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The Writ of Prohibition: Jurisdiction in Early Modern English Law, Vol 1: General Introduction to the Study and Procedure

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THE WRIT OF PROHIBITION:
Jurisdiction in Early Modern English Law

Charles M. Gray

Volume I:
General Introduction to the Study
and
Procedure

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The Writ of Prohibition: 
Jurisdiction in Early Modern English Law 

By

Charles M. Gray

Foreword to Second Edition

The second edition in electronic form adds Vol. III of the study to the two printed volumes published in 1994. No substantive changes in the previously published volumes have been made; only errors in the printing are corrected. Vol. III introduces new problems and new material, but accords exactly with the structure of the study as laid out in the first volumes. An appendix to Vol. III reprints an article of mine on Prohibition cases concerning courts of equity. It does not present that subject quite in the manner of the three completed volumes, but covers the substance. It is appended because it may help clarify allusions to equity and contribute to some of the themes of jurisdictional law than cannot be bounded by volumes.

I am grateful to Richard Helmholz, Philip Hamburger, the Legal History Program and D’Angelo Law Library of the University of Chicago Law School for encouraging and supporting the project; to Jacob Corré as the original encourager; to Judith Wright for helpfulness at every juncture; and to Paul Ripp for invaluable assistance in converting the text to a new medium and preparing the indices.

Charles Gray
These volumes are dedicated
to

Hanna Holborn Gray
Acknowledgments

This study is the product of many years. I am indebted to the American Council of Learned Societies, the Guggenheim Foundation, and the Center for Advanced Study in the Behavioral Sciences for three years free of teaching, devoted almost entirely to the study.

To the Yale Law School I owe four years as Senior Research Associate, when, though teaching was among my activities, the terms of my appointment and the time at my disposal contributed invaluably to my progress. If my most explicit debts are for time to work concentratedly on jurisdiction, I am quick to acknowledge also the benign competition of teaching. It has often meant that the study of jurisdiction must be put aside, and only rarely has my teaching touched legal history at anything like the level of these volumes.

Teaching, however, across a wide range of subjects, has been the essential shaper of my way of talking -- the source of the form in which the matter of innumerable English law reports is cast. I owe to the University of Chicago most of my debt for the opportunity to flourish in a humanistic tradition of teaching, remarkably unconstrained by the mores of the modern academy.

Finally, I am profoundly grateful to New York University Law School for sponsoring the publication of a work so radically empirical that to be itself it must run to inordinate length.
General

Introduction
General Introduction

This volume is part of a larger study. The present volume and its projected companions are about the control of jurisdiction in the English legal system from the later 16th century to the middle of the 17th. It is almost, though not quite, equivalent to say that the study is about one legal procedure -- the writ of Prohibition. That writ was the main means by which the managing courts -- the King's Bench and Common Pleas -- kept other courts within their jurisdictional bounds. In the period I am concerned with, though not at earlier stages of its history, the Prohibition was a judicial writ. That means a party applied to the King's Bench or Common Pleas for a writ and obtained it only if he convinced the court that there was cause. Judicial writs contrast with de cursu Chancery writs, which could be had for the asking and a fee and were merely the ordinary way of starting a suit at common law. If someone wanted to stop a suit in another court on the ground that it was beyond that court's jurisdiction, he went to the King's Bench or Common Pleas with his statement of cause; if he was successful, a Prohibition was granted forbidding the subject court and the plaintiff there from proceeding; the suit could be resumed only if the Prohibition was reversed. I shall explain this more fully and technically below, but the simple formulation is sufficient for a basic understanding of the writ.

I do not give citations for the points in this General Introduction. Many of them come to no more than common knowledge rearranged. Much of what is said could be found here or there in the standard literature on early modern English legal history. I have not, however, derived it from that literature, but from my mere experience with the hundreds of cases in the body of the study. The reader who has seen a substantial amount of that material will, I believe, see that the General Introduction presents a safe-enough, though rough, statement of the material's setting. It is intentionally rough. Technical polish is avoided as an obstacle to reading for the general impression one needs to start with. Here, for example, I will only say that there was a statute to such-and-such effect. There will be plenty of technicality anon, including citation of statutes and explanation of their exact (or uncertain) meaning. The purpose of the General Introduction is to give the reader a feel for where the subject "fits in" and some information that needs to be in hand before entering a maze of particularities that would be hard to follow without premonition. The style is adapted to that purpose. With respect to some of the general matters touched on here, such as Prohibitions in politics and the climate of jurisprudence in the period of the study, the reader is referred to the bibliographical note following the Introduction to Vol.1 later in this volume.
The Writ of Prohibition: Jurisdiction in Early Modern English Law

Jurisdiction and the Prohibition make a significant study because the English legal system, down to its radical reform in the 19th century, was a congeries of quite distinct courts. The common law was most of the law. Although its administration was remarkably centralized in the King’s Bench and Common Pleas, there was a considerable distribution of common law jurisdiction among lesser tribunals. The boundaries of those lesser courts sometimes came in question, and they were sometimes regulated by Prohibition. There were, however, no serious and persistent problems about such courts’ jurisdiction. Prohibitions curbing minor common law tribunals might merit a footnote; jurisdiction control is a substantial topic of legal history, represented by innumerable controverted cases, because the congeries of courts included three sorts traditionally and correctly described as non-common law.

These were certainly “real courts,” with power to compel attendance and apply sanctions as against all the King’s subjects and all sojourners within the reach of his authority. They were forums for the practice of professional lawyers, operating with bodies of formulable, “learned” law. The matters they dealt with were important for the everyday lives of many people. The law of these courts is distinguishable, however, from the common law -- from the body of national custom, often restated or modified by statute, that was applied in the King’s Bench, the Common Pleas, and other members of the common law sub-set within the English legal system.

The three classes of non-common law courts controlled by Prohibition were: (1) Ecclesiastical courts, consisting of a large number of individual tribunals, including lower and higher courts in an appellate hierarchy; (2) Equity courts, of which the Chancery was the chief -- but only lesser members of this class were in practice regulated by Prohibition; (3) Admiralty courts -- for practical purposes a class of one, the civil court of the Lord Admiral. I shall explain below what these courts did and the different senses in which their procedures and their substantive rules were non-common law.

In this Introduction, my main purpose is to set out an analytic map of the field of Prohibition law (or, a bit more generally, of the topic “common law control of non-common law jurisdiction”) as it was in the late-
General Introduction

Elizabethan and early-Stuart period. I shall also explain why that period is distinctive and deal with various features of the law which one needs to understand before entering any segment of the map.

My analytic map is not the analytic map. There are no treatises on jurisdictional law contemporary with the cases discussed in this study, and none covering the whole subject has been written after the fact. The territory is unmapped; there is no traditional scheme for dividing it up, to be used or dissented from. I shall propose here a way of sorting out the problems and decisions in the field as a whole, explaining the reasons, sometimes of principle, sometimes of convenience, for the divisions. The map is primarily of issues or problems. It will perhaps be useful first to present it in tabular form (main divisions only).

I. Procedural issues in Prohibition law (the present volume.)

II. Control of judicial conduct by Prohibition. (‘Conduct’ means how the non-common law court handled cases properly before it. That contrasts with ‘jurisdiction’ in the sense ‘whether a case or issue of a certain sort belongs before the non-common law court.’)

III. The range of jurisdiction-control (in the above sense, opposed to conduct-control.)

IV. Enforcement of statutes by Prohibition.

V. Prohibitions to the Admiralty.

VI. Prohibitions to courts of equity.

VII. Prohibitions and ecclesiastical defamation.

VIII. Common law issues and collateral infringement of common law interests.

IX. Prohibitions and tithe law.

X. Miscellaneous ecclesiastical Prohibitions.

XI. Historical cross-survey and post-Civil War Prohibitions.

I shall presently explain what the titles in the table mean, why they are arranged in this order, and what some major sub-divisions of the eleven topics are. Before elaborating the map, I shall discuss four preliminary matters:

1. Conception, sources, and limitations of the study.
2. Basic procedure in Prohibition cases--beyond the brief indication above, but short of the problematic cases under Title I.

a. Procedures other than the Prohibition connected with jurisdictional law.

3. Character and activities of the non-common law courts regulated by Prohibition.

4. Prohibitions in politics and constitutional law.

Conception, sources, and limitations of the study

The study is case law with a vengeance. All I have really done is to collect a large number of reported cases on jurisdiction, mostly Prohibition cases, and analyze them. “Analyze” has three senses:

1. I have evolved the map outlined above and placed the cases on it.

2. With what may seem excessive persistence, I have taken each report and tried to articulate the issues in the case, the arguments on both sides, the opinions of the judges, and the outcome with its implications. This familiar process is always one of construction. The best law reports (including the modern type consisting of opinions written by the judges) do not speak for themselves. Just what was in question, what could have been and was argued, what precisely the decision was, is inevitably what some interpreter says it was; the next interpreter may have grounds for disagreeing. To say what a 16th-17th century case was about and how it was resolved requires more radical and more dubitable construction. The best reports from that period rarely approach the completeness and clarity of more modern ones, and many are so fragmentary and confusing that they have long since lost legal authority (as citable precedents). They are, however, the historical sources, no worse and often better than other kinds of sources for other kinds of relatively remote history. Reconstructing the cases by detailed analysis will not yield an unchallengeable picture of past legal problems and views of how they should be solved, but it is necessary in order to have any picture at all. (I should perhaps say any picture except for the kind that is almost sure to be misleading -- one
General Introduction

gathered from odds and ends of comment out of court. Anglo-American law is irreducibly what the courts hold it to be in response to the problems contingency puts before them. Evidence of the courts’ activities from other sources than reports and judicial records can of course be informative about those activities, as well as about contemporary impressions of and attitudes toward them. Such evidence is likely, however, to be selective and colored by interest or political predilection.)

3. Typically, though not uniformly, I preface the discussion of the cases under particular topics and sub-topics with essays on the main issues presented by the topic following. When going through the cases, I try to say how the issues were perceived and responded to. In the preface essays I take greater liberty to suggest how the issues ought to have been or might have been perceived, and what the best arguments for alternative answers would have been. History, no doubt, is only concerned with the “were.” As I have already suggested, however, one cannot simply read off from the sources how the question was understood and what the responses were. Construction is pervasively necessary. Two levels of construction are distinguishable, and it is in my judgment desirable to keep them apart. The one starts from the individual source -- the words of the lawyers and judges if the report is in direct discourse, otherwise from the reporter’s representation of the case. The other starts, not from an impossibly a priori knowledge of the issues, but from a general feel for them derived from reading a number of related cases and reflecting on what seems to be involved. I have conducted this reflection, embodied in the preface essays, without worrying too much as to whether I see more or something else (anachronistic visions perhaps) than the contemporary actors in the cases saw. Its purpose, however, is to suggest what the actors may have seen; one cannot expect to know from direct evidence all of what they saw, for even if the reports were more complete than they are, there would be a residue of unarticulated and vague perceptions.

The study is based on the reports in print and on those in manuscript in the British Library. I cannot guarantee that I have overlooked no printed cases, and still less that I have missed none in the manuscript collections, but I have tried not to. I have gone through the printed reports page by page (reliance on primitive indices and on leads and references would not turn up a significant fraction of the relevant cases). Similarly, I have gone through all the British Library manuscripts that appear from the cata-
logues to consist of law reports from the period of the study, transcribing all Prohibition and jurisdictional cases. There are law reports in manuscript elsewhere; searching those would no doubt produce more cases. I have stopped where I have because my collection of cases is already large, and because I think that making sense of the corpus I have is a better investment of energy than further searching. I am quite sure that looking for more unprinted cases would produce mainly duplicate reports. When more are found, they are likely to affect only details on the map I present; having a map to locate new material on seems to me more important than having all possible data in hand before mapping it.

Legal historians now recognize the quantity and importance of unprinted early modern reports, but they have not been very extensively used, and the difference they can make is not generally recognized. It will be evident from almost any sub-section of the study that the picture would be quite different if it depended on printed reports alone. To start with, there would simply be fewer cases; once in a while, very important cases of the sort I am concerned with exist only in manuscript. Manuscript versions of cases that also appear in print are sometimes superior in clarity and completeness; sometimes they are supplementary in the sense that they report the arguments made on one occasion in the history of a protracted case while the printed version reports another; sometimes versions contradict each other. Reporting was substantially an unofficial and individualistic activity, as well as a fashionably ubiquitous one, prompted by early modern methods of legal education and by the exigencies of practice in a litigious age. Every printed report was once the manuscript report of some lawyer, judge, or student; some manuscripts reached print by the initiative of the author, some by that of a publisher who got possession of a collection and brought it out. Although the printed reports gained legal authority by virtue of their availability (and sometimes the prestige of the reporter) -- that is, by being used as precedents -- they have no advantage in historical authority over the reports that have remained in manuscript. One can rarely judge by external evidence how reliable an unprinted, usually anonymous, report is, but there is no reason to doubt that any given manuscript report is as likely to be accurate as any given printed one. Poor reports (garbled, fragmentary, semi-intelligible) occur in both media, as do reports which, to judge by appearance, are careful records or summaries of what the reporter heard in the courtroom. When suspicion can be cast on reports that on their face seem convincing,
it is because other reports disagree. The only ones I suspect at large are the most famous, Sir Edward Coke’s, for conflicting reports in several instances suggest what common sense might surmise -- that the deliberately edited and published product of a strong personality bears the stamp of his predilections.

The study is based on reports, occasionally supplemented by miscellaneous materials, including manuscripts. It is not based on Plea Rolls and other official court records. A study based on the latter would have to deal with the staggering volume of the material. Once that challenge was overcome, such a study would probably correct impressions conveyed by this one. It would also illuminate questions I make no pretense of reaching. By and large, reports from the early modern period are informative enough about the issues and outcome of reported cases. But even about those the official record might always add information beyond procedural details. There is never a guarantee that the court ultimately did what the report suggests it was going to, no certainty that the case was not dropped or compromised, was not reconsidered, did not contain issues beyond those discussed in the report which in the end proved dispositive. But such a guarantee is not vital if one is primarily interested, as I am, in judicial opinion and the perception of issues by lawyers, to which reports alone testify directly. A map of the field, once again, -- an orderly sense of the “lawyers’ law” -- is a prerequisite for work that may eventually be done with official records. Such work would illuminate “legal realist’s law” as a report-based study cannot, especially because it would get at the incidence and outcome of routine litigation in various categories -- the occasions when a non-common law suit was so obviously prohibitable that it would not have been worthwhile for the prohibitee to oppose the Prohibition (he might nevertheless have brought a non-common law suit in the hope that his adversary would acquiesce in the jurisdiction), the occasions on which a Prohibition could plausibly have been opposed on legal grounds but was not, and those on which the dispute was purely factual and resolved by a jury verdict. (The procedural structure that permitted cases of these sorts will be explained below.)

Perhaps the largest limitation of this study lies in the fact that it explores a by-way in considerable technical detail. It is appropriate to ask: Why would one want to know about this? Is the subject’s long-run importance for legal history or general history sufficient to justify the trouble?
I shall not make an elaborate apologia. In summary, I think there are three main reasons for pursuing the slice of legal history I have chosen in the rather relentless manner I have adopted:

1. The subject is not uncelebrated. Legal problems about jurisdiction were politicized (see below for further explanation). Having entered the stream of political history, Prohibitions have made their way into general history books and common knowledge. They are known in that medium, however, through political sources and, highly selected examples of the case law. By looking at the cases extensively and closely, I hope to show what no lawyer or legal historian will find surprising: that the legal problems actually confronted by the courts were complex and tangled, their resolution often uncertain, ambiguous, and deficiently related to general principles cutting through many particular situations. To the degree that the common reader of 17th century English history is made more aware than existing books permit of the rich legal background behind the politics of the law, he will be better attuned to the reality of the past. I do not think it is too strong to say that familiar understanding of the modest slot in general history occupied by jurisdiction and Prohibitions is extremely simpleminded, laden with vague and misleading assumptions about the courts’ activities.

2. The sense in which my subject is a by-way partly constitutes its significance. Legal history is often teleological or evolutionary. I do not mean those words pejoratively. The point of investigating past law may well be to discern phases on the way from somewhere to somewhere -- frequently from a legal universe remote in its intellectual habits and economic bearings to law that is vital today. There is to be sure a sense in which the subject of this study can be placed on a developmental line. In those terms, it is about a middle stage in the history of jurisdictional regulation, between the medieval dispensation and that of the mature common law. (By the mature common law I mean the English system shortly before it was recast by the legislature and the judiciary in the 19th century and beyond -- “the law Blackstone summarized” is a reasonable description.) In the pre-Reformation era, the law of jurisdiction was largely concerned with defining and protecting the sphere of English secular courts as against the organs of the international Church. In the “mature common law” period, compared to the middle stage, the credit of ecclesiastical
General Introduction

courts was considerably eclipsed, the structure of the whole non-common law system had been revised by legislation coming out of the mid-17th century revolutionary period, and the dominance of the common law throughout the English legal order was conceived in subtly different terms.

How the middle stage was working toward the final one is an implicit question in this study, but the major focus is not on broad historical tendency. I want primarily to clarify the law of a delimited period, including its internal tendencies and fluctuations. Evolutionary mechanisms cannot be understood without fairly precise anatomies of the organism at successive stages; without those, developmental explanation is apt to turn into mythology. In one way, the study is prolegomenal to better explanation that I believe we possess of how the common law redefined its relationship to its rivals and supplements over a lengthy span of early modern history, from the later 17th century into the 19th, and prepared for their fusion later on.

In another way, however, I would like to direct attention to the antithesis of developmental pattern -- to lost causes, roads not taken, by-ways that do not lead into the future except as they are forgotten, misinterpreted, or co-opted by historical movements more alien to them than may appear in retrospect. Possibly the most striking light in which to see the jurisdictional law of the late 16th and early 17th century is the light that exposes the period’s singularity.

It was singular because it was more deeply federalistic than earlier and later periods. Jurisdiction was taken more seriously, its problems handled more delicately, because the mixed character of the system was perceived as an essential and legitimate feature of it. The common law was in a sense only part of the system, though with a special trust to keep all parts, including itself, in proper channels.

This situation came about mainly because the Reformation incorporated the ecclesiastical component into a national galaxy of courts and laws. A case in a Church court was no longer made over to a literally foreign authority, which required, even on the most loyally Catholic assumptions as to its legitimacy, to be watched and contained. At the same time, the other non-common law components gained prominence in re-
Hostility ran between different members of a legal system more unified than before and less homogeneous than later, and interested motives entered into their attitudes and conduct toward each other -- as is well known, perhaps too well known; over against that hostility was a set of assumptions shared by people with different views on particular jurisdictional questions and on the approach to such questions in general -- simply that the system was a complex mixture, whose correct proportions were discoverable in the law by the lawyer’s art.

Formalistically, that common ground persisted as long as a fundamental diversity of jurisdictions did (which is to say, until the 19th century reforms). Its spirit, I suspect, was a casualty of the mid-17th century crisis of the political revolution and its aftermath, of altered constitutional premises, and perhaps of economic, cultural, and legal changes that cannot be directly linked to the action on history’s center stage. “Suspect” is the intended word: I shall not argue here for what is only an hypothesis. The scope of the main body of this study is to clarify what was going on before the middle of the 17th century -- to lay the basis for asking, not to decide, whether jurisdictional problems retained the same inner shape and comparable acuteness as problems in later times, and if not, why not. (I shall explain below a projected extension of the study that to a degree qualifies this self-denying ordinance.)

3. I have done the study as I have partly for its by-products. The subject permits one to observe the late-Tudor and early Stuart judiciary dealing with many related yet different questions (different in both formal structure and practical stakes, but all involving in some way debate about the same set of legal values.) A basis is perhaps provided for some tentative generalization about judicial behavior in the period -- broader generalization than simply concerns the constants, diversities, and tendencies of judicial opinion on jurisdiction and Prohibitions. The fact that the subject is “public law” of a sort, and that it was tinged with politics, is in some ways an advantage, though I intend the category “judicial behavior” to be comprehensive. Such differences as those between cautious, self-restraining judges and more adventurous ones -- more moved by principle or more willing to act from a general sense of value and likely practical result -- as well as such phenomena as alignments and leadership on the Bench, are perhaps easier to see when the issues have a public or political cast than when private law alone is involved. Yet, subject to the dangers
of projection, there may be possibilities for seeing beyond or abstracting from the particular subject and its peculiar flavor. Judges are never simply the victims of their predilections for particular outcomes in particular areas; they are also “victims” of their approach to legal problems and their conception of good judging, whatever the context.

I should say in this connection that I got into Prohibitions by way of a different and larger question: What kind of judge was the most famous of all English judges, Sir Edward Coke? What would a thorough study of his judicial career reveal? How would the picture derived from such a study compare with that gathered from tradition, miscellaneous sources -- too many of them from Coke’s own pen -- and monographic investigation of a few of the many areas of law to which he contributed?

I quickly concluded that a thorough study of Coke the judge -- by the standard of thoroughness that the analysis of Prohibition cases here represents, which I believe necessary to avoid deceptive appearances -- cannot be done by a single hand, unless by an extraordinarily able one with a great deal of time. The picture must be built up gradually. I turned to Prohibitions as a fairly wide subject which by reputation (justified so long as it is not exaggerated) Coke had major role in shaping. My next quick conclusion was that Coke in Prohibition cases could not be studied apart from Prohibition cases at large over the period of his career and rather more.

It is a substantive conclusion of this study that Coke was not, as an exaggerated tradition tends to assume, “Mr. Prohibition.” His positions, on many separable issues, make a complex pattern, complexly related to those of other judges. Some others were as ready as Coke or readier to prohibit non-common law courts. Some were judicial predecessors, whose work Coke followed in some contexts and revised in others, not always in a more interventionist or “prohibiting” direction. For the purpose of observing judicial behavior both within and beyond jurisdictional law, I allow Coke and his interaction with other judges a certain special prominence throughout the study. Other judges, however, emerge as objects of interest in their own right.

Another kind of by-product concerns the interests at stake in jurisdictional cases -- the “realist” underside of a study focused on legal issues
and judicial behavior, aspects of Tudor-Stuart society that one might hope to understand a bit better through a close inspection of the range of cases considered here. I keep the pure legal history in the foreground, however, for the use of legal sources for non-legal purposes requires close inspection of those sources in their own terms; using them loosely, with a view only to gross results, is likely to lead to so inaccurate a picture of the law that the tricky and inherently limited process of reasoning from the law to realities beyond it cannot be carried out significantly.

Procedure

I have explained briefly above the rudiments of procedure in Prohibition cases. The first part of the study is on controverted points of procedure, the courts’ handling of which is significant for their attitude toward the writ (whether they were inclined to ease the procedural path for seekers of Prohibitions or to insist on procedural nicety and thereby deny Prohibitions due on the merits.) Here I shall go into more detail on largely uncontroversial points in order to assist visualization of the litigative situations that occur throughout the study. It will only occasionally be necessary to anticipate cursorily matters dealt with in Vol. I.

The Prohibition was a judicial writ issuable by the King’s Bench, or Common Pleas on a showing of cause. (There was controversy as to whether the Common Pleas had the same comprehensive power to grant the writ as the King’s Bench, but in the upshot it did.) The written statement of cause submitted to the court was called a “suggestion” or “surmise.” It was in English and not subject to any requirements of mere form, though there were some in the nature of “supporting documents,” and some substantive rules as to what surmises must contain or show (these are discussed in Vol. I.) I refer to the party who submits a surmise and thus commences a Prohibition suit as “plaintiff-in-Prohibition.” Plaintiff-in-Prohibition was almost always defendant in an ecclesiastical suit (I often, when there is no reason to do otherwise, use “ecclesiastical” per synecdochen for “non-common law” generally -- Prohibition cases involving ecclesiastical courts greatly outnumbered all others.) In uncontroverted principle, any person generally eligible to bring a lawsuit could be plaintiff-in-Prohibition; one did not have to be defendant to the ecclesiastical suit one sought to arrest, or to have any sort of interest. The idea
behind this principle was that there was a public interest in stopping suits brought in the wrong jurisdiction. In practice, however, as one would expect, plaintiff-in-Prohibition was almost always someone hoping to stop a suit against himself. (The nice question whether, in certain circumstances where a motive for doing so existed, plaintiff in an ecclesiastical suit could seek to prohibit his own suit is treated in Vol. I.)

What plaintiff-in-Prohibition hoped to accomplish if he got a Prohibition varied with circumstances. The following objectives may be distinguished:

1. To escape liability entirely. A. sues B. for something which, if recoverable at all, must be recovered in an ecclesiastical court; stopping the ecclesiastical suit frees B. from liability for that. E.g.: A. sues B. for tithes of a certain product; the suit is prohibited because the common law court takes the view that that product is not subject to tithes. (Some products were not subject to that tax; whether they were was for the common law to decide; an ordinary suit for tithes must be brought in an ecclesiastical court.)

2. To force the ecclesiastical plaintiff to sue de novo at common law (or -- a few cases suggest -- to sue in another non-common law court, such as a court of equity.) A simple example would be a non-common lawsuit on a contract actionable at common law.

A party who could escape liability by getting a Prohibition had an obvious motive to seek one. A person who might not ultimately escape liability -- but only make sure he was pursued in the court of his choice, or else hope that his opponent would give up rather than go to the trouble of a new suit, or fail to catch him by the time a new suit could be started -- had a less obvious motive.

3. To secure trial by the common law method of a jury or decision of a legal question by the common law judges with respect to an issue or the issue in an ecclesiastical suit.

To understand this option fully, one has to go a bit further into procedure pursuant to Prohibitions (below), but the idea can be grasped through a common example: A. sues B. for tithes; B. claims that tithes
The Writ of Prohibition: 
Jurisdiction in Early Modern English Law

(an in-kind tax, 1/10th of the crop) in the place in question had been commuted by custom into a fixed payment. Once it got settled, the law was clear that B. was entitled to a Prohibition merely by so claiming. What he was really entitled to, for most practical purposes, was a jury trial on whether the alleged customary commutation existed. If the jury decided against plaintiff-in-Prohibition, the case would go back to the ecclesiastical court; if it decided in his favor, plaintiff-in-Prohibition escaped liability for tithes in kind. Tithe-payers wanted to escape such liability because in a time of monetary inflation and relatively high agricultural prices, tithes in kind were worth more than dated commutations. But a tithe-payer claiming a commutation would not automatically seek a Prohibition; it would depend on the strength of his case and his estimate of his chances with a jury as compared with his chances in the ecclesiastical court, where claims to commutations were not rejected out of hand, but where the trial method and various legal standards were different.

Beyond this and a few other clear-cut situations, the propriety of prohibiting suits properly commenced in ecclesiastical courts in the first instance, in order to achieve common law resolution of issues arising, was often debated. Those debates are considered at various places in the study. Although the matter was never firmly settled in general terms, many Prohibitions were in fact granted on the ground that issues coming up in proper ecclesiastical suits were for this reason or that appropriate for common law decision, factual or legal. For an ecclesiastical defendant who preferred common law resolution, or who was looking for ways to vex and delay his opponent, it could be a good bet to seek a Prohibition on the ground that the ecclesiastical court was asked to decide something a common law court or jury could better decide. (A variant on this category -- essentially the subject of Vol. II of the study -- arose when an ecclesiastical court had allegedly misdecided an issue before it in an initially proper suit. Note also that the category explains the oddity mentioned above of persons seeking to prohibit their own suits: A. sues B. in an ecclesiastical court because that is the only place A. can sue for the object he seeks; pleading leads to an issue which A. claims a common law court or jury should decide and which he prefers to have so decided.)

After plaintiff-in-Prohibition had put in his surmise, various sequences were possible. Frequently there was open-court debate as to whether a Prohibition should be granted (whether the surmise stated good cause on
its face.) Often both plaintiff-in-Prohibition and the opposing party, defendant-in-Prohibition, were represented by counsel. Sometimes debate was *ex parte* -- i.e., defendant-in-Prohibition did not appear, but plaintiff-in-Prohibition’s counsel argued for his surmise and the judges debated with him and among themselves; it was the court’s duty to grant a writ if due and deny one if not, regardless of whether defendant-in-Prohibition appeared to contest it; he was not as a matter of law entitled to notice. A majority of the reports discussed in this study are about debates on the initial motion for Prohibition. The results reported are initial decisions to grant or deny Prohibition. Denial meant the end of the case (in the absence of such occasional moves as the court’s permitting amendment of a surmise; the degree to which denial of an application barred reapplication was a rather tricky question, touched on in Vol. I.) The granting of a Prohibition was sometimes the end of the story, sometimes not, sometimes the end so far as the evidence of reports shows but not necessarily in reality (see below.)

Prohibitions could, however, be granted without debate, both in court and by judges in chambers. Two types of case can be distinguished here:

1. The open-and-shut case, so far as initial grantability of the Prohibition is concerned. Claims to tithe commutations are a good example: there would be no debate on the suggestion and no report, so long as standards for correctly stating a claim to a commutation were met, but at later stages (explained below) a case launched by the automatic granting of a Prohibition might present legal issues and be reported.

2. The case in which one or more judges thought they saw sufficient reason to grant a writ and went ahead and did so with little or no discussion. When this happened, defendant-in-Prohibition was ordinarily permitted to make what amounted to a motion for reconsideration, pursuant to which the merits of the surmise would be debated, usually by counsel on both sides. The technical term was “motion for Consultation.” A writ of Consultation was the inverse of a writ of Prohibition: the Prohibition ordered the ecclesiastical court and the party (defendant-in-Prohibition) to stop proceedings; the Consultation authorized them to resume a once-prohibited suit. As will appear in Vol. I, there was a scintilla of doubt about the general legitimacy of motions for Consultation, but in practice they were usually permitted.
Let us now assume Prohibition granted and motion for Consultation not made, not permitted, or denied. Many cases stopped here, but no case had to. Some common cases routinely went on to further stages. The next step, if defendant-in-Prohibition wanted to go on litigating, was for him to disobey the Prohibition, or pretend to. There is no sign in the reports that prohibited parties ever really disobeyed and persisted with their ecclesiastical suits, nor that ecclesiastical courts, whose cooperation would have been necessary for continuation of prohibited suits, ever joined in disobedience. What happened in reality was that defendant-in-Prohibition signified his intention to contest the Prohibition in the formal or full-dress way that the law allowed him as of right (as opposed to contesting it informally by arguing against the initial grant or moving for Consultation, technically by the court’s grace and favor.) Plaintiff-in-Prohibition had no choice but to cooperate; were he not to, defendant-in-Prohibition and the ecclesiastical court could ignore the Prohibition with impunity.

Plaintiff-in-Prohibition then complained that the Prohibition in his favor had been disobeyed. This complaint, in contrast to the informal or “natural language” surmise, had to observe the form and rules of common law pleading. It was to the Prohibition what the count was to the writ in straightforward common law litigation -- the plaintiff’s first formal statement of his case, in full particularity and subject to the peril that he might lose the case by committing a logical blunder by the standards of art. In other words, plaintiff-in-Prohibition said again, repeating the effect of his surmise but in a more deliberate style and in Latin, why he should have had a Prohibition. Defendant-in-Prohibition proceeded to answer in the form and by the rules of common law pleading; his options were to deny material facts, or admit plaintiff’s facts and introduce new ones claimed to defeat the legal effect of the former, or admit plaintiff’s facts and maintain that as stated they failed to justify a Prohibition, or delay the game on a technicality of form. Pleading would eventually reach issue, of fact for a jury or of law for the court. Whether the Prohibition should finally stand or be reversed by Consultation depended on the verdict or the court’s legal judgment, as the case might be.

It will be evident that the formalistic idea behind all this was that a Prohibition did not have to be obeyed, as a matter of law, unless it was
justifiably granted in the first place. Whether it was could only be ascertained by verdict or legal judgment pursuant to proper pleading. The name for these steps beyond the initial grant of Prohibition was “Attachment on Prohibition,” a form of contempt proceeding. (If after judgment in Attachment, defendant-in-Prohibition and the ecclesiastical judge should actually disobey the Prohibition, they would be punishable for contempt.) The procedure descended from the middle ages, when the Prohibition was a Chancery writ rather than a judicial one. By the period of this study it was a rigmarole; I shall ordinarily finesse the machinery and refer simply to cases that “proceeded to formal pleading.”

The important thing to understand is the motives of defendants-in-Prohibition for carrying litigation on to the formal pleading stage. Again, it was defendant-in-Prohibition’s right to do so. He was not obliged to acquiesce in the Prohibition even if he had been allowed to argue elaborately against the initial grant and to try again by moving for Consultation. But few litigants, except for those who might feel their initial effort was inadequate in relation to the merits of their case and perhaps those who merely hoped to wear down their opponents, would want to reopen a sufficiently argued legal issue. To do so would incur the expense of formal proceedings with little hope of success and the judges’ irritation as well. Defendant-in-Prohibition might, however, want to challenge his opponent to a jury trial on the facts, even after losing a vigorous attempt to make out the legal insufficiency of the surmise. (In effect, the Prohibition procedure as a whole allowed defendant-in-Prohibition to fight on both fronts, fact and law, an opportunity common law defendants, including defendant-in-Prohibition at the formal pleading stage, were denied.) In many cases, on the other hand,--the open-and-shut kind as to initial prohibitability--there was no point in opposing the grant of Prohibition; defendant-in-Prohibition’s defense would be entirely factual; he would not resist the Prohibition, but make plaintiff-in-Prohibition plead formally and reply by taking issue on the facts. Verdicts ordinarily concluded cases taken to an issue of fact, but sometimes the courts would entertain motions in arrest of judgment raising questions of law after the facts were settled by verdict, and special verdicts (the jury, on its own initiative or at the trial judge’s behest, finds the facts conclusively, but refers their legal meaning to the court) were common in Prohibition cases as in other kinds of lawsuit.
In contrast to the cases in which the formal pleading stage was only a step to a jury trial were those in which the parties or the court preferred to resolve a legal issue in the “full-dress” way. If defendant-in-Prohibition thought he had a strong legal case against the grant of a writ, it would be cheaper and more convenient to argue against the initial grant, but those advantages might be outweighed. Defendant-in-Prohibition might want time to prepare a careful case; he might have an interest in a once-and-for-all settlement -- a formal judgment in his favor on the record, with \textit{res judicata} effect, and a judicial precedent strictly so-called. The two parties could share such an interest in a firm settlement and go to formal pleading by agreement. The judges, for their part, sometimes thought desirable the more deliberate argument entailed by formal pleading and preferred to reach a formal resolution of record--an appropriate attitude when a case presented an especially important or novel problem. The judges might then grant a Prohibition in the face of admitted uncertainty as to whether they ultimately ought to, in order to draw formal pleading and reargument. They might also so proceed as a way of dealing with sharply divided opinion among themselves. On occasion their motives were less clean, though perhaps statesmanlike--to put off a hard or divisive question by saying to defendant-in-Prohibition in effect, “If it is really worth your while to dispute this Prohibition, you are free to-- you may have a good case, but we doubt it and do not owe you the time and trouble to unravel it now.” Conversely, irritated judges can occasionally be heard saying to defendants-in-Prohibition whose cases at initial hearings they thought hopelessly weak, “Go ahead and force formal pleading if you feel so strongly about it, but for the moment stop trying to persuade us that black is white.”

This is, I believe, as much as one needs to follow reported Prohibition cases that are uncomplicated by procedural fine points and to understand those in Vol. I which turn on such points or involve elements of procedure beyond those outlined here.
Note on non-Prohibition cases and procedures encountered in the study

Jurisdictional questions occasionally arose by other routes than Prohibition. These are included in the study, but except for the first, *Habeas corpus*, their place was extremely peripheral.

1. *Habeas corpus*. *Habeas corpus* cases occurred mainly in one context -- the jurisdiction and powers of the High Commission, a special ecclesiastical court which to a degree overlapped the ordinary Church courts. The High Commission claimed a much-controverted power to imprison, which ecclesiastical courts generally did not have. Whatever its rightful power, it did in fact commit people to prison. Therefore questions about its substantive jurisdiction and powers, including the power to imprison, often arose by way of *Habeas corpus*.

The *Habeas corpus*, like the Prohibition, was a judicial writ, but in fact its issuance was more nearly automatic. For practical purposes, anyone imprisoned could get a writ from the King’s Bench (and from the Common Pleas, subject to some limitations.) The writ commanded the jailer to produce the prisoner in person, together with a statement (“return”) explaining why he was held. The court proceeded to judge the adequacy of the return as a matter of law -- whether it explained enough and, assuming it did, whether it stated good cause for imprisonment. The factual truth of the return was not examinable. If it was untrue, the prisoner’s remedy was a common law action for false imprisonment. The court had three decisional options in *Habeas corpus*: to send the prisoner back to jail, to free him absolutely, or to bail him (for the obvious case, when someone was imprisoned because he was accused of a bailable common law offense, but bail was often used as a middle way in other circumstances, including High Commission cases.)

In the case of High Commission prisoners, if the return said no more than that the prisoner was held by High Commission warrant it raised the question whether the Commission had power to imprison at all. Such a return, however, would almost certainly be held insufficiently detailed merely as to form. If the return said with reasonable particularity what the prisoner was held for, it raised the question whether the alleged mis-
conduct was within ecclesiastical jurisdiction of any sort and, if so, whether it was within the Commission’s arguably narrower jurisdiction. Apart from the issue of subject-matter jurisdiction, such a return always raised the question whether the Commission had power to imprison, either for all or for some of the things within its jurisdiction; questions about other powers could also arise. E.g., does the Commission have power to fine -- another claimed power not shared by other ecclesiastical courts -- and then to imprison to enforce payment, even if it may not imprison as a punishment?

A prisoner in a position to use the *Habeas corpus* was as a rule also in a position to help himself by Prohibition, but the former remedy was the more straightforward way to release from jail. That is why the sorts of issues normally raised by Prohibition were more often than not raised by *Habeas corpus* in the narrow range of cases in which someone complaining about abuse of jurisdiction was imprisoned -- usually by the High Commission, once in a while by a court of equity or the Admiralty.

2. *Praemunire* It was a vaguely defined statutory offense, subject to serious sanctions and prosecutable by indictment, to act in such a way as to infringe certain rights and powers of the King. The offense was created in the 14th century to protect various secular authorities and interests (symbolically expressed by “the King”) against the international Church. One might suppose that bringing, and the court’s entertaining, any prohibitable suit in an ecclesiastical court would constitute one form of *Praemunire*. That was not the law, however. A small sub-section of this study takes up the question: When is bringing a prohibitable suit an instance of *Praemunire* and when is it not? The answer, roughly, was that only a few especially inexcusable ecclesiastical suits fell within the criminal offense -- suing in an ecclesiastical court for an object notoriously recoverable at common law or in flat defiance of a clear statutory ban.

*Praemunire* also appears in the study in connection with Prohibitions to courts of equity. This is owing to a famous and anomalous episode -- a none-too-plausible attempt by Coke to make out that one form of “especially inexcusable” resort to equity was within the *Praemunire* statutes, despite their original anti-ecclesiastical purpose.
Procedurally, *Praemunire* needs no particular explanation. It was simply an indictable crime like others, though *sui generis* in the sense that it rested entirely on statute, occupied a middle rank between felony and misdemeanor, and was very uncertainly defined. It was of no real practical importance for jurisdictional law. Jurisdictional boundaries, one might say, were enforced by Prohibition, with *Praemunire* a vague threat in the background, rarely invoked even when it may have been invocable in theory.

3. **Tort and misdemeanor liability for suing in the wrong jurisdiction.**

If A. sues B. in an ecclesiastical court when he should have sued at common law, or should not have brought an ecclesiastical suit *simpliciter*, does B. under any circumstances have a common law action for damages against A. or the ecclesiastical judge? Could A. or the ecclesiastical judge be prosecuted for a misdemeanor, leaving aside the much graver possibility of *Praemunire* liability?

The most important point to make in connection with these questions is that tort and low-level criminal law played no significant role in enforcing jurisdiction. People who thought they were improperly sued almost always sought Prohibitions. There are, however, a few reports suggesting that tort and misdemeanor liability was an available supplementary resource. A few discuss the scope of the tort liability. They will be taken up in the study.

In some circumstances bringing a non-common law suit was subject to a statutory penalty or to punitive or multiple damages by statute. When these statutes were relevant they raised a rather difficult question, which is encountered in a few cases: If I may recover a statutory penalty for being sued in a non-common law court, may I have a Prohibition to stop the suit? Did Parliament intend to cut off Prohibitions when it provided the penalty?

4. **Incidental presentation of jurisdictional questions.** I shall discuss a few cases in which the scope of non-common law jurisdiction arose in litigation not as such concerned with that. The following example is an important case in schematic form: An action of Trespass was brought for wrongful entry on the property attached to an ecclesiastical living. The case turned out, by way of a special verdict, to depend on whether the
High Commission was within its jurisdiction when it deprived a one-time holder of the living of his benefice, thereby enabling the appointment of a new clergyman, who took possession of the property.

There is nothing to be said about such cases generally. I could not search systematically for cases in which a jurisdictional issue might be buried. Those discussed are ones I have come across, but they are mostly in fact important cases discoverable from references or hard to miss. I do not think it likely that much jurisdictional law was made off the beaten track of Prohibitions, significantly supplemented by *Habeas corpus* and scantily by the other categories mentioned here. I have always tried to note the supplements when going through the reports.

**Character and Activities of Non-Common Law Courts Regulated by Prohibition**

In principle any court that exceeded its jurisdiction was subject to Prohibition. Once in a while minor or special common law courts -- e.g., courts of Palatinates, such as Chester -- were prohibited, but those Prohibitions are of little practical importance in the history of the writ. The King’s Bench and Common Pleas never prohibited each other, though both had jurisdictional limits. There are some speculative dicta that the King’s Bench could prohibit the Common Pleas if it had occasion to. The converse would presumably be unthinkable, owing to the King’s Bench’s nominal superiority, which was to a degree embodied in real institutions -- e.g., an appeal by writ of error could be taken from the Common Pleas to the King’s Bench, while appeals from the King’s Bench went to a statutory court consisting of the Common Pleas and Exchequer judges through most of the period of this study (earlier there was no resort but Parliament.) Whatever jealousy or competition there may have been between the two great courts of common law (it is often exaggerated), one should not be surprised that a tightly knit group of senior judges avoided overt clashes over jurisdiction. Prohibiting each other would have been a scandalous manifestation of disharmony.

Another court never prohibited was the Star Chamber. Its rank as the King’s Council in the judicial aspect and the regular participation of the Chief Justices of the King’s Bench and Common Pleas sufficiently ex-
General Introduction

plain its immunity. There were clearly recognized limits on the Star Chamber’s jurisdiction, but it was institutionally unlikely that they would be exceeded. In addition, the Star Chamber’s territory fell within the common law system. It administered and developed a slice of the law of misdemeanor and tort, which the ordinary common law courts reabsorbed after the Star Chamber was abolished in 1641. It was not a non-common law court in the sense that the frequently prohibited courts were, though it did share their procedure -- the Roman-canon mode, without jury trial and common law pleading rules. The rationale for a specialized criminal and tort tribunal using non-common law procedure was that some kinds of offense and kinds of offender required a suspension of procedural due process, as it were, for the sake of law and order.

We need, then, only take account of the three categories of true non-common law courts to which Prohibitions were often addressed: ecclesiastical, Admiralty, equity.

1. The ecclesiastical system. A vast majority of all Prohibitions went to ecclesiastical courts. The writ was originally devised to contain the courts of the medieval Church, and it continued to be employed against those of the Church of England. There are books about the ecclesiastical legal system before and after the Reformation. I shall confine myself to a brief sketch, giving only the information one needs to follow Prohibition cases.

There were three types of ecclesiastical courts:

a. Primarily first-instance courts, where most ecclesiastical suits started. The courts of the bishop of each diocese were the main members of this class. The picture was complicated in local ways from diocese to diocese by the existence of archdeacons’ courts below the bishop’s and so-called “peculiars” (courts governing particular places in a diocese whose jurisdiction was on a par with the bishop’s, not subject to him but to the appellate courts above.)

b. Primarily appellate courts. Generous appeals (applicable to factual findings as well as legal holdings) were a feature of the ecclesiastical system, often a significant one for the law of Prohibitions. A losing party at the diocesan or equivalent peculiar level could appeal to the archbishop’s
court; one losing there could appeal to the court of Delegates, which was constituted by statute at the Reformation to replace Rome. Besides their appellate jurisdiction the archbishops had first-instance jurisdiction in some special circumstances and some pretense, which was controverted, to preempt cases from lower courts.

c. Extraordinary courts constituted by royal commission and outside the regular appellate structure. For practical purposes, this means the High Commission.

Practitioners and judges in the ecclesiastical courts were civilians -- lawyers trained at a university, English or foreign, in Roman or civil law. The civilian contrasts to the common lawyer, who was trained at the Inns of Court. He contrasts also to the medieval canon lawyer, for canon law training as such was abolished in the English universities at the Reformation; the role once played by canonists was taken over by graduates in the closely related civil law field. It probably catches the feel of the matter to say that civilians were a somewhat inferior caste compared to common lawyers, but thoroughly respectable as a learned profession. They were organized into a guild or professional society, analogous to the common law Inns, known as Doctors’ Commons.

Civilians quite frequently appear in Prohibition cases in a capacity between that of the expert witness and that of the advocate. To dispose of cases before them, the common law judges sometimes needed to be informed of just what the ecclesiastical law was; although they would take notice of elementary features of that law, its position on fine or controverted points was of course not within their “art” or putative knowledge. Sometimes the judges consulted with civilians informally, but sometimes they admitted or invited civilians to argue before them as advocates representing the adversary parties. The jurisprudential premise behind this procedure would seem to be that non-common law rules are a species of “fact” determinable by common law judges (not juries) upon hearing of rival interpretations argued by experts.

In addition to the ecclesiastical courts, the regular arenas of civilian practice were the Admiralty and the Court of Requests (one of the equity courts.) Practitioners moved freely among these arenas, and judicial careers sometimes included judgeships in more than one. The nominal
holders of ecclesiastical jurisdiction, the bishops and archbishops (and by
the same token the Lord Admiral), were not active judges, as the King
was not; they acted through professional civilian judges, as the King did
through the common law judges, the Lord Chancellor, and other judicial
officers.

The substance of ecclesiastical law was not greatly altered by the trans-
mission from canonist to civilian, nor by the 16th century upheavals in
Church history generally. There were ambitious plans at the time of the
Reformation for a thorough overhaul and codification of ecclesiastical
law, but they did not come to fruition. As a result, the law of the Church
came to traditional, inherited canon law modified by local custom, adap-
tation to the new ecclesio-political situation, Parliamentary legislation
here and there, and, in the 17th century, some new intra-ecclesiastical leg-
islation.

The regular ecclesiastical courts had both civil and criminal jurisdic-
tion, taking those terms to signify procedures undertaken to make some-
one do a legal duty owed to, or directly benefiting, another specific
person, ordinarily at that person’s suit (civil) versus procedures under-
taken to procure someone’s punishment, or at least his “admonition and
correction” (criminal). The High Commission, by contrast, was essen-
tially a criminal court, but that is a rough truth reflective of what the com-
mon law courts in the upshot allowed it to be. There was controversy
both as to whether it was authorized to invade the civil field and whether
it lawfully could be by royal commission.

Civil suits and criminal prosecutions in ecclesiastical courts were
equally within the scope of Prohibition. Apart from High Commission
cases, however, relatively few Prohibitions aimed at stopping criminal
prosecutions. Interests valuable enough to warrant investment, and peo-
ple substantial enough to invest, in Prohibition litigation were usually
those involved in civil suits. The High Commission tended to draw off
the more important criminal cases -- those in which the prosecuted were
likely to have motives of honor or politics to oppose the Church, to have
the means, to have a good chance of success, owing to vexed questions
and unsettled law about the Commission, and to be discomfited by doubt-
fully legal imprisonment, or by fines in good money, also doubtfully le-
gal. Paucity of Prohibitions is not a reliable index of inactivity in
The Writ of Prohibition:  
*Jurisdiction in Early Modern English Law*

criminal matters on the part of regular ecclesiastical courts. There was not much controversy about the criminal jurisdiction of the Church in general, as opposed to the specific jurisdiction of the High Commission. Sanctions on conviction in regular courts, which lacked so much as a pretense of power to fine and imprison, came to an institutionalized scolding and a demand for acknowledgment of repentance (penance in principle, but painful penitential performances were not exacted--treating the court with respect and saying you were sorry were the practical sum of it most of the time). One would not expect many Prohibitions in run-of-the-mill criminal cases.

The pure criminal jurisdiction of the Church boiled down to:

1. Offenses against religious orthodoxy. At the level of heresy or schism the High Commission was likely to get involved, as well as parts of the secular law devised to back up the ecclesiastical establishment. There is little left in this category that does not merge into the next two.

2. Offenses against religious discipline: This included failure to attend the services of the established Church (recusancy, where also secular law lent a considerable helping hand) and various forms and degrees of misconduct on the part of clergymen (e.g., breach of a duty of the office, such as refusing to use or criticising the authorized Prayer Book; mere scandalous behavior, not necessarily in a form that would constitute an offense in a layman).

3. Disrespect for ecclesiastical persons and places and the objects of religious reverence. Examples would be blasphemy, sacrilege, creating an unseemly uproar in church, verbal or physical abuse of a clergyman, and the like.

4. Moral offenses that were not as a rule secular misdemeanors. There was, however, a limited area of concurrence, as with some religious offenses. Sexual offenses predominated (incest, adultery, fornication -- not rape and sodomy, which belonged to the common law), but such things as usury, drunkenness, sorcery, and merely violating the law of charity by making a nuisance of oneself were also included.
General Introduction

There were three ways to prosecute an ecclesiastical crime: private prosecution, prosecution on presentment (at the bishop’s or archdeacon’s regular visitation to a parish, usually by the churchwardens), and prosecution formally at the initiative of the ecclesiastical court itself (ex officio -- the ex officio prosecutor of course depended on rumors, tips, and professional or amateur tipsters to learn about alleged crimes, and was of course expected to sift such information through a scrupulous conscience). The procedural distinction has some importance in the two sections of the study that significantly involve criminal law (on self-incrimination and on the High Commission).

In some contexts, criminal and civil elements tended to be intermixed in one suit. Prohibition cases reflect that situation more frequently than the pure criminal business of ordinary ecclesiastical courts. In marital litigation, for example, a criminal complaint of adultery might be combined with a suit for separate maintenance on grounds of adultery. In principle, complaints of ecclesiastical defamation were classified as criminal, but they were as a rule functionally civil in the sense that a defamed complainant was looking for the private satisfaction of being cleared of an aspersion and apologized to. One criminal sanction of ecclesiastical courts, apart from the controversial secular sanctions of the High Commission, carried a severe material cost: deprivation of a clergyman of his living. Analytically, a prosecution leading to that would be criminal, but someone in danger of the sanction could be expected to fight, and the common law to take a protective attitude toward so substantial an interest.

We may now turn to the main heads of ecclesiastical civil jurisdiction:

1. Tithes. Tithe suits generated by far the most Prohibitions. Basically, a tithe suit meant a suit by the holder of an ecclesiastical living against an occupier of land in the parish, claiming that defendant had not paid tithes in kind. The “holder of an ecclesiastical living” meant in strictness a rector -- either the incumbent clergyman or the owner of an impropriate living. The latter could be anyone generally eligible to own property (a corporate institution, lay or ecclesiastical, or a lay individual). In the case of an impropriate living, the incumbent clergyman was a vicar, normally endowed with part (the less valuable part) of the tithes.
Vicars suing for such tithes as were payable to them could be plaintiffs in
tithe suits.

Impropriation came about by two steps. In the middle ages, monaster-
ies owning advowsons (the right to nominate a clergyman-rector to a liv-
ing upon a vacancy) were commonly given the privilege of not exercising
the right, but keeping the rectorship and entitlement to the lion’s share of
the tithes in their own hands, so long as a vicar was installed and en-
dowed with a smaller share. At the dissolution of the monasteries, these
special rectorships formerly belonging to monastic houses were preserved
by statute. I.e., they were counted among the monastic assets that were
confiscated by the government and subsequently, in most cases, conveyed
to others. The effect was that a considerable fraction of tax-income sup-
possedly for the benefit of the Church went to the private owners of an
anomalous kind of property. When in this study we encounter tithe-pay-
ers trying to avoid the tax, it is important to remember that they might not
be shirking their Christian duty, but a mere charge or quasi-rent on all
productive land in the parish. Conversely, to the degree that the law dis-
favored the tithe recipient, it often disfavored, not the Church, but lay im-
propriators, who usually belonged to the class of large landowners.

The occupier of land -- the direct producer of a crop, however short-
term or exiguous his interest in the land -- was liable for tithes; the owner
was not unless he cultivated the land himself or by hired employees. In-
habitants of a parish who derived income from other sources than produc-
ing crops and other agricultural operations were supposed to pay tithes
(so-called personal tithes). Those were notoriously under-realized, how-
ever. If one were to judge from the hundreds of Prohibition cases on
tithes, one would come close to doubting their existence, though they
come up very occasionally in such forms as suits to tax rents received by
owners of houses unconnected with agricultural land. (The rentier own-
ers of agricultural land and the buildings attached to it were taxed through
the occupier-producer; avoiding or mitigating tithes was as much to their
advantage in rental value as to the occupier’s in ready income.)

Practically all crops in the straightforward acceptation, including hay,
were subject to tithes. So were the offspring of animals and their recur-
rent products, such as milk, eggs, and wool. So was grass pastured by
meat-producing animals. So was the lighter sort of wood harvested for
fuel and other uses. Depletable assets -- timber trees that take many years to replace and minerals -- were not, though there was some legal controversy, reflected in Prohibition cases, about these exceptions, as about various crops and products off the main track of English agriculture. For the agricultural producers really taxed as they were meant to be, tithes were a tax on gross income, in the sense that the occupier paid 10% of his crop whether he was a subsistence farmer who would eat and use as seed all he grew or a commercial one who would sell his whole crop. The system of tithe law did, however, make some kinds of allowance for the maintenance of working capital and the avoidance of double taxation.

Paying tithes of the most important and most manageable kinds -- on cereals and hay -- consisted in setting a visible 1/10th of the cut crop apart from the other 9/10ths in the field. The tithe-payer had no duty to transport the produce to the recipient, only to allow him access. Once separated or “severed” in the field, the produce became the recipient’s property, and the risk of losing it to accident, trespass, or theft was his. If he thought that less than an honest 1/10th had been set out for him, his remedy was to sue for partial non-payment.

Other products than grain and hay obviously required more elaborate law on just when and how the tithe should be rendered. Although ecclesiastical law contained universal or de jure rules on that, the matter was typically governed by locally variable custom. Indeed, the whole subject of tithe law was heavily glossed by custom. I have already discussed the money commutations by custom that generated so many Prohibitions. Custom could also subject to tithes products free of them de jure or otherwise add to the payer’s burden. It could define exactly what the payer must do to satisfy his duty, provided it did not cut the recipient’s entitlement in one respect without adding to it in some other respect. Custom could not simply free a lay tithe-payer from the duty to pay; if tithes on a given product had never been paid since the beginning of time, it remained tithable if it was so de jure. Customs exempting one product in consideration of extra duty in connection with another (e.g., transporting it, insuring it against damage prior to collection) were, however, generally valid.

On the other hand, land owned by ecclesiastical institutions could be flatly exempt from tithes by custom, though it was not exempt de jure.
(i.e., land belonging to the Bishopric of X located in the Parish of Y owed tithes to the holder of the parish living, barring a custom; customary exemptions could be invoked by tenants of the ecclesiastical owner). In the middle ages, land owned by monasteries commonly enjoyed tithe exemptions by custom or Papal grant; at the dissolution these exemptions were preserved by statute to subsequent owners, so that in practice lay occupiers, whether owners or tenants, were sometimes exempt.

Customs affecting tithes could vary in their ambit. One could claim a parish-wide custom (e.g., throughout the parish hay-producing land customarily pays 6d. per acre in lieu of tithes in kind). It was equally valid to claim a custom affecting only a particular piece of land or a unit, such as a manor or farm, with a continuing identity (the owners of Greencroft have customarily given money instead of tithes in kind, or have over-performed one tithe-paying duty in consideration of exemption from another).

In the eyes of the common law, a custom was an immemorial practice -- something that could have been done continuously from the beginning of time and which a jury was therefore entitled to conclude had been so done. (It is obviously impossible for knowledge really to extend to infinity and for evidence to testify to facts extending back forever and ever, but logic and common knowledge can sometimes compel the conclusion that a practice could not have obtained at some time in the past, or before a certain point, and evidence can prove it did not obtain.) Customs not disputed as to their factual existence or immemorialness could be challenged as to their reasonableness. Whether an admitted custom was reasonable was a question for the judges; the criteria by which they decided, constitute a puzzling topic of English jurisprudence, of which decisions on the reasonableness of tithing customs are a chapter. Ecclesiastical theory was different, but the category of custom was recognized in Church law. It is hard to imagine tithe law getting along without it, owing to the awkwardness of collecting all tithes in de jure form and the convenience of trade-offs, even had the inflation and price trends that devalued straight commutations in the 16th century been anticipated when the law took shape.

The rules stated here were generally agreed on and not in conflict as between secular and ecclesiastical law. Which legal system was to decide
the cases and interpret the rules, on what rationale in this and that situation, was the question and the source of conflict.

The routes from a tithe suit in an ecclesiastical court to a controverted Prohibition case were numerous. Many issues collateral to tithe law itself arose from this most frequent type of litigation. The issues about Prohibition procedure in Vol. I are a good example. For another common category: Ecclesiastical suits were usually prohibited when a party being sued for tithes claimed that his land was not located in the ecclesiastical plaintiff’s parish. That is to say, the boundaries of parishes were as a rule taken to be a common law issue, triable by jury.

I have already suggested some of the routes to Prohibition proper to tithe law. Let us sum those up and note a few additions: Common law courts often decided pursuant to Prohibition whether a product was legally subject to the tax and--via jury verdict -- whether, in fact, a product fell in a taxable category (e.g., whether wood cut by a parishioner was non-taxable timber or taxable inferior wood). In some cases the issue was whether a product not subject to the tax de jure legally could be, or factually was, taxable by custom; how “customary tithes” should be classified and where they should be recovered was occasionally a problem.

In the innumerable Prohibition cases arising from alleged customary commutations, the question was often a straight jury issue: Does the custom exist in fact? Sometimes the issue was legal: Does the commutation as surmised or pleaded state a “considerate exchange” and therefore meet the criterion for a reasonable custom? I.e.: Is it unmistakably claimed that the recipient has customarily received something of value in lieu of his tithes, or is the alleged commutation a concealed claim to total exemption?

As surmising a customary commutation in valid form would lead to a Prohibition, so would surmising a perpetual commutation by formal agreement concurred in by the bishop and the patron of the living. These commutations were known as compositions-real; the common law was the judge of their existence, validity, and meaning; this was owing to the patron’s interest. Tithe suits were usually held not prohibitable if the payer claimed that the recipient had merely agreed -- by himself and so as to bind only himself-- to accept a money payment or other substitute per-
formance in place of his tithes. Such agreements were naturally commonplace, and they were perfectly valid ordinary contracts. The argument against Prohibition on surmise of such an agreement was that prohibiting amounted to enforcing the contract specifically: Assuming the ecclesiastical court refused to recognize the agreement, the tithe-payer compelled to pay in kind, or to pay full assessed value, should sue the recipient for damages if he had suffered any, like other victims of breach of contract. Nevertheless, many attempts were made to stop tithe suits by claiming such agreements; there are debates in the cases about the propriety of prohibiting, and outcomes are not entirely consistent.

The common law courts generally took the view that they should not intervene when the underlying dispute was over whether a vicar or rector was entitled to particular tithes. But here again attempts to get Prohibitions occurred: parties surmised that they were being sued by the rector, say, when they had paid or should pay the tithes in question to the vicar. Again, the policy was not entirely easy to apply, and there were disputes about it.

The rule that ecclesiastical land could be wholly exempt from tithes was the source of much complex Prohibition litigation. This was essentially because the Statute of Monasteries, whereby ancient exemptions were preserved to the post-dissolution owners of former monastic land, presented formidable problems of interpretation. Other statutes touched on tithe law in various ways. E.g.: Newly reclaimed land was temporarily exempted from tithes by statute. Prohibitions could be obtained by claiming this exemption; it belonged to the common law to settle any doubts about the statute’s meaning and to try factual disputes as to whether the produce in question actually came from land reclaimed within the statutory time-limit. For another example: As one would expect, a person sued for tithes could not obtain a Prohibition simply by surmising that he had paid his tithes -- ecclesiastical courts were perfectly competent to try that claim; if they mishandled it, the remedy was by ecclesiastical appeal. Matters were complicated, however, by a statute which in general effect made it non-payment to “sever” the tithes and re-take them before the entitled recipient could haul them away. There were numerous disputes in Prohibition cases about the precise operation of the statute and its fit with the common law rule that tithes once “severed” become the recipient’s property, for the taking of which by anyone -- either
General Introduction

the payer or a stranger -- the recipient could maintain an action of Trespass.

The right to receive non-impropriate tithes could of course not be permanently alienated by the holder of a living. It could, however, be leased up to the limit of the incumbent’s life, and impropriate livings could be leased as well as conveyed in greater estate. Lessees of tithes could sue for them in ecclesiastical courts. Tithe suits sometimes led to Prohibitions because the common law courts usually took the position that any dispute about the legality or construction of a lease was theirs to decide.

This much will suffice to make the vast majority of cases arising from tithe litigation intelligible as to general form. When I discuss such cases, I shall usually, for convenience, refer to the recipient of tithes as Parson, unless there is legal significance in the fact that he was a vicar; I shall refer to the tithe-payer as Parishioner.

2. Testamentary Suits. Many Prohibitions came out of testamentary suits in ecclesiastical courts. Ecclesiastical jurisdiction in testamentary matters was an English eccentricity -- an immovably entrenched one by the time of this study -- rather than a function of Church courts throughout Europe. It had three main branches:

a. Probate jurisdiction. By English law chattels (including some interests in land classified as chattels, notably leaseholds) could be passed by will. Land in general could not be, except by custom, until the Statute of Wills of 1540. A will of chattels had to be proved or authenticated in an ecclesiastical court after the testator’s death. This step was necessary before legacies were payable and before any executor named in the will could act as such (even to most intents for purposes classified as secular, such as suing at common law for debts due to the testator). The executor’s duty was to seek probate promptly; when he did so an opportunity to come forth was afforded to anyone wanting to challenge the will (on grounds of form, the testator’s sanity, or whatever). A will solely of land, whether warranted by custom or pursuant to the Statute of Wills, did not have to be proved. It was simply a conveyance from devisor to devisee -- i.e., it gave the devisee power to take possession of the land, subject to any better title; if someone was in a position to claim the land if he could successfully challenge the will, he must find a way of litigating with the
The Writ of Prohibition: Jurisdiction in Early Modern English Law

devisee at common law--oust him, trespass on him, or, if in possession, refuse to give the land up to him; the will’s authenticity would be decided by the judges or a jury, depending on whether the challenge involved a legal or a factual dispute.

Wills both bequeathing chattels and devising land caused difficult interjurisdictional problems and produced numerous attempts to stop probate proceedings by Prohibition. Otherwise there were rarely grounds for common law interference with probate.

b. Intestacy. It was the power and responsibility of the locally appropriate ecclesiastical court to appoint administrators of the estates of persons who died intestate and to supervise administration, in order that it be done conscientiously and that goods remaining after payment of the intestate’s debts be properly distributed. Many Prohibitions came out of intestacy cases, primarily because a 16th century statute--encroaching on the independence and discretion ecclesiastical courts had formerly enjoyed--regulated how they were to proceed. The common law courts were often called on to interpret the statute and enforce it by Prohibition.

c. Legacies. These were exclusively recoverable in ecclesiastical courts. Legacy suits often led to Prohibitions, by various routes. The underlying reality was that two sorts of claims on estates, enforced by different legal systems, stood in an inherently tense relationship. An estate’s creditors had to sue the executor at common law if he did not satisfy them voluntarily; legatees must sue in an ecclesiastical court. The two systems had no disagreement on legal principle: debts prevail over legacies; a legatee is only entitled to be paid when all legally recoverable debts have been paid or clearly can be; if an executor is too lavish about paying legacies and runs out of assets to satisfy debts, he is liable out of his own pocket. Creditors, however, have a motive to delay payment of legacies until they themselves have been paid, or until their claims have been rebuffed at the last litigative ditch; executors have every motive to put off legatees until they are sure the estate is sufficient to satisfy all debt claims that may turn up; meanwhile legatees will be clamoring for payment and starting ecclesiastical suits. One can begin to imagine the complications that could arise from this situation. Numerous cases will illustrate the point.
3. Marital Law. The marital jurisdiction of ecclesiastical courts produced fewer Prohibitions than the classes above, but it was important in itself. Ecclesiastical courts had exclusive authority to determine whether a man and woman were legally husband and wife (essentially by the standards of ecclesiastical law, though there was some statutory encroachment on its free hand). They also had authority to award civil relief from an abusive marriage. Apart from criminal complaints of marital or sexual misconduct, the standard marital suit in an ecclesiastical court was a “divorce” suit in one of two senses in which the word was once used:

a. A suit for annulment—a judgment that an apparent marriage was never really contracted, on any of several invalidating grounds recognized by ecclesiastical law.

b. A suit to terminate the right and duty of cohabitation and to provide for the wife’s separate maintenance (“alimony” in the sense the word then had), on grounds of abusive behavior by the husband. (Wives were not, so far as I know, ever defendants in such suits. Serious misbehavior on the wife’s part could defeat her attempt to get alimony, if the husband simply abandoned or ejected her.)

There is no standard category of Prohibitions arising from marital cases, and there would have been relatively few openings for the common law courts to concern themselves with them had the High Commission not existed. Numerous marital suits were brought before the Commission, which probably testifies that it was the advance guard of civilized marital law in the early 17th century, readier than ordinary ecclesiastical courts to punish abusive husbands, especially if they were of superior social rank, and to give civil relief to their wives. Such suits invited Prohibitions because the Commission’s jurisdiction to entertain them was subject to grave doubt. Otherwise, marital suits usually begot Prohibitions by way of some legal problem incidental to their substance.

4. Defamation. Defamation constitutes a separate topic in the organization of this study (Title VII in the table on p. ix.) The reason for this is that the field of defamation was shared between the common law and ecclesiastical systems in a sense that holds for no other area of law. By and large, the tracts of human relationships governed by law were assigned to
one system or the other -- to begin with, so to speak; innumerable problems of course arose from the difficulty of making such an assignment work smoothly. By contrast, some acts of defamation were remediable in one system, some in the other; acts very similar in character and suits motivated by much the same impulse for vindication and satisfaction might fall on one side or the other of a finer line. (The Star Chamber was a third sharer in this field, by way of its civil and criminal jurisdiction over written libels, but its role does not figure in any direct way in Prohibition law.)

The basic rules about jurisdiction in defamation were as follows: Utterances accusing a person of a temporal offense or (though not necessarily imputations of a legal offense) bringing specifiable and provable temporal loss on someone were actionable at common law by Trespass on the Case. Utterances accusing someone of an ecclesiastical offense were indisputably the proper subject of ecclesiastical suits and not actionable per se at common law -- only in some instances when consequential pecuniary loss could be made out. Since fornication et similia were ecclesiastical offenses, many of the scurrilities people are most apt to hurl at each other constituted ecclesiastical defamation. It was problematic whether ecclesiastical courts were ever free to treat as defamatory aspersions that were neither actionable at common law nor imputations of definite ecclesiastical offenses.

Resort to ecclesiastical courts was clearly common in circumstances such that jurisdictional complaints could be made if the ecclesiastical defendant wanted to make them. That can be explained in part by the fact that ecclesiastical law was equipped to provide what people who go to law over their verbal quarrels often want, or at any rate can reasonably expect to get: settlement of who was in the right, apology and retraction if the defendant indeed said something uncalled for and offensive to the plaintiff's honor and reputation, a nominal but embarrassing punishment for the defendant by virtue of the criminal character of ecclesiastical defamation. Resort to the common law offered the prize or satisfaction of damages, but in the period of this study the common law courts were inclined to find reasons against holding utterances actionable when they could -- to the end of discouraging people from burdening the legal system with their mere quarrels and speculating on a pecuniary recovery when they had probably suffered only offense. In any event, persuading a
General Introduction

jury that one is entitled to damages worth the having involves risks and costs. “When in doubt try the ecclesiastical court first” may have been a common attitude among those whose hurt feelings goaded them to litigative war.

Of the Prohibition cases arising from defamation suits, a large number raise issues collateral to the law of defamation itself, but many others are squarely on the terms of the “sharing arrangement.” Typical issues: Are the alleged words in fact actionable at common law and therefore out of bounds for an ecclesiastical court? Are the ecclesiastical courts strictly confined to the imputation of ecclesiastical offenses, or should they have some scope to treat other words as defamatory so long as no common law action would lie for them? To what extent are ecclesiastical courts bound to apply to their defamation cases standards which the common law applied to its? (E.g., to treat language as non-defamatory if it can be construed in an innocent sense, whether or not the speaker’s intention or the words in their ordinary employment were innocent; to permit a husband to release his wife’s defamation claim; to treat truth as a defense in all circumstances.)

5. Rates. Ecclesiastical suits were often brought to recover parish rates levied for Church purposes. The holder of the living had a limited responsibility for maintaining the church building. Beyond that, the inhabitants of the parish were responsible for the upkeep of the church and adjacent grounds, for which they sometimes had to tax themselves. The churchwardens were usually the collectors of such taxes and therefore appear as plaintiffs in ecclesiastical suits against delinquent rate-payers. Various defenses were recurrent: the rate was not fairly assessed, or not by the customary method; the plaintiffs were not entitled to sue because they were not properly elected, usually meaning not by the customary procedure; the defendants were exempt from rates to maintain the parish church because they customarily contributed to the upkeep of an outlying chapel. Defendants often sought Prohibitions, almost always on the theory that when one asserted a customary right against a claim based on ecclesiastical law one was entitled to stop ecclesiastical proceedings until a common law jury said there was no such custom -- the essential theory behind tithe commutation cases. Both tense local feeling and higher political conflict are reflected in litigation of this sort, the latter because in the 17th century the Church hierarchy attempted to reorganize some as-
pects of parish management, mainly election of churchwardens. The policy of the national Church ran afoul of what local people regarded as customary and due, and what wider legal and ecclesiological opinion regarded as due if customary.

6. Pews. Ecclesiastical courts had limited jurisdiction over claims to the exclusive use of pews in churches. The extent of that jurisdiction and how it should be fitted with limited common law jurisdiction over the same subject was legally problematic, as numerous Prohibition cases show. Going to law to assert such claims tends to reflect quarrels, jealousies, and disputes over local pecking order -- foibles that often reached the courts in defamation cases as well.

7. “Spiritual” incomes. Some ecclesiastical litigation had to do with intra-Church claims to various payments. The well-observed rule was that common law courts had nothing to do with these and would not prohibit ecclesiastical proceedings. Disputes between rector and vicar over their tithe split exemplify this sort of properly ecclesiastical suit. Some payments, however, were difficult to classify, notably pensions claimed by clergymen from ecclesiastical institutions. If they met certain criteria they were ordinary annuities recoverable at common law; if not, they were “spiritual pensions,” which the ecclesiastical courts, so far as the common law was concerned, could enforce if they saw fit. Controversies over the right to hold certain Church offices and draw the income therefrom are another instance in which ecclesiastical jurisdiction obtained in principle, but a common law interest could sometimes be made out on the ground that the holder of the office had a secular freehold in it. Official positions in the ecclesiastical legal system are typical of this category. They must be distinguished from the Church’s central “office,” the parish ministry, which had special characteristics (see below). They must also be distinguished from parish offices, such as churchwarden and parish clerk, which were classified as essentially secular: Title to them often came in question in ecclesiastical cases, but Prohibition would usually be employed to see that such disputes were in effect resolved at common law.

8. Livings. Prohibitions occasionally came out of ecclesiastical litigation over title to be the incumbent of a parish living. The subject was a technical one, in which secular and ecclesiastical rules and jurisdictions
General Introduction

were tangled. The advowson, or right to nominate to the living, was secular property pure and simple; title to it was only disputable at common law. There was also a common law remedy (the action of *Quare impedit*) for interfering with the exercise of advowson rights, which could serve as a check on the power the Bishop had to turn down a nominee with cause. Once the nominee was accepted, he had to be installed in several things at once. I.e., he did not occupy the living merely by being nominated and accepted, but only after three distinct ceremonies or conveyancing acts. Two of them, classified as secular and within common law jurisdiction, in effect made the clergyman representative of a corporation sole and life-tenant as a natural individual of the property and incomes of the benefice; the third made him the holder of a spiritual office, the ministry of a particular parish. (I have already noted that the incumbent’s tenure, in both the spiritual and the temporal interests, was subject to disciplinary deprivation by ecclesiastical due process, and that the common law courts had a duty of vigilance over that process in virtue of the temporal side.) These observations must be altered for impropriate parishes, where the advowson was not exercised, but permanently joined to the rectorship, passing with it to the heirs or successors of the owner like any piece of ordinary property. In such parishes, however, appointment and installation of a vicar was substantially parallel to the process of installing a rector elsewhere. Litigation in ecclesiastical courts over the ecclesiastical aspect of all this could sometimes lead to Prohibitions because it arguably impinged on the temporal.

A word on the civil sanctions of ecclesiastical courts: In effect, those courts gave injunctive relief backed by excommunication. Often they ordered the payment of money (e.g., rates owed, so much alimony to a “divorced” wife, the sum left as a legacy). Tithes are a peculiar case in this respect, because the basic duty was to render produce in kind. But when tithes had to be sued for, they were of course not usually renderable in kind by the time it had been determined that they were due. It was accordingly necessary for the court to assess the money value of the unpaid tithes and order payment of the assessed sum. (There is, I believe, no evidence of common law interference with that process of assessment, perhaps surprisingly.) This was probably the only context in which ecclesiastical courts did something like “assessing damages,” or compensating in money a wrong that does not itself consist in breach of a duty to pay a definite sum of money. Otherwise, they by and large ordered spe-
specific performance of a non-pecuniary duty and enforced the order by excommunication; they did not award damages for breach of the order. (E.g., a husband might be ordered to stay away from his divorced wife, or to abstain from abusive behavior toward his wife. The same principle holds for the “penances” appropriate on criminal conviction. Apology and retraction, in the quasi-criminal field of defamation, is one kind of example. Orders to abstain in the future from a type of criminal activity one had been convicted of were also common -- e.g., from cohabitation with an illicit partner or from incontinent behavior generally). Orders to losing parties to pay money in the name of litigative costs were routine and intrinsically lawful. Prohibitions often came out of costs awards for collateral reasons, however. (E.g., pardons, both royal and statutory, tended to complicate the law of costs, because costs might be incurred in privately prosecuting an offense before the offense was pardoned. It was the common law courts’ responsibility to construe pardons and work out their precise application in complicated circumstances.) I am not convinced that compensatory damages were not sometimes awarded under cover of costs, but that is uncertain. There is a further small penumbra where I am not sure of the law and the practice with respect to “damages,” for Prohibition cases are not informative. (E.g., would an executor by whose fault a physical object bequeathed as a legacy was lost or destroyed be forced to pay the legatee an assessed equivalent in money?) On the whole, however, “specific injunctive relief enforced by excommunication” is a safe-enough formula. (Private settlement of ecclesiastical disputes for money of course occurred. This was usually not a factor in Prohibition law, because the settlement would be an ordinary temporal contract. There is no sign that parties tried to enforce such contracts in ecclesiastical courts, or that ecclesiastical courts would generally have disputed the bindingness of one side’s promise to refrain from suing or to drop a commenced suit. Problems and Prohibitions did sometimes arise from the shadowiness of the border between civil and criminal. E.g., private parties to a defamation suit purport to settle for money: it was problematic whether this was binding on either the ecclesiastical plaintiff or the ecclesiastical court, because the matter was in principle criminal. By recommending a settlement, or perhaps very nearly coercing one, the ecclesiastical court had a certain scope to award damages in effect, and this opportunity may sometimes have been used.)
Excommunication was not only the ecclesiastical courts’ ultimate weapon -- the sanction behind its remedial orders. It was also an interlocutory sanction, the means of coercing attendance and cooperation on parties. There is evidence from Prohibition cases that default judgments were sometimes given against ecclesiastical defendants who simply did not show up when summoned. A correct statement of the law and the practice with respect to default judgments is hard to come by. It was, I believe, at least much more common not to give sentence by default, but rather to excommunicate the defaulter for non-appearance and then, when he did turn up, to absolve him quoad his failure to appear and proceed to try the merits.

There are jokes and anecdotes to the effect that cutting off worldly men from communion with the Church was not always a reliable way to make them conform to its law. Being excommunicated did have worldly costs, however. They might take time to catch up with the sinner, but they pinched when they did. A number of temporal legal disabilities attached to excommunicated persons, if the excommunication was discovered and an adversary had motive to take advantage of it. The most important temporal consequence of excommunication was that it could be translated into imprisonment via the writ De excommunicato capiendo. There were some ifs and buts about that writ -- the bare fact that one was excommunicated did not guarantee that one could be taken and imprisoned. By way of the temporal writ, common law courts got a look at the legality of the excommunication, and such factors as its timing relative to a pardon could affect its “translatability” into jail. Normally, however, jail threatened if one allowed oneself to stay excommunicated very long. Prohibition cases supply some evidence that imprisonment on De excommunicato was not an extreme rarity.

2. The Admiralty. The Admiralty had clear jurisdiction over matters arising on the high seas. The jurisdiction was originally both civil and criminal, but the latter was in effect taken away by an early-16th century statute. (Crimes committed at sea were nominally left under the Admiralty, but they were required to be tried by special commissions using common law procedure, most notably jury trial.)

A court with the Admiralty’s function would have been hard to do without for a country situated as England is, so long as the common law
had no way of trying events that did not occur in one or another of the English counties (or in several, in the case of some complex events). For a long time the common law was prevented from trying disputes about events outside the country by the theory of jury trial and the venue rules that followed from it. Jurors were conceived as people who lived in the vicinity where the disputed event occurred and who would themselves know what had happened -- or at any rate might know, or have ways of finding out on their own accord; therefore, they would not be dependent on evidence presented by the parties at a trial, even if they were assisted by it. Obviously jurors of this description could not be found to try what happened at sea; such events would become triable by jury only when the jury was reconceived as a neutral body assessing evidence -- as the judge was conceived under the civil law method used in the Admiralty and elsewhere. (Whether the trier of facts is or is not thought of as a judge of evidence is probably a more critical difference than whether the trier is a single professional or a committee of laymen, and whether the roles of determining facts and deciding legal questions are united or separated.) Events in foreign countries were equally unreachable: Though French neighbors can observe as well as English ones what goes on in their neighborhoods, they could of course not be compelled to serve on English juries. Within England itself, venue rules were originally strict; the triers of whether something happened in Hampshire must be Hampshire men, and even the narrower neighborhood (the hundred) must be represented on the panel of jurors. I shall explain below how relaxation of the domestic venue law and partial reconception of the jury complicated problems about the Admiralty’s role in the period of this study.

The substantive law of the Admiralty was Roman law overlaid with a body of international maritime and commercial usage embedded in the traditions of the court. (Roman law in the sense that parties were allowed to argue from the general principles, doctrines, and authorities of Roman law insofar as the specific rules of the Admiralty and supranational custom were not clear or dispositive.) As I have already noted, the Admiralty was a major arena for civilian practice and careers.

Admiralty cases led to Prohibitions in three main ways:

(1) There were doubts and frequent disputes about exactly what constituted “high seas,” on the one hand, and “land within an English
General Introduction

county,” on the other. As one would suppose, the questionable places were rivers, harbors, and the sea immediately off shore, including places covered by water only at high tide. Statutes from the 14th century appeared to define the border between literal land and places literally on water which nevertheless counted as “legal land” rather than “high seas.” When people being sued in the Admiralty sought Prohibitions on the ground that they could and therefore should have been sued at common law, with the venue placed in a given county, the rather tricky interpretation of these statutes was often in question.

(2) The events relevant in lawsuits obviously do not have to occur exclusively on land or at sea. E.g., suppose a contract is made in Norfolk and calls for something to be done at sea, which is allegedly not done, causing a suit for breach of contract; conversely, a contract made on shipboard at sea calls for something to be done at a particular place in England (or anywhere in England--or anywhere in the world, but the party alleged to have broken the contract claims to have fulfilled it in England.) or suppose A. takes goods at sea which B. claims as his goods, and suppose A. then brings the goods to Yorkshire and is possessed of them there; or, for further suppositions, A. conveys the goods to C. at sea, who brings them to Yorkshire; or A. himself brings them into England and there transfers them to C. by one of the possible transactions (sale, deposit, etc.).

Complex Prohibition cases arose from such mixed situations: a contract or tort suit in the Admiralty on the plausible ground that acts at sea were involved; plaintiff-in-Prohibition claiming that the significant element, or a sufficient element, in the suit was such that it could and should have been brought at common law.

Mixed situations can be further complicated by introducing foreign land. (E.g., contract made in London for performance in Paris; contract made on land at Lisbon, by which one of the parties agrees to sail directly to London, observing normal standards of good seamanship, and to deliver goods carried on the ship to a specific place on dry land in London. The latter contract can of course be broken in several ways: never leaving Lisbon, going to London by way of Brazil, never going to London, negligent seamanship on the high seas, failure to unload and deliver the goods though the ship arrived near London and anchored in the Thames.)
In other words, this category can cross with (3) below—and for that matter with (1) above, as the second example suggests.

(3) I say above that the Admiralty had *clear* jurisdiction over the high seas. Many suits were brought in the Admiralty, however, and many attempts made to prohibit them, in which the sea was in no way involved, but a foreign country. A simple case, avoiding any “mixture” problems, would be a contract made in Paris and calling for something to be done there. It is of course perfectly imaginable that a party to that contract would want to sue for its breach in England. Suppose both parties are English merchants who formerly lived and traded in Paris but have now returned home, so that even if the prospective plaintiff were to undertake the inconvenience of bringing a suit in the French courts he would not be able to catch the defendant within their reach. (I think it is safe to say, by the way, that a man holding a default judgment, or any other kind, from a French court would be little more likely to get his money in England than if he had not gone to the trouble of obtaining the judgment.) Of course there could be less extreme cases—any case in which the defendant was at present reachable in England, especially if he was in possession of mercantile goods or other property there, regardless of whether he or the plaintiff was a long-term resident (and foreigners count, since they were eligible to sue in English courts for anything except real-estate).

So long as the old jury and venue theories were in real force, common law suit was out of the question, and resort to the Admiralty became usual. By the period of this study, however, the old theories were in practical collapse, though they retained a considerable indirect hold on English jurisprudence. Domestically, by a slow and tortuous process, the law had come to be that some kinds of question (called “transitory”) could be tried by a jury that did not come from the proper county by traditional standards and could thus be decided merely on the basis of evidence. In effect, all questions were transitory except those connected with real property and questions of criminal guilt. By a concurrent and related development, foreign issues that met the criteria for transitoriness became triable at common law by pretending that they were about events in England: The plaintiff alleged fictitiously, e.g., that a contract was made “at Paris, France, in the county of Kent”; the defendant was not allowed to plead that the contract was in fact made in the real France, or that there was no such place in Kent as Paris, France, and the judges shut the eye of
General Introduction

judicial notice to the realities of geography; a jury drawn from Kent would try the case on evidence. After this development, it became possible for someone sued in the Admiralty on a foreign contract or the like to seek a Prohibition on the ground that his opponent could, under current law, perfectly well have sued him at common law and therefore should have.

That ground was not, however, a good ground by universal consent. Some judges were reluctant to prohibit when a common law remedy was only available by fiction, even if they would probably have indulged the fiction in an original common law suit. There was some feeling that it was good policy to let the Admiralty handle the kinds of suits that were typically brought there -- mercantile suits -- because the court had an expertise in commercial matters and international usage. There may have been lingering doubts as to whether the fiction was part of the law beyond all possibility of challenge. Meanwhile, a different ground for prohibiting all foreign-land suits in the Admiralty was pressed: the theory that the 14th century statutes mentioned above simply enacted a positive ban on Admiralty suits not arising on the high seas, whether they arose on land in England or in another country. In other words, the statutes were not enacted only to prevent the Admiralty from encroaching on the common law and to define where encroachment would begin in ambiguous cases, but to confine the Admiralty to the sea absolutely. The antiquarian view was advanced that the foreign-land cases that now often went to the Admiralty had at one time belonged to another (now virtually obsolete) special English tribunal, the court of the Constable and Marshall. Tangled differences over the meaning of the statutes developed, and there was perhaps another level of difference over which was the better approach: to look at the de facto modern availability of a common law remedy and decide whether to prohibit in the light of that, or to come to a resolution that the statutes did or did not exclude the Admiralty. Such complexities made for a particularly difficult branch of Prohibition law and left a haze of irresolution over it.

One might ask whether the fiction applied in foreign-land cases could also be used to bring matters that actually occurred at sea under common law jurisdiction. Could one allege without risk of contradiction that something happened, "100 miles NW of the Azores on the high seas in the county of Middlesex"? I can only say that I have seen no signs of it,
The Writ of Prohibition:
Jurisdiction in Early Modern English Law

though some commentary later than the period of this study suggests it was possible. In any event, Admiralty suits about matters entirely located at sea would not have been prohibitable, for the affirmative proposition that the Admiralty does have jurisdiction in those cases was unquestioned, and was unmistakably confirmed by the debated statutes.

It should be noted that prohibiting an Admiralty suit against oneself was almost never a way to escape legal liability altogether, in contrast to some ecclesiastical and most equity Prohibitions. One might seek a Prohibition to put off and burden one’s opponent, or because one thought one’s chances better with a jury than with civil law trial, or because one preferred common law adjudication of an expected legal issue -- from greater trust in the lawyers and judges, on account of some possibly advantageous technicality under common law rules of procedure and pleading, or owing to substantive rule-conflict between the common and civil laws that might affect liabilities in the specific case. Judging by the evidence I have investigated, I do not think the last and most interesting possibility was very usual. Most Admiralty suits that led to Prohibition cases seem straightforward -- mostly claims which, if factually true, would bring liability on the defendant if he were sued at common law. I am not sure about predictable differences in the execution of judgments, but presume that one would scarcely be better off with a common law judgment against one than an Admiralty judgment. There is reason to believe that the Admiralty was popular in the mercantile community, and so to suppose that many litigants who might have obtained Prohibitions accepted Admiralty jurisdiction voluntarily. Unfairly or not, Church courts must have been suspected of bias in favor of Church interests (e.g., the tithe-receiver’s); between the party of the first part and the party of the second in routine commercial litigation the Admiralty would have no bias. Seeking Prohibitions for vexatious purposes in litigation between merchants would be a poor way for a business man to maintain his reputation among those he must deal with. For all these reasons, I am inclined to guess that the typical motive for seeking a writ in Admiralty cases was the weak defendant’s propensity to gamble on a jury. Notoriously in foreign-land cases and sometimes in mixed ones (since finding a common law foothold was sometimes the basis for Prohibition, even when the actual issue for trial did not relate to events in England), the jury was a trier of evidence -- not typically the kind of evidence jurors can check against their
General Introduction

own knowledge; jurors could have been easier to fool than Admiralty judges.

3. Equity. It is harder to say what a court of equity is than to define ecclesiastical and Admiralty courts by their subject-matter and local jurisdictions. The best operational definition of equity is what the Chancery did. The Chancery was the preeminent court of equity; it was never prohibited, though a few dicta suggest it could be in principle. Three other courts were often prohibited, all of them recognized by contemporaries as courts with equitable powers: the Council of Wales, the Council of the North, and the Court of Requests. (Once in awhile another body with those powers, such as the court of the Duchy of Lancaster, was prohibited from entertaining an equitable claim.) Prohibitions were issued to these courts to cut off attempts to get equitable remedies which the common law judges did not think ought to be granted, or did not consider within the scope of courts of equity generally. Sometimes explicitly and more often implicitly, the criterion for what was within the scope of courts of equity was the Chancery’s practice.

The matter is more complicated, however, for the nature of equity was not such that once could say quite simply, “If the Chancery has never granted relief in this situation, it cannot be a suitable situation for equitable relief.” If the Chancery were known to have considered allowing a remedy in given circumstances and to have decided against doing so, there would be excellent grounds for not letting a lesser court of equity reconsider. (In a few situations this model was approachable; there were some maxims familiarly voiced and applied in the chancery that could be taken as general rules of equity.) That would be to treat the Chancery as the equitable supreme court, which it morally was, although the equity courts were not formally organized as a hierarchy with appellate and preemptive powers at the top. The argument, however, that equitable relief in a certain situation had never been granted by the Chancery, never having been sought, could be no more than a rule-of-thumb argument -- a basis for saying to a minor equity court, “We common law judges do not know this is a good claim to equitable relief, for we have never heard of such a claim in the Chancery. We cannot let you go ahead when we are unsure of your authority. The plaintiff had better go to the Chancery if he wants his claim considered.” In fact, though some judges may have responded that way sometimes, this position has more conservative impli-
The Writ of Prohibition: Jurisdiction in Early Modern English Law

cations than are borne out in the judges’ handling of Prohibition cases. They were not so very restrictive toward the minor equity courts, did not insist that they confine themselves to the beaten track of Chancery practice in the literal sense that they allowed only those claims that were routinely familiar in the Chancery to be pursued. Rather, the judges thought about the generally proper scope of equity in the light of their interpretation of the Chancery’s historical and theoretical role, and when they thought the minor courts were within that scope they allowed them to decide for themselves whether to grant relief.

This approach was entailed by the nature of equity in the period of this study. Later in its history, the Chancery (which survived the lesser equity courts) became more precedent-bound and otherwise closer to the common law, in feel and in cooperative habits, though its substantive and procedural law remained distinct. In the 16th-early 17th centuries, equity was still open-ended. It was thought of as holding a theoretically wide (though in practice cautiously used) warrant to entertain complaints of this form: “Application of the general rules of the common law (in some cases), or (in others) the absence of any common law remedy, in the particular circumstances of my case will result in injustice. Please, therefore, order my opponent not to take advantage of his strict rights under the general rules (or, in the other type of situation, order him not to behave in the way he could do with legal impunity, owing to the lack of a common law remedy”). Theories were advanced, and still enjoy a certain currency, that granting relief to such complainants did not contradict the common law but fulfilled it -- by merely mitigating the hardships which the best possible general rules will sometimes cause. Such theories are unconvincing in the light of the Chancery’s historic practice. The Chancery routinely gave remedies in situations where the common law simply recognized no rights and provided no remedies (enforcement of trusteeship being the most important example.) It routinely vetoed certain rules, which therefore operated as rules only for those who did not get around to seeking equitable intervention in time or could not afford the litigation (e.g., certain rules requiring written evidence--the party who lacked the evidence could bring a suit in equity, prove his case by oral testimony, and enjoin the other party from pursuing the certain victory he would win at common law). The Chancery did not, and could not legally, intervene in the one situation that is paradigmatic for “general rules working hardship in particular circumstances” -- where a statute in general language
has presumably unintended results, in a situation the legislature did not think of and make an exception for; “mitigation” there was left to the common law courts by way of construction.

In sum, equity supplemented the common law and rendered parts of it inoperative in a round-about way (which sometimes could be arguably better than changing it outright. Cf. the written-evidence example above: so long as getting out of the requirement involves the trouble and risk of legal proceedings in a special tribunal, people will be motivated to “demand a receipt,” to have the written evidence that will protect them and will further the public good by diminishing litigation). The common law was not by its nature, or by virtue of some valuable property worth preserving at a cost in unjust results, stuck with unamendable general rules and an unexpandable repertoire of remedies. As is commonplace in modern celebrations of it, its “nature” as a system of case law -- not even constrained by the later doctrine of binding precedents -- favored flexibility, which it not infrequently achieved in practice. In addition, there was a legislature perfectly capable of revising the common law. (The notion that there was a conceptual barrier to the very idea of Parliamentary legislation in the later middle ages, a theory that has enjoyed considerable currency in historical literature, has little merit. Of course legislative activity can be repressed by various kinds of political advantage in refraining from it, by structures of interest and perceived need, and by generally conservative attitudes -- including the belief, or need to believe, that inherited, unlegislated law has a good chance of approaching perfection.)

There did not have to be an equity system supplementing and checking the common law; there simply was. It can be called an accident of 14th-15th century English history, provided “historical accident” is taken as shorthand for a complicated turn of events for which there is not yet an adequately articulated explanation. The meaningful sense in which equity fulfilled, mitigated, or avoided contradicting the common law was that the specific forms of equitable supplementation and correction that developed in the later middle ages were on the whole accepted as benign by the community and the legal community. What must, from an analytic point of view, be acknowledged as contradiction or frustration of the rules the common law professed to have was not perceived as such as long as some rules -- mainly ones connected with real property -- were left alone. What the Chancery did had acquired a kind of prescriptive title to be

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thought appropriately limited; beyond that, however, the door was not closed, in the period of this study, to applications for new equitable remedies. The belief that equity is addressed to the exceptional or hardship case caused the judges to consider whether attempts to secure results at variance with the common law beyond the familiar Chancery round were in effect benign amendments of outlying features of the common law or threats to its core. Prohibition suits directed at the minor equity courts were the forum for that kind of judicial inquiry. The upshot of the judges’ deliberations reveals a considerable degree of non-commitment to every jot and tittle of the common law in such fields as contract, offset by a strong protectiveness toward the common law of property beyond the ambit of certain well-established Chancery remedies altering rights in that area.

It will be clear from this analysis that Prohibitions to courts of equity cannot be introduced by reviewing the established heads of equitable jurisdiction and indicating the entrée for Prohibitions. There are no statements analogous to “claims to tithes belong to ecclesiastical courts, but suits for tithes are prohibitable if....,” or “complaints of breach of contract do not belong to ecclesiastical courts.” The reasons equitable remedies were sought, and the reasons for which the common law courts allowed and disallowed the pursuit of such remedies, have to be inspected through specific cases. (I should add that the substance, though not all the refinements, of my analysis of the Prohibition cases on courts of equity is available in published form.)

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Of the three frequently prohibited minor equity courts, one was almost exclusively a court of equity: the Court of Requests. That means it did little, if anything, else than carry an overload of cases that might have gone to the Chancery. It was especially vulnerable to Prohibitions because its very legitimacy was widely doubted. There was well-based and often-discussed doubt among lawyers that this body—which derived its authority from the King’s Council, but did not consist of members of the

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2 Charles M. Gray, "The Boundaries of the Equitable Function," *American Journal of Legal History*, 1976. This article is reproduced as an Appendix to Vol. III, where courts of equity figure to a larger degree than elsewhere.
General Introduction

Council--had any de jure or prescriptive title to function as a court properly so-called (to compel people to appear before it and award remedies backed by sanctions.) Its history was known to be short-run (to extend back only to Henry VII’s reign), and the King’s authority to create new courts or farm out the inherent powers of the Council, while not the most deeply explored constitutional topic in cases or in carefully argued public controversy, was clearly not infinite. Notwithstanding these misgivings, the Requests was indulged as a court of equity -- i.e., prohibited only for exceeding what the judges thought the appropriate function of such courts. The practical usefulness of an auxiliary Chancery was probably recognized. By the Requests’ vulnerability to Prohibitions, I mean only that any reluctance that might have been felt if attempts had been made to prohibit the Chancery itself -- any feeling that the Chancellor was, after all, the historic arbiter of equitable claims, who, even if prohibitable in the last resort, would deserve every courtesy if the last resort were reached -- did not extend to a suspect tribunal. (The courtesy would have been to put off Prohibition, pending negotiation and an attempt to persuade the Chancellor to disallow the objectionable claim to relief.) It is relevant that the Chancellor was almost always a senior common lawyer and the Chancery the scene of big-league practice by common lawyers exclusively. A serious clash with the Chancery would be a state affair; the Requests practically existed by the common law’s grace and had no claim on delicate treatment.

This point is borne out by the serious clash with the Chancery that did occur in the early 17th century. It was not over the substance of equitable remedies, but over when they are opportune. The prevailing common law view was that a party substantively entitled to equitable intervention must seek it before a common law judgment (based on the rules that equity was allowed to frustrate) went against him. Among the reasons for this position was its symbolic tendency to uphold the pretense that equity does not contradict the common law -- i.e., it ought not to block execution of a common law judgment, with the implication that the judgment was unjust, but may prevent a party with a valid but unjust claim under common law rules from pursuing a judgment. The view of at least the strong-minded contemporary Chancellors, Lords Ellesmere and Bacon, was that equitable relief may be sought after judgment as well as before, subject only to the Chancellor’s discretion as to the excusability for the party’s delay, in the light of the seriousness of the injustice he would suffer if left
remediless. Significantly, the Chancery was never prohibited even from intervening after judgment. (The Requests was several times prohibited from doing just that, when in substance the suit before it was perfectly appropriate to equity.) Instead, Coke embarked on a doubtful, though arguably valid, attempt to stop Chancery intervention after judgment by encouraging a grand jury to indict under the *Praemunire* statutes a lawyer who had pursued an equitable remedy for his client in the face of a common law judgment. The indirection -- going after the erring lawyer, not the Chancellor -- is ironically parallel to the indirection Coke thought it important to insist on: the principle that equity may restrain the unconscionable party who might try to make good on his common law rights, but may not suggest that a common law court has decided a case by unconscionable rules. Perhaps the real point of Coke’s attempt was to stir up a “state affair.” That was in any event the effect: the rights and wrongs of intervention after judgment, and whether it was within the scope of *Praemunire*, were argued out of court between the judicial officers concerned and before the King. In the end, the King purported, with dubious legality (for the argument that only a statute could settle the question so as to bind the common law courts is very strong), to decide the debate in the Chancery’s favor. The common law judges proceeded to ignore his decision in the one judicial context in which it was really possible to: they continued to prohibit the minor equity courts from intervening after judgment. The Chancery won the “state affair,” however; it continued to be Prohibition-proof, and the *Praemunire* offensive died. Coke was dismissed from the Bench on account of that offensive as well as for other reasons, but even if he had not been, the project of chastening the Chancery by making criminals of lawyers serving their clients under accepted law would probably not have survived a major demonstration of the Chancery’s political weight.

The regional Councils were only partly courts of equity. They also had common law jurisdiction over relatively small claims and Star Chamber jurisdiction. The Council of Wales had a statutory basis, the Council of the North rested on royal authorization. Both courts were sometimes prohibited from exceeding their other jurisdictions, as well as the equitable. As courts with express and limiting instructions from the King and Privy Council, and one of them ultimately limited by the statute behind it, they were, so to speak, natural objects of Prohibition, even though they were not under the kind of cloud the Requests suffered from. I.e., they were
bound to provoke some Prohibitions merely to enforce explicit limits on their commissions, and although those did not in terms go to their equitable powers, it must have seemed presumable that they were at any rate limited to the generally legitimate business of courts of equity. Any generalized doubt as to whether controlling courts of equity was a proper use of Prohibitions would probably not have been much felt with respect to special, mixed, limited tribunals such as the Councils. There are some signs of such doubts, though they were discussed and dispelled. The Prohibition was after all historically an anti-ecclesiastical instrument. Its extension to minor common law courts and the Admiralty can be seen as enforcement of the internal rules of the common law, in the one case, and, in the other, protection against direct encroachment on business the common law could handle, together with enforcement of statutes. Equity had a higher rationale than courts merely permitted to perform special jobs under well-known bodies of law distinct from the common law, for it purported to see that natural justice was done, and theory held that that function was a necessary check on any system of positive law. The practical immunity of the Chancery from Prohibition probably reflects this sense of its difference from the ordinarily prohibited courts and respect for the Chancellor as the institutionalized expert on what the demands of natural justice are. The nature and status of the minor equity courts, on the other hand, probably catalyzed the general view that even equity is a “jurisdiction” amenable to control by Prohibition, as well as providing a realistic entrée for the exercise of that control.

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All equity courts proceeded basically by injunction backed by contempt powers. They ordered losing defendants to act in some way that amounted to not taking advantage of their common law rights; if the defendant disobeyed, he was liable to coercive imprisonment -- i.e., to be imprisoned until he did obey or agreed to. In consequence, questions about substantive equitable powers sometimes arose on Habeas corpus. Sometimes too issues arose, by Prohibition or Habeas corpus, about the details of the equity courts’ enforcement powers and the propriety of their exercise in particular cases. The deep question whether coercive imprisonment by courts reliant on it may continue forever was occasionally broached.
The Writ of Prohibition: 
Jurisdiction in Early Modern English Law

In other respects, equity procedure conformed to the same basic civilcanon model as that of the ecclesiastical and Admiralty courts. Pleading was more permissive that at common law -- i.e., a choice between pleading to a factual or a legal issue was not demanded. Trial was by a judge, in practice on written interrogatories rather than at an open-court, viva voce hearing. Appropriate issues in equity cases were sometimes farmed out to the common law for jury trial, but this practice was less usual in the period of this study than later. In contrast to the ecclesiastical system, the equitable lacked an appellate structure. This feature was sometimes cited as a justification for Prohibitions -- if the common law courts did not keep the equity courts in bounds, there was little prospect of their being kept there (the only other recourse being an appeal to the King’s grace for a special review commission). In dealing with ecclesiastical courts, it was often a good argument that mistakes at one level could be corrected on appeal. (With respect to appeals, the Admiralty was in the same position as the equity courts, but, as I have argued, there was nothing seriously problematic about the generic justification for prohibiting it.)

Prohibitions in Politics and Constitutional Law

I have already indicated that Prohibitions have a place in familiar accounts of 17th century English history because they became a political issue. I need now to say a bit more about that in order to put the detailed legal history in its setting. What I shall say here is general, and with respect to any real interpretation of the political spin-off from the law it is non-committal. I hope eventually to attempt such an interpretation with the help of a great deal of manuscript material relating to the out-of-court chapter of the subject, but I am not ready for that. The first step toward it is the cases. A controversy about what courts are and should be doing can hardly be seen in a clear light without first getting it as straight as possible what they were actually doing, and how in actual cases they debated what they should be. This is only the first step, for when law becomes controversial outside the courtroom perceptions of the “is” and opinions of the “ought” unconstrained by the immediacies of particular cases tend to become the dominant reality. Manuscript material coming out of the controversy over Prohibitions helps to get at those perceptions and opinions, and at the tactics of the partisans. The material is itself technical; it is hard to see in its terms, as well as to see in perspective,
General Introduction

without prior immersion in the legal issues through the cases. While the outlines of the politics are not obscure, their inner life is, I believe, open to reexamination. That presupposes getting on top of the technical law the politics were concerned with -- by the steps this study as a whole represents and the further one of taking apart the detailed documentation of the public controversy. I shall confine myself to the outlines here, by which I mean the apparent shape of the problem and the feel of the way it was handled, rather than the high points of the narrative. For telling the story well enough to pick out the high points is just what I have to defer.

Already late in Queen Elizabeth’s reign, the ecclesiastical authorities began to complain that their courts were being excessively prohibited. Complaints from that quarter continued under James I and were eventually joined by those of other frequently prohibited courts. There was manifestly a serious issue as to whether the chief common law courts were applying the law correctly in Prohibition cases. That issue merged, as large differences on legal policy tend to, into an issue about the suitability of current law, technically correct or not, to current situations and needs. It may seem equally manifest that the questions demanded a legislative solution. There is no sign, however, that a statute defining the scope of Prohibitions was considered by the contemporary actors (except in an oblique way by the common law judges, who probably saw no need for legislation, but who had an obvious rhetorical opening to say, “If you do not like our decisions, change or redefine the law by statute -- until then we must do our duty by our best lights.”) It is easy -- and persuasive -- to suggest that legislation capable of satisfying the non-common law authorities and the King, who sympathized with them, would have had no chance of passage. Lay interests in such practical things as tithe-avoidance and sentimental identification with the common law would have been too strong in Parliament. But perhaps one should not jump to that exclusive explanation too unreservedly. Hope of finding a quicker and easier solution to the problems than a legislative one, and mistaken but plausible assumptions on the part of King James and his advisers as to the propriety of proceeding otherwise, may have diverted the government from the less-than-hopeless prospects of a Parliamentary course. It is probably right to suppose that the prospects would have been dim, at any rate without a good deal of compromise, but it may be inadvisable to assume too much about public attitudes at the level reflected in Parliament toward the competing values in a complex legal area.
The Writ of Prohibition: 
Jurisdiction in Early Modern English Law

The course taken, at any rate, was to call the judges to account, to try persuading them they had gone wrong and procuring their agreement to a change. It is anachronistic to think of this as scandalous on its face. Evolution of the standards that make it seem scandalous was catalyzed, perhaps critically, by judicial resistance to the government’s proceedings. The resistance owed a great deal, perhaps nearly everything, to the force of character and the ideas of Sir Edward Coke.

For seeing the proceedings in the mildest light -- the opposite of the light in which infringement of judicial independence and an attempt to change the law without legislative process are the prominent appearances -- one might imagine in the modern world a conference or convention of high-ranking judges. I mean one of those get-togethers that have no official status, but merely assemble people with common problems, who must in one way or another work together, for the purpose of discussing their shared concerns and getting to know each other’s points of view. Suppose some serious differences and bitter feelings come out in such discussion: The second-rank judges are sharply critical of certain decisions by the Supreme Court, to which they must defer when they are sitting judicially. Not only are the highest judges made aware that senior fellow lawyers, who are entitled to respect merely as such, and who express their objections in a reasoned way, strongly disagree with them; they are also made to see that the subordinate judges consider their own judicial lives made difficult by the law that comes down from above, their authority weakened and effective discharge of their duty to handle the cases that come before them obstructed. Suppose that a brotherly spirit prevails. Instead of going home in sadness or anger, the judges decide to have it out in vigorous but fair-minded debate. The superior judges defend themselves, but in the end the subordinate judges make a dent. Perhaps the Supreme Court cannot simply reverse itself when it returns to the courtroom, but a subtler change of direction occurs. When new cases of the controverted sort come up, the art of distinguishing is used to move the law closer to the critics’ position, and when there are openings for discretion it is used in a new way. The Supreme Court judges do not sign a contract when they depart from the conference, but they let it be understood that they will try to avoid the behavior that has caused trouble, and so they do.
General Introduction

This fantasy may not be so far removed from what King James envisaged. His ideal project may have been to assemble the common law judges and their judicial critics from the non-common law courts -- in the mediating presence of himself and his law officers -- for searching and brotherly debate to occur, and for reason and peace to prevail. There were three flaws, three main departures from the picture above: the judicial convention was not voluntary, was not on genuinely neutral ground, and was not among peers.

The King could order his judges before him, insist that they explain themselves to him and answer their fellow-judge critics. Not only was he King; he was titular head of the judicial system. Though by firmly rooted usage he was foreclosed from sitting judicially in person, he was very plausibly entitled to concern himself with disharmony among his own judges. There was no denying the King what he wanted externally -- not simply because of the aura and power of kingship, but because it would be hard to dispute legalistically his interest in the Prohibitions controversy. The judges must and did appear, argue, and submit briefs in defense of their conduct. But being compelled to answer, they were in a good position to cry interference and undue pressure -- indeed, to blur the distinction between a problem of inter-judicial relations and mere royal meddling with the professional work of the courts. The possibilities of political tact are nearly boundless; it is not inconceivable that the King could somehow have maneuvered the judges into a voluntary-seeming discussion of Prohibitions. Political tact was not James I’s strong suit; he had a gift for using the heavy hand of royal office on the wrong occasions.

Partly just by involving himself heavy-handedly, and partly by things he said in discussions with the judges, the King raised a further spectre: the theory that in a matter of inter-jurisdictional relations the monarch had dispositive powers he would never have claimed in the sphere of ordinary law. I do not know how well-articulated such a theory was in the minds of the King and his legal advisers, much less how committed to it anyone was. It was in any event neither outrageous nor unthreatening. It is reasonable to distinguish between legislation and an administrative level of rule-making within the legal system. To make law in the sense of changing or defining the rights and liabilities of the subject so as to bind the courts was of course not in the King’s power except with Parliamen-
The Writ of Prohibition: 
Jurisdiction in Early Modern English Law

tary assent. Neither, in a jurisprudential universe that had no place for judicial legislation, was lawmaking within the judges’ scope. On the other hand, whether settling a dispute among judicial bodies about their respective shares in the common enterprise of interpreting and enforcing the law counts as legislation depends on one’s angle of vision. It is at least arguable that the distribution of responsibility within the legal system as a whole does not touch the interest of the subject so as to require his consent through Parliament to a specification of it beyond that given in the existing legal sources and traditions, even though the specification be at variance with certain controverted opinions about their meaning. (My language here is deliberately circumspect. One might need to preserve a distinction between grossly altering that distribution by overturning very well-based, virtually uncontroverted understandings and relatively marginal “specification.”) Could the mutually interested judicial authorities, at odds about jurisdiction, discuss their differences and arrive at a mutual agreement on future conduct, which they would then be obliged to respect? Would they escape the aspersion that that process amounted to covert legislation? If the answer is “Yes,” the King’s title to impose a settlement in the absence of agreement -- a settlement within the same constraints as would apply to any spontaneous internal rule-making and border-defining activity on the judges’ part -- seems hard to deny. To make the King a total figurehead with respect to the judicial system operating in his name is difficult against the background of the 16th-17th century conception of the royal office in general. Reserving him an administrator’s and arbitrator’s position in the judicial sphere, in recognition of his interest in efficient law-administration and in harmony among his agents, seems a modest addition to the list of royal powers.

From the opposite angle of vision, the suggestion that the King might lay down standards for the issuance of Prohibitions can be seen as unconstitutionality dressed in sophistry. In what sense is deciding whether a Prohibition should be granted not like other questions of law, within the expertise of those on whom the law casts the decision and within their responsibility to construe the law? In what sense is a non-statutory attempt to direct such decisions different from purporting to direct other legal decisions without due legislative process? The distinctions above of course claim to specify a sense. But do they do so cogently? Even conceding some difference between “ordinary law” and “intra-judicial matters,” -- such that the judges with prohibiting power could be said to have a right
General Introduction

or a moral duty to be especially mindful of “policy” as well as “law,” and to take account of the interests and opinions of other courts in the total system and of an efficient division of labor -- it remains arguable that royal interference with mandatory intent would be improper. Any mandate laid down would arguably be unbinding and for that reason extremely inadvisable. Coke exploited this angle of vision effectively in opposition to the King.

Thus royal intervention in the Prohibitions controversy, unless by subtle indirection, would have been invidious, partly by raising gratuitous constitutional issues, even if it had been even-handed. It was not, despite the element of good intentions in King James’s mixture of motives. In other situations as well, he had trouble fulfilling the role of honest broker he sometimes saw himself in. He entered the Prohibitions controversy as the partisan and protector of the non-common law courts and showed his bias. He may have acted from honorable and sincere convictions as to how the legal system should be operated and unseemly disputes avoided, but his style was not designed to serve his cause.

The final blight on the Jacobean out-of-court debate over Prohibitions was the disparity of the antagonists. The common law judges would simply not regard the non-common law authorities as fellow judges in the full sense of sharers of a common enterprise. In this frame of mind there was an element of sociology. The non-common law judges were mostly of the separate and rival civilian profession; the cream of the common law bar, from which the common law judges came, was a social élite, oftenby origin and in any case by self-enriching achievement; I do not think it is entirely misleading to say that the common lawyers looked on the civilians as a doctor does on, let us say, something in the range of dentists, veterinarians, osteopaths, and chiropractors; wealth, snobbery, training at the “best institutions” (the Inns of Court in the heyday of their prestige, in a way outranking even the ancient universities, which in any event many of the common lawyers had passed through en route to the more exclusive professional club) contributed to the perspective. Its deeper source, however, was jurisprudential. In the Introduction to Vol. I, I discuss the ideas and attitudes in virtue of which, from the point of view of many or most common lawyers, the non-common law systems were not really “part of the law as a whole” (as well as the ideas informing the opposite point of view). I do not want to repeat that discussion by antici-
The Writ of Prohibition: 
Jurisdiction in Early Modern English Law

...
**General Introduction**

the common law judges to dispute with the non-common law judges as equals “jurisprudential” -- the product of serious thinking about law and English law, especially on Coke’s part, sharpened and catalyzed by serious contrary thinking, rather than a set of mere prejudices.

