The Writ of Prohibition: Jurisdiction in Early Modern English Law, Vol 3: The Range of Jurisdiction-Controlling Prohibitions

Charles Montgomery Gray

Follow this and additional works at: http://chicagounbound.uchicago.edu/lib_pubs

Recommended Citation
http://chicagounbound.uchicago.edu/lib_pubs/7

This Article is brought to you for free and open access by the D'Angelo Law Library Publications at Chicago Unbound. It has been accepted for inclusion in Publications by an authorized administrator of Chicago Unbound. For more information, please contact unbound@law.uchicago.edu.
THE WRIT OF PROHIBITION:
Jurisdiction in Early Modern English Law

Charles M. Gray

Volume III:
THE RANGE OF
JURISDICTION-CONTROLLING PROHIBITIONS
Introduction.................................................................................................................1

I. Preventing Direct Encroachment on the Common Law:  
The Paradigmatic Prohibition......................................................................................3

A. Introductory...........................................................................................................3

B. The Line between Prohibition and Praemunire and between  
Prohibitable Suits and Suits Constituting Actionable Wrongs.........................10

C. “Paradigmatic” Prohibitions: Miscellaneous Instances..............................26

D. Problems with Paradigmatic Prohibitions:  
   Ecclesiastical Offices.......................................................................................56

E. Problems with Paradigmatic Prohibitions:  
   Spiritual Pensions...............................................................................................65

F. Severed Tithes Converted to Chattels...............................................................119
   1. Introductory.....................................................................................................120
   2. The Cases.......................................................................................................126

II. Prohibitions to Protect One Non-Common Law Court  
    Against Another .................................................................................................155

III. Prohibitions to Control the Ambit of Remedial Wrong,  
    or Merely to Prevent Imposition of Unwarranted Liability.........................170

A. Introductory........................................................................................................170

B. Complaints that the Ecclesiastical Complaint  
    is Substantively Inappropriate..........................................................................183

C. Objection to the Form of the Ecclesiastical Suit, where the  
    Type or Substantive Purpose of the Suit is Unobjectionable......................213

D. Related Cases: Complaints about the  
    Handling of Initially Unobjectionable  
    Ecclesiastical Suits without Disallowance Surmise..................................237
INTRODUCTION

In the preceding volumes of this study, I have examined: (a) procedural problems in Prohibition cases and (b) common law control over the conduct of "foreign" courts, where the conduct of such courts is expressly complained of and their jurisdiction is implicitly admitted. In this volume, I turn to the main body of Prohibition law -- cases in which jurisdiction-control, rather than conduct-control, is the essential theme. Jurisdiction-control is not a simple category, however. In the first volumes, I distinguished the following functions under that general rubric: (1) Preventing a "foreign" court from entertaining a suit which ought to have been brought at common law. (2) Preventing one non-common law court from entertaining a suit appropriate to another non-common law court, (3) Preventing a "foreign" court from entertaining a claim which no court should listen to -- from extending the "ambit of remediable wrong." (4) Preventing non-common law courts from determining certain issues arising in cases admitted to be originally within their jurisdiction. Control of the substantive law applied and procedures employed in ecclesiastical courts -- what I call control over their conduct -- is only one subdivision of this final category. It is perhaps the most striking and jurisprudentially interesting, but there are others, themselves amenable to distinction. For example, one can distinguish stopping a non-common law suit to insure determination by common law judges of an issue appropriate to their expertise; that can be contrasted to stopping one in order to make sure that facts are determined by jury when that is especially appropriate -- notably when a customary usage is in question (though customs also call for a common law judicial role, whose rationale is perhaps rather exclusive legal competence than special expertise, for if a custom is found or admitted as a fact its reasonableness must still be certified judicially.) Both of these operations differ from stopping a non-common lawsuit merely because its determination might de facto prejudice common law determination of a closely related matter. Stopping one to enforce a statute as construed by the common law court, on the theory that interpretation of statutes is a common law monopoly, is something else again. To a degree, these distinctions enter into the way this and ensuing volumes are arranged, but my organization also employs subject matter categories overlapping the analytic ones. (For the principles of organization, the reader is referred to the General Introduction at the beginning of Volume I.)
Volume III (Part III of the study) deals with Classes 1-3 above, not with Class 4. It by no means includes all instances of these classes. The most numerous and important instances are taken up under subject matter categories. For example, Prohibition cases involving the Admiralty are dominated by Type 1 -- preventing a "foreign" court from doing what the common law could, or arguably could, do itself. Type 3 Prohibitions are predominant in cases involving courts of equity,¹ and some cases on defamation raise the question whether ecclesiastical courts may extend the scope of defamation utterance as far as they like so long as they do not duplicate common law remedies. (Other defamation cases conform to Type 1 -- the question is whether a common law remedy is available and an ecclesiastical one accordingly an encroachment on common law territory.) The minor class, Type 2 -- protecting non-common law courts against each other -- is dealt with here, save for aspects entirely dependent on statute (for which see Part IV, in the Addenda to the study – forthcoming but still incomplete). The point of Vol. III is to illustrate the range of cases within the large class of Prohibitions sought or granted because the non-common law suit should not have been brought at all. All such cases contrast with Type 4, where an originally proper non-common law suit should be stopped because of something arising in it. Unclassifiably individual cases and a few minor categories are used to illustrate the range, because they are uncomplicated by the special flavor of large subject matter categories. In the latter, the interests typically concerned and the need to work out a general judicial policy for a practically important area of the law can cut across analytic categories.