Subject to the reticence I consider advisable in representing the story of the political controversy, I think it is safe to say that it was inconclusive in outcome. It rather petered out than issued in a firm agreement on future practice, a purported royal decision, or a decisive refusal by the common law judges to pay the least attention to the fact that out-of-court disputation and negotiation had occurred. The immediate question for this study is whether effects of the controversy can be seen in the cases, either in the form of direct references to it or of shifts in direction which it might explain. (The same question arises for another episode of out-of-court discussion early in Charles I’s reign, when the judges seem to have been more compliant about listening to criticism and undertaking to watch their steps in the light of it -- whether or not this had any significant effect on decisions.)

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I want now to refer back to the outline of the study on p. ix and explain briefly the meaning of the several topics and the rationale of my organization. Much of this is evident from the titles and the information about the setting of jurisdictional cases I have just conveyed. In some instances, a little more explanation will make it easier to follow a presentation that inevitably moves slowly through a plethora of cases on many distinct problems. Readers without a special interest in the whole subject may prefer to read the detailed portions selectively or to concentrate on the more general discussions of underlying principle that preface most sections. Some of the detailed topics have a stronger bearing on general questions of history and jurisprudence than others. It will assist the process of selection for the reader to have at the outset a somewhat fuller picture of how the study is put together than a bare list of headings can communicate. At the beginning of sub-sections of the detailed discussion, I almost always put a summary of the law as it emerges from the cases analyzed in the adjoining text. (The only exceptions are a few short sub-topics where the summary is comprised in the opening paragraphs of the text.) It will be easier for the reader who wants to know the upshot of the cases to find the relevant summaries if he starts with some notion of the problems covered in
The Writ of Prohibition: 
Jurisdiction in Early Modern English Law

the various parts. More specific guidance is provided by the table of contents at the beginning of each major part.

The significance of the procedural issues in Vol. I is explained in the Introduction to Vol. I. That Introduction, more than others, is concerned with the climate of opinion surrounding the Prohibition cases, outside as well as inside the legal community. It is accordingly relevant for everything in the study, not only the material in Vol. I. One reason for putting procedure first is that the cases thereon are in a sense the best measure of the courts’ attitude toward the importance of jurisdiction and of how seriously in practice they took the undisputed theory behind the writ of Prohibition. Another reason is that points of procedure are of course involved in many cases on substantive law. The refinements of procedural law taken up in Vol. I, as opposed to the basic picture given above in this Introduction, are usually not essential for understanding substantive cases, but familiarity with them can be helpful.

Vols. II and III are the most important sections of the study for historical jurisprudence. They raise the most fundamental questions about what the Prohibition was for and what the proper role of the central common law courts in controlling the non-common law ones should be. Sometimes whether a Prohibition should be granted, though perhaps problematic enough as technical law, was not very deeply problematic. That was so (a) when the end of the Prohibition was to prevent a non-common law court from encroaching directly on the business of the common law -- providing a remedy which could just as well be pursued at common law -- or (b) when there was a positive rule of law, common or statutory, limiting what some non-common law court could do. By contrast, there were four situations in which whether to grant a writ was “deeply problematic.”

(a) I have already said that some issues arising in originally proper non-common law suits were grounds for Prohibition, because those issues were considered the common law’s to determine. In the end, some “common law issues” were firmly recognized, and whether a Prohibition should be granted when one of them came up was not very doubtful. But a certain puzzlement always surrounded this sort of Prohibition. When it was argued that some issue other than the well-recognized few was exclusively fit for common law determination, the courts tended to be troubled
and divided. Was the Prohibition really meant for preventing non-common law courts from deciding the questions they needed to in order to dispose of suits properly before them? Was that function essentially the same as, or implicit in, what Prohibitions were manifestly for -- preventing the non-common law courts from taking cases they ought not to ab initio?

(b) Suppose there is no pretense that an initially proper non-common law suit should be prohibited merely because a certain issue has arisen. May the suit ever be prohibited because of the way the non-common law court has handled the case or an issue in it? Can a non-common law court ever mishandle something it is admittedly free to determine so that the common law courts are entitled to prevent or correct such mishandling? (Obviously the non-common law courts, like any court, could err, but why should their errors not be solely correctable by appeal? As we have seen, appeal was generously available in the ecclesiastical system, where alone the present situation arose in practice.)

The practical answer to the questions was a tentative, “Yes.” In fact, common law courts were often invited to intervene because an ecclesiastical court had made a certain ruling or followed a certain procedure; not infrequently they did intervene. The search for a theory to justify such intervention, however, produced much trouble and little clear resolution. The existence of the Prohibition, which in its simpler uses seems a mere instrument of traffic-control -- a way of saying, “This case (or sometimes this issue) belongs in Court A, that one in Court B” -- forced the judges to consider whether parts of the common law had virtually the status of constitutional law, a set of standards which all courts in England must observe, whether or not they are administering the common law in its everyday sense. The problem was probably too deep to be solved satisfactorily, but it is of greater interest for general jurisprudence than anything else in this study.

(c) Suppose a suit brought in a non-common law court does not encroach on the common law’s monopoly over some kinds of litigation. Suppose it does not violate any specifiable rule to the effect that such a suit may not be entertained by that court. The suit is novel or unusual, not immediately recognizable as a kind of suit which the court in question customarily handles. Nothing has happened -- no issues have yet arisen
within the suit, there is nothing the non-common law court can be said to have mishandled; the suit has merely been brought. Could there be any basis for prohibiting it? Why should the non-common law court not be free to decide whether or not the novel claim is from its point of view a good cause of action, as common law-courts would be free to do if an analogously novel claim were advanced before them? 3

Again, there are a few Prohibitions which seem to be issued only because such non-common law suits appeared to the common law judges to extend what I shall call "the ambit of remediable wrong" too far. Again, there is some discussion in the cases of the common law judges' title to

3 Lest it be objected that old-style common law courts operating under the writ system did not have authority to consider the actionability of "novel claims": That is in an abstract sense true. Indeed, the formal concept expressed in the writ system, and mentalities conditioned by it, tend to explain why some judges did not think non-common law courts could be altogether free to consider entertaining new claims appropriate to no other tribunal. By the "formal concept" I mean the idea that there is a limited supply of valid causes of action embodied in the writs, beyond which the scope of wrongs remediable at common law simply does not reach -- as it were, if there is no writ in the Register whereby you can complain about my doing x, I may do it with legal impunity so far as the common law is concerned.

The realistic picture is rather different. For one thing, the action of Trespass on the Case was open-ended. By means of that writ, one could claim that any act allegedly causing damage to oneself was tortious, and it was for the common law courts to say whether it was, subject only to appellate and Parliamentary correction. More generally, the courts were free, subject only to those controls, to hold that any given statement of facts (in pleading terms, any declaration) fell under the writ which the plaintiff employed. Of course, the courts were "not supposed" to make outrageously inappropriate judgments to that effect, but notoriously they stretched the language of some writs beyond the letter. Arguably, analogous scope in non-common law courts not using a writ system would consist in the kind of freedom modern courts generally have -- to judge whether any purported cause of action is good, not by asking whether it fits a particular writ or fails to, nor by asking whether it is strictly precedented (which a "novel claim" is not by definition), but by considering its compatibility or continuity with recognized causes of action.

I stop short of "asking whether the complaint is sound as a matter of natural justice" and "asking whether it is a complaint that should be made legally valid by virtue of legislative authority delegated to the court." It is not necessary to go that far, where no judge could be expected to go without either (a) the recognition of judicial legislation that is an incident of legal positivism, a jurisprudence of later vintage than the period we are concerned with or (b) the doctrine that every court is ultimately a court of equity, entitled to enforce the requirements of natural justice as the court construes them. The latter doctrine, to the best of my knowledge, was held by only one person in the 17th century, Thomas Hobbes (in his Dialogue between a Philosopher and a Student of the Common Law of England --modern ed. by Josephy Cropsey, Chicago, 1971). Hobbes was a self-conscious enfant terrible vis-a-vis the common lawyers, a radical iconoclast with respect to all their jurisprudential beliefs.
control that “ambit,” but ambiguity and uncertainty abound. Under (b) above, we ask, “Are there some standards binding on all courts which it is the common law courts’ duty to enforce outside the common law system?” We now ask the distinguishable but related question, “Do the common law courts have a kind of supervisory authority over the whole English legal system such that they may control what is to be recognized as a valid cause of action outside the common law system proper?”

(d) Suppose a suit is brought in Ecclesiastical Court A when there is reason to say it should be brought in Ecclesiastical Court B, but there is no objection to it as an ecclesiastical suit. Or suppose a suit is brought in an ecclesiastical court when there are grounds for thinking it should be brought in a court of equity (or vice versa). May a common law court prohibit it? Most of the Prohibitions of this sort seriously considered or granted were a matter of enforcing a particular statute regulating intra-ecclesiastical traffic. But there are a few cases outside the statute or in which the statute was not relied on. Questions similar to those under (c) arise: Are the common law courts the traffic directors for the legal system as a whole? Is it their business to see that non-common law jurisdiction stays in order, when there is no question of encroachment on common law jurisdiction? Again, there is express discussion in the cases, divided opinion, and irresolution.

Vol. II is principally about situation (b). Situation (c) and (d) are treated directly in Vol. III. The more routine and straightforward aspects of situation (a) are deferred until later in the study (Part VIII) for reasons of expository convenience, but owing to overlap with the issues under (b) some of the most difficult and important problems under (a) are treated in a section of Vol. II. Vol. III develops the contrast between the least questionable kind of initial-jurisdiction-controlling Prohibition (prevention of direct encroachment on the common law) and the most questionable (c) and (d) here. In other words, Vol. III is not exclusively about situations (c) and (d), but they are the heart of it.

Part IV is about the enforcement of statutes by Prohibition. The introductory essay will deal with another jurisprudential problem of considerable depth: By what warrant are the common law courts the exclusive final interpreters of the statutes? In other words, why should non-common law courts not have standing to construe and apply to themselves statutes

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4 See table on p. ix. ‘Part’ refers to continuations of the study not yet ready for publication. The present three Vols. correspond to Parts I-III on the table.
which are surely addressed to them as much as to the King’s common law judges? In contrast to the problems in Vols. II and III, this one was in practice cleanly resolved: Whether it is warrantable in theory or not, the common law courts did in fact take it upon themselves to enforce by Prohibition their interpretation of statutes concerning what non-common law courts should and should not do. The theoretical warrant is nevertheless worth reflecting on, not only because the doubts -- and the practical resolution in favor of a common law monopoly -- are informative about the jurisprudential climate in which Prohibition law was made, but also because the issues of theory do to a degree hover over the cases. They are occasionally mentioned; occasionally the common law monopoly is expressly defended. Just because the monopolistic power was asserted without serious dissent among the common law judges themselves, and was repeatedly used, its legitimacy was a more visible object for the non-common law courts and their political partisans to oppose than the tenuous and tangled common law powers dealt with in Vols. II and III.

The body of Part IV is about a number of particular statutes whose complex judicial gloss was largely written through Prohibition cases and cases involving related jurisdiction- controlling instrumentalities, mainly Habeas corpus. Other statutes are dealt with in other parts of the study, according as they bear on various subject-matter categories. The large, politically delicate matter of the jurisdiction and powers of the High Commission is located in Part IV because that was essentially a question of what authority a statute -- the Elizabethan Supremacy Act -- intended to give the Commission.

Most of the rest of the topics in the table are self-explanatory. The Prohibition cases bearing on “subject-matter categories” are brought together -- e.g., the jurisdiction of Admiralty and equity courts, the boundaries of ecclesiastical jurisdiction over defamation. To some extent, my ordering is influenced by the analytic categories developed in Vol. III. E.g.: The bulk of Admiralty Prohibitions conform to the simple “paradigm” of Prohibition law, as I shall call it--preventing non-common law courts from doing in effect what common law courts were prepared to do themselves. Cases on ecclesiastical defamation are a good illustration of the range of Prohibitions -- “paradigm” cases on the one hand and, on the other cases in which the common law judges undertook to say to ecclesiastical courts, “You simply may not treat these words as defamatory -- it
extends ‘the ambit of remediable wrong’ unduly.’’ Most Prohibitions to courts of equity by their nature restrict non-common law courts from overextending that ambit -- i.e., from judging for themselves that such-and-such is a valid claim to equitable relief.

By and large, jurisprudential interest declines in the later parts of the study, though there is no decline in difficult problems of ordinary law nor in the real-world importance of the judges’ decisions. Part VIII is something of an exception, requiring a little explanation.

In some ways the best answer to the question raised in Vol. II (“When is common law interference with the handling of a case in non-common law jurisdiction justified?”) is “Only when the cases’ outcome might have a de facto impact on interests in the common law sphere, such as prejudicing potential common law litigation.” This answer is a negation of more portentous claims for the common law. I.e., it comes to saying that there is not some set of common law standards that must be adopted as a model by courts not applying the common law. All it gives the common law courts is an extended form of the self-protective function served by “paradigmatic” Prohibitions. The cases in Vol. II flirt with “more portentous” theories. They do not agree that the more modest “extended self-protective function” exhausts the common law’s power. They do, however, pretty well establish its legitimacy, and as a whole they can be read as concluding that it is the best bet among theories.

In Part VIII, under the rubric “collateral infringement of common law interests,” I deal with the main substantive topic dominated by the “extended self-protective function.” The topic is mixed wills, which I have already introduced briefly. The common law courts were often invited, sometimes successfully, to block probate because otherwise unexceptionable ecclesiastical proceedings might prejudice litigation over the real-estate portion of a mixed will -- e.g., by finding the testator insane, so that a jury trying a case concerning the land might be disposed to conclude he was insane, a conclusion it might not reach if there had been no prior ecclesiastical action nominally concerned only with the personal estate.

It would clutter Vol. II unduly and distract from the major jurisprudential issues central to it to deal there with the rather large and complex “subject-matter category“ of mixed wills. In Part VIII, I so to speak re-
The Writ of Prohibition: 
Jurisdiction in Early Modern English Law

turn to an off-shoot of Vol. II, the least controversial product of the Vol. II cases. Having done so, I also deal in Part VIII with another off-shoot -- the residue of the analytic category “common law issues.” Again, it would burden Vol. II with distracting detail to treat aspects of that category that are not intimately connected with the cases on control of non-common law conduct. They are relegated to Part VIII, but because of the link with Vol. II there is more of the deeper sort of jurisprudential interest in that section than in the other parts of the study.

It remains to explain the anomalous Part XI. That section will have two main sub-divisions:

(a) I have emphasized that the form of the study is intensely legal. That does not mean the tone is abstractly doctrinal, for the focus is entirely on individual cases, and cases cannot be discussed without an eye on the real-life situations they present and the judges’ responses to that reality. I do, however, approach and organize the material as a lawyer does with cases relevant for his practice. I try to figure out how the judges saw particular cases and how their decisions (and dissents) add up to generalizations about related lines of cases -- generalizations that would predict judicial reaction to new cases in the same line if one were a contemporary engaged in practice. (Sometimes, of course, chaos is the only generalization.) Although the study is sprinkled with historical commentary and speculation, it is not geared to history in a broader sense than the history of problems, and complexes of related problems, about the law of jurisdiction over a relatively short span of time. I do not try in the process of the study to make a systematic approach to historical questions of a higher order. This is deliberate, for I do not think they can be approached intelligently, save for incidental impressions, until the returns, in a more limited legal sense, are in. The commentary, or “historical cross-analysis” I foresee in Part XI will attempt to supply the further element.

The legal material of course points beyond the law in a narrow sense. For example, many areas of jurisdictional law, different from each other in legal structure, have to do with tithes. It is possible to cut through all these and say something beyond the immediate suggestions of common sense about how the payer and the recipient of tithes fared at the hands of the law -- and were likely to fare in practice, since the principal social
function of litigation and legal pronouncement is to fix the background against which people are well-advised to conduct their affairs, including the decision to litigate. Are tendencies in the treatment of payers and recipients over the period of the study perceptible? Are there nice points—the grosser ones can hardly fail to be evident—about the lay view of the church and of its interests and agencies to be gathered from a vast number of diverse encounters between lay and ecclesiastical courts? My intention is to cross-analyze my topics and to count outcomes, with questions of this order in mind, in as many ways as seem profitable; I cannot anticipate fully what ways will turn out to be.

I have the same intention with respect to a second type of question, more internal to the law. I have already indicated my interest in these questions; to say anything systematic about them will again require looking across the many analytic and subject-matter topics of jurisdictional law. I refer to what I call above “judicial behavior”--the coherence of individual judges’ decision-making over a diversity of issues (Sir Edward Coke’s above all); the existence of schools or parties among the judges, with respect to jurisdictional law but also to the general canons of judging; (Can one, for example, perceive through the Prohibition cases as a whole, in the decade or so before the Civil War, the “royalist Bench” of tradition?); the small-group sociology of the Bench and Bar--what personalities were dominant, which intellects impressive, what habits of smoothing disagreement and what signs of its aggressive expression are evident; the practical indicia of jurisprudence, such as the propensity to argue from precedent and to respect it; trends and changes within the period in these and other regards.

Finally, it is my expectation that once Prohibition law in the cases is worked out through the body of the study, and cross-analysis of various sorts has put it in perspective, the context will exist in which the story of the political controversy over Prohibitions can be significantly retold. As I have indicated, there is a good deal of manuscript material on the controversy, which I would expect to use for that narrative, but the most important prerequisite for it is a command of the case law. Part XI will include a retelling and analysis of the controversy such as seems necessary and possible after the preliminary operations have been completed.
(b) The law of Prohibitions did not of course come to an end with the Civil War, which marks the approximate terminus of my detailed study. (1640 comes close to marking it. I do deal with a few cases falling between 1640 and 1660, including some from the Interregnum. But that is a badly reported period, so that the additional material it supplies is scanty. By the same token, though 1580 is my approximate terminus a quo, because the abundance of reported cases starts about then, I discuss such cases from the earlier post-Reformation decades as I have found. The medieval law of Prohibitions is outside my province, though it comes into the picture to the limited degree that the 16th and 17th century lawyers and judges cited medieval cases. The reasons why the flood of Prohibitions started in the later Elizabethan years, in so far as that is not a trick of surviving evidence, will be among the concerns of the historical commentary I have just described.) I have, however, collected and classified the printed cases (closer to the whole body than in the earlier period) from the later 17th century -- roughly through the Stuarts or to 1714. I anticipate a follow-up section in Part XI on how Prohibition cases were handled after the great disruption of the mid-17th century, in subtly but not grossly altered circumstances. The basic components that made for a law of Prohibitions remained in place. The ecclesiastical, Admiralty, and equity systems were still in business, though altered by the abolition of the High Commission and minor equity courts; the principal common law courts were still called on to regulate their jurisdiction, by Prohibition and sometimes otherwise, in most of the old litigative contexts. It would beg the question to say strongly that there was a subtle change in the approach to jurisdictional problems, in addition to marginal changes in their institutional setting. For the purpose of extending the study in an afterword on the later 17th century is to determine how much change there was, first on all the substantive points that came up again in later cases and then in a general or ‘cross-analyzed,’ way.

Nevertheless, speaking in a tentative tone, I think that breaking the continuity of this continuing chapter of legal history at the Civil War is justified, as I have to a degree already suggested. Judges after 1660 were looking back to law mostly made before 1640, interpreting it in attempting to follow it (with, I believe, a rather more conscious impulse to base decisions on precedent than characterized the earlier jurisprudence). It may even be possible to say that they were looking back on what they re-


**General Introduction**

garded a something of a Golden Age, with Coke cast in a larger role as its hero and spokesman -- thanks in part to the impressiveness of his publications -- than he actually occupied in his time. Their decisions tend to present a version of the law shaped before 1640, a version that does not always agree with my analysis, from a more distant and more neutral perspective, of what the Elizabethan, Jacobean, and Caroline courts held. Of course the later Stuart courts saw the law whose continuity they tried to maintain through the incomplete information they had (tending to dependence on the cases that had reached print) and through the moods, fashions, and perceived needs of the Restoration period--a time, after all, of quite conscious new beginnings, when a terrible national trauma had been weathered. The disruption seemed at once to warn against old habits of mind and to have resolved old problems by bitter experience. My impression is that there was a good deal of specific legal change in the jurisdictional field after 1660, though on routine matters there was a good deal of consistency with earlier law too. But that, as well as my general observations here, is impression and hypothesis. The purpose of the extension in Part XI is to test the suggestions I have made, and indeed to ask in a systematic way whether the periodization I adopt in confining the study to the pre-Civil War section of the post-Reformation period is justified.

**Note on Technical Procedures**

The MS. reports used in this study are all in abbreviated Law French. My practices are:

(a) To translate into English when quoting from the reports, save at a very few points where there could be doubt as to what translation catches the meaning. Because Law French is not a natural language -- but a professional jargon used by lawyers who thought in English and in legalese, - - translation is virtually automatic. The printed reports were originally in Law French (in their MS. form and sometimes in the earliest printed version), but nearly all of them have been so long available in English that their original condition is easily forgotten.

(b) To rely substantially on paraphrase in stating cases and opinions, quoting the reports directly only when there is a purpose to be served. A purpose is served when, say, the report itself gives a judge’s words in di-
rect discourse and the words have some particularity (i.e., are not in the nature of “Justice A said: In my opinion Prohibition should be denied”). By and large, for the basic structure of a case the step from original to paraphrase is nearly as safe as that from Law French to English. Full quotation of MS. reports in the notes, though perhaps an ideal desideratum, would swell an already large work with a great deal of repetitious and idle verbiage. The British Library MSS. used in the study are not terribly inaccessible, and my representations of many printed cases in paraphrase can easily be checked against the ipsissima verba of the reports. In my discussion of the cases, I often go beyond “basic structure” and what the report unmistakably says in effect. I project from the visible part of the iceberg to what I think a spelled-out version of the judge’s or lawyer’s argument would probably be. (It bears emphasizing that the reports are often very succinct note-taker’s documents. The degree of articulation that readers of modern reports expect is rarely there.) There is nothing sure-fire about the projections, though I believe their spirit is conservative enough. I believe also that readers will have no trouble distinguishing, by context and manner, when I am simply stating what the report certainly says and when I am stepping beyond that.

Printed reports are cited by the reporter’s name. I have in effect used a modified form of standard legal citation -- modified because the standard system, with its abbreviations, may be confusing to readers who do not regularly consult old-fashioned legal sources and literature. E.g., “Godbolt, 171” means p. 171 of Godbolt’s Reports, and for nearly everyone the straightforward way to look up Godbolt’s Reports is to find the appropriate volume of the standard Full Reprint of the English Reports. All the printed reports used in this study are contained in the handful of volumes in the Reprint representing the earliest King’s Bench and Common Pleas reports. The early modern reports are also available in older editions, easily located by looking under the reporter’s name in law libraries that possess them. Pagination is standardized.

Medieval reports -- i.e., the Year Books -- come up only occasionally in the study. When they do: e.g., “Y.B. 31 Edw. 3, 17” = P. 17 of the Year Book for the 31st year of Edward III’s reign. Year Books are usually most likely to be available in the “full reprint” of 1688, though there are also earlier editions. At their most convenient -- in the late-17th century consolidated reprint -- they are unfortunately only available in abbre-
General Introduction

viated Law French and Gothic print. Translations are sporadic; I believe none exist for any of the Year Book cases actually discussed in this study.

Nearly all relevant MS. reports in the British Library are from four collections. These are abbreviated as follows: Lansd. = Lansdowne MSS; Harl. = Harleian MSS; Harg. = Hargrave MSS; Add. = Additional MSS. E.g., “Add. 20,203, f. 97” = folio 97 of Additional MS. #20,203 [97b=the back side of folio 97].” Folio numbers are those penciled in by the collectors, not the page numbers which the original bunches of reports sometimes have. When MSS. other than these four are used the name of the collection is spelled out.

All cases are dated when possible by term and regnal year. The terms are abbreviated as follows: M. = Michaelmas (autumn term); H. = Hilary (winter term); P. = Easter (spring term); T. = Trinity (early summer term). All cases directly discussed, down to the extension of the study in Part XI, are from three reigns: Elizabeth I, James I, and Charles I. These are abbreviated: Eliz., Jac., and Car. respectively. When other monarchs are referred to in citing statutes or earlier cases used in argument in the main body of Elizabethan and early Stuart cases, analogous but more self-evident abbreviations are used. E.g., “23 Hen. 8, c. 9” = chapter 9 of the statute of 23 Henry VIII.

Separate indices covering all three of the volumes here published comprise (a) judges and counsel who appear in the cases and also miscellaneous personnel of the legal system who so appear (such as civil lawyers and clerks of the courts); (b) statutes referred to; (c) cases treated in the study, by name; and (d) the substantive contents of the three volumes, in the 'General Index.' The indices should permit the reader to carry out partially the kind of "cross-analysis" of the material ultimately intended to be done in Part XI.
Procedure
Table of Contents

I. Procedure ........................................................................................................... 1

   Introduction ........................................................................................................ 1
   Bibliographical Note .......................................................................................... 49

II. Statutory Rules Governing Prohibition Procedure ............ 59

   A. 2/3 Edw. 6. c. 13. sect. xiv:
      "Proof" of Surmise within Six Months .................................................. 59
      1. Extent of proof requirement ................................................................. 59
      2. Meaning of"six months"................................................................. 69
      3. The standard of proof under 2/3 Edw. 6; discrepancies between surmise and proof; competence of witnesses .................................................. 70
      4. Double costs and damages ................................................................. 80
   B. 50 Edw. 3, c. 4 ......................................................................................... 83
      1. Cases involving both 50 Edw. 3 and 2/3 Edw. 6 ................. 83
      2. Cases on 50 Edw. 3 alone ................................................................. 93

III. Self-foreclosure ................................................................. 115

   A. Introduction ............................................................................................... 115
   B. Admiralty Sentences ............................................................................... 118
   C. Bare Sentence in an Ecclesiastical Court .............................................. 124
   D. Appeals ..................................................................................................... 128
   E. De Excommunicato Capiendo ................................................................. 133
   F. Miscellaneous Forms of Self-foreclosure .............................................. 137
A. Miscellaneous Problems .................................................................347
B. Collateral Effect of Prohibitions .................................................. 360-i

XI. Flexible Forms of Procedure ..................................................... 361

XII. Miscellaneous Cases on Procedure .........................................373
I.
PROCEDURE

Introduction

I propose first to look at cases which test in a general and relatively simple way how much "favor in law" the Prohibition enjoyed. These cases turn on points of procedure. They can be expected to suggest one or the other of two attitudes on the part of the courts: (a) The courts might tend to make things as easy as possible for parties suing Prohibitions by fashioning and interpreting procedural rules in a liberal spirit. (b) They might tend to insist on strict observance of such rules and allow the adversary party the advantage of technicalities. Those alternative attitudes are of course always open in the administration of law. Courts may see it as their duty to help people vindicate their substantive rights with as little waste motion as possible and therefore to minimize the effect of the procedural mistakes litigants will inevitably make. They may, on the other hand, set a high value on correct procedure and spare little pity for parties who by bad advice or negligence stand in danger of losing what they are entitled to. Either attitude may be generally characteristic of the courts in a given period. On the other hand, the courts may widen or narrow the gates of procedure according to the context. Some rights may seem so important that procedural rules and other technical habits of the courts—such as rules of construction—should not stand in the way of their enforcement. Other rights may seem so relatively inconsequential that high standards of "art" should not be sacrificed to them. As the maxim had it, the common law favors life, liberty, and dower. On the other side, there were claims which the common law would prevent from being asserted to the limit of the judges' ability to pick holes in them. For example, the courts of the 16th and 17th centuries sought to discourage actions for defamation by construing away the slanderous sense of scurrilous utterances when schoolbook logic and grammar permitted. A pedantic chapter of the law was written for the worthy end of repressing vexatious litigation. "Actions on the Case for words," having gained enough favor to get in the door, were rather disfavored when they threatened to overwhelm the courts with fishwives' quarrels. The "favor in law" enjoyed by Prohibitions will be subject to various tests, among which the strictness of procedural requirements is perhaps the most straightforward.
In general, one does not expect a free and easy attitude toward procedure from the common law courts. Common law procedure was a complex inheritance of time and practice, in which the profession took pride and in whose mazes it won profit. The fine art of pleading was a monument to lawyerly skill and judicial conservatism, if also to pedantry and the greed of clerks paid by the page. Tenderness toward clumsy litigants was not typical. The Prohibition raises some special considerations, however.

In the normal run of life, a legal right may be seen as primarily a thing of value to the individual to whom it belongs. If one approves of a legal system, one presumably desires on the whole to see individuals assert the rights which the system gives them to the extent they desire. The social interest is in a general way identified with the successful vindication of rights. But if reasonable procedural rules (or other enabling rules, such as those prescribing the form in which a will or conveyance must be made) sometimes stand in the way of an individual's assertion of his rights, the loss is ordinarily thought of as falling on that person alone. The loss is a consequence of his failure to use skillfully the instrumentalities the law provides for him. It is not thought of as particularly harmful to society at large. Sometimes, however, more will seem to be at stake than the individual's advantage. In a liberal society, for example, "civil rights" might almost be defined as those rights considered to be especially tied up with the moral welfare of society as a whole. A judge who stretches the rules, say, to review the fairness of a criminal trial on Habeas corpus after ordinary opportunities for appeal have been allowed to pass may seem justified, whereas analogous stretching of the rules in everyday civil litigation would seem unduly lax. One could describe the difference between the two situations simply by saying that some rights are more important than others, but it would also be appropriate to refer to the wider scope of the interests involved, saying, perhaps, "The moral credit of the state and every good citizen's capacity to identify with his government will suffer if men are condemned to prison without a fair trial, whatever technical reasons there are against letting this man raise objections to his trial."

From one point of view, the rights asserted by the Prohibition are a straightforward example of rights in whose vindication society at large was thought to have a special stake. In theory, a man who sought a Prohi-
Procedure

bition was conceived as calling attention to an infringement of the "royal dignity." For practical purposes, infringing the royal dignity meant infringing the jurisdiction of the common law. In post-Reformation circumstances, that meant infringing the jurisdiction of one branch of the King's judicial system. In a practical mood, one might ask whether the general interest of society was especially involved with the jurisdiction of one set of courts, except in the sense that it is involved with the observation of the law as a general rule. I.e.: One might think it important for the lines of jurisdiction prescribed by the law to be upheld on the whole, but consider their occasional breakdown unimportant.

There is indeed a sense in which jurisdictional rules may be regarded as especially safe in the hands of individual litigants: If a plaintiff sues in the wrong court and the defendant makes no objection, society loses nothing in letting that court decide their case, no more than if the parties had resorted to an arbitrator by agreement. There is therefore nothing objectionable per se about a court's deciding questions which the general rules of law say are outside its competence. Therefore, one may argue, jurisdictional rules exist primarily for the benefit of such individual litigants as choose to take advantage of them and take the trouble to do so correctly. If a defendant is neglectful to claim his advantage in proper form, fairness to the plaintiff arguably requires that the latter be allowed the advantage of suing in the court of his preference.

This line of argument becomes less persuasive when the judges of one court have some sort of expertise that those of another lack. Within limits, that was true of the system we shall be dealing with. The ecclesiastical courts, Admiralty, and Court of Requests were manned by civilians -- i.e., men trained in the universities in Roman law, as opposed to the Inns-of-Court products who manned the common law. Owing to the existence of two separate legal professions, questions raised in the wrong court could come before judges without the appropriate technical training.

But several qualifications must be put on that objection to the argument that jurisdiction is a relatively indifferent matter from a public point of view. (a) Much litigation requires no special expertise because it depends on the ascertainment of facts. (b) Lack of expertise must not be confused with ignorance of another jurisdiction's law. We have asked: What does it matter if an ecclesiastical court, say, decides a given case or
issue, considering that one party wants it to and the other has not properly taken the steps available to him to prevent it? Of course it matters if the case should be decided by common law rules. If the ecclesiastical judge presumptively does not know those rules and cannot discover them, then of course he should not be handling the case. But that begs the question. We assume that ecclesiastical judges may decide issues before them by their own law. We ask: So what?

There is a limited answer to that, a residuum of validity in the argument from the danger of inexpert judges. Suppose there is a subject-matter field in which the judges of one court have no training or experience. Their law has no such topic, nothing from which to draw a solution. Perhaps it would not be so bad, in that case, if the judges went by the law of nature. The trouble is, that is unlikely to happen. The judge confronted with a strange situation is likely to draw consciously or unconsciously on what he takes to be the relevant law of another jurisdiction. If the law is technical enough and the judge inexpert enough, a botched job may ensue. There is something a little worse —a little more unfair to even a negligent party — about an intended, but misconceived, application of positive law than about a decision honestly based on common sense and fairness alone. To apply this point realistically to the old English system: The English law of real property —to some extent other fields, but pre-eminently property in land - was a very special kettle of fish. An inexpert ecclesiastical judge faced by a property question of any complexity would have to be a strong man not to try to apply the common law and a quick study to do it right. (The other side of the realistic coin is that the chance of a complex property question’s coming before an ecclesiastical court was slight. But we shall have enough of realism anon.)

(c) The danger of the inexpert judge diminishes if there are facilities for supplying his deficiencies. Actually, the old English system was rich in such facilities. Common law courts often decided cases dependent on questions of ecclesiastical law. Insofar as they believed that correct solution to such questions was necessary for their purposes and beyond their legal control (i.e., that they had no choice but to follow the ecclesiastical law as “given”), they took steps to inform themselves. They did not plunge recklessly into waters beyond their expertise. In some circumstances, ecclesiastical courts supplied definitive certification of a case’s standing so far as it involved ecclesiastical law; in others, civil lawyers
Procedure

were consulted informally; in still others, they were admitted to appear as adversary-advocates on points of ecclesiastical law, informing the inexpert judges as to where the ambiguities or disagreements in ecclesiastical law lay and what authorities could be urged both ways. With that much help, non-experts can do pretty well. For another example: The Chancery—though in our period manned by common lawyers at the top—was habitually careful to refer points of law arising in equity cases to the common law judges. In short, the system we are dealing with had practiced ways of dealing with the inexpert judge.

Our argument for the "public indifference" of strictly enforced lines of jurisdiction obviously loses power proportionately as greater public value is given to uniformity throughout the legal system. A party perhaps has no complaint if, owing to his own negligence, his case is decided in Jurisdiction A differently than it and analogous cases would be decided in Jurisdiction B. But it is possible to see societal ill in anomaly as such - i.e., apart from whether A's rule is better or worse than B's, and apart from whether the source or tradition from which the one rule is drawn (common law, ecclesiastical or civil law, natural law) has a higher claim to general prevalence than that from which the other is drawn. Interjurisdictional anomaly as such may seem a vague threat to the cohesion or "oneness" of a society. (For an analogy: Is it bad, or less-than-optimum, if Ohio has a different rule than Kentucky on some point of law? If the legislature or courts of a given state are presented with the opportunity to create new law or resolve an ambiguous or unsettled point, ought they to have a high regard, relative to other considerations, for the law of other states where the law is better settled on the point in question? Is there a duty, ceteris paribus, to strive towards an "American law," partly in the interest of the metaphysical, but perhaps important, "national identity"?)

Such "metaphysical" concerns quickly fade into practical ones. We must adhere to our hypothesis: An individual who suffers the wrong court to decide his case has no complaint. If an ecclesiastical court says his lease is invalid, and in another suit a common law court says it is valid - well, the anomaly is his fault. But will other people, "innocent bystanders," perhaps be injured? Yes, they may be, though in somewhat subtle ways. The accumulation of anomalous results may have a deleterious effect on legal predictability. Grant that "the law of the jurisdiction" is the proper basis for projection. I.e.: If one is trying to design his conduct by
estimating what the common law courts are likely to do, he should leave out of consideration what ecclesiastical courts are likely to do in comparable situations. But when confronted by complex or ambiguous problems, people may be tempted into irrelevance: "Leases of this sort have been held invalid by ecclesiastical courts. What a common law court is likely to do with one looks like anybody's guess. Well, I'll sue anyhow. Perhaps we can use the ecclesiastical results persuasively even though they are not strictly relevant." If this way of figuring is wrong -- i.e., if the common law court would adamantly refuse to listen to argument from the ecclesiastical results -- then someone has been led into a miscalculation. It could perhaps have been avoided by seeing to the enforcement of jurisdictional lines without regard for the behavior of individual litigants (i.e., by minimizing the chance that ecclesiastical courts would ever be invited to pass on leases -- a realistic example of the sort of thing that was often prevented by Prohibition.)

If the calculation above is not flatly wrong, there is still a disutility. The presence of avoidable anomalies -- and of multiple lines of cases in different jurisdictions, some clearer and fuller than others -- at least raises problems for the courts. Should they allow some persuasive influence to results outside the jurisdiction? If so, how much? If not in general -- in mere "like cases" - does the identical case raise a special problem? E.g.: A particular lease was found invalid by an ecclesiastical court, and now the very same lease comes in question in a common law case. Should the decision outside the jurisdiction be given a res judicata or estoppel effect? If not, should the court at least be disposed to produce a concordant result if possible? If not in principle, is there danger of its doing so unconsciously? Whether or not these questions seem especially hard to answer, and whatever the right answers, they are problems. Multiplication of jurisdictions deciding the same sorts of questions, insofar as it can be avoided, creates openings for litigants and their lawyers who might otherwise be persuaded to settle. For the courts, it creates legal problems of such an order of abstraction that they may be hard to resolve consistently.

The gravity of those problems partly depends, however, on the strength of the offsetting institutions discussed above in the context of the "inexpert judge": i.e., the effectiveness of communication within the legal system. In addition to the examples of intercommunication above, and better for immediate purposes, is the situation presented by the principal courts,
Procedure

the King's Bench and Common Pleas (to a lesser degree the Exchequer, because it was a more specialized court). Historical accident and competition produced two courts with very nearly concurrent general common law jurisdiction. The King's Bench and Common Pleas each looked to its own precedents and usage—to "the law of the jurisdiction". There was some risk that one court would insist on its own usage in the face of explicit conflict with the other. But the risk was minimized by prevailing habits and institutions. Decided cases in the other principal court were highly persuasive—perhaps, at a time before *stare decisis* was a strict principle, virtually as persuasive as cases within the jurisdiction—and the mere clerical and procedural usages of one court could also be influential on the other. In addition, the judges of one court often consulted with those of the others in doubtful cases—either informally or by adjournment into the Exchequer Chamber for definitive decision by all the common law judges. Communication and cooperation among the common law courts was of course relatively easy. The judges shared one allegiance to the common law and one profession, saw one another all the time through their highly collegial societies (including the "judges' club," Serjeants' Inn), and exercised jurisdiction in error over each other (which put an obvious premium on avoiding conflicts that could lead to reversal). Avoiding conflict *de facto* would not have been so easy as between common law and non-common law courts, had the latter been freer to create it than they actually were. But the very existence of channels for conflict-avoidance within the common law system would have served as an example and a pressure, an emblem of a frame of mind much readier to say "Get together" than "Go your own way, come hell or high water." The model of cooperation within the common law system probably had a beneficent influence on relations with the Chancery. So with the Star Chamber, whose peaceful coexistence with the major common law courts through most of its career was based on the role of the Chief Justices as advisers to the court.

The civilian courts were farther removed from the professional milieu of Westminster Hall and the Inns of Court. Even so, it is hard when one comes down to it to imagine their developing much law of their own on common law subjects, assuming they had had greater nominal opportunity than they did. The examples above are deliberately unrealistic. The chance of ecclesiastical courts' leading the way with respect to the validity of a certain kind of lease would have been extremely slight. Given
common sense preference for avoiding conflict, reinforced by habits of cooperation in analogous contexts, ecclesiastical courts left free to pass on leases from time to time would probably have looked to the common law for advice. Aside from all else, there was where the relevant, persuasive law on ordinary secular relationships was to be found. On subjects of that sort, most of the traffic would have been one-way. Other subjects, principally ones with a distinct ecclesiastical flavor, such as the law of tithes, are a different story. There were true conflicts between ecclesiastical and common law—cases in which to prohibit was to cause an issue to be resolved one way, and not to prohibit was to allow it to be decided otherwise. My point here is only that opening the way to more parallel case-lines than there were would not necessarily have added significantly to the incidence of legal conflicts.

In the limited areas where non-common law courts regularly decided the same sorts of questions as the common law courts, there is little to suggest disturbing substantive "static". For example, the Admiralty decided a lot of contract cases, having unexceptionable jurisdiction if the contract was made on the high seas. It clearly entertained many suits on contracts not made at sea, simply because the defendant had no motive to bring a Prohibition. No one would have disputed the Admiralty's general right to go its own way, and it presumably did so to a degree, as by giving allowance to mercantile custom in ways the common law would not. There are contexts, however, in which objection to the law of contracts applied in the Admiralty on the ground that it violently conflicted with the common law would tend to come out if it existed. (E.g.: The courts were inclined to see acquiescence in the Admiralty's jurisdiction when a defendant did not seek a Prohibition on local grounds --"not on the high seas as alleged" -- as soon as possible. That inclination suggests basic faith that the Admiralty would settle the case as the common law would.) I am inclined to infer that the Admiralty maintained fairly satisfactory working contact with the common law. In many ways the mixed English system of laws and jurisdictions conditioned to avoid the conflicts it invited.

From one angle, the ecclesiastical and other civilian courts may be seen as wanting full membership in the "club," including participation in its channels for minimizing conflict. In the controversies over Prohibitions, they tended to suggest that they were less likely than the common lawyers assumed to run off in their own direction. The suggestion was
only half-ingenuous, for of course they wanted jurisdiction primarily because certain bread-and-butter interests would prosper better in their hands—the parson’s interest in his tithes, the hierarchy’s interest in its authority. To some degree, such interests would do better in ecclesiastical hands for incidental reasons—because ecclesiastical procedure would tend to favor parties asserting them, because common law juries unfriendly to ecclesiastical interests would not get the chance to subvert them by unfavorable verdicts. Part of the point, however, was to enable ecclesiastical courts to apply substantive rules that did conflict with the common law. On the other hand, as I have argued, there were areas in which the possibility of creating new conflicts by giving non-common law courts wider scope was probably more theoretical than real. There is a sense in which the idealized or propagandistic case for fuller acceptance of non-common law jurisdictions—i.e., for fewer Prohibitions—could take advantage of that point.

Idealistically or propagandistically (both modes figure in the picture), defenders of the non-common law courts wanted the mixed legal system to be conceived as a mere division of labor. The system should be seen as an organic totality. All courts were agents of one king, partners in a common enterprise of governance. Of course each court should stay within its bounds, each member discharge its own special function and only that. Jurisdiction is certainly not unimportant. In controversy, both sides accepted its importance, disagreeing as to who failed to perceive and stay within his proper bounds. On the other hand, the purpose of dividing a common task—and insisting as a general rule that each participant stick to his special function—is only to get it done as well as possible. The end presupposes more than an efficient division of labor and self-restraint by separate participants. In presupposes trust that each part can and will have regard for the welfare and purpose of the whole. An aspect of that is trusting all parts to cope with moments of disequilibrium, as it were—when one part is a little freer than usual to follow its own bent or operate without the supervision of the part whose function is to supervise.

The point to be made here is that this way of thinking acquired a certain color from existing institutions of collaboration and from assumptions so basic to the English legal system that they hardly required stating. There is a sense in which being opposed for practical purposes to the interests and point of view of the common law was almost never a matter
of being flatly "anti-common law." It testifies to the common law's strength that most rivalry with it started by conceding its seniority, copiousness, and right to lead the way. There is a very basic sense in which the common law was the law of England, by everyone's consent. Rivalry with it tended to take the form of claiming that the common law was not really threatened by other jurisdictions -- that its rules would be followed by other courts when cases to which they were straightforwardly appropriate came up, and that its "spirit" would in any event be respected. The most striking example of this comes from the common law's relationship with the Chancery. Although practical habits and mechanisms helped keep conflict down, there were episodes of trouble. There was also an element of persistent doubt as to the legitimacy of separate courts of equity. In consequence, there is a certain amount of literature in defense of the Chancellor's equitable jurisdiction. The significant point about it is that before Hobbes and a few other Interregnum writers there is no such thing as a real defense of equity -- i.e., a frank argument for the superiority of the style and assumptions of equitable jurisprudence over the custom- and precedent-oriented jurisprudence of the common law. From St. German in the early 16th century on, "defense" was a matter of playing down the appearance of conflict between equity and the common law; of struggling to make good on the pious platitude that equity "follows" the law and fulfills it; of making out that the common law's supremacy was unchallenged by its equitable supplement. In that line, there was a good deal of double talk and cloudy thinking. It contained wishful thinking, and also realistic thinking -- for it amounted to the clumsy theoretical counterpart of many working arrangements, whereby equity not only consulted with the common law, but treated a core of common law rules as immune from equitable scrutiny.

To conclude: What the ecclesiastical-civilian courts wanted was not innocent. It cannot be reduced to "full membership in the club," to being trusted to follow the common law whenever the opportunity not to occurred and whenever common law rules were straightforwardly applicable. (Neither was equity in fact innocent of overriding some common law rules.) But there was an implicit theory on the non-common law side which said two things: (a) predictively, or wishfully, less stringently prohibited courts would not permit multiplication of conflicts with the common law; (b) ideally, all courts ought to be expected so to work together that their shared end would be fulfilled -- affirmation of well-settled and
Procedure

important common law rules, and hence basic. consistency within the sys-
tem, being part of that end. With respect to our immediate question --
Does the public interest in consistency throughout the system justify en-
forcement of jurisdictional lines even in favor of procedurally negligent
parties? - subscription to the "ideal" part of the theory arguably ought in
itself to influence conduct. I.e.: Even if one were not sanguine about
avoiding conflict de facto, one ought perhaps to take a certain risk for the
sake of affirming the ideal and giving it a chance to work on judges' con-
sciences. The risk might pay off in the evolution of a modus vivendi com-
parable to that obtaining between the common law and equity --not
perfect absence of conflict, but delimitation of conflict such as to encour-
age the myth that it did not exist at all. In a real sense, the Chancery be-
longed to the club. It enjoyed the benefit of a clubby spirit - the
imputation of harmonious intentions in spite of a certain amount of ill-
will among the members. Should one try to bring the ecclesiastical-civil-
ian courts under the umbrella of that spirit, as they wished? Should an
effort be made, even in the face of dubiety, to recognize the community
of interest and intent that ought to prevail among all the King's courts in
these latter days? (In these latter days, remember, the Church was inte-
grated with the state, so that the ecclesiastical courts were no longer in-
struments of a foreign power --an imperialistic, usurping power, all
right-thinking English Protestants believed.)

We have now considered two objections to the thesis that there is not a
very strong public interest in 100% enforcement of rules on the distribu-
tion of jurisdiction within a mixed legal system --(a) the argument from
inexpert judges; (b) the argument from the inconvenience of multiple case
lines. Both have merit, but both are subject to qualification in application
to the particular mixed legal system we are concerned with. A third argu-
ment is less precise and more portentous.

Everyone has an interest in "good justice," or the best possible justice.
Even those who neglect to insist on it for themselves should enjoy it. "By-
standers" should be able to believe that the society they are members of
does its best to insure it to all who become involved in justiciable contro-
versies. The best reason to enforce the lines of jurisdiction, even for the
benefit of parties who neglect to insist on their enforcement in proper
form, would be the belief that justice according to the law is really less
likely to be obtainable in one jurisdiction than in another. But the best of
The Writ of Prohibition:
Jurisdiction in Early Modern English Law

reasons is also the hardest to be frank about. Waiving the special problem
of the inexpert judge: The morale of a mixed legal system depends on
trust in the basic capacity of all courts to supply equally competent justice
—to ascertain disputed facts as reliably as possible, to weigh legal argu-
ments with care and informed rationality, to observe impartiality. Different
courts may have different rules, procedures, and methods. People may
argue academically that one way is better than the other. But if the mixed-
ness of the system is to retain its legitimacy, there must be confidence that
all routes lead to substantial justice, subject to the randomly distributed
human failings of the judges and lawyers who travel different ways. Things are bad if it is widely believed that some courts with an unques-
tionable "positive" place in the system are in fact very poor instruments of
justice. If one believes that, one can only believe that those courts are de-
generate heirs of institutions that once had value, or true heirs of an irrele-
vant past — unless they are usurpations of the seat of justice in some still
simpler sense. If offending members cannot be immediately cut off or re-
formed, they ought at least to be restricted by such means of jurisdiction-
control as are available.

In the community at large, such beliefs are dangerous to social cohesive-
sion, but there is no preventing their being held if they happen to be, how-
ever justifiably. The legal community -- those responsible for
administering some particular sector of the mixed legal system, those
charged with the control of the jurisdiction -- is in a special position. Dis-
trust in the basic availability of justice in some parts of the system may
exist de facto within that community, but it cannot be admitted. At any
rate, feelings must be very strong to be acknowledged openly. Their truth
and fairness must be very strongly believed in. For administrators of law
in a mixed system have a clear duty to do what they can to foster confi-
dence. If you like, they have a duty to pretend, if necessary, to what they
do not believe. The duty is partly owed to the people they immediately
serve. It does no good to say or seem to say, "I must regretfully remit
your case to Jurisdiction X. I wish I did not have to, for I have very little
confidence that you will get a fair trial there." Pious fraud it may be, but
it does the addressee no good to undermine whatever naive faith he may
have that the arcane zigzags of the law pursue the contours of justice. To
subvert the same faith in "bystanders" is at best to play politics from the
Bench.
Nor should the Judge's own reputation be put in jeopardy. "I must unfortunately dismiss you to an unjust fate in another court" passes quickly to "I am the sort of judge who cares about the letter of the law, justice be damned," or "I am a judge who is generally capable of cynicism -- capable of believing that what we do here is something less than the closest attainable approximation to justice." Pious fraud it may be, but surely it is desirable that judges be believed to believe that there is no better justice than intelligent dispensation of the law they administer.

Finally, the legal community owes a duty to the legislative process. In one way, that duty qualifies the faith or profession of faith a judge owes to the law. In another way, it is part of it. The judge has scope to say, "The road of the law seems to me to end somewhere short of attainable justice. Nonetheless, I must follow it, for extending or redesigning the road is the legislature's business." Yet the tone in which he says that should not imply a grudging positivism. "This is a terrible rule, but, alas! I must consign you to an unfair trial." For not only are the facilities for law-amendment part of the law to which faith is due -- so that belief in the correspondence between existing law and justice acquires part of its justification from the law's openness to change. (As if to say: "Insofar as the law is not optimally just, yet it is potentially juster. It is a thing being tried out, the object of no final commitment -- as a good man is good partly because he stands "under correction." Needless to say, a man detracts from his goodness by being as bad as he can imagine, subject to correction. He may also detract from it by trying too hard to improve himself -- not abiding the intervention, whether of mature conscience or an external authority, on which he has let his experiment in a manner of life depend.)

Not only is the law's openness to change part of the law -- and part of its righteousness. In addition, the legislature's silence, its acquiescence in what may seem less-than-optimum justice, is an important check on private judgement, an important reason for the judge to doubt, qualify, and repress his own sense of discrepancy between the law "as is" and as it might ideally be. One need not say that the voice of the whole community represented by the legislature is right, though perhaps one should be ready to entertain the possibility that it is righter than oneself. The clearer duty is to take that voice as an indication of the community's available sense of justice -- if you like, of its tolerances, compromises and imper-
fection. If the legislature leaves the law in a given state, some level of satisfaction with the law is implied -- positive satisfaction, rough or grudging satisfaction, absence of the kind of consensus that legislated change tends to require, or absence of such passion for reform in some sector of the community that change can emerge from the trading-off among sectors and interests that is intrinsic to the legislative process. As the courts have a duty to foster confidence in the law's basic concordance with justice, so they have a duty to encourage people's acceptance of the legislative voice. "It is just because the legislature suffers it to be" is at weakest shorthand (or pious fraud) for "whether or not the treatment you receive is really optimum justice, your membership in the community entitles you to claim a more perfect form of justice than your community can bring itself to demand."

To apply the last point to the system we are immediately concerned with: Parliament had unquestioned power both to define the lines of jurisdiction and to regulate the law applied in the several jurisdictions. With specific regard to the ecclesiastical courts, the Reformation had insured that statutes could impose on those courts any substantive and procedural rules Parliament saw fit. Although there were special problems as to how it should be done, statutory restrictions on the freedom of ecclesiastical courts were enforced by Prohibitions. The same points apply equally to other non-common law courts, including courts of equity. In short, there was no basis for contending that the quality of justice outside common law jurisdiction failed to enjoy the approval or sufferance of Parliament -- whether or not it was optimum. Moreover, the theory of Parliament was precisely such as to give sanction to the ideas stated abstractly above. The idea that justice is what the legislature says it is a "Hobbist" idea (not held in an unqualified sense by Hobbes). It was not part of the legal culture of 1600. But the proposition that an act of Parliament is every man's act was an ingrained platitude of that culture. Its function was to say what I say above: Men cannot be allowed to divorce themselves from the body of the community by holding up a standard of justice the community is unable to embrace. If judges in a democratic society owe a certain "positivism" to democracy (i.e., the duty to commend people to the processes of democratic politics if they would change the existing law), the judges of an undemocratic society permeated with a corporate, communitarian ethos owed and acknowledged a duty to reinforce men's identification with the community. The mixedness of the legal system was part of
Procedure

England's inheritance from the ancestral community. It enjoyed the continuing approbation of the living community. It provided justice up to the standard those communities were able to embrace. So, I think, the judges we are concerned with were bound to hold -- by their situation, their ethos, and their "faith." As I have been arguing, however, these ideas can be given a special backhanded application to problems of jurisdiction; if it is benign for Jurisdiction X to handle the cases the rules of the system unquestionably assign to it, it cannot be too unbenign for Jurisdiction X to handle a few more. Allowing a court any jurisdiction at all implies faith in its basic capacity to do justice. Therefore any cases which "spill over" to it (by virtue of such arguably valid principles as insisting on procedural correctness and making a certain presumption in favor of the plaintiff who chooses a given court) must be supposed to be in good hands. The very beneficence of the system militates against the necessity of 100% enforcement of rules defining the internal division of labor.

There is, however, one important countervailing argument. Suppose that in the non-legal community there really is strong and widespread lack of confidence in one part of the judicial system. As I have argued, the legal community has a duty to work against such feelings so long as the law provides a mixed system and the legislature takes no note of inadequacies in any part. But perhaps there comes a point at which the stronger duty is to accept incorrigible public opinion, hence to take advantage of every opportunity to prevent parties from being remitted to what will be widely regarded as inferior justice. At that point, the lesser evil is to forget about maintaining the integrity of the whole system and do what one can to prevent breakdown of confidence in the jurisdiction-controlling part of the system. Better, that is to say, to acquiesce in the public's disbelief in the non-common law courts than to endanger the common law's reputation for caring about justice. It would be understood that turning cases over to the non-common law courts could often not be helped; the pretense that there was no public interest in keeping as many cases and issues as possible out of those courts would not be accepted.

Was there then in fact "strong and widespread lack of confidence" in the non-common law parts of the system? As a question about public opinion, I can only answer it impressionistically. The degree to which the common law courts shared or acknowledged such lack of confidence, or the degree to which mistrust entered into their judicial behavior, at least
The Writ of Prohibition: Jurisdiction in Early Modern English Law

in principle lends itself to a more precise approach through all the cases following. We must reserve judgment on that. All we can do here is adumbrate the attitudes that probably were in the air, part of the atmosphere in which the courts had to perform their delicate tricks of balancing value against value. The following claims to be nothing more than my best guess.

Three non-common law jurisdictions were subject to Prohibition: ecclesiastical courts, minor equity courts, and the Admiralty. I can see practically nothing to suggest that the Admiralty was suspect on the score of its basic capacity to do justice. Its heavy users, merchants and shippers, including many foreigners, probably considered it a fair and expeditious court, comparing favorably to the common law. Apropos of all the non-common law courts, one must beware of inferring mistrust of the quality of justice from the mere occurrence of Prohibitions. Parties will inevitably maneuver for advantage -- if not to wear the other party down by sheer maneuvering, then to get their case to a court where for all sorts of reasons they think they will fare better. People frequently prohibited the Admiralty, without necessarily distrusting it. Per contra, the Chancery was never prohibited, yet by 1600 there was certainly a vein of opinion to the effect that Chancery procedure was abusively long-winded and expensive (which may, of course, mean "over cautious in the interest of fairness"). The lesser equity courts that were frequently prohibited -- the Requests and regional councils -- were probably not models of procedural rectitude and high judicial standards, but they were valued by plaintiffs as supplementary agencies of a heavily burdened legal system (as the never-prohibited Star Chamber was). Popularity with plaintiffs is a symptom of people's basic trust in a court's brand of justice, though not a sure-fire test. (Plaintiffs with weak cases have a motive to gamble on low-quality courts -- the worst they can do is lose on claims that would be more likely to lose in a better court. If low-quality courts -- say the Requests as compared to Chancery -- are considerably cheaper, people have a motive to go there even if the court's reputation is not spotless.) On the whole, subject to the great uncertainty that surrounds these matters, I doubt that the secular non-common law courts suffered from pervasive dislike and distrust -- from dislike and distrust going so straight to the quality of justice that many would have said, "It were better if those courts were abolished."
The ecclesiastical courts were at least the object of much more complex attitudes. We may distinguish three main ways of seeing them in an unfavorable light: (a) They had certain objective strikes against them. Most important, they were not, as it were, "formally" impartial courts, however fair they may have been between party and party in practice. In the last resort, they were courts of a privileged franchise -- privileged to protect the corporate interests of the church by way of their jurisdiction over ecclesiastical persons and so-called "spiritual claims." To take the most typical of cases: When a parson sued for his tithes in an ecclesiastical court, he was in one sense suing for himself. For all we know, ecclesiastical courts on the average were scrupulously fair between parson and parishioner in disputed tithe cases. Nevertheless, the suspicion of bias in practice was inevitable because bias of a kind was built in. The church had a corporate interest, across the board, in seeing that claims to tithes succeeded and defenses failed. For thereon depended the Church's collective capacity to support its ministry and perform the work of God. When one man sued another in the Admiralty, the court had no interest in who won. If the Court of Requests was sloppy about fact-finding and over-eager to provide equitable remedies (I do not assert it was either, but if it was), still the court had no interest in anything but justice by its imperfect lights (unless one counts the interest in attracting business by providing relief, a temptation to which any court is open). In many cases within its undisputed jurisdiction, though by no means all, the Church had a long-run interest in the outcome, however successful its judges were in ignoring that interest. (The best modern analogy is a regulatory agency with judicial powers. However scrupulous between party and party such tribunals are, they are usually identified with some sector of the public interest deemed worthy of special protection -- as the Church was with what in its time was the most undisputed of public interests: providing for the ministration of religion. No such agency can quite enjoy the putative indifference of a court of general jurisdiction -- the supposed concern for nothing but "calling the shots" in cases of many varieties, which, as it were, appear out of nowhere, stated for decision as the parties plead. It should be noted that the Church was not the only judicial authority in the old English system with a "special interest" orientation. Franchises, manorial courts, "courts" that were also administrative agencies -- including the Exchequer and Court of Wards: such bodies were also ambiguously bound to do justice between party and party and to look out for corporate, private, or royal interests. The system made demands on people's capaci-
ity to trust the interested to be indifferent. We should speculate on their attitude toward the Church in awareness that they were not conditioned to a "liberal" preference for courts of general jurisdiction, as modern people heavily dependent on bureaucratic justice are not. On the other hand, the Church courts may have served as the main archetype for what emergent "liberal" attitudes were coming to question.)

A second problem for the ecclesiastical courts derived from the Reformation's failure to reform them. The intention of doing so in a thorough way sprang from the Supplication against the Ordinaries, persisted through Cranmer's lifetime, and failed to get off the ground again under Elizabeth. It is not at all easy to say what the consequences of neglect were for the objective quality of justice in the ecclesiastical courts. However that may be, the failure to carry through a conscious remodelling must in itself have had an adverse effect on the courts' reputation. How much reforming in the sense of changing they needed is an open question. But their legitimacy under the new Anglican order surely needed to be established by a comprehensive act of codification and reemphasis. That was the proposal when the Reformation was young: to go over the ecclesiastical law systematically; to decide what parts of it should be retained, dropped, or amended; to come forward with a code for the future which would enjoy the sanction of the state and represent a consistent system for the whole realm. As things turned out, the Church courts were left to find their own way, drawing on their pre-Reformation tradition, subject to the considerable body of new legislation that impinged on them and to such shake-ups of tradition as the abolition of formal university training in canon law. Under these conditions, the courts could hardly escape the stigma of heirs of the "Popish" past -- in some measure, of guilt-by-association, of being "up to no good" in all the unspecified ways the prejudices of a Protestant culture were disposed to assume. In addition, the absence of "codification and reemphasis" left ecclesiastical law open to the imputation of uncertainty and inconsistency from court to court. However much practice belied the suspicion, it is probable that people felt less sure of where they stood in the ecclesiastical courts than in the secular, that they warrantably or unwarrantably felt that to become involved in litigation there was to be plunged into a world where black-letter guidance and informed advice were less forthcoming than in the environs of Westminster Hall. Such feelings are not equivalent to distrust in the courts' "basic capacity to do justice," but they trench close to it.
(b) *De facto,* apart from the built-in disadvantages to which they were subject, ecclesiastical courts obviously did not enjoy a brilliant reputation with the man in the street. Let us put it that way and soon surcease, for this topic -- the sheer mass of popular prejudice -- is too large to deal with properly here. It is hard to discriminate the justified from the unjustified in that mass of prejudice, hard to discount the element of mere interest. People who got in trouble with ecclesiastical courts were going to find reasons for disliking the treatment they received. Many of the functions of ecclesiastical courts were intrinsically invidious -- e.g., their role as tax-courts deriving from jurisdiction over claims to tithes; their criminal jurisdiction over moral offenses, including the defamatory imputation of such offenses, whereby people were called in question about intimate aspects of their lives. Apart from the more articulate religious objections (discussed below), ecclesiastical courts stood directly in the line-of-fire of all those attitudes we vaguely label "anti-clerical." Perhaps the tap-root of "anti-clericalism" is the inevitable discrepancy between pretense and performance when men of God get involved with the world. If the Church does not withdraw to some safe Sion -- if it aspires to make its authority felt in the Cities of the Plain -- it is hard to put to escape the grubby roles of cop and tax-gatherer. At best, one cannot stay clean in those roles. Coercive authority must make decisions in ambiguous cases and be satisfied with the rough procedural justice of this world. It cannot be above reproach, and yet churchmen cannot expect to be judged by standards no higher than those which concede a grudging acceptance to the imperfections of secular justice. Their flesh and blood shortcomings are magnified. Every failure to furnish justice at least as good as temporal courts supply looks larger than it perhaps is, for churchmen should aspire to do better. A tradition of cynicism develops, passes from generation to generation, from the pre-Reformation world to a world less evidently reformed than it is cracked up to be. An inheritance of "anti-clericalism" colors men's encounters with the Church's courts. What one experiences or witnesses is filtered through "negative expectations" -- through the image of meddlesome and greedy bishops; authoritarian clerics, puffed-up, readier to snare and fleece their sheep than lead them beside still waters; parasitic laymen -- the civilian crowd -- taking their corrupt price for doing the clerics' dirty work. In short, there was a fund of ready-made responses available to anyone with reasons of his own to object to the ecclesiastical courts. It is accordingly difficult to evaluate the hostile expressions that occur in the 16th and 17th centuries, as they
had before. How widespread, how serious, how freshly responsive to real experience, how disengaged from private grudge or party purpose were such expressions? Was "you'll never get fair treatment there" a really pervasive attitude, however conditioned by prejudice? Or was it more typical to think of ecclesiastical courts as no better or worse than officialdom generally -- to be borne, as likely as not to treat people as they more or less deserved? It is hard to say. My guess would be that complaints occurred enough to signify something -- that there was enough ingenuous experience of venality, delay, unfair procedure, and legal uncertainty to reinforce the fund of prejudice, and enough reiteration of stock complaints to reinforce their credit. On the other hand, one should not be too hasty to infer massive distrust of ecclesiastical justice from even a considerable body of hostile talk.

(c) Puritanism was opposed in principle to ecclesiastical jurisdiction in anything like its traditional form. That is to say, there was an articulate minority position which took off from, but transcended, stock misgivings about churchmen in the world. Insofar as Puritan propaganda influenced people outside the movement, it reinforced the fund of "negative expectations." Insofar as Puritans were objects of public hostility, they may have given the reputation of the bishops and their courts a helping hand. I suspect the first flow of forces was the more important, just because the "fund" was there to be augmented.

It is a mistake to suppose that Puritans objected to ecclesiastical courts only because they tended to be in trouble with them. They certainly complained for that reason, the more effectively because they were equipped to take every just and unjust offense against themselves as a malevolent stroke at God's people. But they also had purer objections. The original and controlling idea of orthodox English Puritanism (orthodoxy must be carefully distinguished from the Independent, sectarian, and proto-liberal offshoots of Puritanism that became so prominent in the revolutionary decades of the 17th century) was that true doctrine deserved and demanded true "discipline." "Discipline" -- the government and rites of the Church, the whole mode of organizing the opera of the Church of Christ in and on the real world (as distinct from its naked fides) -- meant different things in different contexts. It persistently meant, I think, whole-hearted refusal to accept ecclesiastical jurisdiction as inherited from the Catholic past (partly, of course, because its ancestry was "Popish") and as
domesticated under English Erastianism. As the word "discipline" suggests, the Puritans certainly did not propose giving up the coercive powers and state backing that the Church already enjoyed. Their essential dialectical formula may be stated this way: To be effectually disciplinary -- to coerce to some purpose, to "make a difference," save souls and glorify God -- the Church must liberate itself from the forms of ordinary secular coercion. The existing form of "discipline" -- the judicial system of the Church of England--was both too weak and too strong. It was perverted both ways because it was not *sui generis* -- the *Church of Christ* working on the world for its unique ends, by its unique means. The existing system was a mere *simulacrum* of temporal justice. In one direction, it abused the awful and unique powers of the Church by using them for ends that could just as well be accomplished by secular law. In another direction, it abused the sanctions of the Church -- especially its ultimate weapon, excommunication -- for workaday purposes. Lacking other sanctions and condemned to a misconception role, the ecclesiastical courts cut men off from Christian communion to enforce process. Like other mere courts, they would let a sinner off on a technicality. They would punish a man for a trivial offense without exhausting the resources of admonition. Having punished him by sanctions which for the submissive were very mild, they would send him hence to sin again, caring nothing for his "rehabilitation." For ordinary temporal courts, it was enough to care about a man's "body" -- acquit him if he's innocent as charged, convict him if he's guilty; if you don't hang him, lock him up or flog him, and when he has paid his price let him go. The ecclesiastical courts, charged with men's souls, were institutionally unequipped to care about anything but "outward flesh," plus costs.

The Puritans were not precise by lawyerly standards about what they would substitute. Perhaps they were starry-eyed to put their trust in the general alternative they had in mind -- reinvigorated local congregations that would bear down both hard and mercifully on local sinners; local authority checked and kept on its toes by a Presbyterian hierarchy; the new ecclesiastical system meshed with the state more effectively than the old -- less overlapping in functions, methods, and personnel; supplementing temporal law by spiritual discipline, instead of adding "more of the same"; better able to call on the State for necessary Christian purposes because less mixed up in its temporal business. Right or wrong, the Puritans levelled a real attack on "misplaced ecclesiastical legalism."
Traditional "anti-clericalism" aimed vaguely at the same thing, but the Puritans were much more precisely on target, much abler to conceive a concrete alternative to "the King's spiritual jurisdiction," if not quite to come down from the clouds of idealism and deliver a blueprint. At least some people in the England we are concerned with were beyond commonplace trust or distrust in the ecclesiastical courts. At least some people, with an indeterminate influence on others, were so disposed to see the whole system of ecclesiastical law as illegitimate that nothing the ecclesiastical courts did would be favorably, or perhaps fairly, judged. I suspect that this disposition among Puritans was constant and cumulative -- i.e., that it did not fluctuate with the ups and downs of the overt "Presbyterian movement." I doubt that the dwindling of hell-bent Presbyterianism and the achievement of something of a modus vivendi with the Establishment in the pre-Laudian 17th century imply a diminution of the hope that someday, somehow, ecclesiastical legalism would give way to a Gospel *modus operandi*.

Over against negative attitudes toward non-common law courts, at least the ecclesiastical system, we should consider notably affirmative ones toward the common law itself. On the one hand, there was a body of feeling, however pervasive, that would tend to distrust the quality of ecclesiastical justice, or, short of doing that quite pointedly, at least to see a strong public interest in keeping the churchmen and their minions in the narrowest possible room. Was there on the other hand a pervasive disposition to prize and celebrate the common law, even to overrate it? Was there a tendency in the larger community, if not necessarily to doubt the non-common law courts' *basic* capacity to do justice, at least to think that the common law provided consistently *superior* justice? When they were confronted with jurisdictional problems, did the judges hear voices telling them that every effort should be made, even in behalf of negligent parties, to allow men the special blessing of common law determination?

Here again, one must deal cautiously with appearances. It seems to me that there are three main clusters of attitude to be considered: (a) In a general sense, the reputation of the common law undoubtedly took on a
new glow towards the end of the 16th century. For that irridescence, Sir Edward Coke was largely responsible, though, as with all key intellectual figures in history, it makes a question how much Coke contributed from the idiosyncratic resources of his own mind and personality and how much he formulated and reflected a point of view that was becoming commonplace in his culture. This is not the place to deal with the huge complexities of the phenomenon. In very sketchy terms: I think there was a coalescence, in the first instance, between an extremely high-level (or vague) shift in the "cultural mood" outside the legal world and changes within that world. In the second instance -- though this only happened slowly, in cumulative response to the unhappy experience of Stuart government -- the product of that coalescence passed into politics. There was something of a "nativist revival" in late-16th century England, something of a reaction away from the more cosmopolitan orientation of Renaissance humanism and the original Protestant movement (the dominant themes of earlier Tudor culture). The trend can be seen on the level of "vulgar patriotism": -- in consciousness of England as a "Chosen Nation" (essentially because she was the major Protestant nation-state), reinforced by her role as successful champion of the Cause of Light in the great war against Spain. It appears in Anglicanism's heightened sense of itself from Hooker on, in the British mythology of the Faerie Queene, in growing interest in national antiquities and topography. In the legal world, the spread of printing made the sources of medieval English law more accessible to the profession just as its members became more generally educated and its collective prestige crested. The Inns of Court came into their heyday -- reflecting the status-value English legal studies already had, and throwing some of the lustre of new social fashionableness back on the serious lawyers. "The third university of England" (i.e., the Inns) is a meaningful phrase: Studying Gothic law in medieval French (or at least ostensibly poring over Littleton) could hold its own -- as intellectual discipline and gentleman's pursuit -- with the international learning of the Schools and the classics.

It was in the light of such a cultural reshuffling, inside and outside the law, that Coke could seriously call Littleton's Tenures "the most perfect and absolute work that was ever written in any human science." Lawyers achieved a sharper, better-informed consciousness of their distinctive tradition, and a pride in it that was both more exaggerated and more intelligent than their ancestors'. Such consciousness and pride were not new.
The distance that divides Sir John Fortescue's 15th century Laudes of English law from the "legal nativism" of Coke's generation (like that between Littleton and Coke-on-Littleton) is distance on a single road. By and large, the road ran straight in the 16th century, cumulating toward the accretion of knowledge, sophistication, and business that gave common lawyers and their art the unique prestige and confidence that called forth Coke. That is to say, it did not go underground to avoid "Tudor despotism." The Tudors were careful to stay on the right side of the common law, and the increased dependence of a magnified state on the technical services of lawyers was a major factor in the accumulation of professional prestige. The true story of "English law and the Renaissance" is not a melodrama -- a narrow escape from reception of Roman law and displacement of traditional courts by new prerogative agencies. It is rather the story of steady development of the native legal tradition, offset in reality and obscured to the eye by the competition of new intellectual interests, new career-paths, and preoccupation with foreign and religious politics (as distinct from constitutional issues). Saving our reverence for the middle ages: Fortescue praised English law (and Littleton wrote his practical primer on land-law) in a thin culture -- the old-fashioned world of international Catholicism, clerical universities, an aristocracy still civilized primarily by the European ethos of chivalry. The "discovery of England" implied in Fortescue's realization of the distinctiveness and greatness of the common law is very significant. The rediscovery in Coke's generation is significant in a very different context. The consciousness and pride of "legal nativism" reemerged on top of a much more crowded scene. If the lawyers furnished a "third university," it was over and above two others doing a big business in lay-gentry education. In Fortescue's day, legal education for the well-born (to which he pointed with pride) stood more nearly alone as a layman's path to book-learning. Littleton wrote a craftsman's manual, reflecting the high development of a native English craft; Coke exaggerated its "scientific" virtues because for him the common law had portentous claims as against its cultural competitors; the commentary outweighs the text in proportion to the distance in self-consciousness between "legal nativists" a century apart.

In sum: On the vague but important plane of attitude/association/reputation, the common law ca. 1600 had acquired the status of Good Thing to an especially acute degree. The profession's sense of itself and its subject matter fed into the lay community with exceptional ease, owing in signifi-
significant measure to the institution of sub-professional legal education at the Inns and the contact with the law to which an active lay magistracy was exposed. Reinforcement came from a diffuse "nativism." As the century went on, further reinforcement came from political feeling. The sense in which the common law was a Good Thing was enriched by association with the English political tradition that embraced it -- the English political tradition that was increasingly perceived as threatened. Nothing could have given "nativism" a bigger boost than the accident of a foreign King. James I's specific quarrels with the lawyers helped focus patriotic attachment to the common law he failed to understand. His larger political infelicities forwarded the alienation of a substantial part of the community -- most notably participants in the local and legal power-structures which the Central government could not effectively control -- from the King and his courtiers. The disastrous acceleration of that process under Charles I produced a revolution. In the mentality the Great Rebellion hatched from, loyalty to the common law as a portentous Good Thing was profoundly and confusedly intermixed with political phobia. The English political tradition was perceived as threatened, both justly and paranoically; the common law and its mythic offspring Fundamental Law were seen as the ground of an English "inheritance" beset by alien and "innovative" forces.

These large phenomena have a clear bearing on our immediate concerns. In some degree, the judges must have felt a pressure -- from within their professional souls and from the attitudes of the public -- to favor common law jurisdiction just because the operations of the common law were wrapped in favorable associations. Ironically, the stigma of foreignness may have adhered the more stubbornly to the non-common law courts the more native they became in fact. The very ambiguity of the word "foreign" is indicative. The non-common law courts were sometimes spoken as "foreign" jurisdictions in a neutral sense -- "extrinsic," courts which were over-and-above and distinct from those which administered the main body of English law, "outside supplements" whereby the legal system dealt with some special relationships and was able to handle a wider range of matters than the common law was equipped to take up. But the other sense of "foreign" was close at hand, perhaps the more so as consciousness of the common law as an invaluable native possession was heightened -- "un-English," "imported," unavoidably or at least lawfully present, like a resident alien, but not really congenial to the English way of doing things. The sense in which the ecclesiastical courts, in particu-
lar, could be seen as an import from Rome and a leftover from "Popish times" was obviously available. Giving a man over to "foreign" justice could be deplored without much realistic regard for the quality of justice he would receive. Yet it was such associations of "foreignness" that defenders of the non-common law courts most reasonably resented. With the passing of time, they became evermore settled native institutions. Owing no allegiance except to the King and such aspects of the public interest as came within their protection (including, of course, common justice according to the law), what difference did it make that the historic roots of their procedures and doctrines were extra-English? In the case of the ecclesiastical courts, the very "nativism" that reflected glory on the common law ought to have shed a portion of radiance on another peculiar institution -- the judicial organs of a church which, in addition to being stubbornly different from any foreign model, defended the national community's right to fashion the outward or "indifferent" aspects of the Church (including its organs of discipline") in accord with its unique history and "genius." Alas! Reality and perception, "is" and "ought," can move in different directions and into terrible tangles. When they do, the sense of alienation or "foreignness -- and plain distrust -- dividing antagonistic interests may grow exacerbated.

One must, however, put a caveat on the considerations above. Especially before the prestige of the common law got mixed in with the passions of a deteriorating political scene, there were of offsetting forces. (After the political heat intensified, the judges were under pressure -- moral and otherwise -- to check any tendency they may have had to indulge a mere preference, in themselves or in the public, for common law jurisdiction.) On the high level of articulate thought, the Cokean proclivity to make extreme claims for the common law encountered definite resistance. I do not refer here to the resistance of those who understood little of the matter except that their interests were offended by arrogant lawyers. It is a little insulting to put a foreign, eccentric, fantasy-ridden, obstinate, but highly intelligent monarch in that category, but I do not refer primarily to James I. The most significant resistance to the excesses of "legal nativism" came from within the professional community.

It is explicit in Francis Bacon, who came close to a fully articulated realization of what was happening in his generation: absolutization of the provincial perspective of the prestigious legal caste. Bacon was an ex-
tremely able lawyer. It was his advantage to have a much more
inclusive and balanced intellect than most lawyers, but there is no serious
sense in which he betrayed the "faith" of his profession. He was unques-
tionably an ambitious royalist politician and personal rival of Coke's in
the politics of the law, but I can see no sign that he fulfilled one kind of
possibility implicit in such a situation -- the possibility of becoming one
of those lawyers who ceases to care about the vales and traditions of the
law, who comes to regard his skill in it as a mere instrument for personal
or political ends. Though a great critic of established assumptions, Bacon
was no legal iconoclast in the manner of Hobbes or the Levellers or Ben-
tham. Generally, indeed, the critical impulse in Bacon was not very revo-
lutionary. "Everything's been done wrong -- Let's forget it and start over
right" was not his fundamental theme, though something like it occurs in
some contexts. Much more fundamentally, he was the high priest of in-
tellectual "jurisdiction." The intellectual flaw he most consistently jumped
on was "absolutizing": the tendency of particular disciplines, methods, in-
terests, points of view, or traditions to claim too much for themselves, to
exceed the "jurisdictions" within which each has a limited but valuable
contribution to make. Bacon saw how the literary humanism that so
dominated the horizons of the educated in his time had long since flooded
the real world with undue reverence for idle words. He criticized the Pla-
tonists for projecting the mathematical mind onto realities that would not
obligingly submit to it. By precisely the same token, Bacon the intellec-
tual General Surveyor observed the urge to excess in his own profession -
- as if statesmanship required nothing beyond the training and experience
of a lawyer; as if the law did not need sometimes to be considered from
the outside, as one instrumentally among others for the preservation and
improvement of civilized life; as if, so regarded from the outside, it could
never need formal amendment or informal flexibility in order to serve
ends whereof it was not the only servant; as if the built-in conservatism of
the law -- its necessary insistence on standing by its rules and the inher-
ited valued they incorporate -- were the key to an inclusive social wis-
dom; as if all social wisdom boiled down to the faith that institutions
which have resisted change deserve the immunity from it that tried legal
rules -- qualified in many cases and made the basis for private expecta-
tions -- in some measure do deserve.

*Ex hypothesi*, Bacon's critique of overreaching particularism was af-
firmative of particularistic viewpoints *within* their several "jurisdictions."
Ultimately, he was syncretistic. To see real, but limited, good in many ways of thinking and doing was the beginning of wisdom. Many "jurisdictions" pulling together, each pulling only the weight it was capable of, was his ideal. Bridled particularists would learn to appreciate the value of each other's understanding of the same object, and hence the valid possibility of abstractifying and simplifying knowledge. The false abstraction that consists in imposing a limited category on material too complex for it would give way to the patient search for truly informative analogies -- for the "footprints" which nature leaves in different media, for the level of abstraction at which different approaches to knowledge employ a common conceptual alphabet and in a sense "say the same thing." The parallelism between Bacon's thought and his experience as a lawyer is so striking that one wonders which was the cart and which the horse. In fellow lawyers, he encountered an example of "overreaching particularism." As a lawyer in the thick of controversy over jurisdiction -- and a representative of the royalist-ecclesiastical-civilian-equity interest -- it is perhaps not too fantastic to suggest that he encountered an "informative analogy": antagonism among courts and lawyers reflective of men's general unwillingness to accept the limits of their own "arts" and professions, to appreciate the community of purpose that would enable different jurisdictions to work together if each could contain its self-esteem.

Intra-professional reaction against extreme claims for the common law is beautifully illustrated at another level by Lord Chancellor Ellesmere's concurring opinion in Calvin's Case. (2 State Trials, 659.) On straight legal matters, Ellesmere, rather than Bacon, was Coke's sharpest critic. In Calvin's Case, he found himself in complete practical agreement with Coke, i.e., they favored the same resolution of the case for largely the same reasons. Ellesmere went out of his way, however, to prepare (and publish) an elaborate separate opinion. His doing so was technically appropriate. The situation was that substantively identical suits were brought at common law and in the Chancery (i.e., in order to allow the Lord Chancellor to participate, and by way of totally "wrapping-up" the case -- a case contrived for political reasons, to get a judgement that Scottish post nati were capable of maintaining actions for land in England and thus were not aliens -- a routine equity suit for discovery of deeds was brought alongside a novel disseisin at common law. The equity suit depended entirely on the common law suit and was not argued separately at the Bar: if Calvin could maintain the common law writ even though born
Procedure

in Scotland of Scottish parents -- the point to be established -- it followed virtually automatically that he could maintain a Chancery suit to recover evidences relating to the land in England which he claimed). As Lord Chancellor with an equity suit to be decided solely by him, Ellesmere had perfectly proper occasion to discuss the case in full. But it is manifest from the content of his opinion that his motives were not routine. In the form of a highly concurring opinion, he wrote a critique of the tone and general ideas in Coke's elaborately stated opinion on the common law side. Ellesmere's opinion is not concurring in the ordinary sense -- same-result-for-quite-different-reasons. In terms of the reasoning leading directly to a solution in the case, Coke and Ellesmere were virtually at one. The issue between them was philosophical.

Ellesmere wrote his opinion to put down dangerous doctrine. In part, it was aimed at the politically charged legal ideas urged against the resolution of the case which the government badly wanted and all but two of the common law judges favored (let it be said, lest political prostitution seem imputed, for perfectly sound, if not necessarily conclusive, legal reasons.) In his argument for the majority position, Coke too attacked that sort of "dangerous doctrine." Ellesmere's other target was the unbalanced estimation of the common law written into Coke's opinion. I cannot do justice here to the complex encounter of two great lawyers that the two opinions represent. In brief: Calvin's Case gave Coke a golden opportunity to glorify the common law. (For his opinion, 2 State Trials, 607.) The government had resorted to a trumped-up lawsuit to naturalize the post nati because it was unable to do so through Parliament. The technique was widely and justly criticized. It was widely believed that there was no ordinary legal solution to the unprecedented problem that the case raised. No foreign King had ever inherited the English throne before. Consequently English law had never had to ask whether subjects of the King's foreign crown born after his accession to England are naturalized in England. This new question only admitted of a legislative solution. If a judicial solution was demanded, the judges could only do what judges ought not to do -- viz., legislate in effect; fetch a solution out of such sources as "mere reason" or natural law, not from the precedents and usage that ought to determine the common law. To the refutation of that line of reasoning, Coke devoted a major share of his energy.
He began by accepting its premise: The courts ought not to legislate. They can never justifiably say, "there is nothing in the common law's storehouse from which a solution in this case can be drawn, therefore, let us decide it by common reason." Having conceded that, Coke turned around and asserted the "copiousness" of the common law in highly general terms. He came very close to saying that there is no such thing as a case incapable of ordinary common law solution. The common law represents so infinite a fund of experience and wisdom that it is next to inconceivable for an actual case to be put to it which it cannot solve by its own canons of problem-solving, its own "art," without resort to the natural reason no special "art" can claim as its own. To the degree that cases do not admit of absolutely straightforward solution by common law canons -- simple deduction from well-known rules or inference from obviously similar cases -- they ought not and need not be decided by natural reason. They always should be and always can be solved by the "artificial reason" of the law. That is to say, a solution can be drawn out of the common law fund by those trained to use it right -- to see the less obvious sort of analogy; to appreciate, and hence extend to unfamiliar territory, the general ideas and values implicit in well-known rules and concrete cases. The lay or "natural" mind cannot do that. Its tendency is to "vulgar rationalism," which supposes there is no legal solution when there is not a patent one. Supposing that, "vulgar rationalism" will come up with its own superficial answer to problems which in fact admit of better resolution through the time-tested standards implicit in the law and accessible only to trained lawyers.

These ideas were the heart of Coke's jurisprudence. Calvin's Case was a golden opportunity to state them, first because they had been doubted by critics of the government's resort to a lawsuit, and secondly because they could be demonstrated in the case itself. Doubters said the problem in the case was not appropriate to judicial solution; Coke would show them. In fact, there were reasonably good legal sources for solving the case. Although England had never been inherited by a foreign King before, problems of naturalization had occurred in analogous circumstances (in the latter days of the Plantagenet empire, when Gascons could be born subjects of the person who was King of England -- like the Scottish post nati -- without being born in England, since Gascony -- like Scotland -- was not incorporated into England or subject to its laws).
There was some judicial authority fairly directly in point (i.e. suggesting that Gascons in a position arguably analogous to Calvin's were not aliens in England). Coke by no means rested his argument on the narrow grounds he claimed were sufficient. He in fact ranged far and wide, arguing, *inter alia*, from natural law, though with a carefully emphasized common lawyer's twist: the common law takes notice of the law of nature -- cases cited to provide the same -- therefore to show that a certain rule is required by nature is at least to establish the presumption -- confirmed by "cases directly in point" -- that it is a rule of the common law. But though Coke did not confine himself to the straightforward kind of authority, he had some. *Quod erat demonstrandum* -- the common law was perfectly up to this seemingly novel case, no judicial legislation or natural law adjudication required. For the rest, Coke demonstrated "artificial reason" at work -- the trained legal intelligence finding all kinds of support for the truth the common law revealed and "vulgar rationalism" could too easily miss: that allegiance is a personal tie between king and subject, and "citizenship" depends on allegiance.

Lord Ellesmere took no exception to Coke's positive legal reasoning, much less to the conclusion. He took precise exception to the overreaching generalization -- not to saying that *this* case was well-covered by relevant precedents, but to maintaining that the common law *cornucopia* is adequate to any case. In the jurisprudential fight waged under the surface of concurring opinions, Ellesmere took the more modern position, for he defended judicial legislation as inevitable and therefore legitimate: Common sense and common morality are sometimes the only basis for deciding cases. Every case was once a new case. The first time a problem occurs, there are no "artificial" resources to draw on. Let the courts not deceive themselves as to what they do in fact, let them not blush to do what they sometimes must and always in some degree may. It is fatal to the court's authority for judges to doubt their title to resolve a truly novel case. The courts are indeed up to any case that comes before them, but not for Coke's reason -- not because the common law is infinitely "copious," but because it's the judges' duty and right to solve the case with whatever resources are available and relevant. Common sense and common morality are always relevant and sometimes exclusively available. Let there be no shame about relying on them exclusively if need be, and let them not be represented as something else than the natural faculties they are.
Ellesmere went as much out of his way to say these things as Coke did to say the opposite. He did not consider the instant case a novel one. He did not need to fall back on "natural reason" to solve it. (Though having asserted natural reason's claims, he applied it in ways that "artificial reason" would probably have to frown on. If the instant case had been novel, Ellesmere said in effect, sources extraneous to the books, records, principles, and traditions of the law would have perfectly respectable relevance -- e.g., the King's own opinion and the Council's; extra-judicial opinions of the judges. As it were: When -- as to some degree it always is -- the question is simply "What is reasonable?," the opinions of responsible, rational, authoritative men are always relevant.) I think there can be no doubt that Ellesmere in Calvin's Case wrote a conscious "anti-Coke." Both men saw an opportunity to take up the big current issues of jurisprudence. Each had his eye on the other. Both spoke to persuade -- Coke to explain and demonstrate his "legal nativism" and the extended claims he made for the common law as the vehicle par excellence of social wisdom; Ellesmere to oppose just that, in a practical legal context, with ideas gained from a lifetime in the law.

I have dwelt at some length on the high-level, classic encounters -- Coke versus Bacon and Ellesmere -- to make a point that leads back to our immediate concern. The general reputation of the common law was undoubtedly at a high pitch around the end of the 16th century. Associations of special beneficence surrounded it, tending no doubt to favor its claims to jurisdiction and to put competing courts in a second-class light. But the prestige of the common law was not unchallenged. There were forces pulling the other way, forces evoked by the very semblances of exaggeration, of overreaching professional particularism, that attended the concentration of prestige -- intellectual, moral, social-fashionable -- in the law and its practitioners. The reaction did not all come from outside the law. Exaggeration was opposed by experience of the common law's limitations gained by men who spent their lives inside. Of course Bacon and Ellesmere were King's men and equity judges. They had experience and commitments which gave them perspectives on the law different from those that experience solely in common law practice would conduce to. But it trivializes the thinking of such men about the law itself to see it as merely political, merely expressive of their devotion to the King's interests and the equity courts. There were serious issues among serious men.
Their practical positions and interests influenced what they thought about the law, but their minds were all too large to be bounded by their immediate perspectives. Coke, for his part, was a government lawyer for most of his pre-judicial career, a Privy Councillor, a courtier-politician with the rest of them. He had experience enough of life outside the law. If he tried to make the values and mentality of the law carry a great deal of weight, perhaps more than they would bear -- to absolutize the law, exalt a native tradition over against its intellectual competitors, depose Reason herself and set "art" upon the throne -- it was because he thought his way through the diverse materials of experience to that mode of organized belief. So, to different conclusions, did his opponents. Coke was not a provincial who knew no better, an insular mind, literally and figuratively, who by some half-comic extravagance of personality managed to impress a ludicrous overestimation of the common law on other provincials. I hope that in sketching his approach to Calvin's Case I have given some sense that he had a jurisprudence -- not just a mind piled deep with curious legal erudition, but a theory as to how such a mind was conditioned and equipped to solve problems more wisely than other kinds of mind. That his theory was wide open to criticism does not detract from its serious nature. On the contrary, because there was such a thing as "Cokeanism" -- because claims for the special status of the common law were impressively advanced; because new, distinctive, serious, and profoundly dubious ideas in jurisprudence were on the floor -- equally distinguished lawyers and lawyer-philosophers felt the need to challenge it. There were serious issues among serious men.

There is no more jejune belief in English history that the tendency to think of common lawyers as an intellectual and political monolith -- a bloc allied with an equally imaginary fixed quantity called Puritanism against Stuart monarchy. The element of truth in that picture is vitiated by oversimplifying it. Not only were lawyers divided against each other politically. Their political differences were partly reflective of, and partly independent of, divergent strains of jurisprudence provoked by an intensified level of awareness and debate. When one descends from the peak occupied by very great men, modesty is the most useful attitude to take along. We do not and cannot know a great deal about the general thinking of the legal profession as a whole and the parts of the lay world that caught ideas more or less directly from the legal. The relatively small group of successful practitioners at the Bar, it is worth noting, was in an
The Writ of Prohibition: 
Jurisdiction in Early Modern English Law

intrinsically ambiguous situation. On the one hand, such men belonged to
the official world. The *cursus honorum* to which their ambitions looked
ran into various paths of officialdom. If the common law judiciary was
the chief prize, positions in the equity system, government law, and nu-
umerous posts in the half-legal, half-administrative departments of govern-
ment were eligible objects of aspiration. Many lawyers were exposed to
the kinds of experience that helped such especially gifted men as Elles-
mere and Bacon appreciate the limitations of the common law and the ex-
cesses of "Cokeanism." It is quite possible that lawyers as a social group
were less liable than the "Country" community -- the gentry whose *fora*
were local government and Parliament -- to fall into the looser modes of
exalting the common law -- exalting it into a political symbol, an "inheri-
tance" calling forth the responses of ancestor-worship and visceral nativ-
ism, a portentous Good Thing. On the other hand, common lawyers were
anything but a bourgeois-official caste, a *noblesse de la robe*. They took
ideas and attitudes from the "Country"-J.P.-Parliamentary-gentlemanly
world to which they intimately belonged, as well as imparting ideas and
attitudes to it. In the end, there is probably no reason to doubt that
"Cokeanism" was stronger than "anti-Cokeanism," that the ties between
the legal community and the "Country" community were stronger than
those binding lawyers as a group to the government. But any such reality
is only a net reality -- a prevailing pattern in a very complex tapestry, or
better, a sequence of patterns increasingly influenced by the dynamics of
political history.

Our immediate question is whether highly general attitudes about the
common law constituted a pressure on the judges -- a *de facto* pressure
and for reasons discussed above a legitimate one -- to favor common law
jurisdiction in problematic situations -- e.g., when liberal application of
procedural rules in Prohibition cases was necessary to give a party the
benefit of common law adjudication. My best guess is "yes" -- in an in-
determinately "net" sort of way. En route to that conclusion, we have
been looking at the body of attitudes most ready-to-hand as an influence
on judicial behavior -- attitudes in the legal profession and the part of the
lay community that traded ideas with the profession. If we look toward
popular attitudes in a wider sense, another set of cross-currents and uncer-
tainties will come into view. On the one hand, there are signs of popular
interest in the law, indeed enthusiastic faith in its arcane virtues. The
complicated phenomenon of litigiousness, of whose virulence ca. 1600
there are plenty of signs, probably has one root in the sheer prominence of law on people's cultural horizons. Suing is one way to deal with conflicts. Inter alia, the propensity to sue may reflect a half-conscious wish for the self-importance of involvement in the impressive career of a lawsuit. For modern people, the law is usually remote -- part of a business-government world presided over by experts whose language one does not pretend or care to understand and whose services one hopes and expects to call on rarely at most. Litigation tends to be thought of as "bad news" and the last resort. Of the contrary phenomenon, "the sheer prominence of law on people's cultural horizons," American history up to relatively recent times provides good examples: rural societies where the courthouse was a social center and the trial a form of entertainment; where a man saw jury service and sometimes, literally or vicariously, found himself in the shoes of the party-plaintiff or -defendant; where the learned man who crossed one's path, save for the preacher with his Bible, was the lawyer with his Blackstone; where the lawyer's role as "culture hero" reflected his mastery of an art with whose lingo the laymen had picked up some familiarity, of whose virtuosity he fancied himself a judge. Comparable experiences were available to people in rural and small-scale urban England. They were more apt to be made something of by the late-16th and early-17th centuries than ever before, owing to the undoubted, though hard to measure, cultural progress of middling people -- the prosperity, literacy, and constant hunger for knowledge and status which, in one dimension, created a market for the sermonizing and lay participation in religious affairs that Puritanism tended to furnish or agitate for furnishing. Legal knowledge and attitudes of vicarious loyalty to the law fed into the same market. Those products were enjoyed by the upper-class participants in subprofessional legal education, lay magistracy, and a legalistic brand of politics. Thus invested with status-value, they were accessible to lesser men as well. As the sermon was an oral, collective, relatively inexpensive vehicle of divine knowledge, so a certain familiarity with a useful and highly touted species of secular lore -- at least with the vocabulary of the law -- could be acquired by an ordinary man of observant habits in the everyday run of experience. Law, like divinity, could be had after a fashion this side of the barrier between "English" and "Latin" culture that separated the upper orders from the respectable-aspiring. In both of those spheres, from several upper-order points of view, a little knowledge was all-too dangerously acquirable.
The Writ of Prohibition: 
Jurisdiction in Early Modern English Law

For this side of the coin I can do no better than quote a 17th-century character-speech by a "common yeoman": "...I have a verie great desire to have some understanding of Lawe, because I would not swim against the streame, nor be unlike unto my neighbours, who are so full of Law-points, that when they sweat, it is nothing but Law; when they breath, it is nothing but law; when they neese [sneeze] it is perfite law; when they dreame it is profound law. The book of Littletons Tenures is their breakfast, their dinner, their boier, their supper, and their rere-banquet: Everie ploughhswayne with us may bee a Seneschall in a court Baron: He can talke of Esoines, Vouchers, Withernams, and Recaptions: And if you control him, the booke of the Groundes of the Law is his portresse, and reade at his girdle to confute you. Surelie, sir, my neyghbours are full of sension and tention, and so cunninge, that they will make you beleive that all is gold which glistereth:" (from William Fulbecke, A Parallele or Conference of the Civill Law, the Canon Law, and the Common Law of this Realme of England, 1601 -- Part II, unpaginated.)

As for the other side of the coin: for every yeoman who was proud of knowing what a Withernam was, for every plain man who "identified" with the strange and potent lore of the common law, how many suffered the law's delay? How many experienced law and lawyers as mystifying and greedy? For every happy litigative warrior, how many people were dragged into litigation by the law's frightful obscurity and their society's incapacity to provide alternative devices for avoiding and resolving conflict? How many perceived their own ruin as the correlative of some lawyer's enrichment? How much of the visceral resentment of a class society was focused precisely on common lawyers -- the worst of the worse, a close, monopolistic band of upper-class scions conspiring to frustrate justice and engross power by keeping the law as needlessly complex in substance as it was unintelligible in Law Franch? We should look ahead to the Leveller and Evangelical onslaught on the common law in the middle decades of the 17th century. There was little in that critique that had not in some form been said before. Old veins of explicit popular hostility to common lawyers, as to the ecclesiastical courts, must have been underlaid by deeper funds of inchoate feeling. The Levellers had something to draw on and give coherence to. We should take note of the high incidence of non-common law litigation, some of which may reflect people's desire to avoid the common law or belief that better justice was
Procedure

obtainable elsewhere. One must be very careful about ascribing that significance to use of non-common law courts. Often one had no choice about where to sue, and even when one does, choosing the court that for one reason or another seems likely to serve one’s turn need not imply very far-reaching general attitudes. But it is possible that part of the motive behind some suits in the Admiralty, Star Chamber, Requests, and regional councils was express feeling that delay, expense, mystification, and dubious justice were more likely to accompany common law litigation. The justifiability of such feeling insofar as it existed is a further question, concerning which we should not jump to conclusions, for the real workings of the non-common law courts are still largely uninvestigated. Use of the Privy Council as a subjudicial organ for avoiding litigation or expediting it is another practice of indeterminate significance for attitudes about the regular legal channels. The ecclesiastical courts were the part of the non-common law system most likely to be denigrated as, and because, the common law was exalted, but even in that case the mix and relationship of attitudes is hard to know. If we take the more neutral sorts of ecclesiastical business, such as probate jurisdiction, did average experiences and presuppositions make for hostility to the Church courts? Would people who were free from any religious inclination to disapprove of clerical involvement with worldly things have thought it a good idea to turn all testamentary jurisdiction over to the common law (a measure that would have had some advantages for legal simplification, but one that was not taken when episcopacy was abolished, a special court being created to handle the civilian specialties)? In their jurisdiction over defamation, the ecclesiastical courts provided a clearly popular facility -- a place for the offended and the quarrelsome to go when the common law would not listen to them (and sometimes, by choice, when it would.) Piety untouched by Puritanism may have furnished a good deal of affirmativeness toward the ecclesiastical courts in principle, which many people’s experience may have done nothing to undercut. To some degree, in some contexts, using the ecclesiastical courts may signify happy expectations, even relative to the common law. The comparative expense of litigation as between the non-common law and common law courts (including the courts’ handling of costs) would furnish an important clue to attitudes if we had any precise information about it. Rough impressions, predominantly of the ruinous costs of common law litigation (plus some early intimations of Jarndyce v. Jarndyce with respect to the Chancery), can be very misleading because of the immense variety in types of litigation and
circumstances and "stakes" of particular cases. Even so, there is probably a reminder on the non-common law side -- a body of thankfulness that there were places to sue less costly than Westminster Hall.

Once again, on the level of popular feeling, my guess would be that net prejudice ran in favor of the common law. For example, I would be inclined to discount the argument from Levelling and the mid-17th century reform movement. Even apart from the large question as to how many people were really convinced by the radical critique of the law, there are important senses in which that critique was forged in the exceptional heat of revolutionary experience. In the thought of the Leveller intellectuals themselves, hostility to the law developed in some degree from disillusionment and from a dialectical or "transvaluing" tendency in their mentality, whereby the native legal tradition that was once an object of loyalty came to be seen as a part of a pattern of "usurpation" upon a still more primordial and authentic "English way." But once again, any net tendency was only a net tendency, offset by cross-currents and uncertainty.

(b) Apart from highly general attitudes bearing on the acceptability of consigning people to non-common law justice, we should consider attitudes toward jury trial specifically. Insofar as facts were in issue, to let a case out of common law hands was to let the disputed facts be tried by interrogation of witnesses and judicial determination thereupon. To keep a case in common law hands was to insure trial of disputed facts by verdict of twelve. If we discount all partisan feelings -- i.e., parties' or prospective parties' belief that they will do better with jury or non-jury trial -- was there a residuum of pro-jury prejudice? If people would not typically have doubted the non-common law courts' capacity to do basic justice, including fair and accurate fact-finding, would they still have said that non-jury trial is second best, that where there is any option the value of giving a man a trial by jury outweighs all or most competing values? Here let us sound a note of skepticism and surcease. There are of course good grounds for answering the questions affirmatively. To defend the common law as against foreign systems means first of all celebrating the superiority of the jury. It was praised by Fortescue in the 15th century and defended in a much more sophisticated and closely reasoned way by Sir Mathew Hale after the middle of the 17th (History of the common Law, Ch. 12). Fortescue was not really capable of technical comparative law. When he came down to it, the jury was about the only specific fea-
ture of English law he could make a case for. Hale's capacities were
much greater, but even his concentration on the jury testifies to its abiding
status as Exhibit A.

On the other hand, the history of the jury mystique is complex and ob-
scure. The jury system can be valued for many different reasons, some of
them entirely practical, some quite mystical. There is a difference, for ex-
ample, between considering juries the optimum device for judging the
truth on the basis of specific evidence and valuing them precisely because
their function is more complex and less rational than that (e.g., because
they can represent the norms of the community, because they cannot be
entirely prevented from violating the evidence and the law in the interest
of rough justice.) The history of attitudes toward the jury must be corre-
lated with another complicated story -- the history of the practical work-
ings of the institution (e.g., the amount of informal and legalized control
over juries exercised by trial judges) and ways of conceptualizing it (es-
sentially, as between the poles of "judges of fact" and "those who know.")
It is not easy to say where the period ca. 1600 stands on the historical
spectrum of attitudes toward the jury. The spectrum as a whole is too ill-
understood. To some degree, I suspect, the embalming and sanctification
of trial by jury came after the period we are concerned with here. Late-
medieval experience of corrupt juries must have had a deleterious effect
on the vague reputation of the institution, over and above its specific ef-
facts: legal and legislative efforts to control corruption, attempts to evade
jury trial by resort to the Council and Chancellor. People no doubt con-
tinued to have bad experiences with juries an the 16th and 17th centuries,
and the evasion motive probably still figured in the election of non-com-
mon law courts, especially the Star Chamber. Whether their experiences
with non-jury trial were good or bad, people were likely to have some ex-
perience with it in the heyday of the ecclesiastical and "prerogative"
courts. That is to say, trial by jury could not be taken for granted to the
extent that was possible after the Great Rebellion. Perhaps it came to be
more valued as a touchstone of the "English way" after it came closer to
being the only form of proceeding people were likely to encounter. (It
was not, of course, literally the only form, since equity, Admiralty, and
ecclesiastical courts continued to function and to use the civil law, inter-
rogatory method of fact-finding.) In sum: Though trial by jury was un-
doubtedly valued -- as part of a diffuse "nativism," but the most focused
part -- there is some reason to be skeptical as to the weight of feeling on that specific score.

In connection with the jury trial, we should raise one further question: Was consigning a man to a non-common law court giving him over to something worse that trial without a jury? Was it perceived as relegating him to fact-finding methods less rational or less fair than a non-jury system need be? The full answer to these questions depends on matters to be considered at large in this study. In brief: (1) Ecclesiastical courts were to a degree prevented by Prohibitions from enforcing certain evidentiary rules which the common law judges considered unduly rigid and formalistic. The judges sometimes saw to it that parties being tried without a jury were not subjected to hurdles which they would not encounter if they were tried by jury at common law. (2) Abuse of "inquisitorial procedure" by ecclesiastical courts was also controlled by Prohibitions, though it was not entirely banned. To hand a man over to an ecclesiastical court was to expose him to involuntary interrogation in some cases. It is possible to object to every form of involuntary interrogation, even in a purely civil dispute. The common law jury system avoided it. Insofar as that system served as a norm, people may have regarded the inquisitorial system, even in its most neutral applications, as inherently unfair. Involuntary interrogation is much more objectionable when the effect is to force a man to betray himself to criminal liability. Ecclesiastical courts were not fully preventable from using it to that effect quoad purely ecclesiastical crimes. They were effectively prevented from exposing people to common law criminal liability by interrogating them in ecclesiastical causes. For our present purposes, therefore, there was little reason to fear that relegation to ecclesiastical justice meant relegation to fishing expeditions and secular self-incrimination. If a civil litigant was handed over to an ecclesiastical court lacking jurisdiction in principle, only because he failed to claim a Prohibition in proper form, he could almost certainly get a Prohibition later to stop interrogation tending to incriminate him at common law.

In the loose realm of attitudes, however, it is possible that ecclesiastical use of inquisitorial technique in criminal cases left a black mark on ecclesiastical courts and procedures generally. Almost all questions about the power to expose people to self-incrimination arose in connection with the High Commission -- an extraordinary court, and primarily a criminal court (exclusively one, with jurisdiction only over "high" ecclesi-
Procedure

siastical crimes, according to the prevailing common law view. If the
High Commission had not existed, the reputation of the ordinary ecclesi-
astical courts might have been different. It was the High Commission,
not the Star Chamber, that first got associated with what have come to be
pejoratively called "Star Chamber methods." The strength of that asso-
ciation and the emotions connected with it are hard to gauge. I am in-
clined to think that the High Commission gained itself a generous
measure of unpopularity on account of its procedures in legal and non-le-
gal circles wider than the Puritan circles with self-interested grievances
against the court. Such feeling may have reflected on ecclesiastical juris-
diction generally, and may have tended to focus the virtues which Eng-
lishmen were disposed to see in the common law. The presence of the
controversial High Commission may have heightened the generalized
contrast between the common law--where protection against self-incrimi-
nation was built into the system of fact finding-- and "inquisitorial proce-
dure" with the Torquemadanan associations it can have.

(c) One further special aspect of pro-common law feeling requires no-
tice. In discussing the general prestige of the common law, I have not
dwelt as specifically on the historico-prescriptive dimension of attitudes
toward the law as its importance requires. The native legal tradition was
not valued only because it was native; it was valued because it was reper-
edly immemorial. Coke's conception of the law's "copiousness" and of
an "artificial reason" capable of exploiting the reserves in the cornucopia
was a manifestation of a larger frame of mind. That frame of mind com-
prehended beliefs about the realities of history and about the legitimating
power of time. The law was copious because it was the creation of "infi-
nite ages." The product of boundless time was guaranteed to be a reposi-
tory of such qualities of experience and reflection as could not possibly
be accessible to any given generation of the living, however well-en-
dowed with "natural reason." Objectively, the law itself was "artificial
reason": a body of normative truth superior to that which any living indi-
vidual or group could arrive at by inherent human powers of intuition, or
by reflection on a limited fund of experience. To refer to the law -- to in-
quire after its solution of problems -- was to employ a superior substitute
for reason, an "artifice," a man-made supplement to man's naked facul-
ties. (The sense is perilously and ironically similar to what Hobbes was
to mean by an "artificial animal": A sovereign state erected upon man's
surrender of the right to judge for himself, whereby he breaks the dead-
locks of "mere nature" and gains not only peace but civilization. It is no accident that Hobbes was implacably hostile to common lawyers. To enthrone one Leviathan it was necessary to depose another.) Subjectively, the "artificial reason" of trained lawyers was the one way living men could take advantage of the resources of wisdom history supplied and guaranteed. These ideas depended on a mixture of positive historical awareness--much of which was of course very inaccurate--and legal concepts which exalted the value of usage in a distinctly ahistorical way. Knowledge of English antiquities, especially legal antiquities, had grown considerably by the early 17th century. The basis for actually seeing a continuous tradition of impressive extent, for noticing that features of English Law had in fact weathered long ages, was greatly expanded. Fortescue in the 15th century believed that English law had "always been there," was primordially and "constitutionally" implanted in the national identity. But he could not say how that was so except by positing a "social contract," "in the beginning," when Brutus first set foot upon this other-Latium. Coke had both the means and the need to say a great deal more. He was far from content with abstract generalities, to the effect that English law must be an old and continuous tradition because there was no sign of its having begun at any specifiable time. That is to say, Coke was truly interested in history--not out of idle curiosity, but because his claims for the common law seemed to him to depend on actual demonstration of its remarkable age and continuity. He had no interest in "social contracts" (and no faith in Brutus.) He had great interest in making the case that the essential characteristics of English law were observable in Anglo-Saxon times, and even earlier, in combing Caesar's Commentaries for evidence of common law institutions (which of course he found.) Of course he convinced himself of a great deal of nonsense. Very real knowledge of medieval law was projected backwards into make-believe. But the impulse was historical--no less for being uncritical and wishful. Coke believed that the common law was in fact what it ought to be. His positive history was not accurate, but that does not mean the "ought" simply drowned the "is." It does not mean that Coke failed to study the evidence available to him--available to an extremely busy practitioner and judge who knew about some sources by accident and in the way of business and did not know about others, available also to the preconceptions with which the material was approached.
The historical beliefs spread by Coke and others found acceptance. (Like "Cokeanism" generally, they found resistance too. The better-informed, more critical vein of legal history that runs from Spelman through Selden to Hale was destructive of Coke's certainties even when, as with Hale, it was ultimately affirmative of his jurisprudence.) The prestige of the common law was in part its reputation, sustained by positive historical beliefs, for antiquity, survival, and the chastening wisdom of gigantine ancestors. In point of pedigree, English law was the peer of civil law. (Its correspondence with the primal law of the Jews was one of Coke's themes. God gave His judgements, Moses, "the first reporter," wrote them down. So Lord Justices continued to pronounce and Inns-of-Court men to record. The Twelve Tables, of course, were a respectably ancient record of foreign law.) In England, foreign imports might have their limited place--strangers, guests, peregrini--entitled to hospitality, to tolerance in their place. But they could not be said to supply any deficiency in English law, to represent for any purpose a higher or more universal standard of right, to be anything but latter-day imports whose inevitable role was to occupy such space as the old and all-sufficient English system chose to make for them. To be judged by the common law was to be judged in the old English way. The natural prejudices of an innovation-fearing, traditionalistic society were supplied with confirmatory facts and fictions from history toward the end of the 16th century. Patterns perceived in history affected perceptions in everyday life--manifestly in politics. They may also have borne upon the relative acceptability of common law and non-common law adjudication that concerns us here.

On one side, historical awareness was extended. If you like, it was extended just enough to go wrong, to furnish prejudice and myth with a servant. In part, it was extended -- and patterned as it was -- because of legal ideas which "sounded in history" but were in fact quite ahistorical. Usage legitimated in English law. That is a legal "fact" with specific applications -- viz., to the establishment of prescriptive rights. A prescriptive right is in essence an exception to the common law founded on usage -- local usage (i.e., obtaining throughout a recognized local unit, a county, parish, manor, or whatever) or private usage (as between the owners of Blackacre and the owners of Whiteacre). There were limits on the power of usage to carve out exceptions to the common law, most notably: (1) the rule that an exceptional custom must be "reasonable" in the eyes of the
j�es; (2) *Nullum tempus occurit regi* -- the most important practical ef-
fact of which was that usage could not make an exception to statutory
law. Subject to such limits, usage could establish local rules and private
rights at variance with the common law (some extreme forms of variance
failing by the reasonableness test.) The only *kind* of legitimating usage
contemplated by English law was immemorial usage. That is to say, us-
age extending over a specifiable period, however long, did not establish
rights. It must be shown to have continued "from time whereof' memory
runneth not to the contrary." The negative meaning of that expression,
however, was much more important than the positive. Evidence going to
show that an exceptional practice obtained at some remote time was con-
ductive to the conclusion that it was immemorial; evidence showing that a
practice started at some specific time in the past, however remote, or that
it did *not* obtain at some specifiable time, was fatal to the conclusion.
Applying these ideas sometimes produced terrible legal knots, but such
were the principles, Whether an alleged custom was in fact immemorial
was a jury question. Elaborate historical research was hardly called for to
convince a jury. A man trying to establish a prescription would want to
gather some witnesses or documents testifying to condition a while back.
If the other party produced no evidence of the fatal kind, there was little
to prevent the jury from concluding that the custom was indeed immemor-
ial. Judges exercised a degree of control over irresponsible juries, but it
is doubtful that a skeptical judge could do very much in this context. The
archaic conception of the jury -- "those who know," local men familiar
with local facts -- was appropriate when the question was "What is the
immemorial usage of this locality?"

These legal doctrines bear on our present concerns in two ways. (1)
Custom as a technical category influenced the conceptualization of the
common law itself. Immemorial usage legitimated exceptional local cus-
toms. What else so essentially gave the law of the realm its authority?
The common law was routinely defined as "the common custom of the
realm." I suspect that the phrase had accumulated rather more meaning
by the beginning of the 17th century than it had earlier. A highly profes-
sionalized national legal system could not really be reduced to the model
of customs technically so-called. There were difficulties, certainly, in the
implication that a rule of the common law was the peer of some humble
borough custom -- authoritative for the same reason, on a par because
coeval -- save for the wider prevalence of the common law rule. Not the
least difficulty was that the common law judges passed on the reasonableness of customs proved or admitted to be immemorial "facts," drawing to some extent on the common law itself (as opposed to mere common sense and fairness) for criteria of reasonableness. I suspect, however, that the difficulties tended to be suppressed and the model more insistently relied on as "Cokeanism" organized one side of the legal thinking of an increasingly sophisticated age. As "What is law?" came to worry people more, "Law is essentially custom" took on weight as one serious answer (disputed as a much too simple one by such as Lord Ellesmere.) As more historical information came in to suggest that the presumption of the law's immemorialness corresponded to fact, there was the more reason to dwell on the legitimating power of immemorialness. Conversely, looking into the past was stimulated by the need to verify what was presumed, and what was seen was profoundly colored by presumption.

To the extent that the common law was more sharply perceived as custom, and to the extent that immemorial usage was more credited with the power to make law valid and valuable, contrast between common law and non-common law jurisdictions was heightened in still another way. If a man's case stayed in common law hands, it would be decided by law that was intelligible and good because it amounted to custom; if the case escaped common law hands, it would be decided by rules whose title to be law was less clear. In this way, insofar as they penetrated ordinary people's consciousness, general ideas about the law's source of authority, as well as about its de facto antiquity, may have affected the acceptability of non-common law adjudication and prevailing notions of the public interest in jurisdictional lines.

(2) There is another more specific effect to consider. Many Prohibition cases actually involved prescriptive claims, customary tithe-commutations being the leading example. Speaking abstractly (we shall worry later about practical complications of this subject), there is no necessary reason why an ecclesiastical court could not adjudicate such a claim well enough. Ecclesiastical rules on prescription were different from common law rules (they avoided the common law concept of immemorialness), but they were not on paper less favorable to the establishment of prescriptive rights. In any case, if the ecclesiastical courts had been allowed to entertain prescriptive claims, they would probably not have been allowed to insist on their own substantive rules. In principle, a prescriptive claim can
be tried without a jury, inconvenient though that may be for a man whose hopes rest heavily on a friendly jury. But in another way, there, perhaps, is the rub. A man claims a right based on the immemorial usage of his community. Can the truth of the claim really be judged by anyone but members of the community? In cold theory, the evidence can be evaluated by any "judge of fact." But is there not something missing without the actual testimony of the community that only a jury can supply? As it were, an outside judge can say what appears to be the custom, but a jury can say what it is. In short, non-jury trial may have been especially unacceptable in cases involving prescription, for more-than-partisan reasons. More generally: A man claims a right based on immemorial usage -- one little custom in the vast structure of customs that includes the common law itself, in a sense as good as any other, as sacrosanct, if usage above all else points to right. In cold theory, of course, anyone can judge the "fact" of the custom, and perhaps any reasonable man can judge its reasonableness. But can a court that is not essentially beholden to custom really handle a case of custom as well as a court that thinks custom and breathes custom, applies custom and protects it because the law to which it owes faith amounts to custom? In sum: The high incidence of prescriptive claims in cases raising jurisdictional problems may have created a greater bias in favor of common law adjudication that would otherwise have existed, for there are special reasons why non-common law determination of such claims would have been hard to accept.

In the preceding pages, we have asked whether a strong public interest in the strict maintenance of jurisdictional lines is likely to have been perceived. Did it very much matter if a case fell into the wrong court? Ought it to have mattered a great deal to the judges if they were to serve the expectations of the community that employed them? Was the perceived public interest sufficient to justify relatively loose procedural policies, with the effect of enforcing the lines of jurisdiction in favor of litigants who neglected to take the proper steps to enforce them for what they conceived to be their private benefit? I do not make the slightest pretense of having answered these questions. They do not admit of straightforward answers except by much deeper research and analysis at every point than I have carried out, or, to many intents, than anyone else has. Insofar as the questions go to the "public opinion" of a remote time, they cannot possibly be answered except by elaborately inferential means. Insofar as there are possibilities, such as I have to a degree adumbrated,
for projecting from intellectual history to what considerable numbers of people may have thought and felt, they must always be tentative, not least because the intellectual history itself -- the process of working out what articulate thinkers "really meant" -- can never command consensus. The well-known gross facts of institutional and political history provide a kind of basis for getting at the experiences that were available to people and the features of their environment that were taken for granted, but even those kinds of history are still often too grossly known to permit the sort of projection that would be most valuable for the purposes intimated here. This study is about the "cases and resolutions of the law," to which we must now turn. The considerations above are meant to suggest the large, vague, complex worlds of reality and perception that might conceivably be reflected in innumerable grains of sand, in "actual cases and controversies" of the various types that arose on Prohibitions. The extent to which those large worlds can actually be seen in the grains of sand, and the extent to which studying the cases is a useful indirect approach to the general problems we have raised, are implicit questions in all that follows. For the rest, we shall be concerned with what the courts did in Prohibition cases and with the immediate implications of their decisions for legal doctrine.
Bibliographical Note

A synthesizing and speculative essay such as this Introduction owes a diffuse debt to many historical writings and historical sources. The best path to the jurisprudential climate in which the cases in this study were decided is to read a modest “canon” of original texts. (I use “jurisprudential” here to signify generalized thought about the law and of lawyers, expressed in something like literary form and capable of confluence with wider intellectual culture. That contrasts with the mere generalizable implications of the practice of law, one of the horizons of this entire study, elements of which figure in the present Introduction.) My interpretation of that climate is mainly the product of reflection on the texts. There is secondary comment on them, some of which I shall mention, but it does not approach substitutability for the sources. It could not, in the way that literary criticism cannot dispense from reading the literature it is about. That truism aside, it remains, in my opinion, manifest that the tradition of English jurisprudential writing has not accumulated around it a very significant body of criticism and intellectual history. The corpus of important sources is small and accessible; any reader whose interest or skepticism is provoked by this Introduction should think of going directly to it.

Sir John Fortescue (referred to on page 24) is seminal for the tradition of self-conscious affirmation of English law against its rivals, as well as for some ideas and attitudes within that tradition: De Laudibus Legum Angliae (modern edition and translation by S. B. Chrimes, Cambridge, 1942.) The text at page 24 notes how the work of Fortescue’s contemporary, Sir Thomas Littleton, Tenures, seemed in 17th century retrospect to be a landmark -- one might say half-seriously a monument of Phidian perfection showing that English law had attained its classical epoch. Littleton’s book has no express jurisprudential content, however; for that, Fortescue is the landmark.

The peaks of the tradition after Fortescue are Sir Edward Coke, Sir Matthew Hale, and Sir William Blackstone. The essence of my interpretation of Coke’s jurisprudence is conveyed in this Introduction. It is much more fully developed in my essay “Reason, Authority, and Imagination: The Jurisprudence of Sir Edward Coke” (in Perez Zagorin, ed., Culture and Politics from Puritanism to the Enlightenment, Berkeley, 1980). The reader is referred to that essay for the primary sources beyond the central
Calvin’s Case. (Coke’s general ideas are hopelessly scattered over his writings. The prefaces to his Reports are the best primary sources to go to after Calvin, then here and there in the four volumes of Coke’s Institutes--regrettably here and there, amid a great deal of mere law.) I have said in the “General Introduction” that this study as a whole is meant to contribute to a fuller reconstruction of Coke’s career than is yet possible. For secondary comment on Coke, my recommendations would be: (1) Stephen D. White, Sir Edward Coke and “The Grievances of the Commonwealth, 1621-1628 (Chapel Hill, 1979) -- the only book-length example (and an excellent one) of serious monographic study of Coke; the thorough bibliography covers everything that has been written on Coke, the serious part of which is mostly in articles. (2) Samuel E. Thorne, Sir Edward Coke, 1552-1952 (London, 1957) -- a brief synoptic treatment by a distinguished contributor to detailed Coke studies. (3) Holdsworth in Vol. V -- see below for Holdsworth’s History.

For Hale, again, I have expressed in essay form how he seems to me to fit the tradition, especially in relation to Coke. (Introduction to Hale’s History of the Common Law, reprint, Charles M. Gray ed., Chicago, 1971.) See bibliographical note thereto for the Hale sources beyond the History.

Blackstone’s Commentaries, though well beyond the period of this study, is important for anyone who wants to see the study in perspective - - whether the jurisprudential tradition immediately in question or the substance of jurisdictional law (sparsim for the former, sections of Bk. III dealing with the non-common law courts for the latter). Blackstone’s text can be studied in innumerable editions, ignoring the editors and commentators or using them as a valuable supplement. A reader who wants to avoid the complication of the glossators should use the most easily available edition -- University of Chicago Press reprint of Blackstone’s first edition, ed. Stanley N. Katz et al., Chicago, 1979. Nothing I know of in the extensive secondary literature on Blackstone deals with him adequately in the set of relations immediately relevant here. A still unpublished essay of my own, “Blackstone’s History of English Law,” is intended as a sequel to my pieces on Coke and Hale -- the final chapter of a further working-out of the lines adumbrated in this Introduction, which was written before the essays. With respect to jurisdictional law, reading Blackstone is the best first step -- and at present it would be hard to rec-
ommend further ones -- toward understanding that the relationship between the common law and the non-common law systems as conceived in the 1760s was very different from that relationship in practice and implication during the period of this study.)

The vital point about the tradition “affirming” English law is that the closer one looks at it the more aware one becomes -- as one moves from Fortescue to Coke to Hale to Blackstone -- that the way the history of the law is imagined and the meaning of the terms in which it is affirmed change dramatically. It is a story of successive writers adhering to a common set of basic values, in a sense “saying the same thing,” but in an equally important sense saying very different things. This Introduction catches only something of the first transition -- Fortescue to Coke. It explicitly argues that there is a counter-tradition -- more cosmopolitan, more in touch with natural law thinking, sometimes directly critical of “Cokeanism.” In the text I call attention to Lord Ellesmere’s opinion in Calvin as the sharpest example of engagement between the affirmers and the critics. I refer also to Francis Bacon. There is nothing in the large secondary literature on Bacon that seems to me to put his legal thought in all the right perspectives, though the best-known article on the legal aspect of his work is a good start toward an appreciation of it: Paul H. Kocher, “Francis Bacon on the Science of Jurisprudence” (Journal of the History of Ideas, 1957). I have not myself tried to analyze Bacon’s thought in detail, as I have that of other figures. The best place to start in Bacon’s writings is his essay “On Judicature.” His ideas can then be pursued in his into his expressly legal writings (collected in Vol. VII of the Spedding ed. of Bacon’s Works.) They must be pursued with caution there, for sometimes, as always with such material, the line between the lawyer doing his job and the thinker thinking his own thoughts is hard to draw. My suggestion on p. 38 ff. that major tracts of Bacon’s thought can be brought under the rubric “jurisdiction” amounts to a suggestion for reading The Advancement of Learning.

Bacon has never been so well written about as a political thinker -- in contexts that often make his political thought continuous with his legal -- as by S. R. Gardiner. This is an appropriate occasion to say that Gardiner’s great history is the place to go for a sense of how jurisdictional law fits and has been fitted into the received rendering of general political and constitutional history. (Samuel R. Gardiner, History of England from the
Prohibition: Jurisdiction in Early Modern English Law

Accession of James I to the Outbreak of the Civil War, 1603-1642, 10 Vols., London, 1883-4.) Chs. VIII, XII, and XXII are the most immediately relevant. Observations on Bacon come partly in these chapters; they are otherwise scattered over the first three volumes. Gardiner can be usefully supplemented by J. R. Tanner, English Constitutional Conflicts of the Seventeenth Century 1603-1689 (Cambridge, 1928), and some of the most basic documents touching the legal problems dealt with in this study are available in Tanner’s Constitutional Documents of James I (Cambridge, 1930.) This body of older work is of excellent quality. It is my starting point. Political history has been advanced in many dimensions by more recent scholars, but not in the microscopic one that touches the law of jurisdiction. With respect to that, there is nothing wrong with the rendering of Gardiner et al., save for the missing Prince of Denmark those authors could not have supplied without ludicrous diversion from their larger tasks -- the close inspection of jurisdictional law in the courts which this study attempts to provide.

Between the peaks -- Fortescue, Coke, Hale, Blackstone -- and aside from the obvious competing eminence, Ellesmere-Bacon, are other books of the jurisprudential “canon.” These are more obliquely related to the themes of this Introduction, but they are useful as indirect lights, and some of them are referred to in the text. Christopher St. German’s Doctor and Student (referred to on p. 15 -- best modern ed.: Selden Society, T. F. T. Plucknett and J. L. Barton eds., London, 1974) is the most significant work of jurisprudence proper between Fortescue and Coke. Besides its main claim to landmark status -- as the first book to bring the Chancellor’s court of equity into the open air of literature -- Doctor and Student is an invaluable source for the intellectual world of the English lawyer in the early 16th century. In the end, in my opinion, it documents the “affirmative” nativist tradition along with the tradition’s clearly orthodox bearers, the more so for struggling to accommodate the common law to the “higher law” conventions of the age and the reality of an equitable corrective.

Thomas Starkey’s Dialogue between Reginald Pole and Thomas Lupset (ed. Kathleen M. Burton, 1948) is the “canon’s” witness to dissatisfaction with native English law arising out of 16th century humanism and to a kind of aspiration toward Romanization. Starkey gave the impulse to F. W. Maitland’s well-known essay English Law and the Renaissance.
Bibliographical Note

(Cambridge, 1901 -- often reprinted), which properly takes note of the humanist “aspiration toward Romanization,” explains why nothing came of it in the end, and in the process seems rather to exaggerate the real-life threat, in the Henrician period, of the common law’s being replaced through the agency of non-common law courts. As a cold sober theory about practical danger, the “Maitland thesis” was pretty well disposed of by Holdsworth (History of English Law, Vol. IV, 252 ff). For an up-to-date reexamination of the matter, see J. H. Baker, Introduction to The Reports of Sir John Spelman (2 vols., Selden Society, London 1977-78).

In passing: Readers of this book should keep Baker in mind, not for a great deal of direct help with the legal detail of the later period that concerns me, but for a picture of English law and the legal system at a slightly earlier time that meets an unprecedented standard of scholarship and clarity. There is no comparable picture for the late 16th to early 17th century period where my Prohibition cases fall. I could not provide a comprehensive one at anything approaching Baker’s level. I inevitably do speak, with various degrees of explicitness, about the system as a whole -- in this Introduction and the General Introduction among other places. I speak from the basic legal history and from impressions which I like to say jokingly I got, not from books, but from my practice -- not that of a practitioner of early modern jurisdictional law (who would know infinitely more), but of someone who most of the time, in preparing these volumes, is playing the role of a “re-stater,” or legal textbook writer, or law review article-ist, with respect to those dead and gone practitioners. On the proper occasion, I might be willing to defend that sort of role-player or costume-actor among the personae of the historian; when, in the Introductions and essays, I turn back into something more like a modern-dress historian, I am constantly drawing on the quaintier character. For the reader who wants a sense of the system in many aspects -- the same system, only a little earlier -- at a level above the “basic legal history,” Baker is the place to go.

on the English system of courts in its diversity (cf. General Introduction). For the parts of medieval history in which Maitland did his specialized work, Holdsworth was a transmitter; for the later middle ages and the early modern period, he was a pioneer. In writing an encyclopedic book, he was necessarily confined for the most part to the printed sources and, for close work on many of the innumerable sub-topics of legal history, to monographic studies by others here and there, none of them approaching the scope and quality of what Maitland had done on the high middle ages. The close texture of jurisdictional law, my subject, is one example of the many topics with respect to which Holdsworth could not go beyond what he could do with any single topic himself in the course of taking on everything. Nevertheless, the reader of Holdsworth from Vol. III on will have an enormous knowledge of early modern law and its immediate antecedents -- of the “hardcore” case law and statute law, of the lawyers and judges, of their literature, and of the surrounding constitutional history. Holdsworth has by now been improved on and supplemented, but not succeeded. With respect to lawyers’ literature, in formulating a “canon” of basic jurisprudential texts here, I am saying by implication that little else in the corpus of legal writings contributes much to an understanding of lawyers’ thought beyond the practical level. Others may dispute this judgment. Holdsworth provides comprehensive guidance to the corpus as a whole.

A modest “canonical” niche can be assigned to Sir Thomas Smith’s mid-16th century *De Republica Anglorum*. Law figures only incidentally, but Smith provides a valuable contemporary “fix” on the English political order with the advantage of a partially outside perspective. (He was a practiced insider of English government, but a professional civilian with extensive foreign experience, who wrote in part to make English ways intelligible to an educated public that need not be English.)

Richard Hooker’s *Laws of Ecclesiastical Polity* (most conveniently available in Everyman ed., 2 vols., London, 1907, and subsequent reprints) touches the concerns of this Introduction in interesting ways. It comes, of course, out of the clerical world, not the legal (including the Church-legal or civilian). It testifies to at least the following: The Church of England’s search for a self-conception and ethos distinct from the other strains of Protestantism; a theory assertive of the particular community’s right to choose its ecclesiastical forms as it chooses its secular
law, against the Puritan conviction that there was a divinely prescribed, universal blueprint in the Scriptures (cf. p. 37 in the text); a version of classical natural law theory, reflecting Thomas Aquinas (from one angle discomforting to the Cokean will to keep argument from mere natural reason out of legal debate, but so generous toward man-made law and the self-determination of historic communities that the ultimate formula could be as easily “natural law on terms acceptable to a Cokean” as an antagonistic position); a “jurisdictional” mentality parallel to Bacon’s, for Hooker’s organizing theme is that we are under many laws at once, each in its sphere, and trouble comes when any of them overreaches its domain – a theme to which Coke on his terms would have said “Amen,” and his terms were more clearly opposed to those of a politician and equity judge, such as Bacon, than to those of an ecclesiastic such as Hooker. Hooker was a loyal Church of England cleric, whose sympathy at the practical level would undoubtedly have been with the ecclesiastical courts and their protests against over-regulation by the common law; on the high ground of theory he made peculiarly his, he propounded ideas that do not necessarily serve only the interests he would have cherished. (John Locke’s celebrated reverence for this Elizabethan High Churchman may remind us of that.)

The view has long been in circulation that there was some natural affinity between “the lawyers” and Puritan critics of the ecclesiastical establishment, Hooker’s foes. I believe that material in this study will contribute to sustaining the opinion I hold: the view as stated is jejune. Lawyers like other people differed over current religious controversies. To the uncertain degree that they were held together by a professional ethos -- an ethos given conscious formulation primarily by Coke, and perhaps exaggerated by him beyond the demands of a mere professional ethos -- I do not think they had much in common with serious Puritan thought. (Mildly Puritanish sentiments are something else, for these were widespread in the ruling class and likely to turn up in a caste of conservative laymen apt to be at odds from time to time with high-flying clerics and their friends in the government.) It is easier to imagine Coke reading Hooker with fundamental approval -- particularly on the matters Hooker immediately addressed, though perhaps with moments of theoretical discomfort -- than to see lines of attraction between his mentality and that of ultra-Calvinist idealism.
The last text in my “canon” is Thomas Hobbes’s *Dialogue between a Philosopher and a Student of the Common Laws of England* (modern ed. by Joseph Cropsey, Chicago, 1971), supported by the philosopher’s major works. Hobbes is the antithesis of the “affirmative” tradition. His relation to lawyers such as Ellesmere and Bacon is like his relation to Anglican divines: he propounded a version of their position so extreme that they would have been more shocked by it than by a Coke at his most exaggerated. (So his pressing Erastianism to its logical conclusion was more terrible to Anglican bishops than any spook the bluest of Presbyterians could conjure.) Hobbes analyzed common law ideology as a tissue of nonsense; “mere reason” or natural law he analyzed as the only possible source of adjudication besides sovereign mandate. He was father of the lawyer-Puritan linkage (principally in *Behemoth*). On his premises, there is no objecting to it -- *per* Hobbes, the two groups were victims of different kinds of nonsense, and also malicious propounders of different kinds, but the will to subvert legitimate authority and substitute one’s own is the same malignant will behind whatever ideological facade, and if the head’s muddledness can ever excuse the heart’s disloyalty, then lawyers and Puritans failed alike to grasp the intellectual grounds of political duty. (There is of course also no objection to linking Puritan religious opinion and various veins of legal opinion in the texture of straightforward political history, a texture of imperfect alliances. The shifting confluences of groups alienated from the government and of grounds for criticizing its policies are classically depicted in Gardiner’s *History* and its derivatives; they have been persuasively re-weighed in more recent political history, with the effect of correcting the impression that over several decades currents of opposition to the Stuarts were constantly accumulating, alliances always consolidating, towards the fatal moment of civil catastrophe.)

The aspect of Puritanism I speak of expressly in this Introduction -- its built-in opposition to the “carnal” mode of Christian discipline embodied in the Church courts -- has not had sufficient discussion. Christopher Hill in *Society and Puritanism in Pre-revolutionary England* (American ed., New York, 1964) made a valuable contribution by calling attention to it (Chs. 8-10). A common lawyer or judge could participate in that fundamental objection to ecclesiastical justice as the world had long known it. I can only say that virtually nothing in hundreds of Prohibition cases suggests any such attitude. Exceptions could probably be found, but it seems likely that nearly all of the legally minded believed what institutionally
they must profess -- that the established form of ecclesiastical justice was a benign and necessary part of the legal order. The belief is compatible with great disagreement on the exact role assigned to the ecclesiastical system by the law. My point in the text is that radical disapproval of that system was at large in the community, to reinforce less radical forms of dissatisfaction with it.

For awareness of the tradition affirming the native English legal heritage, and of Coke’s centrality in it, historians owe their primary debt to J. G. A. Pocock’s *The Ancient Constitution and the Feudal Law* (Cambridge, 1957). Pocock has been catalytic for my own work on general jurisprudence (not so much for the study of Prohibitions as such, though even there, to the degree that it started from an interest in pursuing a fuller picture of Coke, Pocock’s placing of the judge as a figure in wider intellectual history was an encouragement). I have come to take some kinds of exception to Pocock’s picture of the “common law mind” (cf. p. 46), but I think the differences are more of perspective than of substance. The “common law mind” looks more complicated when seen from within the history of jurisprudence (with hardcore legal history over one’s shoulder) than when Pocock sets it in the history of historical thought. Any reader whose interest is caught by what I say in this Introduction about the prestige of the common law and the perfections ascribed to it by its initiates should go to Pocock’s representation of those phenomena.

The rest of what I say in this Introduction mostly so merges into a general reading of Tudor-Stuart history that it can hardly be tied to particular sources. Though its place in the vast literature is certainly modest, I have given a “general reading” in *Renaissance and Reformation England* (New York, 1973). That book was written at about the same time as the present volume of the study of Prohibitions. I cite it (with the bibliographical suggestions therein) for the benefit of any reader whose curiosity is engaged by the ways in which my emphases in depicting the background of cases on Prohibition procedure seem to imply a larger way of seeing the period in which the cases fall.

There are speculative observations in this Introduction on the reputation of ecclesiastical courts. Throughout the study, I by and large rely for my sense of what was going on in those courts -- on which any estimation of their reputation depends -- on the reflection of that activity in common
law reports. I do not try to coordinate that with the growing body of direct knowledge of ecclesiastical courts based on their own records. This is a deliberate simplifying measure. There are two pictures: one is of how the doings of ecclesiastical courts looked to the common law courts in particular cases; the other is of how they really were -- typically, across the board, in many normal cases (as opposed to those in which an attempt was made to arrest ecclesiastical proceedings). I think it is better to let study of the common law and ecclesiastical sources converge than to "worry" the former with impressions from the latter. My largely skeptical suggestions in this Introduction seem to me compatible enough with our improved direct knowledge of the ecclesiastical system in action. Readers interested in whether they are might usefully start with Ralph A. Houlbrooke, *Church Courts and the People During the English Reformation 1520-1570* (Oxford, 1979), which contains a good bibliography of other work. Now, however -- just as the present volume goes to press -- another book is available, a more comprehensive work and one more directly related to my concerns: R. H. Helmholz, *Roman Canon Law in Reformation England* (Cambridge, 1990). Helmholz is extending his distinguished earlier work in medieval ecclesiastical law into the early modern period. *Roman Canon Law* takes in all that has been done, by Helmholz himself and by others, and projects a balanced and persuasive wider picture of the post-Reformation ecclesiastical system -- a picture that is being and will be rounded out by study of the ecclesiastical court records in the kind of detail these volumes aspire to on the common law side. That is a larger task than mine, for the quantity of material is much greater. It is my hope that the present study will contribute a dimension to the "rounding out" by working the easier side of the street with some care.
II. STATUTORY RULES GOVERNING PROHIBITION PROCEDURE

A. 2/3 Edw. 6, c. 13, sect. xiv: “Proof” of Surmise within Six Months

1. Extent of proof requirement

**Summary:** Extension of the proof requirement to all or nearly all surmises in tithe suits involving matter of fact—in keeping with the Statute’s probable policy—came slowly, especially in the King’s Bench. Before ca. 1615, the King’s Bench, though not the Common Pleas, restricted the scope of the Statute. Whatever the reasons for such restriction, it served the interest of the plaintiff-in-Prohibition, or tithe-payer. Coke may possibly be associated with the change to a rule more favorable to ecclesiastical interests.

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The Prohibition cases which I have classified as raising essentially procedural issues fall into several sub-groups. The statute law subjected the courts to two rules directly concerned with Prohibition procedure. I shall first deal with problems involving those rules.

By the statute of 2/3 Edw. 6, c. 13, sect. xiv, parties bringing Prohibition were required in some situations to “prove” their suggestions within six months. The meaning of this requirement is as follows: A party seeking to obtain a Prohibition made a "suggestion" or "surmise" to a court with power to issue the writ—for all practical purposes, to one or the other of the two major common-law courts, the King’s (or Queen’s) Bench and the Common Pleas. The Prohibition was not, in other words, to be had automatically, like the Chancery writs-of-course by which most suits at common law were started. To obtain the writ in the first place, plaintiff-in-Prohibition had to move the court by showing that he had some kind of presumptive case. Adversary debate often took place on the first motion for a Prohibition, though it did not always occur, and Prohibitions were sometimes issued with little consideration. In situations to which 2/3
Edw. 6 applied, a further procedural requirement was imposed on plain-
tiff-in-Prohibition.

2/3 Edw. 6, c. 13, is called “An act for the true payment of tithes.” It is
an important piece of legislation on that subject, various of whose provi-
sions will crop up in this study. Sect. xiv is directed against vexatious use
of the Prohibition in tithe litigation. It is meant to discourage defendants
in ecclesiastical suits for tithes from obtaining Prohibitions on fabricated
or flimsy claims, thereby delaying justice and putting the other party to
the trouble and expense of contesting a frivolous Prohibition. To that
end, parties who had obtained Prohibitions in situations within the act
were required to “prove” their suggestions by at least two witnesses not
later than six months after the granting of the Prohibition. “Prove” in this
context did not mean “establish conclusively.” After the suggestion was
“proved” to satisfy the statute, the defendant-in-Prohibition still had his
chance to dispute the suggestion’s truth and have a jury-trial (as well, of
course, as a chance to challenge the suggestion in law). In short, we have
to do with a preliminary requirement -- “proof” in the sense of “enough
evidence to justify further proceedings.” This provision was backed up
by two sanctions: (a) If the suggestion was not proved as required, de-
fendant-in-Prohibition “shall upon his...request and suit without delay
have a Consultation granted.” A Consultation was a Prohibition in re-
verse, as it were -- i.e., a writ authorizing the non-common law court to
proceed in a case previously prohibited. (b) Defendant-in-Prohibition
was also enabled, upon failure of the required proof, to recover double
costs and damages.

Two limits on the extent of the proof-within-six-months requirement
are reasonably evident from the text of the act and common sense. (a)
The requirement only applied to tithe suits. Sect. xiv refers to suits con-
cerning “any matter or cause before rehearsed,” and the previous parts of
the act are almost entirely devoted to tithe law.1 To extend the proof re-

1 The one qualification on this point is that § X of the act speaks of offerings, or “obventions.” I
have found no cases on the application of the proof requirement to suits for offerings. In
Stoneaceran v. Tee (M. 15 Jac. K.B Cited in Stroud v. Hoskins, below, but not separately
reported), it was held that a customary discharge of another type of ecclesiastical due -- a
mortuary fee -- does not have to be proved.
requirement to other kinds of ecclesiastical suits, or to other non-common law suits on which Prohibitions might be sought, would be dubious. Admittedly, the reasons for the rule could hold in other cases. The judicial practice of extending a statute to like cases “by the equity” -- i.e., not by liberal interpretation of the language, but because of the mere fairness of having like situations governed by the same rule -- was still acceptable in the 16th and early-17th centuries. However, it was usually confined to “positive” or enabling legislation. Extension to administrators of the power to bring a certain action which a statute gave to executors is a clear example. A statute imposing a new duty on executors to prove something by two witnesses would probably not have been extended to administrators. So here.)

(b) The proof requirement could not apply literally to all tithe suits. For sometimes -- in tithe cases and otherwise -- Prohibitions were sought and obtained solely on the ground that the ecclesiastical court was entertaining a suit which ought legally never to have been brought there, regardless of the facts. Sect. xiv of 2/3 Edw. 6 contains another provision: that no Prohibitions in cases within its scope were to be granted unless a copy of the libel (i.e., the ecclesiastical plaintiff’s statement-of-claim) was attached to the surmise. This provision was plainly meant to insure that the common-law judges were correctly informed of the nature of the ecclesiastical suit. Thereby, among other advantages, Prohibitions could not be vexatiously obtained by misrepresenting what the ecclesiastical suit was about. The copy of the libel was itself proof that such-and-such a suit had in fact been brought in the ecclesiastical court. The proof-within-six-months rule was clearly meant to cover situations where facts beyond that basic one were asserted in the suggestion. About this there was never any dispute.

Problems did arise, however, as to whether there were any limits on the proof requirement other than the two I have specified. There was universal agreement that the act applied to the commonest sort of tithe-Prohi-

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2 In many cases, occurrences in the ecclesiastical court to which the libel itself would not attest were surmised as grounds for Prohibitions (e.g., that an ecclesiastical judge had improperly refused to admit a certain plea.) There are, however, no cases raising the question whether surmises of such in-court facts needed to be proved under 2/3 Edw. 6. It may be assumed that the Act only applied to out-of-court facts.
The Writ of Prohibition:
Jurisdiction in Early Modern English Law

bition case, as follows: A parson or vicar suing to recover tithes had to proceed in an ecclesiastical court. Tithes were in principle payable in kind. To take the simplest and most important kind of tithes as an example: An agricultural producer was required to separate 1/10th of his harvested hay or corn from the other 9/10ths and leave it accessible in the field for the parson to carry away. Suppose, then, that a parson sues a parishioner in the ecclesiastical court for tithe-hay in kind. The commonest defense to such suits was to claim a *modus decimandi*. I.e.: The parishioner claims that from time out of mind it has been customary in the parish (or for the occupiers of the particular tenement where the hay in question grew) to pay the parson 6d. per acre, say, in lieu of tithe-hay. One of the most certain things that can be said about the law of Prohibitions is that a *modus* was a good basis for the writ. I.e.: An ecclesiastical defendant who surmised to a common law court that he should enjoy the advantage of a prescriptive *modus* could have a Prohibition for the asking. The truth of the custom -- whether the 6d. had in fact been paid in lieu of tithe-hay from time immemorial -- was triable by jury at common law, and the legal sufficiency of *modi* was determinable by the common law judges. Everyone agreed, however, that 2/3 Edw. 6 opposed one obstacle to obtaining a Prohibition by alleging a *modus*: The statute required that the parishioner prove his *modus* by two witnesses within six months.³

Whether other suggestions than *modus* were within 2/3 Edw. 6 gave the courts trouble. The statute did not provide altogether clear guidance in some of the situations that occurred. It was perhaps loosely enough drawn to justify the rule that *all* suggestions involving matter of fact should be proved. If the courts had wanted to lean against parties bringing Prohibitions, the act perhaps gave them room to do so, and such a course could be defended as fulfilling the statute’s general policy. But if the courts’ inclination went the other way, the act was confusing enough to justify taking it narrowly in at least some instances. To understand the problems that arose, we must look at the cases.

³ A couple of reports merely state the uncontested rule that *modi* must be proved: Sharpe v Sharpe, Noy, 148 (undated); Gippe’s Case, H. 11 Jac. C.P., Godbolt, 246.
My earliest cases come from the Queen’s Bench. In Wiggen v. Arscot (1588)\(^4\) a Prohibition was sought in a tithe suit on the ground that the parson suing in the ecclesiastical court was deprived by virtue of the statute of 13 Eliz., c. 12. That act provided that parsons who failed to read certain of the Thirty-Nine Articles publicly in church were \textit{ipsa facto} deprived of their benefices -- i.e., without ecclesiastical proceedings leading to a sentence of deprivation. The surmise here alleged factually that the ecclesiastical plaintiff had failed to read the articles. Need this surmise be proved? The report gives only the opinion of Justice Clench. He thought that the surmise probably stated a good legal cause for Prohibition, “yet because great inconvenience may arise on the admitting of it, the Court hath taken order that no prohibition shall be granted on such a surmise, without great probability of the truth of the surmise.” Nevertheless, Clench continued, the surmise did not need to be proved under 2/3 Edw. 6, for the persuasive reason that the cause of Prohibition created by 13 Eliz. could not have been within the contemplation of 2/3 Edw. 6. It would be hard to take 2/3 Edw. 6 to mean “all tithe-Prohibition cases, whether heretofore known or later created or recognized,” when the act specifically speaks of “Prohibitions [which] before this time have been used to be granted.” It does not appear how the factual probability of surmises outside 2/3 Edw. 6 should be ascertained, as Clench thought it should be where abuse was easy -- perhaps by examination of the party.

In Woodward and Bugg’s Case, from the same term\(^5\) a bargain was surmised, whereby the parson had agreed to discharge a certain parishioner’s tithes for the rest of that parishioner’s life in consideration of L5 paid. The Court held, without reported argument, that his surmise did not have to be proved. The decision here seems less justified than the opinion in the preceding case, but the question is not clearcut. 2/3 Edw. 6 \textit{mentions} (that is as much as can be said) one sort of tithe discharged by agreement, to which sect. xiv might be taken to refer back: the “composition-real” -- i.e., an agreement for the perpetual discharge of land from tithes for some consideration, concluded between parson and parishioner with the consent of the bishop and the patron of the living. The act does

\(^4\) T. 30 Eliz. Q.B. 2 Leonard, 212.  
\(^5\) T. 30 Eliz. Q.B. 2 Leonard, 29.
not specifically mention other sorts of discharge agreements. Whether to include them depends on how freely one is willing to take the statute in order to carry out its purpose. Apart from that, the Court in Bugg v. Woodward thought the surmise legally insufficient (a debatable point). It also thought -- even granting that Prohibition lay -- that the writ should not be issued unless the plaintiff showed the Court a written deed comprising the agreement (on the ground, quite independent of 2/3 Edw. 6, that where a deed is necessary to make a transaction effective it must be shown in order to obtain a Prohibition based on that transaction). As the case unfolded, the Court first denied a Consultation based on 2/3 Edw. 6, then later granted one on the two other grounds, after debating both of them. One might wonder whether the Court would so readily have excluded surmised bargains from 2/3 Edw. 6 if it had not been inclined against the plaintiff anyhow.

In Goodiar (or Goodyear) v. Master and Fellows of the College of Manchester (1601), the surmise said that the Master and Fellows had leased the tithes they were suing for and that the period of the lease was unexpired. Like bargains other than compositions-real, leases of tithes are not specifically mentioned in 2/3 Edw. 6. The two judges present (Gawdy and Fenner) nevertheless thought the language of the statute general enough to include leases. But when they asked the clerks about the Court’s usage they were told that proof had been required only in modus cases. The Justices decided to follow that usage. The general rule of confining the act to modi seems doubtful, since it refers to compositions real and, at least arguably, to several other non-modus situations which

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6 Requiring a deed to be proffered would not necessarily remove the need to bring in witnesses if 23 Edw. 6 were construed to require it, since the witnesses could be used to authenticate the deed. Practically, there would not be much purpose in such extra proof in mere preliminary proceedings. A deed might well be required for a composition real too, in which case the same practical point can be made, despite the mention of compositions-real in the statute. Same point also for leases -- as in the case next following. The demand for a deed in Bugg v. Woodward, however, was based on the fact that the agreement was for life. If it had been a valid ground for Prohibition in itself, an oral agreement would concededly have been sufficient for a lesser time.

7 H. 43 Eliz. Q.B. Add. 25,203, f.296; Add. 25,202, f.24b.

8 “Although the words of the statute are general, yet since it has never been put in ure in any such cases, it seems good to follow the common experience, and the intent of the general words in the statute will be thus expounded.” (Add. 25,203) Add.25,202 has “…because it has not been used in other cases, yet the words of the statute purport the contrary.”
Statutory Rules Governing Prohibition Procedure

we shall encounter below, but the absence of special mention of leases in a sense justifies the judges’ exposition.

In Tanner v. Small (1608), the King’s Bench held that a suggested bargain for discharge of tithes need not be proved. The “experience” of the Court was again invoked. That is all the brief report reveals. The rule excluding bargains was also indirectly upheld in Cobb v. Hunt (below), and another unreported case was later cited to the same effect.

The Common Pleas meanwhile showed signs of taking 2/3 Edw. 6 less narrowly. (Divergence between the two principle courts was not uncommon.) In a Common Pleas case of 1601, a Prohibition was sought on the ground that the parties in a tithe suit had agreed to go to arbitration. The arbitrators had allegedly made an award, but the plaintiff in the ecclesiastical suit was nevertheless prosecuting. The Court held that these allegations must be proved in six months, as provided by the statute. Justice Warburton said explicitly that all matters of tithes, and only matters of tithes, are within the act. The holding is strong, because the statute says nothing specific about arbitration. It would seem strange to require proof of an agreement to arbitrate and the award thereon, while not requiring proof of a bargain concerning the tithes themselves.

In a second Common Pleas case, the ecclesiastical suit was for tithes of wood. Wood was generally subject to tithes -- i.e., 1/10th of what a man cut should be set aside for the clergyman. But by virtue of the statute of 45 Edw. 3, c. 3, timber trees over twenty years old (i.e., “quality” lumber) were exempt from tithes. In our case, the defendant to the tithe suit sought a Prohibition on the ground that the wood in question was timber of the exempt sort. The Court held that he was required to prove the factual truth of this claim and repeated the rule that all tithe cases come under the statute. The Court’s approach here was sensibly general. Nicer construction of the statute might have generated a special problem about wood tithes. As we have seen, sect. xiv speaks of matters “before rehearsed.” Before sect. xiv, nothing specific is said about timber trees,

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9 M. 5 Jac. K.B. Yelverton, 102; Add. 25,205, f.57.
10 Sivall’s Case. 5 Jac. Cited by counsel in Stroud v. Hoskins, below.
11 P. 43 Eliz. C.P. Lansd. 1058, f.10.
12 P. 44 Eliz. C.P. Lansd. 1058. f.41.
The Writ of Prohibition: 
Jurisdiction in Early Modern English Law

though statutory exemptions from tithes are mentioned in general terms. Later (sect. xv), 45 Edw. 3 is specifically reaffirmed.

A brief later note, labelled King’s Bench (the litigative circumstances are not reported), gives the opposite rule on timber trees -- i.e., that suggestions invoking 45 Edw. 3 do not have to be proved -- plus a similarly restrictive rule for another type of case on wood tithes. Wood cut only for use as fuel in a parishioner’s house was not tithable. The report says that suggestions that the wood sued for was used only for that purpose need not be proved. Whereas 2/3 Edw. 6 does in a manner mention 45 Edw. 3, it says nothing about wood used for fuel. Whether the divergence between King’s Bench and Common Pleas carried over to surmised bargains is uncertain for want of significant cases from the Common Pleas. There is a hint that it may have been in one Elizabethan report. In general, it seems clear that the two courts understood the statute somewhat differently.

In Reynolls v. Hayes (1615), however, the King’s Bench moved away from its declared habit of requiring proof only in modus cases. A Prohibition was sought on the surmise that the tithe dispute had been put to arbitration. Chief Justice Coke, with Justices Croke and Dodderidge concurring, held that this suggestion had to be proved within six months, like a suggested modus. By dictum, Coke also extended the proof requirement to suggestions of exemption from tithes by virtue of the Statute of Monasteries. It may be significant that Coke had previously headed

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13 M. 17 Jac. K.B. Harg. 30, f.56b.
14 M. 44/45 C.P. Lansd. 1058, f.50b: A briefly reported per Curiam opinion that a surmise of discharge by reason of a composition must be proved. If “composition” means “composition-real,” the likelihood of conflict with the King’s Bench is less, at any rate, than if the word is used loosely from some other sort of agreement. A much later note (Johnson’s Case. H. 4 Car. C.P. Hetley, 146; anonymously reported by Littleton, 297, under T. 5 Car.) says that a surmise of a “personal agreement” between parson and parishioner does not have to be proved. Quaere whether “personal agreement” takes in everything short of a composition real or lease.
15 T. 12 Jac. K.B. 1 Rolle, 55.
16 The best evidence supports the treatment of Reynolls v. Hayes in the text, but there is a complication. In Stroud v. Hoskins (below), a Heydon v. Kenold is cited, from M. 12 Jac., wherein the decision was allegedly that a surmise of arbitrament does not have to be proved. The names and dates are close enough to suggest that the citation goes to the same case. Rolle’s clear report is more likely to be right than the partisan citation. Further circumstances, reported by Rolle, may explain the confusion: In addition to the question about the proof requirement, there was debate on whether Prohibition would lie at all. Initially, the Justices disagreed about
the Common Pleas, where 2/3 Edw. 6 had been taken in a more reason-
able, and more pro-ecclesiastical, sense. We shall see that there are cases
besides this one in which Coke by no means appears as the friend of easy
Prohibitions.

In Congley v. Hall (1619 -- after Coke’s dismissal from the Bench),\textsuperscript{17}
a case on the Statute of Monasteries actually arose, and Coke’s dictum
was judicially affirmed. Monastic land which for any of several reasons
was exempt from tithes at the time the monasteries were dissolved contin-
ued exempt in lay hands by virtue of a provision of the Statute of Monas-
teries. In Congley v. Hall, it was contended that suggestions of discharge
derived through a monastery did not lend themselves to proof by witness
of the sort contemplated by 2/3 Edw. 6. The contention amounted to say-
ing that witnesses could not be expected to know about conditions at the
time of the dissolution and before as they know about the common prac-
tice of the community in \textit{modus} cases. The Court replied that there must
nevertheless be “probable” proof of the suggestion, though it need not be
“precise.” In other words, the witnesses could swear that the land was lo-
ically reputed to be exempt, and witnesses must be found to swear at least
that to satisfy 2/3 Edw. 6. Justice Dodderidge said in Congley v. Hall that
there were several King’s Bench precedents to support the decision.
(“Precedents” commonly meant “practice Precedents,” not “decided
cases.”) Here, Dodderidge might mean that proof had in fact been taken in
monastic-land cases, not that Consultations had been granted for failure to
take proof. Thus his remark is compatible with the absence -- so far as I
have found, save for the cases just below -- of prior decisions in point.)
There is no particular direct warrant in 2/3 Edw. 6 for including monastic-
land cases -- only a general mention of statutory exemptions and “privi-
leges,” plus the act’s policy of making Prohibitions a little harder to get.

\textsuperscript{17} M. 17 Jac. K.B. 2 Rolle, 125; also anonymously by Harg. 30, f.56b.
With respect to the precision required in proving suggestions that former monastic land was discharged, Congley v. Hall follows an earlier case, Stransham v. Cullington.\textsuperscript{18} There, proof of the surmise was offered. There was no argument as to whether it need have been, but a Consultation was granted on the ground that the proof was inadequate. That would seem to imply that proof was necessary, though that is inconsistent with the Court’s reiterated rule that only \textit{modi} required proof. The proof was held inadequate because the witnesses only gave their opinion based on inference. The Court took care to say, however, that hearsay would be satisfactory. The latter point is confirmed by another \textit{per Curiam} opinion:\textsuperscript{19} It is enough for the witnesses to speak “on the report of others,” “otherwise in twenty years there will be no Prohibitions, for no one can speak of the time before the statute of 32 [Hen. 8] of his own knowledge.”

In Stroud v. Hoskins, a major Caroline case in the King’s Bench (discussed below for its principal point -- see citations there), one issue concerned the extent of the proof requirement in still another context. Sect. v of 2/3 Edw. 6 c. 13, provided that wasteland converted to profitable agricultural uses should be exempt from tithes for seven years: I.e.: Land which had produced no crops and so paid no tithes should continue tithe-free for seven years after improvement, then pay regular tithes in kind. One issue in Stroud v. Hoskins was whether surmises taking advantage of sect. v needed to be proved under sect. xiv -- i.e., whether proof was required of the factual statement that the land in question had been reclaimed less than seven years ago. On the one hand, 2/3 Edw. 6 does obviously mention this sort of case, which is perhaps a reason for saying it is within the contemplation of sect. xiv. On the other hand, sect. xiv speaks of “Prohibitions [which] before this time [italics mine] have been used to be granted.” So does sect. xiv apply to causes of Prohibition implicitly created by the act itself? In Stroud v. Hoskins, the Court unanimously resolved that surmises that land had been recently reclaimed must be proved. The decision accords with good construction and the weight of 17th century opinion in the King’s Bench. According to one report

\begin{itemize}
\item[18] P. 33 Eliz. Q.B. Croke Eliz., 228.
\item[19] P. 33 Eliz. Q.B. Lansd. 1073, f.129b.
\end{itemize}
(Croke), the Court announced its decision in general terms: The suggestion must be proved “because it is a mere matter of fact; and the suggestion ought to be proved by the intention of the statute, as well as a prescription de modo decimandi, or a discharge of tithes, or any other such suggestion.” (Italics in the English mine.) Because the arguments of counsel in Stroud v. Hoskins are fully reported in a MS., one can see how confused the scope of the proof requirement was as late as 1630. Though the decision was perhaps predictable in view of the line of previous cases, that history (as was often true when reporting was still informal) was not accurately available, and the old King’s Bench theory that only modi (with an exception for monastic-land discharges) need be proved could still be contended for. The decision in Stroud v. Hoskins was a significant contribution toward clearing up the confusion.

2. Meaning of “six months”

A few cases on 2/3 Edw. 6 turn on the exact meaning of “six months.” Both principal courts resolved this question liberally -- i.e., in favor of upholding Prohibitions. We may simply note them.

(1) M. 41/42 Eliz. Q.B. Moore, 573: “Six months” for purposes of the statute means “six months of term-time” -- i.e., vacations not counted. (Distinctly liberal, especially in view of the practice of offering proof before Justices on circuit, for which see below.)

(2) Pottinger v. Johnson. P. 43 Eliz. Q.B. Add. 25,203, f.324: Proof before a Justice in the country during vacation is good though it is not recorded in the King’s Bench until the following term, after six months have expired. Add. 25,202, f.25b has a note with the same date which may come from the same case: Surmises are usually proved before Justices in the country -- i.e., presumably, Westminster Hall Justices on circuit, not Justices of the Peace -- and such proof is good.

(3) Copley v. Collins. M. 14 Jac., probably C.P. Hobart, 179: “Six months” means “six months by the ordinary calendar,” not “six twenty-eight-day months.”
(4) Skinner’s Case. T. 16 Jac. C.P. Noy, 30; Harl. 5149, f. 178b: Proof actually given within six months is good although not entered of record until later.

(5) H. 2 Car. C.P. Littleton, 19; Harl. 5148, f. 113b: Proof was offered on the last day of “six months” calculated as twenty-eight-day months. The judge refused to take the proof because that day was a Sunday, so that it was not actually taken until the next day.

_Held:_ The proof is still good, because the statute means calendar-months or a half-year, not twenty-eight-day months. The Court also implied that if the last day of a correctly computed period had been Sunday proof taken on Monday would do.

3. The standard of proof under 2/3 Edw. 6; discrepancies between surmise and proof; competence of witnesses

_Summary:_ In general, neither principal court leaned over backwards to insist that proofs strictly sustain the surmises they purported to prove. There was no disposition in this area to strike down Prohibitions for the ostensible sake of technical or logical precision. However, the legal circumstances of the cases did not always permit indulgent treatment of imprecise proof. The courts showed no disposition to override legal reasoning in such cases, or to be satisfied with extremely nominal fulfillment of the statutory proof requirement.

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Several cases arose on the standard of proof required by 2/3 Edw. 6 and on the effect of discrepancies between what plaintiff-in-Prohibition surmised and what his witnesses testified to. These cases are of some interest and variety. The degree of precision to require in proofs, as to which the words of the statute provided no guidance, gave the courts trouble. I shall take the Common Pleas cases first.
In Woode v. Savile (1587), a modus was surmised: to pay 10/ in lieu of all tithes to the parish clerk, who then pays the money over to the parson. The witnesses testified that the 10/ was customarily paid to the clerk, but they did not say that he paid it over to the parson. Serjeant Walmesley argued that the proof was insufficient, and the Court agreed with him. In this case, as was argued, there was more than a nominal discrepancy between surmise and proof. On several occasions, the courts were liberal toward nominal discrepancies. Here, the trouble was fundamental. For a surmise to pay 10/ to the parish clerk in lieu of tithes would not by itself state a valid modus. The reason is that every good modus must be a considerate exchange between parson and parishioner. It must appear that the parson has relinquished his tithes in exchange for something he could presumably have considered a material benefit to himself. To pay money to the clerk simpliciter would not (as was argued) benefit the parson, since the parson had no legal duty to maintain that official out of his pocket, and there was no pretense here that he had such a duty by custom. For all that appeared from the proof, the money was paid to the clerk simpliciter.

The reports of Baker v. Hulett (1595) vary slightly from each other, so that precise reconstruction of the case presents difficulties. The following statement of the case, based on a combination of the two reports, seems probable (for present purposes it does not really matter whether it is exact): A parishioner who was sued for wood tithes by the parson surmised a modus, viz., to pay 2d. per acre of woods to the vicar in lieu of tithes. (‘Impropriate’ parishes had both a parson, or rector, and a vicar, tithes being divided between them according to one arrangement or another.) In other words, the surmise sought a Prohibition on two redun-
The Writ of Prohibition:
Jurisdiction in Early Modern English Law

dant grounds: (a) that the tithes did not belong to the parson and (b) that a
commutation was in any event customary. The parishioner’s witnesses
tested that money had always been paid to the vicar instead of wood
tithes in kind, but they did not specify any certain sum of money. They
also testified that the parishioner had an agreement with the vicar to pay
the 2d. specified in the surmise. Counsel for the parson argued that the
proof was insufficient to satisfy 2/3 Edw. 6 for two reasons: (a) If a modus
for a certain sum is surmised, it cannot be considered proved when
there is no evidence that that sum was alleged with even approximate cor-
rectness. (b) Seeing that the surmise rested on a modus rather than an
agreement, proof of the agreement for the exact sum alleged cannot be
taken as circumstantial evidence of the surmise’s truth. The modus might
in fact be for 6d., whereas the vicar might, for some separate considera-
tion, have agreed to take 2d. The Court, however -- perhaps wisely in
view of the complicated problem -- simply side-stepped the issue of the
proof’s sufficiency, holding that the suggestion that the vicar rather than
the parson was entitled justified the Prohibition by itself. There was fur-
ther debate (irrelevant as far as 2/3 Edw. 6 is concerned) as to whether the
claim that the vicar was entitled was properly advanced by the surmise.

In another early case, the Common Pleas made a liberal exception
from the words of the statute. Plaintiff-in-Prohibition in this case did not
prove his suggestion by witnesses at all, though the statute in terms re-
quires that mode of proof. Instead, he produced two verdicts from pre-
vious cases by which the matter of his surmise was shown to be true. The
Court held that the substitute proof was sufficient.

Liberality appears again in a case of 1618. It was surmised that the
inhabitants of a village had customarily paid money in satisfaction of
tithes. The witnesses proved the modus only for plaintiff-in-Prohibition
himself. I.e.: The modus was proved to be incorrectly described as run-
ing throughout the entire village, but it was proved true that occupiers of
the particular land held by plaintiff-in-Prohibition had always paid money
instead of tithes. The Court ruled that the surmise was adequately proved
despite the discrepancy. It was also held that 2/3 Edw. 6 is satisfied if the

22 Not dated. Probably 36 or 37 Eliz. C.P. Add. 25,211, f.69.
23 P. 16 Jac. C.P. Harl. 5149, f.161.
Statutory Rules Governing Prohibition Procedure

witnesses confine themselves to saying that they have heard that the matter in the surmise is true, or that it is “in the common voice.”

Somewhat greater strictness was shown in two other cases. In Hobdale’s Case (1619), a *modus* was surmised to be customary in the parish of D. in the County of Warwick. The witnesses proved the *modus*, but it transpired from their testimony that D. was in the County of Worcester. Plaintiff-in-Prohibition asked leave to amend his surmise, but he was turned down and the other party told to proceed in the ecclesiastical court. This looks like a rather hard ruling, since the plaintiff was punished for what was probably an attorney’s or clerk’s error. It may be significant, however, that the brief report does not say that a Consultation was granted -- only that the defendant was told to proceed in the Church court. In the absence of a Consultation (which would bar another Prohibition in the same suit), the plaintiff could probably simply start over with a new, correct surmise. The judges may have had that in mind. But they in any event refused to consider the *modus* sufficiently established in the face of the difference between the surmise and the proof.

Goddard (Toddard or Stiddar) v. Tiler (or Tilet), 1628, is more material. A parishioner was sued for tithes of milk and calves. He surmised a *modus*, viz. that all inhabitants of the parish paid 4d. per cow and 2d. per calf in lieu of those tithes. His witnesses affirmed that the tithes had never been paid in kind, but said that some inhabitants paid 6d., some 7d., etc. The Court granted a Consultation on the ground that nothing like a *modus* running throughout the parish, as alleged, emerged from this proof. The judges took care, however, to prevent their decision from being overinterpreted. If a 20/ *modus* is alleged, they said, and a 40/ *modus* proved, that is good enough. The trouble in this case was the “mere uncertainty” of the proof. Later in the term, an attempt was made to reopen the case by showing that plaintiff-in-Prohibition had later produced some witnesses who affirmed his surmise in its terms. However, this second round of proof had not come within the six-month limit. The Court ruled that one who produces insufficient proof may still prevail by furnishing new evidence (even, presumably, though it is contradictory) within the

24 M.16 Jac. C.P. Harl. 5149, f.141.
25 T. 4 Car. C.P. Littleton, 151 and 155; Hetley, 100.
six months, but not after that period has expired. Again the judges offset their award of a Consultation in this case with permissive language, saying that “slight” proof, “as he thinketh or believeth,” is good enough.

My first Queen’s Bench case in point is from 1593 a modus was claimed to pay 10/ for wood tithes from a certain park. The witnesses proved that the party paid that sum for the wood tithes of the park and two other places as well. The case was adjourned, but the Court is reported to have thought the proof too different from the surmise to be good, as Coke urged from the Bar. There was another strong point against plaintiff-in-Prohibition, however.

In Austen v. Pigot (1600), Coke was unsuccessful in persuading the Court to insist on strict proof. Tithes from the demesnes of a manor were sued for in the ecclesiastical court. The surmise claimed that in lieu of tithes the parson customarily had a 100-acre close in the manor, consisting of 20 acres of pasture and 80 acres of woods. The witnesses proved that the parson had customarily had the profits of the pasture, but the surmise was not proved as to the woods. The Court thought this proof sufficient. Chief Justice Popham laid down a generally liberal policy: “...we ought not to be too precise in accepting proof, but if it is such that it may reasonably appear that the Court Christian has no cause to hold plea of tithes, it is sufficient.” Lest liberality be over-interpreted, however, Popham warned that it will not do for witnesses to prove that a parson is commonly esteemed to hold land in lieu of tithes, unless they also prove that tithes have never been paid. Popham relied strongly on a Cotton’s Case (not independently reported) as exactly in point: Cotton sued for tithes. The parishioner surmised that the parson had always enjoyed a

27 H. 42 Eliz. Q.B. Croke Eliz., 736; Moore, 911; Add. 25,203, f. 159b. There is one conflict of possible importance among the reports. Croke says 20 acres of pasture and 20 of woods, and Moore says 20 of pasture and 10 of woods. I follow the MS. (20 pasture/80 woods) because Coke in his argument for the defendant from the Bar attaches some importance to the fact that the surmise was unproved for the greater part, viz. the woods. Coke and Moore give the opinion as the Court’s, while the MS. represents it as Popham’s without mention of the other judges. Coke and the MS. agree that the case ended by the parties’ agreeing to go on to formal pleading and trial. I.e., the defendant waived his objections to the preliminary proof, probably because he saw that the Court was against him. Quotation in the text and Cotton’s Case are from the MS.
certain close in the parish in satisfaction of tithes. The witnesses proved that “it was commonly taken in the reputation of the country” that the parson had the land in place of tithes and that no tithes had ever been paid. The proof was held good.

In Nowell’s Case (1600), plaintiff-in-Prohibition apparently suggested a *modus* of 60 years’ standing. His witnesses said that 60 years ago and for 30 years thereafter the suggested *modus* was in operation, but that for the last 30 years it had been discontinued, the parishioner instead compounding with the parson for the tithes. At least Justice Fenner thought this proof sufficient. In view of the theory of prescription, that is a reasonable conclusion. Usage of 60 years or any other determinate period did not make a good *modus*, for immemorialness was required. On the other hand, a valid *modus* was not destroyed because it had not been taken advantage of for 30 years or any other certain period. Here, the plaintiff need not have said anything about 60 years. If he had simply said that there was an immemorial *modus*, the proof would presumably have been clearly satisfactory. He was, however, indulged, in that he was not held to prove what he could be taken to have offered to prove.

In Beale v. Webb (1601) a *modus* to pay 4/ was surmised. The witnesses proved a *modus* to pay 4/6d. The Court held this sufficient proof, because it showed that tithes in kind were not due. Counsel cited an earlier case *contra* (Bird v. Collingworth, M. 34/35 Eliz.). That case apparently came from the Common Pleas, for Chief Justice Popham dismissed it with the remark that the Common Pleas judges were now of a different opinion.

In Dett v. Webb (1602), the majority of the King’s Bench continued to make light of minor discrepancies between surmise and proof, but Popham, who was cautiously liberal in Austen v. Pigot, dissented, emphasizing the limits of liberalism. The ecclesiastical suit in this case was for

28 M. 42/43 Eliz. Q.B. Add. 25,203, f.276b (the better report, giving only Fenner’s opinion); Add. 25,202, f. 19 (states facts less completely, but appears to give the Court’s decision).
tithes of two farms. As to one, the parishioner surmised a *modus* to pay 4/6d.; as to the other, a *modus* to pay 2/6d. The witnesses said that the two farms had always been occupied by the same person, and that the occupier had always paid 7/ (=4/6d.+2/6d.) for the two farms. The witnesses, that is to say, conceived that the money was a lump sum paid in consideration of both farms. In some ways, the discrepancy between surmise and proof here seems more nominal than in any of the cases above. So three of the judges thought, for they held “strongly” that the proof was good and spelled out their thinking: “…the intent of the statute of 2 Edw. 6 was to oust delays which occurred by suing of Prohibitions without cause…so that Parliament intended that the plaintiff should make it appear to the Court that the Court Christian should not have jurisdiction, and therefore they think that though the proof does not accord as fully with the suggestion as an evidence on an issue at common law must accord with it, if it varies only in such manner that the Court can see that the Court Christian ought not to hold plea thereof, that is sufficient….” The three judges went on to argue that where, as here, the witnesses are strangers to the relationship between the parishioner and parson, they can hardly be expected to know the particulars of why the money was paid, especially when the two farms were in the same hands.

Chief Justice Popham, on the other hand, expressed his dissent as follows: “…there is a difference between a proof that concurs with the suggestion but is not precise and direct, for then it will be well-allowed on this statute, and a proof that is variant from the suggestion, for such proof is no proof, but rather disproves the suggestion, and so will not be allowed. And therefore if the witnesses do not depose directly according to the surmise, but say that the common voice or opinion of the country has been such, or if they prove it by any probable circumstances, the Court should allow it for sufficient proof, for it would be impossible when a *modus decimandi* or discharge of tithes is alleged in an abbot before the dissolution to produce witnesses who could depose of it of their knowledge, and so it is necessary to admit proof by circumstances. But in our case, the proof varies from the surmise. And if it had been given in evidence on an issue taken on such prescriptions, it would be necessary to find against him who pleaded them.” One may doubt whether Popham’s distinction between an “imprecise” proof and a “variant” one is fruitful. His scruples about slackening the standards of art and relaxing the demands of a statute one may admire.
The Chief Justice’s reluctance to take the statute too freely was again displayed in Webb v. Petts.\textsuperscript{31} A \textit{modus} of 2/6d. was surmised. The witnesses, speaking from hearsay, said that the sum paid was 3/. The Court agreed that the witnesses’ reliance on hearsay was no ground for rejecting the proof. But Popham considered that the difference between 2/6d. and 3/ made the proof insufficient. Justices Fenner and Yelverton held the contrary, for the usual reason: it was sufficiently clear that tithes in kind were not due.

In 1605,\textsuperscript{32} the plaintiff in a Prohibition surmised a \textit{modus} to pay 2d. for the combined tithes of his barren cattle (cattle not in milk-production) and wool. The witnesses said that he had customarily paid 2d. for the cattle, but about the wool they said nothing. The Court upheld the Prohibition \textit{quoad} the cattle but sent the case back to the ecclesiastical court \textit{quoad} the wool. As for the cattle, the decision is permissive in the same way as several others above: The plaintiff failed to prove his suggestion literally, since he claimed that the 2d. related to both products as a lump, but he did prove that no tithes in kind should be paid for the cattle.

In the later Jacobean Boocher v. Rogers,\textsuperscript{33} plaintiff-in-Prohibition apparently proved the negative part of his surmise (that he and his predecessors as lords of a manor had never paid tithes to the parson, but taken the tithes themselves). He failed to prove the “consideration” without which such a privilege in a layman could not be lawful (that he maintained a chapel in recompense). (Besides the principal church, many parishes contained subsidiary “chapels of ease.” Tithes customarily contributed to such chapels could count as consideration for non-payment of regular parish tithes.) The Court held that the proof was insufficient, for the strong reason that to prove a \textit{modus} without consideration is no better than failing to prove a \textit{modus} at all.

\textsuperscript{31} Noy, 44. Undated, but after February, 1602, when Sir Christopher Yelverton joined the Court. It is clear from the names that the parties were the same as in the preceding suit, but this one would appear to be different.

\textsuperscript{32} M. 2 Jac. K.B. Lansd. 1111, f.33. Yelverton, 55, same term, seems to be the same case, except that report says wool and lambs instead of wool and barren cattle and gives the result (same as in MS.) as the opinion of Justices Fenner, Yelverton, and Williams, the others being absent.

\textsuperscript{33} P. 12 Jac. K.B. 1 Rolle, 2.
The Writ of Prohibition:
Jurisdiction in Early Modern English Law

In my last case in the present group,\textsuperscript{34} the King’s Bench was perhaps more permissive than in any of the earlier ones. Having alleged a \textit{modus} for hay, the plaintiff produced his two witnesses. One said that no hay tithes had been paid from the land in question for 40 years; the other agreed except that he said 50 years. Both said that they had heard by others’ relation that something was paid in lieu of tithes, but they did not know how much. Three objections were made to this proof (a) The witnesses’ reliance on hearsay was urged as a defect -- “for many false things are related.” (b) If witnesses said, even of their own knowledge, that a sum was paid instead of tithes, but had no idea whether the sum surmised was the true sum, the surmise could not be said to be proved. (c) The only thing that was proved was non-payment of tithes in kind over a fairly long period. Proving that by itself obviously does not prove that a \textit{modus} -- i.e., a considerate exchange -- exists. Proofs that vary from the surmise in, e.g., amounts of money at least go to show that there is some sort of \textit{modus}. Here there was nothing to show that.

The Court nevertheless upheld the proof. It was perhaps justified in doing so, if the hearsay is no objection,\textsuperscript{35} and proof that an unspecified sum was customarily paid establishes sufficiently that the parson had no claim to tithes in kind. The witnesses’ certainty that tithes in kind had not been paid perhaps supports an inference that they were telling the truth so far as they knew it and that their hearsay was reliable. The language the Court used to explain its resolution was rather looser than any that had been used before. Proof of surmises under the statute, the judges explained, need only be “probable.” Standards of proof applicable to verdicts are irrelevant. It is enough if “the Court can be induced and persuaded in their conscience that the suggestion is true, and [they] have good credit of the suit, for the mischief [was] that parsons were kept from their tithes and put to great vexation, and therefore proof is requisite....But when one traverses [i.e., formally denies in pleading] the suggestion, then there must be strict and exact proof.’’

\textsuperscript{34} v. Paget. T. 22 Jac. K.B. Lansd. 1063, f.9b; 2 Rolle, 434 (dated T. 21 Jac.). Rolle probably relates to an earlier hearing of the case. It agrees with the MS. but is briefer and gives only the opinions of Chief Justice Ley and Justice Dodderidge.

\textsuperscript{35} On this point, an undated note -- Noy, 28 -- confirms the other evidence above that proof by hearsay was in itself regarded as sufficient.
“Conscience” is vague. In the interest of fulfilling the statute’s intent and minimizing litigation, the courts might perhaps have insisted on somewhat stricter standards of proof than they generally did. But those very interests point to the need for balancing strictness and leniency. On the one hand, it might have been advisable to consider fairly closely whether the preliminary proof held out a reasonable prospect that plaintiff-in-Prohibition had evidence capable of prevailing at a trial -- instead of discriminating trial standards and preliminary-proof standards as sharply as the judges in the last case did. Why let the parties go to trial when in six months the plaintiff has apparently failed to muster evidence that would sustain his case if a jury accepted it? Of course a friendly and loosely controlled jury (one expects juries of tithe-payers to be friendly to tithe-payers) might do better by the plaintiff than his evidence warranted, but that is hardly a respectable prospect to contemplate. (However, as we shall see from cases below, verdicts that failed to confirm surmises exactly were sometimes indulged, as well as defective preliminary proof.) On the other hand, scrutinizing preliminary proof with excessive nicety would only breed litigation in the long run. There is no point in destroying a Prohibition on a technicality this year when the plaintiff in all probability has a winning case which, by making sure of his witnesses and avoiding slips, he could successfully prosecute next year. The courts -- most expressly Chief Justice Popham -- saw the need for balance, whether or not they succeeded in stating a satisfactory general rule. There is no sign that the controversy over Prohibitions and greater official solicitude for ecclesiastical interests in the 17th century produced any tightening of proof standards. Popham, at the end of the 16th century, showed most concern lest lax application of the statute go too far.

The one case on the personal competence of witnesses for the purposes of 2/3 Edw. 6 may be considered with the cases above, since it too tests the seriousness with which the proof requirement was enforced. In this case,36 a Consultation was sought because the witnesses, who had admittedly “proved” the suggestion, were attainted felons. After ascertaining that the witnesses were in fact felons, the Court granted the Consultation. Chief Justice Coke pointed out that attainted felons were ineligible for

jury service even though they were subsequently pardoned and said that he himself would not take the testimony of even a convicted recusant (because by statute convicted recusants were supposed to be excommunicated, and therefore should be treated as excommunicated -- hence ineligible -- whether or not they were in fact).

The Court showed no inclination to relax standards in order to uphold Prohibitions.37 (Notably, 2/3 Edw. 6 speaks of “honest and sufficient” witnesses.) It may be worth noting that in the two cases in which Coke was involved as a judge (this one and Boocher v. Rogers) the decisions went against plaintiff-in-Prohibition.

4. Double costs and damages

**Summary:** The very few cases suggest an inclination to avoid awarding penal damages where possible.

* * *

By 2/3 Edw. 6, when plaintiff-in-Prohibition failed to prove his surmise within six months the defendant was entitled to double costs and damages. (He would have incurred legal expenses in excepting to the plaintiff’s proof and whatever damage might ensue from being delayed in his ecclesiastical suit.) This provision of the statute seems pretty punitive, in view of the many problems as to when proof was required and when it was adequate. As a sanction against the vexatious Prohibitions that the makers of the statute were worried about, penal damages made sense. As the history of applying the statute worked out, that sanction could be stringent. A man might be reasonably advised that his suggestion required no proof, only to find himself liable for double damages

37 It may be noted in connection with this case that witnesses under 2/3 Edw. 6 were not subject to criminal punishment for perjury in the same way as most other sorts of witnesses. That is to say, they were not within the statute of 5 Eliz., c.9, which in effect created the regular criminal law of perjury for witnesses (as distinct from the ancient procedure of attaint for jurors and Conciliar power to punish perjury). Add. 25,202, f.36b (P. 44 Eliz. Q.B.), reports precisely such a holding: that witnesses for purposes of 2/3 Edw. 6 are outside 5 Eliz. (as witnesses in the ecclesiastical courts were by express provision of 5 Eliz.). An early report (2 Dyer, 242b) raises the question whether perjurers under 2/3 Edw. 6 could be punished in the Star Chamber. The judges appear to have thought not. Absence of liability for perjury would seem to be a reason for insisting on reputable witnesses and perhaps for scrutinizing what they said carefully.
when a court held the contrary. Or he might proceed in good faith and make an effort to produce proof, yet find his evidence rejected and himself exposed to the penalty because of some defect in the witnesses’ knowledge or carelessness in their way of speaking. It would not be surprising, therefore, if the courts were to prefer not to award penal damages in ambiguous circumstances. A few cases suggest such a preference.

One case\(^{38}\) tends the other way, in the sense that an opportunity to mitigate the rigor of the penal provision indirectly was not taken. In this case, defendant-in-Prohibition got his Consultation and an award of double costs for failure of proof (as of course he must when there was no ambiguity). He subsequently sued an action of Debt to recover the double costs. The question was whether he should have the additional costs (i.e., single or actual costs) incurred in the action of Debt. It was apparently argued by analogy with the practice surrounding certain other penal statutes that the additional costs should not be awarded. But the Court held the contrary, taking the straightforward position that costs are due to one who has been forced to sue for money he has coming to him by virtue of a judgment.

In Watlington (or Wakinson) v. Perry (or Pacy)\(^{39}\) a Caroline case, the plaintiff failed to prove his suggestion. The defendant, however, instead of seeking a Consultation for failure of proof, took formal issue on the truth of the suggestion. After the issue was found against him by a jury, the defendant tried to recover double costs under the statute. He was turned down, as justice surely required, having “surceast his time.”

In Cobb v. Hunt\(^ {40}\) an award of double costs led to a complicated problem. Being sued for tithes, a parishioner surmised a *modus* for part of the tithes and a bargain with the clergyman for the rest. The Prohibition was dismissed for failure to prove the surmise (total failure to produce any witnesses, it would appear). The defendant was then awarded 50/ costs

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38 Cockram v. Davy (or Davies). H. 22 Jac. K.B. Benloe, 143; Lansd. 1063, f.62 (the better report). The parties’ names and the date suggest the major case in the following sub-section (Note 4), but the reports do not overlap in content.
39 Noy, 81; Latch, 140. Neither report dates the case, but since it occurs in Latch it must be early Caroline. What Noy gives as a *per Curiam* decision, Latch gives as the opinion of Justices Crew, Jones, and Whitelocke.
40 H. 5 Jac. K.B. Yelverton, 119; Add. 25,205, f.54.
plus 50/ damages. The judgment to recover these sums was not properly given, however, owing to failure to enter judgment in the technically correct form. The parson then sued an action of Debt in the Common Pleas for the money and recovered. Our case is on a writ of error in the King’s Bench (the normal appellate procedure from a Common Pleas judgment). Two errors were alleged: (a) The technical fault in the original judgment. (b) The substance of that judgment. With respect to the second, Yelverton argued for reversal from the Bar, as follows: A surmise of both a *modus* and a bargain must be proved for the *modus* but not for the bargain. (Correct by the King’s Bench rule at the time of this case.) When it was not proved for either, the Court ought to have dismissed the Prohibition *quoad* the *modus*, but kept it in force *quoad* the bargain. Erroneously, it dismissed the Prohibition *in toto*. On this error was erected the further one of awarding costs and damages relating to the whole.

The Court accepted Yelverton’s argument on this substantive matter, as well as on the technicality, and reversed both the recovery in Debt and the judgment for costs behind it. Under the circumstances of this mishandled case, that seems the right decision. It is possible, however, that Yelverton’s argument (and the Court’s concurrence with it) went a step further -- viz. to maintain that even if the original decision on the substance *had* been correct (dismissal of the Prohibition for part only) no costs should have been awarded. If that was the argument, it seems rather easy on the parishioner.

In Reynolls v. Hayes (discussed above), the Consultation could have been granted either for failure of proof under 2/3 Edw. 6 or for substantive insufficiency. If it was granted for the first cause, defendant-in-Prohibition was entitled to double costs; if for the latter, only to actual costs. After initial disagreement, the Court was apparently persuaded by Chief Justice Coke that the substantive reasons for Consultation were good. Coke then said that those substantive reasons should be considered the cause of the Consultation, with the result that double costs were not due. Though the principle of preferring the substantive grounds in the event of conflict is probably good in itself, Coke may have been moved to insist on it by the sense that it would be unfair to punish the plaintiff with double costs in this particular case. For the holding that proof was necessary (for a surmise of arbitrament) was probably not predictable on the basis of prior King’s Bench practice. I.e.: The plaintiff, though legally in the
Statutory Rules Governing Prohibition Procedure

wrong and justly liable for single costs, may have been reasonably advised that no proof was required.

B.

50 Edw. 3, c. 4

1. Cases involving both 50 Edw. 3 and 2/3 Edw. 6

Summary: Two leading King’s Bench cases well-on in the 17th century decided conclusively that Consultations granted solely for failure of proof under 2/3 Edw. 6 will not bar further Prohibitions in exactly the same suit -- i.e., that such Consultations are outside 50 Edw. 3. That result was favorable to Prohibitions and against ecclesiastical interests. The judges may have been embarrassed at their inability to avoid it. Although cases before Cockeram v. Davies are not decisive, they hardly require the outcome arrived at.

* * *

A second frequently relevant statutory rule was much older than 2/3 Edw. 6. 50 Edw. 3, c. 4, (1376-77) provided “that when Consultation is once duly granted upon a Prohibition made to a judge of Holy Church, that the same judge may proceed in the cause by virtue of the same Consultation, notwithstanding any other Prohibition thereon delivered to him: Provided always, that the matter in the libel of the said cause is not engrossed, enlarged, or in other manner changed.” Though application of this ancient rule raised complex problems in 16th and 17th century cases, the general policy of the statute is evident enough, and plainly desirable: The act meant to restrict plaintiffs-in-Prohibition to one try in what amounted substantially to one case. A return bout after one failure was to be ruled out, and wearing the other party down by repeated litigation was to be discouraged.

Several cases on 50 Edw. 3 also involved 2/3 Edw. 6, for it sometimes happened that a Consultation issued because the surmise had not been proved within six months, after which the plaintiff sought another Prohibition on the same matter. We shall begin with cases of that sort. It was tempting to argue that 50 Edw. 3 only applied where the substance of the Prohibition had been determined, certainly not where the Consultation was granted by virtue of a statutory rule concerned only with preliminar-
ies and enacted long after 50 Edw. 3. In the long run, that argument was successful.

The only Elizabethan case I have found on this point is Hobbleton v. Prince in the Queen’s Bench.41 There, a Consultation was issued for failure to prove a modus in six months. The parishioner brought a new Prohibition against the same parson, for the same tithes of the same year of the same land. He claimed the same basic modus (to pay 1d. for tithes of fruit and garden produce). In one respect, however, he changed his claim. The first time, he had surmised a custom running through the whole village; the second time, he only surmised that the modus applied to his own messuage and garden. The Court held that this change made a new case and let the new Prohibition through. The alteration of the claim, rather than the mere fact that the Consultation was granted for failure of proof, was relied on, whence it might be inferred that Consultations based on 2/3 Edw. 6 will, as such, bar further Prohibitions.

In Cop (or Cox) v. Semer (or Semor),42 1607, when a modus was surmised it was objected that the plaintiff had made the identical suggestion four times before in respect of the same land and on all four occasions had failed to prove the surmise in six months. The Court, noting that the tithes now being sued for were of a different year, let the fifth Prohibition stand. This decision was surely inevitable, at least as interpretation of 50 Edw. 3. It is no doubt vexatious to come back year after year with the same surmise, but there is no reason to say that 50 Edw. 3 rules it out. The statute forbids more than one Prohibition on the same libel. A suit for hay tithes of Greencroft for 1600 and another suit for the same tithes for 1601 are in a sense about the same thing, but they cannot be said to have been started by the same libel. So the Court said in this case. It might be possible to hold the parishioner estopped to surmise the same modus in another year after having once done so unsuccessfully, but such a holding would not depend on 50 Edw. 3, and it would be hard to justify without a determination on the merits. The Court in Cop v. Semer did not, however, confine itself to the fact that there was a new libel. The judges also stressed that 50 Edw. 3 speaks of “duly” granted Consult-

41 Harl. 48 17, f.165b. K.B. Not dated, but from its place in the reports, probably from the 1590s.
42 M. 5 Jac. K. B. Yelverton, 102; Add. 25,205, f.57.
In Kirby v. Pigge (1617), a surmised modus was not proved. When the case was returned to the ecclesiastical court, sentence was given against the parishioner. He appealed the sentence within the ecclesiastical system (which had a several-layered appellate structure and permitted appeals automatically). Then he sought a new Prohibition. The Prohibition was denied by reason of 50 Edw. 3, the Court holding that a case on appeal is still the same case within the statute. In the light of other holdings (see below), this decision was correct. That is to say, if the Consultation had been granted on the merits, another Prohibition could not have been obtained after appeal. The fact that the Consultation here was only granted because of the proof requirement was not allowed to alter the general rule. The appeal, not the basis for the Consultation, seems to have been the point urged in Kirby v. Pigge. The brief reports give no sign that the intimation in Cop v. Semer -- that failure of proof is simply not within 50 Edw. 3 -- was revived. The decision rejects it by implication.

In Cockeram v. Davies (1625), the case was exactly the same: failure of proof, Consultation accordingly, ecclesiastical sentence against the parishioner, ecclesiastical appeal, application for a new Prohibition. This time, the Court went the other way, upholding the second Prohibition. A good MS. report enables us to follow the thinking of two judges, Dodderidge and Jones. Justice Dodderidge was vehement on the danger of letting appeals be an excuse for more Prohibitions than one in the same case. The plaintiff’s counsel relied heavily on the language of 50 Edw. 3 that forbids a second Prohibition to the same judge. An appellate judge, it was argued, is not the “same judge” as the recipient of the first Prohibition. In reply to this argument, Justice Dodderidge not only deplored excessive literalism (“Qui haeret in littera haeret in cortice,” he said), but also gave a reason why a different judge is miraculously the same judge.

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43 P. 14 Jac. K.B. Add. 25.211, f. 157b: Moore, 917, sub. nom Big’s Case.
44 H. 22 Jac. K. B. Lansd. 1063, f.86.
in ecclesiastical law. (An appeal in ecclesiastical law, unlike a writ of error at common law, suspended the prior sentence. I.e.: Until the appeal was decided, the parties remained in the same plight as if no sentence had yet been given. Therefore, the appeal was in no sense a different suit, but quasi another hearing of the suit at the original level. Therefore, though the appellate judge is a different man from the original judge, he is not a different judge.

Justice Jones does not seem to take to Dodderidge’s scholasticism. He prefers to make the ordinary distinction between the words of a statute and its meaning. He admits that the words taken literally do not extend to an appellate judge, but argues that the intent of the statute is to prevent vexation. That intent plainly could not be fulfilled if, after trial of the first Prohibition, the plaintiff could have another one merely by appealing. But then -- Jones continues -- suppose the first Prohibition fails for a technical fault, such as non-proof of the surmise within six months. Does 50 Edw. 3 intend to deprive him of another chance for such reasons? To this Jones says, “No.” His argument goes as follows: When a Prohibition is formally tried, and in consequence of the defendant’s winning a Consultation is awarded, then 50 Edw. 3 comes into force. But if a Prohibition is granted and then is not proved in six months, it is as if the Prohibition had never been granted at all. A Consultation awarded in those circumstances only gives notice of the Prohibition’s nullity ab initio, as opposed to undoing a Prohibition which on its face deserved to be granted. It is therefore not a “duly” granted Consultation within the statute. “This distinction,” Jones says, “he learned from Lord Popham when he was a practitioner.”

When he speaks again, Justice Dodderidge has lost none of his sense of the ill consequences of letting appellors escape the statute. He adds the consideration that the plaintiff is trying to prohibit his own suit, in the sense that he has taken the offensive in bringing the appeal and then turned on himself for his own advantage. (As will appear from cases below, however, self-prohibition was not generally considered objectionable.) On the other matter, Dodderidge is willing to think about Jones’s distinction (he says he “puit advise” of it).

According to the MS., the Court ended by granting the second Prohibition ”at this time,” ”since many Prohibitions were granted in similar
Statutory Rules Governing Prohibition Procedure

cases. This conclusion is not uncommon in Prohibition cases. It means that the Court was sufficiently persuaded that a Prohibition was appropriate, or just enough in doubt, to grant one, deferring final decision until after formal pleading or at least until there was a chance for further debate on a new motion for Consultation. But from other evidence it is clear that the Court finally decided conclusively that the second Prohibition should be granted.45

Our last case combining 2/3 Edw. 6 with 50 Edw. 3, Stroud v. Hoskins (1630-31),46 eventuated in unanimous confirmation, after elaborate argument from the bar, of Cockeram v. Davies -- i.e., that Consultations for failure of proof under 2/3 Edw. 6 are not within 50 Edw. 3. The decision was announced without argument on the Bench. At most, the Chief Justice, speaking for the Court, gave a cursory indication of the reasons. This is a surprising feature. Per Curiam opinions were common enough

45 In Bowrie v. Wallington (below), in Easter, 1 Car., it was said that a Prohibition was granted in Cockeram v. Davies “last term,” which would have been Hilary, 23 Jac., a year later than the MS. report of Cockeram v. Davies. The Prohibition was probably confirmed on advisement at that time. In Stroud v. Hoskins (just below) Cockeram v. Davies is said to have been so decided “on great deliberation.” The statement in the MS. that many Prohibitions had been granted in such cases probably refers to practice-precedents. i.e.: It does not mean that there were decided cases holding that Prohibitions ought to be granted in such circumstances, only that it had been done de facto without contest or discussion. The report is therefore compatible with the absence of reported cases before Cockeram v. Davies straightforwardly holding that failure of proof under 2/3 Edw. 6 is outside 50 Edw. 3 (for Cop v. Semer contains only a dictum to that effect).

46 Croke Car., 208; Jones, 231; Harg. 39, ff. 97, 119b, 130, and 137. The MS. gives the arguments of counsel in extenso, with only a few interlocutory remarks by the judges, whereas the printed reports give only the result. The MS. says expressly that there was no argument on the Bench. Jones confirms that by saying that the Chief Justice spoke for the Court. From Croke’s summary report of the result one would not know whether or not the judges spoke at large. There is one drastic conflict between the MS. and the printed reports: Viz. The MS. (at f. 137) gives the opposite result! --judgment for the defendant and a holding in general terms that there may not be a new Prohibition after Consultation. Since that goes directly against the printed reports, I think the MS. must be a misreport. The only possible reconciliation is that the Court announced a decision one way, then flatly changed its mind and delivered a new judgment (again, as Jones proves, without judicial argument). Such a strange course is all the more possible if the case had the political overtones I suggest in the text. The chronology may also make such an explanation possible. Croke and the MS. date the decision H.6 Car., but Jones dates it P.7 Car. If Jones is right, the Court could have gone for the defendant in Hilary and for the plaintiff the next Easter, Croke being inaccurate. In the text, I adopt the assumption that the MS. simply does not report the final result truly. If the alternative explanation were correct, it would add to the narrative interest, but would not affect the legal analysis. From the MS., it is clear that the case was first argued at the Bar in H.5 Car. and reargued on two separate occasions in T.6. Leisurely handling of an important case was common in the 17th century; excessive leisure might indicate judicial hope that a thorny case would be dropped or compromised.
in routine cases. In complex ones, where, as here, decision was delayed over several terms and counsel were permitted to develop lengthy arguments of notable importance, one expects judicial discussion. (The custom was for the puisne Justices to give their reasoned opinions in ascending order of seniority, followed by the Chief Justice.) Decision without judicial argument in a major case suggests political embarrassment or, at least, disinclination to commit the Bench too firmly to a decision the judges did not like but could not avoid. Both explanations are plausible in the case of Stroud v. Hoskins.

The decision went against the ecclesiastical interest at a time when the church had moved into its aggressive Laudian phase with strong backing from the government. The losing side was impressively represented by William Noy, who became Attorney General in 1631, very shortly after this case. It is at least possible that Noy and his colleague Calthrop (significantly, those two prominent lawyers argued on the defendant’s side against two representatives of the plaintiff, Jermin and Brown -- a sign of a "full-dress" case) were retained wholly or in part by the government to make as powerful a case as possible for their nominal client. In his argument, Noy made one of the very few references to the political controversy over Prohibitions to be found in the reported cases, presumably for the purpose of adding a little extra pressure to the reasons with which he had assailed the Court.47 Possibly the judges resented that, but possibly, too, they were afraid, or disinclined from their own sympathies, to spell out a decision opposed by the government. A per Curiam opinion is not, of course, as conclusive for the future as a decision supported by judicial argument.

47 “In 4 and P.5 Jac., when there was the great debate about Prohibitions, this very matter was complained of, and the answer given hereto was that the complainants should have shown in particular where the fault was and then it would be redressed.” By “this very matter, Noy presumably meant the general question of how strictly 50 Edw. 3 should be enforced. He can only point to a vague response to what must have been the complaint that it was not being enforced strictly enough. His intention must be to say that although the judges did not admit laxity, they were prepared to tighten up enforcement of the statute if specific instances of loose interpretation could be cited. Noy’s remark only functions as a general admonition and reminder to the Court.
Apart from politics, the judges in Stroud v. Hoskins may not have liked the result that reason and precedent drove them to. Plaintiffs-in-Prohibition who neglected or lacked proof should presumably not be overencouraged to seek new Prohibitions. To the end of minimizing litigation and enforcing 2/3 Edw. 6, “one chance in one tithe-year” might have been a good rule, even though 50 Edw. 3 could not be held to have enacted it. A lengthy and deliberate statement of the judges’ belief that no such rule existed would allow tithe-payers and their lawyers to be confident that one did not. We should remember that judicial precedents were neither so easily discoverable nor so authoritative in principle in the early 17th century as they later became. Judicial argument could both publicize a decision in the legal profession and add to its weight. (In the light of these observations, it is ironic that the judges in Stroud v. Hoskins may have felt very nearly “bound” by Cockeram v. Davies.)

Over against these possible explanations for the surprising absence of judicial argument, there is a quite different one: the judges’ desire to settle a troublesome problem in a way they could agree on in the upshot, without proliferating concurring opinions and hence confusion over the reasons for the decision. As will appear from the discussion of the issues, opinions supporting the decision in this case could easily vary in emphasis. The judges could conceivably have been in a state of antagonistic concurrence. 48

48 Lest I seem to make too much of the absence of judicial argument, let me cite one famous case in which a surprising failure to argue on the Bench clearly points to a combination of political timidity and a preference not to generalize. It can be proved from a full MS. report (Add. 25,203, ff. 543b, 558, 570, and 678b -- last entry giving the judgment-without-argument) that that is what happened in Darcy v. Allen (“The Case of Monopolies,” best known from Coke’s misleading report at 11 Coke, 84b). The essential question there was Queen Elizabeth’s prerogative to grant a monopoly to trade in playing cards. The case was elaborately argued over several terms. The Court finally decided against the monopolist (the well-known result). Although one judge said in so many words that a case of such importance should be argued on the Bench, judgment was in the event entered without public judicial discussion. The judges were presumably afraid to offend the sovereign (James I by the time the case came to decision) by talking about the limits of the prerogative. In addition, by keeping quiet they could leave it uncertain: (a) whether the monopoly was being held unlawful, or the case was being disposed of on other available grounds; (b) assuming that the monopoly was being held unlawful, whether it was unlawful only in respect of certain features peculiar to the particular patent in question. It should be noted that Darcy v. Allen was a genuinely hard case. The precedents almost defied sorting out into coherent generalizations about the Crown’s power to grant special privileges and regulate the body politic. Per Curiam judgments are at least a way to avoid saying what you
The Writ of Prohibition:
Jurisdiction in Early Modern English Law

In the aspects that concern us here, the case of Stroud v. Hoskins was as follows: It was surmised in a tithe suit that the land in question was exempt as recently reclaimed land under the statute of 2/3 Edw. 6. This surmise was not proved in six months, whereupon a Consultation was awarded. The plaintiff was now seeking a new Prohibition.

As we saw above, it was unsuccessfully urged that the reclaimed-waste surmise did not have to be proved. If that argument had prevailed there would perhaps have been no problem about 50 Edw. 3. I.e.: If the Consultation had been improperly granted (granted on the mistaken impression that the surmise needed to be proved), then a new Prohibition might seem appropriate. 50 Edw. 3 speaks of Consultations “dually” granted. If the Consultation had been erroneously granted, would it have been “dually” granted? Maybe not, but a strong argument contra was made by Noy. He argued in effect for taking “dually” in the narrowest sense -- as equivalent to “granted by a competent court in proper form,” not as equivalent to “correctly granted as a matter of law.” As things turned out, Noy would not have needed to press for so confined a sense of “dually,” for he and his colleague persuaded the Court that the Consultation had been correctly granted as a matter of law. How the case would have been decided if the issue on the proof requirement had been resolved the other way becomes an academic question. (Though not without interest. Having decided that a surmise of a given type did have to be proved, should the Court be free to reconsider the correctness of that decision on a new application for Prohibition after Consultation? The question would be most troubling if both principal courts were involved. Suppose the Common Pleas held that a surmise required proof and granted a Consultation for failure thereof.

cannot trust yourself to say without misleadingness. The effect of the tactic in Darcy v. Allen was probably to discourage monopolists from believing that they could enforce their privileges through the common law courts, without encouraging would-be competitors to believe that all monopolies could be easily broken, and without putting too severe a damper on the government’s enthusiasm for granting them.

Noy took pains to defend his interpretation of “dually” as accepted legal usage. E.g.: A man erroneously convicted is still spoken of as “dually” convicted. So with the related word “lawfully.” As Noy said, “There is a civil lawfulness and there is a natural lawfulness.” E.g., a child may be spoken of as “lawfully begotten” for the purposes of an entail even though he is a product of adultery. In short, ordinary language can be a very misleading basis for construing legal meanings. Cf. “due process of law.”
Then suppose a new Prohibition were sought in the King’s Bench. It is realistic to imagine the King’s Bench taking a different view of the proof requirement’s scope. Should it be free, in effect, to review and reverse the Common Pleas decision? Noy’s interpretation of “duly” would prevent such a problem from arising. Some related problems on the interaction of the two courts are discussed below).

Given the Court’s position that proof of the surmise was required, Stroud v. Hoskins becomes the same case as Cockeram v. Davies, without the complication introduced by the appeal in the earlier case: Does a Consultation correctly granted for failure of proof, rather than on the substance, bar further Prohibitions in the same suit by force of 50 Edw. 3? The Court said, “No.”

Judging by Croke’s report of the briefly-stated reasons for the decision, it seems that the Court was moved in part by the consideration that 2/3 Edw. 6 came long after 50 Edw. 3. In other words, the makers of 50 Edw. 3 could only have intended to cause such Consultations as they knew about to bar further Prohibitions. A variety of Consultation created by statute nearly 200 years later could not be held within their contemplation.

Noy combatted this reasoning with learning and subtlety. (a) He cited a Commons Petition from 51 Edw. 3 in which it was complained that despite the statute of the previous year Prohibitions were still issued after Consultation. The petitioners asked that the practice be stopped unless the nature of the ecclesiastical suit on which the new Prohibition was being sought had really changed. Taking this contemporary evidence to be relevant for the exposition of 50 Edw. 3, Noy construed it to show that the intention behind 50 Edw. 3 was comprehensive: All Consultations were to bar further Prohibitions save for the one case mentioned by the petitioners in 51 Edw. 3 -- where the ecclesiastical suit was genuinely different. In the first year of the statute’s life, other exceptions than the one specified by the petitioners had apparently been read into it; the Commons who had initiated the statute immediately stepped in to explain their intention that only the exception expressly allowed for in the words of the act should be admitted. (b) Noy cited case evidence from before 50 Edw. 3 to show that prior to the statute new Prohibitions after Consultation had been common. That went to demonstrate that 50 Edw. 3 was a genuinely innovative stat-
The Writ of Prohibition:
Jurisdiction in Early Modern English Law

ute, as opposed to a mere affirmation or clarification of the common law. (In the absence of contrary evidence, 17th-century lawyers on the whole liked to believe that old statutes had been in affirmance of the common law.) If 50 Edw. 3 only declared the common law, it could only refer to Consultations that previously were bars to further Prohibitions (or ought to have been if the law was correctly applied). That class could obviously not include a type of Consultation that owed its existence entirely to a statute of later vintage. Noy maintained, however, that 50 Edw. 3 had flatly changed the common law. Instead of referring back to such Consultations as were already bars to new Prohibitions, it looks ahead, making all Consultations hereafter granted bars to further Prohibitions. The latter class, in Noy’s opinion, was broad enough to include Consultations granted by virtue of later statutes.

Against Noy, counsel for the other side relied on more common and straightforward canons of statutory interpretation: 50 Edw. 3 is “penal” (in the normal sense of “imposing an obstacle or disability,” “making something harder to do”). “Penal” statutes should be interpreted narrowly in doubtful cases. Later statutory Consultations were certainly a doubtful case, hence 50 Edw. 3 should not be taken to include them. The upshot of this argument prevailed with the Court.

Two further lines of argument were also pursued. (a) Cockeram v. Davies was cited. No attempt was made to distinguish it, for that is impossible to do. In a sense, the appeal in Cockeram v. Davies made it the stronger case. It was represented, without contradiction, as a general holding -- that new Prohibitions may be issued after Consultation when the Consultation is not on the merits. That is broader than upholding new Prohibitions solely when the Consultation is based on 2/3 Edw. 6. There is no telling how reluctant the judges may have been, aside from other considerations, to reverse a recent decision. An earlier case, not independently reported, was cited as flatly contradictory to Cockeram v. Davies, which might have mitigated the pain of reversal. As we have seen, there were still other earlier cases, not used in Stroud v. Hoskins,

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50 Pilton's Case, H. 11 Jac. K.B., where it was purportedly resolved that a new Prohibition will not lie after Consultation based on 2/3 Edw. 6.
which could be employed to argue against the result, though not very decisively.

(b) The winning side maintained that a “duly” granted Consultation, as contemplated by 50 Edw. 3, meant one granted on the merits. Consultations granted for failure of proof under 2/3 Edw. 6 or any other collateral or non-substantive reason, it was argued, fall outside 50 Edw. 3. Just below we shall consider whether this claim was supported by cases on “non-substantive” Consultations other than those grounded on 2/3 Edw. 6. It was in fact not well-supported by such cases. The plaintiff’s counsel showed nothing to sustain their distinction. Noy and Calthrop were almost over-generous in conceding that it was an unsettled question whether non-substantive Consultations as a class would bar further Prohibitions. They were right to concede that some non-substantive Consultations had been denied such barring effect, but also right to maintain, as they did, that the recognized exceptions to 50 Edw. 3 were extremely marginal and distinguishable from the principal case. On the whole, I think, the losing side in Stroud v. Hoskins had the better case, save for the fact that Cockeram v. Davies had come earlier and been decided with care, even if it was not so well-argued as Stroud v. Hoskins.

2. Cases on 50 Edw. 3 alone: Are there any exceptions from the statutory rule that there may not be further Prohibitions after Consultation? Conversely, does the rule of 50 Edw. 3 extend to any situations beyond its words?

Summary: Except as Cockeram v. Davies and Stroud v. Hoskins—going beyond what was required in those cases -- made an exception for all Consultations granted without determination on the merits, the courts were disinclined to exempt most “non-substantive” Consultations from the statute. Appealing within the ecclesiastical system was clearly ruled out as a basis for new Prohibitions after Consultation, as to most intents were other attempts to circumvent 50 Edw. 3. A few cases extended the rule against more than one Prohibition in the same case beyond what the language of 50 Edw. 3 warrants -- e.g., to the Admiralty.

* * *

The line of cases just considered, in which both 50 Edw. 3 and 2/3 Edw. 6 were involved, must be seen in the light of another line involving only the former statute. In a few cases, the Consultation issued, not be-
cause the first Prohibition had been dismissed on its merits, but for some incidental reason other than failure of proof under 2/3 Edw. 6 -- e.g., failure of the plaintiff to prosecute. In an important sense, the failure-of-proof cases are similar to the other cases of “non-substantive” Consultations. The major difference between the two classes is that the requirement of preliminary proof did not exist when 50 Edw. 3 was made, whereas such defaults on the plaintiff’s part as non-prosecution could have been within the statute-makers’ contemplation. It would have been symmetrical to treat the two classes alike, but there was a convincing reason to treat them differently.

Perhaps the obvious discrimination is to say that failure of proof is not fatal to a second Prohibition, because the proof requirement did not exist in 50 Edw. 3, whereas non-prosecution or the like is fatal. But the opposite discrimination can be defended. One might argue that failure of proof touches the substance more closely: Having had a chance to produce evidence of the sort that would be relevant for a final determination, the plaintiff has failed, whence it may be inferred that he would be unlikely to succeed on formal trial. The reasons for non-prosecution, per contra, might be various and accidental. For a realistic example: Suppose a parishioner surmises a modus running through the entire parish. Suppose he finds two witnesses who “prove” his surmise. Then suppose he discovers on further investigation that he has mistaken his modus because it applies only to certain land, not the whole parish, whereupon he drops his case and Consultation issues. Does 50 Edw. 3 really intend to foreclose this parishioner from another Prohibition? This example leads to another problem: Suppose that the above parishioner goes to trial. Because the evidence shows that the modus only applies to particular tenements, he loses. Then he seeks another Prohibition on a corrected surmise. Does the change in the surmise, while the ecclesiastical libel remains unchanged, justify a new Prohibition? The answer to the last question should probably be “no,” for the parishioner was surely at fault in standing on a claim he could not support. But is the nonsuit case so clear? A mistake in the confusing realm of tithing customs is understandable, and in dropping a misconceived suit the parishioner has done the sensible, time-saving thing (barring the possibility of amending his original surmise).
The earliest case in the present category, unlike all those in the preceding one, comes from the Common Pleas. The parishioner in a tithe suit surmised a modus, which the parson traversed (i.e., denied factually). A Consultation issued when the plaintiff was nonsuited. He then sought a new Prohibition, changing his surmise slightly. (Formerly, he alleged a custom that “singuli proprietarii firmarii seu occupatores” of a certain grange had paid 13/4d. in lieu of certain tithes. The second time, he alleged that the occupiers of the grange “among them” paid that sum.) Neither the alteration in the surmise nor the fact that the Consultation was the result of a nonsuit persuaded the Court to grant another Prohibition when the ecclesiastical libel remained the same. By way of clarification, Justice Glanville pointed out that the holding did not imply that the plaintiff would be estopped in another year if he was sued for the same tithes on a different libel. Shortly later, the Common Pleas affirmed this dictum. Another dictum from a decade later, agrees: The Court granted a Consultation because the plaintiff-in-Prohibition failed to appear at Assizes for trial, having been duly notified. The Court said he could not have a new Prohibition for the same year, but might for another year.

In Foster v. Berkenshare in the King’s Bench (1609), the plaintiff-in-Prohibition was nonsuited, then after losing in the ecclesiastical court appealed and sought a new Prohibition. The Court refused another Prohibition because the libel was unchanged. Several lawyers at the Bar were surprised by this holding, saying “that the usage had lately been otherwise, because when the plea is removed by appeal it is not within the words of the statute, viz., ‘the said judge,’ etc.” Nothing seems to have been made of the fact that the first Prohibition was lost by nonsuit. If Consultations based on nonsuits should be treated the same way as Consultations for failure of proof under 2/3 Edw. 6, this case is good authority against the decision in Cockeram v. Davies. Foster’s Case was relevantly cited (under the date H. 7 Jac.) in Stroud v. Hoskins, by Calthrop, who was trying to overturn Cockeram v. Davies. An anonymous report from

52 Cropley v. Whiteacres. M. 44/45 Eliz. C.P. Plaintiff surmised a modus and was nonsuited. The briefly reported holding is only that these facts are no bar to a Prohibition to stop a tithe suit for another year.
53 Wakeman v. ---. M. 10 Jac. C.P. Add. 25,210, f.9.
54 P. 7 Jac. K.B. Add. 25,208, f.43.
The Writ of Prohibition: 
Jurisdiction in Early Modern English Law

the same term, possibly relating to the same case, has the Court laying down a general rule that new Prohibitions after Consultation can be justified only when the consultation depended on a clerk’s fault or some such technical error as the mispleading of a statute -- i.e., presumably, where plaintiff-in-Prohibition is not at fault to the extent that he would be in a nonsuit or failure-of-proof case.

Biggs v. J. S. Parson de D. (1616) combines several themes. A Prohibition was granted on surmise of a modus. The defendant pleaded to issue on the truth of the modus. At the trial stage, the plaintiff was nonsuited because he could not prove his case. Then, after losing in the ecclesiastical court, he appealed and sought a new Prohibition by an altered surmise. (He had originally surmised a 2/ modus for all tithes, the inclusiveness of which was probably what he could not prove, for he changed his claim to 2/ for corn and hay tithes only.) The plaintiff’s counsel relied first on the change in the surmise, but was put down by the Court because the libel was still the same. Counsel then switched to the appeal, citing a case to prove that an ecclesiastical suit on appeal is not the same case within 50 Edw. 3. The three judges whose opinion is reported (Coke, Dodderidge, and Houghton) rejected that argument as well. Coke and Houghton rested on the straightforward point that the intent of 50 Edw. 3. was to “oust multiplication of appeals.” Dodderidge added the argument he was later to repeat in Cockeram v. Davies: because ecclesiastical appeals suspend the sentence, an appellate judge is strictly the “same judge” as the original one. On the effect of the appeal, the holding was in line with other cases we have seen. It also accords with Hele v. Chaine et al. (discussed below for another point) of 1609, though there may have been one dissent in that case. As far as appears, counsel in Biggs v. J. S. did not think it worth arguing that there should be a new Prohibition because the first one was lost by nonsuit. It may be relevant that the nonsuit came at a late stage. It may have been ordered by the trial judge for patent failure of evidence, as opposed to being taken voluntarily by the plaintiff.

55 2 Brownlow and Goldesborough. 247.
56 P. 14 Jac. K.B. t Rolle, 378; 3 Bulstrode, 182; Harl. 4561, f.221b.
57 Bacon v. Baker, not independently reported, P. 1 Jac. Also cited, as Sir Nicholas Bacon’s Case, in Hele v. Chaine et al.
58 M. 6 Jac. K.B. Add. 25,215, f.47.
None of the cases just above lend countenance to the theory, advanced in Cockeram v. Davies and Stroud v. Hoskins, that new Prohibitions are always permissible unless the Consultation is based on a substantive determination. A little authority can be mustered in support of that theory, but it is thin and largely distinguishable from the nonsuit and failure-of-proof cases. Arguing against the theory in Stroud v. Hoskins, Noy conceded that a second Prohibition could be granted if the first one failed by an “act of God,” such as the death of a party. In Stroud v. Hoskins, Justice Whitelocke told of one curious case (without specific citation) which, though it involved 2/3 Edw. 6, is best considered here: A man by mistake went to a Common Pleas judge at Assizes to prove his surmise, when he should have gone to a King’s Bench judge, his Prohibition having been granted by that court. That is all Whitelocke said. His purpose was presumably to show that there are slips so minor or understandable that always denying a second Prohibition after Consultation would be unfair. That a layman got mixed up as to the sort of judge he should go before is understandable, but it seems doubtful whether the nonsuit and standard failure-of-proof cases were equally deserving of pity.

A bit more materially, there are a few cases in which Consultations issued by the Chancery had been overridden by new Prohibitions from common law courts. One of these, Syblie v. Crawlie,\textsuperscript{59} was cited by Calthrop (Noy’s colleague with the defendant) in Stroud v. Hoskins, by way of concession. The Chancellor apparently issued a Prohibition, then realized that he should not have done so for procedural reasons (because the application for a Prohibition was by English Bill -- i.e., an equity-type complaint -- which was bad form when one was seeking common law relief through the Chancery). The King’s Bench then granted a new Prohibition on the ground that there was no fault in the party. I take that to mean that the error in the Chancery was blamed on a clerk (litigants in the Chancery being highly dependent on the bureaucracy for drawing documents and steering cases through the court). Calthrop’s legitimate point was that a party who failed to prove his surmise (and the same would hold for an ordinary nonsuit) was not comparably blameless. The independent report of Syblie v. Crawlie, however, has Chief Justice Popham

\textsuperscript{59} H. 42 Eliz. Q.B. Croke Eliz.. 736; Add. 25,203, f.171 : Add. 25,202, f.12.
explaining the decision as follows: “The statute is to be understood when Consultation is once awarded on examination of the matter and not when it is awarded for insufficiency in the form of the proceeding.” (Italics mine.) The other Justices are said to have conceded this distinction. Popham’s statement directly warrants precisely what Calthrop was combating in Stroud v. Hoskins -- a distinction between substantive and non-substantive Consultations, as opposed to a distinction between trivial or faultless Consultations and all others. There is, however, a basis for doubting Popham’s generalization in Syblie v. Crawlie -- viz. at least one other case of a Chancery Consultation overridden by a common law court which points to an exception only for inadvertent or meaningless Consultations not for all Consultations dependent on “the form of the proceeding.” The best conclusion is that Calthrop and Noy were right in Stroud

60 At most there were two such cases, and there may have been only one. I have three reports, all dated P. 3 Eliz. C.P., as follows:
(a) Lyss v. Watts, Croke Eliz., 277: A Prohibition being granted in the Common Pleas, the defendant showed that the Chancery had already granted a Consultation in the same case. At the hearing of Lyss v. Watts to which Croke’s report relates, the reason for the Chancery Consultation seems not to have been brought out. Apparently assuming that the Consultation was substantive, the Court said that the defendant ought to have another Consultation -- i.e., that the Chancery’s act should be respected. This was a strong opinion, for, as further reported discussion shows, the Common Pleas did not approve of the Consultation on the merits. The ecclesiastical suit was for tithes of slate-stones. The Common Pleas thought, in accord with all common law opinion on this subject, that no tithes were due for such stones (being, like minerals, “part of the freehold,” or depletable assets).
(b) Lansd. 1073, f.127b, is clearly the same case, because discussion of the tithability of slate-stones is also reported there. Otherwise, this report says that the Prohibition in Chancery “abated,” whereupon Consultation was granted, because it was sought by English Bill. The Common Pleas is reported to have upheld the new Prohibition because the first one failed by the clerk’s fault rather than the party’s. The MS. is reconcilable with Croke on the assumption that a second hearing brought out the fact that the Chancery Consultation was extremely non-substantive.
(c) Lansd. 1073, f.130b looks like a different case from a bare report, though from the date one suspects that it is another, perhaps confused, version of the same one. According to this report, the Chancellor reversed one of his own Prohibitions by Consultation because it had been granted without order of the Court or English Bill. Syblie v. Crawlie and the report just above show that it was objectionable to grant a Prohibition on an English Bill, whereas this report suggests that the absence of an English Bill was a fault. Perhaps the meaning is that there was nothing of record in the Chancery to warrant a Prohibition, not even an English Bill seeking one. In any event, the Common Pleas allowed a new Prohibition on the ground that the Consultation in this seemingly mixed-up Chancery case could hardly be considered “duly” granted, and because the judges thought that a Prohibition was clearly appropriate on the merits (“for although [sic] there was no English Bill, still the Prohibition was well-granted”).
Statutory Rules Governing Prohibition Procedure

v. Hoskins on the basis of prior cases, though as they themselves admitted, the question was confused. One later case illustrates the possibility of “trivial or faultless” Consultations which it would be harsh to include within 50 Edw. 3. Here the plaintiff-in-Prohibition proved his suggestion as required by 2/3 Edw. 6 before a Justice at Assizes. But because the proof was not entered of record, a Consultation was granted for failure of proof. A new Prohibition was allowed, since the Consultation was a mere accident. As we have seen, proof provided within six months was good even though it was not entered until later.

To resume another theme: The well-argued case of Bowrie (or Dowry) v. Wallington (or Willington) (1625) may be taken as settling the question whether 50 Edw. 3 could be circumvented by bringing an ecclesiastical appeal. The Court said, “No,” in accord with earlier authority. In other words, if A. gets a Prohibition, then the Prohibition is undone by a Consultation, then A. loses in the original ecclesiastical court and appeals to a higher one, A. may not have a new Prohibition. Although there is some confusion in the reports on this point, it seems clear that the Consultation in Bowrie v. Wallington was substantive -- i.e., granted after verdict and judgment against plaintiff-in-Prohibition. If the Consultation

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61 Mayle v. Murlyn. T. 16 Car. C.P. Harg. 23, f.62h.
62 P. and M. 1 Car. K.B. Popham, 159; Benloe, 148 and 150; Latch, 6 and 76; Harg. 38, f.17b; Lansd. 1063, f.116b. The reports present some problems of reconstruction. There is conflict on one point of significance. Benloe, 150 (unlike Benloe, 148) says the Consultation was granted because the plaintiff-in-Prohibition was nonsuited “upon a mistake of alleging a modus decimandi for all the vill, where some part pays tithes in kind.” Harg. 38 says the Consultation was granted either because the plaintiff was nonsuited or because a verdict went against him -- the reporter does not know which. All the other reports say that verdict and judgment were given against the plaintiff. I conclude that there was probably a verdict. If there was a nonsuit, it may have been ordered by the trial judge upon the plaintiff’s manifest failure to give evidence of a modus throughout the village -- which might in itself make the determination “substantive” enough. Benloe, 150, is dated later than the other reports (M. 1 Car., as opposed to P. 1 Car.), but all the other reports make it clear that the case was not decided in Easter. Noy’s argument came in Easter, but on a second hearing, after which (according to Lansd. 1063) decision was still deferred, probably to be given the following Michaelmas. Popham suggests that on the first hearing -- before Noy’s argument -- the judges were less than convinced that the appeal could not justify a new Prohibition. They said it would not if the appellor and the plaintiff-in-Prohibition were the same person, and if the Consultation were substantive -- good enough for this case but still a little qualified. Benloe, 150, is the only decisive report of the result, from which it appears that Noy’s argument was largely accepted by the Court. In Stroud v. Hoskins, Noy cited Bowrie v. Wallington as a general holding (perhaps more general than it was) against new Prohibitions after Consultation.
had been non-substantive, Cockeram v. Davies might have justified a new Prohibition, but the appeal would have had nothing to do with justifying it (as at least Justices Dodderidge and Jones had held in Cockeram v. Davies the year before, and as the whole Court held by implication in this case).