¹ For most of the substance of which, see Appendix at the end of this Volume.

A. Introductory

In a sense, the least complicated and least dubitable proposition of Prohibition law is this: If the plaintiff in a "foreign" court could have pursued substantially the same remedy at common law, he ought to have done so. Accordingly, the "foreign" court should be prohibited from entertaining his suit.

It will at once be apparent that applying this principle is not simple. In the first place, whether a common law remedy was available could be open to debate. Secondly, while it is necessary to say "substantially the same remedy" in stating the rule, the modifier raises obvious problems. The injunctive relief provided by courts of equity and in effect by ecclesiastical courts (the former backed by temporal sanctions, the latter by spiritual) is not exactly the same remedy as damages and other common law judgments. "A given complaint is remediable at common law and should not be entertained by an ecclesiastical court" means "The common law provides a remedy; the remedy is adequate; a plaintiff should not take business away from the common law merely because he would prefer a different remedy or different forum; he should not be allowed to subject the defendant to 'foreign' procedures and to the risk of double vexation because of such a mere preference; 'substantially' the common law protects the interest of whose infringement this plaintiff complains." A classic problem of equity -- When should a party who could recover damages at common law be awarded specific performance of a *de jure* or contractual duty owing to the inadequacy of compensation? -- grows in the crack between some common law remedy and one substantially equivalent to that obtainable elsewhere.