The main interest of Bowrie v. Wallington lies in the new arguments (i.e., beyond those in Cockeram v. Davies) against permitting 50 Edw. 3 to be defeated by an appeal. These arguments were the work of William Noy (an expert, surely, on 50 Edw. 3, though his expertise was not to prevail in Stroud v. Hoskins). (a) In effect, Noy argued from the theory of Prohibitions that granting a new Prohibition after Consultation would put defendant-in-Prohibitions in “double jeopardy.” (That expression, of course, is not used.) Prohibitions, he emphasized, are public or quasi-criminal. I.e.: Defendant-in-Prohibition is accused of contempt of the King’s jurisdiction for having improperly sued in a “foreign” court. Having once been acquitted of that offense, he ought not to be tried again. 50 Edw. 3 in effect enacted that principle of justice. If there were no other reasons against letting an appeal defeat the statute, the importance of the principle behind it would be a reason. (Interestingly, this argument might be turned to the opposite effect on the separate question of non-substantive Consultations: If defendant-in-Prohibition is not tried and acquitted for his “offense,” but allowed to persist in it because the plaintiff has made a procedural mistake, does the public interest and putative policy of 50 Edw. 3 not require that a new Prohibition be granted in order for the substantive issue to be tried?)

(b) Noy reinforced the argument made by Justice Dodderidge in Cockeram v. Davies that 50 Edw. 3 does not mean “the same judge” literally, but rather that an appellate judge in the ecclesiastical system must be taken as “the same judge” as the original one. By ecclesiastical procedure, Noy pointed out, an appellate judge who affirms the sentence below remands the case to the inferior judge for execution. Thus, if the lower ecclesiastical judge is told to go ahead by Consultation, and then another Prohibition is issued to the appellate judge, the effect of the new Prohibition will be to prevent the lower judge (literally “the same judge” who was permitted to carry on before) from executing his sentence, in the event that the sentence is affirmed. In addition, Noy cited an analogy to justify taking persons mentioned in statutes as “persons in interest,” rather
than natural persons: 27 Eliz., c. 8, gave a writ of error in certain circumstances to “parties plaintiffs or defendants.” The courts had interpreted that expression to include the executors of such parties. So here, Noy argued: Different ecclesiastical judges in the sense of different men with different positions in the ecclesiastical hierarchy are the “same judge” in the sense that they represent the same “interest,” as an executor and his testator are in that sense the “same person.”

(c) Finally, Noy challenged the printed statute book: The petition in the Parliament Roll underlying 50 Edw. 3 does not say “the same judge,” but simply “the judge.” The King’s answer to the petition was that several Prohibitions should not be issued “in one case.” The judges ordered the Parliament Rolls to be brought in, from which they verified Noy’s facts. (It does not, of course, follow that the judges would have gone by the Parliament Rolls instead of the printed statute, or used them to expound it, if they had been in real doubt about the effect of an appeal. Noy probably performed the useful office of “over-killing” the theory that appeal ought to make a difference. Previous cases, common sense, and construction with reasonable regard for the statute’s intent all worked against that theory. This case buried it.)

A report from a few years later confirms Bowrie v. Wallington: Justices Jones and Berkeley restated the rule that an appeal will not justify a new Prohibition. They or the reporter added that this was “subscribed” by all the judges of England. (There are various signs of extra-judicial discussion concerning Prohibitions, like that in James I’s reign, in the 1630s, ending with the judges’ signing an agreement as to how they would handle certain types of cases. Though the point was well-settled before, it would seem that new Prohibitions after appeal were included in that discussion. Cf. the possible political overtones of Stroud v. Hoskins above.) Jones and Berkeley confused the reporter by saying that although the statute of 50 Edw. 3 spoke of “the same judge,” there was another statute of 51 Edw. 3 speaking only of the “same cause.” The reporter was puzzled because he could find no such second statute. The judges must have been thinking, perhaps inaccurately, about the historical evidence offered by Noy on two occasions: the petition, not statute, of 51 Edw. 3

63 T. 9 Car. K.B. Harl. 1631, f.412.
and/or the petition and royal response behind 50 Edw. 3. If the petition, particularly, should be used to expound the statute, it would be relevant for the problem raised by appeals, as well as that raised by non-substantive Consultations, for it argues in a general way in favor of enforcing the statute strictly.

We may now turn to other possible ways around 50 Edw. 3. One problem that might be expected to arise almost never did in fact -- the meaning of “the same libel.” Suppose a Consultation issues for whatever reason, then the ecclesiastical plaintiff makes some detailed change in his libel, then the ecclesiastical defendant seeks another Prohibition on the ground that the libel in no longer the same. Does the proviso in 50 Edw. 3 (“Provided always that the matter in the libel...is not engrossed, enlarged, or in other manner changed”) mean “not changed in substance” or “not changed in the slightest”? If the former, what constitutes a change in substance?

I have found only one case on this point, where it arose in a rather interesting form. A parishioner was sued for tithes from former monastic land. He got a Prohibition on the claim that the land was discharged from tithes at the time of the dissolution (and consequently discharged now). The parties went to trial on the truth of this claim. Plaintiff-in-Prohibition lost because he pleaded one kind of discharge and proved another kind. I.e.: He had a good basis for discharge, but lost because he surmised the wrong species. The case was accordingly returned to the ecclesiastical court by Consultation. The parson (plaintiff there) then added to his libel an article saying that whether or not the land was discharged at the dissolution tithes had been paid for some sixty years last past. Relying on the fact that the libel had been added to, the parishioner then sought a new Prohibition.

One possible course the King’s Bench did not take: None of the judges argued for granting the Prohibition merely because in a verbal sense the libel was no longer the same. To do so as a rule would be to evade the purpose of 50 Edw. 3 by an unnecessarily narrow reading of the proviso,

64 Lady Denton v. Earl (or Countess) of Clanrickard. M. 18 Jac. K.B. 2 Rolle, 207; Harg. 30, f.100.
though in this case, where tithes were manifestly not due, that path might have been tempting. Instead, the Court discussed whether the literal addition was a real or significant one.

Dr. Pope, an ecclesiastical lawyer representing the parson, was received to argue that the new words did not amount to a substantial change. (Civilians were frequently allowed to appear before common law courts when cases might turn on the truth of some proposition of ecclesiastical or Admiralty law, of which the Justices did not claim expert knowledge. Civilians often appeared for both sides. Here, there is no sign of the parishioner’s ecclesiastical lawyer.) The implication of Pope’s appearance is that assessing the addition to the libel at least might require civil law expertise. That was a reasonable presumption, for the question may be framed as: “Is there or is there not the slightest possibility that the alteration of the libel could affect the ecclesiastical court’s disposition of the case?” Who but a civil lawyer could be presumed to know? In reality, however, I doubt that the majority of the King’s Bench cared very much about this nicety, or about what Dr. Pope said.

Pope’s contention seems to have been that the addition was insignificant because, if effect, it was only “pleading evidence”: i.e.: The libel claimed that tithes were due and had been paid regularly enough over the whole of time, before and after the dissolution, to exclude any discharge; the added allegation of recent payment pleaded something which, if true, might figure in an inference that tithes had always been paid, as claimed; however, the fact of recent payment would not be decisive, for if the tithes had not been paid before the dissolution they were not due, and the ecclesiastical judge would so hold, just as if the addition to the libel had not been made. Chief Justice Montague (according to Rolle’s report) was persuaded by this reasoning, holding that there was no addition within 50 Edw. 3. Justices Dodderidge and Houghton, on the other hand, (the MS. simply says “the Court”) were unpersuaded. They smelt a rat and as much as said so. Why had Dr. Pope added to his libel? Dodderidge and Houghton thought they saw why: Notoriously, ecclesiastical rules on prescription were different from common law rules. Whereas at common law only immemorial usage could establish rights, continuous usage for a determinate extensive time could establish them by ecclesiastical law. By putting an express allegation of payment over an extended recent period into the libel, Pope had created the opportunity (though he himself denied
it) for the ecclesiastical judge to hold that the tithes were due now by pres-
scription, whether or not they were due at the dissolution. Therefore the
change in the libel could affect what happened in the ecclesiastical court,
whatever the civil law expert said. Therefore a Prohibition should be
granted.

Seeing the majority against him, Dr. Pope agreed to withdraw the addi-
tion to the libel, so that no Prohibition was in fact necessary. The Court
(now including the Chief Justice) was still wary enough to warn Pope that
a Prohibition would be granted after ecclesiastical sentence if the ecclesi-
astical court, even without the addition to the pleading, were to hold the
tithes due by prescription since the dissolution. (Substantively -- apart
from the problem on 50 Edw. 3 -- ecclesiastical courts were never al-
lowed to enforce their standard of prescription against the tithe-payer. If
one was exempt by common law standards, execution of any ecclesiasti-
cal sentence to the contrary would be prohibited, and the ecclesiastical
court might be prohibited before sentence if there was any likelihood of
its applying the ecclesiastical standard of prescription in a tithe case.)

Projecting from this single case, one would come to the following gen-
eral rules on the meaning of “same libel” for purposes of 50 Edw. 3: (a)
Mere verbal alteration does not justify a new Prohibition. (b) Whether an
alteration is really an addition capable of justifying a new Prohibition de-
pends on whether the change could conceivably affect the ecclesiastical
outcome. It is not required by 50 Edw. 3 to lean over backwards to avoid
a new Prohibition, merely because it is not altogether clear that the
change would alter the ecclesiastical outcome, or because the effect on
the ecclesiastical court depends on refinements of ecclesiastical law be-
yond a common lawyer’s competence. Nor is the common law court
obliged to wait and see whether the alteration does have any apparent or
presumable effect on the ecclesiastical court’s behavior. A further rule of
general interest may be projected from the Court’s final warning to Dr.
Pope: There may be circumstances when a new Prohibition after Con-
sultation would be barred before ecclesiastical sentence, and yet would be
legitimate after sentence. I have no further cases testing and working out
that distinction. It points to a question about the intent of 50 Edw. 3 that
might bear on other situations: Did the statute mean only, as it were, to
forbid and spare the common law courts from going over the same
ground twice -- i.e., from reconsidering and reversing a Consultation once
Statutory Rules Governing Prohibition Procedure

granted and from being bothered by litigative warriors-of-attrition, when
there was no information whatsoever before the court beyond what was
available, or ought to have been, on the first occasion? Or did the statute
mean to be harder than that on plaintiffs-in-Prohibition, more solicitous
for the interests of the ecclesiastical courts as an independent part of the le-
gal system?

A few cases raise the question whether a new Prohibition after Con-
sultation was ruled out by 50 Edw. 3 when the second Prohibition was
sought in a different common law court. I.e.: Does 50 Edw. 3 mean only
that the King’s Bench, say, may not ordinarily grant two Prohibitions in
the same case, or that there may not be two Prohibitions in the same case,
whoever grants them? In these cases, again, the courts were careful to
prevent the sensible policy of 50 Edw. 3 from being defeated.

In Alderman Skinner’s Case (1592), a parishioner surmised a modus
applying to a certain park. Upon traverse and trial, the verdict went
against the parishioner because the modus in fact only applied to part of
the park. (An ancient park had been recently extended. The plaintiff was
able to establish his modus for the ancient park, but made the mistake of
claiming it for the whole present park.) After Consultation and sentence
against him, the parishioner appealed to a higher ecclesiastical court and
sought a new Prohibition. This time he of course changed his surmise,
claiming the modus only for the old park. The novelty of this case is that
the new Prohibition was sought in the Common Pleas, whereas the earlier
sequence of events had been in the Queen’s Bench. On the substance, the
Common Pleas thought that no new Prohibition should be granted. This
view is consistent with similar cases above. Common sense suggests that
a party should not be able to evade 50 Edw. 3 by switching from one
common law court to the other. But can it be said that the second Prohi-
bition suit is as good as a repetition of the first, and so clearly within the
statute, when it is brought in a different court? The plaintiff here prob-
ably tried to exploit this doubt (the arguments of counsel are not re-
ported). In any event, the Court felt it necessary to find a device for
making it appear that the Common Pleas suit and the Queen's Bench suit
were all one: “To make it appear to be all one suit, the former surmise

65 M. 31/35 Eliz. C.P. Lansd. 1073, f. 126.
made in the King’s Bench reciting the former libel should be sent here by \textit{mittimus} and should be pleaded here of record, and then we here send Consultation.”

In Hele v. Chaine \textit{et al.} (1608),\textsuperscript{66} two King’s Bench Justices clearly opposed disregarding a prior Consultation granted by the Common Pleas. In this case (a common type), churchwardens sued a parishioner in the ecclesiastical court for a rate assessed by them for repair of the church. The parishioner got a Prohibition from the Common Pleas, which court subsequently granted a Consultation. The reason for the Common Pleas Consultation is not reported, but it was probably based on the legal sufficiency of the surmise (turning on the propriety of the method of assessment, about which serious debate in the King’s Bench is reported). The parishioner then lost in the ecclesiastical court, appealed, and sought a new Prohibition from the King’s Bench. Chief Justice Fleming, with Justice Williams concurring, took the following positions: (a) On the substance, the rate was properly assessed, so that Prohibition did not lie. (b) The ecclesiastical appeal would not justify a new Prohibition. (c) By clear implication, the Common Pleas Consultation was just as much a bar to a new Prohibition as if the King’s Bench itself had granted the Consultation. The report says that Justice Fenner was absent, and Justice Croke is expressly reported to have said nothing. Whether the fifth member of the Court, Justice Yelverton, dissented is ambiguous. The report gives the arguments of Dodderidge, counsel for the churchwardens, and at three places the contrary arguments of “Yelverton.” Having given the arguments of counsel on one side, one expects the reporter to give those of counsel on the other, so that “Yelverton” could refer solely to the practitioner \textit{Henry} Yelverton. Having accounted for four judges, including the absent and silent ones, one expects the reporter to account for the fifth judge, Sir \textit{Christopher} Yelverton (Henry’s father). I am inclined to conclude that at least one of the speeches labeled “Yelverton” came from the Justice. (I would not expect a 17th-century judge to disqualify himself because his son was arguing at the Bar.) In that event, there was a judicial dissent. Assuming that to be true, Justice Yelverton sharply dis-

Statutory Rules Governing Prohibition Procedure

agreed with Fleming and Williams on the substance and on the effect of the appeal. Believing that the appeal would have justified a new Prohibition even if the Consultation had been granted by the King’s Bench, Yelverton did not need to deal with the circumstances of its having been granted by the Common Pleas. He did not choose to deal with it on the assumption that his point about the appeal was unacceptable -- i.e., did not explicitly say that, appeal or no appeal, the case was as if no Consultation had been granted since none was of record in the King’s Bench. All one can say is that he was vehement enough in favor of a Prohibition on the important and controversial substantive question to suggest that he might have been willing to go that far. The case is inconclusive (it was in any event referred to counsel for mediation), but interesting just because of the significant difference of opinion on the substance. Suppose Fleming and Williams had been of the opposite persuasion on that -- i.e., convinced that the Common Pleas Consultation was egregiously in error. Would they then have resisted the temptation to disregard it?

Virtually all the authority there is, at any rate, suggests that the temptation ought to be resisted. There is a dictum to that effect in one report of Bowrie v. Wallington.\(^{67}\) Especially significant is the one clear case that went the other way -- i.e., eventuated in the Common Pleas’ granting a new Prohibition in the face of a King’s Bench Consultation.\(^{68}\) For the judges’ language there makes it clear that in the circumstances they would have overridden their own Consultation -- i.e., that they were in no way moved by the fact that the Consultation came from the other court. The suit was properly brought there, for the woman claimed that the other party had called her “whore.” (“Whore” was not regarded as defamatory \emph{per se} at common law. On the other hand, the common law courts consistently permitted the ecclesiastical courts to treat it as defamatory.) A Prohibition was granted by the King’s Bench because slander \emph{qua} ecclesiastical offense had been pardoned by the general pardon of 3 James I.

\(^{67}\) Benloe, 150. The point to be made in Bowrie v. Wallington was that an appellate judge in the ecclesiastical system is the “same judge” as the original judge. To reinforce this, it was said that a Common Pleas Consultation bars the King’s Bench from issuing a new Prohibition. That is to say: In the common law system, one case is one case, regardless of whether the party switches courts in midstream: so in the ecclesiastical system one suit is one suit, regardless of whether it is moved from the original level to the appellate.

\(^{68}\) --- v. Rogers. P. 6 Jac. C.P. Add. 25,215, f.64.
The particular slander in question had been committed before the pardon and was therefore covered by it. (Prohibitions were frequently used to give effect to pardons as interpreted by the common law courts.) For some reason, however, the King’s Bench subsequently issued a Consultation. The ecclesiastical defendant then turned to the Common Pleas, where he obtained a new Prohibition.

Chief Justice Coke and Justice Foster (whose remarks alone are reported) defended the decision on the ground that it was manifest on the face of things that the Consultation was inappropriate. It appeared from the ecclesiastical libel itself that the slanderous words were spoken before the pardon. The Court of course had judicial notice of the date of the pardon. The judges had absolutely no doubt that the pardon included such slanders. It must therefore be presumed, they said, that the Consultation was granted “inconsulito” or “sub silentio,” not “duly” as 50 Edw. 3 specifies.

Such language raises a disturbing question. Could a presumption of “inconsiderateness” or “inadvertence” not be made whenever one court disapproved strongly of another’s Consultation (or even of its own on reconsideration)? Were Coke and Foster not opening the door to interpreting “duly” as “correctly as a matter of law”? The two judges were aware that these questions would arise and took care to close the door again. The case would have been decided the other way, they said, if either of two circumstances had been different: (a) if the objections to the Consultation had depended on anything outside the libel; (b) if the first Prohibition had been formally pleaded to. (I.e.: If the defendant had demurred to the first Prohibition, a new Prohibition would be denied, however erroneously the King’s Bench had decided the legal issue raised by the demurrer.) With the judges’ qualifications, the power to reverse prior Consultations implied by this case is extremely limited. “Duly” in the statute ought, after all, to mean something. The case shows the difficulty of taking “unduly granted Consultations” to mean “Consultations that could only have been granted on account of clerical errors or the like”--for here the King’s Bench could have granted the Consultation because it was egregiously mistaken about the law (i.e., the terms and meaning of the pardon). But Coke and Foster were careful to show that they reasonably attributed the King’s Bench Consultation to inadvertence (perhaps a mix-up about dates) and overrode it solely on that assumption.
The proper effect of one principal court’s Consultation on the other principal court is further tested in two cases in the group just below, on expansions of 50 Edw. 3. Before leaving attempts to circumvent 50 Edw. 3, we should note a unique Elizabethan case bearing witness to one further unsuccessful device. All we are told of Copley v. Whittacres\textsuperscript{69} is that a Consultation had been previously granted in the matter to which the report relates. The report says it was erroneously granted, suggesting that the Court was of that opinion. Assuming that 50 Edw. 3 barred another Prohibition, the ecclesiastical defendant’s lawyer moved for a Superse-deas to the ecclesiastical court. Justice Kingsmill, whose opinion alone is reported, saw clearly that a Prohibition by any other name would still prohibit. He turned down the motion for an alternative writ, conserving the policy of 50 Edw. 3.

Nearly all the evidence shows that the judges approved of the policy of the statute, as they surely should have, and resisted efforts to whittle it away. Cockeram v. Davies and Stroud v. Hoskins were exceptions to a general tendency to favor the values of economic law administration and respect for the ecclesiastical courts’ place in the sun which the ancient statute expressed. Approval of the policy of 50 Edw. 3 is further attested to by the judges’ willingness to extend the act beyond its words, although there were limits to doing so reasonably, and those limits were drawn in a couple of cases. In terms, 50 Edw. 3 only applied to relations between the common law and the ecclesiastical courts. In a few cases, the question arose whether the act barred new Prohibitions to the Admiralty after Consultation had once been granted. Extension of the statute to the Admiralty was twice upheld.

In the first such case,\textsuperscript{70} the original Prohibition and Consultation to the Admiralty were granted by the King’s Bench. Plaintiff-in-Prohibition made his second try in the Common Pleas. There was apparently no attempt by the plaintiff to exploit the change of courts. This case therefore confirms those above on that point, though it should be noted that the Common Pleas discussed the merits and approved of the Consultation le-

\textsuperscript{69} H. 45 Eliz. C.P. Lansd. 1058, f.59b.
\textsuperscript{70} M. 4 Jac. C.P. Add. 25,215, f.36.
The Writ of Prohibition:
Jurisdiction in Early Modern English Law

gally. On the principal matter of interest, the Court held unanimously that although only the ecclesiastical courts are mentioned in 50 Edw. 3, the rule of the statute applied to Admiralty cases as well. The judges gave as their reason that the act affirms the common law.

We have encountered one context (Stroud v. Hoskins) where it was advantageous to argue that the statute did not affirm the common law (because if it did it could not extend to failure-of-proof cases unknown at the time of the act). (Though in no way decisive on this point, the holding in Stroud v. Hoskins did not lend countenance to that argument.) The logic of such a decision as the present one is ambiguous. There are several routes to the conclusion, and the report is too cursory to show which one the Court took, if indeed it discriminated. One may say: (a) The statute affirms the common law, therefore it is not “penal” (i.e., does not create obstacles or disabilities that did not exist at common law before), therefore it may be extended to like cases beyond its words “by the equity.” (Cf. the argument in Stroud v. Hoskins that 50 Edw. 3 should not be extended to failure-of-proof cases precisely because it is “penal.” Note that the opposing sides in Stroud v. Hoskins shared the premise that the act was not made in affirmance of the common law, drawing contrary implications therefrom.) (b) The statute is simply conclusive evidence of the common law -- as it were, like an especially exalted or authenticated judicial precedent. Then, for purposes of the present case, to refuse a new Prohibition to the Admiralty is not to apply the statute, which admittedly does not apply to the Admiralty. It is rather to apply a common law rule which the statute authenticates in the indistinguishable case of the ecclesiastical courts. (c) The statute, speaking per synecdochen, means to enact a general rule, though it only mentions the ecclesiastical courts. It is known to speak per synecdochen because at least the “better opinion” at common law, if there were no statute, would be that there may never, unless in special circumstances, be new Prohibitions after Consultation. Then to refuse a new Prohibition to the Admiralty is to apply the statute, without resort to the doctrine of the equity. For the upshot of the present case, these distinctions make no difference. There may, however, be contexts in which the precise rationale for taking the act liberally could matter. E.g.: If the statute by its own force enacted a more general rule than it appears to, it might be harder to justify exceptions to that rule than if the statute merely evidences a common law rule. There is a sense (quaere whether it is anachronistic to articulate it for the 17th century) in which at

110
least in principle a common law rule, however certain, is intrinsically vaguer than a legislative mandate. Our case is important as the only express judicial statement that in some sense 50 Edw. 3 does "affirm the common law." Be it noted that the commonsense reasons for saying so are overwhelming. Whatever was going on historically before 50 Edw. 3, allowing second Prohibitions, at any rate in uncomplicated cases, makes no sense and could hardly have been permitted by the courts over the long run if the statute had never been made.

The second case on the Admiralty comes from the same term as the one above, but from the King's Bench instead of the Common Pleas. Here, the plaintiff tried to get a new Prohibition because he had appealed the Admiralty suit after losing in the first instance and also because he had now changed his surmise (in what way is not reported). The Court held unanimously that there could be no new Prohibition so long as the Admiralty libel remained unchanged. No discussion on the applicability of the statute to the Admiralty or the relation of the statutory rule to the common law is reported.

On the two matters discussed just above -- the effect of a Common Pleas Consultation on the King's Bench and extension of the rule of 50 Edw. 3 to the Admiralty -- the closest approach to a dissent from the early 17th century consensus came from Justice Rolle during the Civil War (1648) In a case from that time, a party sought a Prohibition in the Common Pleas to stop an Admiralty suit. The Prohibition was pleaded to issue, and the verdict went against the plaintiff, whereupon a Consultation was granted. The plaintiff then came to the King's Bench and sought a new Prohibition on the same surmise as he had made in the Common Pleas. The Court showed disinclination on the substance to grant the Prohibition, and Justice Rolle said in effect that he could see no sense in applying for a Prohibition in the King's Bench after the matter had been tried in the Common Pleas. Rolle went on, however, to agree, as counsel for the plaintiff urged, that the trial in the Common Pleas was "no conclusion to us." It might be a mischief, he said, for new Prohibitions to be granted after Consultation, but if so Parliament would have to make a law

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72 H. 23 Car. K.B. Style, 87.
The Writ of Prohibition: Jurisdiction in Early Modern English Law

against it. There was no such law applicable to this case in existence. Nothing is said about 50 Edw. 3 in the report. The act’s status in 1648 would have been a curious question to discuss, for from the point of view of the rebel Parliament, from which Rolle held his office, the bishops and ecclesiastical courts to which the statute refers no longer existed. Some of their functions were being performed by new agencies created by Parliament, with respect to which, as well as with respect to the Admiralty, the issue of second Prohibitions could still arise. Rolle’s position may have been that 50 Edw. 3 was wholly obsolete, leaving the issue at common law. By the common law, contrary to earlier opinion, he seems to have thought that Consultations need not bar second Prohibitions to the Admiralty. The report gives no final decision and no judicial views except Rolle’s.

Extension of the rule of 50 Edw. 3 to the Admiralty bespeaks an attitude favorable to the act’s policy, whether or not the statute should be considered technically in affirmance of the common law. That attitude of approval could be used to justify extending the statute to circumstances which in a sense could not possibly have been within the makers’ contemplation, such as failure-of-proof cases, though that option was rejected in that instance in leading cases. Could a disposition to use the act liberally also justify refusing a Prohibition in what was not literally the same case as that in which a Consultation had previously been granted, but an exactly parallel case? One version of that question was raised in Parson Bugge’s Case (1610).

There, the clergyman sued for tithes and was prohibited, after which a Consultation issued. Then the clergyman sued another parishioner for the same kind of tithes. When the second parishioner sought a Prohibition, the parson tried to use 50 Edw. 3 to stop him. It was contended (clearly, though the report does not spell out all the circumstances) that the second parishioner was relying on exactly the same modus that the first parishioner had relied on unsuccessfully, and therefore that the case was still the same within the meaning of 50 Edw. 3. Chief Justice Coke, speaking for the Court, rejected this argument: “...it may be collected by the words of

73 M. 8 Jac. C.P. Add. 25,209, f.209b.
the statute that it must be on the libel by the same parties for the same matter.” Surely Coke’s reading of the act is correct. While the act does not say “by the same parties,” its reference to a single, unaltered libel, which necessarily starts a suit between two particular parties and none others, must be taken to imply “the same parties.” Moving on from verbal construction, Coke cites that “most certain rule in the law,” “Res inter alias acta alteri nocere non debet.” Beyond relying on the words’ clear meaning, Coke construes the statute with the help of a principle of law which it is hard to suppose Parliament had any intention of abrogating.

A dictum in an undated case,74 affirms Parson Bugge’s Case while stretching the policy of 50 Edw. 3 in another direction. According to the dictum, a parishioner who sues a Prohibition on a modus for tithes of 1610 and fails may not have another Prohibition on the same modus for the same tithes in 1611. I think such a rule is plainly fairer than the rule rejected in Parson Bugge’s Case would have been. To foreclose Parishioner B. because Parishioner A. has failed to sustain the modus on which B. is relying is to deny B. the chance to dig up evidence that A. neglected. To deny A. a second chance to establish a modus is only to deny him the opportunity to do a better job than he did before. The dictum does not articulate the relationship of the rule stated to 50 Edw. 3. (An intended or “equitable” effect of the statute -- though hardly within the words amounting to “same libel”? A common law estoppel?) One might, I suppose, question extension of the statute as such to a suit for a different year, then go on to question whether a common law estoppel should take effect on a mere motion for Prohibition. Granting that the parishioner should be estopped to claim the same modus in a subsequent year, should be denied a Prohibition in the first instance? Or should the other party be required to plead the matter of estoppel formally? Economy would perhaps recommend the former course. Our dictum appears to disagree with three cases above (Cop v. Semer, Cropley v. Whiteacres, and Watson v. Langdall). In all those cases, however, the Consultation was non-substantive -- either a result of failure of preliminary proof or of a nonsuit. Here, the Court may have assumed that the merits of the modus had been determined by verdict or legal ruling.

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74 Harl. 4817, f.223b. Probably C.P. Since 1610 is used as an illustrative date, probably from about that time.
In the principal case to which the dictum was appended, a new Prohibition was issued simply because the Court decided it had considered the libel too carelessly when it granted Consultation. The ecclesiastical suit was for tithes of wood and ought to have been prohibited because the wood in question was non-tithable timber. When the second Prohibition was granted, there was apparently no reinspection of outside facts, only reexamination of the libel, from which it was clear that the clergyman by his own admission was suing for timber of the sort the common law held exempt. The overridden Consultation was therefore “inadvertent” rather than “erroneous.” The case is in line with --- v. Rogers above and with the prevailing disposition to “hold the line” on exceptions from 50 Edw. 3.

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We may note a few further cases which touch on the subject of this section but add little of significance:

(1) Dr. Mays v. Hollande. H. 39 Eliz. Q.B. Add. 25,198, f.203b. In a complicated case on ecclesiastical livings, it was shown that the Common Pleas had previously granted a Prohibition and then a Consultation. Coke, at the Bar, tried to stop a new Prohibition in the Queen’s Bench on the basis of 50 Edw. 3. He was promptly put down by Justice Gawdy, who said that the libel had been “greatly” changed. The rest of the debate was on the merits. The report gives no specific information as to the nature of the changes in the libel.

(2) Baldwin v. Girrie. H. 11 Jac. C.P. Godbolt, 245. A case in which it would have been plainly inappropriate to apply 50 Edw. 3. A tithe suit was prohibited, then a Consultation was granted because the plaintiff-in-Prohibition was nonsuited. The ecclesiastical court was subsequently prohibited again, this time from executing an unlawful sentence for treble damages. Taken literally, 50 Edw. 3 might be said to bar the second Prohibition, for although the circumstances were changed after the sentence, the libel was not. As far as the report indicates, no attempt was made to invoke this statute.

(3) Phillips v. Slacke (or Starke). M.3 Jac. C.P. Add. 25205, f.40; Noy, 147. For present purposes, simply an example of an inadvertent Consultation. After discussing the merits, the Court decided that Prohibition would lie, but then apparently discovered that a Consultation had been granted. Nothing in the report (only MS. touches this point) explains how the mix-up occurred. The Court simply held that the Consultation had issued *improvide* and sent another Prohibition.
III. Self-foreclosure

Summary (Covering all sub-topics): The issue in the following cases is whether Prohibitions are barred by waiting too long to seek them or by other misconduct on the plaintiff's part. The courts were inclined to deny Prohibitions to the Admiralty after sentence given there. The effect of ecclesiastical sentences gave the courts more trouble. Although there were some attempts to formulate rules on that subject, the courts came in the end to a loose discretionary attitude. Prohibitions were sometimes denied after sentence. Sometimes they were denied because the party entitled to turn to the common law pursued ecclesiastical appeals before doing so. Miscellaneous forms of delay or neglect of one’s interests were sometimes held to destroy a man’s right to a Prohibition. In cases of all those sorts, however, the courts were essentially exercising discretion against especially negligent or vexatious parties -- not treating undue delay as a legal bar to Prohibitions. In quite a few cases, circumstances would have made it hard to apply a firm rule or policy against common law intervention after sentence or even after ecclesiastical appeal. There are indications that in the 1630s the judges were forced to agree that they would not grant Prohibitions after ecclesiastical sentence, but that commitment was at best shortlived and ineffectual.

A. Introductory

The cases on 50 Edw. 3 belong to a larger genus. If we ask “When will prior litigative events bar a Prohibition which should otherwise be granted?” the statute (and possibly the common law without the statute) points to one answer: “When there has already been a Consultation in the same case, with a few exceptions.” But perhaps the question has more than one answer. Let us now look at cases which raise that possibility. The common element in the following cases is that the party seeking a Prohibition has committed some act or omission which might reasonably be thought to foreclose his right to the writ.

Within the class, a number of cases turn on the effect of a party’s waiting to bring his Prohibition until sentence has passed against him in the ecclesiastical or other non-common law court. On one side, it may be ar-
The Writ of Prohibition:  
Jurisdiction in Early Modern English Law

argued that a party who has waited that long has acquiesced in the ecclesiastical court’s jurisdiction. It is desirable to ease the load on the judicial system as a whole and to spare the adversary party trouble. Therefore parties believing they are entitled to Prohibitions ought either to assert their claims early or forgo them. The sentence is the most obvious boundary between soon-enough and too-late. (Something might be said for denying Prohibitions to parties who had acquiesced in ecclesiastical jurisdiction to the extent of pleading to the ecclesiastical suit. But sentence has the advantage of being an open judicial act, easier to know about and place in time without investigating the moves of the parties factually. There is also a certain logic, or pseudo-logic, in saying that a Prohibition is meant to stop improper proceedings -- things going on -- and therefore that the writ should not lie beyond the terminus represented by sentence, but is appropriate at any time before.) In addition, it is socially undesirable to encourage the kind of litigative gambling in which a party tries his luck with one court and, failing there, looks to another. For a less moral point of view, such tactics are unsporting toward the other party.

These arguments in favor of treating sentence as a bar to Prohibition might, however, have to be qualified in two ways: (a) Are there circumstances in which a Prohibition would be substantively inappropriate before sentence, but appropriate afterwards? I.e.: Are there cases in which there is no basis for Prohibition until the ecclesiastical judge’s decision is known? That in itself is a major question for the law of Prohibitions. If the answer is “Yes,” as in practice it was, then treating sentence as a bar can obviously be defended only where the Prohibition ought to be granted without regard to the ecclesiastical judge’s disposition of the case. The impossibility of making sentence a bar in all might conceivably be taken as a reason against treating it as a bar in any case.

(b) Another complication is introduced by the peculiar nature of ecclesiastical appeals. Suppose we accept the theory (encountered in Cockeram v. Davies and Bowrie v. Wallington above) that an ecclesiastical appeal suspends sentence. Then suppose that A. is sued in an ecclesiastical court. The circumstances are such that he could have a Prohibition at once. But suppose he waits until sentence is given against him and then appeals, after which he seeks a Prohibition. Should the Prohibition be denied because A. has waited until after sentence, or should it be granted because the sentence is in suspense? The policy reasons for insisting that
Self-foreclosure

Prohibitions be sought early or not at all are all the stronger in this case. For if it is bad to wait until after sentence, it is worse to wait still longer, until after an appellate judge has wasted his time and the other party has been put to further delay and charges. If sentence should be a bar, then a sentence actually affirmed on appeal should be a stronger bar. But if the first sentence is not yet affirmed, it is not a sentence, only a sentence in suspense or *in potentia*! This complication may of course be ignored, simply by saying that waiting too long is the fault and that sentence -- suspended or not -- is the measure of “too long.” But if that is the sensible course, the courts would have to steel themselves to follow it, or else not consider sentence a bar at all. For it makes no sense to have a sentence-bar rule if it is always possible to evade it by appealing. The mere existence of this complication -- the difficulty of steeling oneself against the logical consequences of the suspension doctrine if that doctrine were to take hold in other contexts (as it did in 50 Edw. 3 cases) -- might count as a reason for paying no attention to the state of the ecclesiastical suit, but simply granting Prohibitions whenever it was appropriate on the merits.

Against the policy considerations in favor of treating sentence as a bar, it may be argued that Prohibitions are designed to protect the “royal dignity,” or at least the lines of jurisdiction that the law lays down and attaches importance to. There is a public interest in Prohibitions’ being issued whenever on the substance they ought to be. The negligence, miscalculations, or bad gambling of private litigants should not prevent that public interest from being asserted. Moreover, even from the point of view of efficient private law administration, there is some advantage in allowing the party to defer his Prohibition until after sentence. It may be that the party entitled to a Prohibition will win in the ecclesiastical court, either on the same grounds that would support a Prohibition or other sufficient grounds. There is no hint that anyone ever suggested that Prohibitions should as a rule be denied until after sentence. But by allowing the party to wait and see if he wants so, some unnecessary litigation over Prohibitions would be kept out of the common-law courts. If parties knew that they were not prejudicing their right to a Prohibition by defending the ecclesiastical suit, they would tend to defend it, and sometimes they would do so successfully. The adversary party -- defendant to the Prohibition -- was normally plaintiff in the ecclesiastical suit. He could hardly complain if the law so framed the rules that his chance to fight on the
The Writ of Prohibition:  
Jurisdiction in Early Modern English Law

ground of his ostensible choosing was improved (of course in practice one rarely had a choice).

B.  
Admiralty Sentences

Cases on the foreclosing effect of non-common law sentences are best considered in several sub-groups. Few cases raise the question in a completely simple form. Nor can the question be entirely abstracted from the substantive character of the cases in which it arose. Let us look first at a sub-group which illustrates the lastpoint.

The courts showed an inclination, with only slight qualification, to refuse Prohibitions to the Admiralty after sentence there. Ecclesiastical sentences were less likely to bar Prohibitions. This difference may reflect practical realities and social attitudes which could not be officially admitted. The Admiralty was most frequently prohibited from entertaining contract suits beyond its jurisdiction. It was supposed to confine itself to contracts made on the high seas. Contracts made in England (and, more controversially, those made in foreign countries) were supposed to be sued on at common law. The Admiralty enjoyed considerable popularity in the mercantile community, however. It was probably common for merchants to sue there when, strictly speaking, they ought not to, and for the defendants to such suits to acquiesce in the court’s jurisdiction. When the loser in an Admiralty suit came seeking a Prohibition, the unstated assumption may have been that he was a merchant who had been genuinely willing for his quarrel to be settled in the Admiralty, until the smart of defeat drove him to investigate his common law rights and look for a way out. In addition, though the Admiral might be out of his territory in adjudicating a contract made in Limehouse, there is every reason to presume that he would be perfectly fair between merchant and merchant, perfectly competent to discover the facts on which the majority of commercial disputes depend, and even an expert on technical aspects of the sorts of cases likely to come before him. For many reasons, such presumptions could not be made in the case of the ecclesiastical courts. There were far more kinds of Prohibitions to ecclesiastical courts. More kinds of people -- including poor, ignorant, and provincial ones -- passed through the ecclesiastical courts. A man’s seeming-acquiescence in their jurisdiction might be much less conscious and intentional than that of an experi-
enced merchant in Admiralty jurisdiction. Finally, the ecclesiastical courts often sat as judges between laymen and the corporate interests of the Church, for those corporate interests were involved with such private ones as an individual clergymen’s claim to tithes. Though the etiquette of a mixed judicial system required presuming that ecclesiastical judges would handle cases within their jurisdiction fairly, a certain tacit suspicion of their objectivity -- an unstated assumption that the common law was charged with protecting the layman *qua* layman, even in the face of his own acquiescence -- may well have been present. Let us look first at the Admiralty cases.

In Susans v. Turner (1597),¹ which involved several questions about the Admiral’s jurisdiction, the Common Pleas judges said it was their rule not to grant Prohibitions to the Admiralty after sentence in the simplest standard case: i.e., where a contract suit was brought in the Admiralty on the pretense that the contract was made at sea and a Prohibition was claimed on the surmise that the contract was actually made on land in England. Jennings v. Audley (1611)² presented a somewhat more complex situation. The plaintiff in the Admiralty sued on a contract which he said was made in the Straits of “Mallico,” “within the jurisdiction of the Admiral.” His libel did not say in so many words that the Straits were on the high seas, but in effect expressed the conclusion that they were within Admiralty jurisdiction. (As the law was, it did not follow automatically from the fact that something was done on a ship riding on the water that it was done on the high seas, because rivers, harbors, and “territorial waters” were regarded as land, English or foreign. By the controversial but prevailing common law theory, things done on land in a foreign country were not within Admiralty jurisdiction and were amenable to common law trial.) In response to this case, the Court laid down a rule, but the application of the rule to the case is not made clear in the report. The rule was as follows: (a) By *merely pleading* to the substance in the Admiralty -- much less waiting on sentence -- an Admiralty-defendant admits the court’s jurisdiction and debars himself from a Prohibition, *provided the Admiral’s lack of jurisdiction does not appear on the face of the libel.*

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¹ M. 39/40 Eliz. C.P. Harl. 1631, f.272; Noy 68 (undated). Another MS., Add 25,199, f.7b, dated 40 Eliz. C.P., probably relates to the same case. At any rate, the same rule is stated as a dictum.
² M. 9 Jac. C.P. 2 Brownlow and Goldesborough, 30.
Thus, in our case, if the libel had said “At London in Middlesex within the jurisdiction of the Admiral,” the lack of jurisdiction would appear on the face of the libel, because nothing done at London could possibly be within the Admiral’s jurisdiction -- or on the high seas. *Quaere* as to the spectrum, which includes the principal case, where an element of judicial notice of the facts of geography would be required: e.g. -- “At Madrid in Spain within the jurisdiction of the Admiral -- (or ”on the high seas“)”; “On the river Seine on the high seas (or within the jurisdiction of the Admiral)”; “At Bordeaux (a notorious seaport) on the high seas.” My guess would be that in none of these cases would the lack of jurisdiction be considered evident on the face -- i.e., that if the Admiralty defendant behaved in such a way as to seem to admit that Madrid was some place in the middle of the ocean, the courts would take no account of their knowledge to the contrary.

(b) If the lack of jurisdiction *does* appear on the face of the libel, a Prohibition should be granted even though the Admiralty defendant has waited until sentence has gone against him. I.e.: *Ceteris paribus*, waiting for sentence is no more a sign of acquiescence, thus sentence is no more a bar, than pleading to the substance. (There is no sign that a sentence was involved in Jennings v. Audley, so that the second rule should be taken as a dictum.)

There is another judicial statement from the same term as Jennings v. Audley, in general language and without reported context;³ The Common Pleas held that as a matter of law it would grant Prohibitions to Admiralty suits based on contracts made in foreign countries (i.e., on land or quasi on land), but if the Admiralty-defendant admits the jurisdiction and suffers sentence to go against him (nothing said to suggest that merely pleading constitutes acquiescence) Prohibitions will be refused, *unless* the Admiral’s lack of jurisdiction appears on the face of the libel.

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³ M. 9 Jac. C.P. 2 Brownlow and Goldesborough, 30. This report is stuck into the long account of a completely unrelated case (Baxter v. Hopes). It could be a somewhat distorted version of Jennings v. Audley and it could be another case.
In Tourson v. Tourson (1614)\textsuperscript{4}, Coke’s King’s Bench adopted the basic rule enunciated by the Common Pleas in the reports above and applied it to the case at hand. Here, a contract suit was brought in the Admiralty with the allegation that the contract was made “on the river of Lisbone” (plus, presumably, explicit jurisdiction-giving language, such as “on the high seas”). A Prohibition was sought on the ground that the “river of Lisbone” was not legally on the high seas. Coke said that with the consent of his brethren he would apply the following rule and deny the Prohibition in the instant case: If the Admiralty suit is based on the pretense that a contract was made on the high seas, and the Admiralty defendant replies to the substance and a sentence is given (n.b. the “and”), a Prohibition will not be granted on the bare surmise that the place in question was not on the high seas, unless that appears by the libel or (qualifying the above opinions slightly) by writing or other “apparent matter.” Coke’s unwillingness to grant the Prohibition in the instant case shows that he would not make use of his knowledge that “the river of Lisbone” was geographically related to Portugal in such a way as to be legally “land.” To take advantage of that point -- i.e., to show how the river and Portugal are in fact related and persuade the Court that in law the contract was as good as made on Portuguese soil -- the Admiralty defendant would have had to move before sentence. The only “brother” to speak in Rolle’s report is Justice Houghton, who agreed with Coke. An undated opinion in Coke’s reports,\textsuperscript{5} represented as per Curiam, might relate to Tourson v. Tourson. It in any event gives essentially the same rule, slightly softened. (Instead of saying a Prohibition will not be granted after sentence unless lack of jurisdiction appears by the libel or other solid evidence, Coke’s report says the Court “will be advised” -- i.e., take it as a matter of discretion whether to grant a Prohibition, be disinclined to grant one unless a strong case can be made. Coke’s report is careful, also, to prevent over-interpretation: An Admiralty-defendant, the report explains, cannot give jurisdiction -- i.e., common law courts are always legally free, within their discretion, to grant Prohibitions. The habit of refusing them after sentence is a policy to prevent “vexation,” an habitual way of using discretion, not an application of a rule of law.

\textsuperscript{4} M. 12 Jac. K.B. 1 Rolle, 80.
\textsuperscript{5} 12 Coke, 77.
A later Admiralty case raised a slightly different problem from that in the foreign contract cases. Here, a group of sailors joined in an Admiralty suit against the master of a ship for wages. After sentence, the master sought a Prohibition on the ground that the wage contract was made on land in England. It does not appear from the report whether the libel contained jurisdiction-giving language, such as “on the high seas,” or whether, if such language was included, there was anything on the face of the libel to show that it was patently fictitious. In denying a Prohibition, the Common Pleas, in any event, gave no sign of concerning itself with those features. Its motive was the nature of the suit. Eventually, the courts were to except mariners’ suits for wages from the general rules limiting Admiralty jurisdiction. I.e.: The Admiralty was allowed to entertain them even though the contract was manifestly made on land, because sailors were poor men, whose efforts to collect their wages should not be delayed by legal wrangling, and whom Admiralty rules permitted to join in a common suit, as they could not do at common law. In our case, the Court relied expressly on the sentence and characterized refusing the Prohibition as an act of discretion. It justified the exercise of discretion, however, by the undesirability of depriving poor mariners of their wages and the economy of a joint suit, not by discussing the degree to which acquiescence in a fictitious or legally doubtful local allegation ought, in general, to bar a Prohibition. A few further scraps of evidence confirm the courts’ inclination to refuse Prohibitions when such acquiescence in the Admiral’s jurisdiction could be made out.

6 P. 19 Jac. C.P. Winch, 8.
7 (a) Hollmast’s Case. Noy, 70. Undated. A barely reported per Curiam statement that Prohibitions to the Admiralty or ecclesiastical courts (quaere as to the latter) will not be granted after sentence.

(b) Don Diego Serviento v. Jolliff et al. Undated. Jac. C.P. Hobart, 78. The Court took pains to point out that they were especially glad to grant a Prohibition -- which they strongly thought was deserved on the merits -- because it was sought before any proceedings in the Admiralty and the claim to a Prohibition depended solely on the libel. The same report notes another case decided on the same day: Watts et al. v. Villiers. Prohibition denied because the claim that certain events happened on land was not advanced until after sentence and nothing appeared on the face of the libel to show that it was on land.

(c) Somerset v. Markham. M. 39/40 Eliz. C.P. Croke Eliz., 595. This report contains a broad affirmation of the barring effect of sentence with reference to ecclesiastical courts. The cursorily reported principal case seems to have involved an Admiralty suit where Prohibition was sought.
Self-foreclosure

In closing this group of Admiralty cases, we may take brief note of a parallel situation. Prohibitions were sometimes used to stop suits in courts of equity -- either because a party had improperly resorted to such a court when he could have sued at common law, or because someone was seeking an equitable remedy which the common law court regarded as intrinsically unjustifiable. Although the cases involving courts of equity are not consistent, the doctrine appears among them that at least in some circumstances Prohibitions should not be granted after decree, albeit that they would have been grantable before. Because relations between the common law and equity -- as opposed to common law relations with the more distinctly “foreign,” civilian-manned Admiralty and ecclesiastical courts -- raise special problems, I shall defer such cases until taking up Prohibitions to equity as a substantive topic. The point to note here is that the common law courts were relatively inclined to treat equity decrees, like Admiralty sentences, as bars to Prohibition -- relative, that is, to ecclesiastical sentences. Some, at least, of the reasons why Admiralty sentences were more effectual bars than ecclesiastical sentences may apply to equity decrees. That question we shall take up later.

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(d) Scarborough v. Justus Lyrus. Early Car. K.B. Latch, 252. Contains a general dictum by Justice Jones, that Prohibition will not be granted after sentence on a surmise that the matter was not done on the high seas. Sergeant Hitcham contradicted Jones, not flatly, but as if to say, “But acquiescence in jurisdiction does not give jurisdiction.” That reminder accords with earlier opinion. The principal case involved application for a Prohibition after sentence, but did not really turn on the effect of sentence. Rather, a Prohibition was refused because plaintiff-in-Prohibition was seeking to introduce a substantive defense (not a claim going to the Admiral’s local jurisdiction) which he could perfectly well have pleaded in the Admiralty. Neglecting to assert a defense in a non-common law court and later trying to assert it through Prohibition proceedings is related to acquiescence in an inappropriate jurisdiction, but as a significantly different problem is dealt with elsewhere. The relationship between the two problems may explain the exchange between Jones and Hitcham: Hitcham (arguing for a Prohibition) trying to establish a generally permissive rule which would justify a Prohibition despite the party’s neglect of his opportunity in the Admiralty; Jones disputing such permissiveness by reference to the courts’ readiness to refuse Prohibitions when there was any sign of acquiescence in the jurisdiction.
C.

Bare Sentence in an Ecclesiastical Court

Turning now to the ecclesiastical courts: There is little simple direct authority on whether or not sentence should bar a Prohibition -- if not as a strict matter of law, at least as an habitual exercise of discretion in the absence of strong contrary considerations. Several cases which in a sense raised that question were complicated by an appeal (which could in theory either strengthen or weaken the claim to a Prohibition) or by a De excommunicato capiendo. (As to the latter: With a possible exception for the High Commission, excommunication was the ultimate ecclesiastical sanction. The ecclesiastical courts could order a man to do various things, including payment of money, but if he disobeyed they could only excommunicate him. They could not authorize taking his body or goods in execution. Excommunication could, however, be translated into temporal sanctions. After a brief waiting period, upon due certification that A. was excommunicated and unrepentant, the King’s writ De excommunicato capiendo would issue, pursuant to which A. could be imprisoned until the ecclesiastical judgment was satisfied.) The case against a Prohibition might be decisively strengthened by translation of an ecclesiastical sentence into a common law record by De excommunicato capiendo.

The evidence from reports not complicated in either of those two ways suggests that the courts never committed themselves firmly to lean against Prohibitions after ecclesiastical sentence (unless they did so extra-judicially in Charles I’s reign). They were committed to lean that way in Admiralty cases, while insisting that they were not bound to; in ecclesiastical cases, they probably would have insisted on their discretion to weigh plaintiff-in-Prohibition’s delaying until after sentence against him, but without any commitment as to what weight they would normally give it. One cursory report, without context, shows a division over the effect of sentence in the early 17th-century Common Pleas. Justice Walmesley said flatly that Prohibition will not lie after judgment in the ecclesiastical court. He was sharply contradicted on that proposition by Chief Justice

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8 P. 8 Jac. C.P. Harg. 52, f.43.
Coke and Justice Daniel, who said they had a great deal of recent authority on their side. Another report from the same term has Coke laying down a rule, with the concurrence of the rest of the Court: “...that after sentence given in the Spiritual Court, he would not grant a prohibition, if there were not matter apparent within the proceedings; for I shall not allow, that the party shall (to have a prohibition) shew any thing not grounded on the sentence to have a prohibition, because he hath admitted of the jurisdiction; and there is no reason for him to try if the Spiritual Court will help him, and afterwards at the common law to sue forth a prohibition.” The context of this statement is not reported. (Coke’s remark is appended to the full report of a case in which the Court did grant a Prohibition after sentence. In the principal case, however, a Prohibition would not have been appropriate until after sentence. The reporter introduces Coke’s speech with a “but” -- as if he were surprised at the result in the principal case: “But Cook said, the same day in another case ....”) Coke’s rule leaves a certain ambiguity. He clearly meant to exclude the surmising of matter of fact outside the record by parties seeking Prohibitions after sentence. However, he expressly includes the sentence in the record. That is obviously necessary for one type of situation (such as that of the case to which the rule is appended): where there is no basis for a Prohibition except an erroneous sentence. The ambiguity arises in another situation: Suppose a Prohibition could be obtained without going outside the record before sentence, but the party waits until after sentence to seek his Prohibition. Should he be barred for “admitting the jurisdiction,” or allowed his Prohibition on the total record (i.e., because it appears on the face of the libel that the ecclesiastical court lacked jurisdiction -- which could have been shown earlier -- and because the sentence shows that the ecclesiastical court did not refuse jurisdiction -- whether or not asked to by the party)? Possibly Justice Walmesley’s concurrence with Coke on this rule argues for taking it in the stronger sense: i.e., as erecting a bar to Prohibition whenever the party has failed to act as soon as he might. In any event, Coke’s rule is stronger than a mere claim of discretion to deny Prohibitions when there has been undue delay. There are other cases which seem to go no further than such a claim of discretion.

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9 P. 8 Jac. C.P. Godbolt, 163 (Within the report of Candict v. Plomer)
In one later case,\textsuperscript{10} (the remark has no apparent context and the report is somewhat garbled) Sergeant Harris at the Bar asserted what I take to be the following rule: Ecclesiastical sentence should certainly \textit{not} bar Prohibition if the sentence is given “suddenly” -- i.e., (presumably) without giving the ecclesiastical defendant a fair chance to investigate his rights and pursue a Prohibition. Otherwise, whether to give any weight to the sentence is discretionary. Fotherlye’s Case (1627)\textsuperscript{11} provides a clear exposition of the Common Pleas’ attitude. It was said at the Bar in that case that the Court’s “custom” was to deny Prohibitions after sentence. The judges did not deny that that might be true in some sense, but Chief Justice Richardson was explicit on the limits of the “custom.” It is true, he said, that Prohibitions should be sought in due time, “but that is in cases which concern interest and rights which \textit{adonque} [“then,” “after all” or “long since”] are settled.” In other words (I take it), it is in the Court’s discretion to refuse Prohibitions on account of a sentence, but that discretion should be used only to prevent a negligent party from reviving a dispute of some consequence which the other party was entitled to consider long-settled. Fotherlye’s Case itself was a poor occasion to invoke the “custom,” since, as in other cases to be noted below, a Prohibition would hardly have been appropriate before sentence. Even the lawyer, Finch, who invoked it leaned on the shaky additional argument that the sums involved in this dispute (concerning an intestate’s estate) were small -- as if to say “Prohibitions should be denied after sentence so long as no one will suffer very serious pecuniary damage thereby.” Richardson replied, “...a greater or lesser sum will not change the law.”

Two reports from late in Charles I’s reign give a little more countenance to the view that ecclesiastical sentence should usually preclude a Prohibition. As we shall see below, there are indications that the judges committed themselves to such a policy extra-judicially in that reign. In the first of these cases,\textsuperscript{12} a Prohibition was sought on a surmised \textit{modus} after sentence in the underlying tithe suit. It was denied because it was sought “too late” (there is nothing to suggest that “too late” means any-

\begin{footnotes}
\footnotetext[10]{Baron v. Goose. P. 17 Jac. C.P. Harl. 5149, f.291b.}
\footnotetext[11]{H. 2 Car. C.P. Littleton, 21.}
\footnotetext[12]{M. 15 Car. K.B. March. 73.}
\end{footnotes}
Self-foreclosure

thing more than “after sentence.”) Rolle, arguing for the Prohibition at the Bar, tried unsuccessfully to make a distinction on the basis of the Court’s past practice. He conceded that a Prohibition should be denied if a parishioner, being sued for tithes, fails to plead his modus in the ecclesiastical court and waits until sentence goes against him before seeking the Prohibition; contra if he pleads his modus and then waits for sentence, as in this case. In other words, double negligence should count against plaintiff-in-Prohibition, but not the sentence by itself. (Subject to a little dispute, a Prohibition could be obtained on a modus -- at least before sentence -- without pleading it in the ecclesiastical court and surmising that the plea had been rejected.) The second report is just a note: Prohibitions should not be granted after sentence without “special cause” (no explanation of “special cause”).

In a third Caroline case, Dudley v. Crompton, the Common Pleas denied a Prohibition sought four years after sentence in a defamation suit. The three puisne justices thought that Prohibition would lie if it had been sought in time, Chief Justice Bankes disagreeing on the substance. The exact meaning of “too late” is not expounded, but it is clear from the puisne Justices’ words and tone that the four years moved them, rather than the sentence as such. They were little short of scandalized to learn that the ecclesiastical court had regarded the vague abuse in question as legally defamatory; two of the three Justices thought in addition that the sentence was cast in dangerously loose terms, so that a Prohibition specifically requiring retraction or non-execution of the sentence would be justified. Waiting four years to protest being punished for one particular scurrilous speech (probably by an order to apologize for the words or to do some sort of penance, plus costs to the prosecuting party) is unconscionable. Refusal of the Prohibition was surely justified if the Court is assumed to have any discretion at all. If the judges promised categorically to deny Prohibitions after sentence at the high moment of Laudian power, this case shows that in 1642 they no longer felt obliged.

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13 H. 16 Car. C.P. March, 92.
The Writ of Prohibition:
Jurisdiction in Early Modern English Law

D. Appeals

Parallel and related to the last line of cases are those in which a Prohibition was sought after sentence and ecclesiastical appeal from that sentence. As argued above, an appeal could in theory alter the situation in contrary ways: (a) On the assumption that appeal suspends sentence, a suit pending on appeal may be regarded as prohibitable notwithstanding any rule or policy against Prohibition after sentence. (b) The position of plaintiff-in-Prohibition seems weakened by taking an appeal. One who seeks a Prohibition pending his own appeal seem to have entrusted himself to the ecclesiastical system even more than one who has merely waited until sentence and then turned to the common law. One who seeks a Prohibition after the appeal is decided seems (aside from theories about suspension) to have two sentences against him instead of one.

The earliest report involving an appeal is very brief -- a bare statement that it was adjudged that after sentence and appeal no Prohibition will be awarded. Ayliffe v. Brown (1614) casts doubt on that generality. Here, a Prohibition was in fact denied on the ground that the plaintiff had not only waited until after sentence and appeal, but until after the appeal was decided against him. The Court seems to stress the double sentence, as opposed to the first sentence and the mere taking of the appeal. In addition, the Court went out of its way to show that it did not think plaintiff-in-Prohibition had altogether clean hands, even though he would probably have been entitled to a Prohibition at an earlier stage. (The plaintiff was an executor seeking to stop a legacy suit on the ground that there were possible debts outstanding against the estate. An executor was not obliged to pay legacies until he was free from accountability for common law debts. The Court was cool toward the executor in this case because he had refused to give security for payment of the legacy if the estate was sufficient, as the ecclesiastical court had apparently given him the option of doing. The judges seem to have thought that that was a reasonable demand, possibly that it would have been reasonable at any stage. The Court’s position may have been “We might not have granted a Prohi-

15 Sir George Carie’s Case. 40 Eliz. C.P. Add. 25,199, f.16b.
16 H. 11 Jac. C.P. Godboli, 243.
Self-foreclosure

bition before the decision on appeal or even earlier, but after this much delay we will not stop to consider the merits.”) It may also be relevant that the decided appeal here was by the Delegates, the top of the ecclesiastical ladder. (The appeal must have gone directly there, because the original court, as in many testamentary cases, was the Prerogative Court of Canterbury.) The “faith and credit” given to a decision by the court of last resort in the ecclesiastical system was conceivably greater than what would have been given even to an appellate court below the summit. On the whole, Ayliffe v. Brown counts for an open-discretion theory, rather than a strict policy on the effect of sentence or appeal.

Brabin v. Trediman (1618)\(^\text{17}\) goes much farther that way, for a Prohibition was granted after the first sentence had been twice appealed and twice affirmed, the second time by the Delegates. Without going into the somewhat involved facts of the case at this point: It seems clear that the judges thought that the ecclesiastical handling of the case was especially outrageous. The appeals were specifically relied on by the defendant, but to no avail. A case from the last term (Dame Layton v. Hussey, not independently reported) was cited in support of the Court’s holding, as an example of a Prohibition granted despite appeal. Brabin v. Trediman could be taken as authority for never paying attention to an appeal, but that is probably unnecessarily strong. It certainly is authority against any duty to give significant weight to appeals in the face of solid conviction that the ecclesiastical courts were wrong. It would have been hard in this case to argue that the Prohibition should have been sought before the first sentence. The case would therefore be compatible with the following rule: To wait unnecessarily until sentence and then appeal seriously weakens one’s claim to a Prohibition; but merely to appeal from a sentence one was justified in waiting on does not weaken one’s claim, even after the appeal is decided.

A further King’s Bench case,\(^\text{18}\) rather garbled in the report, leaves that court well-short of making ecclesiastical appeals fatal to Prohibitions. The Prohibition in this case was apparently undone by Consultation on the ground that the party entitled to a Prohibition had “surceased his time”

\(^{17}\) T. 16 Jac. K.B. 2 Rolle, 24.

\(^{18}\) Churchwardens de ---. H. 20 Jac. K.B. 2 Rolle, 270.
The Writ of Prohibition:
Jurisdiction in Early Modern English Law

by bringing two ecclesiastical appeals. But as in Ayliffe v. Brown, this reason was reinforced by other considerations: The suit was by churchwardens for a rate. By dragging the churchwardens through the ecclesiastical courts before trying to stop them by Prohibition, the rate-payer had put the parish out sixty pounds, whereas the suit was only for six pounds. The parish -- a public body responsible for various aspects of the community’s spiritual and temporal welfare -- was perhaps entitled to greater consideration than a private litigant would have been. In addition, the rate-payer seems to have taken an untenable legal position in the ecclesiastical court, so that his defeat there was more his own fault than the ecclesiastical judges’.

In Fartham v. Rudd, the late-Jacobean Common Pleas embraced the same open-discretion attitude as the King’s Bench took in the preceding cases. The Court was disinclined to grant a Prohibition after affirmation of sentence on appeal in a defamation suit, but the judges limited their position carefully. They said they would have granted a Prohibition in the instant case before sentence, or even after one sentence, as they had done in a similar defamation case (Calthorp’s Case, not cited by date), but if application for a Prohibition is delayed until after appellate sentence, “then we are more wary, for it is a matter that rests in the discretion of the Court, and so the Court will advise.” Note “will advise”: The judges were only ready to think about denying the Prohibition. I imagine they would consider just how intolerable the ecclesiastical decision seemed to them. (It was one of those trivial-in-consequence but foolish holdings that vague abuse was defamatory, a species of ecclesiastical decision which the common law judges found hard to take.)

In the Caroline Dickes et uxor v. Brown, waiting for sentence and taking an appeal was held against plaintiff-in-Prohibition, at least by Justice Dodderidge. Dodderidge’s remark to that effect is only incidentally noteworthy, however, because the whole Court clearly agreed that the claim to a Prohibition was bad on the merits. In Ward v. Cory, the de-

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19 T. 22 Jac. C.P. Harl. 5148, f.44.
20 M. 1 Car. K.B. 3 Bulstrode, 314; Benloe, 139 (dated H. 1 Car.) and 170 (dated P. 2); Noy 77 (undated, sub. nom. Dixye v. Brown). Bulstrode is the good report.
defendant in an ecclesiastical suit for defamation suffered sentence to go against him, appealed, and then sought a Prohibition. The Court was in doubt about the merits and adjourned the case. But the judges expressly agreed that the sentence and appeal would not bar the Prohibition. In Reynolds v. Dr. Lockett on the other hand, the Common Pleas rested denial of a Prohibition solely on the fact that the plaintiff had appealed twice -- i.e., had a first-instance sentence plus one appellate sentence against him and an appeal to the Delegates pending. The surmise was that the parson suing for tithes was not truly incumbent, being automatically deprived for failure to read the articles as required by 13 Eliz., c. 12, and that the ecclesiastical court had refused to admit a plea to that effect. The Court clearly and unanimously held that Prohibition lay on the merits, but nevertheless denied the writ. In Pew et uxor v. Jeffryes, from the same year as the last case, the King’s Bench also showed respect for ecclesiastical sentence and appeal, though only with supporting effect. The case was tangled in ways we need not go into here. Once the tangles were straightened out, the Court was more than inclined to deny a Prohibition on the merits. It actually did so with the observation that a Prohibition was especially inadvisable here, where the ecclesiastical sentence had been affirmed once on appeal and appealed again. The plaintiff-in-Prohibition’s delay was only used to overcome a shadow of doubt (as to whether allegedly defamatory slang could be understood in such a way as to put the language clearly within ecclesiastical jurisdiction -- a problem both tricky and trivial).

A couple of cases from Charles I’s reign raise the question of the effect of sentence and appeal in special ways. In Smith v. Executors of Poyn-dreill the Common Pleas refused a Prohibition sought too late, but in a manner that strongly confirms the cases pointing to a “rule of discretion.” Despite the result, this case is in a sense especially favorable to Prohibitions, for the only reason to prohibit at all was a statutory rule regulating traffic within the ecclesiastical system. 23 Hen. 8, c.9, protected people against being sued in ecclesiastical courts other than those of the diocese they lived in. The act was frequently enforced by Prohibitions. The ec-

22 H. 12 Car. C.P. Harg. 23, f.4.
24 M. 3 Car. C.P. Croke Car., 97.
The Writ of Prohibition:
Jurisdiction in Early Modern English Law

clesiastical defendant could have a Prohibition on the surmise that he was being sued in the wrong diocese. It is arguable that Prohibitions sought solely on that ground should have been refused after sentence, not to mention appeal; for the rule was purely local and intra-ecclesiastical. A presumption of acquiescence in the “wrong court’s” jurisdiction is most likely to be harmless when there is nothing to choose between the law and procedure of the wrong court and the right one. One bare note in a MS. report gives it as a Common Pleas rule that Prohibitions on 23 Hen. 8 will not be granted after ecclesiastical sentence.\(^{25}\) In Smith v. Executors, the Court declined to enforce the statute. It did so, however, in the full light of exacerbating circumstances. The ecclesiastical suit was fairly trivial -- for a ten pound legacy. Instead of suing in the executors’ home diocese as he should have, the legatee sued in the Prerogative Court of Canterbury. After losing there, the executors appealed to the Delegates, who affirmed the sentence and assessed costs. The executors were subsequently excommunicated for failing to carry out the sentence. After that much delay, the Court thought, the executors had lost their right to a Prohibition. Even so, an additional ground was relied on: The executors had themselves proved the will in the Prerogative Court. They were probably quite entitled to do so, since the Prerogative Court had probate jurisdiction when the estate was of a certain size and its property scattered over more than one diocese. The Court’s point was that the legatee had a certain excuse for suing in the wrong court to start with -- a certain right to assume that the executors would not object to having all litigation about the will in the probate court. The executors’ behavior had strongly confirmed that assumption.

One undated report,\(^ {26}\) relating to a special problem confirms what most of the cases above show: that appeal, even decided appeal, only influenced the courts’ discretion, and that in a fairly marginal way. The report states a rule, as follows: When a party entitled to a Prohibition loses in the ecclesiastical court and appeals from the sentence, he may still have his Prohibition, not only \textit{quoad} the suit, but also \textit{quoad} costs assessed by

\(^{25}\) H. I5 Jac. C.P. Harl. 5 149, f.93b. The report reads “32” Hen.8, but I think that must be a mistake for 23.

\(^{26}\) Noy, 137.
the ecclesiastical judge of first instance. In one way this rule makes sense: If the ecclesiastical court has no jurisdiction, and if waiting until after sentence is neither strictly nor as a strong discretionary habit a bar to Prohibition, why should the party “in the right” pay costs? But two arguments can be made contra: (a) Liability for costs would be a fair penalty for failing to seek a Prohibition before sentence, assuming the Prohibition remains grantable. *A fortiori* when the delay extends beyond the moment of sentence, until after costs have been assessed and until one has brought an appeal. (b) The statute of 32 Hen. 8, c.7, required the ecclesiastical judge of first instance to assess costs notwithstanding any appeal from his sentence. By the statute, the winner at the original level was not to wait until the appeal was settled in his favor to have a judgment for costs. (The reason for that provision was clearly to prevent a just winner from being kept from his costs while successive appeals were brought frivolously, only to prevent the winner from collecting until a remote time when the costs might no longer be recoverable. If the original sentence was reversed on appeal, the winner below would presumably be liable for the costs of the appeal plus the costs recovered earlier.) To reverse the judgment for costs, as well as the sentence, by Prohibition would be to undo what the ecclesiastical judge had done by way of fulfilling his statutory duty, as well as what he ought not to have done, and it was the party’s delay in seeking a Prohibition that caused him to do his statutory duty. Noy’s report suggests that this second argument troubled the judges, for they announced their rule “notwithstanding” 32 Hen.8. The rule strongly favors Prohibitions “notwithstanding” the party’s delay and seeming-acquiescence in ecclesiastical jurisdiction.

E. De Excommunicato Capiendo

A group of four reports, all from the same term, introduces the further complication of a *De excommunicato capiendo*. The abstract question is whether issuance of that “temporal” writ against the loser in an ecclesiastical court will invariably bar him from a Prohibition, whether or not any “spiritual” event (sentence, appeal, decided appeal, excommunication itself) would have that effect. The reports, however, present problems of reconstruction and reconciliation. Although three of them may relate to the same case, I shall consider them one by one. (a) One report, labeled
Cope’s Case\textsuperscript{27} does not recite the facts, but gives the opinions of three judges, as follows: Chief Justice Coke with the concurrence of Justice Warbarton, said that a Prohibition should never be awarded, whatever the merits, after an ecclesiastical loser is “taken” by \textit{De excommunicato capiendo}. Coke thought it illogical that a Prohibition -- whose nature is to stop the ecclesiastical courts from proceeding -- should be issued after the ecclesiastical courts had “proceeded as far forth as they can” and the party had been handed over by matter of record to the temporal courts. Justice Foster disagreed. He admitted that there was authority (from the Register of Writs) against Prohibition after \textit{De excommunicato capiendo}. He apparently thought, however, that the rule was not invariable and that the example in the Register was somehow different from the present case. (Without more information, I cannot reconstruct his point in substance.)

(b) The second report\textsuperscript{28} gives every sign of relating to the same judicial discussion. This one gives the case: A man was sued in the wrong diocese and therefore could have had a Prohibition by force of 23 Hen.8. But he neglected to seek one until after sentence had gone against him and a \textit{De ex communicato capiendo} had been issued. Coke and Warbarton said that they could simply find no authority in favor of Prohibitions after \textit{De ex communicato capiendo}. At the same time, they emphasized that ecclesiastical sentence as such is no bar, despite some ancient authority to the contrary. Coke went on to qualify the latter point by a distinction seemingly different from the one he made elsewhere: viz. that Prohibitions should not be granted after sentence when the ecclesiastical court’s lack of jurisdiction appears on the face of the libel, \textit{contra} when it does not. (The distinction makes sense and is not really inconsistent with Coke’s view above -- that Prohibitions should not be granted after sentence on \textit{matter of fact} outside the record. There were three basic types of claim to a Prohibition. (i) Where all the plaintiff need do is show the libel. (ii) Where the libel shows that the suit originally belonged in the ecclesiastical court, but subsequent pleading or the ecclesiastical judge’s interlocutory handling of the case raises the right to a Prohibition. (iii) Where out-of-court facts are surmised. Coke may well have thought that

\textsuperscript{27} M. 8 Jac. C.P. Harg. 15, f.230.


**Self-foreclosure**

sentence should be a bar in cases (i) and (iii), but not in case (ii). If a man should know his right to a Prohibition the moment he is informed of the libel against him, he is relatively without excuse in delaying. If he should know his right only at a later stage, he is relatively justified in waiting until sentence, even though ideally he ought to move more quickly. The time between the accrual of the right and sentence might be brief, and it would be very awkward for the common-law court to inquire in each case whether the party moved quickly enough.) Finally, Coke gives an indication of regarding Prohibitions on 23 Hen. 8 as a special case -- as if to say, “Although sentence as such is not always a bar to Prohibition, and even if *De Excommunicato capiendo* were not a bar, Prohibitions sought solely on the ground that the suit is in the wrong ecclesiastical court should not be granted after a sentence.” His words are: “...in this case it may be that at the time of the judgment pronounced he was dwelling in the diocese in which he was sued, for it is a transitory thing.” I.e., (I take it): For the reasons I state above, Prohibitions based on a “merely local and intra-ecclesiastical rule” are a special case -- the more so (Coke adds) because local facts change. A man might be sued in the wrong diocese originally, neglect his Prohibition for a time, then, before sentence, move to the diocese in which he was sued. Would it not be absurd in those circumstances to undo a perfectly valid sentence by Prohibition and force the ecclesiastical winner to start all over again in exactly the same court? Justice Foster disagreed with Coke and Warburton “vehementer.” Just how many of their several points he disputed is unclear, but he plainly controverted the other judges on *De excommunicato capiendo*. To Coke’s point that Prohibition after that writ was without warrant in the books, Foster said, “First command the Bishop to absolve him, inasmuch as it appears that he was unjustly vexed.” I would construe this as saying: “It is perfectly possible to proceed against the spiritual authorities and force retraction of the excommunication, despite the *De excommunicato capiendo*. Of course issuance of that writ in a sense takes the matter out of ecclesiastical hands, and of course a Prohibition cannot undo the *De excommunicato capiendo*. If the party is in jail by virtue of it, he will have to look for some way of getting out. The thing we can do to help is see that the wrongful excommunication is reversed, and the existence of the *De excommunicato capiendo* is irrelevant as far as our inherent power to do that is concerned.”
From this report and the last one, it may be safely concluded that the majority of the divided Common Pleas opposed Prohibition after De excommunicato capiendo. Justice Walmesley would surely have agreed with Coke and Warburton, for he was more inclined than any other member of the Court to consider sentence by itself a bar.

(c) The third report\(^\text{29}\) is distinctly different. Without stating the case, it gives the following rule as a per totam Curiam holding: If a man is sentenced in the ecclesiastical court, then De excommunicato capiendo issues, then he appeals, he may have a Prohibition because the appeal suspends the sentence. In none of the cases involving appeals above is there any sign of the “suspension” doctrine. This report alone lends it countenance in the context of the barring effect of sentence. The rule here is especially strong, because of the De excommunicato capiendo. For it might be argued that, although the appeal suspends the sentence, the De excommunicato capiendo still bars Prohibition by “taking the matter out of ecclesiastical hands,” or erecting a common law record to which a Prohibition would be repugnant. In addition, the party seems relatively at fault when, besides waiting on sentence, he delays his appeal (i.e., assuming the “suspension” doctrine, fails to take prompt advantage of the means to have a Prohibition despite the sentence) until the further inconvenience of a De excommunicato capiendo has descended on him.

(d) The final report\(^\text{30}\) is labelled “King’s Bench,” so despite the coincidence of date it must relate to a different case from those above. It is very brief -- a mere noted rule in general terms that Prohibition may not be granted after De excommunicato capiendo.

Allowing for the difficulty of putting the reports on De excommunicato capiendo together coherently, and taking the cases on ecclesiastical sentences as a group, perhaps the main point to observe is that Coke was relatively ready to close doors to Prohibitions by seeing self-foreclosure or acquiescence in at least some circumstances. He was relatively inclined to consider self-foreclosure as a formal category -- to elaborate dis-

\(^{29}\) M. 8 Jac. C.P. Add. 25,209, f.212b.
\(^{30}\) M. 8 Jac. K.B. Harg. 32, f.41.
Self-foreclosure

tinctions as to when it should and should not take effect and to frame such distinctions as rules of law. The more typical judicial attitude was to regard Prohibitions as grantable whenever they were deserved on the merits, and then on occasion to deny them, when in the court’s discretion the plaintiff had behaved very irresponsibly.

F.
Miscellaneous Forms of Self-foreclosure

Alongside cases on the foreclosing effect of sentence, appeal, and De excommunicato capiendo, we may consider a few more in which other acts and omissions by the party substantively entitled to a Prohibition were discussed as possible grounds for denying the writ. These cases are all different from each other. As a group, they confirm the courts’ disposition to grant Prohibitions even though the plaintiff had neglected his interests.

In a case of 1605, the plaintiff was entitled to a Prohibition because the land with respect to which tithes were sued for was exempt as recently reclaimed waste. An unsuccessful attempt was made to block him on the ground that he had confessed the libel before seeking the Prohibition. The brief report does not explain exactly what “confessing the libel” involved. The man had probably not paid his tithes, then, sued for them, had in ignorance admitted they were due as alleged. Subsequently, he probably discovered the statutory exemption for reclaimed land. To deny the Prohibition in such circumstances would be a pretty harsh application of the presumption that every man knows the law. One who contested an ecclesiastical suit might do so because de facto he did not know his right to a Prohibition, but the very fact that he made a legal fight suggests that he was advised by at least an ecclesiastical lawyer -- that he felt the claim against him was invalid and bestirred himself to oppose it, in which case it was his responsibility to discover all his rights, to look into the common law as well as the ecclesiastical law. A poor man, guilty as sin of neglecting the parson, might well come and “confess the libel” without the slightest idea that he had a defense. Insofar as pleading to the eccllesiasti-

31 P. 3 Jac. K.B. Add. 25.209. f.47b.
The Writ of Prohibition: Jurisdiction in Early Modern English Law

cal suit (and even waiting on sentence) were not generally fatal to Prohibitions, “confessing the libel” certainly should not have been.

In a later,\textsuperscript{32} much more inexcusable negligence was held against a plaintiff-in-Prohibition. Here, a man got his Prohibition in plenty of time. He failed, however, to serve it on the ecclesiastical court and the adverse party. It would seem that his omission was deliberate, for after losing in the ecclesiastical court he himself appealed. Then, after a lapse of two terms, he served the Prohibition. The King’s Bench held that he had “sur-ceased his time” and therefore could not take advantage of his Prohibition (i.e., instigate the proceedings which followed when a Prohibition was disobeyed, whereby defendant-in-Prohibition was attached and required to contest the Prohibition formally, ostensibly to justify his disobedience). The decision was surely right, for the plaintiff was, at best, grossly negligent. More realistically, he was gambling on the ecclesiastical courts in preference to litigating over the Prohibition at common law. (His conduct is most intelligible on the assumption that his Prohibition was shaky.)

One who gets his Prohibition in time obviously knows his common law rights -- ignorance thereof could not explain his failure to serve the Prohibition, whatever inadvertence or craftiness does explain it. On the other hand, one who merely fails to seek a Prohibition at a reasonably early stage might be ignorant of his rights, though of course he might alternatively be either speculating on the ecclesiastical outcome or simply negligent. Because of this difference, the failure-to-serve case seems stronger than the standard sentence or sentence-cum-appeal cases. So by implication the Court held. It qualified its rule in one way, however: Suppose a man gets a Prohibition, fails to serve it, and also fails to appear and plead in the ecclesiastical court. Suppose that the ecclesiastical court consequently excommunicates him for failure to appear -- i.e., does not give sentence on the matter, but uses excommunication as a sanction to enforce attendance. In that event, the judges said, the man may take advantage of his Prohibition. The difference makes sense: In this case, as well as the principal one, failure to serve the Prohibition is negligent. But failing to serve and going on to contest the ecclesiastical suit, as in the

\textsuperscript{32} T. 15 Jac. K.B. Croke Jac., 429.
Self-foreclosure

principal case, bespeaks acquiescence -- i.e., waiting to see which way the ecclesiastical cat will jump. Non-appearance bespeaks the opposite, improper though it is to take it upon oneself to stay away simply because one has a Prohibition in one’s pocket. The judges thought that that impropriety would be too severely punished by, in effect, quashing the Prohibition. A more generous attitude toward ecclesiastical courts and ecclesiastical plaintiffs than the common law judges typically showed might have led to the opposite conclusion.

Coffe and Wollston v. Town of Shrewsbury\textsuperscript{33} provides an example of the “open discretion” theory of the judicial power to refuse Prohibitions. On the complicated merits of that case, the Court clearly thought that a Prohibition should be granted. Chief Justice Hobart, however, favored withholding the Prohibition “in discretion” because he was convinced that the plaintiff’s behavior had been dilatory and his motives vexatious. The exact grounds for his suspicion are not clear from the report. Hobart said that the plaintiff had “been in the Chancery and Arches and in the Court of Requests; and the Prohibition is solely for vexation.” Presumably that means that the plaintiff had tried unsuccessfully to get a Prohibition elsewhere and also tried to make his point in an ecclesiastical court (the Arches), instead of going directly to a major common law court as soon as he thought he was entitled to a Prohibition. Also, the plaintiff’s claim was based in part on what seemed off-hand a technically correct but unusual and rarefied contention, whereas his object was only to escape a church-rate. Hobart probably wanted to avoid a thorny legal debate in a suit of slight material consequence and was therefore ready to look for a discretionary basis for denying the Prohibition. The rest of the Court would not go along with Hobart, however, so that the Prohibition was finally granted. Justice Hutton, who directly answered Hobart’s plea for a discretionary approach, was moved by the consideration that part of the plaintiff’s claim was not rarefied, but a standard ground for Prohibition. The report as a whole does not count against the “open discretion” theory as such, but against straining it to deny Prohibitions when the plaintiff has behaved questionably.

\textsuperscript{33} H. 15 Jac. C.P. Harl. 5149, f.95.
Standard cases on sentence, etc., ask whether a plaintiff entitled to a Prohibition may foreclose himself. In Gilby v. William, the King’s Bench did not think the plaintiff was entitled to a Prohibition on the merits. His delay in seeking one was used against him in another way, however. The plaintiff had waited on ecclesiastical sentence, appealed, and lost again at the appellate level. Then he sought a Prohibition on grounds the judges thought insufficient. They might, however, have granted the Prohibition in order to permit adversary debate on the merits, for the other party was not represented at the hearing on the surmise. That was probably urged as the proper course, and it probably would have been in normal circumstances. In this case, the Court thought the plaintiff’s delay destroyed any right he might otherwise have to a provisional Prohibition, pending formal pleading or motion for Consultation by the other party. The Prohibition was simply denied after the plaintiff had had his chance to argue for it ex parte.

Standard cases ask whether the ecclesiastical loser may have a Prohibition when he has unnecessarily waited to lose before seeking one. In Barkham v. Woode, the shoe was on the other foot. A parson sued a parishioner for tithes. The parishioner pleaded in the ecclesiastical court that the land was recently reclaimed waste and therefore exempt by the statute. The ecclesiastical court gave judgment for the parishioner -- i.e., that the land was exempt for the reason alleged. The parson appealed. Then, to halt the appeal, the parishioner sought the Prohibition he could have had as soon as the ecclesiastical suit was started. The Prohibition was denied, “since he has sentence for him and the other appeals only to reverse it, which is just. For the appeal is on the old libel and therefore if erroneous sentence is given it is fit to be reformed.” To put it another way: If I have acquiesced in the ecclesiastical court’s jurisdiction to the extent of contesting the suit, when I win my mouth is surely stopped to dispute the jurisdiction for the purpose of cutting off the other party’s appeal -- an appeal that may perfectly well be justified. (Here, it is perfectly possible that the first ecclesiastical court misdetermined the factual question whether or not the land was recently reclaimed -- the same question

34 P. 21 Jac. I.B. Croke Jac., 666.
35 P. 22 Jac. C.P. Harl. 5148, f.16.
that would probably be litigated over at common law if the Prohibition were granted. Realistically, to grant the Prohibition would amount to transferring the litigation to the common law -- thus adding to the expenses of the parson, who did no wrong in suing in the ecclesiastical court to start with and was in no way discouraged by the parishioner from the steps he took there, including the appeal. Suppose, however, that the appellate courts were to reverse the sentence. Should the parishioner then have his Prohibition? In other words: Compare A., who wins in the ecclesiastical court of first instance, then loses when his adversary appeals, then seeks a Prohibition, with B., who seeks a Prohibition either after losing in the original court or after losing both there and on his own appeal. Is A.’s claim weakened, relative to B.’s, by his having won once? Another problem arises if we imagine a case turning purely on a question of law, as the principal case is unlikely to have done: X. sues Y. in an ecclesiastical court, and Y. wins because the ecclesiastical court resolves in his favor a question on law solely within common law competence. Should Y. have a Prohibition to cut off X.’s appeal, with the effect of bringing the legal issue into proper hands? The main reason for raising these speculative questions is to emphasize that Barkham v. Woode, which is unique of its type, does not resolve them.)

Our last case comes from the Civil War period. Here, a Prohibition was sought to a borough court (the Corporation of Lincoln), rather than a “foreign court”, such as the ecclesiastical courts or Admiralty. (Prohibitions from superior courts of common law to inferior ones -- such as the borough court with franchisal jurisdiction here-were perfectly appropriate, though few cases of that sort or problems of consequence arising from them are reported.) The surmise was local -- that the cause of action “if any were” arose outside the circumscribed jurisdiction of Lincoln. It was urged against the Prohibition that the party seeking it had admitted Lincoln’s jurisdiction by pleading there (only pleading, not waiting for judgment). In a case of this sort, where there was no problem of “crossing legal systems,” inferring acquiescence in the jurisdiction from the minimum basis -- pleading to the merits -- seems justified. However, the judges were hesitant to do so, and their remarks by the way are of some interest. On one hearing of the case, only Justice Rolle spoke. Off-hand,
he thought that Lincoln should be prohibited if it was outside its jurisdiction, pleading or no pleading. On the other hearing, Justice Bacon spoke and Rolle spoke again. Bacon made a surprising distinction between “foreign” courts and the inferior common law court here. Without explaining his thoughts, he favored the Prohibition in this case despite the party’s pleading but said that “had it been the Spiritual Court or the Admiralty, it had been otherwise.” Rolle replied that there was no difference between such non-common law courts and the borough court here. In either case, he thought, courts exceeding their jurisdiction should be prohibited. At the same time, he thought it “mischievous to grant a prohibition in this case, for thereby many judgments will be stopped.” The Justices accordingly adjourned the case for advisement. Nothing more is heard of it. It is noteworthy that one Parliamentary judge, Bacon, was readier to infer acquiescence in “foreign” jurisdiction than most earlier judges would have been. The secularization of what remained of ecclesiastical jurisdiction may be reflected in that instinct. On the other hand, in somewhat different ways the two judges adhered to the tradition of seeing a public interest in jurisdictional lines -- an interest the neglectfulness or acquiescence of private parties could not compromise.

G. Prohibition Inappropriate until after Sentence.

The cases discussed so far in this section have been simple in form. In most of them, a man properly informed of his rights could clearly have obtained a Prohibition at point $x$. In a loose or “moral” sense, he should have (if he proposed to seek a Prohibition at all). But he waited until a later point, $y$, to seek a Prohibition. The question was whether the gap between $x$ and $y$, or the particular character of the party’s acts and omissions within that gap, should destroy his right to a Prohibition at point $y$. A number of cases bearing on the effect of an ecclesiastical sentence on Prohibition proceedings cannot be reduced to that formula. To those cases we now turn. They go to illustrate the complexity of meshing the common law and ecclesiastical systems, and hence to show the impossibility of any such inclusive rule as “Prohibitions must always be sought before the ecclesiastical court gives sentence in a prohibitable suit.” The courts’ refusal to admit such a rule categorically for simple cases may reflect the impossibility of universalizing it.
**Self-foreclosure**

In Lady Lodge's case, an executor waited a long time before trying to stop a legacy suit, for he made his move only after the sentence against him had been affirmed by the Delegates on appeal. His delay was not held against him, if indeed that was urged. From the reporter's careful specification of the facts, I am inclined to think that relevance was attached to the delay, though in counsel's arguments as cursorily reported it is not relied on. The substantive complexities of this case are too great to work through fully at this point. Basically: A. made a will with B. as executor and died. B. made C. his executor and died. C. was sued by A.'s legatee, not straightforwardly, but by way of executing a sentence for the legacy already given against B. C.'s real point was that he never had any property from A.'s estate (because B. had conveyed it away), hence that he could not be held to pay A.'s legacies. The mere lack of funds from the appropriate estate was perfectly assertable in the ecclesiastical court -- i.e., no basis for a Prohibition. C.'s right to a Prohibition depended entirely on his claim that the ecclesiastical court had passed on the validity of B.'s conveyance, a question that the common law was solely competent to decide. In short, the case comes down to a common type: A suit unquestionably within the ecclesiastical court's jurisdiction is brought there, but it turns out that the suit cannot be settled except by determining an "incidental" question solely within common law jurisdiction. As we shall see in Vol. II, that situation presented a substantive problem, since it was arguable that jurisdiction over the "principal" engendered jurisdiction over the "incident." However, that argument was unsuccessful as a generality, for Prohibitions were often used to make sure that the common law courts settled common law issues incidental to ecclesiastical suits. With respect to delays through sentence, or through sentence and appeal, such cases raise a special problem. In the present case as I have schematized it, there was presumably a point short of sentence at which C. knew that the inappropriate question of B.'s conveyance was before the ecclesiastical court. That is to say, he could have sought his Prohibition earlier. But should he have? Could he be reasonably expected to? Would it have been the most useful thing to do? Speaking generally: In "principal-incidental" cases it was likely to be unclear before sentence whether the ecclesiastical court would consider the inappropriate "incidental" question

37 H. 26 Eliz. Q.B. 1 Leonard, 277.
relevant for its decision. An ecclesiastical court hardly seems to exceed its jurisdiction if, being confronted with an issue beyond its competence, it concludes that it can decide the case without resolving that question one way or the other. Even if it does treat the common law issue as relevant, and therefore pass judgment beyond its competence, it may of course decide it in such a way that neither party thinks the common law would do anything different -- in which case further proceedings could be avoided. For these reasons, it is perhaps better to tolerate or encourage waiting on sentence and even trying an appeal. The rule would be: At least when the party so times his moves as to make it possible, keep the common law courts out of the case until it is quite clear that the ecclesiastical courts have in fact decided a question beyond their competence against plaintiff-in-Prohibition -- then whether they decided correctly or not may be debated pursuant to the Prohibition. In Lady Lodge's Case, itself, it may have been unusually baffling whether determination of the common law issue (the validity of the conveyance) was going to be an essential ingredient in the ecclesiastical court's decision, because behind the sentence against the plaintiff-in-Prohibition (C. in the schema) was the earlier sentence against B., into which the validity of the conveyance may or may not have entered. In the event, the Court thought that the ecclesiastical court had -- or was likely to have -- determined a question beyond its jurisdiction, so that the Prohibition was granted.

But the Court immediately issued a partial Consultation in order to protect the legatee against loss of any rights he might have independent of the disputed conveyance. The flexible solution arrived at did justice to both parties. A rigid requirement that Prohibitions be sought at the earliest possible moment would have resulted in injustice to the executor, for he would have been stuck with liability for the legacy when he probably had nothing from the estate out of which it was bequeathed. Whether he ought to have had property from that estate, or was in a position to recover such property, depended on a "common law issue" which he could not fairly have been expected to raise before it was clear that the ecclesiastical court was going to hold him liable.
**Self-foreclosure**

In Bagnall v. Stokes,\(^\text{38}\) waiting until after sentence was positively encouraged. Here, an executor was sued for a legacy. His substantive defense was that the legatee had made him a release. However, he had only one witness to prove the release. Ecclesiastical rules generally required that matters of fact be proved by at least two witnesses. Prohibitions were frequently issued to prevent that evidentiary rule from being applied. In this case, the executor surmised the release and the fact that he had only one witness, but he did not surmise that he had pleaded the release and unsuccessfully offered to prove it by one witness in the ecclesiastical court. As we shall see, it was problematic in cases of this sort whether one needed to allege such an unsuccessful attempt in order to obtain a Prohibition. The Court in this case thought that an unsuccessful proffer needed to be surmised, and therefore that Prohibition did not at present lie. The Court said, however, that this decision was no mischief to the plaintiff because he could have a Prohibition *after sentence* if necessary. The plaintiff was not told to go plead his release and proffer his proof, then seek a Prohibition at once if the proof was ruled insufficient (Prohibitions were commonly sought at that point in such cases). Rather, he was told to wait on sentence.

The advice makes sense in two ways: (a) A rule *requiring* application for a Prohibition at an interlocutory stage would be hard to enforce because of the unpredictable speed at which sentence might follow an adverse ruling on a plea or evidence. I.e.: Suppose a man seeks a Prohibition after sentence on the ground that the two-witness rule was the cause of his losing. Assume a rule that waiting avoidably until after sentence will always bar Prohibition. Then the common law court would have to investigate the actual chronology of events in the ecclesiastical court to ascertain whether the gap between rejection of the evidence and sentence was large enough to allow reasonable time for instituting Prohibition proceedings -- a cumbrous and unnecessary task.

(b) The final effect of ecclesiastical insistence on the two-witness rule might be unpredictable. Suppose proof by one witness is offered and rejected. How certain is it that the party offering such proof will lose? That

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\(^{38}\) H. 30 Eliz. Q.B. Croke Eliz., 89; Moore, 907.
depends on his other defenses, and even on the stringency with which the two-witness rule is ultimately enforced. (I am not sure about this, but inclined to think that ecclesiastical courts may sometimes have overruled pleas unsupported by a proffer of two witnesses, then later relented if documentary or circumstantial evidence was brought in to back up a single witness.) The advantage of waiting for sentence is that then one knows who has lost and can relieve him if he has possibly lost as a result of an inappropriate ruling by the ecclesiastical court. The disadvantage is that then the dependence of the sentence on the inappropriate ruling either has to be gone into or assumed, possibly contrary to fact. The advantage of encouraging (if not requiring) parties to seek Prohibitions at an interlocutory stage is that the factual common law issue, if disputed -- in Bagnall v. Stokes, whether or not the release was made -- could be settled at common law before the ecclesiastical court has been permitted to go on. By going on, it would at least waste its time, at worst create a complicated problem about the "cause" of the sentence. (It is incidentally noteworthy that in Bagnall v. Stokes a Consultation was issued. I.e.: The executor got a Prohibition without consideration, so that when the Court got around to deciding that the Prohibition was inappropriate a Consultation had to be granted. No one suggested that 50 Edw. 3 would stand in the way of a new Prohibition after sentence. Cf. Lady Denton v. Earl of Clanrickard above.)

In a late-Jacobean legacy case, the K.B. positively insisted on having a sentence before granting a Prohibition. An executor sought a Prohibition on two grounds: (a) Because the ecclesiastical court refused to let him rely on a sealed acquittance for the legacy. (The refusal was allegedly because the witnesses to the acquittance were dead -- an especially indefensible evidentiary ruling, as the King's Bench judges clearly thought.) (b) Because, apart from the acquittance, the ecclesiastical court made what the executor claimed was an egregious legal error in holding him liable at all. (We may defer the substance of this complex problem until Vol. II.) The executor surmised that the ecclesiastical court had given sentence against him, the sentence being founded on those two errors. The King's Bench, however, declined to grant a Prohibition until

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39 M. 21 Jac. K.B. Harg. 30, f.169; 2 Rolle, 414. MS. followed as much the fuller report.
the sentence was shown -- i.e., until its exact content was certified to the Court. Without having scrutinized the sentence for themselves, two of the three judges who speak in the report (Dodderidge and Chamberlain) were disposed to favor a Prohibition, while the third (Houghton) was disposed to deny it. Their difference was over the fundamental question, raised in a complicated form by the double surmise, whether Prohibitions could legitimately be used to control the behavior of ecclesiastical judges when the suit as such was proper to their jurisdiction. The Justices agreed, however, that no Prohibition should be granted until the sentence was known to them in its exact terms. If they were going to prohibit -- possibly dividing the Court on a major issue -- they wanted to be as sure as they could that the sentence did in fact depend on intolerable error.

This case is at the opposite extreme from those in which sentence was discussed as a possible bar to Prohibition. It presents the kind of situation in which insistence on seeking a Prohibition before sentence would have been least feasible. The executor here could have turned to the common law as soon as his acquittance was unreasonably excluded -- but then he had another wholly independent defense fully assertable in the ecclesiastical court (i.e., without inviting the ecclesiastical court to pass on an issue solely within common law competence). He could have sought a Prohibition on his second ground the moment he was sued, for that claim amounted to total non-liability to one in the position of the party suing him -- but then if that party had acquitted him voluntarily and the ecclesiastical court allowed him to use his acquittance, the difficult legal point raised by the second ground need never come up. If he had sought a Prohibition the moment he was sued, relying solely on the second ground -- i.e., simply suppressing the acquittance -- he probably should have been turned down, for there would at that point have been every reason to predict that he would win in the ecclesiastical court. In other words, although the ecclesiastical court may in the event have committed so egregious an error on a question within its competence that it deserved to be prohibited, one does not assume in advance that a court will take leave of its senses.
Partlet v. Butler\textsuperscript{40} illustrates a way in which the shape of a case in the ecclesiastical court could make it hard to require seeking a Prohibition before sentence. Parson Butler libelled against Partlet for two offenses consisting in the same act: (a) for defaming him; (b) for disturbing divine service by the act of speaking the defamatory words. As to the slander, Partlet was (as the King's Bench thought in the event) entitled to a Prohibition because Butler could have maintained an action for the words at common law. (The most indisputable ground for prohibiting ecclesiastical defamation suits was that the words were defamatory at common law, so that resorting to the ecclesiastical court was a simple infringement of lay jurisdiction.)

As to the disturbance of divine service, the ecclesiastical court had undisputed jurisdiction and was entitled to find Partlet guilty whether or not the words were true or defamatory. The ecclesiastical court resolved the case by sentencing Partlet to recant the words, without distinguishing the two elements in the libel, to either or both of which the sentence could have been appropriate. ("I'm sorry I called the preacher a criminal in church last Sunday and take it back" was probably more or less what he was sentenced to say.) After sentence, Partlet sought and obtained a Prohibition with the effect of forcing reversal of the sentence (costs were no doubt the material point). Chief Justice Popham favored an off-setting Consultation (Cf. Lady Lodge's Case) \textit{quoad} the disturbance, but the other judges disagreed and prevailed. The report gives no sign that anything was made of Partlet's waiting until after sentence. Could he have reasonably been expected to move earlier? It would in a sense have been salutary if he had done so, for then the ecclesiastical court could have been prohibited from taking any action \textit{quoad} the defamation, in which case the sentence could have been framed unambiguously to cover only the disturbance and Butler could have recovered the costs of appropriately prosecuting for that offense. (As things turned out, he would lose the costs, in a sense unjustly. But to adopt Popham's solution would have been to leave the ecclesiastical court free to award Butler his full costs anyhow, when he had no business suing there for defamation -- in a way,

\textsuperscript{40} M. 38/39 Eliz. Q.B. Harl. 1631, f.148b; Add. 25,198,f.170.
Self-foreclosure

to reward wrong-doing). But would it really be fair to expect Partlet to make that salutary move? He probably believed, in men's ordinary self-justifying way, that he had spoken the truth and would be vindicated on the important point, whether or not he was technically guilty of disturbing divine service. The greater fault lay on Butler and the ecclesiastical court for failing to distinguish the two offenses clearly in the libel and the sentence. (In fact, as the report shows, Partlet claimed that Butler had forged a release. He spoke his defamatory words in the context of accusing him of that. Whoever was in the right, the parties clearly had a substantial quarrel. Partlet does not look like an idle mischief-maker, slandering the parson from mere ill-will.)

Candict (or Conduit) v. Plomer (or Plumer)\(^{41}\) shows how seeking a Prohibition before sentence could be all but impossible, as opposed to "not reasonably expectable" or "not desirable." Here, a man was elected parish clerk by the inhabitants of the parish, in accord with immemorial custom. The parson appointed another man clerk by virtue of the ecclesiastical canons of 1604, which purported to give clergymen such power of appointment. The parishioners' electee was then sued in the ecclesiastical court to the end of depriving him. Before sentence, he obtained a Prohibition. (Prohibitions were several times successfully used to block implementation of the 1604 canons in the face of the lay community's prescriptive rights. Even apart from that, the judges in this case held that the ecclesiastical powers had no authority to deprive a parish clerk -- as opposed to disciplining him -- because the office was intrinsically lay.) Then the parishioners' electee was sued again in the ecclesiastical court for various misdemeanors in church. This second suit did not manifestly violate the Prohibition, though in fact it amounted in part to accusing the man of doing things appropriate to a parish clerk, as if he had no title to do them (such as setting bread on the communion table). The ecclesiastical court proceeded to resolve the second suit by a sentence of deprivation! The Common Pleas had no hesitation about granting another

\(^{41}\) P. 8 Jac. C.P. Godbolt, 163; Harg. 15, f.208b. I follow Godbolt as to the exact facts, because the MS. does not make it clear that one Prohibition had been issued prior to the case reported. There is no conflict otherwise. "Gaudye's Case with Dr. Newman" (2 Brownlow and Goldesborough, 38. Same date.) is clearly the same case, concordantly though less fully reported. Dr. Newman was the name of the ecclesiastical judge. Gaudye must be either a mistake for one of the other names or the name of the parson's clerk.
Prohibition (requiring reversal of the worthless sentence and presumably preventing the ecclesiastical plaintiff from recovering costs). To expect the clerk to seek his Prohibition before sentence would have been absurd, since the second suit did not and legally could not aim expressly at his deprivation. The only procedural question worth asking would seem to be whether he could have had a Prohibition before the unanticipated sentence, on the ground that he was being sued at least in part for acts that would only be wrongful if he were not parish clerk. I would hardly bring up the case in the present context had not the clerk's lawyer, Serjeant Houghton, expressed some doubt as to whether the Prohibition was grantable after sentence. ("But what shall we do? for we are deprived by sentence given there.") It may be significant that he was addressing Coke's Common Pleas, for Coke was warier than other judges of Prohibitions after sentence. Also, Coke's earlier remarks in the discussion of this case may have suggested that he considered the second suit prohibitable before sentence because it was visibly predicated on the assumption that the parishioners' electee was improperly exercising the office of clerk. But Coke was prompt to assure Houghton that the sentence was no obstacle (and to express his outrage at the ecclesiastics' conduct).

Brabin v. Trediman⁴² (discussed above for its bearing on the effect of appeal) presents another situation in which common law intervention before the first sentence would have been nearly impossible. The essence of the case was as follows: Brabin was required by an ecclesiastical court's decree to refrain from disturbing Trediman's enjoyment of a particular pew. (Ecclesiastical litigation over pews was common, as were Prohibitions in such cases.) By his Prohibition, Brabin wanted to challenge the ecclesiastical court's decree on two grounds: (a) His right was based on a custom permitting the churchwardens to assign pews at discretion. The ecclesiastical court had disregarded or overruled this allegedly reasonable custom in holding for Trediman. (b) The ecclesiastical decree was erroneous on its face. (It said that Trediman and his heirs were to have the use of the pew, without adding "so long as he lived in the parish." Brabin maintained that it was a flaw in the decree not to spell out that qualification. Taken as meaning to omit it, the decree could not be good, for

strangers to the parish could not have a right to seats in the parish Church. By Brabin's theory, that rule should be enforced by the common law. It was not the ecclesiastical court's right to give a stranger an interest in a pew, if it meant to do anything so absurd, nor was it the ecclesiastical court's right to frame its decree carelessly if it liked.) The second point could obviously not have been raised by Prohibition before the decree was made. The very fact that a man might in the end have several independent grounds for Prohibition -- some perhaps easier than others to handle -- is a reason for not insisting that he seek common law help as soon as one ground accrues. As for Brabin's first point by itself: Ecclesiastical courts were commonly prohibited in pew suits on the surmise that plaintiff-in-Prohibition had a private prescriptive right to the seat. Such prohibitions exemplify the rule that trial of "time out of mind" claims should take place at common law. They presume that quasi-proprietary interests in pews were acquirable (i.e., that they were "real rights," not held by the mere grace of the ecclesiastical authorities). Brabin v. Trediman is unusual, because Brabin was not defending his private right on a prescriptive basis, but the churchwarden's prescriptive right to assign him a pew.

Still, the principle seems the same: Brabin took his stand on custom. Having done so, he could have obtained a Prohibition without waiting to see how the ecclesiastical court would jump. Should he have? The question is academic because of the alternative basis for Prohibition, but the report is suggestive on this point. Brabin's surmise stressed the reasonableness of the custom, over and above its mere existence. Possibly, then, Trediman had not quarrelled with the fact of the custom, but had instead convinced the ecclesiastical court that it was not reasonable. Then imagine the following case: A. sues B. in an ecclesiastical court. B. relies on a custom. A. admits the custom de facto but takes issue on its reasonableness. After the ecclesiastical court decides it is unreasonable and gives sentence for A., B. seeks a Prohibition on the ground that the ecclesiastical court made an erroneous legal judgment as to the custom's reasonableness. Should B. have come sooner, with a bare surmise of the custom, forcing A. to demur at common law to contest its reasonableness? There can be no doubt that the reasonableness of a custom was a "common law issue," just as the fact of a custom was for trial by jury at common law. (It was a standard rule, applied in many contexts, that customs were valid only if they were reasonable in the judges' eyes, as well
as immemorial in the jury's.) As with other common law legal issues "incidental" to ecclesiastical suits, an argument can be made for waiting until it appears that the ecclesiastical court has actually done something wrong. With respect to reasonableness questions in particular: There is a sense in which they were both easy and hard -- easy in that often no very special skill (such as real-property law), as opposed to common sense and fairness, was required to settle them; hard in that generalized standards for judging customs were difficult to evolve. There might be advantages in letting the ecclesiastical court look a custom over first, then reviewing the ecclesiastical decision if one of the parties thought his chances of persuading the common law court to take a different view were really serious. Ecclesiastical opinion on the reasonableness of a custom affecting church matters might be persuasive as to its reasonableness at common law.

In Chase v. White,⁴³ there was no discussion as to whether the Prohibition, being sought after sentence, was sought too late. But the case is worth noting as another test of the feasibility of requiring that Prohibitions be sought as early as possible. The ecclesiastical suit was for tithes of draught animals (computed as the equivalent of 1/10th of the herbage they consumed). Draught animals used for farm labor were not tithable (on the theory that they were "means of production" for crops that paid tithes). Animals used for the commercial carrying trade, on the other hand, were tithable. The two judges who speak in this report (Dodderidge and Chief Justice Ley) thought that beasts used partly for farm labor and partly for carrying came within the exemption -- i.e., owed no tithes at all, not even pro rata for as much of the year as they are used for carrying. In this case, plaintiff-in-Prohibition could undoubtedly have sought the writ the moment he was sued, simply by surmising that he was being sued for tithes of a non-tithable thing. The common law court would have granted one if it agreed that the thing was non-tithable. Any relevant question of fact (here, what use was made of the animals) would have been tried by jury pursuant to the Prohibition. Instead, the parishioner

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⁴³ T. 22 Jac. K.B. Lansd. 1063, f.8.
took his chances in the ecclesiastical court. The ecclesiastical court gave sentence that he should pay tithes for such part of the year as the beasts were used for carrying, and nothing for the rest of the year. Dodderidge and Ley thought the sentence erroneous in its terms, by standards which in principle the common law was entitled to enforce. (The ecclesiastical courts were never permitted to entertain suits for tithes of products which the common law regarded as intrinsically exempt.) Dodderidge did, however, express hesitation about granting a Prohibition in this case. He wanted to be sure that issue had not been taken "in the negative" in the ecclesiastical court: i.e.: If the parties had taken issue as to whether the beasts were ever used for farm work, and the ecclesiastical court had found as a matter of fact that they were never so used, then the sentence would be justified and Prohibition would not lie. That the sentence in its terms expressed an erroneous rule of law would make no difference. In other words, a factual determination by the ecclesiastical court would not be called in question, even though the sentence showed that the ecclesiastical court was proceeding on a mistaken view of the law.

Now, if plaintiff-in-Prohibition had moved before sentence, the Court would have been spared investigating whether the sentence was really "caused" by an error in law. The ecclesiastical court would have been spared proceeding under an erroneous impression, because the Prohibition would have held up if the parishioner proved on common law trial that the beasts were employed to any appreciable extent for farm labor. But nothing was said to suggest that the plaintiff ought to have moved earlier. Should he have? For this kind of case, would there have been any disadvantage in a general rule against Prohibitions after sentence? Although I do not think the answer to these questions is clear, the human grounds for going easy on the parishioner in such a case can be seen: A man is sued for tithes of his oxen. Knowing the law in a rough way -- that laboring beasts do not ordinarily pay tithes -- he assumes the suit is founded on a mistake of fact, compounded perhaps by some wishful clerical thinking about the law. "The Parson knows I do some carrying. Maybe he doesn't realize that I use the animals interchangeably on the farm. Maybe he has gotten greedy and thinks he can squeeze some additional tithes out of me. Surely all I need to do is show the ecclesiastical judge the truth -- that the animals are 'really' working cattle, that this is an unheard-of tithe claim." It turns out
The Writ of Prohibition:
Jurisdiction in Early Modern English Law

to be more complicated. A legitimately ambiguous legal issue is involved
(wheras generally the rules about tithability were simple and notorious,
the sort of rules the ecclesiastical courts would respect whether they liked
them or not, as in this case they respected the exemption for draught ani-
mals insofar as they were actually used for farm work). How to plead his
case becomes problematic. But having committed himself to the ecclesi-
astical court on the understandable assumption that his case is open-and-
shut, a layman will perhaps not have sufficient motive to seek a
Prohibition when the complications close in. He might as well wait and
see what the ecclesiastical judge will do. The chance of the controverted
questions’ being resolved in his favor look fair enough. Why go to the
perhaps unnecessary trouble of a Prohibition?

In Fotherlye’s Case44 (discussed above for general points on the tim-
ing of Prohibitions), Chief Justice Richardson said in so many words that
the Prohibition could not have been sought before sentence. I wonder
whether that was true in a strictly literal sense, but Richardson’s point
was practically sound. In this case, an intestate’s sister sued in the eccle-
siastical court to force the administratrix (intestate’s widow) to distribute
part of the estate to her. The ecclesiastical court awarded the sister 10%
of the £200 estate, after which the administratrix sought, and in the event
obtained, a Prohibition. I can see no reason why the administratrix could
not have moved as soon as she was sued, for her legal contention was that
the sister had no claim to any share of the estate and the ecclesiastical
court no discretion to assign her a share.

It is understandable, however, that the administratrix waited on the ec-
clesiastical court’s decision. Had the Common Pleas been asked to inter-
vene before sentence, it might understandably have preferred to delay.
My reason for saying this boils down to the predictability of the ecclesiast-
tical outcome. The ecclesiastical court erred in this case, in the judges’
opinion (an opinion well-confirmed by other intestacy cases), because
statutory law limited the freedom which the ecclesiastical authorities
originally had to impose an equitable settlement of intestates’ estates.
The common law courts were keepers of the subject’s statutory rights and

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44 H. 2 Car. C.P. Littleton, 21.
exclusive authoritative interpreters of statutes. At least they were that in their own conceit and in practice. The ecclesiastics disagreed. In their opinion, ecclesiastical courts were competent to construe and apply statutes when claims purportedly based on them were advanced in cases within ecclesiastical jurisdiction. Lay and ecclesiastical lawyers might argue about this question of principle outside court, but the common law courts had the weapon of Prohibitions, so that they could and did enforce their interpretation of statutes. But what should a common law court do when faced with a statute-based claim to a Prohibition? Wait and see whether the ecclesiastical court would apply the statute correctly, or prohibit at once in order to insure that construction and enforcement of statutes stayed strictly within the common law's province?

A good case can be made at least for preferring the former option -- i.e., for encouraging rather than punishing plaintiffs-in-Prohibition who waited until they could claim that an ecclesiastical court had decisively ignored or misconstrued a statute. In the first place, it is a reasonable presumption that the ecclesiastical judge will correctly understand and obey statutes affecting him. There might be notorious exceptions -- cases of known and constant disagreement between ecclesiastical and common lawyers on a statute's meaning. But the statutes on intestacy involved in Fotherlye's Case were probably not an example of that. Even if they were to a degree, it would be uncertain before sentence whether the ecclesiastical judge would in the event use his discretion so as to produce a result contrary to the statute. (Here, the statutes in effect gave everything to the wife. By assigning a small share to the sister, the ecclesiastical judge assumed more discretion than he had. His mistake, however, was to claim too much discretion. It would have been unpredictable before sentence whether he would in fact see any equitable basis for giving the sister a share.) Secondly, the very fact that authority to interpret statutes was a bone of contention is a reason for presuming in favor of the ecclesiastical judge until he actually commits an error. It is more insulting, as it were, to assume that an ecclesiastical judge will misconceive or ignore his statutory duty than to assume that he will not be able to handle a "common law issue" in the sense of "an issue calling for expert knowledge of the common law."
The Writ of Prohibition:
Jurisdiction in Early Modern English Law

Eaton v. Ayliffe presents an unusual situation, in which a Prohibition was granted in the face of objection that it was sought too late, but where it is hard to see how the delay could have been considered blameworthy. The report is too poor for much sense to be made of the judges' opinions, but the following reconstruction probably catches the essential point: Ecclesiastical litigation over the right to pews was most frequently prohibited because a prescriptive title to the pew, triable at common law, came in question. Ordinarily, it was the ecclesiastical defendant who got a Prohibition on the surmise that his adversary was suing to establish his right, whereas the defendant's right rested on prescription. In our case, however, Eaton sued in the ecclesiastical court to establish his title to a pew and himself set up a prescriptive claim at the outset. The ecclesiastical court held against him and awarded costs to Ayliffe, the defendant there. Eaton then appealed. When he saw that the appellate court was going to affirm the sentence below, he sought a Prohibition.

Whatever Eaton's hopes may have been, the Court plainly thought that the only possible application of the Prohibition -- if it should be granted at all -- was to frustrate the award of costs. To have required reversal of the body of the sentence (presumably a sentence in the nature of a declaratory judgment that Ayliffe was entitled to the pew and/or an order to Eaton to stay out of it) would have been absurd. Although, as we shall see, prohibiting one's own suit was by no means ruled out, it was usually permitted only when a common law issue arose in the course of the ecclesiastical suit and could not have been certainly anticipated by the ecclesiastical plaintiff. Here, Eaton took his prescriptive claim before the ecclesiastical court voluntarily. Having done so, one might suppose that he had assumed the risk of costs if he failed. The judges seem not to have taken that position, however, for if the report is right they granted the Prohibition going to the costs. Insofar as I can grasp their reasons from the obscure report, they seem to have taken the power to award costs as a function of "really" or "legally" having jurisdiction over the matter. If (as in this case of a prescriptive claim) the ecclesiastical court ought never to have entertained it (i.e., should, at least in theory, have said to Eaton, "Go away, we cannot judge a prescriptive title."), then the ecclesiastical court

45 Early Car. C.P. Hetley, 94.
Self-foreclosure

has no power to award costs, even though both parties have consented to have the suit determined there, and even though there was no way to prevent the ecclesiastical court from making a decision and, presumably, enforcing it by spiritual sanctions. *(Quaere, however, if Eaton were excommunicated for disturbing Ayliffe's enjoyment of the pew contrary to the sentence. Could he then have a Prohibition? Could he call the excommunication in question pursuant to an attempt to imprison him by De excommunicato capiendo?)* Assuming the rule that costs were not lawfully awardable, the question remains whether Eaton moved too late, as Ayliffe's counsel urged.

The appeal was the problem, for he obviously could not have moved before sentence. By taking an appeal and as good as waiting until it was decided against him, did he commit himself to ecclesiastical justice in such further degree that his right to avoid costs (morally a shaky right to start with) was destroyed? It is not clear from the report how the judges responded to this, except that in granting the Prohibition they rejected the argument from Eaton's delay. It seems to be arguable, in support of the court's decision, that the delay should not have harmed him, even assuming a stronger policy against permitting Prohibitions after appeal than existed. For under the circumstances appealing seems the honorable course, compared to seeking a Prohibition to escape the costs immediately after sentence: A man entrusts himself, in a sense inappropriately, to the ecclesiastical system, the other party making no objection. He loses and is erroneously charged for costs. He could get a Prohibition at once. Instead, he tries by appeal to show that he should have won and *therefore* owe no costs (for all we know, he had no expectation of costs for himself if the sentence was reversed). Has he not acted as to fulfill a kind of "contract" with the other party to abide the ecclesiastical courts' award insofar as the ecclesiastical courts could make one (as they could not for costs)? If he could avoid the costs -- as he was entitled by law to do -- without breaking the "contract," should he be penalized for trying to?

Our last case in the present line, from 1633, shows the judges in perplexity over prohibiting after ecclesiastical sentence. At an earlier date, this case would probably not have been difficult. By and large, as we

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46 P. 9 Car. K.B. Harl. 1631, f.378b.
have seen, sentence was not a formidable bar to Prohibition even when
the party had no good excuse for delay. In the more complex cases just
considered, the courts were ready to take it for granted that waiting on
sentence was justified, sometimes to insist on waiting. In the case of
1633, the Prohibition was sought before sentence. A majority of the
Court would have preferred to wait until after sentence. The difficulty of
doing so was expressed by Chief Justice Richardson: "If you permit them
to go to sentence in the spiritual court and then award Prohibition, they
will complain that it is against our promise not to grant Prohibition after
sentence." We have seen other signs that the judges were forced into an
extra-judicial commitment on the handling of Prohibition cases in Charles
I's reign. Plainly, the ecclesiastics insisted on the theory that sentence
should be a firm bar to Prohibition. Plainly, the judges signed on the dot-
ted line. In our case, they were stuck with the consequences.

The case was of the sort in which delay until sentence would have had
advantages. Tithes were sued for by the holder of a deanery. (By usage,
tithes could be due to ecclesiastical persons and corporations other than
parish ministers.) The holder of the deanery claimed it through the King,
thus by royal letters patent. It came in question in the ecclesiastical court
whether the tithes attached to the deanery were included in the royal
grant. A Prohibition was sought because the meaning and validity of let-
ters-patent was exclusively within common law competence. To Justices
Jones and Berkeley, waiting to see what the ecclesiastical court would do
seemed the best course. They relied on a general principle: When the ec-
clesiastical court is entitled to entertain a case at its start, it should not be
prohibited unless and until it decides an "incidental" common law issue
erroneously.

The practical considerations I have dwelt on in the present context
might recommend waiting even if that general principle were not em-
braced: Construction of a routine patent is not a very difficult job. The
chance of the ecclesiastical judge's reading it erroneously could be very
slight. Plaintiff-in-Prohibition might have an utterly flimsy argument for
his interpretation of the patent, so that the Prohibition proceedings would
come to a vexatious delay, or he might have so strong a case that it would
be mischievous to put the other party to the needless charge of defending
a Prohibition if his side was to be heard at all. Conceivably, the suit
could be resolvable without construction of the patent: e.g., by the eccle-
siastical judge’s finding that no tithes were ever attached to the deanery. Why not wait until it was clear that a real problem within common law competence existed, until one party or the other thought seriously enough that the ecclesiastical court had misconstrued the patent to venture a new round of proceedings?

Chief Justice Richardson may or may not have agreed with Jones and Berkeley in the abstract. If he did, he was worried enough about violating the extra-judicial promise to favor prohibiting now -- clearly the preferable alternative to not prohibiting at all, since no one disputed that construction of a patent was ultimately the common law’s business. Justice Croke favored a Prohibition now on general principles -- ecclesiastical judges should be prohibited as soon as it is surmised that a common law issue is before them -- without apparent concern for any out-of-court commitment. Jones gives no sign of such concern either: He speaks only once (before Richardson delivered his admonition) clearly and strongly in favor of waiting on sentence.

Justice Berkeley looked for a way out. While agreeing with Jones that no Prohibition ought to be granted at present on the ground surmised, he suggested that a Prohibition now could perhaps be justified another way: Were the bounds of the deanery not implicitly in question before the ecclesiastical court? If so, an immediate Prohibition could be granted on a commonplace ground. (When ecclesiastical courts, normally in tithe suits, were confronted with the question whether Blackacre was inside or outside Parish X., they were invariably prohibited. Bounds of parishes were regarded as factual questions exclusively triable by jury at common law. It was almost never suggested that the common law should wait to see how the ecclesiastical court resolved a bounds issue. It would probably have made no sense to do so, for the whole point -- as in the case of prescriptive titles -- was that one and only one method of trying the facts was appropriate in such cases.)

Although Richardson needed a way out himself, he was not impressed by Berkeley’s idea. (Partly because he was unsure whether the bounds of a deanery came under the same rule as the bounds of parishes, partly because the terms of the patent as alleged made it doubtful -- though Berkeley would not admit that -- whether there was an implicit issue about the deanery’s bounds.) Richardson preferred to play out the conse-
quences of the extra-judicial promise, whether or not the Prohibition would have been delayable before any such promise was made. Divided and perplexed, the Court adjourned the case. There is no report of further action.
IV.
Self-prohibition

(The conclusions of this section are summarized in the text immediately below.)

We now turn to cases on whether a man may prohibit his own suit. That problem could easily arise: e.g., A. sues B. in an ecclesiastical court. B. introduces a defense which in principle the common law should determine -- either a defense triable by jury as to fact or a legal defense within exclusive common law competence. A. seeks a Prohibition, whereas B. to all appearances is content for his defense to be verified or evaluated by the ecclesiastical court. Ought A. to have a Prohibition to stop the suit he initiated himself?

The answer to that question can be stated categorically: Basically, the courts did not consider self-prohibition objectionable. In the standard schematized case above, A. would get his Prohibition. If he waited until after sentence against him, or until after appeals, his chance of getting the Prohibition would still be excellent -- at least as good as B.'s chance if B. had sought the Prohibition after comparable delay. In a couple of cases, the courts refused to let ecclesiastical plaintiffs prohibit their own suits. The exceptions, however, are quite easily distinguishable. Deeply problematic cases on self-prohibition could have arisen. It was not always permitted. Cases therefore could have occurred in which the rationale of the mainline cases and of the exceptions had to be searched and generalized. In fact, however, there are no cases on this subject showing the courts in doubt or divided. Basically, self-prohibition was permitted; when it was not, it would have been outrageous to permit it. We shall accordingly need to do little more than note the relevant line of cases.

Before doing so, however, we should reflect on the implications of the courts' attitude. In permitting self-prohibition, the courts obviously favored Prohibitions -- Prohibitions, not ecclesiastical defendants over ecclesiastical plaintiffs, (typically) parishioners over parsons. If a parson wanted a common law issue that arose in his tithe suit tried by jury, he could get it so tried; if the parishioner in that case thought his chance of convincing an ecclesiastical judge by witnesses was better than his
chances with a jury of his peers, he was out of luck. The central idea behind permitting self-prohibition was the “public stake” in Prohibitions: “Foreign” courts should not determine common law issues to the derogation of the “royal dignity.” It makes no difference how the common law court finds out that lay jurisdiction is in danger of being infringed— from the ecclesiastical defendant, the ecclesiastical plaintiff, or a little bird. Private law considerations concerning the informer’s standing or moral title to common law assistance are irrelevant or almost irrelevant.

On the whole, the cases on self-foreclosure above also support the “public stake” approach. The courts were not really ready to say that a dilatory party destroys his right to a Prohibition. For — the “public stake” theory says — it is not primarily his right. As a private litigant, he may be in a weak position, but he still informs the common law courts of an offense against themselves and the King. He ought to have informed them earlier, but soon or late “foreign” courts who meddle where they have no business should be stopped. On the other hand, in self-foreclosure cases the exigencies of economy and fairness to private litigants caused the courts to compromise the “public stake” theory — on occasion; without complete confidence; without an articulated view of the rival claims of “public” and “private” considerations. Permissiveness toward self-prohibition might, because of its implications, be urged as a reason for non-recognition of a party’s power to foreclose a Prohibition. Conversely, the intrusion of “private” considerations in self-foreclosure cases could be a reason for treating them as relevant in self-prohibition cases. For example: An ecclesiastical defendant who not only waited for sentence against him but took two appeals and lost them before seeking a Prohibition would at least be in danger of losing the Prohibition. Could it not be argued that an ecclesiastical plaintiff in comparable circumstances is at least the a fortiori case? (I.e., A. sues B. in the ecclesiastical court. A common law issue arises. Neither party seeks a Prohibition. A. loses, takes two appeals and loses twice again. Then A. seeks a Prohibition. Is A., as the original plaintiff, not in a slightly weaker position than B. would be if they were interchanged?) However, the courts show no signs of having considered that argument, or of being urged to in the terms in which I have stated it. On the other hand, self-prohibition was sometimes not permitted. Private justice was only almost irrelevant. In self-foreclosure cases, the courts explicitly reserved discretion to deny Prohibitions in the interest of private justice. Perhaps one should conclude that in self-prohi-
Self-prohibition

bition cases, too, they reserved what can only be called discretion to take that interest into account. But problematic tests of such discretion were rare in the latter context.

If self-prohibition cases are seen through the categories of private justice, a distinct set of considerations comes into play. It is unintelligent to say that it is *ipso facto* “repugnant” to prohibit one’s own suit. Many sorts of claims -- e.g., a parson’s claim to tithes -- could only be asserted in an ecclesiastical court. A parson might know that his title to certain tithes depended on whether or not a certain *modus* was valid; he might sue with the sole intention of subjecting the *modus* to a legal test; he might prefer as an individual and intend as a “good subject” to have the test made at common law. Nevertheless, his only option was to start an ecclesiastical suit. If the parishioner would take no step to transfer the contention to the common law, surely the parson should be able to. Going a little deeper than “*ipso facto* repugnance,” however, an argument against self-prohibition can be made: Should every plaintiff not be presumed to have faith in his claim? I.e.: In the very act of bringing a lawsuit, is one not saying, “I believe that the truth of my claim will stand up to *any* fair factual investigation, and that its legal validity will be evident to *any* reasonable and impartial judge.”? Even when ground rules of the legal system require a man to sue where he might not choose to, is he still not saying that? Ought he not to have that kind of faith, or else refrain from suing? Litigation is after all an extreme way to settle conflicts. Is a kind of bias in the defendant’s favor not built into the very idea of law? The defendant has not started trouble, has not made demands on the time and energy of the courts, has not sought to secure his interests by the coercive power of the state. Is there not reason to allow defendants the procedural advantages they are on paper entitled to, while looking very hard at a plaintiff who, by maneuvering procedurally, casts doubt on his faith in the “natural justice” of his claim?

This line of argument obviously raises huge problems. It may be rejected as a general argument in its premises. It may be regarded as specious in particulars. For instance: While it makes sense of a sort to presume that a plaintiff has sufficient faith in the factual truth of his claim to entrust it to any putatively fair fact-finder, it makes less sense to suppose that faith in a claim’s legal validity ought to imply willingness to have it adjudicated by any fair-minded judge. Competence in the sense of
“expert ability” may accompany, and account for the distribution of, com-
petence in the sense of “legal authority.” E.g.: A parson suing, perforce
in the ecclesiastical court, to test the validity of a lease on which his tithes
depend can hardly be supposed to entrust an inexpert ecclesiastical judge
with the technical exposition of a conveyance. If, however, the argument
above is conceded some force, it would justify looking hard -- if not too
hard -- at ecclesiastical plaintiffs seeking Prohibitions. “Looking hard”
would mean asking questions that need not be asked if the ecclesiastical
plaintiff’s right to a Prohibition is just as good as the defendant’s. E.g.: Is the “common law issue” in question legal rather than factual? If illegal,
is it one that genuinely requires special expertise? If not, is it one on
which ecclesiastical rules are notoriously different from common law
rules, so that the ecclesiastical court is likely to err? Has the ecclesiastical
plaintiff sought a Prohibition as soon as possible, thus acting so as to re-
but any presumption of willingness to have his claim adjudicated by the
ecclesiastical court? (Sed contra: Waiting until after sentence or until ap-
peals are exhausted can be taken as acting consistently with the faith in
his claim that a plaintiff ought to have. Perhaps common law intervention
in an ecclesiastical plaintiff’s favor should always be delayed until an er-
ror in law can be attributed to the ecclesiastical court.) “Looking hard” at
an ecclesiastical plaintiff’s application could also mean considering the
structure of interests realistically: De facto, as posited above, a parson
might prefer to have a modus tried at common law. But is a clergyman
(of course a parson could be a lay impropriator) really entitled to object
to having his right to tithes judged by the Church if the parishioner is con-
tent? In an important sense, the ecclesiastical courts existed because the
Church was a “franchise.” I.e.: It was privileged, subject to limits and
controls, to look after its own people, the “spiritual estate,” and, in enforc-
ing those people’s rights, also to enforce its corporate interests. If a lay
defendant voluntarily trusts his interests to the law and procedure of the
Church, can a member of the clerical order complain? This argument
would probably cease to hold if the ecclesiastical plaintiff were not a clerg-
ryman (or even, like a lay impropriator, representative of an intrinsically
“spiritual” right). Ecclesiastical plaintiffs could be ordinary laymen
driven to the Church courts by what could be considered historically acci-
dental delegations of functions -- e.g., an executor seeking to prove a will;
a legatee seeking to recover his legacy.
Self-prohibition

The very complexity of the problems I have outlined is a reason for doing what the courts substantially did -- allowing ecclesiastical plaintiffs to get Prohibitions as easily as ecclesiastical defendants. Exceptions were made only when it was intuitively obvious that to grant the Prohibition would be grossly unfair -- “in discretion,” one would have to say.

We may now review the cases. In Holcroffte’s Case, ¹ a lessee of an impropriate parsonage sued for tithes. His title to the parsonage and tithes turned out to depend on the meaning and validity of several lease-assignments. He did not seek a Prohibition merely because that “common law issue” had arisen. Rather, he proffered proof of his assignments by a single witness, and sought a Prohibition only when and because the ecclesiastical court, owing to its usual two-witness rule, rejected his evidence. The Queen’s Bench granted the Prohibition. The only note of hesitation was sounded in the interest of the lessee (plaintiff-in-prohibition): Chief Justice Popham wondered how he would get back into the ecclesiastical court to claim his tithes once the validity of his assignments was determined at common law. Coke, the lessee’s counsel, had an answer: “Well enough, for we will prove the assignments here and then we will have a Consultation, and on the Consultation they will proceed.” (I.e.: In Coke’s opinion, a man could prohibit his own suit to get an issue determined at common law, then undo his own Prohibition by a Consultation -- no doubt a qualified Consultation, authorizing the ecclesiastical court to proceed *ita quod* it treat the question of the assignments as conclusively decided.)

In Pyper v. Barnably ² the defendant in a tithe suit pleaded that the relevant land was not in the plaintiff’s parish. The original ecclesiastical court decided in the defendant’s favor -- I.e., that the land was in a different parish. The parson then appealed and lost again. Then he sought a Prohibition on the standard ground that issues concerning the bounds of parishes were triable at common law. Serjeant Heale, representing the parishioner, tried to make the general case against self-prohibition: The parson “chose them to be his judges,” the more so because he had taken

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¹ M. 39/40 Eliz. Q.B. Lansd. 1099, f.131.
² H. 41 Eliz. Q.B. Add. 25,203, f.47b.
an appeal. But Chief Justice Popham, speaking for the whole Court, invoked the “public stake” theory of Prohibitions to reject Heale’s argument: “...If the Court Christian will hold plea in derogation of the common law, the Court ex officio ought to restrain their proceedings.”

In Saunders v. Lashford, the general case against self-prohibition was again urged at the Bar. Again there was the added factor of an appeal. (A parson sued for tithes, lost, appealed, lost again, then sought a Prohibition on the ground that the validity of a lease had come in question.) The only Justices present, Yelverton and Fenner, thought the Prohibition should clearly be granted.

In Worts v. Clyfton the ecclesiastical plaintiff sought a Prohibition in a tithe suit dependent on two leases and a composition-real -- both “common law issues.” It does not appear from the report that the ecclesiastical court had given sentence or that there had been any appellate proceedings. The Court upheld self-prohibition is strong terms: “...et non refert, although the plaintiff in the Spiritual Court brings this prohibition to stay his own suit; for if this court hath knowledge by any means that the Spiritual Court meddles with temporal trials, they ought to grant a prohibition.”

In Napper’s Case, the defendants to a tithe suit pleaded a modus and made no move to get a Prohibition. The ecclesiastical judge was proceeding to examine witnesses as to the truth of the modus when the parson applied for a Prohibition. The Court issued a temporary stay to halt the examination of witnesses and assigned a day to show cause against the Prohibition. Although that step is less decisive than actually granting a Prohibition, it probably does not imply reluctance to allow self-prohibition. Prohibitions nisi and temporary stays were common, the point being to permit adversary debate before definitive issuance of the writ. It would, I think, be a little hard to let a man prohibit his own suit on a naked ex parte motion. However well-established the right to do so was, any such attempt raised a serious question. The other party should have

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3 P. 44 Eliz. Q.B. Add. 25.203, f.471.
4 M. 12 Jac. K.B. Croke Jac. 350.
5 Undated, probably Jac. C.P. Hobart, 286.
his chance to argue against the Prohibition when there was any reasonable question about its legal propriety. That is all the Court gave him here.

Berd v ---. 6 is obscurely reported, but it contains another express statement -- probably by counsel -- that self-prohibition is perfectly permissible. The Court granted the Prohibition, endorsing the point. The ecclesiastical plaintiff was suing to secure his right to a pew. Apparently his libel claimed on its face that the pew was appurtenant to his freehold. I assume that this fact as such was challenged, thus raising a real-property question within common law competence.

Farmer’s Case 7 had a complication. In this case, a tithe suit was prohibited on the ecclesiastical defendant’s motion, upon the standard surmise that the land was discharged in the hands of its former monastic owners. Pursuant to the Prohibition, the parties took issue on the fact of the discharge. At the trial, after the parties had presented all their evidence, plaintiff-in-Prohibition (ecclesiastical defendant) was nonsuited. (Probably his evidence manifestly failed to establish the discharge.) A Consultation returned the suit to the ecclesiastical court. The ecclesiastical defendant then pleaded the identical discharge and the spiritual judge was proceeding to try it. Thereupon, the ecclesiastical plaintiff sought and obtained a qualified Prohibition -- prohibiting the ecclesiastical judge from accepting the plea of discharge. (That was probably tantamount to ordering the ecclesiastical judge to give sentence for the parson-plaintiff, though there is no theoretical reason why the parishioner-defendant could not have some alternative defense.) The decision was surely sound. It amounted to requiring the ecclesiastical court to respect a res judicata -- and judicata in the competent court. Even if the discharge had not been as good as adjudged (by virtue of the probably-involuntary nonsuit at trial), the ecclesiastical defendant would have been in a weak position to object to the Prohibition: He took due exception to the ecclesiastical suit and had his chance to establish his discharge in the proper forum. If he had simply changed his mind -- i.e., simply dropped his Prohibition at an early stage and gone back to the ecclesiastical court, hoping to establish his discharge there -- it would be reasonable to prevent him by a second

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7 Undated, probably Jac. C.P. Hobart, 286.
qualified Prohibition. The report gives no arguments against the course taken by the Court. I can imagine two: (a) 50 Edw. 3 forbids more than one Prohibition in the same suit. It does not say that there may be two if they are sought by different parties, or if one is a general Prohibition and the other qualified. The Court’s decision implies an exception to 50 Edw. 3 -- an undoubtedly sensible “exception without a rule,” like those occasionally made for second Prohibitions after ecclesiastical sentence when the first Prohibition had been inconveniently obtained before sentence. (b) A man may not prohibit his own suit, even in the special circumstances of this case. I.e.: If one adopted the arguments against self-prohibition in radical form (“self-prohibition is ipso facto repugnant”; or “a plaintiff always undertakes to make his claim good, wherever its adjudication falls”), then one could argue that the ecclesiastical plaintiff in our case was helpless -- even to take advantage of a res judicata, even though the other party was in a very weak moral position. The Court’s decision implies rejection of those arguments in radical form and hence encourages their rejection in more normal circumstances.

Over against the group of cases above, there are a few in which self-prohibition was not permitted. In a way the strongest such case is Kinsley v. Piggins (1630), in which the ecclesiastical suit was for defamation -- for saying that Kinsley “did keep a man in his house to bugger.” The suit was probably prohibitable because those words were actionable at common law, hence, by the usual rule, not actionable in the ecclesiastical court. They were actionable at common law because buggery was a statutory crime by 25 Hen. 8, c. 6. (Falsely accusing someone of a secular crime was the clearest case of common law defamation.) I say “probably” prohibitable, instead of “certainly,” because statutes creating secular crimes raised a special problem with respect to coordinating common law and ecclesiastical jurisdiction: If buggery was once an ecclesiastical offense but not a lay offense, and then it was made a lay offense by statute, it might be argued that it remained concurrently an ecclesiastical offense (depending on the constructed intent of the statute-makers). If it did remain an ecclesiastical offense, it could then be argued that the ecclesiastical court also retained concurrent jurisdiction over

8 M. 6 Car. K.B. Harg. 39, f.133.
defamation consisting in the false imputation of that offense. In Kinsley v. Piggins, however, the Court did not need to go into those complexities, if indeed it would have been inclined to in other circumstances (instead of simply holding categorically that no ecclesiastical action lies when a common law action would lie for the same words). The Court refused the Prohibition in this case because Kinsley, the ecclesiastical plaintiff, was also plaintiff-in-Prohibition. So far as the report shows, that was the sole reason for the decision.

The existence of a possible alternative basis for denying the Prohibition makes it harder to project from the case. Let us assume, however, that the Prohibition would certainly have been granted if it had been sought by the ecclesiastical defendant. Then what does the decision imply? The report is spare. Why Kinsley wanted to prohibit his own defamation suit is in no way indicated. The obvious motive would be to cut the other party off before he could vindicate himself. In a quarrel, Piggins accuses Kinsley of buggery. In his anger, Kinsley slaps a defamation suit on Piggins -- probably in the wrong court, but he doesn’t know any better, and what’s done is done. When he cools off, Kinsley thinks twice about having his sex-life reviewed in court -- the more so if there’s a chance of Piggins’ proving that he is a bugger, to his possible incrimination as well as embarrassment. But Piggins still wants to fight, hoping to win. He has no need for a Prohibition. For Kinsley, it’s the only way out.

The disparity between this sort of story and any account one might give of the motives and strategies of the parties to, say, tithe litigation is obvious. The greater part of litigation over defamation, whether at common law or in the ecclesiastical courts, was patent “quarrelling in the courts.” Though the judges tried to discourage it in various ways, it could not be prevented. To have granted the Prohibition in Kinsley v. Piggins would have been to cut off one litigative feud (without, on paper, preventing it from starting up again at common law). The price for that would have been unfairness to one disputant, Piggins, in a quarrel already joined. As defendant to an essentially criminal suit (for all ecclesiastical defamation suits, aiming not at damages but at some “penitential” act, were essentially criminal), he deserved the chance to clear himself of unbrotherly slander if he chose to. To deny the Prohibition was probably only to let the ecclesiastical judge determine factual questions (Were the
words spoken? Were they true?) -- a far cry from letting ecclesiastical judges decide such “common law issues” as the validity of a lease or the truth of a modus. They were indeed factual questions of a sort he was used to determining. (A defamation suit for “bugger” is not much different from one for “whore.” The latter was unquestionably within ecclesiastical jurisdiction. It is not as facetious as it sounds, on the other hand, to suggest that the legal definition of buggery might present rather more problems than simple whoredom. After sentence, Kinsley might have had a chance for Prohibition on surmise that the ecclesiastical court had erred in its understanding of “buggery.” The problem was whether penetration was necessary to constitute the crime.) One might conclude from Kinsley v. Piggins that an ecclesiastical plaintiff is estopped to prohibit his own suit when starting it was in the simplest sense his mistake -- i.e., when he could have sued at common law, or when he had no cause of action assertable anywhere. I wonder, however, whether such a rule would stand up against the “public stake” theory of Prohibitions in a serious matter -- e.g., if a man sued in an ecclesiastical court to recover a piece of ordinary secular property, to the blatant infringement of the common law, and the defendant made no objection. On the whole, Kinsley v. Piggins is best dismissed as an exception for the exceptional category of defamation suits.

Self-prohibition was also not permitted, again for the best of reasons, in Hutton v. Grimball. But the total effect of that case and another related one is to reinforce strongly the general rule that self-prohibition was entirely permissible. In both these cases, the ecclesiastical plaintiff sought a Prohibition based on 23 Hen. 8. That is to say, a man sued in the wrong diocese (not the defendant’s home diocese, where the statute required ecclesiastical suits to be brought), then tried to prohibit his own suit for that reason. One might suppose that self-prohibition would never be permitted in such cases: The fault the ecclesiastical plaintiff is trying to take advantage of is his own. The defendant, so far as appears, would just as soon be sued in the wrong ecclesiastical court as in the right one. Denying the Prohibition would not hand over an issue beyond ecclesiastical-

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9 M. 9 Jac. C.P. Harg. 15, f.255.
10 Langdale’s Case. M. 8 Jac. C. P. Harg. 15, f.236b.
Self-prohibition

cal competence to the ecclesiastical court. Nevertheless, in Langdale’s Case, the Court granted the Prohibition. The report gives only the holding. What the suit was about is not reported, so there is no basis even for asking whether there might have been any ulterior reason for granting the Prohibition. As it stands, the holding is stronger for self-prohibition than any other: A prohibitable suit should be prohibited, whoever moves for Prohibition and whatever the grounds.

A year later in Hutton v. Grimball the same Court went the other way. But the circumstances were special: (a) The suit that was brought in the wrong diocese was for defamation. (Perhaps, as I argue in Kinsley v. Piggins, there were reasons against self-prohibition specific to defamation suits as a class.) (b) The Prohibition was sought after sentence against the ecclesiastical plaintiff, the ecclesiastical judge having found factually that the defamatory words were never spoken. (Thus, the effect of prohibiting would be to override the defendant’s vindication of himself, when he had been accused of a “crime” he had not committed, and to deprive him of his costs, when he had been unjustly vexed both by a groundless accusation and by being sued outside his home diocese.) It would have been dogmatic indeed to prohibit in this case. The equities were so clear that the decision can hardly be taken to overrule Langdale’s Case. The Court’s explanatory language, on the other hand, was general enough to count as reversing the earlier case. The judges said that only ecclesiastical defendants -- the victims of being improperly drawn out of their home dioceses -- could take advantage of 23 Hen. 8. They also said (in effect proposing an alternative ratio decidendi) that waiting on sentence constituted an admission of local jurisdiction within the ecclesiastical system, though not of ecclesiastical jurisdiction as against the common law. (This point could be made against an ecclesiastical defendant who waited too long to invoke 23 Hen. 8, as well as an ecclesiastical plaintiff. Cf. the partially contrary Executors of Smith v. Poyndreill above.) Finally, the Court expressly affirmed the practice it seemed on the surface to be violating in Hutton v. Grimball: “...it was admitted here that Prohibition may be granted at the suit of him who first sued in ecclesiastical court, and though it be at the suit of the party or ex officio it is not material.”

We may note, finally, two anomalous cases in which the right to prohibit one’s own suit was in a sense questioned. In neither is a final decision reported. In neither would a decision have signified much for the
straightforward problem of self-prohibition. In one case an executor was not permitted to prove the will in the ecclesiastical court because he could offer only one witness. He then sought a Prohibition analogous to the many aimed at preventing enforcement of the ecclesiastical two-witness rule. Two of the Justices took note of the fact that the executor was seeking to prohibit his own suit, though not in such a way as to suggest disapproval of self-prohibition in general. Self-prohibition was not the real problem in this case. The problem was whether there was anything to prohibit. (Ordinarily, a Prohibition stopped a suit in progress. Was there anything for the executor to stop here? He had not started a suit, but rather been prevented from taking the first *ex parte* step in an ecclesiastical proceeding. So, at least, the situation could be interpreted. On that interpretation, the question was in effect whether the executor could have a Prohibition to do the service of a *Mandamus* -- i.e., to prevent the ecclesiastical court from standing in the way of the executor’s administration of the estate, even if it could not be forced to accept the will directly. There may also have been a substantive question as to whether the ecclesiastical courts were entitled to apply their two-witness rule to probate, even though they were not allowed to apply it in other contexts. The judges adjourned the case without decision. If they had denied the Prohibition, they would only have furnished one very special example of “self-prohibition prohibited.”

The other anomalous case presented a complicated problem. Counsel threw in an objection to self-prohibition as reinforcement to arguments that were really substantive, as if to say, “It would be most unjust to grant the Prohibition in this case, especially since the ecclesiastical plaintiff is trying to prohibit her own suit.” In brief, Mrs. Harris sued White for defamation and won. White appealed and lost again. He appealed again and this time was successful -- the sentence below was reversed and costs awarded against Mrs. Harris. Between the first appeal and the second came a general pardon, which extended to White’s ecclesiastical offense of slander. Mrs. Harris sought a Prohibition to take advantage of the pardon and escape the costs. I.e.: She claimed that as of

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11 H. 2 C. P. Harl. 5148, f.114.
12 Harris v. White. P. 1 Car. K.B. Lansd. 1063, f.120b.
the time the second appellate court decided against her the offense was wiped out by the pardon, and consequently that no “incident” of the suit grounded on that offense (the costs) could be given effect. Common sense might suggest offhand that Mrs. Harris’s cause was shaky, but in fact the application to cost awards of pardons covering the “principal” was a re-currently difficult problem, and Mrs. Harris’s case was formidably argued. The Court ended by issuing a temporary stay of ecclesiastical proceedings, reserving judgment on the Prohibition until later. If this conclusion suggests an inclination to grant the Prohibition, then we have another example of “self-prohibition permitted” -- and permitted in a “hard” case, where an excuse for preventing Mrs. Harris from escaping the costs might be welcome. If the conclusion suggests disinclination to prohibit, objection to self-prohibition can hardly be taken for the reason. The only reported judicial remark, by Justice Dodderidge, is a ruminative and doubting one as to how pardons should be handled -- i.e., going to the substance.
V. "Judging by the Truth"

A. Introductory

From the cases on self-foreclosure and self-prohibition above, a predominant theory of the Prohibition emerges: Prohibitions are granted in the public interest upon information to the Court. It does not matter whom the information comes from, whether the informer's hands are clean \textit{qua} private party, whether his motion is timely. On the other hand, it was difficult entirely to exclude considerations of private justice in Prohibition cases. "If Prohibition should lie in principle to protect the public interest it should lie here" was too stringent a rule to apply with complete consistency. We turn now to several classes of cases which further test the "public stake" theory of Prohibitions against the claims of private justice. Cases of these several kinds in one way or another raise a common question: "To what extent should parties in Prohibition cases be allowed to take advantage of technicalities or points of strict legal logic?"

That question of course arises in every branch of law administration. In innumerable contexts, courts have a choice between strictness and leniency, between doing substantial justice and insisting on procedural standards. The law erects procedures, "right ways of doing things." There is a social interest in insuring that litigants observe those standards -- because they are perceptibly or presumptively reasonable, or, failing that, because regular forms of some sort are necessary and those that exist, exist. In addition, forms of procedure inevitably beget expectations in private litigants -- reasonable and unreasonable expectations, just ones and cunning ones. Parties will inevitably say, and within bounds of reason must be allowed to, "Whatever the substantive rights, I should win because the other party has violated the procedural rules of the game. He could have done things the right way, and if he had perhaps he would have a case against me. But he has done them the wrong way. It is unfair to me (as well as publicly undesirable) to help him out -- to dismiss his errors as if procedure were unimportant, or to let him go back and correct his mistakes, and to decide the substantive matter on the basis of facts that have accidentally emerged despite my adversary's failure to make his
The Writ of Prohibition:
Jurisdiction in Early Modern English Law

case in due form." Litigation is warfare. Given the adversary system, that is a salutary fact. At the same time -- if the agonistic character of life is tragic, the bellicose or sporting character of litigation is at least a nuisance. To allow parties the advantage of procedural points when that is avoidable is both socially desirable within limits and a necessary concession to expectations naturally and properly formed in an adversarial world. But it is also, in one degree or another, to indulge sharpness and to waste time in the long run, to punish the laity for bad counsel and reward the rich and the smart. It is to cheat that rather amorphous genius loci, Substantial Justice, of his worthy and hungry demands. With these tensions, courts struggle in countless situations. It would be mistaken to assume that unreformed, traditionalistic common law courts did not often struggle with them -- that they were mere sticklers for form, connoisseurs of litigative jousting, aficionados of logic abstracted from life.

I recite those truisms in order to put the Prohibitions cases below in focus. If we find the courts lenient toward procedural errors and disinclined to allow parties the advantage of them, we may legitimately see the "public stake" theory of Prohibitions in operation. We may take the judges as saying, "It is of no concern whether the plaintiff has 'done the right thing' procedurally." If it appears that Prohibition ought to lie, it will be granted -- never mind how it became apparent, never mind whether this careless plaintiff ought to lose in an ordinary contest between party and parry, never mind that it is unsporting or even more seriously unfair to deprive the defendant of his well-taken procedural point." Procedural indulgence of defendants. it should be noted, could similarly imply the "public stake" theory, for the defendant, too, can be conceived as the court's informer -- its source of facts and reasons for seeing no infringement of the "royal dignity," or for upholding the putatively desirable jurisdiction of "foreign" courts in their sphere. A difference in procedural tenderness toward plaintiffs and toward defendants would signify something else -- a "when in doubt prohibit" policy, or bias in favor of typical interests of plaintiffs (or vice versa).

However, a caveat must be put in the way of inferring the "public stake" theory from procedural leniency: It cannot be glibly assumed that the courts would behave differently on the "public stake" theory from the way they would behave if they saw Prohibition cases primarily through the categories of private justice. I.e.: It is not necessarily true that 16th
Judging by the Truth

and 17th century courts would tend to prefer procedural nicety over substantial justice in mere contests between party and party. I would expect them -- as I would expect most courts at most times -- to do so in somewhat greater degree than when they recognized an important public interest in the substantive outcome. But one should be careful of naked inference, looking for positive signs of the courts' attitude before concluding too much. The self-foreclosure and self-prohibition cases above furnish a clearer test than the cases below.

B. Variant Verdicts

Summary: If a verdict, or conceded evidence, literally falsifies a claim but substantially supports it, should the claim be upheld? Did the "public stake" in Prohibitions lead the courts to follow the truth as established by verdict even though the claim to which the verdict responded was misstated? Some of the evidence supports an affirmative answer to those questions, but it must be considerably qualified.

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One sub-group of cases involves discrepancies between special verdicts or conceded evidence and plaintiff-in-Prohibition's claim. It may be advantageous to look at simple example before taking up the cases: Suppose A claims amodus to pay 6d for tithes and the jury finds a modus to pay 10d (i.e.: The jury so finds by special verdict. Juries were in many situations permitted or encouraged to return the facts as they knew them, as opposed to finding generally that the claim to be established -- e.g., a modus for 6d -- was true or false. When a special verdict was returned, its application -- whether or not the facts as found sustained the claim to be established -- was a question of law for the Court.) Should the jury's negative finding -- that tithes in kind have never been paid -- be used to sustain the Prohibition? Or should A's failure to prove his claim as alleged be taken against him and Consultation granted? (Cf. the similar problem in connection with preliminary proof of surmises under 2/3 Edw.6.)

From a public point of view, the Prohibition should clearly be upheld. If private considerations are relevant, how strong is the case against A? The following points seem to me to be the main ones bearing on that question:(a) Though A obviously ought to have alleged his modus correctly, confusion about tithing customs is understandable. (Imagine a
newcomer to community, or a purchaser of land misinformed by the previous owner.) (b) On the other hand, indulgence toward careless pleading of *modi* might encourage a species of fraud: A jury of friendly and self-interested neighbors knows the custom is really 10d, but is tempted simply to find the plaintiff's allegation of 6d true, for then he will certainly not have to pay tithes in kind, as he ought not, and a verdict for 6d will not make it any easier for the parson to collect 10d in the future. A dishonest verdict might be hard to get away with if strong evidence of the truth were presented at the trial, in the judge’s hearing. But the plaintiff would only have a motive to present evidence of a 6d *modus*, and the defendant should not have to bear the burden of proving something he does not believe (for his ecclesiastical suit is predicated on the claim that there is no *modus* at all.) Moreover, under the still-prevailing ancient theory, jurors were supposed to draw on their own knowledge, though judges could, to a limited degree, control verdicts flagrantly against the evidence as presented. The defendant in our case would be entitled to assume, especially when communal custom was in question, that the jurors knew the truth and would declare it. Even apart from the absurdity of expecting a man to present evidence against his interest and belief, one should not have to hustle up evidence to make sure that jurors could not commit fraud. Insisting on strict conformity between claim and verdict when jurors were honest would of course not prevent dishonesty, but it would tend to condition litigants and their lawyers to be careful, and it would catch deliberately fraudulent plaintiffs whose hopes backfired. (I.e.: one intentionally alleges a too-low *modus*, gambling on the jury’s collaboration, but the jurors tell the truth. Making that man pay tithes in kind for one year is modest punishment.)

(c) The preliminary-proof requirement affects the equities: If A. alleges 6d by an honest mistake, the necessity of finding two witnesses to back him up gives him an occasion to discover the truth. So in principle the proof requirement should reduce the excusability of coming to the jury with an inaccurate claim. But complexities arise: A man says 6d, then in looking for preliminary proof discovers that the truth is 10d. Will he be allowed to amend his surmise? Hopefully. But suppose he cannot or does not. His preliminary proof for 10d will probably be accepted even though the surmise says 6d (see above). Now what is he supposed to do when he sees a 10d verdict looming? Drop his surmise and start over correctly? If a Consultation for non-prosecution is obtained by the other
Judging by the Truth

party, will a new Prohibition be barred by 50 Edw. 3? Perhaps when he pleads formally he should change from 6d to 10d. But will a discrepancy between the surmise and the declaration be held against him (see below)? In sum: The problems of escaping from an initially inaccurate surmise are perhaps a reason for "judging by the truth" instead of holding parties to prove exactly what they allege.

(d) The defendant is perhaps entitled to assume, (seriously as opposed to sportingly), that the verdict must support the plaintiff's claim exactly. That is to say, his so assuming might affect his conduct: Suppose a parson says to himself, "I think I can make my claim to the tithes in kind stick, at least against A. For he says he only owes me 6d That can't be true. It's just possible that the jurors will find a 10d modus, properly enough. I doubt it, but they might, for I know that 10d has occasionally been taken for tithes in this parish. Maybe the jurors will infer a custom from that. Maybe they ought to. But 6d -- that's unheard-of. A. is seriously misinformed, if not just ornery. I know that he will fail with the jury. So I can safely count on tithes in kind from him this year." (The superior economic value of tithes in kind of course explains why there was so much litigation over modi.) These thoughts are not unrespectable. Both the parson's economic planning and his litigative conduct (not making an all-out effort to show that there is no modus, on the assumption that the worst the jurors can find is a 10d modus) could be influenced by what is probably the layman's natural guess about the law -- viz. "My adversary will surely be made to prove exactly what he is foolish enough to believe or wicked enough to assert." Whether the law should try to conform to "the layman's natural guess about the law" is a large and persistent question. Moreover, opinions can differ over the respectability and typicality of the thoughts I have put in a parson's head. Imagine a malevolent parson: Knowing full well that a 10d modus is the custom, he picks out a parishioner whom he knows to be misinformed about the amount of the modus. This parson's motive from the start is to catch a parishioner in a legal squeeze-play and extract unowned tithes. Perhaps the second parson is more typical than the first, and the thoughts of the first may need very little modification to pick up the flavor of sharp practice.

(e) Against the plaintiff in our case, it may be urged that he would be in a better position if his mistake were not favorable to himself. Thus, if one pleads a 10d modus and proves a 6d one, he should perhaps win on
public grounds. Insisting that the mistake be unfavorable to the party before invoking the "public stake" theory might be a compromise between fairness to the defendant as a private party and the public reasons for "judging by the truth." In sum: There is no manifestly right solution to our exemplary case within the perspectives of private law.

Turning now to the real cases: In the early Pelles v. Saunderson, the ecclesiastical suit was for grain tithes from 60 acres. A Prohibition was obtained on the surmise that the 60 acres were recently reclaimed waste -- i.e., that the land produced no crops and paid no tithes before reclamation and was therefore exempt for seven years after reclamation by 2/3 Edw. 6. The jury found that 30 of the 60 acres were completely barren before reclamation, but that the other 30 acres had paid tithes of lambs and wool (not of grain.) The theoretical alternatives were: (a) Consultation for the whole 60 acres. (The plaintiff did not prove what he said was true -- that the 60 acres by reason of barrenness had never paid any tithes.) (b) Consultation quoad only the 30 acres that paid lamb and wool tithes. This course would involve: (i) Interpreting the statute to mean that land that had paid any sort of tithes before reclamation was not exempt. (ii) Going by the truth as established by verdict, rather than punishing the plaintiff for an inaccurate claim. (c) No Consultation. This would involve: (i) Interpreting the statute to mean that land which by reason of uncultivation had never paid grain tithes (nor, I feel sure, hay tithes) was exempt from "great tithes' -- grain and hay -- for seven years after being reduced to cultivation, even though it had previously paid some "small tithes" in virtue of grazing use. (ii) Going by the truth, but in a different sense. i.e.: The plaintiff did not prove what he said -- no tithes from 60 acres -- but he proved all he need have claimed -- no great tithes from 60 acres.

The judges of both principal courts, plus the Chief Baron of the Exchequer, conferred about this case. There is no sign that the first course -- Consultation for all -- was considered. It may be material that the defendant had not traversed the plaintiff's claim, but pleaded affirmatively that the 60 acres were fruitful. (The reporter tells us, with perhaps a note of surprise, that such pleading was said to be tolerated by Queen's Bench
Judging by the Truth

practice. It would be unacceptable by the normal canon: one should not make an affirmative statement which amounts to an implied denial of adversary's statement without at least accompanying it by an express denial.) Thus the verdict failed to conform with the defendant's statement as well as the plaintiff's, which is perhaps a reason for not being too hard on the plaintiff. As between the other two courses, the judges were first inclined to (b), but later decided on (c). So far as the spare report indicates, the change was only a matter of information: When they were disposed to (b), the judges were under the impression that the ecclesiastical suit covered the lamb and wool tithes as well as the grain. When they got the facts straight and saw that the parson could recover his lamb and wool tithes by starting a new suit -- i.e., without a Consultation in this one -- they had no apparent hesitation about taking course (c). In sum, Pelles v. Saunderson comes to authority for "judging by the truth," but owing to its complications it is not clear authority for simple cases such as our example above. It points to one kind of reason for "judging by the truth," a reason that would not hold in simple cases -- viz. legal ambiguity: The plaintiff in Pelles v. Saunderson may have drawn his claim as he did because he thought his only chance of asserting the exemption from grain tithes for all 60 acres was to show that none of the land had ever paid tithes of any sort. That would have been a legal miscalculation, not a matter of factual misinformation. To the degree, at least, that it was a legitimate miscalculation, perhaps it should not be held against him. (The report is too brief to show whether the judges were in serious doubt about the statute's meaning. As far as it goes, they hardly seem to have been.)

In a case of 1609, Chief Justice Coke cited a Queen's Bench judgment from 19 Eliz. (1576) in favor of "judging by the truth" in simple modus cases: Plaintiff-in-Prohibition said that the commutation he claimed was customarily paid at Michaelmas. The jury found that there was a modus; but that the custom was to pay at Pentecost. The Prohibition was upheld in spite of the discrepancy. Coke used "public stake" language in explaining that decision (whether he was interpreting or stating from a re-

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2 M. 7 Jac. C.P. Add. 25,211, f. 189; Harg. 52, f.29. The same citation from 19 Eliz. appears as a noto in 13 Coke, 58, where Chief Baron Tanfield is said to have a MS. report of the case, and the case is said to have been "well-debated." The 1576 case is also cited in Chambers v. Hanbury below.
The Writ of Prohibition:  
Jurisdiction in Early Modern English Law

port the reasons actually given in 1576): "...because it goes to the jurisdiction of the court; though the prescription is not found in the manner common in law, yet it suffices." In other words: In a purely private matter, if issue were taken on prescriptive title it would have to be more strictly sustained by the verdict, but here there is a public interest. Quaere whether a mistake as to the day of payment is more trivial and hence excusable than other mistakes, e.g., as to the amount of a modus. Probably there is no difference: the important thing is that the verdict showed no tithes in kind due.

In Folcot v. Ridge, the parties were at issue on a modus for hay tithes from certain specified land. The jury found that there was a modus, but also that part of the land had never been mowed (in which case, there could not possibly be a modus for hay.) The verdict did not, however, specify which of the acres in question had never been mowed. The Court upheld the Prohibition, on the ground that the defendant had not contested whether all the land had been mowed. In one sense, the Court went by the substance, as opposed to punishing the plaintiff for an inaccurate claim: The plaintiff said such and such specified land was subject to a certain modus. The jury said in effect, "Money is indeed given in respect of such hay as is grown within the area specified, but is not true that there is a hay modus applying to exactly the land to which the plaintiff says it applies, for some of that land has never produced hay." In another sense, the Court cared more about pleading-logic than the truth: If the defendant's traverse of the modus implied an admission of the plaintiff's implied claim that all the land mentioned was hay land, then the reality could be ignored. Quaere whether it would have made a difference if the jury had said what specific land had never been mowed. (The reporter takes special note of its indefiniteness.)

In Chambers v. Hanburye, plaintiff-in-Prohibition claimed a modus to pay a certain sum for all tithes "at every time when he shall be required." His evidence was offered to the Court for evaluation before any verdict. (A common practice. A party could "demur to the evidence" -- i.e., concede the factual truth of the evidence, but contest its legal sufficiency to

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3 T. 36 Eliz. Q.B. Croke Eliz., 333.  
Judging by the Truth

maintain the claim of the party offering it. The Court must then determine the validity of that legal assertion. As this case shows, however, decision on the legal effect of the evidence did not necessarily conclude the matter between parties.) The evidence showed that the money was customarily paid at Lammas, not as the plaintiff said, on demand. Tanfield, at the Bar, argued that only the existence of the modus, not the day of payment or whether there was a fixed day, was relevant, citing the case of 19 Elizabeth above. The judges said they would be of Tanfield's opinion if the jury returned a special verdict. (The plaintiff's evidence was held good for his purpose, despite the discrepancy, but the evidence was not treated as equivalent to a verdict. A special verdict finding the modus to pay at Lammas would be considered a verdict for the plaintiff, but the jury was left free to bring in some other verdict.)

One late Elizabethan report underscores the limits of "judging by the truth" in modus cases. An opinion is reported, without specified context, to the following effect: Plaintiff-in-Prohibition alleges a 20/ modus. The truth is that he has always paid money instead of tithes in kind, but sometimes he had paid less or more than 20/. Held: The plaintiff's prescription here fails, even though there is only one established instance of a different sum paid. The point here is really substantive, not procedural: A modus by nature is a custom of paying so much for tithes. If one alleged a modus to pay various sums, or an uncertain sum, the prescription would be bad on its face. Therefore, to prove a practice, even from time immemorial, of paying one sum this year and another sum that year is manifestly not to prove any modus at all -- which is not the same as proving a different modus from the one alleged. I cite the case here because the existence of the report suggests that an argument from permissive application of verdicts may have been made: Jury A says "Tithes in kind have never been paid, but the commutation that ought to be paid is 10d, not 6d as the plaintiff alleges." Jury B says "Tithes in kind have never been paid, but we cannot say that 20/ should be paid as a commutation, as the plaintiff alleges -- for all we know positively is that various sum of money have been paid." The negative statement common to the two verdicts makes for a superficial similarity. It perhaps encourages arguing that if the negation in the first is more important than the affirmation, so should it be.

in the second. But as the report implies, the point is badly taken. (And note: We as yet have no cases directly holding that a 10d verdict will sustain a 6d claim.)

Nowell v. Hicks⁶ presents the converse of the last case: a bad substantive point against plaintiff-in-Prohibition which may have got its color from procedural problems. Here, the jury found that the communal modus alleged by the plaintiff had obtained up to 20 years ago, but added that within the last 20 years some parishioners had paid in kind. Justices Clench and Fenner, alone in Court, thought this was a plain finding for the plaintiff. Surely it was, for as a matter of substance a modus was not destroyed by an interruption -- i.e., by the mere fact that the de jure thing was done instead of the customary thing in specific instances. (Though of course instances of payment in kind could count as evidence against a modus -- perhaps as a evidence to conclude a jury in the absence of any positive evidence of the alleged custom.) No arguments contra are reported, only that the plaintiff's counsel moved for judgement and argued that he should have it because the verdict was in his favor. From the fact that he had to argue, I would infer that the other party was making trouble, or at least that the Court was expected to have some hesitation. I can see a possible basis for momentary hesitation in a superficial resemblance to discrepant-verdict cases: If a man who pleads a 6d modus and proves a 10d one should lose (quaere whether he should), then what about a man whose plea says that tithes in kind have never been paid in the parish, and whom a special verdict likewise in one sense supports and in one sense contradicts? But surely a plaintiff-in-Prohibition who alleges a perfectly true and legally valid modus in the parish is not by implication saying that the custom has always been observed de facto by every parishioner. Surely he is not bound to anticipate and explain away in his plea such facts as might count against him in evidence.

Hall v. Spencer⁷ contains the same point as Nowell v. Hicks, plus others which make it a much more material discrepant-verdict case. Here, a modus (16d for hay tithes) was laid in a manor. I.e.: The tithing custom was alleged to be the custom of the manor, applicable to its customary

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6 M. 43/44 Eliz. Q.B. Add. 25,203, f.384b.  
7 P. 1 Jac. K.B. Add. 25,203, f.684.
tenants (copyholders). Manors were local units -- comparable to parishes, towns, etc. -- capable of having their own tithing customs, as well as other customs of their own at odds with general law. The jury found a special verdict, as follows: (a) The land whereof tithes in kind were demanded is customary land of the manor, as alleged. (b) The customary tenants of the manor have used to pay the 16d commutation up to 23 years ago. (c) For the last 23 years, they have paid sometimes more than 16d, sometimes less.

The three puisne justices of the King's Bench (Chief Justice Popham being absent in the Star Chamber) made the following determinations: (a) Cessation of observation of the modus for 23 years does not destroy it. The verdict is not against the plaintiff because it shows such a cessation. (b) The verdict is, however, against the plaintiff for another reason: The jury did not find a custom of the manor, as alleged -- i.e., a modus within and throughout that local unit, applying to its customary tenants. Rather, it found the customary practice of a group of people, holders of a particular group of tenements, the customary tenements of that manor. It is as if A. alleged a parochial modus and the jury found a modus applying only to a particular piece of land. A -- and so the plaintiff in this case -- has a perfectly good claim to the commutation, but he must allege it correctly. There are two kinds of modi -- those pervading a local unit capable of its own custom (parish, town, manor, etc.) and those peculiar to particular pieces of land, singular or plural ("the close called Greencroft," or "all the customary tenements in the Manor of Dale"). A man must correctly allege which kind of modus he has, as between those two kinds. A jury must answer the question "Is such-and-such the local modus?" if that is the question it is asked. It may not say "No -- but the plaintiff has always paid a certain commutation in respect of his particular tenement," or "We do not know -- but the plaintiff has always paid a certain commutation in respect of his particular temenent." (c) Since, however, it appears from the verdict that the parson has no right to tithes in kind, a Consultation should not be granted.

Rather, a new Venire facias (i.e., another jury to retry the issue) should be awarded. I.e.: Instead of punishing the plaintiff for what was not his fault, the Court "punished" the jury (and tacitly, perhaps, the trial judge) for rendering an unnecessary special verdict. If the jurors believed that the customary tenants of the manor had always paid the commutation,
save for the recent cessation, they were in a position to find that the cus-
tom of the manor was as the plaintiff said it was. The possibility that the 
jurors could in good conscience find only a *modus* applying to particular 
tenements was merely theoretical. In reality, no doubt, the jurors and trial 
judge were confused by the 23-year cessation. Being unsure that they 
could affirm the plaintiff’s claim as stated when the custom had not been 
observed in recent years, they chose and were permitted (for trial judges 
undoubtedly exercised a good deal of control over whether juries returned 
general or special verdicts) simply to return the facts as they knew them. 
In doing so, they inadvertently stated the facts in such a way, that strictly 
construed, they failed to support the plaintiff’s claim. A new jury could 
be expected more or less automatically to return a proper general verdict 
for the plaintiff, the law having been clarified. The solution arrived at 
was liberal and fair. The more liberal and more economical alternative 
would have been to refuse a Consultation *simpliciter*, without a new *Ve-
nire facias* to establish a logically elegant record. In rejecting that alter-
native, the Court implied a rule for the simpler parallel case: A man 
alleges a parochial custom and the jury finds a *modus* applying only to the 
plaintiff and his predecessors in estate with respect to a particular tene-
ment. There, Consultation should be granted, for the plaintiff has without 
excuse misstated his modus, even though it is evident that he does not 
owe tithes in kind. Simply denying Consultation in the principal case, 
where the plaintiff was not at fault, would tend to encourage similar per-
missiveness in the parallel case where he is at fault. (That is to say, 
where he can be considered to be too much at fault to win. It is of course 
not inevitable that he be so regarded.)

In Berrie’s Case (1617), a parochial modus for hay tithes was 
claimed. The jury returned a special verdict: There was such a modus ap-

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8 T. 15 Jac. C.P. Harl. 5149, f.98; Hobart, 192. I follow the MS. except at the point noted, for 
Hobart’s report is plainly of his own opinion only, giving no suggestion of the division in the 
Court. Hobart’s thoughts (perhaps rather than what he actually said in Court) as reported by 
himself took account of the “public stake” theory of Prohibitions: “...we shall never give them a 
Consultation to proceed in all, no nor in part, where the suit appears to us originally ill-founded,
and a Prohibition leaves more power in this Court, than the other actions, in as much as it locks 
up that Court [the ecclesiastical] which cannot require it to be opened but with a key of right and 
justice...” This is strong language, hard to reconcile with Hobart’s agreement (in the MS.) with 
Warburton’s case of a 6/ modus alleged and a 12/ modus established.
Judging by the Truth

plying to most of the parish, but one particular tract of meadowland customarily paid tithes in kind. Plaintiff-in-Prohibition had five acres in that tract. Upon this verdict, the Court was presented with two choices: (a) A general Consultation, for the issue was manifestly not found for the plaintiff according to his claim. (b) A Consultation quoad only the five acres which clearly owed tithes in kind. The judges were divided as to which course to take. Chief Justice Hobart and Justice Winch favored the partial consultation. They embraced the general policy of "judging according to the truth," relied on Pelles v. Saunderson as supporting that policy, and maintained that it was consistent with practice in ordinary private suits. (As to the last point: Hobart put the case of an action of Debt on a tenant's obligation not to commit waste. Suppose the lessor alleges that the lessee did waste by cutting 20 trees and the jury returns that he cut ten trees. Although, Hobart said, this verdict is strictly speaking against the lessor, it will be taken in his favor -- i.e., the lessee will be held to have committed waste and hence to have forfeited his obligation. So in the principal case, though the verdict is strictly speaking against the plaintiff, it will be taken in his favor -- i.e., with respect to all but the five acres. To emphasize the private law parallel is to de-emphasize the "public stake" in Prohibitions. In the MS. version, nothing is said of the special character of Prohibitions, but Hobart's report of his own opinion shows that he had it in mind. See note 8.) Justice Hutton took the opposite view: The verdict was simply against the plaintiff, so that a general Consultation should be granted. Hutton for his part claimed good common law to support him (citing a prescription where one claimed to have been seised of a vill from the time of Henry VIII and the jury found that he was seised from Henry VII -- held, the prescription fails in toto even though the truth was more on the party's side than he imagined.) Though he speaks less directly, Justice Warburton plainly agreed with Hutton. He says simply that the verdict is "void," then lays down an important parallel rule: If one claims a 6/ modus and the jury finds a 12/ modus, the issue is found against the plaintiff (implying that Consultation should be granted even though tithes in kind are manifestly not due.) This rule the rest of the Court conceded, notwithstanding the judges' disagreement in the principal case. The first and only judicial statement -- a dictum -- on the problem in our "exemplary
The Writ of Prohibition: 
Jurisdiction in Early Modern English Law

case" above goes plainly against "judging by the truth." The ultimate dis-
position of Berrie's Case is not reported. We are left with a picture of the
Court evenly divided on the important question at issue.

The only case in the present line later than Berrie's, is a relatively weak
instance of liberalism: A modus of 40/ for all tithes was claimed as applying
to the scite and demesnes of a manor owed by Crane, Plaintiff-in-Prohibition.
The evidence showed that part of manor had been severed before Crane pur-
chased it. (Assume A. owned the unit prescriptively identified as the Manor
of Dale. A. conveys some of the demesnes to B. and the rest to Crane, in
the name of the Manor of Dale. Crane has the manor -- i.e., is lord with
the jurisdictional rights of a lord that comes to him -- while B.'s land is
severed from it -- i.e., no longer part of that manor or any other.) The ef-
effect of the severance was that the 40/ modus applied to more land than the
scite and demesnes of the manor, to which Crane's plea applied it. The
Court held upon this evidence (not upon a verdict incorporating it) that
Crane's prescription was good despite the discrepancy between the exact
truth and his claim. Having applied the modus to the unit to which it ap-
plied prescriptively (the manor), Crane was not obliged to spell out the
further circumstance that he was not the owner of all the ancient manor,
or that what the modus now applied to was the manor-plus. (Note that
Crane's "mistake" of a sort was against himself He did not, so far as the
present record showed, dispute his duty to pay 40/, even thought he did
not possess all the land covered by that modus.)

From the cases above, we must conclude that the courts never reached
a firm policy of "judging by the truth" when verdicts failed to fit plain-
tiffs' claims. Sometimes they so judged. They tended to be liberal to-
wards plaintiffs who were not at fault, or scarcely at fault, in stating
claims that turned out not to be provable exactly as stated. But they can-
not be said to have embraced the "public stake" theory so boldly as to
overlook the party's fault and the imperatives of procedural correctness.
They did not say "The conclusive truth of the verdict is the decisive infor-
mation to the Court. If on the basis of that information Prohibition should
lie, it will lie, however things stand between plaintiff and defendant." The
divided Court in the late-Jacobean Berrie's Case -- and the dictum in
that case -- do not recommend "judging by the truth" very strongly. The
doubts in that case do not really go against the weight of earlier holdings.

8a Crane v. ----. M. 13 Car. C.P. Harg. 23, f.15.
**Judging by the Truth**

Coke came closer than any other judge to endorsing "judging by the truth" on public grounds as a general policy.

**C. Misconceived Surmises**

**Summary:** A plaintiff who claimed a Prohibition on the basis of a misconceived legal theory, but was plainly entitled to one on a different theory, had a good chance of being helped out by the Court, according to the "legal truth," provided the claim he originally relied on had not been falsified by verdict. This conclusion, however, depends on slight and ambiguous evidence.

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The cases in the last group ask whether the truth as established by verdict or conceded evidence should be decisive, notwithstanding discrepancies between that truth and the party's claim. Whether or not to "judge by the truth" (or give primacy to the public interest in Prohibitions, or do substantial justice in spite of the party's error) could arise in other ways as well. Suppose a plaintiff-in-Prohibition misconceives the law and draws his surmise in accord with his misconception, so that the defendant would have grounds for demurring. But suppose it is clear on the face of things that the plaintiff would be entitled to a Prohibition on a different legal theory than the one he has adopted. Should the Court help him out, or should it leave him to consequences of his folly -- and leave an improper suit in the hands of a "foreign" court? A few cases raised that question.

In Brewer _et al._ v. Dawson (1597), a parson sued for tithes computed as one-tenth of the rent the parishioners paid for their houses. At common law, as the judges clearly agreed, the parson had no claim to such tithes -- i.e., men had no duty to pay what amounted to a real-estate tax to the Church. Actually, the parson's claim was not all that absurd, for he based it on prescription. Generally speaking, non-tithable products, such as minerals or ocean fish, could be subject to tithes by special custom. In this case, however, the judges also clearly agreed that the parson's prescriptive title was bad (because he claimed the "real-estate tax" as the cus-

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9 M. 39/40 Eliz. C.P. Harl. 1631, f.272b.
tory commutation for other things which in their turn were legally non-
tithable.) Therefore, the parishioners had an open-and-shut claim to Pro-
hibition on the ground that they were being sued for tithes which were
simply not due by the law. However, they did not make that claim. In-
stead, they surmised that they paid certain other tithes in lieu of any
charge on their houses. As a defense to a tithe suit, that was bad by well-
established principles, as the judges again clearly agreed: A man sued for
hay tithes could not escape them by alleging a modus to pay corn tithes
instead. Payment of one species of tithes was never good consideration
for exemption from another species.

Because the surmise in Brewer et al. v. Dawson was founded on a mani-
festly untenable legal theory, the defendant moved for Consultation. Af-
fter discussing the case on two occasions, the Court decided unanimously
to deny the Consultation. For it was clear from the parson's libel ( at-
tached to the surmise as required by statute ) that he had no claim and
should have been prohibited on a correctly drawn surmise. It should be
noted that the case arose on motion for Consultation, before formal plead-
ing. If the plaintiffs had declared on their misconceived surmise and the
defendant had demurred, could judgment for the defendant have been
avoided? (The propriety of Consultation on motion is discussed as a dis-
tinct topic below. There was no mention of that problem in this case.)

In Baxter v. Hope (1611), 10 a parishioner did essentially what the
plaintiffs in Brewer et al. v. Dawson did -- alleged a modus when the
proper claim would have been de jure exemption from the tithes sued for.
The tithe suit was in part for "after-crop and stubble." (After corn was
harvested, another crop of some sort was grown in the cornfield during
the same year and/ or the stubble was grazed. The parson was suing for
tithes of such by-products.) The parishioner said in his surmise and his
declaration thereon that the custom was for householders to pay corn
tithes and in consideration thereof to be discharged of tithes of after-
crops. That is to say, the plaintiff pleaded what looked like a modus. But
taken as a modus, the claim here was presumably bad: paying corn tithes
could not be good consideration for exemption from tithes of after-crops,

10 M. 9 Jac. C.P. Harg. 15, f.260.
assuming the latter owed tithes *de jure*. When the defendant demurred to the declaration in this case, the Court faced two questions: (a) Should the plaintiff's claim be construed as a *modus*? (b) Assuming that the claim, despite its appearance, is not to be taken a *modus*, are after-crops tithable *de jure*? A majority of the Court said "no" to the first question, Justice Foster dissenting. The Court then proceeded to decide that no tithes were due from after-crops by the law. (A conclusion which accords with most opinion on that often-discussed question).

Baxter v. Hope is an instance of "judging by the truth" or "helping the party out of his legal mistakes," but in a more complex sense than Brewer v. Dawson. Strictly speaking, the majority of the Court *understood* the plaintiff as claiming a *de jure* exemption. The judges (save for Foster) did not say, "The plaintiff has made the mistake of claiming an invalid *modus*, but we will find for him anyhow since he never ought to have been sued for such tithes." They said instead, "The appearance of the claim is deceptive -- it really amounts to claiming a *de jure* exemption, or at least admits of such interpretation." Color of a sort can be given to that reading of the plaintiff's claim. There is a sense in which the theory behind legal exemptions from tithes of after-crops "sounded in exchange," or involved the notion of "consideration": A given field produces its main annual crop, on which tithes are paid. *Therefore* (in consideration thereof, considering that fact) subsidiary crops are tithe-free -- for post-harvest use of a field, while it may be incidentally profitable to the user, contributes to the upkeep of the field, or at least to the general maintenance of the farmer's husbandry, and hence to the ultimate value of the parson's tithes on the main crop.

Therefore, a plea which cites payment of tithes for the principal crop as "consideration" for exemption *quoad* after-crops *can be taken as merely invoking the theory on which the *de jure* exception of the latter is based -- i.e., as innocuous "surplusage." However, as Justice Foster presumably thought, such construction strains against the apparent tendency of the claim's language and ignores the probable motive behind it. As to the latter: A man hopes to claim *de jure* exemption, but he is not sure that the Court will hold that after-crops are intrinsically tithe-free. So he draws his claim to keep all options open. "Maybe the Court will think the after-crops are intrinsically exempt and will find a way of deciding in my favor whatever I say. But if the judges think the after-crops are legally subject
to tithes, maybe I can make out a *modus*, notwithstanding the general rule that one tithe cannot be consideration for another. For perhaps it can be plausibly argued that non-payment on after-crops from time immemorial was presumptively in consideration of the increased value of the main crop by virtue of post-harvest use -- in other words, that this is not a true case of claiming to pay one tithe in consideration of another." I strongly suspect that such calculations -- the strategy of a lawyer, not the simplicity of a layman -- were behind the plaintiff's position in Baxter v. Hope, for the case falls in an intricate and problematic area of tithe law. The question then arises whether such strategy should be indulged. The usual motive for a professionally drawn ambiguous claim -- i.e. for avoiding a clear stand on one legal theory or another -- is hoping for the best of both worlds. Does the value of substantial justice, in general or in Prohibition cases particularly, outweigh the value of discouraging what might be called "cheating on the common law" (i.e., inventing ways of fishing for substantial justice in defiance of the common law's pervasive "take your choice" philosophy -- the philosophy that said "Traverse or demur," "Make your declaration accord with the writ you have brought or find another writ that suits you better")?

Thus, when the majority in Baxter v. Hope understood the plaintiff's claiming a *de jure* exemption it committed a colorable, but strained and lenient, act of construction. Strictly speaking, the Court did not endorse "judging by the truth" regardless of the plaintiff's handling of his claim. If a man came forward with what could only be regarded as a bad *modus* (a prescription to pay hay tithes in consideration of after-crops from cornfields would be an example), the decision in Baxter v. Hope would perhaps leave room for holding against him despite the Court's conviction that after-crops were exempt *de jure*. Strictly speaking, the decision endorses "judging by the truth" only in the form of the rule: "When possible, construe claims in such a way that the legally correct result can be produced." The Court's language (probably *per* Chief Justice Coke) was certainly broad enough to embrace such a rule, if not a still more general policy in favor of substantial justice and the public interest in Prohibitions (for the Court did not make the pretense of merely construing, of giving mildly ambiguous language a sense it could easily be made to bear): "...Foster... said that it is not good law that the payment of tithes in one kind should be satisfaction for tithes in another kind or in the same kind for part in the same kind, but the other judges said, as to that, that it is..."
only surplusage here to show a prescription, but we as judges will ad-
judge according to the law, which is that he will be discharged..." (My
italics).

In the King's Bench case of Jouce v. Parker, plaintiff-in-Prohibition
tried unsuccessfully to take advantage of the same legal "truth" -- de jure
tithe-exemption -- that prevailed over bad pleading in the preceding cases.
The form of the case was different, however. Here, a parishioner pleaded
exemption by way of modus from tithes on two classes of "dry cattle." ("Dry"
means "not in milk-production. The two classes were draught-
oxen and heifers. Their tithes, if they owed any, would be equal to one-
tenth of the herbage they consumed.) The parson traversed the alleged
modus, rather than taking exception to it on legal grounds. The jury
found for the parson -- i.e., that tithes in kind had always been paid for
the dry cattle. The parishioner then moved in arrest of judgment on the
ground that dry cattle were exempt from tithes from tithes de jure. The
Court turned down the motion.

How much does this holding imply? Hardly that a party who unwisely
stands on prescription will always be struck with his folly. Here the pa-
rishioner said that tithes in kind had never been paid, whereas the truth es-

dablished by verdict was that they had regularly been paid and no
commutation paid in their stead. It does not follow from that verdict-truth
that they ought to have been paid, or that the parson was entitled to main-
tain a suit for them qua tithes in kind. The verdict does, however, suggest
that the parson might be entitled to the tithes by way of prescription (as-
suming, realistically, that dry cattle were exempt de jure -- though the
Court did not need to decide that question in this case.) If he were so en-
titled, he of course ought to sue by way of prescription. Nevertheless, it
would be hard to deprive the parson of his tithes when both the factual
truth and the parishioner's fault in misconceiving his claim weighed on
the parson's side. In the preceding two cases, the parson moved for Con-
sultation and demurred, respectively. There is perhaps a sense in which a
party who takes his stand on the law expresses faith in the general legal
justice of his claim, not simply his belief that he can "take apart" the
other party's claim as stated. (Cf. my argument above on every plaintiff's

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11 T. 18 Jac. K.B. Croke Jac., 575.
implied faith in his suit's "natural justice.") In this case, on the other hand, the parson made no statement construable as such an "expression of faith." He simply said, "The plaintiff is not telling the truth," and the jury backed him up. It seems more unfair to turn back and help out a party who has demonstrably "not told the truth" -- who has thus vexed someone else with a "false" suit -- than to come to the assistance of someone who has only mistaken the law. (This point would apply to our "6d. modus, 10d verdict" case above, except insofar as some untruths -- untruths in details, as to dates of payment, amounts, etc. -- may be regarded as more excusable than others.)

In sum, there are reasons for distinguishing misconceived claims challenged by legal exception from those falsified in their terms by jury trial. To judge by the brief report, the Court in Jouce v. Parker probably did not worry about that distinction as such -- as opposed to seeing intuitively that the legally foolhardy and factually falsified parishioner was in a weak position. In addition to that general perception, the Court relied on another point against the parishioner: To one intent, his motion in arrest of judgement was based on a legal error. In stating his ill-fated modus, the parishioner applied it to other people's draught-oxen grazed for hire on his land, as well as his own draught-oxen. The Court thought that the other people's oxen were clearly tithable (in accord with the better option.) I.e.: De jure, a man who took money for use of his grazing-land ("agistment") owed tithes on the herbage consumed by the guest-cattle. Therefore the "agisted" beasts could only be exempt by way of modus, and the verdict showed they were not.

This consideration would not necessarily stand in the way of arresting judgment quoad the parishioner's own oxen and heifers and granting Consultation quoad the guest-oxen only. But perhaps it adds to the equities against the parishioner (and proportionately reduces the general meaning of the decision): After starting off on the wrong track and failing to establish facts favorable to himself, the parishioner was trying to escape by arresting judgment -- and even then he was being legally careless and/or greedy. For instead of trying to escape only insofar as he had a fairly good case in substance (with respect to his own oxen and heifers), he also, on the face of his motion, hoped to escape quoad the agisted cattle, where the Court thought he plainly had no case.
Norton v. Fermer raised the same point as Jouce v. Parker and came out the same way, but the shape of the case and reasons for the decision were slightly different. Here, the ecclesiastical suit was for tithes of wood. Unlike (in all probability) most dry cattle, wood was perfectly tithable de jure. There was, however, a vein of opinion (probably the stronger vein) that wood used for fuel in a man's house was exempt by law. In this case, the parishioner got a Prohibition on surmise that the wood in question was used as fuel and that by custom wood so used was tithe-free. (The report does not tell what consideration was alleged. As with after-crops, it was easy to say that exemptions of firewood were in consideration of something -- and similarly easy to defend common law exemption as based on a universal or presumptive "consideration." A man must be able to heat his house in order to maintain an agricultural establishment. Therefore, the parson can be said to exchange tithes of fuel-wood for the greater value of other tithes that will come from a decently maintained "family," or agricultural establishment. So to speak, keeping the family from freezing to death was deductible as a legitimate business expense, by common law or customary law as the case might be.) The parson in Norton v. Fermer traversed the custom, and the jury found in his favor. The parishioner then moved in arrest of judgment: that even though there was no such custom, fuel-wood was exempt de jure. The Court denied the motion. In explaining the decision, it gave two reasons: (a) The judges

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12 T. 4 Car. C.P. Croke Car., 113; Littleton, 152. I follow Croke in the text because it purports to give the final per curiam judgment. Littleton gives an earlier discussion (same term) ending with an adjournment. Littleton reveals disagreement among the judges, which I take to have been composed later. Justice Hutton argued for the view finally adopted, at least as the better opinion -- that fuel-wood is only exemptible by custom -- while Justice Croke argued that it is exempt de jure. Croke also expressly endorsed "judging by the truth" in the case of a misconceived surmise, because in his opinion that was what should be done in case of a variant verdict. (He puts the case of an alleged 4d. modus and a verdict for 3d. and says no Consultation should be granted.)

Hutton cited two cases, not independently reported, in his favor: (a) A Dr. Graunt's Case, which sounds exactly like Brewer et al. v. Dawson, except that the plaintiff who misconceived his claim tried to escape only after verdict, by motion in arrest of judgement. According to Hutton, consultation was granted. (b) Another case, cited in Dr. Graunt's, where one entitled to the statutory exemption for timber-trees mistakenly relied on a custom. There too a motion in arrest of judgment was denied and Consultation granted in keeping with a verdict against the custom.
The Writ of Prohibition: Jurisdiction in Early Modern English Law

did not think -- or did not think it clear -- that fuel-wood was exempt de jure. ("Or did not think it clear": I question whether it is correct to say that fuel-wood was not exempt de jure. "Correct" or not, this Court said so in terms and may well have thought so. However, the report suggests to me that the judges' stance was less-than-dogmatic. They said -- correctly -- that it was "usual" for customs to be alleged in fuel-wood cases, and that "hearth-penny" -- a small monetary payment -- was often alleged as consideration for discharge from fuel-tithes. The judges may have meant to say, "Whether or not fuel is exempt de jure -- however we would decide that question if it were raised straightforwardly -- the frequency of custom-based claims to this exemption is prima facie reason for doubting that the motion in arrest of judgment is well-founded in the abstract.") (b) In any event, the parishioner took his stand on the custom and lost -- he cannot escape by the back door now.

If the Court in Norton v. Fermer believed flatly (subject only to possible correction after full-scale adversary debate on a demurrer) that there was no de jure exemption, the decision has little meaning for our present purposes. If the Court was only inclined to believe, the decision need only mean, "Parties should not be helped out unless it is quite clear off-hand that they could have won if they had not misconceived their claims. The Court should not spend its time giving all due consideration to a weak contention, or debating a dubious or difficult one, in order to come to the aid of someone who could have helped himself." In this case, in addition to the doubtfulness of the parishioners' legal contention, a material fact was in a sense outstanding: Was the wood in question actually used for fuel? Legally, the parson's traverse of the custom no doubt implied admission that it was, but the real truth had never been tried. Would it be fair to trap the parson in his legal admission while relieving the delinquent parishioner?

For a final hypothesis as to the Court's view of the substantive question: The large number of "precedents" of custom-based claims to fuel-tithe exemption relied on by the judges suggests the possibility of treating law-based and custom-based claims to the exemption as true options. It is logically puzzling to say "This product is tithe-free de jure, but a man may prescribe to pay a commutation for tithes of this product." Logically, either custom-based claims should be good if factually true and law-based claims should be bad, or vice versa. The Court in this case was
inclined to be logical: i.e., to conclude that law-based claims were bad from the presumption that the many custom-based claims that had been made were not all ill-conceived (a perfectly acceptable presumption in 17th-century jurisprudence, where practice-precedents or "repeated de facto happenings" were allowed considerable force.) But perhaps this logic is not entirely compelling. Non-tithable products were tithable by prescription. In order to "save" the precedents, one might conceivably interpret custom-based claims in the case of a particular product, such as fuel-wood, as founded on an admission, not of the parson's de jure title, but of his prescriptive title, against which a counter-prescription could be invoked.

Counter-prescriptions raise logical problems of their own, but those problems perhaps admit solution. On this theory, one could say that as a matter of law fuel-wood was exempt de jure, but also hold a party, such as the parishioner in this case, absolutely to his custom-based claim once he made it -- for there would be no sense in which it was ill-conceived. Despite the rather elaborate hypotheticalness of this line of argument, I doubt that it can be overlooked as a possible construction of the Court's thinking in Norton v. Fermer. The point is that the Court could have held several positions on the legal issue -- whether fuel-wood was exempt de jure or not -- and still reach the same conclusion. I think it is quite likely that the Court did hold several positions, in the sense that it saw vaguely, and saw that it did not need to sharpen its vision, that the plaintiff had no case, "whichever way you slice it."

In summary: On the basis of the four cases above, one would be entitled to conclude that the courts would help out plaintiffs-in-Prohibition who founded their claims on a misconceived legal theory when and if the plaintiff's claim was challenged legally. On the other hand, the courts frowned on attempts to escape ill-conceived claims by motion in arrest of judgment after verdict. I am not sure, however, that I would invariably advise my client against making such a motion in arrest of judgment, for sharper cases can be imagined than either of the two on that point above. For example, suppose A. is sued for tithes of a flagrantly non-tithable product, such as coal. Suppose A. claims a flagrantly unlawful prescriptive exemption -- alleges no consideration whatever. Instead of demurring, the parson traverses. The jury finds for the parson (that there is no such custom of non-payment.) Will a motion in arrest of judgment fail in
The Writ of Prohibition:
Jurisdiction in Early Modern English Law

this case? (This case differs from Jouce v. Parker (a), in that no consideration is alleged for the exemption, making it "flagrantly unlawful," (b) in the implications of the verdict, owing to the character of the product. In Jouce v. Parker, the verdict implied that the parson had received tithes for dry cattle from time immemorial -- not necessarily rightfully, but de facto. Minerals, on the other hand tended by nature -- and I am far from certain that judges would close their eyes to such reality -- to be "one-shot," limited, or recently exploited products. When the jury says there is no custom of non-payment, it hardly can be assumed to mean that the parson has been collecting tithes on this parishioner's coal from time immemorial. If that were true, there would not be any coal left to litigate about. The jury must only mean that a few instances of tithe payment, or the very fact that coal has only been mined within recent memory, force it to conclude that here is no such custom as alleged. Admittedly the imaginary case would be unlikely to occur, but it is perhaps worth considering by way of emphasizing that the strongest case on motions in arrest of judgment, Jouce v. Parker, has it limitations.

D.
"Legal Truth," Miscellaneous

Alongside the cases above on discrepant verdicts and misconceived claims, we may consider two cases where, in different circumstances, the courts were asked to "judge by the truth," or bail out a legally entitled party who had mishandled his cause. In Pringe v. Child (1603), 13 a vicar sued the parson of the same parish for small tithes. (Such a suit is in no way surprising. The vicar claimed to be endowed with the small tithes -- i.e., tithes other than corn and hay. The commonest arrangement between vicar and parson was for the small tithes to go to the former, the great to the latter. The parson here had carried off the parishioners' small tithes, refused to pay them in respect of his own land, or both.) The parson got a Prohibition on surmise of a prescriptive right to the small tithes as against the vicar. In pleading to the Prohibition, the vicar relied on his endowment of 1310. The parson demurred to that plea, whereupon the Court gave judgment for the vicar and granted Consultation. (A plainly correct

13 P. 3 Jac. K.B. Lansd. 1111, f.60; Add. 25,209, f.36; Noy, 3 (dated T. 2 Jac.). Lansd. 1111 is the good report. The others are too brief to bring out the point with which we are concerned here.
decision: even if the parson had been collecting and not paying small tithes continually since 1310, the usage would not be immemorial, and the parson could not be admitted to prescribe against his own endowment -- "his own" in the sense of "the parson's qua corporate person." The suit having been returned to the ecclesiastical court, sentence was given for the vicar. The parson appealed. When the appellate court was on the point of reversing the sentence below, the vicar got a Prohibition on surprise of his endowment, but without mentioning the former judgment in his favor. The parson demurred.

It is at this point that our problem arises. In the Court's opinion, the vicar's claim to a Prohibition on the basis of his endowment was bad. (Clearly correct: Contentions between vicar and parson as to who was entitled to which tithes, and hence over the terms of endowments, were often affirmed to belong to ecclesiastical jurisdiction.) On the other hand, in the Court's opinion, the vicar could have validly claimed a Prohibition by reciting the earlier judgment. (The Court may have meant, "The invalidation of the parson's title to the tithes, insofar as it depended on the prescription as against the endowment, in the prior common law suit concluded the ecclesiastical courts. The case was sent back by Consultation in order to allow the ecclesiastical courts to do what the lower ecclesiastical court did -- give sentence for the vicar -- not to abjudicate the matter by its own standards, as the appellate court proposed to do." This proposition can be questioned. When the common law decides, for whatever reason, that Prohibition does not lie and sends a suit back by general Consultation, can it not be argued that the ecclesiastical courts ought to be free to handle the case by their own lights?

But even if this point is conceded -- and even if the Court in our case did not necessarily deny it -- the vicar ought still to have pleaded the prior judgment. Thereby he would at least state a prima facie cause for Prohibition, or at the very least a possible cause. He would open the question, if it can be regarded as an open question, whether the prior common law judgment restricted what the ecclesiastical courts could do. As it was, the vicar had foolishly failed to state any cause for Prohibition whatever.) In these circumstances, should the Court help the vicar out? Should it visit him with his folly by granting Consultation, or take notice of the matter of record he could have used? The Court faced this question directly and resolved it leniently: No Consultation was granted for the
The Writ of Prohibition: 
Jurisdiction in Early Modern English Law

time being. The vicar was told to start over with a new Prohibition and amend his surmise. (By this solution -- as opposed to refusing Consultation definitively -- commitment was properly avoided as to the vicar's ultimate title to a Prohibition. Properly, because even if the ecclesiastical courts were concluded by the prior judgment the parson should have an opportunity to show anything he could in his favor -- e.g., that the ecclesiastical suit could be decided for him on another point, without contravening the common law judgment.)

Chief Justice Popham proceeded to take both parties to task: "This matter was badly handled on both parts. For at first if the parson had not brought Prohibition those of the ecclesiastical law would have adjudged for him on his prescription, being almost for 300 years, against the vicar's endowment, and the vicar could not have a remedy at common law, for he could not have a Prohibition to prohibit himself. And now the vicar has negligently omitted the judgment in his Prohibition, and so there is folly on both parts." Popham's first point is clear: The parson ought never to have brought a Prohibition, for he has the kind of prescriptive claim against the vicar that would probably have succeeded at ecclesiastical law, where immemorialness was not insisted on, but which was bound to fail at common law in the face of the endowment. His second point may seem surprising in the light of the court's general tolerance for self-prohibition. However, Popham was clearly right in result: If the vicar had sought a Prohibition when the parson set up his prescription in the ecclesiastical court, he would surely have been turned down -- not because he was trying to prohibit his own suit but because he had no grounds for a Prohibition. For the parson's prescription should surely be interpreted, however he stated it, as an ecclesiastical prescription -- i.e., a claim that as a matter of ecclesiastical law the 300 years' usage should prevail against the endowment. Men were generally allowed to prohibit their own suits when issues within common law competence arose, but there would have been no common law issue in this case. Prescriptions were usually common law issues, but not as between vicar and parson. (In the actual case, the ecclesiastical defendant -- parson -- of course got his Prohibition by alleging a prescription. On the face, he could not have been turned down: one sued for tithes comes and says he has a prescriptive exemption in the common law sense -- Prohibition lies. Quaere whether there would have
Judging by the Truth

been any way for the vicar to defeat the parson on the law, without pleading his endowment -- merely by bringing out that the contest was between vicar and parson and so within ecclesiastical jurisdiction, whatever the nature of the claims and counterclaims.) Popham's apparent language against self-prohibition may be taken as shorthand. As for Popham's dwelling on the mistakes on both sides: Perhaps the pervasiveness of folly in Pringe v. Child was an added reason for disregarding legal nicety on the side of the tarnished parson and trying to straighten the matter out as justice required.

The reporter adds one further note: "But the opinion of Coke at Lincoln was with the ecclesiastics, because it seems there was a later composition." Whatever the context of Coke's involvement, the hint is significant: It looks as if there was a further issue in the ecclesiastical suit, beyond the prescription, the endowment, and the bearing of the common law judgment -- viz., a claim that the vicar and parson had an agreement of relatively recent vintage governing the distribution of tithes. If so, the vicar probably had no ultimate right to a Prohibition -- as Coke presumably thought. The ecclesiastical court of appeal may have been perfectly entitled to find for the parson on the basis of the agreement, regardless of the other events -- and right or wrong (for although compositions between parishioner and clergyman were within common law jurisdiction, all matters concerning the apportionment of tithes between vicar and parson belonged to the Church.) In that event, all the Court did for the negligent vicar in Pringe v. Child was give him a chance to make the best case he could for himself. The decision basically reinforces Brewer v. Dawson and Baxter v. Hopes above, except that in Pringe v. Child the Court resorted to its knowledge of the record to aid a delinquent party, rather than simply to its knowledge of the law.

Hill v. Thorton (1629)\(^\text{14}\) presents another kind of tension between the party's delinquency and the legal rights. In this case a landowner's son and heir got a Prohibition to stop the executor from probating his father's will. The surmise (a) claimed that the father did not make the will which the executor was seeking to probate; (b) recited that the purported will comprised both land and goods. (Prohibitions were often sought and

\footnotetext{14}{M. 5 Car. K.B. Croke Car., 165; Harg. 39, f.67b.}
often obtained to stop probate of wills including both real estate and personalty. The theory behind such Prohibitions was that authentication of the will as a whole by an ecclesiastical judge would tend to prejudice anyone who wanted to challenge the will at common law *quoad* the reality. The basic fact behind that theory was that the probate authority of ecclesiastical courts extended only to personal estate. If land was claimed in common law litigation by virtue of a devise made pursuant to the Statutes of Wills, it made no legal difference whether or not the will comprising that devise had been admitted to probate. It was argued, however, that if a mixed will had been proved in ecclesiastical court a common law jury would be prejudiced in favor of its authenticity. Though sometimes successful, that argument did not always prevail. Mixed wills gave the courts trouble and led to mixed results. In the instant case, however, the heir-plaintiff almost certainly had good grounds for Prohibition, for he challenged the authenticity of the will *eo instante*. I.e.: He did not propose to stop probate of the mixed will because its authenticity *might* be contested in common law litigation; he contested it here and now.) The executor took issue on whether the father in fact made the will in question. After presentation of evidence at the trial, the heir-plaintiff was nonsuited -- probably involuntarily or semi-voluntarily, because the evidence manifestly supported the will.

Our case arises at this point. For the heir-plaintiff then tried to persuade the Court to withhold Consultation notwithstanding the nonsuit (and what I would assume to be virtual, though not literal, establishment of the will's authenticity.) In other words, he tried to invoke a flat rule that probate of mixed wills should be prohibited. His initial claim involved the theory that would lie behind such a rule, but did not rest flatly on that rule and did not require it as a flat rule, to be good claim. Now he was asking the Court to treat him as if from the start he had relied solely and simply on the theory that no mixed will should be probated. His counsel proposed parallel cases in support of "going by the truth" despite the nonsuit: e.g., suppose a clergyman sues for tithes of timber trees and pursuant to a Prohibition to the parties take issue on a collateral point (i.e., a point other than whether the trees were really timber). If the plaintiff is nonsuited, Consultation will still not be granted, because it is legally manifest that the ecclesiastical court has no jurisdiction to entertain a suit for timber.
The judges conceded the parallel cases. I find it difficult to visualize them concretely, but they come to saying that a nonsuited party will not necessarily lose, if according to the "legal truth" he ought to have won. There is a sense in which being nonsuited, even in some degree involuntarily, can be considered worse than losing the case one has stated on demurrer or by verdict. A non-prosecutor is negligent of his interest, as opposed to ill-advised or misinformed; or he has lost faith in his suit before any test of it is made; or he has convicted himself of frivolity by failure to produce any evidence in his favor, as opposed to showing something and being overruled by the jury. To the degree that he is worse, perhaps he has less right to be helped out of his legal mistakes by the court. Nevertheless, the Court agreed, he will not always lose. In the principal case, however, the judges would not listen to the heir-plaintiff's contention. Instead, they took one of the most standard and most sensible courses in mixed-will cases: Consultation *quoad* the goods only. The effect of that was to let the ecclesiastical court go ahead and probate the will as a document, so that the executor could assume his functions, legacies be collected, etc., while making as sure as possible that the ecclesiastical court's proof of the will would not be used against a common law challenger *quoad* the land. The judges said expressly in this case, as in others, that the fact of probate could not be given in evidence in a common law suit about the land. By formally limiting the Consultation to the goods, probate was rendered strictly irrelevant in any future land suit: an attempt to introduce it as evidence, however inconclusive, of the will's authenticity could be countered by saying (warrantably if a bit fictitiously) "No document mentioning land was ever proved in the ecclesiastical court -- for the ecclesiastical court was expressly forbidden to touch this document insofar as it has to do with land."

Going by his nominal pretensions, this solution should have satisfied the heir (obviously his ulterior purpose was to block the will altogether because of interest in the personal estate.) The Court's decision amounts to simple rejection of the rule on which the heir was relying. In other words, the judges did not think that probate of mixed wills should be prohibited generally, only *quoad* land. Therefore the decision (as distinct from the dictum on parallel cases) says nothing as to whether a nonsuited party should be helped out by the Court. If the Court's view of the law
had been otherwise, or had been in doubt, it seems to me that the equities were still strongly against the heir-plaintiff, since he had -- and had failed to take advantage of -- an opportunity to disauthenticate the whole will at common law, thus avoiding the prejudice that he pretended to be concerned about.

With respect to the underlying rule, Justices Jones and Whitelocke (in the slightly fuller MS. report of the judges' words) conceded that in the leading Marquis of Winchester's Case probate of a mixed will had been prohibited in toto, but they thought that case distinguishable. It surely was, for in Winchester's Case the surmise said that the testator who made the mixed will was a lunatic, and the decision was against a Consultation quoad the goods where the effect of such a Consultation would have been to open the possibility of contradictory rulings on the testator's sanity (if indeed anyone had the interest or standing to challenge his sanity in the ecclesiastical court, whereas his disinherited heirs obviously had an interest in challenging it at common law.)

If Winchester's Case had paralleled Hill v. Thornton in form -- i.e., if issue had been taken on the testator's sanity and plaintiff-in-Prohibition had been nonsuited -- there might still have been good reason for withholding Consultation quoad the goods. For notwithstanding the plaintiff's negligence or inability to produce evidence, and even assuming that mere prejudice in the event of further common law litigation could be guarded against, it is hardly fitting to have a man's legacies paid on the assumption that he was sane when there is a strong probability that a jury will soon be asked to pass on his mental condition and may well find him mad. In Hill v. Thornton, per contra, the heir-plaintiff's whole case depended on the claim that probate might prejudice him, and he was in a weak position to urge that claim when he had created an opportunity to avoid prejudice, then neglected or tried-and-failed to exploit it. Such, perhaps would be the spelled-out meaning of Jones's and Whitelocke's discrimination between Winchester's Case and this case. (Their words: "...the Prohibition [in Winchester] was granted, scil. for the goods and for the land, since the cause on which the Prohibition was grounded, scil. the testator's lunacy, was entire and one and the same thing. But contra where the suggestion consists on several grounds, as here.")
Judging by the Truth

E.

Variance between Surmise and Libel

Summary: Surmises were generally expected to conform with the libel by which the ecclesiastical suit was commenced--i.e., not to misrepresent, even in small ways, the suit one was seeking to prohibit. The libel (which in many cases was required by statute to be affixed to the surmise) showed the truth conclusively, but the courts would not on that account overlook inaccuracies in the surmise and prohibit any suit which on public grounds ought to be prohibited. They were disinclined, however, to grant Consultations (as opposed to merely declaring the Prohibition void) once a Prohibition was granted on an inaccurate surmise, and in one important case a principled exception was made to the requirement of conformity. There was therefore a reasonable chance that a mistaken surmise would not do the plaintiff-in-Prohibition much harm.

* * *

A further kind of discrepancy between "truth" and the party's statement of this case occurred when a plaintiff-in-Prohibition was inaccurate in reciting the nature of the ecclesiastical suit against him. As a rule, the truth was right in front of the Court, for in all Prohibition cases within 2/3 Edw.6,c. 13, Sect. xiv, a copy of the ecclesiastical libel had to be attached to the plaintiff's surmise. In any event, producing the libel would show conclusively and exactly what the ecclesiastical suit was about. Imagine; then, some difference between what the surmise says about the ecclesiastical suit and what the libel shows. Is there any point in penalizing the plaintiff for his inaccuracy? One would hardly think so, for it is difficult to imagine inaccuracy of this sort as amounting to more than clerical error. The plaintiff presumably has the libel right in front of him. What can go wrong except misreading, or a slip in writing, or some carelessness in communication when a plaintiff orally informs the attorney or clerk who draws the surmise -- hardly worthy grounds for letting justice fail?

Yet there is something puzzling about prohibiting an ecclesiastical court from entertaining a suit described as x, because someone has come and so described it, when it is manifestly entertaining no such suit. Cf.: John says to Father "Tell William to stop teasing the dog." Father sees with his own eyes that William is in fact teasing the cat. He would gladly intervene to stop that activity, but he obviously cannot do so by literally carrying our John's request -- by using the words "Stop teasing the dog."
The Writ of Prohibition: 
Jurisdiction in Early Modern English Law

It may seem unnecessary to reduce Prohibitions to "literally fulfilling the plaintiff's request" (i.e., to "Stop entertaining the suit commenced by this libel"). But will justice and orderly law-administration sometimes require such reduction?"?

Our example may be altered to expose the problem: (a) Imagine extreme disjunction between what John complains of and what William is doing -- either there is no resemblance between the activity described and the activity observed, or there is resemblance in form but great difference in moral seriousness. Father may feel a certain unfairness about using his authority to prohibit William's activity -- even though abstractly he considers the interference justified -- when he would never have observed it had he not been deceived, or credulous, or unnecessarily shocked, by the request made to him. "I searched out William in an anxious and angry mood, intending to do as John urged me. But William is doing something quite different, and it's only mildly naughty. Though I could and maybe should tell him to stop, it seems a little unfair in the circumstances. If I spoke at all, would I speak too loudly because of the state I was in, or too softly because of the relief I now feel?"

Of course this story has no literal application to Prohibition cases. But it helps make this point: "Extreme disjunction" between surmise and libel is imaginable. E.g., A man sued for hay tithes claims a modus covering all tithes but recites that he is being sued for corn tithes. The feel of unfairness, or sense of emotional disproportion, that is crucial in the story is hardly going to enter directly into such reluctance to prohibit as one may have. But the residue of that feeling, or the unconscious force of such an analogy, may have something to do with it. There is no very good "cold" reason not to prohibit. Hay or corn, the ecclesiastical court is obviously entertaining a suit which it ought not to if the alleged modus is true. If one is reluctant to prohibit -- if it seems odd -- the reluctance is "irrational." But in what sense? Because one is all too legal or all too human? Because one has fallen for a "formalistic" or "essentialist" notion -- that a Prohibition "by its nature" refers to the case recited in the surmise, or that the surmise is "grounded" on the libel and must therefore pursue it? No doubt. But such notions may sometimes be projections from such real-life paradigms as the story represents, and perhaps there is value in legal "irrationality "which serves to maintain a kind of contact with those paradigms. "Extreme disjunction" can of course be taken as a limiting case,
short of which variance between libel and surmise could be overlooked, but once a limiting case is admitted the way is open to argue that degrees of variance are too hard to judge, and therefore that the best policy is to insist on strict conformity.

(b) Suppose that Father has a strong policy against acting on the boys' complaints unless he sees for himself that they refer to activity that is really going on. When John says "Tell William to stop teasing the dog," Father will not shout a command to that effect, intending William to hear it wherever in the house he may be. Instead, he will say "Take me to William," and will act only after that order has been fulfilled and he has observed William. Now go back to the original case: Father does de facto observe William teasing the cat. Recollecting his policy against acting blindly, he says to himself, "Though abstractly I ought to order William to stop teasing the cat, would doing so undercut my policy of insisting that the boys show me the offenses they complain of? I would not have acted on John's complaint if he had been unable or unwilling to lead me to William. I would in a sense not have believed him -- i.e., a certain presumptive incredulity, or suspicion of irresponsible or malicious complaints, underlies my policy. Is it quite consistent to act pursuant to, or because of, John's complaint here -- where it is vitiated on its face, demonstrated not have been literally credible (as opposed to presumptively suspect)? Is it consistent to demand that the boys be prepared to back up their complaints ostensively, but not to insist that they be accurate in their words? John does not appear to have been actually irresponsible or malicious here -- rather, he was mistaken, accountably or unaccountably, or merely let the wrong word escape by some trick of the psychopathology of everyday life -- and he has in a general way acted virtuously in calling attention to improper activity that manifestly is going on. Nevertheless, the inconsistency troubles me."

This version of the story has a direct application to Prohibitions. By virtue of 2/3 Edw. 6, many Prohibition were not lawfully grantable unless a copy of the libel was affixed to the surmise. "Presumptive incredulity, or suspicion of irresponsible or malicious complaints" was the clear policy of the statute. It would be legitimate to translate those attitudes, being sanctioned by statute, into a policy of the law, relevant even where the statutory requirement qua form of procedure did not apply. In the event that a Prohibition within the statute was somehow granted without a copy
of the libel having been affixed, Consultation probably would lie (as distinct from treating the Prohibition as null ab initio and therefore not amenable to being undone by Consultation, or not requiring it.)

Because of the statutory requirement and its implications, precisely the reflections attributed to Father in the story come to mind. Is there an inconsistency in demanding that plaintiffs-in-Prohibition demonstrate their good faith and the reality of the ecclesiastical suit, but not insisting that what they say conform to what they point to?

The arguments against following the libel and overlooking or mentally amending inaccurate surmises of course fall under the "private" approach to Prohibition cases. A full-blooded "public" approach would go the other way: If, as the libel conclusively shows, an improper ecclesiastical suit is going on, it should be stopped. It should be stopped (to allow for the outside possibility) even though the suit described by the surmise looks like a completely different suit from the one the libel attest to, even though perhaps no party to the unquestionably real suit wants to prohibit it, even though it has perhaps been decided long since. But maybe that is too "full-blooded." In any event, the cases show that variances between libel and surmise could give the courts trouble.

The earliest cases in point involved small misnomers. In Gibbs v. Rowlie (1583), the surmise named the ecclesiastical plaintiff as "Rector of Nether Beddington." In the libel he was referred to as "Rector of Beddington," and there was nothing in the libel to suggest that Beddington and Nether Beddington were the same place. (In substance, the ecclesiastical suit was for tithes, against which a modus was claimed.) A Prohibition having been granted, Solicitor General Egerton moved for Consultation. His argument had two prongs: (a) If the Prohibition had been granted without any libel affixed, Consultation would lie. This is in effect the same case -- i.e. failing to show (by attaching the libel) that there is any suit by the Rector of Nether Beddington going on is no worse, or no different, from showing that a suit by the Rector of Bed-

15 One undated note in the reports (Harl. 4817,f.162) says flatly that Consultation will be granted in that case. See below for doubts on this point.

16 M. 25/26 Eliz. Q.B. 1 Leonard, 272; Harg. 11, f.30 (Reports fully accordant, but M.S. gives the argument for Consultation more adequately.)
Judging by the Truth

dington, very possibly a different man, is in progress. (b) As a practical matter, denying Consultation is as good as letting the inaccurate or logically inappropriate surmise do the service of a correct surmise. For without a Consultation the ecclesiastical court will not proceed. In other words, there are only two choices -- to penalize plaintiff-in-Prohibition or not to penalize him. The alternative to Consultation -- treating the Prohibition as void *ab initio*, pretending that since no suit by the Rector of Beddington was ever prohibited the ecclesiastical court is free to proceed--is to leave plaintiff-in-Prohibition in as good plight as if he had surmised correctly. For in fact the ecclesiastical court will not dare to proceed, in the face of the Prohibition, on the basis of a technicality.

The Court in Gibbs v. Rowlie rejected Egerton's argument. The Consultation was denied. The Court said, however, that since the Rector of Beddington had never been prohibited, "let the parson proceed in the Spiritual Court at his peril." Several observations must be made on this decision: (1) It obviously says that Consultation will not be granted when there is a variance between libel and surmise, at least when the variance is minor and unlikely to be more than a slip. (2) From the reports, the reasoning behind the decision remains ambiguous: (a) The Court might have rejected Egerton's premise -- that Consultation lies if a Prohibition is mistakenly granted when a copy of the libel is not attached. (See the note above for authority *contra*. However, the alternative of regarding the Prohibition as merely void and the ecclesiastical court as entitled to proceed is available. The text of 2/3 Edw. 6 is not, in my opinion, decisive. The requirement of affixing the libel is intermixed, in Sect. xiv, with the requirement that preliminary proof of surmises be given within six months. Consultation is plainly required if the preliminary proof is not supplied. Whether it is also required if the other procedural hurdle--affixing the libel -- is sidestepped could be argued both ways on the basis of the text. We have encountered the doctrine, in connection with 50 Edw. 3, that a Prohibition granted for failure of proof within six months is "really" void *ab initio*, the statutory Consultation being mere notice of that fact.)

(b) The Court might have accepted Egerton's premise while distinguishing variance cases. There are three possible bases for distinguishing: (i) Failing to attach the libel is a serious failure to observe a categorical and reasonable statutory requirement. If by any chance a Prohibition slips through despite violation of that requirement, the plaintiff should be penalized, and perhaps the statute itself demands a Consultation.
Variances between surmise and libel, at least ones of the sort this case presents, are likely to result from mere carelessness or understandable mistake. Therefore the plaintiff's offense is less serious and the reason for penalizing him less -- and anyhow there is no statute to worry about. (*Contra:* If a prohibition slips through without a libel attached to the surmise, it is a judge's mistake. Presumably the judges ought also to check whether the surmise and libel correspond, when a libel is attached, but perhaps the fault is somewhat more the party's though a lesser fault -- i.e. if the libel is there, the judge has a right to suppose the party has looked at it carefully in drawing his surmise. Further, might a party not fail to attach a libel in the belief that his case was outside 2/3 Edw.6--whereas only carelessness could explain failure to follow the libel? I know of no cases on the scope of 2/3 Edw. 6 *quo ad* affixing the libel, but the many cases on its scope *quo ad* proof within six months prove that it was often questionable what Prohibitions the statute applied to. Its scope was clearly the same with respect to both of the procedural hurdles.) (ii) The logic making failure to point to any ecclesiastical suit equivalent to mispointing is specious. (iii) Consultation is less necessary in variance cases. If the ecclesiastical judge is prohibited in a correctly described suit, he will obviously not proceed without Consultation. It may be the case that the Prohibition ought not to have been issued because no copy of the libel was attached, but the ecclesiastical judge has no way of knowing that. If it were pointed out to him, he would not be competent to decide whether or not the Prohibition was valid. The ecclesiastical judge who would presume to interpret a statutory requirement and overrule a common law act would be hardy-to-foolhardy. But if an ecclesiastical judge is prohibited, say, from entertaining Smith v. Brown, why should he not proceed in Jones v. Robinson? Even if he has reason to be pretty sure that "Smith v. Brown" is a mistake for Jones v. Robinson, he has a "plea," a good-enough basis for believing he may proceed with impunity.

(3) "Jones v. Robinson" notwithstanding, the Court probably assumed that the ecclesiastical judge would not proceed without a Consultation. The Court probably intended, by denying the Consultation, to avoid inflicting any penalty on plaintiff-in-Prohibition and to insure that the case would turn out as if the trivial variance did not exist. While the parson *could* go try to persuade the ecclesiastical judge to proceed -- and if, per-
haps against the odds, he was successful, he would be out of peril of the attachment procedures that followed on violation of a Prohibition -- he would no doubt be better advised to contest the *modus* at common law if that was the real question. After all, in this case the choice was Consultation or no-Consultation. No-Consultation was the way to go easy on plaintiff-in-Prohibition, short of some special measure to protect him absolutely against the consequences of his mistake, and the court was not invited to think about that. (E.g., staying ecclesiastical proceedings in the "real" suit until the plaintiff amended his surmise to conform to the libel, then issuing a new Prohibition.) If it is at all relevant that the Court did not propose something like that on its own -- then the decision was in a sense a compromise: the parson was dared to go back to the ecclesiastical court, the parishioner perhaps a little frightened by the chance that he might.

(4) The Court said the ecclesiastical judge was free to proceed because there was no Prohibition referring to the Rector of Beddington. I.e.: The Prohibition in this case followed the surmise and said *Nether* Beddington. The chances are that the discrepancy was not noticed when the Prohibition was issued. A seemingly pettifogging, but perhaps not wholly insignificant, question may be raised on this point, however. Presumably if a judge notices a variance he ought to grant no Prohibition at all -- just as if no copy of the libel were affixed. Plaintiff-in-Prohibition, being apprised of the reason he could not have a writ, would be perfectly free to start over or, if permitted, to amend his present surmise, *Sed quaere.* Two other courses would be theoretically open to a judge who noticed a variance: (a) to grant the Prohibition, following the surmise -- thus leaving the ecclesiastical plaintiff and ecclesiastical judge free "at their peril" to proceed in the real suit; (b) to grant a Prohibition in the terms of the libel, without requiring plaintiff-in-Prohibition to recommence or amend. In contradistinction to the case of failure to affix the libel, no statute forbade either of these courses (unless, along Egerton's line, variance cases should be regarded as the same in effect as failure-to-affix case -- within the policy or even the equity of the statute.) Course (a) would seem an unintelligent thing to do, for it would create an entirely unnecessary problem for the ecclesiastical court and defendant-in-Prohibition. Course (b) would be both sensible and oriented toward the public purpose of halting unwarranted ecclesiastical suits economically and without regard for carefulness of the "informer's" behavior *qua* private party. It is, however,
(apart from any bearing of 2/3 Edw.6) subject to the kind of philosophic disquiet I have indicated above. Gibbs v. Rowlie does not answer these questions, but it might be considered relevant in its implications if they were to arise.

In Lovegrove v. Inocke (1588), George Lovegrove was sued in an ecclesiastical court. He got a Prohibition, naturally enough, in that name. It appeared from the libel, however, that the ecclesiastical suit was brought against "Gregory" Lovegrove. The reporter makes it clear that "Gregory" was simply a mistake. All the brief report says is that the Prohibition "was abated." I.e.: It was held merely void on account of the variance. The ecclesiastical court was left free to proceed against a non-existent person! If there was a motion for Consultation (of which the report gives no sign) it was denied. George could perhaps find a way out by rewriting his surmise so as to show the misnomer in the libel and request in terms that the Prohibition refer to the suit against "Gregory." If he wanted any further protection, he would have to make such an attempt. As things stood, the Court would not act on its own to make sure that the ecclesiastical judge refrained from any further moves against him. The danger, I should think, would be that the ecclesiastical judge would permit rectification of the libel and then proceed against a person in esse. George could no doubt have another Prohibition in that case, showing the amended libel, but the responsibility would be his. A stay of proceedings or new Prohibition now, referring to the suit against "Gregory," would have something to recommend it, I think. But what if (contrary to the clear truth here) there really was a Gregory? Should George be able to initiate prohibition of the suit against Gregory? From a public point of view, we may say "Why not?," but the public point of view could not be pushed that far.

In Hutton v. Barnes (1605), the surmise said that the tithe suit in question was for 40 fleeces of wool. The libel showed that the suit was in fact for 400 fleeces. On account of this variance, the ecclesiastical plaintiff moved for Consultation. The Consultation was granted at Assizes (the only instance of such a step at Assizes I know of.) The propriety of

17 T. 30 Eliz. Q.B. Croke Eliz., 105.
18 M. 3 Jac. K.B. Yelverton, 79
the Consultation was brought in question in the King's Bench by writ of error. The Court reversed the judgment below.

In justifying the decision, the Court relied on the substantive grounds for Prohibition and said that the Consultation would have been appropriate if those grounds had been different. In other words, sometimes Prohibitions granted despite variance between surmise and libel should be undone by Consultation and sometimes not, depending on the nature of the common law's title to prohibit. In Hutton v. Barnes, plaintiff-in-Prohibition claimed a total exemption from tithes by virtue of the Statute of Monasteries and an exemption allegedly enjoyed by the monastic house at the time of the dissolution. The Court said that the variance was not material in this case because the claim to Prohibition came to asserting the ecclesiastical court's total lack of jurisdiction in the suit—meaning by its "total lack of jurisdiction" its alleged want of power to hold the land in question charged by any tithes at all ("...the suggestion discharges the Spiritual Court from all manner of power for any tithes at all; and therefore the variance is not material." Earlier in the report, plaintiff-in-Prohibition's prescription is said to "oust the Spiritual Court of all jurisdiction.") The Court then proceeds to distinguish modus cases: There, the tithe suit does "originally" belong to the ecclesiastical court, therefore agreement between libel and surmise is material. ("...the suggestion is grounded upon the libel, and the plaintiff is to stay the proceedings there but for one cause certain.")

This decision is not easy to make sense of. It must, I think, be analyzed from two angles (a) "at common law"; (b) in the light of 2/3 Edw.6. (a) As to the first: is there any point in considering variances more material in one case than another, and particularly in distinguishing monastic-discharge from modus cases? The colorability of the distinction can be seen by comparing polar-opposite cases: Imagine an ecclesiastical suit utterly and scandalously beyond ecclesiastical jurisdiction -- e.g., a suit for five-pounds damages for breach of contract to sell a horse. Suppose to surmise for a Prohibition says four-pounds, or a cow instead of a horse, and that the truth is immediately evident from the libel. It is unimaginable that a Consultation would be granted in this case. On the other hand, imagine a suit for hay tithes and a modus alleged applying to corn tithes. (The Court in Hutton v. Barnes put this latter case.) A Consultation must obviously be granted here, if despite the variance a Prohibition slips through. For a modus applying to corn is simply irrelevant.
The Writ of Prohibition:  
Jurisdiction in Early Modern English Law

vis-a-vis parson's claim to hay. Yet writing "corn" instead of "hay" is just as likely to be a mere slip as writing "40" for "400." Thus, comparing extremely divergent cases shows (1) that variance between surmise and libel must sometimes have a material bearing, and sometimes not, on whether to prohibit and whether to grant Consultation; (2) that the distinction does indeed have to do with the ecclesiastical court's "original" jurisdiction or lack of it. The Court in Hutton v. Barnes took two steps -- perhaps not necessary steps--within this framework. (1) Asserting a monastic discharge was assimilated toward (in our example) asserting the ecclesiastical court's utter incapacity to entertain a suit for breach of contract. The difference is obvious: No one ought to bring a contract suit in an ecclesiastical court, and the ecclesiastical judge ought not to touch one. The statutes of *Praemunire* were made against just that. But a parson who seeks tithes from Blackacre does no wrong to sue in an ecclesiastical court, and the ecclesiastical court no wrong to listen to him, though the parishioner may have reason to stop the suit until the matter can be tried at common law. What difference if that matter is a monastic-discharge or a *modus*?