Thirdly, the rule that an adequate common law remedy is preemptive leads to the problem of negative instances. If the common law will give damages on such and such a contract, and there is no reason to consider damages an inadequate remedy, then non-common law courts should be prohibited from entertaining a suit on the contract. But suppose the common law either would not or might not (subject to advisement in a
problematic case) give any relief for breach of a given undertaking. Should "foreign" courts be prohibited from so much as considering whether to enforce that contract? Should the common law be regarded as having preeminent jurisdiction over the field of contract -- the right and duty to decide which undertakings should be enforced and which not, whether by the common law itself or by other courts (as opposed to the exclusive right to enforce those promises which it recognizes as actionable at common law?) If contracts should be regarded as a common law field -- if anyone complaining of breach of contract should be confined either to the common law remedy itself or to a "foreign" remedy on a contract intrinsically actionable at common law -- what about other areas? Take defamation: Assuming no common law action lies for "scoundrel" (as a mere everyday insult, too vague to be taken as defamatory), ought ecclesiastical courts to be prevented from treating that word as slanderous? If so, should one speak of the field of defamation as preeminently within common law jurisdiction, though not entirely covered by common law remedies? Or would it be sounder to avoid talking about "fields" especially appropriate to the common law and stick to the quadrupartite schema above. I.e., would it be better to say that Prohibition lies when the common law positively furnishes a substantially adequate remedy on given facts and, beyond that, simply when "foreign" courts in any field threaten to stretch the "ambit of remediable wrong" too far? The choice of theories might make a practical difference. E.g., if the field of contract is thought of as preempted by the common law, it will be relatively easy to prohibit, say, suits on contracts whose considerateness fails to meet common law standards. Even though a reasonable case can be made for enforcing some promises that are not fully or literally considerate, the common law will probably regard itself as the only competent judge -- i.e., as the forum in which, if there is to be any relaxation of the consideration requirement, proposals for such relaxation must be fought out. If, on the other hand, the common law's authority to prohibit suits on inconsiderate promises is only an instance of its authority to check unfair, oppressive, or fundamentally "un-English" extensions of liability, one would probably expect the judges to listen to reasonable arguments against prohibiting in exceptional cases. It would be easier to say, "We would not give relief on this promise (cf. on these purportedly slanderous words) for want of consideration in our sense, but since allowing relief in the circumstances hardly offends against reason and the policy of the law, we will not stop a court of equity from giving relief if it sees fit (cf. punishing this particular defamatory utterance, since doing so would not
come to attaching liability to a trivial insult or ridiculously inhibiting people from expressing themselves -- we do not want to impose an approach to defamation on other courts, only to prevent oppressive extensions)."

Beyond these problems about the simplest kind of Prohibition, there is a more basic question: Is it unambiguously legitimate? Is it true that "foreign " courts should be prohibited if the common law supplies an adequate remedy in the same circumstances? Is that really the case in which the propriety of prohibiting is most beyond doubt? Of course these questions are somewhat artificial. On intuitive grounds alone, it seems evident enough that questions of principle are easier to raise about other types of Prohibition: Does the common law have interest and standing to tell one ecclesiastical court to stay out of another's territory, instead of leaving it to the Church to thrash out its own jurisdictional conflicts? What theory makes the common law courts judges of the "ambit of remediable wrong", to the exclusion of other courts under the same Crown and Parliament? If a suit belongs in an extra-common law court in the first instance, should that court not be allowed to determine any issues that arise in the suit, at least if it shows no sign of mishandling any issue for which the common law furnishes a governing standard, or in which it has a specifiable interest? If jurisdiction over the "principal" ever carries the power to settle the "incidents", by what criterion can it be said not to carry that power in some cases? By contrast, protecting the common law's monopoly seems, logically and historically, the common law's clear right. The inconvenience of conflicting rules when several courts are competent to act upon the same complaint; the impropriety of giving litigants a chance to speculate on which of several concurrent courts they will fare best in; the presumption that Englishmen prefer trial by jury and common law procedures generally, that indeed they have a birthright in them, of which they should not be deprived without very good reason; the historical fact that Prohibitions originated in reaction to ecclesiastical claims over areas which the common law staked out for itself in the days of an autonomous international Church: -- all these considerations support "the simplest kind of Prohibition."

There are still a few complications. We have seen in Vol. I, for example, that Prohibitions to insure the common law's handling of suits which it was capable of handling were not always the most privileged Prohibitions in the procedural sense. Specifically, parties who sued in the Admiralty on contracts remediable at common law were denied Prohibitions if they acquiesced in Admiralty jurisdiction until sentence went against them.
Ecclesiastical litigants were much less likely to be foreclosed from a Prohibition by failure to seek one promptly, even though the end of the Prohibition was often less straightforward than stopping a suit whose effect was to deprive the common law of business. The good practical reasons for this discrimination do not detract from the present point: Persons who manifestly "ought" to have sued at common law were allowed to get away with suing in the Admiralty if the adversary failed to object in time; persons who were perfectly entitled to sue in other non-common law courts were often prohibited on this ground or that in spite of the adversary's seeming acquiescence. The public interest in the "simplest kind of Prohibition" was not consistently regarded as stronger than the public interest in more questionable kinds.