On the other hand, the contract case and the monastic-discharge case can be stated to look alike. In the contract case, the surmise for a Prohibition says "No suit of this type has any business in the ecclesiastical court" (implying -- we have agreed -- "whether or not I have described the particular suit against me accurately, for all that is material is the type of suit"). In the monastic-discharge case, the surmise says "No suit of any sort for tithes from Blackacre should be brought, for the land is totally exempt." Why not the same implication, "whether or not I have described the particular suit against me accurately, for all that is material is that it is a tithe suit, and no suit of that sort is good *quoad* Blackacre"? In a *modus* case, the mere *type* of suit -- that the ecclesiastical suit is for tithes -- cannot possibly be *solely* material, for then Prohibition would have to be granted, or Consultation denied, in the impossible case (where the libel says "hay" and the statement of the *modus* in the surmise says "corn.") Putting it more practically, when the libel says "hay" and the surmise "corn," the common law judge would be warranted to say, as it were, "Wait a minute. What about this discrepancy? Hasn't there been a clerical mistake here?" But he ought not -- the reasoning goes -- be free to say that. When on the face an utterly irrelevant *modus* is alleged, the judge's only choice should be to deny Prohibition. (2) From the proposition that
some variances in *modus* cases must be material, the Court in Hutton v. Barnes advanced expressly to the generalization that accuracy is material in *modus* cases, and to the application thereof to the *modus* case directly parallel to the principal case: In a *modus* case, the judges said, a variance as to the amount of tithes sued for (e.g., 40 fleeces as against 400) would be just as material as a mix-up between hay and corn. Again, this step is not necessary, though the difficulty of distinguishing degrees of accuracy and materiality perhaps justifies it.

(b) As to 2/3 Edw.6: The statute probably entered into the decision, at least to help the distinction above come out. It could account for the decision altogether. With respect to another issue, the statute was directly involved in Hutton v. Barnes: The Assize Justices, in addition to granting Consultation, awarded defendant-in-Prohibition double costs under 2/3 Edw.6. This award was also objected to by the writ of error, and it too was reversed by the King's Bench. The Assize Justices clearly reasoned as follows: The statute gives double costs to defendant-in-Prohibition when the surmise is not proved within six months. Since the proof requirement and the requirement that a copy of the libel be attached are linked together in the statute, double costs must also be given when plaintiff-in-Prohibition fails to affix the libel. Since there is no difference between affixing no libel and misrepresenting the one affixed, double costs should be given in the principal case. In reversing the award of costs, the King's Bench held expressly that the double-costs provision of the statute applied only to failure of proof within six months.

Now, as to the merits of the Consultation: The Assize Justices, in reasoning as they did about the costs, must have reasoned similarly about the substance. Viz.: "2/3 Edw. 6. requires attachment of the libel with the same force and seriousness as it requires proof within six months, for it penalizes violation of both procedural requirements in the same way. Insisting with that force and seriousness on attachment of the libel points to a policy of making demands on plaintiff-in-Prohibition, of making sure that his surmise is in reaction to an ecclesiastical suit that is actually going on. Leniency toward inaccurate surmises, or indifference as to whether the Prohibition is really 'grounded' on the libel so long as a libel is there, would violate the policy, if not the direct force, of the statute." In reversing the conclusion to which this reasoning was probably the path, the King's Bench might have said, "2/3 Edw. 6 does not involve such rigor
against plaintiffs-in-Prohibition. It limits double costs to one of the requirements it sets up. The other one -- affixing the libel -- is shown to be less serious because violation is not punished by double costs. It perhaps is to be enforced by the other and lesser sanction -- obligatory Consultation if a Prohibition slips through. But must it always be so enforced? There has been doubt as to whether even the more serious proof requirement applies beyond modus cases. Its application to monastic-discharge cases has certainly been questioned. Perhaps the history of interpreting the proof requirement points to a distinction between cases 'originally' belonging to the ecclesiastical court and others. If so, the same discrimination favoring plaintiff-in-Prohibition must apply to the lesser demand on him -- affixing the libel. The more so because there would be reason for making such a distinction even if there were no statute (the reasons under (a) above.)

Therefore we conclude, at least probably, that no libel was required by the statute to be affixed in this monastic-discharge case, or at any rate that no Consultation should have been granted if no libel had been attached. If that is true -- even probably -- the still lesser offense of inaccurately reciting the ecclesiastical suit, or not 'grounding' the surmise on the libel precisely, which is not directly within the statute, should have the benefit of the distinction." The Court in Hutton v. Barnes did not, so far as the report shows, talk in these terms -- rather, it discussed the case "at common law." I suspect, however, in view of the statute's involvement in the case and in view of the difficulty of treating the matter of the costs and the matter of the Consultation as entirely separate, that such thoughts as I have spelled out entered into the Court's perspective on the case. It would have been possible and rational, though the report does not indicate that this happened, to hold simply that the requirement of showing the libel does not apply to monastic-discharge cases, and hence that variances do not matter in such cases by any pretended force of the statute. It would remain a question at common law whether defendant-in-Prohibition could come forward and show the libel, claiming Consultation on the ground that plaintiff-in-Prohibition had misrepresented the ecclesiastical suit.

One further point should be observed on Hutton v. Barnes. The Court held that Consultation should not be granted in the instant case. Where does that leave the parson? Free "at his peril" to carry on in the ecclesias-
Judging by the Truth

tical court? Not subject to procedures incident to violation of a Prohibition because only a non-existent suit concerning 40 fleeces had been prohibited? Though the judges said nothing as to that, it is unlikely that that is the implication they wished to leave. Denial of Consultation was based on conceiving plaintiff-in-Prohibition's claim as an objection to any possible tithe suit with respect to the land in question, whether the one described in the surmise or not. The Prohibition should be interpreted correspondingly, as "carrying out the plaintiff's request" -- viz. as saying "You are forbidden to entertain any tithe suit with respect to this land, whether the one for 40 fleeces described by the plaintiff or any other, pending common law adjudication of the matter of discharge." On the other hand, by way of strong dictum, the Court held that Consultation should be granted in modus cases when the surmise varied from the libel. No exceptions appear to be admitted. Both ways, therefore, Hutton v. Barnes goes counter to the two misnomer cases above.

Beyond the three cases just considered, I have found none directly on the effect of variance between surmise and libel. A few others involve the rule that surmise and libel ought to correspond, but in less direct ways. Dean and Chapter of Wells v. Goodwin illustrates how, in a complicated case, it could be problematic whether the surmise and the libel really disagreed. The ecclesiastical suit purported to be for a pension settled on a vicar by the former monastic owner of a rectory, in which case the claim was plainly within ecclesiastical jurisdiction. (There was a class of annuity-like payment known as a "spiritual pension" running between parson and vicar or other ecclesiastical persons. The common law took no notice of such dues but left the ecclesiastical courts free to enforce them, as intra-Church business.) The rector wanted to show that what the vicar was, or should be, suing for was not a "spiritual pension," but what amounted to a rent or annuity charged upon the rectory -- i.e., an ordinary temporal due, concerning which the common law should ultimately judge -- and then to show that nothing was now owing under the temporal transaction which in reality gave the vicar's claim such color as it had. He attempted to plead the matter which would tend to show this in the ecclesiastical court, then got a Prohibition on surmise that his plea had been disallowed. The vicar argued in the King's Bench that the surmise

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19 P. 4 - T. 5 Jac. K.B. Harl. 1631, f.302b.
had misrepresented the ecclesiastical suit -- in effect, that whereas the libel set up a claim to a "spiritual pension," the surmise talked as if the ecclesiastical suit were to recover the temporal due which the rector thought was the only colorable claim. The rector denied this, arguing that he had represented the *purported* object of the ecclesiastical suit accurately, and then gone on to show his reasons for believing that its real object was, and only could be, something else. The Court finally held for the vicar, granting Consultation. I find it difficult to access this decision and to discern in what degree it depended on perceiving a conflict between the surmise and the libel. In other words, *could* the surmise have been rewritten to conform better to the libel? Or was the rector trying to do the impossible (move his properly ecclesiastical claim -- that there is no "spiritual pension" as alleged -- over to the common law by surmising what amounted to his evidence -- that the vicar had once been granted a rent and in virtue of that grant had collected something which he now claimed to have collected in virtue of his "spiritual pension")? I think the latter is likely -- i.e., that conflict between libel and surmise here was not a procedural mistake, but an inevitable symptom of a misbegotten attempt.

In Wrothmeal v. Gill,\(^\text{20}\) as I understand the case, a Prohibition was denied in part because interpreting the surmise so as to make it state a sufficient cause for Prohibition would throw it into conflict with the libel. The parishioner in a tithe suit wanted to say, in effect, "I am being sued by a mere hired curate, not the holder of the living or his vicar -- hence by one without title to the tithes." He could not surmise this as a *fact*, because as a fact it could (as the Court held) be pleaded in the ecclesiastical court. If the ecclesiastical court ruled out the defense -- i.e., took the erroneous position that a "stripendiary" curate was entitled to recover tithes -- Prohibition would lie straightforwardly, but not before. If the parishioner was to get a Prohibition now -- before pleading in the ecclesiastical court -- he needed to make it appear from the face of the libel that the ecclesiastical suit was brought by a legally unqualified person. The case turns on his attempt to do so. The surmise found fault with the libel for reciting that the ecclesiastical plaintiff was curate without saying that he was "admitted, instituted, or inducted" (the three distinct "legal ceremonies" whereby

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\(^{20}\) M. 1 Car. K.B. 3 Bulstrode, 310.
Judging by the Truth

a man was installed in a living.) In other words, the parishioner claimed that the libel failed on its face to show that the ecclesiastical plaintiff held a living with tithes appertaining. The Court refused to accept this argument. By construction of the word "curatus" itself, plus other language in the libel, the judges held that the ecclesiastical plaintiff had sufficiently set out his pretense to be holder of the living, whether or not it was true. At this point, if I understand the report correctly, the parishioner's lawyer tried to save the day by arguing that his surmise sufficiently pleaded the "truth" (that the parish was impropriate, having neither parson nor vicar with cure of souls), and that Prohibition should lie on that showing (though not on a showing simply that the person suing in the ecclesiastical court did not hold the living).

Whatever the merits of this (either as to construction of the surmise or as to the law), Justice Dodderidge said that a surmise to such effect would be contrary to the libel. The rest of the Court clearly agreed, for the Prohibition was denied and the party told to plead his matter in the ecclesiastical court. I take the point to be: According to the libel as construed, the ecclesiastical suit was brought by the holder of the parish living, a "curatus." A surmise which said in effect, "There is no such thing as a 'curatus'-holder-of-the-living in this parish" would contradict the patent reality that the ecclesiastical suit was brought by "such a thing," though of course his claim to be that might be false. (Cf. the last case: "I claim so much as a 'spiritual pension'" cannot be met by "But you cannot possibly be claiming a 'spiritual pension' -- though you might have color to claim a rent." So here: "I am suing you as the beneficed clergyman of X" cannot be met by "But you cannot possibly be suing me in that capacity -- for X has no beneficed clergyman." The legal pretense of the libel, however refutable, must be accepted, as must its factual statements -- e.g., that tithes for so many acres, so many fleeces, such and such a product, are claimed -- though those statements may of course be untrue, in the sense that a man sued for hay from 100 acres might in fact have only ten acres of hay. In both of the last two cases, however, it seems to me that speaking of conflict between libel and surmise is only a manner of speaking. Plaintiffs-in-Prohibition were not held to accuracy as a matter of procedure, but rather told as a matter of substance that Prohibition will not lie on surmise of facts tending to show the ecclesiastical suit's lack of color, or "impossibility," anymore than on
the surmise that what a libel says is simply untrue. In either case, the matter should be pleaded in the ecclesiastical court and resort to the common law had only when and if the ecclesiastical court commits an error within the common law's power to control.)

In Townshed v. Baker, a modus was surmised to stop a suit for tithes of furze (a shrub used for fuel, sometimes cultivated.) Defendant-in-Prohibition demurred to the suggestion. He advanced a number of objections to the surmise, inter alia a conflict between its language and that of the libel: Whereas the libel said that the suit was for tithes of "furze lands," the surmise said it was for tithes of "furzes." In relation to the matter of the contention, the discrepancy was not trivial, since the parson's suit was directed at land sown with furze, and therefore possibly withdrawn from production of other tithable crops, as distinct from furze harvested in the state of nature. In substance, a modus applicable simply to "furzes" might be interpreted to apply only to the wild variety. On behalf of plaintiff-in-Prohibition, however, it was argued that the demurrer amounted to a waiver of objection to the surmise-libel variance. That is, the admission of facts involved in every demurrer was, inter alia, an admission that the ecclesiastical suit was what the surmise said it was. The Court apparently accepted this point, for the Prohibition was upheld. The decision, of course, was based on the Court's opinion that the modus was legally sufficient. Holding the demurrer to admit that the surmise recited the ecclesiastical suit correctly, notwithstanding the libel, would in no way have prejudiced the parson's claim that the modus did not extend to cultivated "furze lands," or any other of his legal contentions. For our present purpose, the decision only says "Demurrer waives objection to variances." Therefore a defendant-in-Prohibition who wanted to take advantage of a variance should be advised to move for Consultation instead of demurring.

Lastly, there is one case from the Admiralty in which the principle that libel and surmise must conform was in a sense tested. Prohibition to the Admiralty were not within 2/3 Edw.6 -- i.e., the statutory requirement that a copy of the libel must be attached to the surmise. Therefore, inso-
far as failure to represent the libel accurately was conceived as equivalent to failure to attach the libel, conformity perhaps need not be insisted on in Admiralty cases. Moreover, conformity in one strict sense could not possibly be demanded in the most common Admiralty case: A sues in the Admiralty on a contract allegedly made on the high seas. B seeks a Prohibition on surmise that the contract was made on land. Obviously B's whole point is to contradict something the libel says. Granted that Prohibition lies, B cannot be asked to accept A's pretense in the way one being sued for what was labeled a "spiritual pension" was required to accept the ecclesiastical plaintiff's pretense. (Though claiming a "spiritual pension" contrary to the reality could be a jurisdiction-giving maneuver like alleging a contract to have been made at sea.) 22

In Don Alonso v. Cornero, 23 however, there was a reasonable question as to whether the surmise followed the libel properly. In this case, the Spanish ambassador sued a Spanish subject in the Admiralty, alleging that Cornero's goods had been confiscated for crimes against the King of Spain, and that Cornero had come to England carrying 3,000 lbs. of tobacco worth £800. The ambassador prayed attachment of the confiscate tobacco in the hands of . I.e.: He left a deliberate blank in the libel, by way of saying "I request attachment of the goods in whosever hands they now are, Cornero's or anyone else's." The tobacco was actually attached in the hands of Watts, who then sought a Prohibition. The theory behind his application was that the present ownership in England of the goods (which he claimed to have bought for value) should be determined by the common law, even though the goods were confiscated before they were brought into England. The court accepted this substantive theory

22 The point that a surmise may say that a contract was made on land, contrary to the Admiralty libel, was relied on in Hughe's Case (M. 11 Jac. C.P. Godbolt, 214, to support a parallel and equally obvious ruling: That a surmise founded on 23 Hen.8, c.9, may aver that the ecclesiastical defendant is being sued out of his home diocese, though that does not appear from the libel. That this was held, inter alia, in Hughe's Case suggests that the point was challenged. I can only imagine a serious challenge as a way of saying that Prohibition should not lie at all to enforce 23 Hen. 8. I.e., "Surmises should conform to libels. If a libel says or implies that the defendant lives in the diocese where the suit is brought, he may not surmise the contrary. Therefore, exception to ecclesiastical suits based on 23 Hen. 8 must be left to the ecclesiastical courts." The parallel with the Admiralty then comes to saying that Prohibitions to enforce 23 Hen. 8 are just as acceptable in principle as Prohibitions to stop contract suits falsely or fictitiously laid on the high seas.

23 M. 9 Jac. C.P. Hobart, 212.
and granted the Prohibition. It was argued by the way, however, that Watts had no standing to bring a Prohibition founded on the libel against Cornero because he was not named therein. The Court expressly rejected this argument, saying that as "a party grieved by that undue suit" he was entitled to his Prohibition. (N.b., as a "party grieved," a party in interest -- not because the interest of an "informer" is irrelevant as long as the suit is undue.) The decision on this point seems entirely sensible, especially considering the blank in the libel. Strictly speaking, however, allowing a party whose involvement does not appear from the libel to stop a "foreign" suit may be seen as inconsistent with the usual policy of insisting that the libel attest to the reality of the suit to be prohibited. (If Watts had been turned down on a nicety, he would perhaps have been able to stop the attachment proceeding as such, as opposed to the suit against Cornero. Quaere.)

By and large, one must conclude that conformity between surmise and libel was demanded. The serious exception was the one made in Hutton v. Barnes for Prohibitions conceived as going to the original or total jurisdiction of the ecclesiastical court. However, the logical peculiarities of this subject and the direct or indirect intrusion of a statutory rule tend to disqualify it as a test of the "favor" of Prohibitions or the relative weight of "public" and "private" values.
VI.
Pleading

A. Introduction

Let us now turn to cases on errors or alleged errors in pleading. In the classes of cases just above, there was a "truth" to compare with the party's misstatement or mistake. A verdict said one thing and the plaintiff another; or there was a legally correct way to frame a complaint over against the plaintiff's misconceived surmise; or the libel established what the ecclesiastical suit was about, whereas plaintiff-in-Prohibition misrepresented it. By definition, pleading problems proper arise when there is no "truth" in front of the Court. A man says something in order to move the Court to act for his benefit. The question may then arise whether he has "spoken properly," or whether he has spoken so improperly that the step he requests should not be taken. Has he contradicted himself? Spoken ambiguously? Been too vague? Said too little? The Court cannot respond by saying, "It makes no difference, for we know the truth and can act on that." It must respond in ways like the following: "There is a contradiction of sorts -- but either way, or at least one way, he has given us a sufficient reason to act in his favor"; or, "Though he might have been more precise or fuller, indeed should have been, what he has left out is not essential to his purpose"; or "Though he has not said enough to give us reason to act, we will presume that what is left out is favorable to him unless the other side says the contrary." Those, of course, are lenient responses. The judges may equally well insist on "immaculate speech" even when there is a reasonable basis for mitigating such insistence. What counts as "immaculate" in pleading is of course conditioned by the traditions of legal practice -- as meaningful, clear, or polite speech in ordinary discourse is defined by the conventions that have developed in many social contexts. Yet, for all the importance of convention, there are natural limits to the unintelligibility, vagueness, or incompleteness than even the most permissive court can tolerate.

So in ordinary life a request or order can be so garbled that it is impossible to carry out; or not fulfillable except by guessing -- without much confidence in one's guess -- as to what the speaker is driving at; or, short
of that, so unnecessarily muddy that it is unfair to expect the hearer to take the trouble to guess; or perhaps the speech is suspiciously unclear, as if the speaker were trying to get his way by creating confusion, knowing that a clear statement of his purpose would be laughed down. The common law, of course, had a proud tradition of "good pleading." Litigants were presumed to be advised by professionals who knew their business. The courts we are dealing with as a rule held the party responsible for "speaking properly" well-short of the "natural limits." We need to ask whether such standards were relaxed in the special circumstances of Prohibition law, but we should expect relaxation to be, at best, relative to a strict tradition.

In one aspect, then, the issue about pleading in any juridical context is how hard the litigant's utterance should be scrutinized as against the "natural limits" of clear and responsible speech. I.e.: Ought one to see mere unintelligibility where it can be seen through rather "cold" and rigorous logico-grammatical spectacles? Or ought one to avoid seeing it in legal discourse when it would not be visible in ordinary discourse, where we usually judge with the eye of common sense, having regard to the speaker's probable intent and probable justifiability in the real-life context?

In other aspects, pleading problems are more markedly the product of convention. So are everyday problems about "proper speaking" and whether to act on a request or order: "Pass the meat and potatoes" is not an unintelligible request, but it may be regarded as inappropriate and unworthy of being carried out, (a) because it is incomplete owing to the omission of "please" and (b) because it may be regarded as impolite to ask for two dishes at once. At the limits, an utterance strongly condemned by etiquette may seem quasi-illogical, or one may express the condemnation by picking holes in the logic. "The rule in this household is that requests for dishes must give evidence on their face of being made in a courteous spirit. By omitting 'please,' you have given no such evidence and therefore failed to state a cause why I should pass you anything -- just as if you had left out the word 'pass.'" Or: "Your request is contradictory or ambiguous because, for all that appears, it demands the simultaneous performance of two acts which cannot in all aspects be done at the same time. If that is not literally true, still I cannot imagine that your real intention is not to help yourself first to the meat and then to the pota-
Pleading

toes, or vice versa. Surely it would have been clearer, as well as more polite, to make two separate requests in accord with the intended sequence."

One type of pleading problem strongly tied to positive legal tradition derives from the common law's "take your choice" policy -- demur, or traverse, or confess-and-avoid. In "nature," it is perfectly common and intelligible to say, e.g., "I did not hit you, but even if I had I would have been justified." The common law's insistence on either denying the facts alleged against one or admitting them and disputing their legal effect engendered problems in the construction and evaluation of pleading language: E.g., being forced either to deny or admit, I assert facts radically inconsistent with the facts alleged against me. but omit to deny the latter in the expressly negative language implied in the idea of "denial." If I have really done that, I have "spoken badly" in terms of convention. As in the meat-and-potatoes case, the failure of manners can be taken as a failure of logic, for there is a sense in which no affirmation, however pregnant with negation, is ever fully delivered of its burden. That would be true even if a choice between traversing and pleading were not insisted on, but the convention sharpens the eye to the contradiction. The etiquette is not necessary, and how deserving it is of strict enforcement is a typical problem, but it does have a basis in natural sense, for there can be genuine uncertainty, e.g., as to whether an affirmation is meant in effect to deny, or as to whether verbally it is tolerably close to at least an implied negation. (So, in some circumstances, a request to "pass me everything on the table" might be genuinely baffling to execute, as well as grossly rude and "constructively" illogical.) Within the set of standards dictated (as strict standards) by a positive legal tradition and considered deserving of strict enforcement, problems will arise as to whether the rules have really been broken -- e.g., a statement may mix affirmative and negative elements in such a way that it is problematic whether it is an affirmation improperly trying to do the work of a negation, or a good-enough negation with affirmations superfluously thrown in.

Legal convention is also strongly determinative of "burden of pleading" problems -- problems as to how much a party must say to move the Court tentatively in his favor (i.e., to move it in his favor unless and until the other party makes a countervailing statement.) What counts as "stating a prima facie cause of action" and what counts as "anticipating a defense" is a matter of convention, though the conventions are influenced
by real-life probabilities. E.g. To commence an action for battery, Smith might be expected to say "Jones struck me intentionally," but not to add "and not in defending himself." Convention could permit Smith to omit the "intentionally," leaving it to Jones to plead accident. It could also require Smith to anticipate common defenses such as self-defense. Yet there is reason for the convention: people are often struck accidentally, so a striking should not be presumed intentional until the contrary is asserted; more often than not, intentional strikers appearing in the role of defendants were not defending themselves, so an intentional striker will be presumed at fault unless he speaks up to deny it.

The "burden of pleading" was usually clear at common law because of the writ system: The writs ex hypothesi stated valid causes of action; a plaintiff "declaring upon the writ" -- spelling out his complaint along the lines of the writ -- must obviously say as much as the writ says and equally obviously need not anticipate defenses which the writ does not anticipate. Prohibitions, however, were a species of "procedure without writ." Questions could therefore arise as to whether surmises said as much as need be said to state a good cause of Prohibition.

The interest of "substantial justice" is usually served by presuming in favor of the pleader when everyday probabilities and the everyday use of language provide a reasonable basis for doing so. I have reviewed the character of pleading problems in highly general terms, however, as a reminder that they occur in different contexts and that in those different settings the way to "substantial justice" and the feasibility of lenient solutions may vary considerably. In the context of Prohibitions, the "public stake" approach might justify a very lenient attitude toward plaintiffs: "If there is the least apparent ground to prohibit, prohibit. It is almost enough that someone has come here and claimed a Prohibition -- as it were, that someone has pointed, however vaguely, in the direction of an ecclesiastical court that might be out of bounds. Prohibit, then investigate. Let the truth come out, however badly the parties botch the job of assisting a clear and manageable truth to emerge -- the job for which they are responsible in private litigation." Such permissiveness would go against the habit of insisting on "good pleading," as well as the interests of private justice, and its feasibility may vary from situation to situation even within Prohibition law.
B. Conformity between Surmise and Declaration

Summary: Must plaintiff-in-Prohibition's formal statement-of-claim (declaration) correspond exactly with the surmise by which he initially moves the Court to grant a Prohibition? The one case on this subject favors strict conformity.

* * *

Cases involving pleading problems fall into several sub-groups. Gomersal v. Bishop (1587 or 1588),¹ is the only case on one question: Is conflict between the plaintiff's surmise and his declaration fatal? As to the procedural setting: After a Prohibition was granted -- and assuming it was not quashed or undone by Consultation on motion -- the defendant had the nominal choice of obeying or disobeying the Prohibition. If he wanted to contest it formally, on the facts or the law, he nominally "disobeyed" -- i.e., consented to being attached as if he had actually disobeyed. The procedures pursuant to an Attachment-on-Prohibition then came into play. The plaintiff-in-Prohibition set out his case by a declaration, analogous to the declaration on the writ (the plaintiff's first pleading move) in writ-initiated common law actions. The defendant was then free to demur, traverse, or confess-and-avoid. If he took either of the first two courses, issue was arrived at; if he took the third, pleading continued to issue in the standard common law way.

In Gomersal v. Bishop, plaintiff-in-Prohibition surmised in a tithe suit that the parson had agreed with him to take 7/ a year for the tithes for the rest of the parishioner's life. Upon attachment, the plaintiff declared that the parson had leased him the tithes for life at 7/ per annum. The defendant (with Coke as counsel) demurred. The Court held unanimously that the declaration was bad owing to the variance. A declaration in Attachment-on-Prohibition, the judges said, should conform to the surmise as a declaration on a writ should conform to the writ.

There is no doubt but that the variance between surmise and declaration here was real. I.e.: A contract to take money for tithes was not the same thing as a lease, which conveyed the property in the tithes. The practical purpose of discharging a parishioner by agreement and leasing him his own tithes was much the same, but the transactions were manifestly different -- the words "contract" and "lease" were by no construction synonymous. The Court's decision may sound entirely in good form -- i.e., mean simply that a declaration must use the same words as the surmise or synonymous ones.

But the decision may not have been quite that simple. "Contract" and "lease" were in no sense synonyms. In form, the surmise and declaration plainly conflicted. What could the plaintiff (who also had a good lawyer, Godfrey) say for himself? The reports suggest an answer. Though they do not give the arguments at large, they have Godfrey saying that a con-

¹ Leonard, 128 (dated T. 30 Eliz. Q.B.); Croke Eliz., 136; Add. 25,196, f.198; Harl. 1633, f.55b.

(Croke and the MS. date the case T.31. The MSS. alone show that Coke was the plaintiff's counsel).

Note: The page margins have been expanded to accommodate new text in the second paragraph.
tract discharging tithes is a good cause of Prohibition, and Coke saying that a contract in discharge of tithes will support a common law action for breach of contract. From those remarks, I would reconstruct the plaintiff's contention as follows: Godfrey did not maintain that form never mattered in Prohibition cases -- i.e., that if the declaration is good in itself it makes no difference in any case whether it conforms to the surmise exactly, or even approximately. Rather, he maintained that the surmise and declaration here both stated good causes, and equally good causes, of Prohibition, and, in that case -- considering that there was no further conflict -- the pleading should be construed favorably. I.e.: The surmise should be dismissed as a mistake, innocent in the sense that the mistake caused nothing to happen that would not have happened otherwise -- for the parson was just as properly prohibited on surmise of a contract as if the parishioner had correctly surmised a lease.

What then was Coke's counter-position? He could perfectly well have argued that Prohibition simply does not lie on surmise of a contract, whereas it plainly lies on a lease: One who contracts to pay money in lieu of tithes may recover his loss by action for breach of contract if an ecclesiastical court forces him to pay tithes in kind in the face of the agreement. Therefore it is not necessary to prohibit the ecclesiastical suit, and doing so would amount to enforcing a contract specifically, contrary to the common law practice of "enforcing" contracts only by compensatory damages. This was entirely a legitimate opinion, probably the better opinion in the long run, and Godfrey cited recent authority contra. On this premise, Coke could proceed as follows: The Prohibition in this case should never have been granted. When a bad Prohibition slips through -- as could easily happen in the absence of adversary debate, especially in such cases as this one, where opinions on the merits could legitimately differ -- it is only fair to stick the plaintiff with his original theory. It is unfair to let him improve his case on further consideration. Therefore in this case the declaration must be overruled -- whether or not verbal conformity between surmise and declaration matters, and whatever should be done when the surmise and declaration both state good cause for Prohibition.

An alternative argument can be constructed without claiming that the Prohibition in this case should never have been granted: Let it be admitted only that it is less clear that Prohibition should be granted on a con-
Pleading

tract than on a lease. I.e.: In a full-dress debate as to whether Prohibition will lie on surmise of a contract, serious arguments could be made both ways -- irrespective of Coke's opinion, Godfrey's opinion, the better opinion, or decided cases on either side. A serious debate as to whether Prohibition would lie on a lease, per contra, is unimaginable. Or, short of that, admit only that the theory of Prohibition on contracts and that of Prohibitions on leases are not the same though the writ lies equally well on either surmise. Thus: Ecclesiastical judges should clearly not pass on conveyances or real property, the clearest case of "common law issue." Therefore tithe suits should be prohibited as soon as the parishioner comes and claims that he is exempt from tithes by virtue of a lease. In the case of a contract, ecclesiastical courts should allow parishioners the specific benefit of discharge-agreements -- i.e., not award tithes in kind in the face of a contract. If ecclesiastical courts fail to respect contracts in that way, the Prohibition should be used to control them. But that is different from using the Prohibition to prevent ecclesiastical courts from entertaining issue beyond their competence. They are not incompetent to so much as listen to a claim of an agreement, though they are not free to dispose of such a claim by their own lights. Therefore, to surmise a contract and then switch to a lease at the declaration stage is in effect to obtain one variety of Prohibition and justify another variety. In other words, the disjunction between the surmise and the declaration in our case is extreme. No one would say that "contract" and "lease" are synonyms in the ordinary sense. Godfrey, however, tried to make them out as "virtual" synonyms in a special sense: "two related, easily confusable, grounds for Prohibition -- equally good grounds and the same sort of grounds." Coke might have replied: "For that argument to have color, two conditions should hold, neither of which does. (a) 'Equally good' should mean 'equally clear or uncontroversial,' not 'equally good in abstract truth.' (b) 'The same sort of grounds' should refer to the underlying theory of the Prohibition, not to the superficial resemblance in practical effect between protecting a tithe discharge based on contact and protecting one based on lease."

Though construction is required to state the arguments, I think it is clear from the reports that something like the exchange I have supposed took place -- i.e., that Godfrey tried to argue that the variance was superficial or inconsequential and Coke replied in one or both of the ways specified. (The exchange in reality may have been brief, informal and
The Writ of Prohibition: 
Jurisdiction in Early Modern English Law

implicit, not in form the kind of debate I have spelled out.) How is the interpretation of the decision affected? Godfrey's attempt to explain away the variance was rejected. That could be done, however, without accepting the replies I suggest Coke made. It could be done simply by insisting on literal correspondence between surmise and declaration, as a matter of good pleading, citing the analogy of declarations on writs. The reports suggest that that is what the Court did. In other words, the Court chose to regard the issue as one of form in the simple sense and to lay down a pleading rule conformable to common law habits, when other approaches were available. The judges chose not to consider whether the surmise was good in substance, and hence not to get into the question whether a bad Prohibition may be saved by a good declaration. They chose also not to consider whether an apparent or literal variance may under some conditions be tolerated, and hence to go into what those conditions are.

As it stands, the decision is strong for good form, though perhaps the availability of other approaches could be used to mitigate it in a "hard" case. Suppose a declaration departed from the surmise in a more plainly trivial way -- e.g., by changing the amount of a modus. As it stands, Gomersal v. Bishop should doom the declaration, at least to the extent that a comparable discrepancy would doom a declaration on a writ. But it is easily arguable that the discrepancy in Gomersal v. Bishop was much more fundamental than, e.g., a conflict between a 6d and a 10d modus. Should Gomersal v. Bishop be followed because the Court refused to go into the character and degree of the discrepancy? Or should it be not-followed because the Court neglected to go into that question although invited? Unfortunately there are no cases to resolve this nicety upon stare decisis. Fortunately, perhaps, there was no stare decisis, properly so-called, in the earlier 17th century. My guess is that a trivial difference between surmise and declaration would probably have been overlooked. As Gomersal v. Bishop stands, it is stricter than the run of holdings in parallel areas (variant verdicts and misconceived surmises), very possibly because it was perceived as a mere pleading case and a stock-response was furnished by common law practice. (The plaintiff in Gomersal v. Bishop might have done better to lie low until verdict. In all probability, the plaintiff originally mistook the transaction behind his discharge, then discovered on investigation and better advice that what he had and could hope to prove was a lease. Honorably, in a sense -- but also fearfully, lest he be nonsuited or verdict be given against him -- he
Pleading came forward and rectified his claim in the declaration. If he had said "contract" in the declaration and gone to trial, he might hope for a special verdict finding the lease, then denial of the parson's motion for Consultation on "judge by the truth" grounds. To say that the plaintiff's chances might have been better that way is of course to criticize Gomersal v. Bishop.)

C.

Pleading on the Plaintiff's Part: Surmise and Declarations

**Summary:** Although the courts hardly took every opportunity to be permissive, their holdings on statements-of-claim were largely liberal. There is only slight basis for saying that the pleading standard for declarations (which were pleadings properly so-called) was higher than for surmises (mere "informations"). The courts did not encourage demurring to declarations on points of form or subtly conceived points of law when a contest on the facts was possible. A few cases on the "burden of pleading" (plaintiff's duty to anticipate defenses) tend slightly against going easy on the plaintiff, but they are neither unambiguous nor readily discussable apart from the particular situations to which they relate.

* * *

Several cases turn on assorted errors and inelegancies of pleading, and a few on the "burden of pleading." (By the "burden of pleading" I mean: Must the plaintiff say X, or will X be presumed in his favor until the defendant says not-X? Some cases ask that. Those which we take up first ask whether a party had misspoken, as opposed to leaving too much to the other side.) Classifying cases as involving pleading errors, as opposed to substantive law, is inevitably problematic because an allegedly mispleaded claim is inherently an allegedly bad claim. E.g.: To set up a modus and lay no consideration is simply bad. But suppose a modus is set up and the surmise contains what looks like an attempt to make out some consideration. It may in some cases be ambiguous whether objection to the surmise is substantive ("The consideration alleged is not really consideration within the legal meaning of the term") or procedural ("If you want to claim that this is consideration for your modus you must state how that is so more clearly"). In classifying cases as essentially procedural, I have gone by common probability: If the chances are that the party had a perfectly good prima facie claim, capable of being stated in a more unexceptionable fashion -- so that presuming in his favor would have a reasonable basis -- the case is classified as procedural. There is
The Writ of Prohibition: 
Jurisdiction in Early Modern English Law

sometimes similar ambiguity in distinguishing "burden of pleading" cases from mispleading cases: "The plaintiff ought to have said X in addition to what he has said" could mean "He has not stated an adequate claim" tout court, or "He has left too much to the defendant." Again, I have gone by probability: If "Defendant struck me" is objected to, there is a "burden" problem, because there obviously are real defenses to such a claim, some of which, it is argued, the plaintiff ought to have anticipated. If "Defendant trespassed on my pasture" is objected to on the ground that the plaintiff should set out his title, the problem is mispleading, because the defendant probably has no defense based on the quality or quantity of the plaintiff's estate, but is merely saying that the unexplained "my" is too vague (too vague, of course, for a reason -- because people speaking as landholders ought to give earnest of their right to hold others liable in that capacity -- but not because the defense of "no interest" or "no right to speak as holder of this land" is so likely that it should be anticipated.)

Two cases bearing on good pleading raise a special problem. In Man's Case (1590 or 1591)⁡ a Prohibition was undone by Consultation essentially because it had been granted on a too-general and inelegant surmise. Man was sued in the High Commission for incestuous marriage (his late wife's sister's daughter.) While the ecclesiastical courts had jurisdiction over the validity of marriages and the crime of incest, their authority was limited and directed by the statute of 32 Hen. 8, c.38, which confined forbidden marriages in England to those within the Levitical degrees of relationship. Prohibitions were sometimes granted to prevent ecclesiastical courts from enforcing marriage law inconsistent with the statute. Man's Prohibition was deserved on that ground in substance, for his marriage was outside the Levitical degrees. It was dissolved by Consultation, however, because it had been obtained by relying generally on the statute, not by reciting specifically that the marriage in question was not within the Levitical degrees.

⁡ 4 Leonard, 16 Dated M. 33 Eliz. Q.B. (M.32/33 or 33/34)
That is all the report says about the ground for decision. Man presumably said in effect, "The suit against me should be prohibited because it contravenes 32 Hen. 8." He ought to have said "...because I am charged with incest in respect of a marriage not within the Levitical degrees, contrary to 32 Hen. 8." Is there any reason for holding the difference important? The answer, I suspect, trenches on substantive law. Why should the ecclesiastical court be prohibited? Two replies are possible in this type of case: (a) Because the ecclesiastical court is invited to deprive the plaintiff of a statutory right, and the interpretation of statutes belongs to the common law. (Analogous to "Because a claim in the ecclesiastical court depends on a lease, and the construction of conveyances is within exclusive common law competence.") (b) Because the ecclesiastical court is invited to dissolve and punish a marriage which may not legally be dissolved or punished, vide 32 Hen. 8. The theoretical difference between these two statements is considerable. Whether construction of statutes belonged exclusively to the common law was a difficult and sensitive question. To assert such proprietorship was to say that the King's ecclesiastical judges could not be trusted to understand and faithfully apply the statutes -- the highest law of the land, binding on every man because putatively every man's act -- as they could not be allowed to decide questions beyond their professional training. Formulation (b) has the advantage of avoiding that implication. Of course, the common law courts protected the subject's statutory rights as they understood them by means of Prohibitions. But that -- says formulation (b) -- is only an instance of protecting the subject's rights generally. There is no special variety of Prohibition for protecting statutory rights or insuring that statutes are construed by common law courts. Therefore it states no cause of Prohibition merely to evoke a statutory right and show that it has been, or may be, violated. Plaintiff-in-Prohibition must rather state a specific way in which, on the facts as they are claimed to be, he has been, or may be, treated illegally. Therefore, because this distinction is important, the plaintiff must not seem merely to evoke a statutory right. He must not leave it ambiguous whether he wants common law help because a statute is involved, or because he has suffered, or may suffer, a specified illegality. If he does leave it ambiguous, his surmise will be construed against him, even though it is perfectly clear that he could prevail merely by rewriting his surmise. So I take the meaning of the decision in Man's Case. The circumstances being special, and the distinction involved a sensitive one, the case says little about the construction of pleading generally.
In Man's Case, the Prohibition was granted after sentence against Man. There was no suggestion that it should have been sought earlier. The structure of the case, indeed, was such that the opposite suggestion might have been made if the circumstances had created the opportunity. I.e.: If Prohibition had been sought before sentence, it might have been urged that no cause of Prohibition had accrued. The distinction developed above perhaps points that way: If ecclesiastical courts are perfectly competent to entertain claims and defenses based on statutes, how can they be prohibited until they have committed an error? There is not just one answer to that question, for there is an argument from economy for prohibiting suits that cannot be good on their face as soon as they are brought. But a later opinion both confirms Man's Case and adds the rule that actual error in the application of a statute -- either interlocutory or final -- must be assigned to make out a claim to Prohibition.

In the later case, Samstead v. Dr. Huchenson (1612), a parishioner, being sued for tithes, pleaded in the ecclesiastical court that the parson was presented by "corrupt agreement" -- i.e., that the owner of the advowson was bribed to present Dr. Huchenson to the living. The point of the plea was to claim that Huchenson was never installed in the living, by virtue of the statute of 31 Eliz., c. 3, which made admission to benefices pursuant to bribes ipso facto void. Therefore he had no title to the tithes. Huchenson replied that the King had pardoned him his simony. Samstead then sought a Prohibition on two grounds: (a) because the case depended on a statute; (b) because it depended on a royal pardon. I.e.: The theory of the surmise was that construing statutes and pardons was common law business as such. The report gives only the opinion of Chief Justice Coke, which is against granting Prohibition. Coke's preliminary words suggest that he did not have much faith that the ecclesiastical court would handle the case correctly and avoid Prohibition in the long run. (The bribe in this case was alleged to have been given by Huchenson's friends. In Coke's opinion, the statute extended to a bribe for a clergyman's benefit even though he himself had no knowledge of it. His words suggest that he did not think the ecclesiastical court would understand the statute that strin-
Pleading
gently. He also thought the pardon would not extend to validate Huchen-
son's installation -- i.e., a clergyman installed as a result of a bribe was
simply never installed, and pardoning him could not change that, though
it would relieve him of other sanctions attached to the offense. There too,
perhaps, Coke was not confident that the ecclesiastical judge would make
the right discrimination.) Nevertheless, Coke held that Prohibition would
not lie until an error could be laid to the ecclesiastical court: "...no Prohi-
bition shall be granted *dicendo* in his surmise that the statute is to be ex-
pounded by the common law. For since the statute says that the admission
will be void, that is plain and sufficient direction to... the ecclesiastical
court to give sentence against the parson...But if the judges of the ecclesi-
stastical court will not allow the plea...And in the same manner if they mis-
construe the statute Prohibition lies on surmise thereof."

The point of this opinion is that before assignable error no right to Pro-
hibition has accrued. That point is substantive, not a matter of pleading.
As stated, however, I think Coke's opinion goes to affirm Man's Case,
and that it could be applied to a pleading problem: It is never good, ac-
cording to Coke, to *say (dicendo)* simply that a statute is involved and
therefore the suit should be prohibited until the statute's meaning is re-
solved at common law. I infer that in a true pleading situation -- where
the right to Prohibition has clearly accrued -- the party must be careful to
rest his surmise on a specified error, not on a general complaint that his
statutory rights have been violated by an incompetent court. E.g.: Sup-
pose Samstead had been in a position to surmise that his statute-based ob-
jection to Hucheson's seisin of the living had been disallowed. I would
infer that he must be careful to say that and only that -- "I tried to plead
that Hucheson was never lawfully installed in the living and entitled to
the tithes, by virtue of such and such a corrupt bargain (spelled out) and
the statute of 31 Eliz., and I was erroneously not allowed to make that
plea." He must be careful not to short-circuit such a statement or expand
it in such a way as to make it ambiguous whether the erroneous disallow-
ance of a plea (analogous to many others involving no statute) or the
suit's dependence on a statute was the theory of his claim.

Coke's opinion in Samstead v. Dr. Huchenson (as opposed to his pre-
liminary comments on the legal merits) goes only to the statute, not the
pardon. Possibly the same point should be made about a pardon -- i.e., ac-
tual error in the handling of a pardon must be surmised; a surmise assert-
ing or implying that claims based on royal pardons are beyond ecclesiastical competence is bad. But Coke made no such point about the pardon. Suppose for the sake of argument, however, that an ecclesiastical suit should be prohibited merely because a royal pardon comes in question, regardless of how the ecclesiastical court handles it. Then our case would be as follows: In the ecclesiastical court Samstead pleads the corrupt bargain and statute. His plea is not disallowed. Therefore, as Coke's opinion says, Samstead has no present cause of Prohibition -- only the possibility of cause if the ecclesiastical court ultimately misconstrues the statute. Hucheson answers the plea of the bargain and statute by pleading the pardon. We have stipulated that Samstead now has cause of Prohibition in principle. Is there any reason to deny it to him? There might be a pleading reason: Samstead rested his surmise on two grounds -- one good and one bad. When a plaintiff does that, the surmise should perhaps be taken against him. A less formalistic argument might say, "On his own showing, Samstead had no complaint against the ecclesiastical court. He accepted the ecclesiastical court's jurisdiction to the extent of making his plea, which the ecclesiastical court was perfectly willing to hear. If he had sought a Prohibition before pleading he would have been turned down, but that does not detract from his acquiescence. For his claim to a Prohibition on the basis of his own plea is no better now than it would have been earlier. Given such acquiescence, does Samstead have standing to claim a Prohibition because a 'common law issue' has been introduced by the other party? Is his position not like that of a man seeking to prohibit his own suit when he himself is at fault, or when he has created the situation in which the 'common law issue' is introduced in a meaningful sense (as opposed merely to suing in the only possible place)?" I doubt that that argument is very good (because Samstead had no choice except to plead the bargain and statute in the ecclesiastical court), but it is conceivable that weight could be given (a) to Samstead's failure to move as soon as he thought, though incorrectly, that he had cause of Prohibition (instead of waiting for something reinforcing to turn up) and (b) to the ecclesiastical court's apparent willingness to accept his correct interpretation of the statute (whether or not one expected them to accept it in the long run). Finally, there would be a practical argument for withholding Prohibition until sentence simply because the plaintiff's claim was complicated. We have seen cases above which can be taken as sanctioning the Court's discretion to "throw up its hands" when faced by complex claims to Prohibition -- i.e., to wait and see whether the ecclesiastical court will
Pleading

do anything wrong, even though, strictly speaking, sufficient basis for Prohibition now has been stated. Such discretion may be conceived as the converse of discretion to deny a Prohibition because it is sought too late.

This analysis quoad the pardon is of course entirely speculative. The report gives only Coke's opinion quoad the statute. His omission of comment on the separate matter of the pardon could imply the opinion, on one ground or another, that Prohibition based solely on the pardon could not be justified. But it might equally well mean only that he reserved judgment on that point on the occasion to which the report relates. A final word of warning is in order with respect to Man's Case and Samstead v. Dr. Huchenson: These cases should not be taken as the last word on whether construction of statutes belonged as such to the common law. We shall meet with contrary suggestions on that question. The two cases do, however, recommend care in setting up claims to statutory rights vis-a-vis the "foreign" courts.

Markworth v. Colfes (1598) raises a characteristic pleading problem: whether affirmative language will do when a point of negative import must be made to state a strictly valid claim. In this case, a parson sued for tithes of barley. The parishioner surmised a modus to pay 6/ to the vicar in lieu of barley tithes. It was objected that the surmise ought to use negative language -- that it is customary not to pay the tithes in kind to the parson, but instead to pay the commutation to the vicar. As it stood, the surmise left this negative to be inferred from the affirmative. The Court overruled this objection and laid down two generalizations about pleading in Prohibition cases: (a) The Court expressly invoked the "public" approach to Prohibitions as grounds for construing surmises favorably: A surmise is only an information to the Court, on which it may act according to the common sense meaning--here, the obvious implication that nothing was due to the parson by the custom. Strict canons of pleading are not applicable; (b) A surmise, in any event, is not a pleading properly so-called -- i.e., a statement to which the defendant makes a formal answer. There is a difference between the standard of pleading applicable to a declaration on a Prohibition and that applicable to a mere surmise. (I

4 M. 40/41 Eliz. C.P. Harl. 4817, f.172.
do not take the latter point as saying that a declaration in this case would be bad for omission of any explicitly negative prescription, only that it might be. In other words, on demurrer to a declaration, it would be relevant to argue that negative language was required, whether or not that is actually true. In the context of whether to grant Prohibition on a given surmise, the argument is irrelevant, however valid in the abstract.)

In another late-Elizabethan case, it was objected that the surmise, claiming a *modus*, was defective for failure to set out plaintiff-in-Prohibition’s estate in the land that produced the crop. The objection was overruled: “...for it is all one if he has an estate at will, for years, or a fee, for the tithes are demanded against him.” That is plainly correct. I can understand the objection only as a speculative formalistic quibble. It is likely (the brief report does not say) that the *modus* here was private -- i.e., applicable to particular land (not to the whole parish or some other local unit.) In that event, the prescription would be laid as accruing to the present holder and those whose estate he has (i.e., his predecessors in estate.) The defendant’s objection was probably a matter of arguing that it is incomplete to prescribe in *que estate* and not to say expressly that one has any particular estate in the land, or repugnant so to prescribe and leave the possible inference that one has no estate. But the Court’s point was surely well-taken: The actual occupier or crop-producer was liable for tithes, and he was entitled to the benefit of a *modus* whether local or applicable only to particular land. Whatever would have been gained in formal elegance by setting out the estate, doing so would have had no relevance for the matter at stake. (It might be asked whether one without any legitimate estate -- a naked disseisor or abator -- may take advantage of a private *modus*. I know of no authority on this point, but the answer is probably that even then the occupier’s interest in the land is irrelevant.)

A couple of cases turn on the special problems of pleading prescriptive claims. In the Rector of Tunstall’s Case, plaintiff-in-Prohibition said “that before. the time of memory two acres of meadow were allotted to the parson’s predecessor in lieu of tithes...and that the rector for the time being received and had the aforesaid two acres in recompense of the
Pleading

tithes...from time whereof memory of man does not exist." This was not an elegantly pleaded *modus* because it alleged an event (allocation of the two acres) before the time of memory. The second part of the quoted sentence speaks properly and says enough -- that the two acres have been enjoyed in consideration of the tithes from time beyond memory. By the theory of prescription, to say that a specific event took place before memory involved an implicit contradiction -- as if one were to say, "I know event X took place at a time that nobody knows anything about." There is no contradiction, on the other hand, in what amounts to "Practice X has been going on and no one knows when it started." The defendant in this case stated his objection to the plaintiff's claim by saying that he could not take issue on the allocation. i.e.: An asserted event should be capable of being denied. But an event asserted to have taken place at a time nobody knows about cannot be denied. This objection came to saying that since the first part of the prescription was bad the whole should be taken against the plaintiff. The Court, however, ruled that since the second part of the claim was good the first part could be overlooked. In the terms of the defendant's objection: the judges told him he could take issue on the immemorial usage. In other words, the claim as a whole did not prevent the defendant from taking issue on the relevant fact.

The report of the Rector of Tunstall's Case concludes by saying that the parties joined issue by consent and waived demurrer. Thus it is clear that the discussion above was not on demurrer (but on motion for Consultation or to quash, for a Prohibition had been granted.) The Court's opinion was of course dissuasive to demurring. It is possible, however, that a higher standard of pleading would have had to be considered if the Court had faced a demurrer to a declaration which repeated the inelegance of the surmise (and *quaere* how far a declaration may correct the surmise.) For that reason, and in the interest of substantial justice, it is possible that the Court used some persuasion to see that the defendant took issue on the facts.
Prose v. Dr. Leyfield\(^7\) arose on demurrer. In this case, a parishioner sought to stop a tithe suit by showing one type of monastic discharge -- a prescriptive exemption at the time of the dissolution. In pleading the monastery's exemption, he made the mistake of saying that the abbey was discharged from its foundation to the dissolution. I.e.: Instead of saying that it was discharged from beyond the time of memory until the dissolution (an indefinitely long period of time), he referred the usage to a specified period (the distance between two events -- the foundation and the dissolution.) The parson demurred on account of this violation of the theory of prescription, and the Court upheld the demurrer. The parishioner's counsel argued unsuccessfully that it would have been enough simply to allege that the land was discharged in monastic hands at the dissolution -- i.e., that it was unnecessary to say \emph{why} it was discharged. Therefore the admittedly bad pleading was surplusage and should not be held against the plaintiff. But the Court rejected this argument. Having rejected it, there was no way to hold for the plaintiff, it seems to me. For if the plaintiff had to show the manner of discharge and chose prescription, then he must plead an adequate prescriptive title, which he utterly failed to do. Justice Dodderidge, with Chief Justice Coke concurring, said that the plaintiff's plea would have been good if he had expressly laid the foundation of the monastery before memory (albeit, cf. last case, a "specific event.") As it was, there was mere failure to claim immemorial usage. The Court would not presume, until the contrary was shown, that non-payment throughout the monastery's history was non-payment from time immemorial. Nor would the Court permit monastic discharges to be alleged in general terms, without showing the manner of discharge.

As noted, Prose v. Dr. Leyfield arose on demurrer. \textit{Quaere} whether Prohibition should have been granted in the first place, and whether a motion for Consultation should have been granted if one had been made. As the Court finally saw the case, the surmise was bad on its face. Could anything be said in favor of indulging it until a formal challenge came on demurrer? Possibly, for the plaintiff here probably had a perfectly good basis for a proper prescriptive claim. Most monasteries were established

\(^7\) T. 12 Jac. K.B. 1 Rolle, 54.
Pleading

quite a while before the dissolution. The intelligent move would probably have been to claim a straight prescriptive exemption for the monastery and leave it to the defendant to prove if he could that the monastery was established at a known time (which is to say, within memory.) Possibly a bad surmise should be let through until either: (a) the plaintiff improved his declaration, say by adding that the abbey was founded before memory (in which event the question whether the surmise and declaration sufficiently conformed could be taken up); or (b) the defendant took issue on the fact (i.e., whether the abbey was paying tithes at the dissolution and before), in which event the truth could prevail despite bungled pleading. Sed quaere.

The last two cases above indirectly suggest the question whether standards of precise pleading should be the same on demurrer as on preliminary challenge to a Prohibition. The case of Price v. Mescal is a pleading case in only a marginal sense, but it contains an important indication of the judicial attitude toward demurrers in typical Prohibition cases. For that point, the report should be noted here. In substance, Price v. Mescal was a complicated modus case. A parishioner was sued in one action for several sorts of tithes. He surmised five distinct modi covering those several tithes. The plaintiff declared upon his Prohibition, and the defendant demurred. Upon the demurrer, the defendant's counsel urged objections to all five modi. The issues debated essentially concern what constitutes a legally valid modus. Though that question is often hard to distinguish from whether a modus is well-stated, and some of the points in dispute could possibly be reduced to pleading, I shall defer the matter of this case.

The point to note here is the strong exception to the demurrer taken by Chief Justice Coke: "...to demurre upon such matters, is a very desperate kind of practise, and I would never have done so, but to joine issue upon the customes, and first to try whether there was such a custome or not? and if it be found so, then afterwards to demurre upon the validity of this in law." In other words, Coke did not approve of demurring to prescriptions. He liked to see the truth established by verdict first. Legal debate, if any should be necessary, ought to come upon motion in arrest of judg-

8 T. 12 Jac. K.B. 2 Bulstrode, 238
ment or, where appropriate, upon a special verdict. His words perhaps suggest that the "desperate practise" of demurring was in his opinion both foolish from the defendant's own point of view and a mischievous thing for counsel as "officers of the Court" to do -- risky for the defendant to stake everything on the refined construction of a pleaded "text" when a jury might find straightforwardly that the tithes has been paid in kind; mischievous to burden the Court with difficult problems of law when the alleged customs might be unprovable in fact.

Coke could not, of course, get around the demurrer by disapproving of it. He necessarily went on to discuss the points of law that had been raised. In the event, Consultation was granted quoad two of the five modi. In taking this step, Coke and the Court said that even where a demurrer is "bad," the Court should look at the declaration on its own and grant Consultation if it is defective. I am not sure I understand the force of this remark in relation to the case. I do not think the demurrer was considered legally "bad" just because Coke thought it a foolish and mischievous step. The Court's reason for granting the partial Consultation seems to have been essentially a matter of pleading -- the plaintiff's incompleteness in stating his claim. (He claimed a discharge for certain classes of cattle without showing that the cattle in question belonged thereto. He claimed the right to pay a fixed number of cheeses in consideration of certain tithes without showing that he produced any cheese. These flaws would seem offhand to be in the airtightness with which he stated his claims, rather than in the probable merit of the claims.) Perhaps the effect of the total demurrer to the declaration's sufficiency in law was a waiver of these formal objections (the defendant's counsel argued against the prescription on other grounds than the Court thought decisive.) In any event, the ill-advised defendant was treated generously and the plaintiff held to high standards of pleading.

Coke's objection to the demurrer as "practise" has a bearing on our procedural concerns. If it was bad practice to raise possibly unnecessary debate on the legal merits of modi -- a species of debate that involves the muddy line between the modus "as is" and "as stated" -- is it not also bad practice to raise possibly unnecessary debate on purer pleading questions? Quaere. But if so, there is an argument for not looking too hard at surmises: Let formally doubtful surmises through, hoping -- and using the Court's influence to urge -- that issue will be taken on the facts, so that
the contention can be settled on the truth. The public interest in prohibiting when Prohibition is due would be served thereby. On the other hand, Price v. Mescal itself insists on high pleading standards for declarations. Surely the best way to insure demurrer-proof declarations (and to avoid problems of conflict between declaration and surmise) would be to withhold Prohibition on formally inadequate surmises. Once, however, a Prohibition slips through, it should probably be allowed to stand if at all possible (i.e., not undone by Consultation on motion), in hope of factual issue.

The final feature of Price v. Mescal goes to vindicate Coke's objection to the demurrer. The reporter tells us that the remaining three prescription (those with respect to which the declaration was held good) were tried by jury "at the Bar" (i.e., in Westminster Hall). Since the fact of those modi finally came to trial, I can only suppose that the defendant was persuaded and allowed to abandon his demurrer, for the effect of demurring ought to be admission of the customs as "facts." The jury found for the plaintiff, upholding the modi "against the directions of the Court, and contrary to all their evidence, insomuch that the Court said unto them, that they never heard of so ill a verdict, they having no proof at all for the prescription...but for the tithe to be paid in kind, and therefore the Court said that it should be tried again by another jury..." In addition to its value as evidence of a new trial awarded for a verdict against the evidence, the results show how foolhardy and unnecessary it was to demur. If courts could be depended on to control biased juries as this one did, parsons had no reason to figure demurring as the lesser risk, compared with pro-parishioner jurors.

The ill-advised demurrer in Price v. Mescal must have been abandoned. In Foster v. Hade (or Hide), a demurrer based on a point of pleading was given up with the consent of Coke's King's Bench. Here, a Prohibition was granted on the standard ground that the bounds of parishes had come in question in the ecclesiastical court. When plaintiff-in-Prohibition declared, he undertook to show how the parsonage came to his opponent. (The relevance of such a showing does not appear.) He said that it came to the King by the dissolution of the monasteries, was

granted to a corporation by the King's letters patent, and then granted over by the corporation. In some way, however, he allegedly failed to plead these transactions adequately, wherefore the defendant demurred. (Just what was wrong does not appear from the brief reports. There were special rules about the pleading of letters patent and deeds. It was not enough to say, e.g., "Jones got Blackacre from the King by letters patent." The date, effect, etc., of such documents had to be specified if one wanted to rely on them.) Coke, speaking for the Court, agreed that the declaration was defective for the reason alleged. Nevertheless, he refused to grant a Consultation with the effect of permitting the ecclesiastical court to determine the bounds of parishes. With the Court's assent, the parties then took factual issue. In effect, the Court's response to the demurrer was "forget about it." The defendant was not given the advantage of his apparently well-taken pleading-point. On the other hand, he was not stuck with his demurrer when the Court decided that a common law issue could not be turned over to ecclesiastical trial just because the plaintiff had mispleaded. By permitting the defendant to withdraw the demurrer and take issue, the court denied the plaintiff the advantage of the admission of fact in his favor which the demurrer ought to imply.

Demurring on pleading points was discouraged. In one sense, that is to say that pleading was not given consummate importance in Prohibition cases. But it does not follow that pleading points could not be insisted on by means other than demurrer. There were four other contexts in which to complain of bad pleading on the plaintiff's part, all of which appear in cases below: (a) In adversary debate before any Prohibition was granted; (b) On motion to quash a Prohibition; (c) On motion for Consultation; (d) On motion in arrest of judgment after verdict on a factual issue.

In Allen's Case, 10 a parishioner surmised a modus to pay 1d per acre "or thereabouts." The Court, speaking through Chief Justice Coke, had no hesitation in denying Prohibition. To state the point substantively: A modus must be definite to be good. To state it as a matter of pleading: It is not enough to say, in effect, that a modus exists, without making any definite statement as to what the modus is. The Court will not presume --

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10 M. 7 Jac. C.P. Add. 25,211, f.189; Harg. 47, f.29.
Pleading

even with the help of an approximate averment -- that there is a basis far
prohibiting the ecclesiastical suit. It will not let the Prohibition through in
order to see whether the jury will come up with a definite sum.

Thus a party who genuinely does not know the amount of the modus
affecting his land must still take a stab at a definite sum. As we have
seen, he would probably be safe enough if the jury found a different sum.
But for just that reason the decision in Allen's Case may perhaps be
questioned. Ignorance of the details of a modus could be excusable. Is it
better to insist on definiteness in the surmise and then go easy on a vari-
ant verdict, or to tolerate an honest expression of uncertainty in the sur-
mise and simply ask the jury for the truth? Making the plaintiff plead
definitely when he may not know the truth makes him run the risk of a
general verdict against him. Short of that, it invites the problem of what to
do with a variant special verdict -- a source of legal contention, one must
admit, even if one is strong advocate of "judging by the truth." But the
other course -- the one ruled out by Allen's Case -- raises problems too: If
"1d or thereabouts" is tolerated in a surmise, should it be tolerated in a
declaration? Merely to leave that question open is to risk demurrers. To
permit a vague surmise but insist on a definite declaration raises the prob-
lem of conformity between surmise and declaration. Assuming an
equally vague declaration would be acceptable, what does a traverse
mean, and what can the jury find? "There is a modus for 1d. or there-
abouts" can be read as "There is a modus of some sort" (="There is a mo-
dus"). Denying that seems to say "There is no modus at all." If that is
what the traverse means, may the defendant introduce evidence of, say, a
6d modus without cutting his own throat? Could the jury ever find its
way to a special verdict -- even out of its own knowledge -- if the ques-
tion before it must be logically reduced to "Is there any sort of modus?
Perhaps that reduction is not inevitable, but at least the question arises.

For the reason last given, the decision in Allen's Case seems right.
The problems one way are worse than the problems the other way. At
least as far as the brief report indicates, the Court saw the case as cut-and-
dried. Coke cited an analogy -- a Cox's Case, where a copyholder pre-
scribed to pay a fine of "not above 2/" and the prescription was adjudged
bad for vagueness. I would suggest that the analogy may have been se-
ductive. In the end, it probably points the right way, but an argument
contra can be made for the special circumstances of Prohibition cases.
"All prescription must be definite -- look at copyhold cases" might at least arguably contain a fallacy. (Cf. Gomersal v. Bishop, the possible fallacy in "Surmise and declaration must conform -- look at the relation declaration must bear to writs.")

Price v. Osborne\(^ {11} \) shows a pleading point successfully made on motion, but with the effect only of quashing the Prohibition, not of obtaining a Consultation (as the defendant presumably desired.) The report of this case is skimpy, but I reconstruct it as follows: A Prohibition was granted to stop a suit for hay tithes on surmise of a \textit{modus} that the parson enjoyed five acres of meadow in consideration of all the hay tithes of a vill. The parson then moved that the surmise was defective for failure to aver that the land which produced the hay in question in this suit had lately been converted from arable to meadow.

Assuming the conversion to be a fact, why should the plaintiff aver it (as, in the event, the Court thought he should have)? I think that question can only be answered by appreciating the lurking substantive matter. Changes in land use understandably raised problems in tithe law. \textit{Modi} such as the one in this case (i.e., where the commutation was not computed at so much per acre or other unit, but as a lump sum or the equivalent for all tithes of a given sort) could not as a rule be allowed to stand in the face of major changes in land use. Leaving inflation aside, \$5\) for all hay might represent fair value according to the traditional employment, let us say, of 100 acres -- where roughly 1/4 of the land was usually in hay, the rest in other crops, either tithable in kind or subject to their own commutations. If the farmer suddenly converted all 100 acres to hay, the parson's income from this land would be drastically and unfairly diminished. The \textit{modus} in that case would probably be interpreted as applying only to hay produced on land that had always or sometimes produced hay. A \textit{modus} unmistakably alleged to apply to all hay produced within a given area, regardless of how much it was devoted to hay, would probably be held an unreasonable custom.

\(^{11}\) M. 15 Jac. C.P. Harl. 5149, f.25.
Pleading

To return to the pleading point in Price v. Osborne: The parson must have alleged the conversion from arable to meadow in his libel, attached to the surmise. Otherwise, it could not be taken for a fact which the parishioner was obliged to aver. To say he should aver it means, I assume, that he should either affirm it or deny it. I.e.: He should plead his *modus* and say the land was *not* recently converted to hay, in which event the parson could admit the *modus* and take issue on the conversion (reserving points of law until after verdict.) Or else the parishioner should plead his *modus* and admit the conversion, in which event the parson could demur to a concordant declaration or move for Consultation, so raising the legal issue -- whether the *modus* should be interpreted or allowed to apply to any converted land (apparently only one acre was allegedly converted in this case.) The fault was saying nothing at all about the alleged conversion.

This objection to the surmise seems well-taken, as the court agreed. At the very least, it was unnecessarily loose pleading, leaving the parson to plead at common law what he had already made part of the record. I.e. suppose as things stood the parson could admit the *modus* and plead the conversion, leaving it up to the parishioner to demur to that plea or traverse it. But the extra step was avoidable by forcing the parishioner to plead in such way that the parson could get to the point at once. The Court accordingly "disallowed" the Prohibition and "ordered" that the ecclesiastical court proceed. But it refused Consultation (So I take the words of the report "mes navera procedendo"). So in the upshot the plaintiff's mispleading hardly hurt him, for there would be nothing to prevent his making a correct surmise and having a new Prohibition. The case was handled like some of those on conflicts between libel and surmise -- the Prohibition was void, the parson and ecclesiastical court could carry on at their peril and if they had time to move before a new Prohibition issued. If I reconstruct the case correctly, it can indeed be seen as a libel-surmise conflict of a somewhat problematic sort. (The standard libel-surmise case was a misrecitation of the ecclesiastical suit. Here, it might make a question whether sliding over one element in the ecclesiastical claim -- the conversion -- is equivalent to, say, misrepresenting a suit for 400 fleeces as a suit for 40. That the suit here was for tithes in kind from such-and-such land was not misrepresented, though the legal theory behind the parson's claim -- that no *modus*, if there was one, applied to
The Writ of Prohibition:
Jurisdiction in Early Modern English Law

the converted land -- was ignored).

In the Caroline case of Wood and Carverner v. Symons, the Common Pleas was divided on one sort of objection to a surmise and united in insistence on tight pleading in another respect. In this case, a man being sued for hay tithes surmised: (a) In consideration of extra work in making up hay in the meadows, the parishioners were customarily exempt quaod hay grown on "headlands." (I.e.: They did more than their legal duty in preparing the parson's share of the main hay crop, probably by shocking and binding it in more convenient form than they had to -- and in return paid no tithes on hay harvested from the uncultivated ends of arable open fields where the plough-teams turned around.) (b) No tithes are due for headland hay de jure. The plaintiff omitted, however, to say expressly that the hay in question in this case came from headland! On account of that omission, the judges agreed that the suggestion was "naught" and denied Prohibition. In addition, the surmise was objected to as duplicitous -- for claiming a discharge via a modus and via the common law. The two Justices whose remarks are reported responded differently to this objection. Yelverton thought the double allegation immaterial. One might suggest twenty grounds for Prohibition, he said. Richardson disagreed with Yelverton's principle, though without holding the duplicity fatal to the surmise in this case. So, at least, I take his meaning, for he said that the claim of common law exemption was surplusage (mere unnecessary added words, to be ignored.) The real difference between these two positions is not obvious. Yelverton's principle would argue for granting Prohibition unless all the alleged grounds were inadequate, Richardson might argue for picking the weakest ground alleged and denying the Prohibition if that is not strong enough (i.e., construing duplicitous surmises against the plaintiff to that extent.) In the instant case, it is more likely that he took the first ground mentioned in the surmise as the plaintiff's claim and the other ground as surplusage. But what does that imply? Consider these possibilities; (a) The modus comes first and is held bad on its face. Will the Prohibition be denied even though the Court thinks the product being sued for non-tithable de

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12 M. 5 Car. C.P. Hetley, 147.


Pleading

jure? Such a result would be inconsistent with the cases on misconceived surmises above. (b) The de jure exemption comes first and is held bad. Will the ecclesiastical court be turned loose to determine a modus? I should doubt it. In short, I wonder whether Richardson's adverse reaction to Yelverton's general point would turn out on reflection to mean anything in the context of deciding whether or not to grant Prohibition in the first place.

Later on, it might mean something. Richardson's point might come to saying: "Having put the modus first, the plaintiff must declare upon the modus. I.e.: He must offer the defendant a factual issue. After an unfavorable verdict, perhaps the plaintiff may move in arrest of judgment that the product is exempt de jure. Perhaps the Court ought to intervene on its own motion to prevent collection of tithes not due de jure -- using its discretion as to when to intervene. Those bridges we will cross when we come to them. The immediate point is that declarations cannot be duplicitous. The best way to prevent their being is to construe the surmise as asserting a single claim and insist that the declaration conform. The best way to that end is to take the first good ground alleged in the surmise as the plaintiff's sole pleaded claim." Would Yelverton have disputed this? In the actual context of Wood and Carverner v. Symons -- the first motion for Prohibition -- Yelverton's opinion sounds righter than Richardson's -- i.e., more accordant with the "merely informational" nature of the surmise. Looking ahead, however, I find it difficult to suppose that Yelverton would be equally tolerant of duplicity in the declaration. How is the defendant to answer twenty separate claims, or even two? (If the declaration were permitted to assert two claims, at the least a problem of interpreting a demurrer or traverse would be introduced. If the defendant demurs to challenge the claim of de jure exemption, does he confess the modus? If he takes factual issue on the modus, does he waive the right to argue that the product is tithable de jure?) Granting that the plaintiff must take a single stand at the declaration stage, it would make perfectly good sense to say he may take his choice, and perhaps that is what Yelverton would let him do. The disadvantages thereof are: (a) Introduction of a possible conformity problem. (Does a single-claim declaration follow a multiple-claim surmise as a valid declaration on a writ follows the writ? Richardson's approach, by giving the surmise a definite single-claim interpretation, establishes a clear criterion of what the declaration must conform to if it is not to fail.) (b) Attaching no penalty at all to a duplicitous
surmise, provided the duplicity is eliminated in the declaration. (Perhaps there is no need to attach a penalty. Richardson's approach would attach only the mild one of eliminating the plaintiff's free choice at the next stage. That mild penalty is perhaps comparable to the "penalty" of merely denying the Prohibition when the surmise is loosely pleaded -- as the Court actually did in Wood and Carverner v. Symons -- for denial was no bar to starting over with a more "artistic" surmise. We have considered the wisdom of being tough on ill-stated surmises -- to that mild extent -- precisely in order to avoid trouble later on.)

In Henchman v. Parsons,\(^\text{13}\) defendant-in-Prohibition tried to take advantage of a mispleading late in the game and failed because he had waited too long. A man was sued for a parish rate to repair the church. He got a Prohibition on surmise that there was an ancient "chapel of ease" in the parish, to the upkeep of which he had always contributed, and that he had customarily been discharged from repair-rates for the main church. This was a common type of response to rate suits, analogous to the \textit{modus} in tithe suits, i.e.: It was common and lawful to claim a customary duty to maintain a chapel, and in consideration thereof a customary exemption from helping maintain the church. In this case, however, the plaintiff failed to say expressly that he was discharged from repairing the church \textit{in consideration} of repairing the chapel. He laid down a negative prescription (non-repair of the church) alongside an affirmative prescription (repair of the chapel), but he omitted to say expressly that the two usages had any relation to each other. I.e.: He left it to be inferred that the one was consideration for the other -- a safe enough inference by common sense, but \textit{strict juris}, the mere coincidence of the two usages in no way legitimated the negative one. Simply never paying rates for the church would not establish a right not to pay them, any more than immemorial non-payment of tithes would establish a lawful exemption; always repairing the chapel by itself would only go to establish a customary duty of so doing, over and above the parishioner's legal duty to the church.

In the abstract, the Court thought the surmise in Henchman v. Parsons defective. However, the judges refused to grant Consultation because the

\(^{13}\) T. 16 Car. C.P. Harg. 23, f.65b (Incorporated into the report of a Sir Thomas Houlte's Case.)
Pleading

defendant did not move for it until after a verdict was given against him. Originally, he took issue on the negative prescription -- whether the plain-
tiff had in fact customarily contributed to the church. After the jury found that issue for the plaintiff, the defendant brought up the point of pleading (or, if you prefer, the point of law -- that customary non-contribution to the church, which the verdict established, plus the admitted contribution to the chapel, did not legitimate the exemption.) In refusing Consultation at this stage -- and apparently only because this stage had been reached -- the Court was in effect willing to infer that the one usage was claimed as consideration for the other. That amounts to taking the problem as one of pleading. (Quaere whether similar permissiveness would have been shown at any stage in a tithe case. In the rate case, the Court may have been moved at heart by the established fact that the plaintiff "did his bit" for the church-edifices in the parish. Letting a man out of economically valuable tithes in kind -- to the parson's real loss -- was more serious.)

Alongside the mispleading cases above, we may consider a few on the "burden of pleading." A late-Elizabethan opinion goes as follows: "Rakings" are exempt from tithes by the common law, but the plaintiff-in-Prohibition must surmise that tithes of the main crop were set out without covin. "Rakings" means hay or corn raked up or gleaned after harvesting the bulk of the crop. There are many cases concerned with tithes of rak-
ings. As with second crops in a single year and other post-harvest land uses, it was a question whether rakings were exempt de jure or only ex-
emptible by considerate modus. The present holding (in accord with most other opinion on that subject) says as a matter of law that rakings are exempt de jure, provided that the rakings represent what was left behind by inevitable or honest accident. Obviously enough, a man could not be allowed to leave a substantial part of the crop lying on the ground

14 In one earlier case (Shelton v. Mountaine. H. 13 Jac. Court uncertain), a defendant tried to raise a pleading point by motion in arrest of judgement after verdict against him. This is the only thing about the case that is really worth noting. The motion was turned down, but because it was without merit of any sort. The plaintiff had claimed to be discharged for tithes of a park. The defendant argued that the claim was not well-stated because he did not say it was an ancient park. The Court did not hold that this was no inelegance, or a forgivable inelegance, in pleading, but rather that the antiquity of the park was utterly irrelevant, since the suit had nothing to do with park products, such as game. In effect, "park" was just a geographic description of the area to which the modus applied.

15 H. 38 Eliz. Q.B. Add. 25,198, f.112b. (Litigative context not reported.)
The Writ of Prohibition:
Jurisdiction in Early Modern English Law

until a second raking-over in order to evade a substantial part of his tithes. As a matter of pleading, the opinion says, plaintiff-in-Prohibition must allege in his surmise that the rakings in question were not left behind fraudulently. He must not leave it to the defendant to plead fraud.

Only three years later, in the well-reported Greene v. Hunne, the same court appears to go the other way on the same issue. But it is not finally necessary to see a conflict. In Greene v. Hunne, a man sued for barley-rakings surmised a modus to do extra work in making up the main crop into cocks, and in consideration thereof to be discharged for rakings "not willfully dispersed." I.e.: The parishioner relied on prescription rather than de jure exemption, and in describing the modus he said that it only applied insofar as there was no deliberate or fraudulent failure to catch as much as possible the first time over. A Prohibition having been granted, Francis Bacon moved for Consultation on behalf of the defendant. Bacon contended that the surmise was bad for failure to allege that the rakings in question in this case had in fact not been "willfully dispersed." I.e.: The plaintiff claimed benefit of a custom covering only honest rakings but did not say the rakings he was sued for fell in that class.

The Court was unanimously against Bacon on this point. But we must be careful in constructing its exact meaning. Chief Justice Popham spoke first, making the following points: (a) There was no need to allege a prescription at all, for rakings are exempt de jure. (Implication: Though the plaintiff here rested squarely and solely on prescription, he should be treated -- at any rate in the context of a motion for Consultation -- as if he had relied solely on the common law. Cf. "misconceived surmises.") (b) Of course the de jure exemption only applies to honest rakings, but the parson suing for rakings has the responsibility to say that they were "willfully dispersed." I take this to mean that he must say so in his ecclesiastical libel. In other words, if it appears from the libel (attached to the surmise) that the parson is claiming dishonest rakings in terms, the ecclesiastical suit should not be prohibited, except on surmise that the rakings were not, in fact, dishonest (assuming that the fact of fraud should be tried at common law -- probably a safe assumption). If no such thing ap-

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16 M. 41/17 Eliz. Q.B. Add. 25,203, f.120; Add. 25,200, f.164b.
Pleading

pears from the libel (but only that the parson is suing for "rakings," or only, say, for "hay tithes"), Prohibition lies. Plaintiff-in-Prohibition has no responsibility to say the rakings are honest. If the libel says "raking," the surmise need only, as it were, point to the ecclesiastical suit. If it says "hay tithes," the surmise need only say that the real object of the suit is "rakings" (not "honest rakings"), tithes on the main crop having been paid. If this is a correct reconstruction of Popham's position, it disagrees with the earlier opinion above. (Granting that the parishioner never needs to plead his honesty unless the ecclesiastical libel expressly accuses him of dishonesty, it would remain a question whether the parson may introduce a plea of fraud later on. I.e.: Assume the parson sues for "rakings" merely. The surmise, and accordingly the declaration, rest on de jure exemption. May the parson now plead fraud and force the parishioner to traverse? Probably, sed quaere.)

It is not clear that the rest of the judges accepted Popham's position in full, though they came to the same result. Kempe, the Clerk of the Court (clerks were often consulted as to "precedents"), said that he had never seen an averment of the sort Bacon said was necessary. Justice Fenner agreed that it was not necessary to aver that the rakings in question were not willfully dispersed. These opinions do not imply, however, that rakings were exempt de jure, or at any rate that the plaintiff in this case could escape the prescription he stood on. Therefore they do not have to imply anything as to the burden of pleading in a de jure-exemption case. I.e.: They might mean only that to surmise a modus as applicable to honest rakings is to assert clearly enough, though not quite directly, that the rakings in question are honest. (A modus alleged to apply to dishonest rakings would obviously be held unreasonable. Therefore expressly applying the modus to honest rakings has the more title to count as claiming honesty for those in question.) Whereas Kempe and Fenner maybe meant to follow Popham and maybe not, Justice Gawdy explicitly stuck with the case as it was--a modus case. For he said in so many words that the averment Bacon found lacking was implied in the surmise. Gawdy attached importance to the plaintiff's saying the parson's suit was against the custom alleged. I.e.: In addition to claiming exemption only for honest rakings and thereby implying that those in question were honest, the plaintiff used further language to reinforce that implication. He said there was a custom discharging honest rakings and then added that the ecclesiastical suit went
against that custom. The addition surely goes to imply that the suit is for rakings which are honest.

A further speech in the report, labeled \textit{tota Curia}, says generally that it is always the parson's job to allege willful dispersion. Possibly the generalization was meant to reach the \textit{de jure} exemption case which Popham wanted to see in the case at hand. But taken conservatively Greene v. Hunne does not have to rule that case or overrule the opinion above.

Besides the rakings, the surmise in Greene v. Hunne claimed several other prescriptions and exemptions for other products, to all of which Bacon took exception. One such exception goes to the burden of pleading, as distinct from substantive criteria for a valid \textit{modus}. \textit{Inter alia}, the parishioner was sued for herbage consumed by cattle. He claimed that the pasture land in question was used for breeding cattle for his dairy and plough, and therefore exempt \textit{de jure}. Bacon did not dispute the underlying point of law: pasture consumed by breeding-stock and their calves was not tithable insofar as the calves were replacements or additions for the dairy herd or the farmer's supply of draught animals. The surmise did not say, however, that the animals who consumed the grass in question were in fact used as dairy -- or draught -- replacements. Bacon argued that this was a defect in the surmise. Popham and Gawdy replied that there was no defect: It was up to the parson to allege anything about the actual employment of the animals that would remove them from the exemption.

There are numerous cases testifying to the reality behind this exchange. Parsons were trying hard to collect their share from the expanding livestock business. They had no claim on "replacement and expansion capital," by means of which the "tithe-base" would be maintained or increased, but they had every right to collect in respect of animals bred and raised for sale to butchers or other farmers. Parishioners had a natural tithe-dodge in the inherent uncertainty of an animal's destiny. At a given moment -- say when he is sued for tithes from 1590 -- a farmer could say with factual truthfulness and fraudulent intent that the cattle who ate the grass in question over the last year were either cows temporarily out of milk-production or replacement-stock. The next moment -- say as soon as the suit against him is prohibited -- he sells off some steers, as of course he had every intention of doing. If the parson
Pleading

wants to go to the trouble of a suit (or another suit), he can presumably recover something. "Go ahead and sue me," says the farmer (knowing that besides the steers he sold he has ten more to sell.) Maybe the parson knows that too and decides to wait. Maybe he waits until not even honest men can remember whether Farmer Brown raised any cattle for sale year before last. In short, livestock operations -- in a predominantly mixed and small-scale agricultural economy -- were much more likely to slip through the tithe-net than field-crops.

The exchange between Bacon and the Justices in Greene v. Hunne, though nominally on a point of form, should be considered against this background. It is not entirely clear from the surface of the report what Bacon was asking for. I suspect that the Justices may have reacted adversely because it was not entirely clear to them. Bacon said that a farmer claiming his "breeding-stock and replacement capital" exemption should allege that the animals in the "replacement capital" category were actually used as such. I do not see how that could be asked for literally, since young animals honestly or dishonestly assigned to the "replacement" category would not as yet have been put to the dairy or draught uses for which they were purportedly intended. It would make sense, however, to require the parishioner to speak with more particularity than the Justices were ready to insist on. He might be asked to spell out his situation as follows: "All the animals that used the pasture fall into the classes (a) breeding-stock (b) immature beasts bred from the farmer's own stock (c) adult animals already in use for dairy or draught purposes; none of the animals that used the pasture (a) have been sold (b) are old enough to be used for dairy or draught purposes but have not actually been so employed." If farmer could not say just that truthfully -- or undertake the risk of proving just that -- then he should not have a general Prohibition. He should rather be driven to plead the truth to the end of obtaining a Prohibition covering only as much as he was really entitled to. As things stood -- with the approval of the Court (for although only Popham and Gawdy speak to this point, the Prohibition was finally upheld in toto) -- a general Prohibition could be had merely by saying in effect, "I claim the breeding-stock/replacement-capital exemption." If the parson had not already anticipated that claim in his libel (by alleging that the pasture was used by animals which had been sold and/or adult animals not employed for "pail or plough" and limiting his suit to the herbage consumed by these animals), his only course would presumably be to plead
specially to the declaration -- that so many animals fell outside the exemption. That course throws the burden of knowing something about the farmer's livestock operations onto the parson. (We know too little about 16th-century trials to say confidently that it throws the burden of proof onto him, but it probably has at least that tendency. Unless the parson could maintain that there was no basis for claiming the exemption at all, he would be driven to make a factual statement about the use made of a specified number of animals. Since juries retained the right to draw on their own knowledge, we cannot say the parson would be put strictly in the position of having to produce evidence or risk a directed verdict, though in practice his position might not be very different from that. The institution of special verdicts might relieve some of the strain on the parson. I.e.: Failure to sustain such a statement as "The farmer sold nine steers" might lead to nothing worse than a special verdict for six steers. Nevertheless, some shift in the real distribution of trouble and risk would be likely to follow the burden of pleading.)

In sum, Bacon was probably suggesting a rule of more than formal significance -- a rule that might have been of real help to parsons in a contentious area of tithe law. Besides merely reacting negatively, probably without much consideration and without extended explanation on Bacon's part, the Justices said one thing -- in effect, that Bacon's theory was untenable because homebred animals might die before they were "apt" for dairy or plough. That does not seem much of an objection to requiring more particularized pleading in the form I spell out above. It does, however, point to the kind of complication that might arise once one demanded that plaintiff-in-Prohibition do more than claim his exemption generally. It might make a question of law whether the pasture consumed by beasts who die young should be within the exemption (because the animals might have been used as replacement-stock if they had lived) or outside it (because they were not so used.) The Justices plainly preferred the first alternative (surely correctly, I should think). I assume that answer in the proposed form above (i.e., that home-bred young beasts are exempt if they are not sold, whether they live or die). But if Bacon's proposal were taken a little differently and more literally -- as demanding an allegation that all users of the pasture either were already or might still become replacements -- then the beasts who died young would not be covered in terms. If they were not to be taxed, as they should not be, they would have to be brought within the language of the surmise by interpre-
Pleading

tation, at the expense of argument and doubt. To generalize the point: The simpler the surmise, the fewer problems; demand particularity and problems will arise as to how much particularity, what kind, and whether certain cases (such as the beasts who die young) fit the formula arrived at; where the complex land use means that tithe claims will often have to be settled on a partial or pro rata basis in the end, the simplest surmise -- the least problematic way to turn the ecclesiastical suit off and let the common law unscramble the matter -- is a generic claim to the "breeding-stock/replacement-capital" exemption.

One much later brief report\textsuperscript{17} goes to the "burden of pleading" in suits for rakings. It confirms the first Elizabethan opinion a above, rather than the apparent (but uncertain) meaning of Greene v. Hunne: plaintiff-in-Prohibition must allege that he rakings were "\textit{sparsim}" involuntarily. If there is any doubt that that was a pleading-duty, a well-advised pleader would still be careful to assert his innocence and most did.

Another \textit{nota} in the reports\textsuperscript{18} makes what may be regarded as a burden-of-pleading distinction for another situation. As laid down, the rule is: It is enough for plaintiff-in-Prohibition to surmise that he exposed ("exposuit") corn-tithes; but in the case of wool-tithes or the like "exposuit" by itself is not enough, for the manner of setting forth must be shown. The reality behind this is that paying tithes of field-crops -- grain and hay -- was a stereotyped and easily monitored operation; \textit{contra} for other sorts of products. Harvest was a notorious annual event. When a man cut his grain or hay, it was his duty to shock or stack it in some manner and to set the parson's 1/10th apart from the rest in the field, so that the parson could see for himself whether he was allotted his honest share. That -- "exposing" the tithe -- was all. There was no common law duty to deliver the tithe to the parson, prepare it in a particularly convenient form, or expressly notify the parson that it was ready. (One was not, of course, to cheat -- as by separating the tithe \textit{pro forma} and then carrying it off to one's barn before the parson had a reasonable time to view it over against the 9/10ths and pick it up, or by obstructing the parson's access to the field.) This system obviously would not work for other products: Things like milk and eggs came on every day; lambs and calves were born at this time and that; wool was harvested when the farmer happened to shear,

\textsuperscript{17} Cicill v. Scott. P. 3 Car. C.P. Littleton, 31.
\textsuperscript{18} H. 43 Eliz. C.P. Lansd. 1058, f.3.
possibly some of his sheep now and others later, and even where shearing time was as regular an event as corn harvest there was no analogue of the natural process of mowing, drying, raking, stacking -- a process extending over days in one highly visible place. It was therefore necessary, in the case of animal products, to put more burden on the parishioner. Custom often did the job by prescribing a time, place, and manner of payment. Otherwise, it was the parishioner's responsibility to inform the parson when a tithable product was available and to give him a reasonable chance to see that he was getting his fair share.

Our holding follows the allocation of substantive responsibility in the matter of pleading: If the parishioner's duty is only to "expose" in the sense explained above, he need only say exposuit. But where his duty cannot be reduced to the duty to "expose," exposuit is not enough. He must (as the report says) "show how" -- i.e., tell what he actually did by way of paying or proffering the tithe -- and also (the report is again explicit) make it appear that it was "in such manner as the parson could take them" -- i.e., that the mode of payment or proffer recited gave the parson a reasonable chance to judge what he had coming and take possession of what he was offered. It is in the latter situation that the pleading point is of interest. In the case of corn and the like, the opinion comes to saying that the word exposuit by its meaning describes what the parishioner claims he did (which by the law is all he needs to do.) By the same token, exposuit does not describe any process of paying or proffering such things as wool (and hence does not imply satisfaction of legal duty.) If exposuit were taken more loosely, as a way of saying "paid or proffered in a legally sufficient manner," then our opinion holds that no such general surmise would justify a Prohibition. The parishioner-plaintiff may not say only that, leaving it to the parson-defendant to plead to the generality. (I can only imagine its being pleaded to by the special kind of traverse commonly used to get around the objection to affirmative matter in a negative pleading -- positive statement of the alleged truth followed by an absque hoc denying the other side's plea expressly. E.g.: "The parishioner did not notify me that he had sheared his sheep at the time it was done or allow me to see the newly sheared wool, absque hoc that he exposuit the wool as alleged." As the holding stands no such pleading would be required. The parishioner would state concretely traversable facts and make the demurrable claim that the steps to pay or proffer he went through were legally sufficient.)
Finally, we should note a way in which the *exposuit* opinion is puzzling -- not for its content, but its existence. When could one have a Prohibition for corn tithes by surmising *exposuit*, or for wool tithes by surmising payment/proffer in a spelled-out manner? In the most standard case, the answer is "Never." I.e.: A parishioner could not prohibit a tithe suit by saying he had paid the tithes, for that was a perfectly cognizable and acceptable plea in the ecclesiastical court. How then could the question to which the opinion relates come up at common law? The answer, I suspect, lies in the nature of certain *modi*. Some *modi*, as we have seen, required extra work on one product in consideration of exemption for another. Thus a man might have occasion to say he *exposuit* his tithe-hay (in a form superior to what was obligatory, e.g., in bound sheaves) in consideration of some other tithe. Secondly, *modi* for "small tithes" tended to be only specifications as to how the duty should be performed. E.g.: A man sued for wool tithes surmises that by custom he is to pay wool tithes at Easter and that he paid them at that time. This is not to surmise payment merely (which would fail to state a cause of Prohibition), plus the additional fact of performance according to the *modus*. For there is no common law duty to pay tithes at any specific time, but whenever shearing occurs. A custom specifying Easter is therefore a *modus* like any other -- determinable at common law as to its truth, meaning, and validity. It meets the consideration test for *modi* because there is a benefit to the parson in assuring him his tithe at a definite time and relieving him of the trouble of claiming and collecting the product at scattered times. (So held with respect to some of the prescriptions in Greene v. Hunne above, for example.) Therefore, men could have occasion to say *exposuit* or "paid or proffered" in surmises as an adjunct to claiming certain types of *modi*. Our holding says that *exposuit* is not the right expression. It at least suggests that "paid or proffered" by itself might be inadequate, though probably surmising just that *in conjunction with claiming a "specifying" modus* would be enough. ("This is the customary mode of payment and I have paid" may be taken as implying "I have paid in accord with the custom, which, if the custom is reasonable in itself, is a sufficient discharge of my legal duty.") Finally, we should inquire whether ecclesiastical courts ought to have final authority to decide pleas of payment of "small tithes." I.e.: Suppose the parishioner pleads payment of wool tithes in the ecclesiastical court. Suppose the ecclesiastical court decides that he did not give the parson adequate notice of the product's
availability or a reasonable chance to see and take his due. Should the pa-
rishioner be able to challenge that decision by Prohibition? Quaere.

D.
Defensive Pleading

Summary: These cases are on plaintiffs’ exceptions to the defendant’s manner of traversing declarations. On the basis of few cases, nothing like a bias in favor of plaintiffs-in-Prohibition can be seen. Most refined logical objections to traverses were probably recognized as plaintiffs’ attempt to escape from a weak factual case, and such attempts were not treated indulgently.

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The cases above ask what standard of pleading plaintiff-in-Prohibition should be held to. In a few other cases, pleading points arose from defensive pleas. In Hockleton v. Prince, 19 a man being sued for tithes of eggs surmised (and subsequently declared) a modus of the sort commonly claimed for “small tithes” -- not so much a commutation as a customary way of computing what was due. In this case, the alleged custom was to compute the egg tithe from the number of chickens kept by the farmer (three eggs per cock and two eggs per hen.) To the declaration setting forth this modus, the parson pleaded as follows: Before bringing his suit for tithes in kind (i.e. ten per cent of the eggs produced), he demanded payment according to the customary method of computation, absque hoc that the plaintiff was ready and offered to pay, as the plaintiff alleges. To this plea, the parishioner-plaintiff demurred, for two reasons: (a) It is repugnant to sue for tithes in kind and then plead that one had demanded tithes according to the custom; (b) the traverse (i.e., the negation of a point in the plaintiff’s plea introduced by absque hoc) is bad because it goes to deny a subordinate clause. (The plaintiff said that the customary computation-method existed, and that he was being sued for tithes in kind although he was ready and offered to pay according to the custom. The defendant’s traverse went, not to the whole sentence, but to the “al-

19 M. 37/38 Eliz. Q.B. Add. 25,201, f.796.
though" clause.) The Court upheld the demurrer, giving judgment for the plaintiff.

By common law standards of good pleading, the decision seems correct. Off-hand it may seem a little rough on the parson, if we imagine the human situation. Assuming the parson to be telling the truth, the story would go as follows: The parson demands eggs according to the custom. For same reason, the parishioner refuses to pay. "Very well," says the parson, "I'll sue you for tithes in kind." When he cools off and takes some legal advice, the parson sees that he has no chance of breaking the custom. He needs a plea that will "take back" his ill-conceived suit for tithes in kind but still insist that his just tithe was withheld. Why not let him so plead? Why not let a jury say whether the customary tithe was offered? There are, I think, two difficulties in that: (a) Juries had no business deciding the bare question whether tithes had been paid or offered. That question was within ecclesiastical competence. Upholding the Prohibition would not be ruinous for the parson, because he could start a new ecclesiastical suit for the customary tithe, pursuant to which the ecclesiastical judge could decide whether the parishioner had satisfied his duty by a proper offer to pay. (b) If the jury said an offer had been made, the Prohibition should presumably stand. But suppose it said no offer had been made. What then? The suit for tithes in kind could hardly be sent back by Consultation. For even if the parishioner wrongfully refused to pay the customary tithe, he ought not to be liable for tithes in kind. Therefore a "fancy" solution would be needed -- a qualified Consultation in effect requiring the ecclesiastical court to pretend that the suit before it was for the customary tithes. It is much simpler just to uphold the Prohibition on pleading grounds, as the Court did.

In Austin v. Clifton et al., 20 a traverse was challenged on a nicety of pleading, but upheld. A man had charged some land to answer for his taxes and public duties -- viz., at least to pay his Parliamentary fifteenths and 5/ per annum to the poor. The real issue in this case was whether, over and above those encumbrances, the land was charged to pay any surplus profits it produced for maintenance of the church. The churchwardens sued the landholder for such surplus profits. To have a Prohibition,
he set out the encumbrances for fifteenths and the poor and said that he was to have any surplus to his own use. The churchwardens pleaded as follows: The surplus profits were to go for repair of the church, _absque hoc_ that they were for the plaintiff's own use. The plaintiff demurred to this plea, arguing that the traverse (_absque hoc_ etc.) was bad. (The point is, I think, a refined one. The plaintiff's counsel made two arguments: that a traverse "waives" a plea in bar, and that the traverse here was directed at an "inducement" to the plaintiff's plea rather than the thing itself. Perhaps the following restatement catches the point: If we think of the affirmation as "waived," the churchwardens have no case. I.e.: Whether or not the plaintiff has the surplus to his own use, the churchwardens have no claim to it unless it is for repair of the church. In other words, the churchwardens must say something positive to make out a claim. The negation -- _absque hoc_, etc. -- could not stand on its own feet. But a good traverse must be able to stand on its own feet. A traverse in the _absque hoc_ form may be _explained_ by affirmative language, but must by itself deny the adversary's statement in such a way as to destroy his case. The negation must "go to the heart." Thus, its effect must not be merely to deny an introductory statement or conclusion, either of which could be falsified without destroying the adversary's case. Here the plaintiff's claim to prohibit the churchwardens from collecting the surplus profits could be valid even though he was not entitled to the profits for his own use.) The Court overruled this objection to the defendant's plea, pouncing on its evident weakness: What _could_ the defendant traverse, the judges asked, except the claim that the profits were to go to the plaintiff's own use? (This point may perhaps be spelled out as follows: The affirmation could not stand by itself as a plea in bar, because it implicitly denies that the plaintiff has the profits to his own use. An explicit negation -- an _absque hoc_ -- was therefore necessary. A mere negation -- without the accompanying affirmation -- could have been employed, but it would have negated the same thing, the only thing there is to negate, and would do so in less useful form than the present plea, which shows the positive basis for the churchwardens' ecclesiastical suit.) I conclude that the decision was correct in the purest pleading terms. I.e.: The Court did not overlook a doubtful pleading in the interest of justice; it overruled a fancy argument against a plea that could not be improved on. The report says that judgement was given against the plaintiff. I.e.: He was apparently stuck with his demurrer, so that the real dispute never reached a jury. In the light of the cases above in which defendants were allowed or encour-
aged to waive demurrers, that course may seem a little rigorous -- in this case on plaintiff-in-Prohibition. Possibly the plaintiff showed his hand all too clearly in taking a far-fetched demurrer -- i.e., suggested to the judges' intuition that he had no serious hope of winning on the facts.

The report of Dr. Bowles's Case does not give the Court's decision, but it serves to illustrate further the kinds of objections to defendants' pleas that could be made. In this case, a parishioner claimed the temporary tithe exemption for recently reclaimed land provided by 2/3 Edw.6. The parson wanted to plead that the land in question had not been reclaimed from unproductivity so as to qualify for the exemption. He said the land was "fructuosa et non stirrilis [sic]." The plaintiff objected that the proper plea would have been "The land was fruitful, absque hoc that it was sterile." I.e.: The plaintiff having said "sterile" or the equivalent, the defendant was bound to contradict him expressly. It would have presumably have been all right to say "It was not sterile" tout court. But having used one word -- "fruitful" -- which only by implication contradicted the plaintiff, the expressly negative language -- "not sterile" -- must be set off in an absque hoc clause. It would be interesting to know whether the Court allowed this point of elegance. The report says that the plaintiff moved his objection to the defendant's plea, not that he demurred. Assuming that it is not a mere manner of speaking -- i.e., that there really was no demurrer -- what did the plaintiff hope to gain? If the plaintiff persuaded the judges, would they do any more than delay the trial until the defendant amended his plea? One suspects a dilatory intention.

In Rochett v. Gomershall, a parson sued for tithes of furze. He said in his libel that he was suing for furze used as fuel (furze which the parishioner "convertebat in focale and combustible.") The parishioner surmised and declared that the furze had been burned in his "house of husbandry," and that furze so used was exempt from tithes by custom (upon the usual consideration when such discharges were claimed by prescription -- because heating the "house of husbandry" contributed to maintaining the "tithe-base"). The parson then pleaded as follows: The furze in question

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21 P. 22 Jac. C.P. Harl. 5148, f.18.
22 P. 7 Car. C.P. Littleton. 367.
was sold, *absque hoc* that it was burned in the parishioner's house as alleged. The parishioner demurred.

In support of the demurrer, counsel argued that the plea and the libel conflicted: Having sued for furze *burned*, he now buttressed his denial that it was burned as domestic fuel by saying it was *sold*. It was also argued that allowing the plea would be unfair to the parishioner. According to counsel, there were in fact two customs in the village, one covering furze burned domestically, and the other covering furze sold. (If you are reluctant to believe counsel on a statement of fact outside the record, it is enough to say, "Suppose there were two such customs"). The parishioner, being sued in terms for furze burned, naturally invoked the custom discharging furze burned as domestic fuel. If he had been sued for furze sold, he would have (or "Who knows but he might have?") invoked the other custom.

This argument sounds convincing, but the Court turned it down. In fact, I think, the Court was right. I suppose there is a sense in which the "cleaner" plea would have been a mere denial of the plaintiff's statement that the furze was consumed in his house. The appearance of conformity between the parson's libel and his pleading would thereby be preserved. But the pleading as it stands puts that question -- the only question raised by the parishioner -- in issue. The appearance of unfairness to the parishioner seems to me specious. Let us grant his version of the facts: Of the furze cut, some was burned in the parishioner's house; some was sold; none was burned anywhere else; tithes of furze sold were discharged by a separate *modus*. Now, trial of the issue raised by the defendant's plea as it stands could lead to any of the following results: (a) No furze cut was sold; all was burned in the parishioner's house. (Upshot: Prohibition stands.) (b) None sold; none burned in house -- i.e., all burned by the parishioner elsewhere. (Consultation) (c) Some sold; all the rest burned in house. (Result indeterminate. Either Consultation *quoad* the furze sold -- in which case the ecclesiastical court may decide whether the libel extends to furze sold; or Prohibition stands -- because the common law decides that the libel only extends to furze burned by the parishioner.)

The following points should be observed in connection with these possibilities: (i) The problem of what to do here only arises if one of several possible verdicts is returned. Why not get a verdict first and "cross that bridge when we come to it"? (ii) The libel is genuinely ambiguous. It can be read as a suit for "furze burned by the parishioner, i.e.,
Pleading

not sold," or as a suit for "furze taken out of the state of nature and converted to use as fuel, whether directly by the parishioner or by his harvesting and selling it as a fuel-product." The parishioner argued that he was entitled to read the libel in the first way, but that is not clear. He would at least have been better advised to allow for the other reading -- i.e., to claim the separate modus for furze sold if he had in fact sold some.

(iii) An excellent case can be made for allowing the ecclesiastical judge to resolve the ambiguity in the libel. Surely "What does the libel mean?" is an ecclesiastical question. We have, however, left the common law court to decide that question, should it consider the meaning of the libel open-and-shut and the risk of its being over-extended by the ecclesiastical court excessive -- in which case the parson would be driven to start a new suit for furze sold. (Justice Hutton said expressly that in his opinion the libel was good for furze sold -- i.e., that it should be read in the second sense above.)

(iv) Should the case go back to the ecclesiastical court quoad furze sold, the parishioner ought presumably to be allowed to rely on the separate modus applicable to that special class, notwithstanding his failure to rely on it in seeking a Prohibition. (Though he ought to have read the libel correctly, surely his failure to is understandable.) Could he have a new Prohibition based on that modus either because the ecclesiastical court would not allow him to plead it or because a custom subject to common law trial was at issue? 50 Edw. 3 would raise a problem here, though perhaps not an insuperable one. (There is no indication that the Court thought about this contingency.)

(d) Some was sold; some burned in house; some burned elsewhere by the parishioner. (Consultation as to that burned elsewhere by the parishioner; as to the rest, same questions as above.)

(e) All sold. (Same questions.)

In sum, it seems to me that the demurrer should have been overruled, as it was, because the defendant's plea pointed as well as the complicated structure of the case permitted to a resolution on the merits. The alternative plea, a simple denial, could ultimately have been less in the parishioner's own interest. (If the jury said "No, the furze was not burned in his house," a straight Consultation would probably have been unavoidable. Yet it would have been ambiguous what the jury meant by "the furze." All the furze cut? Only the furze burned by the parishioner? The common law would have less opportunity to consider whether the libel could reasonably be construed as extending to furze sold and to grant or withhold Consultation accordingly.) Having overruled the demurrer in
Rochett v. Gomershall, the Court granted Consultation. The effect of the demurrer was to admit that all the furze was sold and none burned in the parishioner's house. No question of waiving the demurrer was raised. If there was any chance of blocking the Consultation on the ground that the libel extended only to furze burned by the parishioner, I imagined the chances would have been better on motion after a verdict establishing the same truth. In this case as in others, demurring to pick holes in an *absque hoc* plea has a look of desperation.

In our last case on defensive pleas, a tithe suit was prohibited on the standard ground that the bounds of parishes were in question. To get a Prohibition on that ground, the parishioner had to say that the parson suing him claimed that the land was in A., whereas in fact it was in B., wherefore the bounds of parishes were in question. In this case, the parson-defendant answered such a statement with: The land is in A., *absque hoc* that it is in B. The plaintiff's counsel excepted to this traverse (without, apparently, demurring). All the report says is that the Court overruled the exception and upheld the traverse. I can see no reason for doing otherwise. What would be a better plea? Simply "It is not in B." could presumably lead to a verdict for the defendant if the jury thought it was in C. (but not A.). But the defendant ought not to have a verdict unless the land is in A., his parish which is what he offers to prove by pleading as he did. Again, one suspects that shooting at the pleading was a forlorn hope or a delaying tactic.

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23 H. 12 Car. C.P. Harg. 23, f.6.
24 In connection with the cases on defensive pleading, we may note one in which, instead of the plaintiff demurring to a traverse, the defendant demurred to a replication (plaintiff's plea responding to defendant's "confession and avoidance.") Matingley v. Martyn (P.8 Jac. K.B. Jones, 257) is deferred for its principal point. The case was decided in the defendant's favor on substantive grounds. That conclusion was reinforced by a pleading point against the plaintiff. Full explanation is impossible without going into the complexities of the case. In effect: the Court held that an *absque hoc* traverse (of the defendant's plea, by the plaintiff) was bad on several grounds, essentially because it did not cleanly negate the central point of the preceding plea. Refined pleading considerations were used to shoot down a traverse -- but in a tangled case where, with some difficulty, the Court had managed to persuade itself to go for the defendant on the substance. Two judges inclined the other way on the merits were presumably willing to overlook or get around the objections to the traverse.
VII.
Consultation on Motion

Summary: In practice, Consultations on motion were very common. Before ca. 1590, there was probably some doubt about the propriety of reversing Prohibitions without formal pleading, but on several occasions in the '80s the practice of doing so was upheld in general terms, and thereafter it was hardly questioned. Firm criteria as to when Consultation on motion should be considered and when full pleading should be insisted on where never evolved. The Jacobean courts probably assumed the freest discretion to act on motion, even when doing so required information from outside the record.

* * *

We have seen numerous instances above of Consultation granted on motion. It was common enough for Prohibitions to be granted when they should not have been -- on too hasty consideration or without adversary debate. In that event, the defendant could in practice move for Consultation. In cases within 2/3 Edw.6, properly granted Prohibition were required by statute to be reversed by Consultation for failure of preliminary proof. Consultations pursuant to the statute were ordinarily obtained on motion, as the statute surely demanded. 50 Edw.3, roughly speaking, banned more than one Prohibition in the same suit. Parties were allowed to move for Consultation on the ground that the record showed they had been once prohibited and then erroneously prohibited again, after the first Prohibition had been undone by Consultation. In short, Consultations on motion were a reality.

In theory, however, Consultations on motion could be questioned. Ruling out that maneuver would drive the defendant to plead to the declaration upon Attachment, a more cumbersome way to the end of arguing that the Prohibition was misgranted and should be undone. In addition to being more cumbersome for both parties, that course was more dangerous, especially for defendants, because of the possibility of being caught in an admission. It would be foolish, no doubt, to allow that effect in some circumstances, and possible not to. Even so, once one is in the toils of common law pleading there is a risk of getting caught. The courts would at the least have had to devise forms of excepting specially in deliberate pleading -- i.e., for raising special objections without fatal admissions.
Time would have been consumed in arguing over niceties. (We have just witnessed some dubious efforts to shoot down the defendant on pleading points. Increasing the role of formal pleading for the defendant would surely have multiplied such attempts.) In every way, Consultations on motion were a useful economy. Nevertheless, a theoretical case against them can be made: A Prohibition is a writ. Once granted (one may argue), a Prohibition is like any other writ -- i.e., like a Chancery writ. Once a writ had gone forth against you, you are committed to the process that emanates from it -- in the case of a Prohibition, to the choice of obeying, or else disobeying, suffering Attachment, and challenging the Attachment in due form. If a writ of Novel Disseisin issues against you, you may not go around to the back door and claim the it should never have issued -- however convincing your reasons. You must abide the process on the writ -- appear, plead, etc. Why should a Prohibition be any different?

This argument, as I say, is theoretical. It may have been given passing consideration in the late-16th century. Thereafter, the Consultation on motion was an established institution. The scope of the procedure sometimes came in question, however. The shadow of the theoretical argument against it perhaps did not disappear. Sometimes the courts hesitated as to whether to allow legal exceptions to Prohibitions on motion, or to insist that the defendant demur. They could not accept the motion as a fully respectable equivalent of the demurrer-in-law. Secondly, since Consultations on motion were basically accepted, defendants sometimes tried to push them too far -- or arguably too far. That is to say, they sometimes tried to smuggle in a few facts outside the record and move for Consultation so long as no one on the other side was heard to contradict those facts. The question then arose whether under any conditions Consultations could be granted on motion on the basis of facts not appearing of record. (Such facts as failure of proof within six months or a prior Consultation in the same case of course appeared by the record of the Court.) We turn now to a number of cases on the propriety of granting a Consultation on mere motion.

Three Elizabethan holdings come to sustaining the general proposition that Consultations upon motion are permissible. In none of the reports is the theoretical argument against them spelled out. The holdings appear, however, to be responses thereto. I conclude that in the 1580’s it was se-
Consultation on Motion

riously, though unsuccessfully, argued that Consultation may never be granted on motion, but only after demurrer or trial.

The first report comes in the case of Sutton v. Dowse (1583). In this case, a Consultation was sought on motion and in the end denied on the merits. (We may omit the substance here.) The reporter adds that the judges also agreed that motions for Consultation are appropriate: A defendant who wants to except to the sufficiency of a surmise on its face does not need to demur, "but as amicus curiae he shall shew the same to the Court, and the Court shall discharge him." For the judges to have agreed on this publicly, the opposite -- need for a demurrer in all circumstances--must have been urged on the plaintiff's side.

The plaintiff's lawyer in Sutton v. Dowse was Coke. It was presumably he who advanced the general argument against Consultations on motion. Our next report shows him going the other way. (Of course there is no contradiction. In Sutton v. Dowse he was arguing for his client. In the later report, he was either arguing for another client or -- more probably --just advising the Court.) According to this report, Coke said to the Court: "The common course of this Court is and always has been, and the law is clear thus, that if a man sues in spiritual court and defendant afterwards sues Prohibition and has it allowed, and makes insufficient surmise and insufficient proof in law to prohibit...the Court here will grant Consultation although the party does not demur...and that ex officio..." All the puisne Justices (Chief Justice Wray being absent) agreed with Coke's statement of the law.

The following points are to be observed: (a) Coke was speaking to the Queen's Bench and referring to the established practice of that court. Sutton v. Dowse was in the Common Pleas, where allowing Consultations on motion may have been less well- established. But however well-established the practice was in the Queen's Bench, some objection must have been made, or some puzzlement expressed, to call forth Coke's re-

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1 M.25/26 Eliz. C.P. 1 Leonard, 10 (A M.S. report -- Harl. 6687, f330b -- does not contain the holding on Consultations on motion in general. Otherwise it agrees with Leonard and adds the detail that Coke was counsel for the winning side
2 T. 30 Eliz. Q.B. Harl. 1331, f.53; Harl. 15, f.176. (Quotation from Harl. Harg. states the point more summarily.)
marks and the judges' agreement. (b) Coke mentions unproved surmises as well as legally insufficient ones. This suggests the possibility that even Consultations on motion for failure of preliminary proof were questioned. The more serious possibility, I think, is that 2/3 Edw.6 was the entering wedge for Consultations on motion. The statute says that in the event proof is not supplied within six months defendants-in-Prohibition "shall upon his or their request and suit without delay have a Consultation granted." If that language does not absolutely require Consultations on motion, it comes awfully close. It is possible that a fund of "precedents" was accumulated in the first instance from motions pursuant to 2/3 Edw.6, in the face of which it was difficult not to entertain motions on other grounds. It seems anomalous to let Defendant A discharge a perfectly good Prohibition on motion for failure of proof—possibly only after debate on a difficult question of the statute's scope—while forcing Defendant B to spend his time and money on formal pleading to point out an utterly worthless Prohibition. (c) Note the phrase "ex officio" in Coke's remarks, and "amicus Curiae" in Sutton v. Dowse. The public nature of Prohibitions could redound to the defendant's benefit as well as the plaintiff's. It would be anomalous to regard only plaintiffs as "informers in the public interest." If plaintiffs qua "informers" should be free to drag their opponents through three appeals before seeking a Prohibition, or prohibit their own suits, or call on the Court to help them out of misconceived claims, should defendants not be allowed to inform the Court of its oversights with a minimum of procedural fuss?

In Bishop of Landaff v. Slugge, a Consultation was sought on motion, and again there was apparently some discussion of the propriety of the procedure. All the reported arguments are on the merits of the motion, and may be omitted, but the Court is said to have agreed unanimously that "the Judges use, if the suggestion be not sufficient to maintain the Prohibition, to grant a Consultation without any formal demurrer...if the insufficiency of the suggestion be manifest." Coke was arguing against the Consultation on the merits, so if objection to proceeding

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3 T.31 Eliz. Q.B. 1 Leonard, 181
on motion was raised by counsel, it is probably he who raised it, notwithstanding his remarks in the last report.

Beyond the early reports above, there are several cases in which the question whether to grant, or consider granting, a Consultation on motion arises, directly or indirectly. In Nicholls v. Small, a parishioner was sued for tithes of his garden produce. He surmised a *modus* to pay 1d per year for tithes of his garden. The parson moved that the surmise was bad for failure to say that the garden in question was "ancient." I.e.: By the defendant's theory, the *modus* should be applied to a particular piece of ground that had always been a garden. It is not a valid *modus* to pay a fixed sum for garden produce wherever the garden is planted however large it is. According to the reporter, the Justices who were present "seemed to agree" (Justice Clench and Chief Justice Popham were absent.) The reasons for the rule urged by the defendant are good: The plaintiff relied on a common custom -- a trivial payment, "garden-penny," appropriate to a small kitchen-garden. To let such a nominal commutation discharge the product of a greatly expanded garden -- even a commercial truck-farming operation -- would be unfair.

The Court in Nicholls v. Small did not, however, grant a Consultation, or quash or deny the Prohibition. (It is not clear which it was asked to do.) Rather, Justice Gawdy said to the defendant's lawyer "Demur on it." He said this, according to the report, because the plaintiff's attorney offered to stand on the prescription as stated. We do not have in this case a discussion of Consultation on motion, or any assurance that a Consultation was sought. We do have an instance of advice to demur, or apparent unwillingness to dispose of a bad surmise informally. Why were the judges disinclined here and now to say "Consultation," or "The Prohibition is null," or "No Prohibition"? I would not attach importance to the lack of a full Court. Two judges may not have wanted to act themselves, but they could have put off action by an adjournment. It was not necessary to advise demurring. The report suggests that the plaintiff's stubbornness was decisive. The judges plainly said to the plaintiff's attorney, "Why don't you amend you surmise and add ancient garden? We'll give you the chance." He plainly answered, "No, we'll stand on it as it is."

4 M. 42/43 Eliz. Q.B. Add. 25,203, f.265b.
Why then should Justice Gawdy turn to the defendant's counsel and say "Demur" (with the implication "We think your chances on a demurrer would be very good")? Why not say to the plaintiff, "Very well. No amendment, no Prohibition" (or "If you won't amend, the defendant will have a Consultation")?

Two explanations seem possible: (a) Plaintiff-in-Prohibition always has the option of forcing a formal demurrer. Disposition of cases on motion is acceptable if both parties are willing, but the plaintiff may stick by his guns if he chooses to. (This theory only makes sense if the Prohibition has already been granted -- as I think it probably had been in Nicholls v. Small. It is clear that no one had a right to a Prohibition in the first place without showing cause. Judges might grant a Prohibition when in doubt about the surmise's merit in order to bring on full debate, but a man certainly had no right to a Prohibition just because he insisted on one. Once the Prohibition was granted, however, it would be possible policy to say it will never be quashed or undone on motion without the plaintiff's agreement to an informal mode of proceeding. Such a policy would express the idea I suggest above -- that a Prohibition is a writ like any other, hence that a man with a writ in his favor is entitled to hold the other party to the procedures the writ entails.)

(b) If the Court is in doubt, or thinks that an issue worth debating has been raised, it should hold out for a demurrer, or at least wait on demurrer if either one of the parties so prefers. In other words, disposition on motion should be confined to open-and-shut, easy, or practically inconsequential cases -- at least unless both parties clearly agree to "have it out" pursuant to a motion. (Thus if the Prohibition has been granted. If the question is whether to grant in the first place, the rule might be as follows: If the judges think a surmise is dubious, but that a full debate would be desirable, they may grant the Prohibition; but they should do so with the intent of raising a demurrer; they should not grant a doubtful Prohibition with the thought of possibly turning around and undoing it on motion -- at least not without the parties' clear agreement to take the motion as solemnly as a demurrer.) This policy is so much the way of reason that in one sense it must be regarded as inevitable (unlike Policy-a above). I.e.: If the Court is in serious doubt, it must want full debate for its own ex officio purposes, not to mention fairness to the parties as private litigants. It should not grant Consultation on a mere ex parte motion.
Consultation on Motion

unless it is very sure the Prohibition ought never to have been granted. Similarly, it should not confuse casual or unprepared debate on a motion with full-dress debate. It does not follow, however, that full-dress debate should be exclusively associated with debate on demurrer. It does not follow that either party should be free to insist on a demurrer on the ground that he cannot be expected to show his best at any earlier stage. It is reasonable, for the sake of orderliness and conformity with ordinary common law actions, to say that ultimately adequate debate can only take place on demurrer, but it is not inevitable.

In Nicholls v. Small, the plaintiff does not seem to have been represented by counsel, only by his attorney. (The American usage of "attorney" for any sort of lawyer does not of course apply in present-day England, much less in the 16th century, when the professional distance between counsel and such ancillary practitioners as attorneys was greater than the comparable modern barrister: solicitor distinction. The plaintiff in Nicholls v. Small was not represented by anyone with the standing or putative competence to debate the merits of the surmise.) Therefore, if the Court was in doubt and wanted a debate, it must wait until another occasion. But "Demur" need not follow. Debate on a motion in full court at a later date, the plaintiff being notified, would do the practical trick. "Demur" may therefore imply a preference for putting full-dress debate in that context -- a reasonable preference, but not a necessary one (and as we have seen, demurrers had their disadvantages.)

The final question to ask about Nicholls v. Small is whether it is at all likely that the judges were in doubt about the merits. The reporter say they "seemed to agree" with the defendant's counsel, as if they sounded hesitant. My guess would be that their state of mind fell somewhere between legal doubt and the sense that a visibly deliberate decision would be practically useful. Modi such as the one the plaintiff's attorney chose to stand on -- 1d for the garden, whatever its place and size -- look unreasonable from one angle. But they are a little puzzling. Is it not possible that a man could have paid a fixed sum for his garden from time immemorial while moving the garden about from year to year? So long as the garden stayed about the same size, is such a custom necessarily unreasonable? Perhaps "garden-penny" can be good without being applied to a particular "ancient garden." Perhaps it belongs to the parson to show that a parisioner's gardening has changed so significantly in nature and scale.
that the old commutation is no longer appropriate. So much for the legal doubts. On the other hand, the judges were at least inclined against the plaintiff's surmise. They could have been strongly so inclined and still want a deliberate decision. For suppose they thought that just what the plaintiff was attempting should be decisively struck down. The attorney must have had a reason for refusing to amend. The garden must at least have changed location within memory.

Perhaps more was at stake. Truck-gardening for the London market, like the cattle business, was a "growth industry" at the end of the 16th century. Perhaps the plaintiff knew exactly what he was gambling on -- viz. making an ancient trivial commutation stick, so as to keep the produce of a commercial operation tithe-free. Perhaps the judges had no doubt that the gamble ought to fail, but wanted it to fail upon debate, to set a precedent and discourage other truck-farmers. The important thing would be a debate -- something to attract attention in the legal community -- but as a pure "precedent" a judgment upon demurrer would be even better. Hence, on one construction, there is a reason in the circumstances of this case -- without implying much beyond it -- for "Demur," in preference to "Move again when counsel for the plaintiff are present." On the same construction, "Demur" may be thought of as intended for the plaintiff's ears, though addressed to the defendant -- as if to say "We encourage you to demur in order to let us set a strong precedent against the kind of mischief the plaintiff insists on making against our advice" (to be understood by the plaintiff as "We've warned you that you're headed for a fall. You'd better reconsider your project of making this modus stick -- better take some proper legal advice before you declare. For if you push ahead you're going to have to fight your case on demurrer against all odds.")

In Henry v. Soame, a Consultation on motion was denied on the ground that it could not be granted without stepping outside the record. A parson sued for tithes, some of which the parishioner acknowledged to be due. Sentence was then given for the parson, apparently with respect to all the tithes. After the ecclesiastical suit had been prohibited in toto, the
parson tried to get a Consultation on motion covering as many of the tithes as the parishioner had acknowledged. The Court denied the motion on the ground that it had no way of knowing from the record that the acknowledgment had been made. The parson was told to plead the acknowledgment, after which the Court would give him an answer.

In the most basic sense, the correctness of this sort of decision is beyond doubt. The courts obviously could not assume disputable facts on a party's say-so. What they could do would be to investigate facts of the sort that could be easily ascertained informally. Here, the certificate of the ecclesiastical court, or perhaps careful inspection of the sentence, would supply the needed information, if the judges were strongly disposed to grant Consultation on the parson's version of the truth. Perhaps they were not, for their language was hardly encouraging. They did not tell the parson he would certainly have a partial Consultation if the acknowledgment was duly pleaded and confessed or found in his favor. They told him to plead, then "we'll see." It is probably not self-evident that Consultation should lie even though the parishioner had beyond question acknowledged the tithes in the course of ecclesiastical proceedings. A court might hold that the parishioner was free to dispute whether the tithes were actually due in Prohibition proceedings, notwithstanding the acknowledgment and the sentence partially pursuant thereto. If the judges were uncertain about that point of law, their inclination to wait and see is the more understandable.

In the later Jacobean Pitt v. Harris, a judge's refusal even to consider a Consultation on motion can perhaps be linked to his suspicion of the motives and probable justification of the party moving. The ecclesiastical suit in this case was for tithes of rakings. It was prohibited on the ground that rakings were exempt de jure unless the parson expressly alleged that they were fraudulently excessive. On the occasion when the Prohibition was granted, Coke said that "he did not like such greediness." (In other words I take it: "I am happy to have this chance to prohibit one of those greedy parsons who try to squeeze the last drop out of the tithe-payer by unwarrantable suits for by-products.") On a later day, Serjeant Finch, for the defendant, told the Court that "the party [parishioner] makes great
gain by it, for he carries it into his barn." Coke replied, "The Prohibition is now granted, and therefore plead if you want to have Consultation."

As reported, Finch's remark does not make much sense. Coke's reply, on the other hand, is a clear refusal to consider a Consultation now, so that must be what Finch was asking for. I can only suppose that Finch was in some way saying that the parishioner was fraudulently counting tithable hay or corn as rakings. Perhaps "he carries it into his barn" means "he has gathered up his so-called 'rakings' by the cart-load -- obviously they are not honest rakings." It looks as if Finch was introducing new facts, thus raising the question whether a Consultation should ever be granted on motion on the basis of facts outside the record. Obviously such as Consultation could not be granted on Sergeant Finch's bare say-so. He was presumably requesting the Court to take informal verification-measures -- either to examine the party or to ask his counsel whether they would dispute that the rakings were excessive. (As to the latter: Counsel could be asked "Will you stipulate that the rakings were excessive in fact and nevertheless try to uphold your Prohibition in this case as stated?" If they say "Yes," argument on "this case as stated" could proceed on motion for Consultation. I shall show why the plaintiff's counsel might be willing to make such a stipulation.)

If we visualize a rakings case, Finch's proposal will perhaps not seem unreasonable: The parson sues for rakings by that name, alleging no fraud in his libel. The parishioner gets a Prohibition by invoking the de jure exemption -- merely pointing to the libel. I.e.: He does not allege in his surmise that the rakings were left behind despite due care and honest intent. Serjeant Finch now figures that he has two strings to his bow. (1) An argument -- probably weaker than the argument contra, but, as we have seen, possible on some authority -- that the parishioner ought to have alleged that the rakings in question were honest. (2) Strong evidence that they were not in fact honest. His obvious course is to plead the facts formally. But how sure-fire is that? First, there is the risk that every parson runs with a jury of tithe-payers -- and perhaps a "greedy" claim to rakings would run a special risk. But even waiving that, trusting the overwhelming evidence -- will the parson necessarily win even if fraud is established by verdict? Is it arguable that the parson is out of luck in a rakings case unless he has alleged fraud in his libel? I.e.: May the parson plead fraud pursuant to a Prohibition when he has neglected to rely on it
from the outset? Given these legal questions, a motion for Consultation begins to make sense. Finch would like to make a pleading argument against the surmise, but he dares not risk everything on that and throw away his strong facts. Yet he is not sure that the facts will help him. Why go to the trouble of further pleading? Why not try to convince the Court -- and, with a little help from the Court, the other party -- that the facts are not seriously in dispute, that the real questions are of law and might as well be discussed here and now? It is in everybody's interest to avoid waste, and waste will be inevitable if formal pleading is insisted on. For if the plaintiff is forced to declare, Finch will not demur on the pleading point -- through he might reserve it for a last-minute motion in arrest of judgment. If the plaintiff is forced to declare, Finch will plead the fraud.

The plaintiff might then raise the legal issue by demurring to the plea. But perhaps he will want to try his luck with a jury (assuming reasonably that the Court will let him take advantage of his legal point on motion if he loses.) So there would be an unnecessary trial, and in the end a legal debate on motion anyhow! In sum, it is to Finch's advantage to show his evidence now and stimulate legal argument on a motion; it is arguably to the Court's advantage to consider whether the case could not be abbreviated; even if the facts in Finch's favor cannot be established positively by informal means, the plaintiff may believe enough in his legal case to stipulate the facts against him and save himself time and risk. For these reasons, I can see color in a motion for Consultation on a likely construction of the reality.

Coke, however, said "No." He told Finch to plead the facts in his favor. That is not necessarily to say that the facts would help him -- only that he had better try that if he wanted to make a case for Consultation. The interesting question upon Coke's opinion is whether it signifies anything about the general acceptability of Consultations on motion. I would make three observations: (a) Hostility to Consultations on motion as such cannot be inferred from unwillingness to go outside the record for facts. It is one thing to entertain such a motion on a pure point of law, sidestepping demurrer; another thing to take informal steps to establish the facts in order to sidestep a plea in bar. (b) Coke's opinion might be given some weight as authority against such expeditions outside the record. (c) His earlier remark on the "greediness" of parsons suing for rakings vitiates the
opinion as authority even for that. He may have thought that a parson who first sued for rakings without saying anything about fraud and then came crying "Fraud" was intrinsically suspect. His first motive was greed, not an honest belief that the parishioner had cheated him. His afterthought -- finding his hope of bullying the parishioner frustrated by a Prohibition -- was to bring in a claim of fraud by irregular means. Instead of abiding the consequences of his original decision, he hoped to force the case into the shape it would have had if he had alleged fraud in his libel. It is conceivable that in other circumstances Coke would have been less unfavorable to an "expedition outside the record."

The case of Gilby v. Williams is noteworthy as evidence of reluctance to grant Consultation without formal pleading. The ecclesiastical suit was of an unusual sort: A vicar alleged that there were two churches in his parish; for as long as sixty years past, the vicar said services in the two churches on alternate Sundays; more recently, he had agreed with his parishioners to say services in both churches every Sunday; in return for the extra work he was to have 40/ [per year, presumably] from each of the two villages to which the two churches belonged, the sum to be taxed on the inhabitants. The present suit was against an individual parishioner for 4d representing his share of the tax. A Prohibition was obtained on the ground that the prescriptive claim in the libel was not founded, as far as the language of the libel showed, on immemorial usage. I.e: The vicar claimed the right not to serve both churches every Sunday. He claimed to have relinquished that right in consideration of the payment for which he was suing. He claimed the right by usage, but not by immemorial usage. By the theory of the surmise, (a) the usage must be immemorial for the right to be valid and (b) the right must be valid for the money to be due.

In the event, the Court reversed the Prohibition by Consultation. It justified doing so without formal pleading as follows: "And for that the suit was before the prohibition and affirmed in the appeal, a consultation was granted without enforcing him to appear and plead to the prohibition." It justified the Consultation on the merits by saying (a) that the suit was in effect for a "spiritual pension" and, as such, within ecclesiastical jurisdic-

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7 P. 21 Jac. K.B. Croke Jac. 666.
Consultation on Motion

tion; (b) that the usage for up to sixty years would be presumed immemo-
rial until the contrary was shown. The explicandum here is why the judges
thought it necessary to justify the Consultation on motion by reference to
the plaintiff's delay until after appellate sentence against him. They seem
to say, "We really ought not to undo this Prohibition without pleading, but
we will because the plaintiff has already subjected the defendant to pro-
tracted ecclesiastical litigation." Why should they say that, when they
thought the Consultation was due and there was no question of relying on
facts outside the record? Does the judges' conduct militate against Con-
sultations on motion in general?

I suspect it rather militates in favor of the rule "Do not grant Consult-
ation on motion unless you are sure." The very unusualness of this case
probably meant that the judges did not feel quite sure. Their basic view
of the case, I think, was that the vicar's claim appertained by its nature to
the ecclesiastical court, and that therefore the suit should be prohibited
only upon a showing of error. So, that is to say, they would have seen the
case if the Prohibition had been sought as soon as the ecclesiastical suit
was started. As it was, two ecclesiastical courts had made decisions for
the vicar. The error, if it was one, of upholding a non-immemorial pre-
scriptive right had been committed. But whether there was any error is
surely a question of some complexity: (a) For the vicar to have had any
claim to the money, must it have been promised in consideration of relin-
quishment of his right (not long-standing practice) of alternating
churches? (b) Could such a right exist only by virtue of prescription in
the common law sense (as opposed to the ecclesiastical sense, whereby
sixty years was more than enough to establish titles)? (c) Whatever the
true answer to these question, was resolving them clearly beyond ecclesi-
astical competence? (d) Granting that it was, and that the answer to the
two preceding question is "Yes" -- even so was there any error? I.e.: Did
the ecclesiastical courts decide not to apply the common law standard of
prescription when confronted with evidence against the usage from more
than sixty years ago? Or did the question simply never come up? Is it er-
ror for any ecclesiastical court to give sentence for A when A pleads the
wrong kind of prescriptive title (ecclesiastical-type instead of immemo-
rial), but when there is nothing to suggest that the other party tried to of-
fer evidence going beyond the ecclesiastical period?
The court in Gilby v. Williams answered the last of these questions: In the absence of any showing to the contrary, sixty years' usage should be presumed immemorial. (Possible generalization: to have a Prohibition, it is not enough to say that your opponent relied on an inadequate prescriptive title in the ecclesiastical court; you must say specifically that he would not have been able to sustain an adequate one.) Even that point, however, might be problematic enough to warrant full debate -- ideally, or in other circumstances. The other question would surely warrant it. Full debate would not necessarily require pleading. For all that appears from the report, the plaintiff may not even have been represented by counsel; the Court may have been justifying Consultation, under the circumstance of the plaintiff's delay, on the defendant's motion merely, without any adversary debate. I think that unlikely, but the possibility exists. In any event, proportionately as the legal question were complex, debate in formal setting was the more to be recommended -- in principle. In practice, the plaintiff had not thought of a Prohibition until losing on ecclesiastical appeal. When he got around to a Prohibition, he raised a tangle of issues most disproportionate to the 4d at stake in the suit. (Cf. the cases above on Prohibition sought after ecclesiastical appeal.)

Gilby v. Williams tends to make Consultation on motion an act of discretion, rather than something ordinarily to be considered in the absence of distinct reasons against doing so. Parish of Aston v. Castle-Birmidge makes the same point with a different emphasis, for here the Court assumed a conscious discretion to grant Consultation on motion on the basis of facts outside the record. The case was a standard one: Some parishioners were sued for a rate to repair the church. They got a Prohibition on surmise of a prescriptive discharge in consideration of repairing a chapel-of-ease instead. The defendant's normal recourse would have been either to traverse the prescription or to pick legal holes in it as stated. The defendant (Parish of Aston) was allowed, however, to introduce evidence upon a motion for Consultation. The evidence was of a sort hardly amenable to contradiction. The Parish showed: (a) an ecclesiastical sentence from 16 Eliz. requiring the plaintiffs ("men of Castle-Birmidge") To con-

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8 Hobart, 66. Undated. Probably Jac. C.P.
Consultation on Motion

tribute toward repair of the main church; (b) an ecclesiastical sentence of 30 Eliz. requiring certain men of Castle-Birmidge to assume the office of churchwarden in the main church (whereas in their surmise the plaintiffs had said that the chapel had its own churchwardens and other privileges -- an attempt, common in such cases, to show that the chapel was quasi an independent parochial church.) Further evidence of the same order, wholly or partly conflicting, was also introduced (by whichever side): (a) Five ecclesiastical sentences in favor of the men of Castle-Birmidge. But all five had been reversed on ecclesiastical appeal! (b) An acquittance from 11 Eliz. for a contribution made by Castle-Birmidge for the repair of Aston church, the said acquittance reciting that the money was received "as a benevolence and not of duty."

In the light of this evidence, the Court granted Consultation. The following points are to be observed: (a) The Court emphasized the discretionary character of its act and the special circumstances of the case: "...for though the surmise were matter of fact and triable by the jury, yet it is in discretion of the Court to deny a prohibition, when it appears unto them that the surmise is not true, and especially in a case of this nature, when the delay of reparation may turn to a final decay of the Church, and the intolerable charge of the parishioners both in repairing and in suit, for the suit in this case had cost already (as was said) three-hundred pounds."

(The uncontradicted statement that the suit had cost that much must be taken as a further fact outside the record by which the Court was moved.)

(b) The evidence that moved the Court no doubt ought to have moved a jury. But it is challengeable with respect to its decisiveness and completeness. I.e.: Should the ecclesiastical sentences be given great weight -- not to say decisive -- against the alleged prescription? Castle-Birmidge no doubt relied on usage in all that ecclesiastical litigation, but how much should ecclesiastical decisions against a prescriptive claim (which perhaps the ecclesiastical court ought not, properly speaking, to try) count against its "real" validity? Is it significant that so far as appears Castle-Birmidge had never attempted a Prohibition before? Granting that the ecclesiastical decisions deserved great weight, should they outweigh other evidence of the sort that might be taken into account by a jury (oral testimony and the jurors' own knowledge) but could not be put before the Court as undisputed truth? In sum, was the Court in Aston v. Castle-Birmidge riding a reasonable hunch too far? Was it assuming a perhaps justi-
fiable prerogative to step outside the record but abusing it -- for is it true in this case that a jury could not find for Castle-Birmidge without blatant fraud or inexcusable credulity?

From the way the Court's opinion goes on, I suspect the judges were sensitive to the criticism implied in those questions. Their decision is not quite so crude as saying "No responsible jury could find for Castle-Birmidge, so we will grant a Consultation without trial." Aside from stretching a point to avoid financial hardship on ordinary people and the decay of churches, the judges seem to me to have softened the edge of their decision in the following ways: (i) Consultation on motion would have been far less controversial if it could have been argued for on legal grounds. That was not straightforwardly possible here. There was, however, a sense in which Castle-Birmidge's claim was less than airtight. The reporter's statement of the case says that the chapel performed all the functions of a church, including the sacraments; that it had its own churchwardens; that the "precinct" of the chapel was regularly perambulated (the Rogation Day perambulation was a standard parochial practice); that the Vicar of Aston provided a curate for the chapel; that the chapel did not have a graveyard, but inhabitants of the "precinct" were buried at Aston. I take it that all these points appeared from the surmise. They show what Castle-Birmidge was shooting at: to establish its virtually parochial status. The attempt has one or both of two meanings: to serve in lieu of a sufficient prescriptive title, or to enforce the "consideration" for the prescriptive discharge. I.e.: Conceivably a true "quasi-parish" could claim a de jure exemption from repair rates in the proper parish to which it belonged. More likely, "quasi-parochial" status would tend to justify an inference of prescriptive discharge in the absence of sufficient evidence of non-contribution to the "mother church," or in the presence of evidence of occasional contribution.

On the other side, it was questionable whether contributing to the upkeep of any chapel, however immemorial, was good consideration for discharge from ordinary parish rates. If the chapel was little more than a place to pray or get in out of the rain, one's chances would not be very good. In other words, it would not be presumed that regular users of the parish church were let off scot-free for doing something mainly for their own benefit and hardly at all for the parish's. If, on the other hand, the
Consultation on Motion

Chapel functioned virtually as a full church, one's chances would be good. A second church relieved the strain on the main church, or at least enriched the religious facilities of the parish. Maintaining it was therefore a benefit to the parish as a whole, and the frequenters of the chapel would derive no great benefit from any rates they were forced to contribute to the main church. Now, the Court in Aston v. Castle-Birmidge pounced on the two facts that were not favorable to the plaintiffs: the lack of a cemetery at Castle-Birmidge and the curate. The former went to show that Castle-Birmidge was less than a quasi-parish, even if it came pretty close. The latter -- a separate curate -- was no doubt intended by the plaintiff to elevate the chapel's standing, but then he was only an appointed curate. As the Court said, the Vicar could let the curate go if he liked and serve the chapel himself. (An endowed or perpetual curate -- a quasi-benefice attached to a quasi-church -- would have looked better.) Ergo, said the Court, "they were to all purposes part of the parish of Aston, and therefore de communi Jure, were liable to reparation with the rest."

This remark must not be taken out of context, however. The context was created by the evidence against Castle-Birmidge whereof the Court was taking notice. The judges were clearly not saying: "We can forget the ecclesiastical sentences and other evidence and still dismiss the Prohibition, because Castle-Birmidge has undertaken to show its quasi-parochial status in pleading and failed." Rather, I take them as saying: "We may in this case grant Consultation on the basis of evidence which strongly undercuts the prescription, even though it may not destroy it decisively. For besides the apparent weakness of the plaintiffs' jury case, there is at least reason -- supplied by their own admission -- to question whether their legal case is strong enough to prevail in the end.

Even if, contrary to the clear reality, their evidence in straight support of the prescription (non-contribution to the church, contribution to the chapel) were very strong, there would still be a question whether contributors to a chapel who are free to use the church and must do so for burial can escape parish rates. Even if we disregard the ecclesiastical sentences, the plaintiffs' attempt to make out quasi-parochial status suggest the need to -- i.e., that they do not have much straight evidence for the prescription (such as testimony or documents relating to really old practice.) They trust in its being inferred from the fact that the chapel has
been an independent 'going concern' in recent times. Yet by their own admission it is not fully independent, and a jury that wanted to take it as such and so find the prescriptive title might have to be checked,"

(ii) The Court was careful to give Castle-Birmidge a chance to show its evidence and to rebut the one piece of favorable evidence it could produce. As the Court said, "the proof lay on their [the plaintiffs'] side' -- i.e., in a trial upon a traverse, the plaintiffs would be expected to show something in support of their prescription. In practice (subject to the still-existing problems of the judge's power to prevent a jury from relying on its own knowledge against the evidence), Aston could sit on its ecclesiastical sentences, confident that it would win without them if Castle-Birmidge could produce nothing. Proceeding upon the motion for consultation, the Court accordingly invited Castle-Birmidge to show what it had. The court was careful to avoid asking itself simply, "Which party would be likely to win upon trial?" It also asked the stricter question "Is there any likelihood that the plaintiffs can sustain the burden of proof?"

Had the plaintiff produced substantial evidence, perhaps the motion would have been denied in spite of the Court's conviction that the defendant's evidence was much better and more likely to prevail in the end, As it was, all Castle-Birmidge produced was the acquittance of 11 Eliz. Against that, the Court made two points: First, the language of the acquittance ("as of benevolence and not of duty") was only the language of the two receivers who had written it. As the judges said, "...the folly of two men could not change the right nor bind the parish." Secondly, the acquittance had been pleaded and overruled in the ecclesiastical suit of 16 Eliz. One might add the obvious point that was no doubt understood: The acquittance went to show that Castle-Birmidge had contributed to Aston, even though it had claimed not to do so as an obligation, and the claim had been accepted by two dead-and-gone collectors whose honesty and knowledge were anyone's guess. Thus, the plaintiffs were invited to show evidence and produced worthless evidence.

The acquittance need not, of course, exhaust the evidence that the plaintiffs might ultimately produce. They were in effect allowed to show their evidence of the type amenable to evaluation by the Court -- documentary evidence. The Consultation could probably not be justified merely by the plaintiff's lack of convincing prima facie evidence. But it
Consultation on Motion

could be given weight in the context created by the defendant's good negative evidence and the legal doubts surrounding the plaintiffs' case.

On the whole, Aston, v. Castle Birmidge: (a) is too special to provide much of a lead in other cases; (b) does, however, count against the proposition that going outside the record is never justified upon a motion for Consultation; (c) gives a kind of countenance to the view that every Consultation on motion (save perhaps for such special cases as failure of proof under 2/3 Edw.6) is an act of discretion, so that the judges need never go out of their way to justify waiting on the normal course of pleading.

In the Caroline case of Wood v. Symons,\(^9\) the Common Pleas refused to go beyond the record on a motion for Consultation. The ecclesiastical suit was for hay tithes. The parishioner surmised that the hay in question came from "headlands," and that in consideration of paying his regular hay tithes he was customarily discharged for hay produced on headlands no larger than was necessary for turning the plough. The parson's counsel tried to move the Court to grant Consultation without pleading by saying that in truth the hay in question did not come from legitimate headlands, but from strips alongside the arable land as wide as the cultivated ground itself. Counsel got nowhere. The Court told him to join issue or demur, since the Prohibition was granted.

The last phrase gives one pause because it suggests that there might have been a basis for denying the Prohibition in the first instance. The report is not good enough to make such basis visible. I would suggest the following possibilities: (a) The Court would in fact have been willing to look beyond the record to the truth if the Prohibition had not already been granted. (In which event, the decision points to different standards as between the two occasions -- initial motion for Prohibition and motion for Consultation). (b) There was a basis for at least doubting the surmise's legal sufficiency. I can think of two likely grounds for doubt: (i) The plaintiff pleaded his modus as applicable only to legitimate headlands -- what was actually necessary to turning the plough -- but perhaps did not say with sufficient specificity that the hay in question came from such

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\(^{9}\) Hetley, 32 Not specifically dated. 3-7 Car. C.P.
land. (ii) The modus was bad. The alleged consideration was payment of regular hay tithes, whereas performance of one duty was never consideration for exemption from another. It is more than likely that headland hay should be regarded as tithe-free de jure, but it can be argued that one who alleges a modus is stuck with his prescriptive claim. Either of these grounds might have justified a demurrer, which the Court suggested to counsel as one of his possible courses. But counsel did not move for Consultation on legal grounds. His theory may have been like that I ascribe to Finch in Pitt v. Harris above: Consultation could not be confidently moved for (nor a demurrer taken) or legal grounds alone, but legal questions would or should ultimately be raised when the truth was established by verdict. If the truth is not really likely to be much in dispute, there is an advantage in establishing it early by informal means or stipulation and getting on to the real problem.

The only other feature of the report is a statement by Chief Justice Richardson. Richardson said that grassland along the sides of enclosed arable fields could be discharged of tithes, as well as headlands properly so-called. I take it: Whereas in open-field agriculture only literal headlands were exempt (de jure, presumably, or else exemptible by the kind of pseudo-modus that only assured that the parson got hay from other sources), consolidation of strips might change the picture. A man should be entitled to ancillary grassland attached to his arable equivalent to what he would have had in common with others under an open-field system. But the physical arrangement might be different from what obtained where there was a long field with ample turning space for large teams along the two ends. Thus -- I take Richardson to be saying -- the bare "truth" that counsel wanted to insist on out of order (that the hay did not come from headlands strictly so-called) would not necessarily permit resolution of the case. The full truth -- how much ancillary grassland there was, how it came to be arranged as it was -- would come out more reliably by verdict than by any informal investigation. With the full truth known, lurking legal questions as to what should be counted as headland hay could be more intelligently discussed (unless, of course, the defendant thought he had a sufficient point of law here and now, in which event he was free to demur.) On this analysis, the Court was not frowning on Consultation on motion as such, nor even on all "expeditions outside the record." It simply thought that the case was not amenable to solution on the basis of easily ascertained facts and the law.
In another Caroline case, a Prohibition was obtained on 23 Hen. 8, because the ecclesiastical suit was brought in the Arches instead of a court of the diocese where the ecclesiastical defendant lived. A Consultation was sought on motion on the ground that the diocesan or sub-dioecesan court had remitted jurisdiction to the Arches. Such surrender of jurisdiction by an inferior court to a superior was permitted in same circumstances by ecclesiastical law. It might make a question whether a Prohibition pursuant to 23 Hen. 8 could invariably be overcome by showing that such an official "remission" had occurred. But that question could not be approached until it appeared de facto or by admission on the pleadings that the remission had taken place. Defendant-in-Prohibition here was trying to get it established de facto without pleading. He was asking the Court to go beyond the record, but in a relatively easy and controllable way -- by ascertaining the official act of another court. That is less than asking for informal establishment of such facts in pais as whether hay was grown on proper headlands. Nevertheless, the Court denied the motion, saying that the matter must be pleaded. The decision counts at least against going outside the record on motion.

The important case of Margaret Hide v. Bishop of Chester reveals a clearcut judicial division over Consultations on motion. In this case, there was no question of noticing or attempting to ascertain facts outside the record. The Consultation was sought because the Prohibition on its face was alleged to have been misgranted. Two judges, Jones and Whitelocke, thought that the Prohibition ought not to have been granted in the first place. But they also thought it could not be reversed on motion. ("Although prohibition has been unduly granted, it is not the court's discretion to grant a consultation on motion without answering.") The other two judges, Richardson and Croke, thought the Prohibition was well-granted, thus that no Consultation was deserved on the merits. They thought, moreover, that there was a special reason (explained below) why a Consultation on motion could not be considered in this case. (I.e.: They opposed consultation on motion here even conceding that the Prohibition was bad in its main aspect, for this one had a special aspect.) But

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11 M. 7 Car. K.B. Croke Car., 237.
Richardson and Croke went out of their way to disagree with Jones and Whitelocke on motions for Consultation in general. ("But perhaps in some cases, when prohibition appears in itself unduly granted, defendant, before appearance having committed no contempt, may move for consultation.")

The Case was as follows in Hide v. Bishop of Chester: William Hide was a priest of the diocese of Chester. When he died, the Bishop sued Margaret Hide for a mortuary fee, claiming it due by custom. Margaret's surmise for a Prohibition (a) recited the statute of 21 Hen. 8, c. 6 (which, generally speaking, set the mortuary fees that the ecclesiastical authorities could charge); (b) averred that there was no such custom as the Bishop was invoking; (c) said that she had paid the lawful mortuary to the parson of Bunberry. Margaret said also that the Bishop had prosecuted his suit after the Prohibition was granted. Since the original surmise could not possibly say that, it is clear that we are dealing with a declaration. The Bishop was trying to escape on motion, not before any formal pleading, but after declaration.

This circumstance markedly influenced Richardson and Croke. They would have considered a Consultation on motion if they had seen anything wrong with the original surmise, as they did not. But as they expressly said, the charge of contempt -- that the Bishop had actually disregarded the Prohibition -- must be answered. Even if the Prohibition should never have been granted, he must say something to that. (Probably he must deny it and prove his innocence or else face punishment for contempt. At the least, he must admit it and argue for his legal innocence. The possibility of his being legally innocent though factually guilty must be allowed for because of the theory we have encountered that legally defective Prohibitions are adjudged void ab initio when they are reversed. A parson who persisted in a tithe suit after a Prohibition based on a modus would unquestionably have committed a contempt, because the Prohibition unquestionably "ought to have been granted." Quaere where the Prohibition ought not as a matter of law to have been granted, though it was. If Richardson and Croke allowed for the latter possibility (the Bishop's legal innocence) they would have been saying, "The Prohibition's original validity is too serious a matter to decide on motion, considering that a man's liability for contempt depends on it -- or might depend on it, the question as between 'does' and 'might' being it-
Consultation on Motion

self a serious legal problem." If they did not consider that possibility, they would only have been saying "However bad the Prohibition is, it cannot be reversed until the Bishop denies the contempt and clears himself.")

The fact that they were faced with a declaration could mitigate the opinion of Jones and Whitelocke. I.e.: It would be a plausible rule to say, "Consultations on motion are perfectly acceptable -- at least if they are confined to law -- so long as they are made before any pleading. But once the plaintiff has gone to the trouble of declaring the defendant must come back with a commensurate plea and may not resort to motion." Jones and Whitelocke do not make such a distinction, but they may have intended it. In any event, the case before them did not require a general condemnation of Consultations on motion, only of motions for Consultation brought too late. On the other side, Richardson and Croke did not rely on the mere fact that the pleading had proceeded as far as declaration, but rather on the fact that the Bishop's contempt was now an additional issue. They may have meant that Consultation on motion is "perhaps" permissible before declaration, but never after, though they do not say that exactly. (The "perhaps" is worth noting. Richardson and Croke did not give Consultations on motion an overwhelming endorsement.) The substantive question that divided the judges in Hide v. Bishop of Chester need not detain us here. It should only be noted that they were flatly divided on a question of some difficulty. That in itself supplies a motive for waiting on further pleading. (Would the Bishop's counsel -- encouraged by Jones and Whitelocke and equally discouraged by Richardson and Croke -- believe enough in the Prohibition's legal insufficiency to demur? Could they demur to the substance of the Prohibition without confessing the contempt as a fact? Almost certainly, I think, the Bishop would be driven to take issue on the custom -- assuming he wanted his mortuary enough to carry on -- thus permitting resolution with a minimum of complexity.) The division of opinion also supplies a reason for waiting: Proportionately as a legal issue is serious or divisive, there is reason to settle it in the solemn context of a demurrer. Despite their two-layered difference of opinion in Hide v. Bishop of Chester, the judges agreed on the result.
Division of opinion over Consultations on motion appears again in Netter v. Brett, but this time roles were reversed. The judges’ views of acting on motion corresponded with their opinions of the merits. The case presented a complicated mixed-will problem, the details of which we may omit. In brief: A Prohibition had been granted to stop probate of a will comprising land and goods, and Consultation was moved for. Such cases were problematic when they occurred in simple form, and here there were complications arising from the exact way the will was drawn (in effect, how mixed, or how separable, the devises of personal and real estate were) and also from the exact way the libel and surmise were cast. Justices Jones and Berkeley strongly favored a general Consultation, while Justice Croke was equally vehement for a Consultation quoad the goods only. (Chief Justice Richardson, who was on his deathbed, did not participate.) It was Croke who made an issue of proceeding on motion, with the evident, though entirely respectable, motive of blocking what he regarded as a bad, precedent-breaking decision until there could be further debate before a fuller Court. Croke did not deny the propriety of Consultation on motion under any and all conditions, but he came pretty close to saying that a single judge with serious dissenting views should be privileged to insist that the parties proceed to formal pleading. (Again, a highly defensible position. That way of putting it is mine, not Croke’s, but his insistence on the inadvisability of Consultation on motion in “doubtful cases” pretty much comes to that -- a cynic would say the doubts were all Croke's. It should be noted, however, that Croke had plenty of authority on his side, and a neutral prophet might well have predicted that in the long run his side would prevail. Croke argued that glibly granting Consultation on motion would deprive plaintiff-in-Prohibition of the Writ of Error he would be entitled to if he should lose after full pleading -- for Error did not lie upon motions for Consultation, no more than on the decisions to grant Prohibitions which they opened for reconsideration. Croke plainly thought that if plaintiff-in-Prohibition should lose after pleading in this court his chances for reversal in Error would be excellent.) Croke argued

12 H.10 - P. 11 Car. K.B. Croke Car., 391 and 395; Harg. 378, f.32; Jones, 355. (Croke is the best report on the matter of Consultations on motion.)
Consultation on Motion

further that Consultations on motion should be scrupulously limited to cases where the mistake of prohibiting lay exposed on the face of the record. He contended that that condition had not been strictly met here. Apparently the will had been shown to the Court, so that the judges' sense of the reality was informed by a little more than the record. Croke thought the bare record -- libel and surmise -- put no obstacle in the way of upholding the Prohibition for the land, whereas looking at the will created questions about that course which the Court had no right to take account of.

It was Jones, not Berkeley, who expressly disputed Croke's position, though in Hide v. Bishop of Chester he had opposed Consultations on motion on principle. Now he defended them with rather cavalier generality. Without taking on the serious problems, including the implicit issue of judicial comity, raised by Croke, Jones came up with an historical theory: "...anciently in this Court there were no declarations and suggestions upon prohibitions, but they were granted upon motions. And consultations were granted upon motions without demurrer..." Whatever the historical truth, that was not a very responsible position to take, for contemporary practice did treat motions for Consultation and formal pleading as alternatives, and for that very reason the question of which alternative was preferable in particular cases was unavoidable. Whether or not it was justifiable to proceed on motion in this case, merely to assert the general respectability and "antiquity" of so doing was hardly to establish that. Indeed, I think it is clear that Jones and Berkeley were too eager by half to grant a general Consultation.

Even though his position of the moment on motions for Consultation may have been too conservative, Croke had the moral upper hand in this case. A remark in Berkeley's opinion gives the point away: The judges had committed themselves to the King to refrain from blocking probate of mixed wills. Jones and Berkeley may have been right on the merits of the case even apart from any weight they actually gave to that commitment, but I suspect they were reluctant to let a point of procedure frustrate an opportunity to carry it out by the most expeditious means.
A final undated case from the Common Pleas may be cited to illustrate the situation in which Consultation on motion was most obviously appropriate. To stop a tithe suit, a parishioner surmised that he had fully set out his tithes—period. The Prohibition was granted, plainly erroneously, for it was well-settled that ecclesiastical courts were competent to entertain and try mere pleas of payment. The parson promptly moved for Consultation (at least within the same term) and got one. That is all the report says. I doubt that such a motion would have been denied at any time in the later-16th and 17th centuries.

As for more complicated situations, the cases show a faintly discernible arc. In the beginning, there was doubt about Consultations on motion. Their general propriety was clearly asserted by the late-Elizabethan courts. There is a little to suggest that the Jacobean courts may have felt the freest discretion to grant such motions, even when it required going beyond the record, but they were also clearest in perceiving their power as discretionary. The Caroline courts were in general a little more conservative. If easy Consultations are seen as pro-ecclesiastical, Netter v. Brett is the only sign of deliberate favor to Church interests in the High Church mood of Charles I's reign, and that case was decided over the vigorous objection of one judge. If willingness to consider motions for Consultation is a symptom of the "public" approach to Prohibition law, then the Jacobean courts were perhaps the most public-minded--the most inclined to think of Prohibitions and Consultations as ex officio acts, to be granted or withdrawn when the judges in their discretion saw fit. Later and perhaps earlier, the courts' spirit looks a bit more "private"--more inclined to want Prohibition cases to be pleaded out like other cases between party and party.

But perhaps the most significant conclusion is the one that Hide v. Bishop of Chester and Netter v. Brett points to: In the 1630's there was no agreement about Consultations on motion. Earlier cases were hardly strong enough to force a consensus.

13 Harl. 4817, f.194.
VIII.
Partial Prohibitions and Consultations

Summary: Partial and qualified writs were common in practice, and there was very little question about their appropriateness in general. Some authority suggests that Prohibition should be total and unqualified, whereas limitations on the ecclesiastical court might be written into Consultations, but this difference was not consistently observed. The structure of some fields, such as testamentary law, made the partial writs particularly necessary. The availability of both partial Prohibitions and partial Consultations sometimes created rather complex specific problems as to whether and how they should be used. The partial writs allowed the common law courts to exercise a more flexible control over the rest of the legal system than would otherwise have been possible.

* * *

As in practice Consultations on motion were common, so were partial Prohibitions and Consultations. We have already seen a number of instances. The principle of Consultations on motion was sometimes expressly questioned. Despite their acceptance in practice, the courts were never wholly satisfied of their legitimacy. Cases where it was problematic whether to grant a motion tended to awaken suspicion of the procedure as such. By contrast, I can see no open vein of skepticism towards partial Prohibition and Consultations. In numerous cases, it was problematic whether to grant the writs in total or in partial form, if they were to be granted at all. In such cases, I can find no instances of the judges' asking themselves outright or almost outright, "Should we be granting these writs in qualified or partial form? Are they perhaps meant to be all-or-nothing procedures?" I suspect, however, that in an implicit sense those general questions sometimes entered into consideration of the particular question, "Shall we grant a partial writ in this case?"

I argued above that there is a formalistic set of mind capable of militating against Consultations on motion: a writ is a writ is a writ -- once a Prohibition has gone forth, however unduly, there is no stopping it until it is overcome by a verdict against the plaintiff or a successful demurrer. A parallel objection to partial Prohibitions and Consultations can be framed: The "nature" of a Prohibition is to stop an on-going suit in a "foreign" court -- of a Consultation, to erase an existing Prohibition. An ecclesiasti-
The Writ of Prohibition:  
Jurisdiction in Early Modern English Law

...
beating her."}) Reasonable though that may sound, it evades the jurisdiction-regulating function. It is tougher and better to say, e.g., "You may not touch this suit until Issue X is resolved at law. Then we shall consider whether to give the suit back to you, to be decided in a manner clearly consistent with our resolution of X." Or else, per contra, "The suit is yours to decide as you like. When you have decided it, we may consider whether your decision was caused by an error within our power to control, and if so we may consider whether to prevent execution of your decision. But for now the suit is yours."

The theoretical argument against partial Prohibitions and Consultations did not rear its head so overtly as the argument against Consultations on motion. In some ways it is a less good argument, more of an exercise in formalism abstracted from common sense. Insisting that a Prohibition be pleaded to once it is granted can be justified by formalistic talk, but there is a point in so insisting -- the point of making sure that issues once raised are debated or tried in the context in which they will receive the most complete and fair evaluation. Once it is raised, perhaps even a very dubious claim might as well be subjected to the going-over that is most likely to be thorough. If a partial Prohibition or Consultation looks like the most sensible way to unsnarl a complicated problem, neat, pseudo-logical ideas about the writs' "nature" ought not to stand in the way. But whether a partial writ was the best solution could be problematic. The alternatives above (partial writ, full Prohibition pending common law resolution of an issue, no Prohibition, or full Consultation with power to review error reserved) could in some situations be live alternatives. When the immediate choice was among such alternatives, I think it is quite possible that a shadow of doubt about the partial writs as such was in the background. The possibility should be kept in mind when we look at cases exemplifying qualified writs. The shadow does not show on the surface; the legitimacy of such writs is not discussed. But perhaps decisions to grant them were half-felt victories over a certain reluctance. In rather indirect ways, some of the cases suggest as much.

The most interesting and problematic use of partial Prohibitions and Consultations was in testamentary cases. Let us reserve those for a moment, looking first at other instances.
One brief early report\(^1\) illustrates a problem incidental to partial writs. The report says only that Consultation was granted for part of the matter in question and denied for part, and that "yet" damages were awarded "according to the statute." A later case -- Lord Riche v. Courmarke, M.36/37 Eliz. Q.B. -- is noted in the MS. as agreeing. "The statute" must be 2/3 Edw.6. A surmise must have been unproved, whereas only part of it was subject to the proof requirement; or else plaintiff-in-Prohibition combined several claims (e.g., several *modi* going to different tithes) and failed to prove only some of them. The problem was whether to allow defendant-in-Prohibition his statutory double damages. I assume the choices were (a) no double damages (b) double damages *pro rata* for as much of the surmise as stood unproved (as distinct from double damages for all -- though perhaps the latter cannot be excluded.) The interesting point is that "no double damages" would seem to have been argued for (n.b. the reporter's "yet"). In such an argument, there is a suggestion of discomfort with the partial Consultation -- as if the statute could only contemplate all-or-nothing, as if the partial Consultation were an irregularity that must raise a problem as to how to apply the punitive damages provision of the statute.

There is some point in the puzzlement. The statute gave punitive damages against presumptively vexatious Prohibition-bringers. Here, plaintiff-in-Prohibition emerged as not quite a "bad man" -- for his surmise was not made up out of whole cloth. Whatever might be said about single costs and damages at common law, are the punitive damages' directed against any but the unambiguously vexatious -- as opposed to those who are merely mistaken about their rights or careless about assembling sufficient proof? That, of course, is simply a question about the statute. But perhaps a question about the partial Consultation hovers. The statute might be said in an indirect way to warrant all-or-nothing writs. If the statute is conceived as making a distinction between "bad men" who improperly try to stop ecclesiastical suits and "good men" who try to stop them properly and in the public interest, perhaps it implies a corresponding distinction between the "bad" who wrongfully sue at ecclesiastical

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\(^1\) Broughton v. Prince. H. 32 Eliz. Q.B. Harl. 1633. f.78.
law and the "good" or "innocent" who properly assert their real rights in that forum. If the first distinction is "binary", so perhaps is the second. A man is not "good" in one sense and "bad" in another, but one or the other in a net sense. It is "bad" to bring a partly appropriate and partly inappropriate ecclesiastical suit, as it is "bad" to bring a partly justified and partly vexatious Prohibition. (Or else it is "good." in a net sense, to do either.) In reverse, the dichotomizing effect of the statute might be conceived as reflecting the either-or choice implicit in the nature of the writs: The statute-makers viewed plaintiffs-in-Prohibitions as either punishable or not-punishable because they thought of Prohibitions and Consultations as either stopping or disobstructing the ecclesiastical suit given as an "integral thing."

The Court in Broughton v. Prince, however, denied countenance to any such line of reasoning. That is clearly true if the decision points to pro rata double damages -- i.e., if it means "where part of the surmise requires proof and is not proved, a Consultation quoad shall be granted and double damages shall be assessed quoad that part." If the decision points to awarding defendant-in-Prohibition twice his litigative costs plus other damages for all, then the significance would be different -- a matter of saying that although Consultations quoad are legitimate in themselves, the statutory offense consists in bringing a Prohibition without full prima facie justification and therefore remains an offense in spite of partial justification.

But that decision would equally go to deny the connection between the ideas of the statute and the nature of the writs on which the argument above depends. In any event, the case supplies a de facto instance of a partial Consultations. Leaving aside the double damages provision, it is hard to see how 2/3 Edw.6. could be fairly applied without partial Consultations. As it is conceivable to say that the statute does not require Consultations on motion, so it is conceivable to say that it does not authorize partial Consultations (but means that proof for part counts either as proof for all or proof for none.) But those conceivable rules would be foolish and unlikely. As for Consultations on motion, the statute may have provided an entering wedge for partial Consultations.
In Buckhurst v. Newton\textsuperscript{2} a kind of reluctance to grant partial Consultations appears -- let us say reluctance to grant them on a somewhat speculative basis. A parson sued for wood tithes, viz. for faggots. The parishioner got a Prohibition on surmise that the faggots in question actually came from exempt timber trees (oak and elm) but that the parson had falsely pretended in his libel that they were tithable beech and thorn. (It was assumed in the surmise, and undisputed, that mere sticks from exempt trees -- picked up from the ground, lopped, or the like -- fell within the exemption, as well as the timber proper. That is a probably sound, but perhaps not altogether indisputable, proposition.) The parson moved for a Consultation covering such of the wood as was \textit{not} oak and elm. The report is condensed, but I would construct his arguments as follows from the hints it provides: Prohibiting \textit{in toto} in such a case as this is unfair and inviting to easy trickery on the parishioner’s part. What is to prevent the parishioner from making faggots substantially of beech and thorn, but craftily inserting a stick of oak or elm in every one? The parson might have no knowledge of the trick and sue for every tenth faggot in the fullest belief that only non-exempt wood was involved. Even if he was aware of the stratagem, he might be justified in suing for every tenth faggot, on the theory that the amount of oak and elm was so nominal and the parishioner’s intent so fraudulent that there was no legal need or practical possibility of claiming the tithe otherwise.

So long, however, as the parishioner claims that exempt wood was involved in the least degree, a Prohibition of some sort is unavoidable. The question then becomes whether it should be partial or total. If total, the parson would be vexed and delayed by what \textit{might} be utterly frivolous Prohibition proceedings. He would have to prove the truth at common law, whatever it might be, and in the end would probably do no worse than partial Consultation. (I.e.: It is unlikely, though not impossible, that virtually every stick in the faggots would be oak or elm -- in the very nature of woodlands and stick-gathering. The more serious possibilities are: (a) that the parson will be altogether vindicated, the amount of oak and elm being at most so trivial, and its distribution so suspect, that the jury

\textsuperscript{2} M. 36/37 Eliz. Q.B. Croke Eliz., 347
Partial Prohibitions and Consultations

will give a general verdict for the parson, or else the Court will hold that one who intermixes a little exempt wood with fraudulent intent is entitled to no consideration -- in which event, a full Consultation will issue; (b) that the amount of oak and elm will be found appreciable, or the intermixture of even a small amount will be found innocent, or the Court will hold that exempt wood remains exempt, however trivial the amount and even if it is distributed fraudulently -- in which event, the solution must be Consultation _quoad_ as much of the wood as is not oak and elm.) In these circumstances, would it not make better sense to grant a partial Prohibition (or, with the same effect, a partial Consultation on motion) right now? The ecclesiastical court could then proceed at once to what it will probably be authorized to do in the end -- to figure out how much of the wood is beech and thorn and, if there is any oak or elm, to make a _pro rata_ award.

The Court did not reject the idea of a partial Consultation, but refused to grant one until the parson somehow made his claim more specific. Just what the judges meant requires interpretation. They said that the parson must "show the special matter," namely, that the oak and elm are so intermixed "that he cannot do otherwise." I take this as an objection to the "speculative" way in which the parson's counsel had argued. They had in effect proposed partial Prohibition as the best _general policy_ in this sort of case -- owing to the possibility of fraud and the likelihood that there would turn out to be some sort of intermixture of the two classes of wood, calling for sorting out and pro-rating by the ecclesiastical court. The Court evidently wanted the parson to stand up and say something definite about this case -- that the amount of oak and elm was trivial, or was fraudulently distributed, or at least (what the judges specifically suggested) that the mixture in the faggots, whether fraudulent or innocent, was such that the parson had no practical choice except to sue for every tenth faggot and ask the courts to figure out whether he was entitled to that much. So long as there was a possibility that the parishioner had substantially kept the exempt and non-exempt wood apart, or that the parson could have easily known the approximate proportion of the two kinds and brought an honest suit for proportionately less than a full tenth, there was insufficient reason to deny the parishioner a total Prohibition and common law investigation of the truth.
The Writ of Prohibition: 
Jurisdiction in Early Modern English Law

The disturbing feature of the Court's position is that it comes to a demand for a factual claim. Is it therefore a demand for formal pleading? I.e.: Was the Court saying, "We cannot give you a partial Consultation on motion, but if you will plead the facts which you think would entitle you to one, the chances are good -- assuming of course that those facts are found or admitted in your favor"? The report does not make it clear whether or not that is what the Court meant. The alternatives would be: (a) The Court would act on motion, once the parson made a factual statement applicable to this case, and once that statement was informally verified. (As we have seen, Consultations on motion requiring information outside the record cannot be entirely ruled out, though they were rare.) (b) The Court would act on motion without any verification of matter of fact, but wanted a less "speculative" motion as a matter of form, to furnish a better basis for argument. (I.e., to give the parishioner a chance to argue against the Consultation even on the assumption that the parson was telling the truth. If, for example, the parson's claim was only that he had no way of knowing what fraction of the faggots, if any, consisted of exempt wood and therefore could only sue for the full tenth, the parishioner should perhaps have an opportunity to defend the full Prohibition, even though the Court were inclined to a partial Consultation.) The last possibility is less likely than the other two, but perhaps cannot be excluded in this peculiar kind of case -- peculiar because it is extremely hard to arrive at a sensible way of handling the timber exemption when mere sticks were in question. In principle, the judges were anything but opposed to a partial Consultation. They cited a case (Molyns v. Dawes) favoring that solution. Their reticence, I think, was lest they be unfair to a parishioner who really was being needlessly and dishonestly sued for a full tenth of his faggots. They probably wanted at least informally verified information that that was not the case -- but at the very least they wanted the parson to stick his neck out far enough to supply the parishioner with a hypothetical basis for argument.

In Gresham v. Lucas, a *modus* was surmised, to pay 1d per milk-cow and 1/2d per mare in satisfaction for all cows, horses, steers, and other

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Partial Prohibitions and Consultations

cattle. A Consultation was granted "dummodo non tractetur" of milk-cows, plough-beasts, and animals grazed for domestic use. That is all the report says. The substantive point was in all probability that the *modus* was held unreasonable except as it applied to the milk-cows and mares, their products and sustenance (milk; calves; colts; herbage consumed by the breeding-stock and their young insofar as the latter could be counted as potential replacement-capital or domestic food.) In tithe cases arising from the troublesome cattle business, a typical problem was whether a sum calculated as so much per animal of one type (e.g., milk-cows) was a good *modus* for all animals (including, e.g., beasts fattened for sale.) The Court here said "No." Having said so, it did not simply send the suit back to the ecclesiastical court. (To send the suit back *in toto* would leave the parishioner to insist on his *modus* insofar as it was valid in the ecclesiastical court, as of course he might do successfully. *Quaere* whether, notwithstanding 50 Edw.3, he could have a new Prohibition on surmise that the ecclesiastical court had disallowed the *modus* even for the milk-cows.)

Rather, the Court used the partial Consultation to protect all the animals that ought not to pay tithes in kind, whether by virtue of this *modus* or *de jure*. Bringing a badly-founded Prohibition was not penalized. (The truth of the *modus* for milk-cows must be assumed for the partial Consultation to be reasonable. Its truth may have been established by verdict, after which a motion for Consultation was made in arrest of judgment. It may have been conceded by the defendant in connection with a motion for Consultation before pleading. Finally, it may have been held admitted by demurrer. In the latter event, it seems to me a special problem arises as to partial Consultations: The defendant demurs to the legal sufficiency of a declaration attempting to claim a *modus* for all cattle calculated as 1d x the number of milk-cows. The demurrer is upheld. It would seem very doubtful to take the demurrer as admitting a *modus* for milk-cows and their products so calculated. We cannot be sure from the report that the Court did not do so, but it is unlikely.)

One brief note in the reports⁴ only goes to support the partial Consultation in the most obvious sort of case: If one sues for tithes of several

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⁴ 40 Eliz. C.P. Add. 25,199, f.7b.
things, and some are not tithable, there may be a Consultation covering only the tithable products. The very fact that the point is reported may mean that it was doubted.

In another case,\(^5\) a tithe suit for various products was prohibited by way of preventing the ecclesiastical court from enforcing its two-witness rule. Specifically: The parishioner surmised that he had pleaded payment of one tithe (pigeons) in kind, but was in danger of losing because he did not have two witnesses to prove the fact of payment. The Prohibition was granted after some discussion of the merits. The parson subsequently moved for Consultation for the other tithes comprehended in the same suit, on the ground that the parishioner had not offered proof of payment (presumably by one witness) for those, as he admittedly had for pigeons. The partial Consultation -- *quoad* all except the pigeons -- was granted. The alternatives would have been: (a) to wait until the payment of pigeons had been tried at common law, then to grant either a total or partial Consultation, depending on which way the verdict went; (b) a total Consultation now, with the right reserved to consider another Prohibition after the *whole* ecclesiastical suit was settled, to the end of preventing execution of any part of the ecclesiastical sentence that could be shown to depend on enforcement of the two-witness rule; (c) regarding the whole matter as subject to common law trial since the ecclesiastical court had shown its unwillingness to apply reasonable evidentiary rules. (I. e.: in his declaration, the parishioner would be allowed to plead to all the tithes -- payment, *modus* or whatever -- and all action would be deferred until after verdict. A partial Consultation might still be necessary in the end, but it would have been eschewed until it was unavoidable.) None of these alternatives would have been as sensible practically as the course taken. All of them would express a bias against partial Consultations (inclination to avoid them if at all possible) of which the Court gave no sign.

The last case is pretty close to the limit at which complaint against partial writs would hardly be rational -- for a single suit for several tithes might as well be several suits. If there was reason to prohibit *quoad* one tithe, but no reason whatever *quoad* the others, the best procedure might

\(^5\) P. 41 Eliz. C.P. Add. 25,202, ff. 3 and 4b.
be a partial Prohibition. But if a total Prohibition got through, undoing it by partial Consultation is next-best. The motive of the partial Consultation was to return to the ecclesiastical court what belonged to the ecclesiastical court, no strings attached. The motive was not to influence its conduct, though that might well be the effect. (I.e.: The ecclesiastical court would be unlikely to insist on the two-witness rule again if the parishioner went on to plead payment of another tithe and offer proof by one witness. If it did, I doubt that 50 Edw. 3 would protect it against another Prohibition, *sed quaere.*

In another sightly later case, the same court used a qualified Consultation to direct the ecclesiastical court’s conduct, but in an interestingly restrained manner. The statement of this case is mutilated in the MS., but the part that concerns us here is clear enough. The ecclesiastical suit was against a bishop for improperly instituting a clergyman in a living. It is not clear why a Prohibition was sought and obtained. As soon, in any event, as the judges thought seriously about the matter, they concluded that the Prohibition was without merit. An attempt was then made to get the Consultation qualified. The report brings out the motive behind the attempt: The ecclesiastical suit was expected to lead to sequestration of the tithes and other profits of the living. (I.e.: The matter of the suit was whether A had been wrongfully instituted, but the ecclesiastical court was expected to proceed by cutting the income from the living off from A, pending settlement of the substance.) It was argued that such a sequestration would affect the interest of the patron, a lay interest with which the ecclesiastical courts were not supposed to meddle. The reason for that was that a parson’s receipt of the profits counted as evidence of his patron’s seisin of the advowson. Cutting off the profits from the clergyman would be like putting the patron out of possession and therefore nullifying his power to generate rights by adverse possession. Counsel requested language in the Consultation expressly forbidding any sequestration.

The judges would only go half-way. They agreed with everything counsel said -- i.e., that a sequestration was likely and would interfere with the patron’s interest. But they would not write a Consultation saying

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6 M. 42/43 Eliz. C.P. Lansd. 1065, f.66.
in effect "We return this suit to you, but you must not sequester the
profits of the living." Rather, they qualified the Consultation with "dum-
modo non agatur de iure patronatus." The difference is between overt
and oblique direction of the ecclesiastical court's conduct, between warn-
ing the ecclesiastical court and enjoining it. The rejected formula would
have prevented the ecclesiastical court from using a recognized ecclesias-
tical procedure. The accepted formula only reminded the ecclesiastical
court not to do what it in any case had no business doing. The ecclesiasti-
cal court was left to judge for itself whether sequestering the profits
would come to meddling with the patronage. Technically, at any rate,
that was left to the ecclesiastical court. Actually, the judges left little
doubt as to what they meant. For when they turned down counsel's re-
quest for more explicit language, they added "...but if they proceed to se-
questration notwithstanding that, if they complain to us we will find a
remedy" In sum, the case is evidence of two things: (a) willingness to use
qualified Consultations to direct or almost-direct the behavior of ecclesi-
astical courts -- as opposed to using them merely to split off an easily
detachable part of a conglomerate suit; (b) recognition of the dubious
implication in that use of the qualified Consultation and reluctance to
push it too far -- insistence that in theory a Consultation does, after all,
liberate the ecclesiastical court to do what it likes with the suit before it.

If I read it correctly, Sir William Hall v. Ellis\(^7\) illustrates a special use
of the qualified Consultation -- to protect a plaintiff-in-Prohibition from
being caught in a procedural snarl. The ecclesiastical suit was brought by
the farmer of an impropriate rectory to recover a seat in church. His
original libel claimed a seat "in dextra parte Cancellae." Then he added
to his libel, making it "pro primo loco, and principally in dextra parte
Cancellae." The adverse party obtained a Prohibition on surmise that he
and his predecessor in estate of a certain house had always sat "in dextra
parte praedict." The Court held in principle that an impropriate rector or
his farmer had a dejure right to the chief seat (i.e., "first place") in the
chancel, but that another could claim it against him by prescription. In
other words, there would be nothing against the claim plaintiff-in-prohi-
bition probably wanted to make -- a prescriptive claim to the chief seat.

\(^7\) T.7 Jac. K.B. Noy, 133.
A Consultation had to be granted, however, because he had not actually made that claim. His claim was only to a seat in the right-hand part, and that was not the object of the ecclesiastical suit as amended. But the Consultation was granted with a *quoad*. The report does not give the language of the *quoad* clause. I assume it went to authorize the ecclesiastical court to proceed in the case before it (for the chief seat), but is such manner that it did not contradict the plaintiff's alleged prescriptive title to a seat in the right-hand part. It is not clear from the report whether the original libel and corresponding surmise concerned one *particular* seat or one seat among several. (If the latter, the original libel would in effect have aimed at "bumping" the plaintiff -- "If anyone is to be displaced from the right side of the chancel, it is X., not me.") If a particular seat was in question, the Consultation as I reconstruct it would give the suit back only *pro forma*. If not, it would come to saying "You may not displace the plaintiff from the right side, but you may determine the precedence as among those entitled to sit there." In sum: Though the report of Hall v. Ellis is obscure, it would seem to illustrate a rather generous use of the *quoad* Consultation. Plaintiff-in-Prohibition strictly speaking had no right to a writ, for he had shot down a non-existent suit (for a seat -- one in particular or any one -- on the right-hand side.)

But the Court helped him out by not granting a total Consultation. Very possibly the Court was lenient because the misfiring of the surmise may not have been entirely his fault, inasmuch as the libel had been amended. Once the libel had been amended, the surmise ought to have been amended correspondingly if the plaintiff thought he had a case against the new-framed ecclesiastical suit, but neglect of that step might be forgivable. Despite its obscurity, the decision is a suggestive precedent for cases in which a surmise failed to describe the ecclesiastical suit at which it was aimed. Those cases must be distinguished into two classes -- (a) those in which a copy of the libel had to be affixed to the surmise by force of 2/3 Edw. 6, and (b) those in which affixing the libel was not required. Hall v. Ellis presumably falls in the latter class. At least within that class, it suggests saving the plaintiff so far as possible by qualified Consultation. (Whether that technique does him more good than the alternative one of quashing the Prohibition *totaliter* and leaving the ecclesiastical court to proceed "at its peril" is questionable. Cf. cases on conformity between surmise and libel above.)
All the cases above involve partial Consultations. Don Siego Serviento v. Jolliff and Tucker and Sir Richard Bingley\(^8\) presents us with a partial Prohibition. In this case, the Spanish Ambassador sued in the Admiralty as "procurator" of Spanish subjects. He sought to recover two ships belonging to Spaniards. Jolliff and Tucker had allegedly captured the ships piratically at sea. They had brought them to Ireland. Thereafter (the libel not specifying where), the ships came into Bingley's hands, who converted them to his own use. Bingley sought a Prohibition, which the Court unanimously granted. The Prohibition was confined to as much of the Admiralty suit as concerned Bingley. The Ambassador was told that he could proceed against Jolliff and Tucker for the wrongful taking of the ships at sea, for the libel clearly placed it there. Bingley's receipt and conversion of the ships, on the other hand, was not laid on the high seas. The libel did not expressly assign it to any particular place, but suggested indirectly that it had occurred in Ireland.

Since there was no basis for presuming that Bingley's dealings with the ships took place at sea, and substantial basis for supposing that they took place on land, the suit as it concerned him was clearly beyond Admiralty jurisdiction. There was considerable discussion of the merits (whether the Ambassador suing as "procurator:" should be prohibited, inasmuch as he was not owner of the ships and therefore could not maintain an ordinary action of Trover for them at common law; whether the Admiralty should be prohibited from determining a claim in the nature of Trover-on-land when the original act of misappropriation was a crime on the high seas.) Having resolved those questions against the Ambassador, the Court had no apparent hesitation about splitting the suit up by way of partial Prohibition.

Coke's report of the well-known Fuller's Case\(^9\) contains a fully articulated generalization about partial Consultations and Prohibitions and provides a complex example of the former. The substance of this case will be discussed later in the study. In brief, the King's Bench sent a criminal suit against Fuller back to the High Commission because he was

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\(^8\) Hobart, 78. Undated. Jac. C.P.
\(^9\) T. 5 Jac. K.B. 12 Coke, 41.
Partial Prohibitions and Consultations

being prosecuted for schism -- a major ecclesiastical offense of the sort that clearly fell within the High Commission's much-debated jurisdiction. The Consultation was qualified in two ways, however: (a) Fuller was accused of slandering the High Commission, as well as schism. The King's Bench took the view that any contempt or slander he had committed against the High Commission was solely punishable by the common law courts. The Consultation was qualified accordingly: "Quatenus nun agat de aliquibus scandalis, contemptibus, seu rebus quae ad communem legem aut per statuta regni nostri Angl sunt punienda et determinanda."

(b) Fuller's alleged schism and contempt consisted largely or wholly in things he had said while arguing for his client in a Prohibition case. It was of course scandalous in the extreme for the High Commission to prosecute a lawyer for vigorously disputing its jurisdiction in the line of duty. But so long as he was accused of schism the King's Bench could not prohibit the prosecution. So, at least, the judges were constrained to think in this politically charged case of a "radical lawyer." It is probably fair to say that the second qualification attached to the Consultation was "the best the Court could do for Fuller." The words were: "Quatenus non agat de authoritatate et validitate literarum patentium pro causis ecclesiasticis vobis vel aliquibus vestrum direct' aut de expositione et interpretatione statuti de anno primo nuper Regnae, etc." The whole controverted matter of the High Commission's jurisdiction depended on the meaning of the clause of the Elizabethan Act of Supremacy that authorized the court, plus the meaning of letters patent pursuant to the statute by which the court was constituted. Part of the controversy was whether interpretation of the statute and patents belonged exclusively to the common law courts. It is hard to say exactly what the second quantenus clause added to Fuller's Consultation would prevent the High Commission from doing in the case at hand. If his "schism" consisted in statements about the meaning of the statute and letters patent, could he be convicted without a determination that the statements were untrue, and could such a determination be made without violating the qualified Consultation? In any event, if the tendency of the quantenus clause was to warn rather than enjoin -- to remind the ecclesiastical court where its "peril" lay -- the function was precedented.

Having qualified the Consultation in two ways, the judges in Fuller's Case proceeded to lay down a general justification of partial Consultations. Their doing so suggests that a doubt was raised by counsel, or at
least existed in the judges' own minds. As they said, there could not be serious doubt in view of prior cases. At any rate, having used the partial Consultation in a visible, political case, the judges understandably wanted to make it explicit that they were following a perfectly regular procedure. The generalization as Coke states it was as follows: Where the ecclesiastical suit contains several matters, some prohibitable and some not, standard procedure is to grant a general Prohibition, and then to undo it in part by Consultation on motion -- "the writ of consultation with a quoad is frequent and usual, but a prohibition with a quoad is rara avis in terra nigroque simillima cygno." Whether or not there is better reason for qualifying Consultations than for qualifying Prohibitions, the rule is an accurate description of practice. We have seen but one black swan above.

If Consultations quoad were common, Consultations ita quoad were not. This verbal hair is split in one brief report.\textsuperscript{10} The report does not say why a partial Consultation was sought or whether it was granted, only that quoad rather than rather than ita quoad was said to be the correct expression. But the substance can be guessed at from the reported surmise. A parishioner being sued for tithes of lambs claimed by prescription that lambs born in Parish A and subsequently pastured in Parish B were tithable in A. I imagine that it was argued that this amounted to prescribing for total exemption from tithes relating to the lambs in B and was therefore unlawful. A qualified Consultation was probably sought to allow the parson of B to recover something for the pasturage of the lambs in his parish, while his suit was stopped quoad the lambs themselves insofar as they were born in A. (\textit{De jure}, one out of ten lambs born was due in kind.)

An advantage of the practice recommended in Fuller's Case -- general Prohibition and partial Consultation, as opposed to partial Prohibition -- is brought out by another report.\textsuperscript{11} The substance of the case is not reported, only the following: A partial Prohibition was granted. Defendant-in-Prohibition then sought a Consultation quoad those parts of the ecclesiastical suit that had not been prohibited. The Consultation was requested because the ecclesiastical court was allegedly in doubt as to how

\textsuperscript{10} Parson Earle's Case T.7 Jac. K.B. Add. 25,208, f.51b.
\textsuperscript{11} M. 8 Jac. C.P. Add. 25,209, f.205b.
Partial Prohibitions and Consultations

far the Prohibition extended. In other words, the ecclesiastical court wanted to be told positively wherein it should proceed, because it did not understand exactly what it had been prohibited and not prohibited from doing.

The Common Pleas, however, refused the Consultation—a redundant Consultation for insurance purposes, we might call it. Without knowing the circumstances of the case, there is no telling whether the ecclesiastical court was in legitimate or over-cautious doubt, and whether that made any difference to the common law judges. But the decision underscores the advisability of confining quoad clauses to Consultations: A partially prohibited ecclesiastical court might be reluctant to construe the Prohibition, and hence to proceed in the matters never prohibited. If the decision in this case -- no Consultations to clear-up partial Prohibitions -- represents a general policy, there is all the more reason to keep Prohibitions-*quoad* in the rare bird category. That partial Prohibitions continued to be occasionally granted and that they remained somewhat questionable appears from the late Lush v. Webb (1641). The ecclesiastical suit was for tithes and offerings. The surmise of a modus covered only the tithes. The award of a Prohibition *quoad* the tithes only was striking enough to report, and for Siderfin to cite one other case (Coleman v. Gilbert) as an example of the procedure.

The partial Consultation was used in anomalous circumstances in a case 1612. A parson sued for wool tithes, not *de jure* but by virtue of an alleged custom more favorable to the parson than common right -- he claimed to be entitled to 1/10th of the wool "without the view or election of the party." It is hard to visualize what this customary method of payment would amount to. It goes, in any event, in derogation of the parishioner's ordinary right to take part of his wool and say to the parson,"Here, I offer you this as your fair tenth of the total crop." The parson was evidently claiming some sort of right to come to the shearing place and take his pick, and he was evidently complaining that this had somehow been made impossible for him. The parishioner got a Prohibition to contest the truth of the alleged custom and proceeded to declare

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12 P. 17 Car. K.B. 1 Siderfin, 251.
13 P. 10 Jac. K.B. 1 Bulstrode, 204.
on his surmise. The parson then demurred and struck out the words "without the view of election of the party." The report leaves it ambiguous whether he struck out the words -- presumably from his libel, attached to the surmise and part of the record -- before or after officially entering his demurrer. But it is clear what he was trying to do in effect: He wanted to amend his original claim, dropping the unconvincing custom so that the claim would amount to a straightforward demand for tithes in kind. If that was his claim, the cause of Prohibition now set forth in the parsoner's declaration would be groundless, and Consultation should lie. The parson accordingly moved the Court for a general Consultation. What he got was a qualified one -- *quoad* tithes in kind due *de jure*. As to the custom, the parson was told he must proceed at common law without amendment of his claim.

This solution was, I think, rather generous to the parson. For what he got was the go-ahead signal to the ecclesiastical court that he needed. The partial Consultation would say to the ecclesiastical court, "The suit of A v. B which we prohibited has now been amended into a straight claim to tithes in kind. So long as it is that and remains that, you may proceed." A harsher solution from the parson's point of view would have been no Consultation. He could justifiably have been told, "You may not change from a custom-based claim to a *de jure* claim at this point. The suit we prohibited is and must remain custom-based. If you want to start a new ecclesiastical suit for *de jure* tithes, or to try to persuade the ecclesiastical court to proceed with an amended version of the existing suit, that is your business. But we will not help you out by telling the ecclesiastical court wherein it is safe to proceed in the existing suit." The more lenient solution that the parson wanted (general Consultation) would have had two disadvantages: (a) It would in principle, no doubt send back the suit as amended, but the language of a general Consultation ("You may proceed in the erstwhile-prohibited suit of A v. B") would not communicate the understood qualification -- "as amended." (b) Suppose the custom cropped up again in the future. A general Consultation would be a record against the parsoner. The partial Consultation would count as a record in his favor so far as any claim by the parson based on the custom was concerned. If on some future occasion the parson were to reassert the custom, the parsoner might be able to make use of the record in his favor. The Court was right, it seems to me,
Partial Prohibitions and Consultations

in preventing the parson from escaping by latter-day amendment all consequences of his original suit (including, perhaps, costs) and also in issuing a writ that let the ecclesiastical court know where it stood.

In Gerey's Case, a partial Prohibition was issued in somewhat problematic circumstances and with some hesitation. The hesitation may have extended to whether partial Prohibitions were ever proper procedure. The statute of 2/3 Edw.6 provided for punitive damages against persons who withheld due tithes. As the statute was applied, ecclesiastical courts were allowed to assess double damages. A parson could recover still more valuable treble damages, but to do that he had to go to the added trouble of suing an action of Debt at common law for the penalty. In Gerey's Case, an ecclesiastical court improperly awarded treble damages after giving sentence for the parson to recover his tithes. A Prohibition was sought on the ground that the ecclesiastical court had exceeded its jurisdiction in awarding the treble damages. That some sort of Prohibition must be granted was clear, but the Court hesitated between a general one (prohibiting execution of the sentence altogether) and a special one (prohibiting execution quoad damages above the amount the ecclesiastical court was entitled to award). The problem in the immediate circumstances arose from doubt as to whether ecclesiastical procedure permitted a definitive sentence to be divided for purposes of execution. I.e.: Did the ecclesiastical court have the procedural flexibility to obey a Prohibition going only to execution of the unlawful damages? If not, the only alternatives would have been no Prohibition or a general Prohibition, the first impossible in fairness to the subject, the latter excessive and unfair to the parson.

The Court finally decided on a partial Prohibition. Surely that was the sensible course. If the ecclesiastical court was so tied up in its procedure that it could not obey the Prohibition except by not executing its sentence at all, so much the worse for it. A general Prohibition would surely have prevented the sentence from being executed in toto. (Unless it was undone by partial Consultation. But if the ecclesiastical court could not execute only part of its sentence in obedience to the partial Prohibition, neither could it do so by way of following a partial Consultation.) The re-

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14 H. 11 Jac. C.P. Moore, 873.
The Writ of Prohibition: Jurisdiction in Early Modern English Law

port suggests that the Court was helped to its conclusion by being convinced that partial Prohibitions were as such legitimate, as if the judges had some doubt about that apart from the peculiarity of the case at hand. For several cases are given in the report as cited in favor of the partial Prohibition. One is an example of a partial Consultation, citation of which suggests that doubt may have been raised about both writs in partial form. One, so far as appears, goes only to the general propriety of partial Prohibitions. (Cullier v. Cullier, 37 Eliz.: The ecclesiastical suit was for defamation -- saying the plaintiff had a bastard. Prohibition was granted *quoad* the bastardy, but the ecclesiastical court was permitted to proceed *quoad* the defamation. *Quaere* what this decision would mean. The object was clearly to prevent the ecclesiastical court from bastardizing someone -- to the possible prejudice of his secular rights, as to inherit land -- as an incidental effect of a petty suit for words. But how can the truth of "You had a bastard" be investigated without inquiring into whether X is the plaintiff's bastard, and how can the defamation suit be determined without going into the truth of the words? Possibly the Prohibition leaves the ecclesiastical court free only to inquire into whether the words were spoken -- i.e., to clear the speaker if he never spoke them. I doubt that it would be left free to rule out truth as a defense -- i.e., to punish the speaker if he spoke the words, regardless of their truth. It would be interesting to know who brought the Prohibition in Cullier v. Cullier.)

The third citation comes a little closer to Gerey's Case, in that the partial Prohibition was granted after sentence, with the effect of blocking execution in part. The sentence looks more easily divisible than the excessive award of damages in Gerey's Case, however. (Took v. Stafford, 2 Jac. The citation does not state the case very clearly. It would appear that the ecclesiastical suit and sentence covered several sorts of tithes -- probably certain tithes in kind, plus sums of money claimed by the parson in lieu of tithes for agistment. The Prohibition blocked execution for the tithes in kind but not for the rest, for whatever reason.)

In Hoskins's Case,\(^\text{15}\) a partial consultation was sought and denied in circumstances somewhat different from any of the cases above. The re-

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\(^{15}\) Hobart, 115. Undated in Hobart, but clearly the same case as Eve v. Hoskins, M. 13 Jac., probably C.P., Lansd. 1172, f.52b. Hobart's report brings out the point better than the MS., though they basically agree.
porter (Hobart, who was probably a judge in the case) seems to have doubted the decision's correctness. The ecclesiastical suit was for tithes from a specified area. A Prohibition was obtained on surmise that the tithes from two-thirds of that area had belonged to Queen Elizabeth, who had granted them to X, whom plaintiff-in-Prohibition had paid. (The monarch was "capable of tithes" by prerogative, apart from impropriations. Tithes from land which did not belong to any parish, for example, were due to the monarch of common right. The basis for the Prohibition here was presumably that the validity of the royal grant was brought in question, or else that the bounds of parishes were in question. The mere claim that the tithes had been paid to the proper person should not warrant a Prohibition.)

A Consultation was then sought quoad the one-third of the land concerning which the surmise manifestly made no claim. This seemingly reasonable request was denied, however, on the ground that the Consultation must conform to the libel. The libel was "entire" -- i.e., the ecclesiastical suit aimed at recovering tithes from the area as a whole -- ergo the Consultation must be "entire" too. Since continuation of the ecclesiastical suit as originally cast could not be authorized, no Consultation could be granted. Defendant-in-Prohibition was told to start a new suit for tithes from the one-third that the surmise said nothing about.

This decision seems to me to go pretty squarely against the grain of holdings in favor of partial Consultations. I can see no necessary distinction between splitting up an ecclesiastical suit territorially and splitting one up according to subject matter. I.e.: Parson sues for pigs and lambs. Parishioner shows cause of Prohibition covering only the pigs. If a Consultation quoad lambs is proper in that case, why not in the principal case quoad the one-third not covered? There is admittedly a distinction between a partial Consultation that splits up the ecclesiastical suit and a qualified Consultation of the "quatenus non agatur" type. The latter respects the "entirety" of the ecclesiastical suit as conceived, but indicates channels within which the ecclesiastical court must stay in handling the suit. But the former type was precedented as well as the latter (though not, it should be noted, as numerously, judging by the cases above), and would seem to present less of a theoretical problem in most respects. Hobart appends a quaere to his report of Hoskins's Case. So far as appears,
the *quaere* goes straight to the decision -- i.e., asks "Were we really right in deciding the case as we did?"

In the Caroline Matingley v. Martyn, a partial Consultation was proposed and probably granted. The case was as follows: William and Joan were prosecuted at ecclesiastical law *ex officio* (publicly or criminally, without private complainant) for "suspicious cohabitation" -- i.e., living together as husband and wife without being married, or at least (as the accusation against them read) without its being known or probable that they were married, since marriage banns had not been read in their parish and they had no license dispensing them from banns. William and Joan's essential defense was that they had a marriage license from the Archbishop of Canterbury. After unsuccessfully trying to plead their defense in the ecclesiastical court, they got a Prohibition. Their claim to a Prohibition rested essentially on the statute of 25 Hen. 8, c.21. That act gave the Archbishop the dispensing powers formerly vested in the Pope. William and Joan maintained that the ecclesiastical court was pretending that the statute did not give the Archbishop power to dispense from marriage banns, or at least that the meaning of the statute was in question, whereas the exposition of statutes belonged to the common law. In other words they maintained that insofar as their license was not allowed, the ecclesiastical court was depriving them of a statutory right, or at least purporting to construe the statute by disallowing a license made pursuant to the Archbishop's statutory powers.

I think it is fair to cut through the complexities of this case by saying that the judges at last saw the light and perceived that William and Joan had no claim. Claims to Prohibitions on the ground that a statute was involved raised special problems in any event. The claim here was particularly flimsy. For one thing, the Archbishop's license was no better by virtue of the statute than it would have been without it. (Though the statute gave the Archbishop the Pope's dispensing power for all England, every bishop and archbishop had non-statutory power to dispense from marriage banns within his diocese or archdiocese. William and Joan lived in, and their wedding took place within, the Province of Canter-

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16 P.8 Car. K.B. Jones, 257.
bury.) Secondly, there was nothing to suggest that the ecclesiastical court actually had done anything that would count as interpreting the statute, or that it would be required to -- much less that the statute had been misapplied. In other words, even if the license is taken as an exercise of the Archbishop's statutory power, overruling the license, or refusing to accept it as a sufficient defense to the charge of suspicious cohabitation, does not ipso facto point to an act of interpreting the statute. The reason is that the formal sufficiency, meaning, etc., of licenses issued by the Archbishop pursuant to his statutory powers were clearly within ecclesiastical jurisdiction. I.e.: The ecclesiastical court may not deny that the Archbishop has licensing power by the statute. It perhaps may not even entertain questions, if any were to be controverted, about the scope of his power. But it may certainly consider, nay, decide, whether a statute-based license is in the right form by ecclesiastical standards (as it were, whether it is on the right kind of paper, signed in the right place, etc.) For 25 Hen.8 did not set up a special manner of licensing -- only transferred power to issue due ecclesiastical licenses from one ecclesiastical officer to another. Similarly, marriage licenses invariably had provisoes -- provided that the licensees are not within forbidden degree of consanguinity, etc. The factual question whether conditions laid down in an ecclesiastical license had been met belonged to the ecclesiastical court, whether the license was made pursuant to statutory powers or otherwise. In the instant case, the charge of "suspicious cohabitation" may have been sustainable without raising any question about the license's validity as an ecclesiastical document -- much less about the statute behind it. For it was an issue in the case whether the couple's local ecclesiastical authorities had notice of the license.

To all appearances, what really happened was that William and Joan got a perfectly good and utterly uncontroverted license from the Archbishop to be married without banns in a designated church in London. They lived somewhere else, however. It was a question of fact whether they had given the local authorities where they lived notice of their lawful marriage, and perhaps a question of law whether cohabiting without giving such notice constituted a crime of "suspicious cohabitation." But all these questions -- what constituted sufficient notice, whether such criteria of notice had been met, whether living together without giving due notice was an ecclesiastical crime even if the couple were married in fact -- were
perfectly within ecclesiastical competence and perfectly independent of the statute.

In sum, William and Joan got up a farfetched theory that could lead to prohibiting every marital suit involving an Archepiscopal dispensation, whether or not there was the least question as to what powers the statute gave the Archbishop. William and Joan said that the ecclesiastical court was proceeding against the statute (i.e., on the pretense that marriage licensing belonged only to the bishops), but there was nothing to suggest that that was true. Their saying so was only by way of stating their theory. So the judges agreed in the end, holding that there was no present basis for prohibiting, though there might be in the future, upon a showing that the ecclesiastical court had actually misapplied the statute -- i.e., had held that the Archbishop had no power to issue such a license.

The road to the above conclusion was circuitous, however. The matter of qualified Consultations arose along the road. The case was discussed only after full pleading and demurrer (declaration; plea in bar; replication; demurrer by the defendant, the ecclesiastical judge). On the first hearing, Justice Jones favored a Consultation, upholding the demurrer. The rest of the Court (Richardson, Croke, and Whitelocke) went the other way. Then the case was reargued, the able Attorney General, William Noy, speaking for the defendant. Chief Justice Richardson was now converted to Jones’s opinion. But since the Court was still divided 2-2, outside judges were called in -- two from the Exchequer (Chief Baron Davenport and Baron Denham) and two from the Common Pleas (Chief Justice Heath and Justice Hutton). These advisers favored a Consultation with a qualifying clause -- "ita quod non agatur" of the Archbishop’s statutory powers. Was their advice taken? The report fails us. We are told that on the occasion of their conference with the four outsiders the King’s Bench judges reached agreement on the substance as I have outlined it above. That is to say, Whitelocke and Croke were talked out of their previous opinion. (On the main question. There was a further pleading question, on which everyone held for the defendant, and an additional question as to whether the ex officio proceeding against William and Joan was lawful without any presentment. On the last question, Croke and Whitelocke thought the proceeding unlawful, contrary to their colleagues and the outside judges.) We are not told, however, whether the "ita quod" clause was finally put into the Consultation.
Partial Prohibitions and Consultations

The chances are that it was. The proposal to insert it has the look of a compromise: The outside judges clearly agreed with Richardson and Jones on the real matter. They were faced with two stubborn hold-outs -- two stubborn hold-outs in a thoroughly argued case, where the issue was broad enough to have a political flavor. Croke and Whitelocke were resisting the ecclesiastical interest and the arguments of the Attorney General. They were also (in my opinion) wrong -- though possibly wrong from good motives and with some technical justification. (As to the good motives: Here was a couple being harassed by the churchmen for the curious offense of "suspicious cohabitation," when they were probably doing nothing immoral. Here were the churchmen, with government assistance, making a "Federal case" out of this trivial matter -- raising grave and difficult questions about the independence of the ecclesiastical judiciary and its relation to the statute law. Fair-minded judges -- as well as Puritans and fornicators -- might well take offense at such a display of Laudianism. As for the technical justification: The pleadings on their face did claim that the ecclesiastical judge had violated the statute -- unlikely though it is that that was anything but a pretense.) The outside judges probably saw themselves in a mediating role -- charged with bringing two "right" judges and two "wrong" ones together if at all possible. The "ita quod" clause was in one sense a small sop to offer Croke and Whitelocke, in another sense a large concession -- the perfect compromise. On the one hand, it would tell the ecclesiastical court not to do something it was virtually sure not to do anyhow. On the other hand, it would give Croke and Whitelocke what they were holding out for in principle -- recognition that ecclesiastical courts have no intrinsic authority to construe statutes, are bound by the common law interpretation, and may be prohibited from meddling with statutes without a showing that they have made a decision necessarily dependent on misapplication of a statute. It is more likely that Croke and Whitelocke agreed to the qualified Consultation than that they were so wholeheartedly converted as to accept a general Consultation. It is likely that Richardson and Jones would have accepted the "ita quod" for the sake of unity. We cannot be sure, however. We cannot even be sure that the case was decided for the defendant, for where the report stops Croke and Whitelocke were still holding out on the separate question of whether the ecclesiastical suit was lawful at all in the form it took. That question was not raised by the pleadings. If Croke and Whitelocke
wanted to insist on it, they were proposing that the "legal truth" be followed, instead of the pleadings -- as in the cases on "misconceived surmises" above. Since, counting the outside judges, they were outvoted, the chances are that they would not have refused the Consultation on that ground in the end. (The outside judges were only advisers. I.e: The case was not formally adjourned into the Exchequer Chamber, to be decided by all the judges of the three principal courts. But unless their feelings were very strong indeed, Croke and Whitelocke would in all probability have accepted the votes of their outside colleagues as binding on them.)

With respect to partial Consultations, two observations on Mattingley v. Martyn should be made: (a) If I reconstruct the drama correctly, qualifying the Consultation was a compromise. Judges who thought the right solution was no Consultation and judges who thought it was a general Consultation got together on an "ita quod." In one way, recognition of the qualified Consultation as a legitimate form provided a useful instrument for compromise and similar motives. "We might as well put in a qualification, just to make sure the ecclesiastical court does not stray out of bounds" was a possible thing to say -- when doing so would enable a divided court to act, or when the judges had a skeptical or hostile attitude toward ecclesiastical proceedings which they were powerless to prohibit.

On the other hand, it seems questionable whether qualified Consultations ought to be granted "just to make sure," to make someone feel better about permitting the ecclesiastical court to continue. The cleaner, more rigorous course is to decide between no-Consultation and general Consultation, unless a qualifying clause will genuinely serve to direct the ecclesiastical court away from misconduct which might require another Prohibition later on. When there is no real expectation that the ecclesiastical court will exceed its jurisdiction or come into conflict with the common law, the etiquette of a mixed legal system is probably best observed by leaving the ecclesiastical court alone to do its business, not by surrounding it with warnings and conditions, which themselves may raise problems of interpretation. In the particular matter of statutes, it is perhaps best to act as if one assumed the ecclesiastical court would apply the statute correctly -- an assumption hardly contrary to fact in many circumstances.
Partial Prohibitions and Consultations

(b) Matingley v. Martyn was a fully pleaded case. The qualified Consultation was proposed as a solution upon demurrer. Ordinarily, partial Consultations were sought on motion before pleading (insofar as they were sought on purely legal grounds -- i.e., not pursuant, say, to a verdict finding for the plaintiff quoad one tithe and the defendant quoad another). That is what the resolutions in Fuller's Case contemplate -- partial Consultations on motion as procedurally preferable to, but not different in effect from, partial Prohibitions. Is there any difference? Arguably, perhaps. In the first instance or nearly the first instance, one might say, the Prohibition should be tailored to cover only as much of the ecclesiastical suit as the surmise shows to be prohibitable. If, however, the plaintiff declares on an "overstated" Prohibition, and the defendant demurs to the Prohibition as declared on, perhaps the parties have challenged each other to an "all-or-nothing" contest. The plaintiff has said inter alia that his Prohibition is not "overstated," the defendant that its "overstatedness" is among its flaws wherefore a total Consultation should lie. Therefore partial Consultations should not be granted upon demurrer, or at least they should be granted more reluctantly than upon early motion. From the perspective of private litigative warfare, there may be some point in this argument. Matingley v. Martyn is a precedent contra, but vitiated by the special need to unjam a divided Court.

Alongside the miscellaneous cases above, we must consider testamentary cases exemplifying qualified writs. I treat these as a special class because they may have been the entering wedge for partial writs in general. It would have been hard to avoid such writs in testamentary cases. Without the example of testamentary cases, they might have been avoided elsewhere. It is arguable that simple conglomerate suits should not be split up by partial Prohibitions or Consultations. (If a parson sues for pigs and lambs and a modus covering only the pigs is surmised, the effect of granting a total Prohibition and letting it stand will be to make the parson start a new suit for lambs. Arguably, people who bring conglomerate suits undertake to make them stick across the board, or else to go back and sue separately for separate items.) As for "quatenus non agatur" Consultations, designed to warn or direct the ecclesiastical court -- questions can be asked about their propriety and utility in enough contexts to raise the general question whether they were a very good idea. In testamentary law, however, the division of labor between common law and ecclesiastical courts was such that qualified writs were close to a practical necessity.
If they had not been needed in that area, perhaps they would have been less willingly recognized elsewhere. Even so, it was sometimes problematic in testamentary cases themselves whether a partial writ was the right solution. Let us now turn to cases in the special testamentary group.

In Harvey v. Harvey (1584), a qualified Consultation was expressly sought by the ecclesiastical plaintiff, Clare, who was suing an executor, Sebastian, for a legacy. Sebastian's essential defense was that the testator was in debt to him (by a "Statute Staple," a special type of obligation by which land was made liable to execution to satisfy the debt) and had given him all his goods by inter vivos gift, so that he had nothing as executor from which to pay legacies. He prohibited the legacy suit on surmise of the Statute Staple and inter vivos gift (both transactions which, if questioned, were clearly within common law jurisdiction.) Clare then moved for a Consultation "quatenus non agitur ad validitatem facti [i.e., the deed of gift of the goods allegedly made in the testator's life], aut statutti."

Lady Lodge's Case (above) was urged as authority for such a Consultation (by Egerton, who had himself been of counsel in the earlier case.) But Chief Justice Wray, whose opinion alone is reported, was inclined against it. His reported words go only to distinguish Lady Lodge's Case, but his full point needs to be put in somewhat broader terms: There was a practical reason in the instant case for seeking a Consultation -- albeit necessarily qualified. At first sight, that may not be apparent, for if the testator gave all of his goods to Sebastian, how could the ecclesiastical court do anything for Clare without venturing where it plainly must be forbidden to go -- i.e., without passing on and invalidating the deed of gift? The answer (as Wray acknowledged) is that there might be debts owing to the testator which Sebastian had collected, or could collect, and out of which the legacy could be paid. The inter vivos gift of all goods would not operate as an assignment of such debts owing to the testator. So why not (in effect) Consultation quoad any assets in Sebastian's hands by virtue of obligations falling due to the estate -- the Prohibition to stand quoad any property of the testator comprehended in the deed of gift? In
Partial Prohibitions and Consultations

answer to that, Wray turned to the Statute Staple. Sebastian claimed to have £2000 coming to him by virtue of the Statute. For that large sum, he had a claim against the estate -- i.e., against anything that came to the estate by virtue of obligations to the testator (offset, I suppose, by any equities arising from the gift -- i.e., a claim against the estate for £2000 minus the value of the goods, if the gift was intended as, or should be presumed, a partial satisfaction of the debt, a question presumably resolvable in a court of equity).

In sum, I believe Wray's point comes to this: The qualified Consultation might be justified if only the gift had been surmised -- for the estate might still be sufficient to satisfy legacies. Likewise if only the Statute Staple had been surmised -- for an estate worth £10,000, say, should be subject to legacy suits even though it was encumbered with a £2000 obligation. But putting the two together, the chance that the estate could satisfy the legacy was extremely marginal -- not theoretically excludable, but extremely marginal. Better to stop the ecclesiastical suit altogether, pending common law determination of the gift and Statute, than tempt the ecclesiastical court (even while forbidding it) to meddle in common law matters. Given license to award the legacy so long as the gift and Statute were not questioned, it might soon find itself involved in other issues beyond its depth -- e.g., the validity of obligations to the testator -- raising the possibility of new Prohibitions (and 50 Edw. 3 problems). Better avoid "quatenus" Consultations except where there is a real chance that the ecclesiastical court can settle the matter in its own terms -- where it only needs to be warned away from questions it is unlikely to touch.

Lady Lodge's Case was very possibly at the opposite pole from Harvey v. Harvey in the way that matters. I.e.: It may have been the perfect case for a "quatenus" Consultation -- a case in-which the chance of an ecclesiastical resolution without touching common law ground was better than good. In specifically distinguishing Lady Lodge, Wray relied: (a) On the fact that the deed in Lady Lodge constituting the "common law issue" was made by a previous executor, rather than the testator. Quaere whether that is a distinction without a difference. (B conveys away all the goods he has as A.'s executor. B makes C his executor and dies. A's legatee sues C. The ecclesiastical court is told to go ahead "quatenus" it does not touch B's conveyance. That is Lady Lodge's Case minus further complications. Wray seems to say the Consultation was justified there.
because the conveyance was B’s. Where X conveys all his goods to Y and makes Y, his executor and dies (Harvey v. Harvey) Wray seems to say that the Consultation is less justified, even apart from the additional factor of the Statute Staple. Why? In the first case, if B.’s own estate was big enough to satisfy its debts should the ecclesiastical court be free to charge it with A.’s legacies, either prior or posterior to B.’s legacies? Quaere.) (b) Though B. in the above outline of Lady Lodge had conveyed all of A.’s goods away, there might have been debts collectable by A.’s estate out of which A.’s legacies could still be satisfied. In Harvey v. Harvey, the heavy charge represented by the Statute Staple made that improbable.

One further feature of Harvey v. Harvey should be noted. As of the time he brought his Prohibition, Sebastian had been excommunicated for failure to appear and answer Clare’s suit and imprisoned upon De excommunicato capiendo. As far as the report indicates, nothing was made of this circumstance against Sebastian. Wray talks about the differences between his case and Lady Lodge’s in a vein favorable to plaintiff-in-Prohibition. There is nothing to suggest that Sebastian’s title to have and maintain his full Prohibition was vitiated by his non-appearance and his delay in suing the Prohibition.

A case of 1590 exemplifies the qualified Prohibition in circumstances we have not heretofore encountered. Prohibitions were sometimes used to prevent ecclesiastical courts from exacting detrimental testimony from parties by inquisitorial investigation. Such cases, including this one, are discussed in substance in Vol. II of the study. The famous instances concern criminal suits, primarily in the High Commission. But there are civil instances as well. The general principle to keep in mind is that inquisitorial procedure was not objectionable -- or at least not controllable -- as such. Requiring the party to answer interrogatories was the way ecclesiastical courts did things -- objectionable, or controllable, only insofar as it took certain unfair forms in criminal suits, or, in civil

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18 T. 31-M. 31/32 Eliz. C.P. Add. 25,194, f.6b; Lansd. 1073, f.108 (two nearly identical reports, giving Anderson’s initial speech); Add. 25,196, ff. 199b and 204 (the second and third hearings -- of primary importance here; Moore, 906 (brief report, misleading because it does not say that the Prohibition was qualified).
Partial Prohibitions and Consultations

suits, at least matrimonial and testamentary suits, insofar as it might tend
to the damage of a man's common law interests.

In our case, the ecclesiastical suit was to revoke administration. The
intestate's wife had been made administratrix; his heir (i.e., real-estate
heir -- his blood relationship to the intestate does not appear) sought to
have administration transferred to him, on the ground that the debts and
credits of the personal estate were bound up with the land he had inher-
ited, in consequence of which he had paid off some of the estate's debts.
There was serious question as to whether ecclesiastical courts had juris-
diction to entertain such revocation suits at all, because the statute of 21
Hen. 8, c. 5, sect. ii, severely limited their discretion in awarding admini-
stration. The statute as the common law judges understood it was fre-
quently enforced by Prohibition. In this case, however, the
widow-administratrix did not claim that the suit should be prohibited be-
cause it was unlawful by the statute. Rather, she sought a Prohibition on
the ground that she was being compelled to answer improper interrogato-
ries -- questions about the condition of the estate and the intestate's af-
fairs which she claimed were irrelevant for the ecclesiastical court's
purposes, intrinsically "temporal," and apt to extract admissions that
could be used against the estate in common law litigation with the credi-
tors.

Whatever else could be said against them, it was not entirely clear
from the surmise that the questions were irrelevant. Chief Justice Ander-
son, who alone spoke when the case first came up, was unwilling to con-
clude out of hand that they were. When the case was discussed again, the
court was inclined to agree that a partial Prohibition was the right solu-
tion: tell the ecclesiastical court not to proceed on "points belonging to the
common law" (as the report puts it), otherwise let the suit, including the
interrogation process, go on. In some sense, that must perhaps be consid-
ered what plaintiff-in-Prohibition was asking for, since she did not object
to the revocation suit as such or, it would seem, maintain that she should
not be interrogated to any intent. What the form and effect of such a par-
tial Prohibition would be is problematic. Would the Prohibition specify
which questions were so "temporal" that the ecclesiastical court must stay
away from them, whether or not they were relevant, or the ecclesiastical
court considered them relevant, for its purpose? Or would the Prohibition
be cast in general terms and operate only in a minatory way -- in effect,
"Go ahead and ask questions which you consider essential for your purpose, but be careful about asking anything that is likely to affect common law interests -- for any inessential questions that trench on our sphere will put you in danger of violating this Prohibition?"

When the case was taken up a third time, the Court found itself in serious disagreement. Chief Justice Anderson insisted on the ecclesiastical court's right to ask any questions that were relevant for its purposes, whether or not they were about "temporal" matters and whether or not they might lead to detrimental admissions: "If the examination of the other matters is a necessary circumstance to prove the principal point, there is no reason to prohibit them. As if it [a suit] were begun there for a legacy, and defendant pleaded a gift by the testator in his life of all his goods except those with which he should pay such-and-such a debt -- if they are at issue on the gift, they may take examination concerning the gift, and yet the gift is determinable at common law..." (N.b. Anderson's parallel example. Lady Lodge and Harvey v. Harvey show that the ecclesiastical court could be prohibited _quoad_ an _inter vivos_ gift. Anderson should not be taken as disputing that.

Rather, his point is as follows: If the ecclesiastical defendant chooses to rely on such a gift by way of ecclesiastical plea, and does not get a Prohibition, then the ecclesiastical court may make him answer questions about the gift, even though it is an intrinsically "temporal" matter and even though admissions capable of being used against him in common law litigation might be exacted. Justice Periam replied to Anderson briefly and sharply: "In our case itself, I hold the contrary." I take Periam as not wanting to dispute Anderson's general principle or his parallel case, but as favoring a strong Prohibition in the instant case -- either general, or qualified so as to rule out the questions about "temporal" matters specifically. Periam's underlying point must be that the relevance, or high-degree relevance, of the questions was not evident in the case at hand. He must have taken the surmise as importing the claim that there was no "justifying relevance" here. Perhaps he was unable to imagine any. Therefore the ecclesiastical court should be strongly prohibited, pending a showing, by pleading to the Prohibition, that the "temporal" questions were in fact essential. (In Anderson's parallel case, on the other hand, the relevance of the question is evident.) Anderson, by con-
Contrast, was taking the surmise as defective for failure to claim irrelevance, or lack of "justifying relevance," specifically.

Anderson came back at Periam rather testily: "My case was law before my age and will be afterwards, and there is a book case circa H[en.] 4, where one sued in the spiritual court for a mortuary." Justice Walmesley then intervened to suggest a compromise: "Yes, sir. His case is good law, and thus is 8 H[en.] 4 and 2 R[ich.] 3. But it seems to me there may be a special prohibition -- that if it not be pertinent to the cause to surcease, otherwise to proceed. And Anderson agreed to that in this plea." These remarks are puzzling in that "my case" and "his case" have the look of referring back to Anderson's parallel case (the inter vivos gift), as if Periam had said "in your case itself" -- i.e., "I dispute your parallel case itself, a fortiori what you are implying about this one." However, I read the MS, as clearly "notre," not "votre," and Periam's position makes good sense as reconstructed above. In any event, Periam and Anderson disagreed about the case at hand. Walmesley essentially agreed with Anderson, but thought there was no harm in a weak, or "minatory," Prohibition, to which Anderson had no objection. The fourth member of the Court, Justice Wyndham, was present, but said nothing on this point.

The Justices went on, however, to discuss whether suits for revocation of administration ought to take place at all. On this, Periam and Wyndham lined up squarely against Anderson and Walmesley. The first pair thought that the Henrician legislation regulating administration removed all basis for revocation suits. (This position amounts to the following: Anyone entitled to administration by statute should proceed by Prohibition to block the appointment of improper persons. Except for such persons deprived of their statutory right, no one could have any basis for disputing the ecclesiastical court's appointment -- i.e, seeking to have the old grant revoked and a new one made. The statute preempted the field -- requiring the appointment of certain classes of relatives when persons in those classes were available, otherwise giving the ecclesiastical court discretion.) Anderson and Walmesley disagreed "strongly." (They would not, I am sure, have denied that the statute severely limited the ecclesiastical court's discretion, or that the statute was enforceable by Prohibition. Their position was presumably: (a) that a person entitled by the statute could if he liked sue for revocation in the ecclesiastical court instead of bringing a Prohibition: (b) that where neither contender was entitled by
the statute, the ecclesiastical court was free to allow its original grant of administration to be challenged on any grounds that would have been appropriate in ecclesiastical law before the statute.) The report only tells us that the judges were divided over whether the suit for revocation was proper in the first place -- i.e., does not spell out the counter-positions as I have done.

The court's further exchange leads to two conclusions: (a) Periam's view on the ecclesiastical court's power to exact self-betraying "temporal" testimony must have been influenced by his skepticism about the revocation suit as such. Logically, his opinion on the former question is independent, and that is the question raised by the surmise. But Periam hardly needed to worry about whether plaintiff-in-Prohibition had made out the irrelevance of the questions sufficiently, in view of his position on the other question. At strongest, he could favor a general Prohibition according to the "legal truth" that the revocation suit ought never to have been brought. Short of that, he could reason as follows: "It is doubtful whether the ecclesiastical court should even be entertaining this suit. Granting that it may, at least so long as no complaint is made in terms, the claim to revocation must be based on the statute, or else it must be a mere objection to an exercise of discretion -- for the statute defines the sole legal reason why anyone in particular should have administration, so that, at most, the ecclesiastical court is free to reconsider its original act of discretion. Temporal transactions cannot be relevant for any claim based on the statute, because the statute only refers to familial relationships to the intestate. If the claim is not de jure, but a mere request for reconsideration on grounds of equity or convenience, it is not important enough to justify asking a man to betray his temporal interests. The ecclesiastical court might like to know about them to the end of assessing its discretionary act wisely. But so long as that is its only purpose -- so long as it has no strict legal duty to reconsider at all, or to give any particular weight to this or that factor -- it cannot be said to need the information to do its legal task, or to need it so badly that it is entitled to extract it from the party. Therefore ex hypothesi the questions are not 'relevant' in the proper sense of the word. Therefore it does not need to be shown that they were irrelevant. 'Temporal' interrogatories should always be banned in revocation-suits."
Partial Prohibitions and Consultations

(b) Since Wyndham agreed with Periam on the legitimacy of the revocation-suit as such, and since views on that question and views on the propriety of the interrogatories are likely to have been connected, it follows that Wyndham and Periam were probably united against Walmesley and Anderson across the board. Therefore, as far as the report takes us, the Court looks deadlocked. My guess would be that Walmesley’s compromise -- the weak *quo ad* Prohibition -- was adopted in the end. (Moore’s report indicates that a Prohibition of some sort was granted.) No-Prohibition would have suited Anderson, and Walmesley probably would not have complained. The choice for Periam and Wyndham was a deadlock resulting in no-Prohibition or a weaker *quo ad* than they would have preferred. On my reconstruction, the qualified Prohibition -- like the qualified Consultation in Matsingley v. Martyn above -- figures as an instrument of compromise.

Our remaining cases concern a problem we have already touched on -- the "mixed will," a single document comprising the two legally separate transactions of bequeathing personal estate and devising land. In a case of 1596, the ecclesiastical suit was to annul such a will. It does not appear whether the will had been proved, so that the suit aimed at reversing probate, or whether it aimed to block probate in the first instance. In any event, the claim in the ecclesiastical suit was that the testator had revoked the will in question during his life. The ecclesiastical defendant -- presumably the executor named in the disputed will -- sought a Prohibition on surmise that the ecclesiastical court was on the point of giving sentence to annul the will as a whole (or *quo* integral document), whereas it had no authority to allow or disallow a will of land. A partial Prohibition was granted -- i.e., *quo ad* the devise of land -- without reported dispute. (The alternatives, for any of which a case can be made, would have been:

a. No-Prohibition -- for an ecclesiastical decision about the document's authenticity may not be given in evidence in common law litigation about the land and therefore will not significantly prejudice common law interests, whereas a partial Prohibition is incapable of being meaningfully obeyed by a court asked to pass on an integral document; upholding or annulling a will ostensibly *quo ad* the goods only is just as likely to be

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19 M. 38/39 Eliz. Q.B. Add. 25,199, f.23b.
The Writ of Prohibition:
Jurisdiction in Early Modern English Law

prejudicial as upholding or annulling it as a whole.  

b. Total Prohibition, pending a showing that the will has actually been affirmed or disallowed in a common law suit, or pending determination of the will’s authenticity pursuant to pleading on the Prohibition itself -- the only sure-fire way to avoid prejudice to common law interests.  
c. Total Prohibition, subject to motion for partial Consultation -- which, apart from being the better procedure in general, allows for at least a brief delay, during which the ecclesiastical court cannot move, and the party who fears for his common law interests may take steps to assert them; if such steps should actually be taken, the Court might conceivably notice the fact judicially and withhold Consultation.

Our case arose at the next stage -- upon a motion for Consultation quoad the personal estate. As in the comparable Jacobean case discussed above (see note 11), the court denied the motion: The ecclesiastical judge was not prohibited quoad the goods; therefore he need not be authorized to go ahead to that intent; therefore he should not be. The reality that undercuts that unimpeachable logic came out, however. Godfrey, of counsel, in favor of the motion: "But they there [the ecclesiastical court] being prohibited as to part will not examine the other part of the will."  But the Chief Justice was obdurate. Popham: "Consultation may not be granted except where Prohibition is granted to the testament of goods. Therefore the Prohibition will stand."

We have no way of knowing how timid the typical ecclesiastical court was. It is not self-evident that a partial Consultation would ease its plight. But the report suggests a line of reflection: In mixed-will cases, a Prohibition quoad the land operated in practice (so Godfrey said) like a general Prohibition. Did the courts anticipate that effect and therefore deliberately use partial Prohibitions, instead of full Prohibitions subject to partial reversal, in such cases? Did they intend, in other words, to make it hard for ecclesiastical courts to do anything with mixed wills, but without taking the bull by the horns -- i.e., without granting and upholding full Prohibitions until the document’s authenticity was settled at common law? Was there any advantage in not taking the bull by the horns, except for the "public relations" or "etiquette" advantage in not ordering ecclesiastical courts to desist from doing what they had an unquestionable right to do? Possibly there was an advantage in mere vagueness -- in Prohibitions that may in effect have said to the ecclesiastical court "Go ahead, but watch..."
Partial Prohibitions and Consultations

your step." Circumstances might have a lot to do with how hard the ecclesiastical court took the warning. Estates are enormously various. Imagine on the one hand a mixed will devising thousands of acres and bequeathing large legacies, on the other hand a will involving trivial legacies and a few acres. A Prohibition quoad terram might provoke different reactions in the two cases -- in the first, reluctance to act, the sense of having been warned against infringing common law interests, combined with virtual certainty that the devise of real-estate would be challenged in common law litigation; in the second, awareness that the common law interests involved were of slight value and that delay would work mainly to deprive some poor servant or spinster daughter of a little legacy.

In other words, the ecclesiastical court in our case may have been balking, not because quoad-Prohibitions were intrinsically impossible to obey, or any harder to follow than quoad-Consultations. It may have been balking because common law interests were involved and because the Prohibition conveyed just the message it was meant to under the surface -- "We can't prohibit you from annulling this will with a pro forma statement that you are only doing so quoad bona, but before you do that look the situation over. Consider the magnitude of the values and who would gain and lose by delay in settling the personal estate." Godfrey may have been making the move that offered desperate hope to his client interested in the personal estate. One can imagine him saying to his civilian counterpart, "Let me try to persuade the Queen's Bench that a quoad-Consultation is a harmless or logical complement to a quoad-Prohibition, a desirable clarification of an intrinsically hard-to-follow order. If you can come armed with a Consultation, the ecclesiastical court will probably be deprived of its pretext for delaying sentence to annul the will, and then we can promptly get our client appointed administrator of the personal estate."

On this construction, the Court in rejecting the motion prevented its perfectly conscious policy from being subverted by a clever lawyer. When we take up mixed-will cases from the substantive-law point of view, I think the need to look behind the legal surface to the real difficulties of handling such cases fairly will appear. The construction above is speculative, but it looks to the large-looming reality -- the immense variety of estates, confronted by cumbrously divided jurisdiction and categories of jurisdictional law that took no account of that variety. Partial writs
were a necessity in that situation; we have explored a sense in which the partial Prohibition -- as distinct from the generally superior partial Consultation -- may have provided an inelegant but useful way-out.

The Marquis of Winchester’s Case involved the large estate of a nobleman, whose mixed will substantially disinherited his legal heir in favor of bastard children named executors. In the event, probate was prohibited totaliter, and the executors’ attempt to get a partial Consultation quoad bona was turned down, pending the outcome of common law litigation over the land. The reason for the decision was that the Marquis’s sanity was challenged. The Court thought that the possibility of a conflicting or prejudicial ecclesiastical decision on the question of his sanity should be headed off. It seems to be implied that a partial Consultation would have been granted if there had been no sanity issue -- i.e., if plaintiff-in-prohibition had merely sought to stop probate pending litigation over the land, without claiming in his surmise that the marquis was insane and thereby showing how he hoped to break the will. Quaere if some other specific reason for contesting the will -- such as the revocation in the testator’s lifetime in the last case -- had been laid. An ecclesiastical decision on a Marquis’s sanity, in a case well-flavored with high-society scandal, is surely the sort of thing that would get around, to the prejudice of other litigation reopening the same issue -- more so, no doubt, than a decision on some such duller question as whether the will had been revoked, superseded by a later document, or the like. On the other hand, given the size of the estate and the certainty of common law litigation, the judges may have welcomed a good reason to stop the ecclesiastical court altogether, and might have made do with a less good one had there been need.

From a procedural point of view, Winchester’s Case is interesting for the maneuvers that led up to the conclusion. When Prohibition was first sought, the Court was inclined to grant a partial writ. Coke, representing plaintiff-in-Prohibition, immediately urged the Court to grant a full Prohibition subject to motion for partial Consultation. He said that that procedure was the Court’s usage and cited Lloyd v. Lloyd as a case in point.

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20 P. 41 Eliz. Q.B. 6 Coke, 23. Hetley, 120; Add. 25,203, ff.59 and 61.
Partial Prohibitions and Consultations

Others at the Bar confirmed Coke’s memory of Lloyd v. Lloyd, and the judges thereupon followed his advice. Good Form was not the only beneficiary of Coke’s quick victory on this point. For when, on a later day the same term, Serjeant Williams came to move for partial Consultation, he was turned down. In considering Williams' motion, the Court took up the effect of the insanity issue, as it had not done on the first hearing. The insanity was laid in the surmise, but Serjeant Heale, who spoke for the original motion for Prohibition, did not, so far as the reports show, say anything about it. He did not need to, for the mixed will by itself was reason enough for some sort of Prohibition. When the court offered a partial Prohibition, Coke intervened with his point of form -- not with the argument that the Prohibition should be total in this case because of the insanity issue. If he had brought that up at once, Serjeant Williams might have been saved the trouble of his motion. One cannot be sure about the motives and strategy. Perhaps Coke decided to shoot for a full Prohibition on the point of form first, because if that worked he would gain time to prepare his arguments on the point of substance. The other side might in the meantime decide that a partial Consultation was not worth pushing for. Conceivably such intervening events as actual commencement of a suit for the land could affect both the other side’s thinking and the Court’s.

Coke’s argument from the usage of the court in Winchester’s Case is contradicted by our last case above. That case at least furnishes an individual counter-example. If there is anything to my argument that partial prohibitions may have had positive advantages in mixed-will cases, one would expect them to be common enough to constitute a counter-usage. That the Court’s first instinct was to grant a quoad-Prohibition suggests there was previous practice that way. The non-testamentary cases above show that in general there was practice both ways, though Coke’s full-Prohibition-subject-to-motion procedure should probably be regarded as preferred. On balance, it may have been more favorable to plaintiffs-in-Prohibition. A full Prohibition is a bird in the hand. The other side may have trouble wresting it away -- as in Winchester’s Case -- even though in theory, or ceteris paribus, he is entitled to an automatic Consultation quoad bona. Cf., however, the argument above that some plaintiffs-in-Prohibition may have been better off with nominally partial Prohibitions. If the ecclesiastical court had been prohibited only quoad terram in Winchester’s Case, one wonders whether it would have dared go ahead -- say to pronounce the nobleman sane and put his bastard favorites in posses-
The Writ of Prohibition:
Jurisdiction in Early Modern English Law

sion of vast quantities of goods, while the legitimate heir and representa-
tive of the family -- the more likely favorite with a jury -- stood an
excellent chance of breaking the will at common law. Godfrey in the last
case may have been right -- partial Prohibitions were sometimes as good
as full ones, with the added advantage of being Consultation-proof.

In almost all mixed-will cases, the propriety of partial writs is in some
way an implicit issue. Except for the two cases just discussed -- on the
relative claims of partial Prohibitions and partial Consultations -- I shall
treat such cases later, under substantive law. On the one hand, mixed-will
cases naturally suggested partial writs, in one form or the other, and pro-
vided some of the precedents for such writs as a generally appropriate
procedure. On the other hand, the suggestion was sometimes rejected --
i.e., sometimes it was argued that partial writs were precisely not the way
to handle such cases, without necessarily denying their appropriateness in
other contexts. Such arguments sound to a degree in procedure, but in
their more major aspect go to the function of Prohibitions and modes of
justifying them. For that reason, further mixed-will cases are deferred.
IX.
Joint Prohibitions

**Summary:** The Elizabethan courts permitted parties with identical complaints to join in Prohibition at the surmise stage. The Jacobean King's Bench turned against joint Prohibitions, but 17th-century holdings in general are mixed, and the legitimacy of joinder was never firmly settled. The better opinion at all times was that joint plaintiffs-in-Prohibition must declare separately if the case progressed to formal pleading. Joint Prohibitions were most likely to be allowed when the ecclesiastical suit joined the plaintiffs-in-Prohibition as defendants.

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Over the last several topics, we have been essentially concerned with the degree of procedural flexibility to be admitted into Prohibition law. In general, the public stake in preserving correct jurisdictional lines made for flexibility -- for relaxing, within limits, conventions of "art" and logic that might have been more insisted on in strictly private litigation at common law. Such instruments as Consultations on motion and partial writs may be seen as ways of doing the special work of jurisdiction control sensibly and efficiently, in the face of a certain feeling, perhaps, that such flexible instruments were not quite good form and not absolutely necessary. A few other manifestations of procedural flexibility remain to be inspected.

One question under that rubric concerns the power of parties to join in suing Prohibitions. To take the simplest example: Suppose separate tithe suits are started against several parishioners, all of whom want to claim the same local *modus*. May the parishioners make themselves joint parties to one surmise and stop all the ecclesiastical suits by a single Prohibition? Other attempts to bring suits arose from different situations, but the characteristic issue is the same: When individuals are similarly aggrieved and want to make what amounts to the same claim, may they pool their resources? May they save themselves money and time by a joint suit -- and thereby save the courts the trouble of dealing repetitiously with identical cases and the risk of handling them inconsistently? The advantages of permitting it are obvious. On the other side, it may be argued that "by nature" litigation is individualistic. Joint suits by persons strictly "one in law" or "one in interest" (e.g., husband and wife; joint-tenants) were un-
questionably appropriate. But a joint suit by persons who simply happen to have the same case to make is more problematic. When A sues B and C separately, is it fair to A to let B and C entrust their legal fortunes to a common bottom? Is A not entitled to gamble on the "hazards of individualism," the possibility that B and C will take different steps in what each supposes to be his interest -- e.g., that B will hire a good lawyer and C a bad one; that B will lose interest and be nonsuited while C persists; that B will adventure an unsuccessful demurrer while C takes a traverse; that if both go to trial, one will be more conscientious in assembling evidence than the other; that B will make a procedural mistake (such as failing to prove his surmise in a Prohibition case) while C dots all the i's? It must, no doubt, be conceded that identical cases should be handled the same way in the same context (e.g., if identical declarations come up on demurrer separately). Apart from the simple judicial duty to handle like cases alike, more complicated procedural routes to consistency my be legitimate. (E.g.: If a modus is found bad as between Parson and Parishioner Jones, should Parishioner Smith's Prohibition on the same modus be denied, or reversed by Consultation on motion, upon a showing of the verdict against Jones? If a local modus is found good by verdict as between Parson and Jones, may Parson be attached without a separate Prohibition when he sues Smith for the same tithes in the same locality? A few cases on such points as these are discussed below.) But whatever the courts may or must do to insure consistency, the argument continues, the private litigant is entitled to whatever "breaks" he may get from proceeding separately against several identically positioned adversaries. Like other forms of "sporting" fairness to the litigant, this one has to do, however decisively or indecisively, with the larger ends of justice. Though identical cases should come out the same way in general, perhaps that is only true when several parties in the same position show equal zeal and care in taking advantage of their position. Perhaps permitting easy joinder tends too much to protect people from their own indifference, folly, and temptation to compromise. (Cf. the sense in which several people conspiring to do something wrongful may seem a little different and a little worse than several people simply doing the same wrongful thing. In the case of a joint suit -- as distinct from a conspiracy to do wrong -- it is hard to object to the economic pooling of resources. I.e.: It is hard to defend a party's sporting chance to defeat some of his identically placed adversaries by exposing them to charges they cannot bear as individuals. But an objection can be made to the pooling of moral resources. It is possible to imagine paro-
chial situations in which bringing a joint Prohibition would have a flavor of conspiracy: Suppose there are one or two parishioners with more to lose than others if tithes in kind are exacted and/or a more virulent desire than others to "get the parson." Suppose they go to work on other parishioners and persuade them to withhold their tithes and defy the parson to sue, proposing a joint Prohibition and agreeing to foot the bill. If the joint Prohibition is permitted and succeeds on the merits, it is likely that some will escape their tithes who would not as individuals have thought it worthwhile to try, or who for the sake of friendly relations with the parson might have paid up or settled in the end. Once in a common bottom, there will probably be no motive for individuals to get out, and the difficulty of doing so is in any event likely to be considerable. A parochial common bottom might well be promoted and maintained by a few men with a special interest in the nominally worthy public end of upholding the locality's immemorial manner of tithing.)

A final argument against joint Prohibitions specifically is that a joint surmise cannot conform to several libels. If the prohibo must correspond strictly to the prohibendum -- if a misnomer or miscopied figure in a surmise will cause the Prohibition to miss the target it is obviously aimed at -- should a surmise aimed at stopping A v. B not refer solely to A v. B, not to A v. B, A v. C, etc.? That this point is pettifogging -- that it makes less sense than even pedantic insistence on care in reciting the ecclesiastical suit to which the surmise relates -- does not necessarily rule it out.

We turn now to the cases on joint suits for Prohibition. In the early Sir Gilbert Gerrard v. Sherrington,\(^1\) joinder was forbidden in relatively innocuous circumstances. Gerrard sued for tithes (as farmer of a rectory) against (a) Sherrington and (b) a servant of Sherrington's. He either brought two wholly separate libels or stated his claim against the two men twice-over in distinct parts of the same libel. In any event, the Court held that Sherrington and his servant must make separate surmises. There is nothing to suggest that the claims against Sherrington and the servant were in any substantive way distinct -- i.e., that Gerrard was doing anything but suing the legal occupier of land who was responsible for paying the tithes, plus an employee of the legal occupier who was immediately

\(^{1}\) P. 20 Eliz. Q.B. 1 Leonard, 286.
The Writ of Prohibition: Jurisdiction in Early Modern English Law

responsible for the wrongful act of not setting the tithes out. Not letting a master and servant join to stop a suit that was all one in effect could be a strong precedent against joinder as between less closely related parties -- e.g., two parishioners. (It is just possible that there was a touch of politics in the Court's disposition to be tough on Sherrington and his servant. Sir Gilbert Gerrard was an important courtier. He sued as farmer of an impropriate rectory owned by the Queen. His lawyer, Solicitor General Egerton, argued against the Prohibition on the ground that the Queen's farmer's suit -- like, no doubt, the Queen's own -- could not lawfully be prohibited. Having rejected Egerton's substantive argument, the judges may not have been disinclined to give his well-connected, prerogative-invoking client a technical consolation-prize.)

In our next case, a decade and a half later, joinder in Prohibition was upheld. Bartue sued Wodrofe and Coke for tithes. It does not appear how separate the ecclesiastical suits or claims against them were kept. The situation, in any event, was this: Wodrofe and Coke both wanted to take advantage of a tithe exemption enjoyed by certain land when it was in monastic hands. The allegedly exempt land had been leased to one Pastor by the erstwhile abbot for a term of 99 years. Pastor then subleased the land to Wodrofe for 60 years. Wodrofe granted part of the land to Coke for the remainder of his 60-year term. Thus it would appear that Wodrofe and Coke were sued as occupiers in respect of different parcels of land -- Wodrofe for the part he had not granted to Coke; Coke for the other part. They joined in Prohibition because they relied on exactly the same exemption. Godfrey, counsel for Bartue, showed some authority against joinder and attempted to argue that it was only permissible when people were sued in respect of true joint obligations (as if two joint-tenants were sued for tithes from their land). The reports have the Court rejecting Godfrey's argument with a simple statement that the joinder was good (MS: "good enough"). Conceding that, Godfrey showed that either Coke or Wodrofe was dead and moved that the Prohibition abate. The Court again turned him down: "Nothing is to be recovered by them except to be discharged, and the death of one will not abate the Prohibition."

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2 Wodrofe and Coke V. Bartue, H. 36 Eliz. Q.B. Add. 25,196, f.321; Owen, 13 (sub nom William Bartue's case.)
Joint Prohibitions

(MS.) In other words, though a properly brought joint suit with a "positive" objective -- recovery of damages or the like -- would fail by the death of one partner and require recommencement as the survivor's individual suit, that is not true of a Prohibition with the "negative" aim of establishing a tithe exemption.

A year later, the Common Pleas was confronted with the question whether two parishioners sued separately for tithes may join in Prohibition to take advantage of a single local modus. The question is reported simply as "moved at the bar" -- i.e., it does not appear whether there was an "actual controversy," as opposed to a request for an advisory opinion. In any event, the Court was split, with the majority of those present favoring the joinder. Justices Walmesley and Beaumont thought it "clearly" appropriate: "...their title to be discharged by the custom is joint, although the suits are several, as all the tenants in ancient demesne should join in Monstraverunt although they are severally distrained." (The privileged tenants of ancient demesne manors could protect themselves against being distrained for services beyond what the custom of the manor permitted by writ of Monstraverunt. The parallel is closely in point because ancient demesne tenants joining in Monstraverunt, like the parishioners joining in Prohibition here, would be seeking to enforce the custom of a local unit -- the manor in one case, the parish in the other.) Justice Walmesley went on to invoke the "public" theory of Prohibitions in support of joinder: "The offense is to the Queen and her Crown, and that is not several." (In other words, one might say, the object of Prohibitions is to protect the public interest in proper lines of jurisdiction; if several inappropriate ecclesiastical suits are going on at once, it makes no difference in what manner the common law Court is informed thereof -- by one joint surmise or several surmises.) Justice Owen, however, disagreed with Walmesley and Beaumont, insisting on the formalistic point that only the ecclesiastical suit "as is" can be prohibited: "...the suit is the cause of the prohibition, and that [the suit] is several." Since Chief Justice Anderson was absent, we cannot be sure that a majority of the Court would accept joint Prohibitions by a number of parishioners relying on the same custom.

3 H. 37 Eliz. C.P. Add. 25,200. f.100.
A year later, the same two judges who favored the joint Prohibition in the last report struck down a less defensible attempt at joinder. This time, two parishioners without identical claims tried to economize by bringing a joint Prohibition. It appeared from their surmise itself that one of them claimed to pay 5/ in satisfaction of all tithes, while the other claimed to pay 4/. Justices Walmsley and Beaumont, alone in court, quickly granted a motion to quash the joint action. A limit was drawn: the suits against these two parishioners might equally offend the Queen, but nothing less than an identical claim -- a claim based on a single custom of whose benefit all parishioners are as it were "joint tenants" -- would justify a joint Prohibition.

In Shepard v. Metcalfe, two Queen's Bench judges (Popham and Fenner) reaffirmed the second holding in Wodrofe and Coke v. Bartue above: once a joint suit for Prohibition is properly commenced, it may continue even though the partnership breaks up. That is all the reports give -- the opinion that the withdrawal, nonsuit, or death of one joint-plaintiff-in-Prohibition will not bar his fellows or require them to start over. The feasibility of joint Prohibitions obviously gains with their immunity to breakdown. Permitting joint suits to change easily into individual ones implies a departure from common law formalism, as does permitting such suits in the first place.

In Stevenson et al. v.______, the Common Pleas reendorsed joint Prohibitions upon an explicit challenge to them, drawing at the same time a limit to collectivism. In this case, the ecclesiastical court proceeded ex officio against a number of non-resident landholders of a certain parish, to the end of holding them liable for rates to repair the church. The landholders were all in the same boat, in that they all wanted to challenge the ecclesiastical authorities' right to make non-residents contribute to the upkeep of a church from which they got no benefit, and to claim that the attempt to rate them proceeded from an unlawful piece of ecclesiastical legislation. They accordingly got a joint Prohibition. Yelverton, moving

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4 P. 38 Eliz. C.P. Harg. 7, f. 195.
6 M. 41/42 Eliz. C.P. Lansd. 1065, f. 32b. Lansd. 1172. f. 54b, is a brief report of only the holding on joint Prohibitions in this case.
for Consultation at the Bar, took exception to the joint prohibition, as well as to the substance of the plaintiff's claim. The judges were in doubt and divided on the substance of the plaintiffs' claim, but they agreed, promptly and in general terms, that the joint suit was legitimate. Justice Daniel cited a Darcy's Case as upholding joint Prohibitions. The judges added, however, that the joint plaintiffs must declare separately upon attachment. In other words, the surmise may be joint, but if and when the case proceeds to formal pleading the partners must act as individuals. There would consequently be an outside chance in the long run of the several plaintiffs' cases being differently pleaded and responded to.

An undated report, certainly Elizabethan,\(^7\) upholds the joint Prohibition in especially strong terms. Several occupiers of land in the Forest of Gisborne joined to assert a *modus* applicable to tithes throughout the Forest. The Court accepted the joinder *although the joint plaintiffs were sued by separate libels in the ecclesiastical court.* It justified the joinder by express reference to the public character of Prohibitions, i.e., their exemption from the individualistic canons of mere private litigation: "... for the Prohibition is no action, but an *ex officio* act on information, and there is neither plaintiff nor defendant nor pleading in Prohibition." The last clause amounts to saying that "plaintiff, defendant, and pleading" come in only at the next stage -- Attachment on Prohibition. At the earlier stage, there are only "informers" *pro* and *con,* and they may speak in any "natural" form (as opposed to the "artificial" style of pleading.) The report goes on to say that the joint plaintiffs in the instant case declared separately. We have, therefore, a practice-precedent to support the rule, stated judicially elsewhere, that though "informing" may be joint, "pleading" must be individual.

Basically, the Elizabethan authority supports joint Prohibitions, stronger support coming from the Common Pleas than from the Queen's Bench. The Jacobean King's Bench turned the other way. In Burges and Dixon v. Ashton,\(^8\) it clearly repudiated joint Prohibitions, though with lenient effect in the event. Two tithe-payers joined to take advantage of the

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7 Harl. 4817, f. 162. The dated cases surrounding this and other undated ones in the series are all from *ca.* the 1590's, mostly C.P.
8 T. 6 Jac. K.B. Yelverton, 128.
same local *modus*. Upon motion for Consultation, the Court agreed unanimously that the Prohibition should never have been granted in joint form. The judges clearly embraced "formalistic individualism": The two parishioners were sued by separate libels, ergo they must seek separate Prohibitions; "the tortuous vexation of the one does not extend to the other." Nevertheless, the judges denied the motion for Consultation. They consciously treated the case like a "misconceived surmise": The joint surmise was bad; the plaintiffs should have been told then and there to start over as individuals. Since, however, the Prohibition had been granted, and since it appeared to the Court that both parishioners had good grounds for individual Prohibitions, Consultation was denied. The two parishioners were told to declare separately (as Stevenson *et al.* says they should do in any case).

In Barnard *et al.* v. Little, a two terms later, three joint plaintiffs managed to keep their partnership going too long. They were punished accordingly. Here, the plaintiffs made their surmises jointly and went on to declare jointly. Upon demurrer, the Court granted Consultation. The Court's language makes it clear that the joinder was considered bad *ab initio*, though perhaps it was only fatal because it survived through the declaration stage. There were three libels, the judges said, ergo there must be three Prohibitions (leaving the implication, as the last case does, that a joint Prohibition might be justified if the ecclesiastical plaintiff had comprehended his separable claims against several persons into a single libel). The report does not say what kind of common claim caused the three plaintiffs-in-Prohibition to join. Justice Fenner did not participate in this decision, but the judges present were unanimous.

Two Common Pleas holdings, just slightly later than the two from the King's Bench above, reaffirm the former court's acceptance of joint Prohibitions. The first report is of a *per Curiam* opinion: Tithe-payers may join to take advantage of a common local *modus*, but they must declare separately. "Public theory" language was used to support the point: "...
Joint Prohibitions

the Prohibition is only to give notice to the court." Essentially the same point is repeated in the Court's resolution of Hopkins, Smyth, et al.\(^{11}\) It appears that the libel in this case was joint in the sense of "conglomerate," "one document comprising similar claims against a number of tithe-payers." It may be easier to justify a joint Prohibition in that case than where there are fully distinct libels. Even so, the Court in Hopkins, Smyth, et al. reiterated that the joint plaintiffs must declare separately. A Sir Francis Drurye's Case was cited in support of the holding in Hopkins, Smyth, et al. The reporter adds a note on a Bugg's Case from the same term (M. 8 Jac.), where it was argued that one Prohibition should be directed against two joint ecclesiastical plaintiffs, but that plaintiffs-in-Prohibition should declare against them separately. That goes to support distinguishing the surmise stage from the declaration stage. The undated Parker's Case,\(^{12}\) probably roughly contemporary with the two reports above, reaffirms the joint-Prohibition-separate-declaration rule (where the Prohibition aimed at taking advantage of the tithe exemption for reclaimed land under 2/3 Edw. 6).

In Cotes and Succerman v. Warner,\(^{13}\) the King's Bench was confronted with two of its seemingly contradictory precedents. One side urged Burges and Dixon v. Ashton against the joint Prohibition. The other side urged Wodrofe and Coke v. Bartue in its favor. Actually, Cotes and Succerman was not quite like any earlier case. The following features are to be noted: (a) Cotes and Succerman were both sued by the same ecclesiastical libel. (b) They were sued for tithes of hay cut from certain fenland, of which they made no pretense to be owners -- i.e., for hay taken by virtue of a right of common. (c) They claimed in their joint surmise to be beneficiaries of a quondam monastic exemption: A monastery was seised of the fen and prescribed in exemption from tithes for itself, its tenants, farmers, and occupiers. The exemption was preserved by the Statute of Monasteries. Cotes and Succerman had houses near the fen, the occupiers of which had always taken hay from the fen by way of common. They claimed, therefore, to be "occupiers" within the prescription, even though they had nothing in the soil of the fen. (d) Having got a

\(^{11}\) M. 8 Jac. C.P. Harg. 15, f. 225.
\(^{12}\) Brownlow and Goldesborough, 7.
\(^{13}\) M. 9 Jac. K.B. Harg. 32, f. 99.
The Writ of Prohibition: 
Jurisdiction in Early Modern English Law

joint Prohibition on that surmise, Cotes and Succerman went on to declare jointly. The parson then pleaded over (in effect disputing the monastery's seisin and the prescription and that Cotes and Succerman were "occupiers" within the prescription if it was true). It is only at this point that the legitimacy of the joint surmise and declaration was discussed. The procedural form in which the question was raised does not appear from the report (plaintiff's demurrer to the plea in bar? latter-day motion for Consultation?).

The parson contested the substantive sufficiency of the Prohibition as well as the joinder (the former on the ground that a pernor of profits by way of common is not an "occupier" within the meaning of the prescription). The judges' remarks in our report are largely on the joinder, though as much as is said on the other point is favorable to Cotes and Succerman -- i.e., to taking "occupier" broadly. (It is not irrelevant to note that, for the Court's disinclination to jump on a point of procedure at a late state might be explained by its belief that the plaintiffs were substantively in the right.)

On the joinder, Justice Yelverton was strong for Cotes and Succerman. He had "no question" but that they might join. His reasoning seems to go as follows: It is significant, but not decisive, that one libel was brought against both men. What is decisive is that the libel did not show on its face that their "interests and titles" were separate. I take that to mean in effect that the libel should be construed against the parson. If the libel were merely "conglomerate," the joinder would be bad. But if for all that appeared the parson might be suing with respect to a single act of taking hay, jointly performed by the two men -- or if so far as the parson was concerned they might have been "joint tenants" of one and the same pretended right or non-right to withhold tithes -- then the joinder is good. (My second formulation is awkward, but perhaps necessary to make the point. I think it is clear that Cotes and Succerman did actually have separate "interests and titles" within Yelverton's meaning. I.e.: Each had a house; each took hay by right of common appurtenant to his house; each claimed to take it tithe-free by virtue of an exemption applicable to the occupier of his particular house; in principle, Cotes might have a valid right of common and concomitant tithe-exemption, while Succerman's claim to the same sort of right might be invalid. I therefore take Yelverton to refer solely to the way the libel is drawn and the assumptions on
Joint Prohibitions

the parson's part it implies. The difference would be between libels in the following alternative forms: Libel 1 - "C is an inhabitant and land-occupier of my parish, and has cut hay in the fen, and has not rendered tithes thereof as the law requires; S is also an inhabitant, etc."
 Libel 2 - "C and S are inhabitants of my parish and have cut hay in the fen, etc."
By Yelverton's opinion, C and S may join in Prohibition if the libel is like Libel 2, contra if it is like Libel 1. The opinion comes to this: A parson who sues several parishioners in one tithe suit risks a joint Prohibition unless he is careful to show that his libel is not a true joint suit, but a mere conglomerate of several individual suits, analogous to a single suit against one parishioner for several different tithes.

Justice Williams agreed with Yelverton, perhaps with slightly different emphasis: The ecclesiastical suit is against both, "but if the interest had appeared to be several they ought to have had several prohibitions." There may be difference between the two judges, coming to the difference between "the joint ecclesiastical suit is a sort of prima facie justification for the joint Prohibition" (Yelverton) and "It makes no difference whether the ecclesiastical suit is upon one libel or several; joint Prohibition can only be justified by the absence of anything in the libel to suggest that the two parishioners' 'interests' are separate" (Williams). Chief Justice Fleming's words on the joinder are "if you have a joint libel they shall join in prohibition, because there it does not appear that they have several interests." If there are any hairs worth splitting as among the Justices' opinions, Fleming seems stronger than Yelverton on the matter (as if to say, "A joint libel always implies that so far as the parson is concerned the parishioners' interests are not several"). But his "if" suggests that he wanted to see the ecclesiastical record before making a decision. (It is perfectly possible that the other judges were speaking hypothetically, not with certain knowledge of the shape of the ecclesiastical suit.) In any event, the case was adjourned, so that we have no reported decision.

In sum, Cotes and Succerman v. Warner at least goes to qualify the generalized disapproval of joint Prohibitions that might be incautiously projected from Burges and Dixon v. Ashton. It also tends to qualify any wholly generalized distinction between the surmise stage and the declaration stage. On the other hand, the judges showed no inclination to follow the theory implicit in Wodrofe and Coke v. Bartue, as counsel urged them
to: That two persons claiming the same merely "negative" monastic discharge may always join. The cases are probably distinguishable: Wodrofe and Coke were closer "in interest" than Cotes and Succerman because Wodrofe was Coke's lessor of part of the land affected. I.e.: If Blackacre as a whole was exempt, Blackacre minus X (what Coke had) was certainly in the same boat as the rest of Blackacre (what Wodrofe retained). By contrast, Cotes could have had a good right of common and Succerman a bad one.

In all the cases we have looked at so far, two or three people with related but technically distinct claims attempted to join. The case of the Parishioners of Begger's Barton\textsuperscript{14} presents a different situation -- the true "group Prohibition." The report is unfortunately too brief to do much with. We are told that plaintiffs-in-Prohibition were the parishioners generally. They surmised that the vicar had a piece of land in satisfaction of certain tithes. The Court thought that Prohibition lay because "every parishioner will take advantage." The way that it is put suggests that the doubt was the "standing to sue" of parishioners who were not objects of ecclesiastical proceedings. It is most unlikely that there was a libel out against every single parishioner. The chances are that some parishioners were sued for their tithes, whereupon all the parishioners got together in a Prohibition. The Court held that this form of proceeding was acceptable, since all the parishioners had an interest in upholding the modus. Is it not anomalous to admit this sort of joint Prohibition, but to frown on joinder by actual parties to ecclesiastical suits wishing to make the same claim? Yet the Court that was liberal towards the Parishioners of Beggar's Barton was the King's Bench, the Court that tended to frown on private joinder.

In Kadwalder et al. v. Bryan,\textsuperscript{15} the Caroline King's Bench ruled out a joint Prohibition. Kadwalder and confrere based their Prohibition on 23 Hen. 8, c. 9, complaining that they had been sued in the wrong ecclesiastical court. (For defamation. Nothing appears as to whether there were two libels, or, in the more likely event that there was only one, as to whether and how the two people were associated in defamatory conduct.)

\textsuperscript{14} H. 12 Jac. K.B. Add. 25,213, f. 169.
\textsuperscript{15} M. 5 Car., K.B. Add. 25,213, f. 169.
The case was pleaded to a legal issue: declaration, plea in bar, demurrer by the plaintiffs to the plea. Omitting the reasons why, the Court thought the plaintiffs had no case -- i.e., that the plea in bar was perfectly good, the points urged in support of the demurrer largely frivolous. Strongly disposed to grant a Consultation anyhow, the Court added that the joint Prohibition was not good because the plaintiffs' "griefs" were several. Under the circumstances, the decision does not mean much. The implications are worth reflecting on, however. Suppose A. and B are sued in Diocese X by the same libel but with respect to acts or offenses that could, if necessary, be made the object of separate suits. If both live in X, there is obviously no basis for Prohibition under 23 Hen. 8. The other possibilities are (1) that A lives in X but B does not, or vice versa; (2) that neither lives in X. The existence of the first possibility recommends insisting on separate Prohibitions. I.e.: If identity of "title" is required to justify a joint Prohibition, A and B should not be permitted to join, because there is a possibility that one is entitled to a Prohibition and the other not. However, even if it is true that A lives in X and B does not, the ecclesiastical suit "as is" should be stopped. I.e.: It should be stopped qua joint suit. Do A and B not have a truly joint interest in stopping that suit? Do they not suffer a joint "grief" by being so sued, even though one would have no grievance if he were sued separately? In sum, it seems to me that cases arising on 23 H. 8 pose a special dilemma with respect to joint Prohibitions. Our case, however, counts against the argument that could be made in favor of joinder.

In Wood and Carvener v. Symons\textsuperscript{16} (treated above for its other points), the Caroline Common Pleas discussed joint Prohibitions. Defendant-in-Prohibition made nothing of the fact that the surmise in question was joint, but persuaded the Court on other grounds that no Prohibition should be granted. Chief Justice Richardson brought up the joinder of his own motion, implying that joint Prohibitions were bad in general. Yelverton, of counsel with plaintiffs-in-Prohibition, argued that when the ecclesiastical suit is joint, the Prohibition may be joint too. Such, he said, was the King's Bench rule. He also invoked the "public theory" argument for joinder -- that a Prohibition is not a simple private suit, but in one aspect "for the King," and therefore not subject to the individualism of mere

\textsuperscript{16} M. 5 Car. C.P. Hetley, 147.
civil litigation. Two Justices, Hutton and Harvey, then laid down the well-precedented rule that joinder at the surmise stage is permissible, but not at the declaration stage (not necessarily confining joint surmises to cases where the ecclesiastical suit is joint). Richardson, however, held out against joinder generally. A wrongful ecclesiastical suit, he argued -- albeit a joint suit -- wrongs the several parties individually; consequently, their surmises complaining of such wrong must be separate and individual. He expressly rejected Yelverton's invocation of the public aspect of Prohibitions: "... it is as the suit of the party is" -- i.e., in the most basic respect, a Prohibition is just another lawsuit, an individualistic matter. Finally, Richardson was frank about one disadvantage of joinder: "It is against the profit of the Court to suffer many to joyn..." He then adds: "... and it is usual in the case of customs of a parish in debate, to order proceedings in the two prohibitions, and that to bind all the parish and parson." I would construe the last remark as follows: If several parishioners are sued for tithes and want to invoke the same local *modus*, the practice is to insist on at least two separate Prohibitions -- i.e., *not* to permit all the parishioners to join in a single one. If both come out the same way -- validating or invalidating the *modus* -- then the decisions will be given collateral effect as *res judicata* for or against other parishioners (see below for cases on such "collateral effect"). Regardless of whether Richardson was right about the practice, there is some point in insisting on two separate Prohibitions -- by way of "double check" -- if one is thinking about settling a matter so as to bind non-parties. Wood and Carverner v. Symons principally testifies to the unsettledness of basic questions about the joint Prohibition as late as 1629.

A final scrap of late evidence is conservatively favorable to joint Prohibitions. In 1641,17 two Common Pleas Justices, Reeve and Foster, said that parishioners jointly sued for tithes may join in Prohibition if they rely on the same *modus*. *Contra* if they want to allege different *modi*.

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17 H. 16 Car. C.P. March, 94.
X.
The "Logical Individualism" of Prohibitions

A. Miscellaneous Problems

Summary: For the general theme which these cases share, see immediately below. In some contexts, the "public stake" in Prohibitions was strong enough to keep Prohibitions alive in altered circumstances. For example, courts were inclined to hold that the death of a party destroyed an outstanding Prohibition, so that his executor could not take advantage of it. The death of the King was held to "abate" Prohibitions in the King's Bench if formal pleading had not taken place. On the other hand, the courts did not insist altogether strictly that only the "party grieved" in the narrowest sense had standing to sue a Prohibition.

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The "individualism" implied in such resistance as there was to joint Prohibitions crops up in an extended sense in a few other situations. In the narrowest focus, a Prohibition can be seen as an "arresting" or "braking" mechanism applied by one man, in consideration of harm done or threatened to him, directed solely against the particular thing doing or threatening such harm -- viz. an on-going, improper "foreign" suit, or such part of an on-going suit as affects that man. This narrow view, at odds with the "public" conception of Prohibitions, was tested in its implications in a few cases other than those on joinder. The most interesting cases of this type are those on the "collateral effect" of Prohibitions and Consultations -- i.e., those which ask whether the specific, inter-party act of stopping A.'s ecclesiastical suit against B. can ever affect C's right, or the future rights of A. and B. Before taking up the "collateral effect" cases, however, let us look at a few miscellaneous ones in the same general area.

Suppose one ecclesiastical suit is brought for several things -- e.g., tithes of several different products. A hyper-purist might argue that each item in the libel should be met by a fully separate surmise. Is a man sued by a conglomerate libel for wheat, oats, and barley not thrice grieved? Three prongs being stuck in him, should he not take three separate steps -- three several Prohibition suits -- to remove them one by one? (He may, of course, have good grounds for extracting one prong but not the others,
or different reasons for getting off different hooks.) We have seen plenty of examples to show that such "hyper-purism" is not to be taken seriously. Ecclesiastical defendants normally responded to conglomerate libels with conglomerate, itemized surmises. Partial Prohibitions and Consultations made it possible to deal with the situation where only part of the surmise was legally or factually sustainable. There is, however, one early holding expressly permitting conglomerate surmises, which suggests that the "hyper-purist" position was once urged. The holding, reported without context, is simply that if A. libels against B. for several things, B may have one or several Prohibitions, as he prefers.

Another problem arises from the death of a party. Suppose A. sues B. for tithes and B. gets a Prohibition. Before proceedings on the Prohibition have reached a conclusion, B. dies. If the Prohibition is conceived as doing just one thing -- stopping the suit A. v. B. -- is it not meaningless the moment B is dead? There is no longer an A. v. B, because there is no longer such a person as B. Therefore the ecclesiastical court cannot be considered "frozen," or under inhibition, with respect to A. v. B. Therefore, -- for the practical consequence -- the ecclesiastical court is free to proceed against B.'s executor without requiring a new libel, if that is permissible under its own rules. If it does so proceed, the executor must get a new Prohibition in his own name to stop the ecclesiastical court again.

In a couple of cases, the courts accepted that line of reasoning. In Bowyer's Case, a parishioner being sued for tithes got a Prohibition and died pending the same. Bowyer was his executor. The case arose on the parson's motion for Consultation. I think it is clear that the Court's whole doubt was whether a Consultation was necessary and appropriate in such circumstances. The judges decided it was not necessary, but still appropriate. I.e.: They agreed that as of the testator's death there was no longer any Prohibition in force -- nothing to stop the ecclesiastical court from proceeding against the executor if it saw fit. Therefore no Consultation was necessary. Nevertheless, the judges were willing to grant a Consultation -- presumably, as in other instances we have seen of "non-necessary" Consultations, to let the ecclesiastical court know where it stood in

2 T. 41 Eliz. C.P. Lansd. 1065, f.20b (the fuller report); Harl. 3209, f.6.
somewhat doubtful circumstances. The fuller report of the case says clearly that a Consultation was granted. (The briefer one only gives the negative holding -- that the Prohibition died with its bringer.) In the fuller report, Justice Walmesley speaks separately, emphasizing that the Consultation was not necessary, that the ecclesiastical court should be able to tell that the Prohibition had lost its force just by reading it carefully. I imagine that Walmesley was uneasy with the Consultation, even though he apparently agreed to it. Given the negative holding, however, the Consultation was probably the right step. If the Prohibition was dead, the executor could not prosecute it to a conclusion. Giving the ecclesiastical court a nudge would stimulate it to act against the executor if it intended to, whereupon he could get a new Prohibition capable of determination. (I cannot believe that 50 Edw.3 would be an obstacle to a second Prohibition on the same libel in such circumstances.) Without a Consultation, the ecclesiastical court might dangle in doubt. The best reason for denying a "non-necessary" Consultation is a positive intention to inhibit the ecclesiastical court without doing so directly -- where the ecclesiastical claim looks fishy, or where delay (e.g., waiting on a common law suit for the land in a mixed will case) might be salutary. One respectable motive of that sort is imaginable in Bowyer's Case -- to encourage a new ecclesiastical suit against the executor, in contrast to proceeding against him on the libel originally laid against the testator. Such a preference is conceivable, but the very granting of the Consultation indicates that it was not actually felt.

The inconvenience of trying to get along without a Consultation in such cases comes out in Goodiar (or Goodyear) v. Master and Fellows of the College of Manchester.³ A Prohibition having been granted in a tithe suit, motion for Consultation based on 2/3 Edw.6 was denied (because the surmise of a lease was held not subject to the proof requirement.) Later, the Court was informed that the original plaintiff-in-Prohibition was dead. Defendant's counsel plainly wanted a Consultation. The judges at first told him that no Consultation was necessary -- the Prohibition had died with its bringer, therefore the ecclesiastical court was free to proceed. Counsel insisted, however, that the

³ H. 43 Eliz. Q.B. Add. 25,203, f.296 (Discussed above for its other point. The other report cited there does not contain the present point.
ecclesiastical court would not actually proceed without direction. The judges therefore agreed to transmit a ruling to the ecclesiastical court, certifying that in their opinion it was at liberty to proceed. The principle that Consultations should not be granted without need was preserved, while the effect of a Consultation was achieved. (We shall see below other examples of special, flexible forms -- ways around the dichotomous choice between Prohibition and Consultation.) The Court said expressly in Goodiar v. Master and Fellows that the executor could have a new Prohibition if he was proceeded against. I.e.: There was no 50 Edw.3 problem. Along with Bowyer’s Case, Goodiar v. Master and Fellows rejects one possibility: regarding the Prohibition as in force despite the plaintiff’s death, and the executor as competent to plead thereon. (Cf. the rule above -- most notably in Woodruff and Coke v. Bartue -- that death of one party to a joint Prohibition does not terminate it. Could that rule be used as the basis for arguing that death of a single plaintiff need not terminate the Prohibition quoad his executor?) Bowyer’s Case and Goodiar v. Master and Fellows clash on the acceptability of a Consultation, the later case endorsing a more puristic position.

One Caroline report\(^4\) relates to the inverse situation: death of defendant-in-Prohibition. All that is reported is Justice Yelverton’s recital of what he understood to be King’s Bench usage, as follows: Death of the defendant, like death of the plaintiff, terminates the Prohibition. Therefore the defendant’s executors are free to proceed. A ruling authorizing the ecclesiastical court to proceed (as opposed to a proper Consultation) will be made. Plaintiff-in-Prohibition may have a new Prohibition against the executors if he likes. This usage is entirely consistent with Goodiar v. Master and Fellows. There is no reason to suppose the King’s Bench ever departed from the holdings in that case. Yelverton’s bringing up the King’s Bench usage in the Common Pleas suggests that the latter court had no settled way of dealing with death-of-a-party cases.

Another Caroline case\(^5\) presents a different situation in which it was problematic whether a Prohibition was terminated -- the death of the

\(^4\) M. 4 Car. C.P. Littleton, 155.
\(^5\) P. 2 Car. K.B. Harg. 30, f.218; Latch. 144. *sub. nom.* Watkin’s Case, undated. I think there is no question but that the two reports are of the same case. There are detailed differences in the
The "Logical Individualism" of Prohibitions

King, rather than of a party. A legacy suit was prohibited in James I's lifetime. The King died before there was any Attachment and pleading thereon. The issue was whether there was a Prohibition now in force, upon which the plaintiff could have Attachment and plead, or whether he needed to start over with a new Prohibition. The Court held that a new Prohibition was necessary. That result was reached by an unusual combination of strands -- the public character of Prohibitions on the one hand; on the other, technical purism.

The King's death did not terminate ordinary lawsuits between party and party. The Court held, however, that a Prohibition in and of itself is not such a lawsuit. In its predominant aspect, it is merely a royal order, and therefore dies with the King. Admittedly, the naked Prohibition -- the royal order -- is the base from which proper inter-party rights are generated. Thus, the judges agreed, if proceedings had gone as far as Attachment in King James' reign, the monarch's death would have had no effect. Contra as things stood.

The fact that a Prohibition (unlike Attachment-on-Prohibition) was not a returnable writ counted against regarding the mere issuance of a Prohibition as commencing a proper lawsuit. I.e: A Prohibition was unidirectional. It went out against the ecclesiastical court and ecclesiastical plaintiff, but its delivery -- signifying that one party had "engaged" the other in litigative combat -- was not certified back into the King's Bench. In principle, plaintiff-in-Prohibition only "went after" defendant -- sought to "engage" him -- by complaining that he had violated the King's Prohibition. Therefore Attachments grounded on that complaint were returnable, while Prohibitions were not. Counsel in our case (according to the MS) tried to turn the very unreturnability of Prohibitions the other way -- into a reason for regarding a true lawsuit as existing before Attachment. As I understand it, the argument goes this way: As a rule, a lawsuit exists when a writ is returned -- when it is of record that a writ has gone out and reached its object. But that is the criterion for "when a lawsuit exists" only when the writ is returnable. In the case of an unreturnable Prohibition, that criterion makes no sense. In the case of an unreturnable writ,

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points covered, but the issue and result are the same. Latch does not usually date his cases, but they are all early Caroline. My discussion conflates the two reports.
the only feasible criterion for "when a lawsuit exists" is "when the Prohibition itself is entered of record." But counsel got nowhere with that. Neither did they succeed with the argument that plaintiff-in-Prohibition may be nonsuited before Attachment -- ergo there must be a suit. Justices Dodderidge and Jones denied the premise: There is no such thing as a nonsuit in Prohibition before Attachment.

Finally, comparison was made with Common Pleas practice. The judges admitted that things were different there. In principle, the Common Pleas did not have the same freedom and power to grant Prohibitions as the King's Bench. Only the King's Bench had a kind of *plena potestas* to protect the "royal dignity," however that worshipful interest was offended and however notice of the offense reached its ears. In principle, the Common Pleas was only entitled to protect its own narrower interest in its own jurisdiction. We shall encounter this distinction again. In practice it did not come to much, for by procedural rigmarole the Common Pleas was able to handle Prohibition cases virtually to the same extent and in the same way as the King's Bench. But the very rigmarole created a sense in which a bare Prohibition in the Common Pleas had more of the marks of an inter-party lawsuit than a bare Prohibition in the King's Bench. The judges in our case conceded that a Common Pleas Prohibition might not or probably would not be discontinued by the King's death prior to Attachment. Nevertheless, the King's Bench must stick to its own ways.

The decision represents no very significant triumph for the public theory of Prohibitions over the private. It uses the former to introduce an avoidable procedural nicety and inconsistency as between the two principal courts. It evades the sense in which Prohibitions were in fact private proceedings from the start, however much they were also public proceedings and as such free from some of the canons of common law correctness. The decision hardly seems consistent with those above on the death of a party. If a naked prohibition is so much the King's action that it dies with him, how is it enough the plaintiff's to surcease with his death? If there is no inter-party lawsuit before Attachment, why may not the original plaintiff's executor start one by attaching the supposed violator of a standing royal order? However, our decision stands, the only one on its subject. If you expect the King to die, hurry and get your Attachment, or else proceed in the Common Pleas.
The "Logical Individualism" of Prohibitions

The abating effect of King James' death on King's Bench Prohibitions had in fact already been upheld in two cases. One, Trumpley v. Maio (P. 1 Car. K.B., cited in Dickes v. Brown following, not independently reported), decided just that: if there had been no declaration or return on an Attachment, Prohibitions evaporate when the King dies. The second case, Dickes et uxor v. Brown, I am taking out of chronological order because it involves notable points of procedure beyond the matter of the King's death. In this case, a legacy suit was prohibited by the executor in P.22 Jac. (spring, 1625). He had lost in the court of first instance and lodged an appeal when he decided to desert his appeal and turn to the common law. Between the issuance of the Prohibition and M. 1 Car. (autumn, 1625), there had been no further proceedings -- no declaration or return. Now Calthrop, of counsel for the legatees (defendants-in-Prohibition), came and moved for Consultation. He argued for a Consultation partly because the Prohibition had abated, citing Trumpley v. Maio. The opposite view -- that the King's death does not affect outstanding Prohibitions -- was unsuccessfully urged by the executor's counsel. Calthrop also argued for Consultation on the merits -- i.e., on the ground that the Prohibition ought never to have been granted (a strong substantive contention, in the light of other cases on the same point -- the merits are discussed elsewhere.) Here is the point to note: By the "abatement" theory there was no Prohibition in being to be undone by Consultation; nevertheless, a Consultation was sought, no doubt because the ecclesiastical court would not move without one despite the King's death, or at least because the legatees did not believe it would go ahead and wind up a long-pending matter without positive authorization. Likewise, by the "abatement" theory, the ecclesiastical court ought to be encouraged to resume proceedings (with the help of a Consultation, if the judges could be persuaded that it was necessary and not too illogical to grant one) whether or not the Prohibition ought to be reversed on the merits; nevertheless, counsel went to the merits.

M. 1 Car. K.B. 3 Bulstrode, 314; Benloe, 139 and 170 (sub. nom. Browne v. Dixe); Noy, 77 (Dixye v. Brown.) Bulstrode is the report that gives the full unfolding of the case as I recount it. The other reports agree as far as they go, except that Benloe's two reports are dated H. 1 and P. 2 respectively (Noy is undated). It is perfectly possible that the case was started in M. 1 and dragged on into ensuing terms, though Bulstrode does not indicate that.
The Court's initial reaction was not adverse to a Consultation. It did not grant one immediately, however, but assigned a day for the other party to show cause why the writ should not issue. On that day, plaintiff-in-Prohibition came and admitted that his Jacobean Prohibition was dead. But instead of arguing against a Consultation even so, he simply moved for a new Prohibition. He grounded his motion, not upon the merits of the original surmise, but on the bare fact that a Prohibition had been granted. I.e: He contended that the Prohibition should be presumed granted for good reason, and should therefore be automatically renewed to get over the technicality of its "abatement," even though the Court could not at present see the justification for prohibiting. The effect of this ingenious idea would be to take positive advantage of the King's death to cut off a Consultation on motion. I.e: In the lifetime of one King, defendant-in-Prohibition could move that the Prohibition was erroneously granted and pray Consultation without formal pleading; he might not succeed, even if he seemed to have a good case in substance, but he was entitled to try. Now it was urged in effect that the Court ought not to look back on the decision to grant a Prohibition made in a former King's reign, but presume that the decision was right pending demurrer.

It seems to me that that theory deserved to be dismissed out of hand, but the report suggests that it may not have been dealt with quite that simply. At any rate, counsel for defendants-in-Prohibition seem to have taken it seriously. For instead of attacking the theory itself, they tried to show that the Jacobean Prohibition was not only ill-granted as a matter of law, but granted by procedural inadvertence. (As if to say, "Perhaps the Court is not entitled to look back on the merits of a judicial act of the last King's reign, but it is not obliged to renew an abated Prohibition automatically if that Prohibition was a mere mistake, not an intended judgment of law at all.") Specifically, the prohibition was said to have been granted as a result of failure of notice to the defendant: When the Prohibition was originally sought, the Court, following common practice, took no immediate action except to assign a day for the defendants to show cause against it; they were never notified that a Prohibition was being sought or that the day to show cause had been set; when they failed to appear, the Prohibition issued automatically. That in itself would not necessarily undercut the plaintiff's claim to have the Prohibition renewed without question, counsel implied, (such failures of notice were probably common),
had he done anything to follow up the Prohibition, so that the defendants could see that he meant to persist and move for the Consultation which they thought they were entitled to on the merits. Under all the circumstances as they were, they thought they should have a Consultation now.

Whether the defendants needed to go to such lengths to win the judges to their side is unclear. In any event, they were pretty successful. Justice Dodderidge took the plaintiff to task for his conduct generally -- first for appealing and only then seeking a Prohibition, now for trying to get his substantively worthless Prohibition renewed in such a way as to force formal common law proceedings on the defendants, delaying them still longer, until they should have spent more on litigation than their legacy came to. The rest of the judges agreed with Dodderidge that there was no cause of Prohibition on the merits as the surmise stood. They accordingly agreed that Consultation would be granted unless the plaintiff came up with a more satisfactory surmise by an assigned day; meanwhile, the ecclesiastical court was ruled free to proceed. Under the circumstances, that solution may seem tender to the plaintiff, but it is explicable by the substantive issue. (The plaintiff had predicated his Prohibition on a plainly bad legal theory -- that ecclesiastical courts were not competent to try whether an estate had been used up paying debts and could therefore not meet legacies. The judges realized, however, that in such cases an executor might be in a position to claim that evidence tending to show that the estate was exhausted had been improperly excluded by the ecclesiastical court -- probably a good ground for Prohibition. Despite his questionable behavior, the executor was given a last chance to switch his surmise to a better theory before being cut off by Consultation, since there was a fair chance that he might have the requisite facts on his side to do so.) In sum, Dickes et uxor v. Brown confirms that bare Prohibitions die with the King, supports "non-necessary" Consultations, and provides a complex instance of the use of judicial discretion when plaintiff-in-Prohibition delayed unconscionably.

One further case, different from any of those above, may be considered as testing "narrow-gauge individualism" in Prohibition law. In this case, two churchwardens in their official capacity sued a parishioner for a
The Writ of Prohibition: Jurisdiction in Early Modern English Law

repair rate. The parishioner lost in the first instance and appealed. Pending the appeal, one of the churchwardens released the claim. The parishioner got a Prohibition on the ground that the ecclesiastical court was going to proceed to judgment in spite of the release. The other churchwarden -- the one who did not participate in the release -- challenged the Prohibition by demurrer. His contention was substantive: Churchwardens together -- let alone one of them -- may not release a claim that belongs to the parish. The other side contradicted that proposition, but also made a procedural argument: Whether or not the release was a valid transaction, the original ecclesiastical suit was brought by both churchwardens. Both were prohibited -- i.e., the suit as originally conceived, A. and B. v. C., is what was prohibited. Now one churchwarden was proceeding upon the Prohibition, seeking Consultation. The other one de facto was not prosecuting the defense against the Prohibition, whether or not he could do so in the face of his release. In effect, withdrawal of one ecclesiastical plaintiff/prohibitee discontinued the suit (presumably driving the other churchwarden to start all over in the ecclesiastical court if he hoped to collect the money in spite of the release.) Counsel reinforced this point by saying that the two churchwardens brought the suit in their own names -- not, in terms, for the parish -- and would consequently be in a position to recover costs and damages to their own use.

In the event, the Court settled this case without regard to the arguments made by either side. The judges agreed unanimously that the Prohibition should never have been granted, and therefore that Consultation should be granted now. They reached that conclusion without making any decision about the release's validity. Rather, they held that there was simply no basis for taking the suit away from the ecclesiastical court. The question of the release's validity was amenable to adjudication there. In other words, it was not a "common law issue." At least, there was no basis for prohibiting without a definitive and erroneous sentence (and I imagine not even then, since the power of churchwardens to bind the parish was probably a purely ecclesiastical question.) Having taken this view of the case -- "going by the legal truth," rather than by the shape of the case as the parties' actions and arguments defined it -- the judges had no occasion to rule on the plaintiff's procedural contentions. The Court handled the case as if the non-releasing churchwarden had moved as amicus curiae for dismissal of an improperly granted Prohibition. His standing to demur in the face of his partner's withdrawal could be sidestepped (if indeed it is
The "Logical Individualism" of Prohibitions

worth worrying about.) For our present purposes, the case is of interest only for the occurrence of an unavailing argument in an "individualistic" vein.

A couple of cases test the "individualism" of prohibitions by way of "standing to sue." In a narrowly private focus, A. should be allowed to stop an ecclesiastical suit only if it is against himself. In less narrow, but still private, terms, a man whose interests are threatened by a suit against someone other than himself might be allowed to prohibit that suit. In public terms, anyone, interested or disinterested as an individual, should be able to prohibit an ecclesiastical suit brought "in contempt of the King's jurisdiction." The early case of Love (or Land) v. Pigott\(^8\) accepts the private vocabulary, but extends "standing to sue" beyond the party grieved by improper proceedings against himself. In that case, the following rule was stated and said to be supported by several precedents: A. leases land to B. for years. B, as the occupier, is sued for tithes. A, the reversioner, may prohibit that suit. B's payment of tithes in kind -- either because he prefers paying to pressing his defense or because he loses a fully contested suit in the ecclesiastical court -- could of course make it more difficult for A. to establish a modus or other exemption in a later prohibition suit. The same can be said about any two parishioners in any situation depending on a local custom: one's non-resistance to an ecclesiastical claim, or loss in the ecclesiastical court, could make things harder for the other later on. Habits of mind formed by property law probably made it easy to say that the reversioner may prohibit a suit against the lessee -- to "protect the freehold" against harm to the property and its value done or suffered by a temporary tenant. Would Parishioner B. have stood a chance to prohibit a suit against Parishioner A.?

The only case that bears directly on that question\(^9\) does not provide a very satisfactory answer. In this case, a tithe suit was prohibited by a parishioner other than the one against whom it was brought. The substantive ground of the Prohibition was that the parson had no dejure title to a full tenth of the fish caught in a seaside parish. Hence a custom limiting his take to a certain percent of the fishermen's share and wholly exempt-

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\(^8\) P. 29 Eliz. Q.B. Croke Eliz., 56; Moore, 915.
\(^9\) H. 45 Eliz. C.P. Lansd. 1058, f.57.
The Writ of Prohibition:
Jurisdiction in Early Modern English Law

...ing the boat-owner's share was claimed to be perfectly valid and a reason to stop the parson's suit for a full tenth. That is to say, the basis for the Prohibition was one of which any parishioner engaged in fishing might have occasion to take advantage. The parson moved for Consultation because plaintiff-in-Prohibition was not personally party to the ecclesiastical suit. To this motion, Justice Walmesley replied: "The spiritual judge may advise himself whether to proceed." In other words, Walmesley would not grant a Consultation on motion to prevent a non-party form prohibiting an ecclesiastical suit. On the other hand, he would not say that Parishioner B has standing to prohibit a suit against Parishioner A by invoking the common law and a parish-wide custom. Rather, Walmesley left it up to the ecclesiastical court whether to obey the Prohibition or to proceed (on the theory that the Prohibition was null owing to the plaintiff's want of standing.) He must have expected that the ecclesiastical court would not proceed in such doubtful circumstances. The parson's lawyer, having failed with his procedural motion, turned his attention to persuading Walmesley that the Prohibition should be reversed for substantive insufficiency. He did not get anywhere, for Walmesley simply disagreed with him concerning the tithability of fish. The judge's views on the substance perhaps color his procedural opinion: In this case, Walmesley saw what he considered a plainly unwarranted tithe suit. Its unwarrantedness was basically a matter of law, not of a custom which might or might not be true. To favor a Consultation on mere motion in such circumstances would have taken convictions strongly opposed to non-party Prohibitions. We can only conclude that Justice Walmesley was not that opposed to them, and not so ready to support them in all appropriate circumstances as to speak generally in their favor. His solution hardly seems a happy one in general. If cases in point had arisen, the courts ought either to have decided that non-party Prohibitions were unacceptable as a rule, or to have let such Prohibitions stand in language that would have said plainly "Do not proceed."

One final miscellaneous case on the "logical individualism," or "one-to-oneness," of Prohibitions\textsuperscript{10} presents the following mixed-up situation: A parson sued for tithes of milk from 60 cows. That suit was prohibited

\textsuperscript{10} M. 28/29 Eliz. Q.B. Harl. 1331, f.40.
The "Logical Individualism" of Prohibitions

in the Common Pleas. That Prohibition was then undone by a Consultation covering 40 cows. The substantive reason for Consultation is not reported. The substitution of "40" for "60" must be taken as a clerical error, for otherwise our case makes no sense. I.e.: It cannot have been an intended partial Consultation, or if it was the language did not show it by some such expression as "quoad 40 cows." The parishioner then sought another Prohibition, this time in the Queen's Bench. All the report tells us is (a) that the question was moved whether the ecclesiastical court was free to proceed; (b) that the question was adjourned, suggesting that the judges found it doubtful; (c) that the better opinion as the reporter gathered it held that the ecclesiastical court was entitled to proceed. I take the puzzle to be as follows: The id to be prohibited is "suit pertaining to 60 cows." Idipsum is prohibited (surmise relates correctly to the libel.) A Consultation issues apparently referring to a non-entity ("suit for 40 cows"). Is the id-prohibited not-disprohibited? (If so, there is no need for a new Prohibition. Defendant-in-Prohibition is attachable on the existing prohibition in the event the ecclesiastical court should proceed by color of the Consultation. Plaintiff-in-Prohibition should go back to the Common Pleas and follow up his Prohibition. The Queen's Bench has no business taking action unless the ecclesiastical court is committing a new offense -- i.e., not the offense of violating an outstanding Prohibition, but that of proceeding quoad 40 cows contrary to an alleged modus or whatever.) Strict logic, or "individualism," would say that there is no dis-prohibition, with those consequences. (A Prohibition can only prohibit an on-going suit -- e.g., it cannot prohibit "A v. B" when there is no such living person as B; likewise, a Consultation can only wipe out a Prohibition in esse -- e.g., it cannot wipe out a prohibition referring to a libel for 60 cows except by aiming unambiguously at that Prohibition.) The "better opinion" of the Court was perhaps more sensible. In one sense, there seems to be no reason to refuse a new Prohibition, with the effect of stopping the ecclesiastical court from entertaining a suit which it had not been clearly told to entertain quoad the 40 cows, but might well believe it was authorized to proceed in to at least that intent. In all probability, the Common Pleas meant to authorize continuation of the original suit for 60 cows, but it had so confused things that perhaps the best measure was to stop proceedings until the mess was cleared up, by starting over if necessary. On the other hand, the judges may well have wanted an excuse to send the plaintiff back to the Common Pleas, where the mess was created. He complicated it by coming to the Queen's Bench, instead of to where the
record was, hence where an informed and economical solution might be worked out. If my reconstruction of the problem is correct, there was a pretty convincing technical argument for refusing a "redundant" Prohibition and so driving the plaintiff back to the Common Pleas where, if he had a real complaint, it made sense for him to stay. (Court-switching inevitably suggests sharp maneuvering. It is not unlikely that plaintiff-in-Prohibition here had no real case, but hoped to take advantage of a slip. I.e.: If he had gone back to the Common Pleas, some such simple step as correcting the Consultation from "40" to "60" might have finished him.)
B. Collateral Effect of Prohibitions

Summary: Although policy was never firmly settled on this matter, the courts were inclined to be liberal in granting Attachment and other special remedies to remove the necessity for multiple Prohibitions to stop virtually identical ecclesiastical suits. The tendency, perhaps stronger in Elizabeth’s reign than later, was to avoid extreme “individualism” to the end of preventing vexatious litigation.

* * *

We may now turn to cases directly on the “collateral effect” of Prohibitions. One group concerns the availability of Attachment in slightly irregular circumstances. Normally, a defendant-in-Prohibition was attached because he ostensibly violated one specific Prohibition, going to one specific ecclesiastical suit. There is, however, good authority for not insisting on that link between Prohibition and Attachment in every case -- i.e., for permitting Attachment and procedures pursuant thereto without a Prohibition precisely in point.

In Stafford’s Case,\textsuperscript{11} a parson sued for tithe-milk and was prohibited on surmise of a modus. Then the parson brought a new libel against the same parishioner for the same tithes and the same time-period. He made one alteration, however: In the second libel he claimed the milk from a smaller number of cows than in the first. The parishioner then prayed for Attachment upon his existing Prohibition -- as opposed to putting in a new surmise going directly to the new libel. The Court granted the attachment: “…for otherwise a prohibition should be granted to no purpose.”

Two reports of Sharington (or Swarrington) v. Fleetwood\textsuperscript{12} give two different but related rules. (a) The MS. gives the following as a unanimous holding of the Court: If Parson sues Parishioner A. for tithes and is prohibited on grounds of a local modus, he will

\textsuperscript{11} P. 30 Eliz. C.P. 1 Leonard, 111.
\textsuperscript{12} M. 37/38 Eliz. Court uncertain. Lansd. 1059, f.340b; Moore, 599. (Lansd. 1059 is a version of Moore’s reports, varying from the printed version and containing numerous additional cases.)
be attached if he sues Parishioner B. for the same tithes, *provided* that A.’s Prohibition-suit is undetermined. (N.B. the proviso.) (b) According to the printed report, all the judges held that if a parson sues A. for tithes of 1590, he will be attached if he starts a new suit for the same tithes from 1591, provided the first Prohibition-suit is undetermined. It is perfectly likely that both rules were laid down in the same case, perhaps one by way of decision and the other by way of dictum.

In a nearly contemporary Queen’s Bench case, a parson sued one parishioner for tithe-hay and was prohibited on surmise of a *modus*. The parson then dropped that suit and sued a second parishioner for the same tithes. When the second suit was prohibited, he dropped it and went after a third parishioner. After five parishioners had obtained separate Prohibitions, Serjeant Yelverton, evidently representing a sixth, moved the Court as follows: “Inasmuch as his client was a poor man, and not able to afford the expenses of a Prohibition, and also inasmuch as the suit in the Court Christian was commenced against all of them upon one and same cause, solely for vexation, and to make every parishioner of the parish either be condemned there or sue Prohibition here, the charge of which amounts to four marks at least, whereas perhaps the tithe owed to the plaintiff by each of them is worth no more than 2d., and the prescription being all one for all the parishioners, he prays that the Court here will award that the said plaintiff render a reply or issuable plea to some [ascuns -- perhaps ‘any, at least one’] of the said Prohibitions, and that he not proceed against his client nor against any other of his parishioners in Court Christian until that suit is determined here.”

The Court replied as follows: “The Justices hold it reasonable that Attachment should issue against the party to make him come in person, and then upon his examination to commit him to prison if it seems just; and to make examination whether there is a prescription throughout the whole parish to discharge tithes, and so to order that he proceed solely upon one of the Prohibitions, and that he relinquish the suits in Court Christian against the others.” The quotations speak for themselves and amply demonstrate why a narrowly individualistic relationship between Prohibition and Attachment would have been untenable.

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13 P. 38 Eliz. Q.B. Add. 25,198, f.132b.

* This section was omitted from the original published copy. Pages are numbered 360-i through 360-viii in order to maintain consistency with the original page numbering. Chapter XI begins on page 361 following this section.
Shortly later, however, two Common Pleas judges were in disagreement over whether one may be attached for doing anything except exactly what he is prohibited from doing. No context is reported, no indications of a “hardship case.” All the report says is that Justice Glanville thought Attachment lies when, pending a Prohibition, the defendant-in-Prohibition libels de novo; whereas Justice Walmesley held the contrary -- that a new Prohibition must be obtained.

In Downes v. Hackesby, Coke’s King’s Bench appears to have reversed one of the rules laid down in Sharington v. Fleetwood. For the Court agreed that suing for tithes from 1611 is acceptable even though a suit for the same tithes from 1610 is or was prohibited. I say “is or was” because the report does not distinguish between a determined Prohibition for the earlier year and an undetermined one. In any event, Attachment was sought and denied, and the Court used general language about taking “inhibitions” strictly.

One undated report, probably late-Elizabethan and probably from the Common Pleas, comes to a compromise position. The holding says: (a) Attachment lies without a new Prohibition if the parson starts a new suit for tithes of the same year. (b) But if -- pending a Prohibition for tithes of 1600 -- the parson sues for tithes of 1601, he will not be attached at once. Rather, he will be ordered not to sue (i.e., restrained by special order, not a new Prohibition, from pressing his second suit) until the first Prohibition is tried. If, however, he violates the order and prosecutes anyhow, he will be attached.

In sum, one must conclude that the matter of a party’s attachability outside the circumstances in which Attachment was manifestly appropriate was never firmly settled. The Elizabethan Queen’s Bench took a strong position, allowing one Prohibition to generate Attachment collaterally in several situations. But the Common Pleas was not persuaded to go so far, and the Jacobean King’s Bench seems to have drawn back to some extent.

Alongside the cases on Attachment, we may consider an attempt to use the restraining order to the same effect -- i.e., to insure determination of outstanding Prohibitions and

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14 P. 41 Eliz. C.P. Add. 25,202, f.5.
15 M. 12 Jac. K.B. 2 Bulstrode, 289.
16 Harl. 4817, f.205b.

360-iii*

* This section was omitted from the original published copy. Pages are numbered 360-i through 360-viii in order to maintain consistency with the original page numbering. Chapter XI begins on page 361 following this section.
obviate the need for repeated Prohibitions in closely related cases. In the case of the Parishioners of Rolvenden, the controversy was over the manner of choosing churchwardens. The Ecclesiastical Canons of 1604 purported to insure the power of incumbent clergymen to appoint parish officers. Numerous Prohibitions were brought to prevent enforcement of the Canons in the face of parochial customs. In Rolvenden, the alleged custom was for the parishioners to elect one churchwarden and the vicar to appoint the other. The vicar, claiming by virtue of the Canons to appoint both churchwardens, proceeded to name two men. The parishioners proceeded to elect one man in accord with what they claimed to be the custom. The bishop qua ecclesiastical judge then inaugurated proceedings against the parishioners to compel them to obey the Canons -- i.e., to accept both of the vicar’s appointees and give up their own. A Prohibition, based on the custom, was granted to stop those proceedings. Then the bishop changed tactics. Instead of either dropping the matter or contesting the Prohibition, he instituted a new suit: One of the vicar’s appointees (presumably his second choice, that one being recognizable as the parish-electee’s competitor) was cited into the ecclesiastical court to show cause why he should not exercise the office -- obviously a pro forma maneuver intended to get the controversial churchwarden “into action” by virtue of a court order, exposing anyone who resisted him to harassment for contempt, while the Prohibition hung nominally obeyed and perpetually untried.

At this point an attempt was made (apparently by the parishioners as a body) to stop the second suit without a new Prohibition. The King’s Bench was asked to order the ecclesiastical court not to proceed in the pseudo-suit against the vicar’s appointee while the existing Prohibition was outstanding. Counsel maintained that the second suit did not need to be prohibited separately because it was a mere dependency of the suit already prohibited. I.e.: Determining the existing Prohibition would decide whether there was any title to compel the vicar’s second appointee to exercise the office. Such was the polite, legalistic way of calling attention to a patent subterfuge. But despite the glaring circumstances the Court refused the motion for a special order. The judges said that they would order a party not to proceed in the ecclesiastical court in a comparable situation -- i.e., where someone

17 P. 5 Jac. K.B. Lansd. 1111, f. 366.
tried to start a new suit dependent on another suit already arrested by an unresolved
Prohibition. (E.g. -- presumably -- if the vicar \textit{qua} private complainant had proceeded
against his appointee to compel him to exercise his office, he could be restrained by mere
order.) But the judges considered themselves powerless to bind the ecclesiastical court itself
by a restraining order. They needed to bind it in this case, where the ecclesiastical court was
proceeding \textit{ex officio}. Therefore the motion was denied and the parishioners told to get a
Prohibition, which they did. I think there is no doubt but that they had a right to a
Prohibition for the specific purpose of stopping the suit against the vicar’s appointee, quite
without regard to the prior Prohibition. In other words, the second Prohibition was good on
its own merits. It was not generated by the first. The only way to have given the first
Prohibition “collateral effect” would have been to grant the special restraining order.
Although that course was rejected in the circumstances of this case, it was given sanction by
way of dictum for use against a private party.

In another case, Wells \textit{v.} Agar,\textsuperscript{18} an outstanding unresolved Prohibition was simply used
as the ground for another Prohibition -- as opposed to a reason for \textit{avoiding} multiple
Prohibitions. As far as can be made out from a scanty report, the case was as follows: A.
prohibited a tithe-suit on surmise that the ecclesiastical plaintiff was not parson of the parish
in question. (Nothing in the report explains the situation. There are many reasons why it
might be claimed that someone suing as Parson of Dale was not legally or actually such.)
Later, B., another inhabitant of the same parish as A., was sued for tithes by the same
clergyman. B. sought and obtained a Prohibition, apparently by alleging nothing more than
that he was in the same case as A. I.e.: I take it that B. did not spell out whatever basis there
was for claiming that the ecclesiastical plaintiff was not parson of the relevant parish.
Rather, he relied on the bare fact that there was an unresolved Prohibition outstanding in an
exactly analogous case. Although the Prohibition was granted, Chief Justice Fleming is
reported to have had some (unexplained) doubt. It may be arguable that the better course for
one in B.’s shoes would be to pray Attachment or a restraining order, avoiding multiple
Prohibitions and the possibility of conflicting resolutions.

\textsuperscript{18}M. 8 Jac. K.B. Lansd. 1172, f.168.
The last case points to another variety that is mainly conspicuous by its absence from the reports -- what we may call the res judicata or estoppel case. The cases immediately above deal with unresolved Prohibitions stopping suits intimately related to suits subsequently commenced. They tend to involve vexatious suit-dropping -- suing A., then as soon as he gets a Prohibition, dropping that suit and proceeding against B. on an indistinguishable claim, hoping to catch someone who would rather pay up than litigate. What then about the determined Prohibition (and the corresponding vexation of losing and trying again, possibly against a less resistant or economically weaker adversary)? A. is sued and brings a Prohibition; the parties proceed to issue of law or fact; A. wins; B. is sued upon an indistinguishable claim. Should B. have a Prohibition merely by surmising the prior result -- as opposed to alleging his substantive reasons for a Prohibition and using the prior result as evidence (in the case of a verdict) or as a judicial precedent? Or should B. have still stronger remedies -- Attachment or restraining order, without a separate Prohibition? Contrariwise, suppose A. in the above sequence loses and B. is sued upon an indistinguishable claim. B. obtains a Prohibition on the same surmise as A. formerly made. Should his adversary be able to undo the Prohibition on motion by showing the verdict and/or judgment in A.’s case? If he does not or may not seek a Consultation on motion, should he be able to plead such verdict and/or judgment as res judicata, as opposed to pleading the merits? One might guess about the detailed answers to these questions, but there is no point in doing so in the absence of relevant cases. It is of course unsurprising that the cases raising such questions do not occur frequently. It will rarely be worth a loser’s while to try again, even if there is nothing except the strong de facto chance of losing again to restrain him. It seems to me, however, that such attempts -- mere vexatious gambling on “better luck next time” -- were even rarer than one would predict. Their rarity suggests that parties in easily-recurrent situations -- typically parsons and parishioners in tithe disputes -- expected that the courts would give res judicata effect to earlier decisions precisely in point.

There is one relevant case to be considered here, however. Pottinger v. Johnson\(^ {19} \) involved a parson’s attempt to take advantage of an earlier verdict. Parson Johnson sued Aubrey for hay-tithes from the second cutting of a meadow. Aubrey surmised a custom --

\(^ {19} \) P. 43 Eliz. Q.B. Add. 25,203, f. 324.
viz., that when they cut the hay the first time they make it into cocks of “perfect hay,” and in consideration of rendering first-crop hay in better form than the law requires are discharged form tithes for the second crop. Johnson and Aubrey took issue on the custom, and the jury found it true as alleged. Later, Johnson sued another parishioner, Pottinger, for tithes of first-crop hay. However, he did not sue simply for his de jure tithes. Rather he sued for his customary tithe, according to the earlier verdict -- viz., cocks of “perfect hay.” Pottinger got a Prohibition on surmise of a different custom -- that first-crop hay was customarily rendered in the form of grass-cocks (less than “perfect hay,” less thoroughly treated, but still arranged in a manner somewhat more convenient to the parson than bare legal duty required). Thus, the form of the Johnson-Pottinger litigation was: Parson sues for what he has coming to him by virtue of an admitted modus -- e.g., 6d. per acre for corn; parishioner seeks a Prohibition on the ground that the modus is different -- e.g., 4d. per acre. There was some doubt (raised in the case) as to whether such a ground for Prohibition was good in itself. I.e.: It was arguable that when a parson waives tithes in kind and sues upon a modus, the ecclesiastical court is competent to decide between that modus and an alternative one alleged by the parishioner. The Court in the instant case rejected that argument, however.

For the matter of present concern: Pottinger having got his Prohibition on surmise of an alternative modus, Johnson moved for Consultation. His main ground was that his modus -- the “perfect hay” -- was found by verdict inter himself and Aubrey, wherefore Pottinger was estopped to claim an alternative modus. He added a reinforcing ground: Pottinger himself had been a foreman of the jury that found for Aubrey!

The Court denied the motion for Consultation. But the decision was put on narrow enough grounds to leave room for the underlying idea of Johnson’s motion -- invoking a verdict in a prior case to estop plaintiff-in-Prohibition. In this case, the Court could see no inconsistency between the verdict for Aubrey and Pottinger’s present claim. The verdict for Aubrey would still be correct though Pottinger’s version of the custom -- grass-cocks -- were true. In other words, Aubrey’s jury (and its foreman) should not be taken as saying only what it need say: “Second-crop hay is tith-free, in consideration of the benefit to the parson in the customary manner of rendering the first crop.” What the customary manner was, grass-cocks or hay-cocks -- whether Aubrey stated the custom correctly and whether or not he had been doing more for the parson than he needed to -- was beside the point. On the other hand, the Court at least did not deny that Johnson’s motion might have been granted in
other circumstances. E.g.: Suppose Pottinger were sued for second-crop hay and surmised a wholly different modus -- say 1d. per acre for second-crop hay. Or suppose that he claimed de jure exemption for the second crop instead of a modus. Or suppose he were sued for first-crop hay upon Aubrey’s modus and claimed that he only owed the hay in de jure form -- neither in grass-cocks nor hay-cocks. All those hypothetical cases strike me as tricky. All one can say is that Pottinger v. Johnson does not in terms rule out taking advantage of a custom established by verdict in the parson’s favor by way of motion for Consultation.
XI.
Flexible Forms of Procedure

Summary: In the area of Prohibition law, the courts showed reasonable willingness to invent variant forms, or modify the usual ones for special purposes -- e.g., orders other than Prohibitions and Consultations, slightly irregular uses of the ordinary writs. There is, however, very little authority favoring the most obvious supplement to Prohibitions -- the Mandamus, or positive order to a "foreign" court. There was probably scope for such forms of procedural flexibility as amendment of pleadings and advisory opinions, but the reports give little evidence of them.

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We have seen in several ways that the forms of procedure in Prohibition law were allowed to develop considerable pliability. A spare and rigid model can be made out in the background -- wherein the only entities are Prohibition and Consultation, the Stop-sign and the Go-sign. But those simple entities were permitted to develop their variations to meet the variety of occasions. E.g.: We have seen Prohibitions *quoad* and Consultations *quatenus*; joint Prohibitions and "non-necessary" Consultations. We have seen the instrument of Attachment stretched from a mere dependency of Prohibition into a device for preventing sharp practice and the multiplication of similar suits. Finally, we have seen occasional use of additional instruments -- restraining order in lieu of Prohibitions; rulings amounting to informal authorizations to proceed in place of proper Consultations. There remain a few further cases illustrating the flexible use and supplementation of the standard procedural forms.

An early report\(^1\) presents a variant form of Prohibition which we have not encountered elsewhere -- the Prohibition *Si ita sit*. All the report gives is a statement at the Bar: that if no libel is shown, such a conditional Prohibition may be granted ("*Si ita sit* = "If such an ecclesiastical suit as the surmise recites is going on"). It is unclear whether this form was a way around 2/3 Edw. 6, or only applicable to cases outside the statute. I.e.: 2/3 Edw. 6 required a copy of the libel to be attached to the surmise. The

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\(^1\) Harl. 5143, f.225. Undated. C.P. (Nothing in Harl. 5143 appears to be later than 20 Eliz.)
The Writ of Prohibition:
Jurisdiction in Early Modern English Law

present opinion may mean that a conditional Prohibition could be granted
even when that requirement was ignored. On the other hand, it may mean
that where there is no statutory restriction on the Court's power to grant a
Prohibition, the Si ita sit form should be used unless the libel is voluntar-
ily shown to back up the surmise.

In an Admiralty case of 1590, a man entitled to a Prohibition was re-
quired, owing to special circumstances, to give security against using his
Prohibition to evade justice. In this case, a Scot sought to stop an im-
proper contact suit against him in the Admiralty. The Court held that a
friendly alien was as much entitled to a Prohibition in appropriate circum-
stances as an Englishman. However, the danger existed that the Scotsman
would escape answering on the contract at common law if the Admiralty
were simply prohibited. His ship had been attached by Admiralty proce-
dure to insure his response there. If the Admiralty were simply told
"Hands off" and the attachment consequently undone, the alien could eas-
ily take his ship and sail beyond the reach of English justice. Therefore
the Court ordered that he put in bail to assure his appearance if his adver-
sary sued him on the contract at common law. If he would not give such
security, the Court said, a Consultation would be granted.

Another Elizabethan holding accommodates the Consultation to a
situation in which a purist might consider the writ unnecessary or not ex-
actly appropriate. The report simply states the rule that where a plaintiff-
in-Prohibition is non-suited or will not declare, Consultation will be
granted. No discrimination is made between the two points at which fail-
ure to prosecute might occur: (a) before a writ of Attachment is issued (b)
after Attachment but before declaration thereon. Either way, the rule is
manifestly sensible. The alternative would be to leave it up to the ecclesi-
astical court whether to proceed after a lapse of time and failure to prose-
cute. Two ill consequences would ensue: (a) As in other doubtful
situations, ecclesiastical courts could not be expected to proceed without
Consultation. Possibly, left to its own devices, the ecclesiastical court
would eventually proceed in the absence of any sign of intention to prose-
cute. But a man obviously ought not to be able to delay ecclesiastical jus-

3 H. 43 Eliz. C.P. Lansd. 1058, f.3.
Flexible Forms of Procedure

tice for a considerable time merely by getting a Prohibition and then doing nothing to sustain it or to expedite a determination. (b) Once the ecclesiastical court made up its mind to proceed by reason of non-prosecution, it would commit a *prima facie* violation of the outstanding Prohibition. Attachment following thereupon, the undue delay and non-prosecution would have to be pleaded to justify proceeding in the face of the Prohibition. The common law court would have to deliberate as to how soon the ecclesiastical court is entitled to conclude that a Prohibition has been dropped. If the common law court decided for defendant-in-Prohibition in such a context, it would presumably end by granting Consultation anyhow. It is obviously simpler and better to grant Consultation on motion at any early stage, upon a showing that the Prohibition has not been followed up with reasonable promptitude.

The very occurrence of the report, however, suggests that the matter may have been in some doubt. A puristic argument *contra* is possible: A bare Prohibition -- as distinct from the returnable, plea-engendering Attachment -- is "by nature" a warning or hypothetical imperative. It says, "Do not proceed in this case unless you are willing to risk Attachment and justify your disobedience." Therefore one who believes a Prohibition is not going to be insisted on, or that so much time has elapsed that insisting on it can no longer be justified, should go ahead and disobey, testing his belief. The risk falls on the ecclesiastical plaintiff and ecclesiastical court. They should not be helped out by a premature Consultation. (Cf. the discussion above as to whether a Prohibition before Attachment is a "real lawsuit" *because* the plaintiff is capable of being non-suited).

In connection with the last case, a brief later report⁴ may be noted: A holding that if after issue is joined plaintiff-in-Prohibition does not prosecute for a year and does not have the case officially continued on the jury-roll, it is *in the Court's discretion* whether to allow the case to go on. That being the case, an ecclesiastical court would hardly want to decide on its own initiative that it was free to proceed. Consultation would have been less necessary if there had been an automatic cut-off date.

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⁴ M. 5 Car. C.P. Hetley, 148.
Another case\(^5\) is best seen as an unsuccessful attempt to introduce flexibility into Attachment proceedings. In this case, the elder of two sons died intestate. The younger son and the father each sued in the ecclesiastical court to obtain appointment as administrator. The younger son got a Prohibition on surmise that the ecclesiastical court was on the point of granting administration to the father. His theory was that the governing statute left the ecclesiastical judge no discretion but to choose the younger brother, as between those two relatives of the intestate. That theory was not discussed judicially until the younger son moved for Attachment upon a showing that the ecclesiastical court had proceeded in spite of the Prohibition. When it was discussed, Chief Justice Popham held (without being contradicted by any other judge) that it was without merit -- i.e., that appointment of the father was permissible if not obligatory. Nevertheless, Attachment was granted because the Prohibition had admittedly been disobeyed (with the effect of forcing the father to plead to the Prohibition if he wanted Consultation.) Attachment was normally "of course." We have seen the motion for Attachment above in exceptional circumstances -- e.g., when B. seeks to have an ecclesiastical plaintiff attached upon A's Prohibition because he has sued B. on an indistinguishable claim. In the instant case, I assume that the motion for Attachment was by agreement of the parties. The father hoped to avoid pleading. The other side agreed to move for Attachment specially in order to raise the legal issue at once. The father's hope, and perhaps the son's as well, was that Attachment would simply be denied if the Prohibition was groundless, so that the ecclesiastical court could safely proceed without further ado. The Court, however, refused to go along with the irregular procedure. At the same time, it was willing to speak to the merits upon the motion for Attachment, showing the parties where they stood and probably de facto obviating further litigation.

There are a few instances of special orders. Prohibitions *nisi* were common. The writ would be granted on the plaintiff's *ex parte* applica-

\(^5\) H. 43 Eliz. Q.B. Add. 25,203, f.296.
Flexible Forms of Procedure

tion, but a day given for the defendant to show cause against the Prohibition. In Harris v. Wiseman,\(^6\) the defendant did not have proper notice of the Prohibition *nisi* against him. He appeared one day late and showed that the surmise failed to state a good claim, but by then the Prohibition had become final. The Court granted a *Supersedeas* to stay the Prohibition, thus removing the need for so much as a motion for Consultation. One report\(^7\) tells us that it was King's Bench practice never to grant or hear motions for Prohibitions on the last day of term, but that a temporary stay of ecclesiastical proceedings until the next term could be moved for and granted on the last day.

Another case\(^8\) presents a special order overriding a Consultation. A man prohibited a suit, and then apparently failed to follow up his Prohibition. "Long after," he got a new Prohibition directed at the same libel but based on different grounds. (I would suppose the ecclesiastical court had at last resumed proceedings on the libel, making its own judgment that the first Prohibition had been dropped.) Being informed of the prior un-prosecuted Prohibition, the Court undid the second Prohibition by Consultation. But then, on motion by the plaintiff's counsel (the formidable pair of Coke and future-Chief Baron Walter), the Court ordered, in spite of the Consultation, that the plaintiff plead on the second Prohibition, the matter to "grow to a demurrer." I.e.: The Court in effect reversed its prior grant of a Consultation on motion, on condition that the second Prohibition be prosecuted so as to face a demurrer. I would suppose a special order was directed to the ecclesiastical court, staying it until the forthcoming demurrer was determined. I would also suppose that the Court meant to give defendant-in-Prohibition a choice: (a) Demur to the substance of the second Prohibition. (The plaintiff was given no chance to go back to the first.) (b) Plead the matter above -- the prior Prohibition and non-prosecution. (In which case, the plaintiff *must* demur, raising the legal question whether a suit once prohibited on one ground can be prohibited again on another ground after non-prosecution of the first Prohibition. I take it that the plaintiff was *not* free to go off on some other course -- notably, to deny that there was an earlier Prohibition, or that undue time had elapsed.

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6 T. 19 Jac. C.P. Winch, 19.
7 Early Car. K.B. Latch, 7.
8 Cliffe v. ___ P. 41 Eliz. Probably Q.B. Lansd. 1172, f.55.
The Writ of Prohibition:  
Jurisdiction in Early Modern English Law

without prosecution thereon.) My construction proceeds from the assumption that the Court meant to be fair to the defendant while going back on a decision in his favor, and that is the reason why allowing the matter to "grow to a demurrer" is insisted on. In effect, I argue, the Court was inventing a new procedure for a specific situation -- where the judges think better of a Consultation on motion. We have seen that Consultations on motion were accepted with some skepticism. When a man has a Prohibition in his favor, even if off-hand the judges doubt that it should have been granted, should he have the right to battle for it in full panoply -- viz. upon demurrer? Here, as always when they granted Consultation on motion, the judges had said "no" to that. Being moved to reconsider whether the Consultation on motion was right in this case, they decided that the question was doubtful enough to justify formal debate on demurrer. They accordingly reversed their action on motion, but in such a way as to insure that the defendant could raise the same point as he raised by motion if he saw fit. Otherwise, he could contest the legal sufficiency of the Prohibition, without fear that other matter on the plaintiff's side (the claim in the first Prohibition) would be used against him. The report is scanty, but such would seem to be its thrust. If my construction is right, it provides a strong instance of procedural flexibility.

A couple of cases introduce the Mandamus, or positive order, to an ecclesiastical court. Alongside the hundreds of Prohibitions, there is very little evidence of such positive injunctions. It is perhaps arguable that the Prohibition was a sufficient instrument: May the common law courts concern themselves with what goes on in the ecclesiastical courts except insofar as the latter exceed their jurisdiction and expose themselves to Prohibition? Is refusal to take jurisdiction on the part of an ecclesiastical court not inherently a judgment of ecclesiastical law, right or wrong -- as opposed to an offense to the "royal dignity" and the secular rights of the subject? Admittedly, "negative" Prohibitions could have a pretty "positive" thrust (e.g., the quatenus Prohibition -- or Prohibition offset by partial Consultation -- virtually directing the ecclesiastical court to handle a case in a particular way.) But for that very reason, where is the need for any further commanding-power?
Flexible Forms of Procedure

I imagine some such arguments were made or assumed in Bishopp's Case, through only the contrary side and the judges' opinion are reported. In this case, Bishopp was elected churchwarden and presented to the diocesan official (officer of the ecclesiastical court) for administration of the oath required before one could exercise the office of churchwarden. The official refused. The reasons for his refusal are not reported, but in all probability there was a dispute between the parish and the ecclesiastical authorities over the method of election. (Numerous Prohibition cases reflect such disputes.) Bishopp therefore sought a *Mandamus* to require administration of the oath. The matter in question was rather an administrative function than a judicial act, though the two are not easily separable in the 17th century. (In the ecclesiastical world, as in the lay, "administrative" acts were commonly performed by "courts." In this case, Chief Justice Montague found it as natural to speak of the ecclesiastical court's power to swear in churchwardens as he would have to speak of its power to entertain a tithe suit.) In support of the writ, it was argued: (a) That there were precedents for ordering ecclesiastical courts to permit executors to probate wills -- a function that is in a sense "administrative," but trenches on the judicial, for probate suits were commonly contested and sometimes prohibited. (b) That ecclesiastical authorities had sometimes been ordered to do their duty in purely non-judicial contexts -- e.g., a Bishop was once ordered to send some chrism to a Dean to enable him to perform baptism. (c) That the *Mandamus* (a relatively new procedure in common practice) was generally legitimate in lay contexts -- e.g., to require local officials to do their duty.

Chief Justice Montague favored the *Mandamus*. His language shows that he thought of the power to prohibit as *leading to* the power to order positively (as opposed to thinking of the Prohibition as an exclusive and sufficient instrument): The King's Bench has jurisdiction over the misfeasance and non-feasance of ecclesiastical judges. (As if to say, "If we can prohibit the ecclesiastical courts from handling cases which they wrongfully undertake -- or from handling them *quatenus* they propose to do so in a certain way -- why should we not command them to take up matters

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9 T. 17 Jac. K.B. 2 Rolle, 106.
The Writ of Prohibition:
Jurisdiction in Early Modern English Law

properly brought before them and dispose of the same as the law requires?"

Secondly, Montague thought that the common law had sufficient interest in the present matter to justify intervention: Churchwardens are necessary officers. The statutes take note of them. Though within ecclesiastical jurisdiction, the office is intrinsically "temporal." Though the ecclesiastical court has jurisdiction, it is a "contempt" to misuse it (as -- he probably meant to imply -- an ecclesiastical court may in a sense have jurisdiction of a lawsuit, but still be prohibited on account of its conduct -- e.g., insisting on the two-witness rule. As it were, misuse of one's jurisdiction is all one, whether by misfeasance or non-feasance. Montague might have added that many Prohibition cases went to show that ecclesiastical jurisdiction over churchwardens was controllable by common law standards.)

Finally, Montague argued for the general legitimacy of the Mandamus, citing the leading Bagg's Case (reported 11 Coke, 93b).

The other judges seemed to the reporter to agree with Montague -- but only seemed to. A day was given for the ecclesiastical official to show cause against the Mandamus, and nothing more is heard of the case. Some doubt seems still to hover around the positive counterpart to Prohibitions. Even in the circumstances of Bishopp's Case, it is perhaps arguable that the power to prohibit was enough. Could Bishopp have engendered a prohibitable suit by undertaking to exercise his office without oath? Was there perhaps a rival candidate for churchwarden whose swearing-in could be prohibited? So in the case of the executor who is not allowed to prove the will. Before rushing to approve the Mandamus in that case, we should consider the likelihood of its occurring and the likelihood of real interests' being insufficiently protected by Prohibitions alone. We should wait on real cases.

One such occurred during the Interregnum. In this case,10 a man made a will disposing of goods in Virginia. The executors named in the will refused to assume administration. Testator's next of kin sued for the letters of administration they were entitled to by statute in the event of intestacy

10 M. 1658. Upper Bench. 2 Siderfin, 114.
or failure of executors. For some reason, the Prerogative Court (Interregnum
equivalent of the ecclesiastical court) refused. A Mandamus was unani-
mously granted, the Court repeating Montague's language to the effect
that misfeasance and non-feasance are indistinguishable. For the rest:
The rarity of Mandamus cases indicates in itself that situations to which
the Prohibition was inadequate were unlikely to occur. Although there is
a little authority for positive orders at the margin where the judicial func-
tion fades into the administrative, there is none for casually using the
Mandamus where some form of Prohibition would do the job.

A few further topics of procedural law are only very lightly touched by
reported cases. There is, for example, little evidence on the courts' liber-
ality in permitting the amendment of surmises and formal pleadings.
Their willingness to "go by the truth" in cases of variant verdicts and mis-
conceived claims and to construe pleadings favorably points to a liberality
of spirit of which easy amendment might be another expression. On the
other hand, that very willingness may have tended to make amendment
unnecessary. But a couple of cases give evidence of its occurrence. A Ja-
cobean nota\textsuperscript{11} states that as a general rule there are no costs for defend-
ant-in-Prohibition to recover, but that if the plaintiff is given leave to
amend his declaration appropriate costs will be awarded to the defendant.
The generality seems surprising: Even if the defendant wins upon demur-
rer or by verdict he recovers no costs? The qualification, in any event,
shows that insufficient declarations were sometimes amended.

A late case\textsuperscript{12} provides a direct instance of leave to amend a surmise. A
man was sued on a contract in the Admiralty and wanted to prohibit on
the ground that the contract was made on land. But not wanting to admit
that there was any such contract, he drew his surmise in hypothetical
form: if there was any such contract, it was made on land. The Court held
the surmise bad for uncertainty. I.e.; If there was no contract, there was
no basis for complaining that the Admiral was entertaining a suit on a
contract outside his jurisdiction. Plaintiff-in-Prohibition was confined to
either claiming in the Admiralty that there was no contract whatever or
prohibiting upon a "certain" surmise. (He would not, I think, actually

\textsuperscript{11} P. 17 Jac. K.B. Harg. 30, f.13b.
\textsuperscript{12} H. 21 Car. K.B. Style, 1.
make a damaging admission in saying, fictitiously if necessary, that the contract was made on land. To rebut the Prohibition, the other side would have to show that the contract was made at sea, which necessarily involves showing that a contract was made. If defendant-in-Prohibition could not show that, the Prohibition would stand. If he proved that a contract was made, but on land, he would still lose. He would then be driven to sue on the contract at common law, in which case I can see nothing to prevent the present plaintiff-in-Prohibition from pleading "No contract" and having the matter tried de novo. I do not think a statement in a successful surmise could be used against him in another action.) However, instead of denying the Prohibition, the Court in this case ordered that the surmise be amended to the proper form.

Another procedural flexibility worth noting is the advisory opinion. In general, 16th and 17th-century courts, like medieval courts, did not rigidly insist on talking only about "actual cases and controversies." We have seen instances of willingness to discuss the merits of a case more broadly than the issue immediately to be decided required -- to let the parties know where they stood. Among the many reports we have dealt with, there may be concealed instances of advisory opinions proper -- i.e., judicial answers to questions put to the Court from the Bar where there was no actual case before it. Wallipole's Case¹³ is an explicit instance. In this case, the King's Bench was asked whether the 1604 Canons could be enforced against the local custom quoad the election of a parish clerk. I.e.: Did the Church have complete control over this office, so that it was free to make a rule giving the power of appointment to the minister, whether or not the clerk had been chosen by the laity in the past? In accord with most opinion, the Court said "No" -- the office is essentially lay, and customs of lay election should prevail against the Canon. The Court was quite willing to express itself even though, as the report shows, no Prohibition was sought and contested, or could be sought and contested, by those who had moved the Court for its opinion. For there

¹³ H. 22 Jac. K.B. Benloe 142.
Flexible Forms of Procedure

was no ecclesiastical suit pending. Under these circumstances, the judges said, they could not grant a Prohibition. That point seems axiomatic, but the very fact that it was made suggests that an irregular device may have been proposed: perhaps an anticipatory Prohibition, directed to someone whom the minister had appointed clerk and to the local ecclesiastical court, cutting off any proceedings to install that appointee or discipline a rival parish-electee before such proceedings had begun. The situation was perhaps one in which some sort of Mandamus could have been considered (surely a better form than an "anticipatory Prohibition"), if avoiding litigation is desirable and fabricated litigation is dubious. The Court, however, went the straight path, bringing its advisory opinion down to earth and eschewing irregular forms: The parties and judges agreed that an appropriate ecclesiastical suit (its exact nature does not appear) would be commenced, and that a Prohibition would be brought thereupon and pleaded to issue. Insofar as the suit thus created would depend on the point of law already discussed, the Court had tipped its hand.
The Writ of Prohibition:
Jurisdiction in Early Modern English Law
XII.

Miscellaneous Cases on Procedure

A number of reports contain points on Prohibition procedure which do not fit any of the categories above. They may be noted, as follows:

(1) Sir Gilbert Gerrard v. Sherrington. P.20 Eliz. Q.B. 1 Leonard, 286. (Discussed above for its main point.) Plaintiff-in-Prohibition delivered his surmise by attorney. It was objected that he ought to have appeared in court in person. Held unanimously: Acting by attorney was good enough (although the clerks said that delivery of surmises by attorney had not been the practice for twenty years.) Note that this case comes at the beginning of the period when Prohibitions became extremely common. Ability to act by attorney is an obvious convenience to plaintiffs and may have been contributed to the frequency of Prohibitions.

(2) Nash and Usher v. Mollins. M. 32/33 Eliz. Q.B. 1 Leonard, 240. Apart from the substance of this case, the reporter notes that when the Prohibition came to trial, no evidence was given to prove that defendant-in-Prohibition prosecuted in the ecclesiastical court in the face of the Prohibition. Nevertheless, the jury found for the plaintiff. This nota is important for explaining the theory and reality of Attachment proceedings. As we have seen, Prohibitions could not be formally contested as such. Pleading to issue only occurred upon Attachment. In principle, one was attached for violating a Prohibition. Therefore, in principle, it should be an issue in every pleaded case whether such a violation had in fact occurred. If defendant-in-Prohibition did not admit as much in his pleading (by demurrer or plea in Bar), it was an open issue for the jury (i.e., among the material facts covered by a general traverse.) In reality, however, it is clear enough that Prohibitions were not commonly violated. Defendants simply did not dispute the nominally alleged violation when their purpose was to have the factual issue raised by the Prohibition tried in the only possible place -- at common law. The present report, however, is the only explicit evidence I have found on this point. It comes from fairly early in the history of heavy Prohibition practice. The reporter, a student perhaps, noticed that no evidence of violation was offered at a trial pursuant to Attachment -- i.e., that one logically necessary element in the plaintiff's contested factual claim was entirely unproved. He noticed that the jury
nevertheless found for the plaintiff -- i.e., returned a general verdict in his favor, founded exclusively on evidence going to the substantive factual dispute (whether certain land was discharged from tithes in the hands of a quondam monastery.) He noticed, presumably, that the defendant and judge made no objection. In principle, I suppose one might say, the jury was free to find of its own knowledge that the Prohibition had been "violated" when the jury had reasonable grounds for thinking that the really material facts were such as would warrant the Prohibition. (We have seen indications enough that juries were not left free to find such "really material facts" against the evidence or without evidence, even though the jury's theoretical duty to stick by the evidence and means of controlling juries were still underdeveloped.)

(3) In connection with the last case: Facy v. Lange. M. 15 Car. K.B. Croke, Car., 559; Jones, 447. This case shows that actual violation of a Prohibition sometimes occurred and could be made a real issue for the jury: A tithe suit was prohibited on grounds of a modus. The jury found two issues for the plaintiff; (a) His modus was true; (b) He was actually prosecuted in the ecclesiastical court after delivery of the Prohibition. In consequence of the second finding, the jury awarded the plaintiff £15 damages and costs.

The question for the Court was whether the award of damages and costs was lawful. After some discussion and inspection of precedents, the judges held that damages were lawful, in consideration of the wrongful prosecution and driving the plaintiff to his Attachment. The following observations may be made: (a) The report gives no indication as to whether any special form of pleading on the plaintiff's part was necessary to raise an "actual violation" issue. It is possible that between the early case above and this one pleading rules evolved whereby an actual violation could be and had to be alleged in a special way, distinct from the nominal violation needed to justify Attachment. The latter may have come to be pleadable in meaningless "common form" language. All I can say is that I have no evidence on this. (b) Assuming there was no special way of pleading an "actual violation," it was presumably up to the plaintiff to bring in evidence going to show one, and the jury's duty to say "Yes" or "No", with reasonable respect for the evidence, when such violation was made a real issue. (c) The fact that the damage award gave the Court trouble tends to confirm that actual violations were rare. I.e.: The
Courts saw verdicts for the plaintiff-in-attachment-on-Prohibition all the time. In theory, such verdicts implied a violation. But it was unheard of to give damages to the plaintiff, as if he were really the victim of unlawful conduct by the other party. Obviously he almost never was in fact, despite the pretense. When an actual-violation case occurred, the judges had to search for precedents on damages. The reports suggest they found just one -- 7 Jac. C.P. (d) Against the damage award, counsel argued for the principle that violation of a Prohibition is damage only to the King -- wherefore a fine is appropriate, but not private damages. The argument may be placed among unsuccessful tributes to the "public theory" of Prohibitions, for the Court rejected it.

(4) In connection with trials and evidence: Sir Henry Carewe v. _______. P. 18 Jac. C.P. Harg. 30, f.76. It was surmised in a tithe suit that the parson enjoyed a piece of land in lieu of the tithes. This modus was tried "at the Bar" in Westminster Hall. (Such trials before the full court, as opposed to trials in the country at Nisi prius, were clearly exceptional -- how exceptional in Prohibition cases I cannot say.) Plaintiff-in-Prohibition's evidence went to show that his land had always been tithe-free, and that it was the common opinion ("and that was not ancient in time") that the parson's enjoyment of the piece of land mentioned was the consideration for the discharge. The jury found for the plaintiff. That it was permitted to on such evidence struck the reporter as notable, perhaps surprising ("...the cause was but slenderly proved..."). The language of the report suggests that the Court may have positively encouraged the jury to infer that the consideration related to the discharge, for the report states the upshot of the case in the form of a rule of law, as if the judges said as much ("...when the land...has been always discharged...it is to be presumed that it was by a lawful discharge, although one may not plead this discharge simply of itself without alleging a cause for it.") As stated, that would seem to go even beyond the case -- i.e., to suggest that the jury should be permitted or encouraged to find for the plaintiff even if no evidence relating the consideration to the discharge were produced. Quaere what a higher standard of proof would require, except for "common opinion" of a somewhat more ancient vintage. Proof of a specific transaction, whereby the parson agreed to take the land instead of the tithes, would tend to defeat the immemorialness of the usage. Yet something of the sort seems to be what the reporter found missing, for he notes that the
plaintiff "gave in evidence nothing of the original to the parson's predecessor."

(5) This and the following two cases in connection with juries in Prohibition cases: M. 12 Jac. K.B. Harg. 30, f.173b. A modus was laid in the Manor of Dale, to pay something to the Rector of S. at the Church of S. on such a day. The venue from which the jury was taken was solely the manor. It was moved in arrest of judgment that the venue should have been the manor plus S., the place of payment. Counsel so moving conceded that venue within the manor alone would be correct if the custom had been stated simply as a duty to pay the Rector of S. -- i.e., if no specific place of payment outside the manor had been alleged. The Court was inclined to hold that there was a mistrial owing to incorrect venue, but adjourned the matter to advise. Quaere whether the Court's hesitation implies any inclination to be less fussy about venue in Prohibition cases than in other comparable cases. (A custom of a manor requiring performance of a duty outside the manor must be a rarity in any other context. Logic of one sort suggests that only inhabitants of the manor would know its custom, which is strictly the thing in dispute. Inhabitants of the parish at large would provide a check on any tendency manorial tenants might have to find a favorable custom dishonestly -- for they could say whether the payment at S. was in fact habitually made, and if it was not infer that there was no such custom. Logic of another sort suggests that venue should relate to all necessary parts of the matter to be established -- e.g., where a man was stabbed and where he died, for without a felonious assault in A. there would be no murder, and likewise no murder unless he actually died in B. Quaere whether that logic really applies here. The Court's inclination to follow it anyhow perhaps implies a wish to be fair to the parson.)

(6) M.7 Jac. C.P. Harl. 4817, f.205b. Held: Defendant-in-Prohibition may not sue a Venire facias upon issue joined in Prohibition unless there is a default of record on the plaintiff's part. I.e.: In the first instance, it is the plaintiff's responsibility to have a jury summoned to try an issue of fact upon a Prohibition. The defendant may take steps to get a jury only after the plaintiff has delayed for a certain time. The rule imports a slight advantage for, say, the tithe-payer who has obtained a Prohibition on a shaky modus. The parson cannot take steps to get a trial the moment is-
sue is joined. I do not know what kind of delay would occur before a def-
fault would be entered on record against the plaintiff.

(7) Read v. Hide. M. 10 Jac. C.P. Add. 25,210, f.8b. Issue was joined on the truth of a *modus*. The trial (exceptionally) took place "at the Bar" in Westminster Hall. One prospective juror was challenged because he had been on the jury in an earlier case between the same parties "upon such a matter in the same place." (It is not clear from the last phrase whether the two cases were exactly the same in the sense of "same par-
ties, same tithes, same *modus*, different year." Even if the relationship was not that exact, the report is possibly evidence of a reopened question of fact. I.e.: There were evidently two at least similar and overlapping cases, both of which came to trial. There is no sign that either party tried to claim a *res judicata* or estoppel.) A second juror was challenged be-
cause he was tenant of one of the parties. *Held*: "Because these chal-
lenges do not touch them in their credit, they themselves were examined on their oath, etc." *Quaere* whether they only examined as to whether the facts alleged by the challenger were true, or as to whether they were actually prejudiced. If the former, then the challenges were legally good. The tenant raises no problem: If a tenant cannot be expected to be free of bias in his landlord's favor, then he should be excluded. The juror in an ear-
lier case is more interesting: Insofar as modi could be retried between the same parties, or the same parson and another parishioner, is it so clear that one man should never serve on more than one jury? How far should one go to make sure the *modus* was considered *de novo* each time? The point of examining them on their oath only when the challenge does not "touch them in their credit" is that otherwise they would be exposed to self-incrimination.

(8) Baker v. Brent and Robinson. T.41 Eliz. Q.B. Add. 25, 203, f.87. We have encountered a few cases showing that Prohibitions could be granted by the Chancery as well as the principal common law courts. This case is of interest because it illustrates the mode of cooperation between the Chancery and common law courts with respect to a Prohibition. Although the Chancery and the common law had their differences, there was in general a tradition of cooperation and mutual respect. Issues approp-
riate to common law trial were regularly "farmed out" by the Chan-
cellor. That occurred in Baker v. Brent and Robinson. We may omit the
The Writ of Prohibition:  
Jurisdiction in Early Modern English Law

substance of the case (a complicated matter on ecclesiastical livings.) The original Prohibition was granted by the Chancery, and the parties pleaded to issue there. Being at issue on the facts, the case was remitted to the Queen's Bench for jury trial. The jury returned a special verdict. The plaintiff moved that on the facts as found the Prohibition ought to stand. He so moved in the Queen's Bench. After elaborate debate by counsel, the judges held in favor of the plaintiff's motion. The point to note is that more than fact-finding was delegated to the common law. Although the Prohibition was granted by the Chancery, the Queen's Bench both found the facts and decided the legal questions on which the case depended. It was axiomatic that legal questions incidental to equity cases should be decided by the common law courts insofar as they were questions of common law (usually about the rules of property.) With regard to Prohibitions, the Chancellor shared common law jurisdiction with his brethren of the other courts. Nevertheless, this case suggests, farming out a fact issue for trial carried such power even though here, in contrast to equity cases, the legal issues were not beyond the Chancellor's putative competence.

(9) Hutton's Case. Hobart, 15. Undated. Jac. C.P., after 1613, on the virtually certain assumption that the report was actually written by Hobart. (The reporter writes "we".) The procedural point raised in this case is whether the central common law courts can ever be obliged to stand aside in favor of a franchisal court with power to issue Prohibitions. The case in brief was as follows: Hutton, owner of an advowson, presented a clerk to the Bishop. The Bishop refused him. Hutton appealed to the Archbishop of York, who ordered the Bishop either to institute the clerk or appear and show cause. Upon his default, the Archbishop instituted Hutton's clerk himself, and he was accordingly inducted into the living. The Bishop and one King then sued in the Delegates to nullify the Archbishop's acts on the technical ground that they were done outside the Archdiocese, in London. (King, the rival candidate for the living, is described by the report as a "great scholar" presented by King James, Hutton's rival for the right to present. He may be Henry King, the poet and future Bishop of Chichester, or another of the same distinguished family.) Hutton now sought a Prohibition. The Court thought he should have it, because induction was a temporal act, triable at common law. I.e.: Hutton's clerk, being inducted, could not be dislodged by challenging the preliminary "spiritual" act of institution in an ecclesiastical court. That
probably means the only way to get him out would be for King James to sue Hutton in *Quare impedit*, pursuant to which the "spiritual" issue would be determined with civilian advice or by certificate of an ecclesiastical judge.

The procedural wrinkle rests on those foundation. As it happened, the church in question was within the jurisdiction of the Duchy of Lancaster. Presumably any common law action to try the matter should be brought before the Duchy Court, which had general jurisdiction, including power to issue Prohibitions. To complicate matters, Hutton had already commenced a *Quare impedit* in Lancaster (presumably against the Bishop.) He apparently intended to claim his Prohibition partly on the ground that a common law writ going to the same matter as the ecclesiastical suit was actually hanging. The Court, however, instructed him very firmly not to do that (probably requiring amendment of the surmise). For Hutton had got his clerk inducted and therefore had no title to a *Quare impedit* (the purpose of which was to complain of interference with a patron's right, preventing him from putting his clerk in.) In short, Hutton must not seek a Prohibition because a *Quare impedit* was hanging, when on his own showing *Quare impedit* with himself as plaintiff did not lie. He must rest solely on the common law's jurisdiction over induction. Therefore it was not arguable -- not relevant to argue -- that Hutton should have brought his Prohibition in the Duchy of Lancaster because it depended on a suit hanging there. Nevertheless, the Court spoke to the objection that the Prohibition should have been brought in Lancaster. I.e.: It was argued -- or assumed to be arguable -- that where the proper mode of trying the matter would be a suit in Lancaster (presumably *Quare impedit* with Hutton as defendant), the Prohibition should have been sought here. The Court rejected that argument, however, in language broadly affirmative of the central courts' comprehensive responsibility to protect all forms of common law jurisdiction, not only their own: "...the title of the advowson is not hereby questioned [if that were questioned Lancaster would have jurisdiction]; but the intrusion upon the common law (whereof this Court hath general care) is to be restrained..."

One other feature of this case is of interest: "This act of Court [the Prohibition] was complained of to the King, and he signified his pleasure both by Sir Thomas Lake [Secretary of State from 1616, an important courtier before then] and the Lord Archbishop of Canterbury, that he
would have a consultation granted: but we answered His Majesty by letter, that we could not do it by the law, and in the end, after many passages to and fro, it was left, and so it stood." This is a rare and damning instance of royal interference in an individual suit aimed directly at dictating the result (as distinct from: a. Royal interference aimed at influencing the policy of the courts, but without reference to specific pending cases; b. Royal interference by writ of *Rege inconsulto*, aimed at delaying a suit to insure adequate representation of the King's interests. The judges -- not led by Coke, but by his successor at the Common Pleas, Sir Henry Hobart -- struck by their guns and prevailed.