Secondly, there are instances in which concurrent jurisdiction was accepted. Some statutory offenses punishable at common law were also liable to ecclesiastical prosecution. Admittedly, the criminal and statutory character of such instances makes them a special case. Parliament obviously could take a quondam ecclesiastical offense and make it a common law misdemeanor, while, by clear language or constructed intent, preserving ecclesiastical authority. In the absence of clear counter-indications, there is little reason to suppose that Parliament would ever intend to cut the ecclesiastical system out of low-level criminal law enforcement in areas where it had customarily engaged therein. For when Parliament singles out an activity as deserving of temporal punishment, it presumably wants to see that activity suppressed as vigorously as possible, by whatever officials are willing to take the initiative or in whatever court private complaints find their way to. (The argument loses force if one imagines an ecclesiastical crime turned into a felony, for then the sanction becomes so grave that it would be hard to deny suspects the protection implicit in exclusively common law procedure. Ecclesiastical proceedings, even without incriminating interrogation, would call attention to suspected offenders and turn up evidence against them, thereby -- in the absence of guarantees against double vexation -- increasing the chance of common law conviction. In practice, the overlap in criminal or semi-criminal -- "penal" -- law was at a relatively petty level.) For present purposes, the only point to be made is that some concurrency existed in the criminal area and was not resisted by every resource (as by construing temporalizing statutes against the preservation of ecclesiastical powers if at all possible.) "If the common law has jurisdiction, no 'foreign' court has it" was not an absolutely embedded principle.

Though concurrency mainly obtained in a small area of criminal law, there was some spill-over to civil relationships. For one thing, defamation was linked to crime. Slandering
someone as a murderer, say, was the clearest case of actionable defamation at common law; analogously, to impute a pure ecclesiastical offense -- say by calling someone a heretic -- was indisputably ecclesiastical defamation. Therefore, if Parliament temporalized a spiritual misdemeanor, it ought at least arguably to be taken to have temporalized defamatory imputation of the offense also. But if ecclesiastical jurisdiction over the crime was preserved should not ecclesiastical authority over the defamation not be preserved as well? For another example, the Church's right to tithes was reinforced by statute so that persons who failed to pay their tithes were in some circumstances exposed to common law actions. There was never any question, however, that the traditional ecclesiastical jurisdiction over claims to tithes survived concurrently. (See Sub-sect. F below for one way in which statutory intervention in tithe law probably created concurrent civil remedies.) Again, exclusiveness was not absolutely characteristic of the English system.

Another complicating factor is the criminality or tortiousness of violating the common law's territory under some conditions. The ancient and grave statutory crime of Praemunire consisted basically in using the ecclesiastical apparatus so as to derogate from the jurisdiction of the King and the common law. The Praemunire statutes were notoriously vague; it is extremely hard to say textually just what specific acts amounted to the offense and what acts of a similar nature failed to. At any rate, some of the acts of suing, or entertaining suits, which Prohibitions were used to cut off would seem to be within the range of Praemunire. In addition to the crime of Praemunire, opportunities existed for parties proceeded against in improper "foreign" courts to recover damages and penalties against their adversaries and the non-common law tribunal. Several statutes allowed such recovery, and a common law right to an Action on the Case for wrongful vexation was recognized in principle.

Two questions arise from the existence of Praemunire and of penal and civil remedies against suing in the wrong court. (a) Can any color be given to the thesis that Prohibition should be an alternative to other remedies? Assume that A has either incurred Praemunire or committed a tort or tort-misdemeanor by suing B in an ecclesiastical court. Is there any possibility of arguing that B should not be able to prohibit A's suit, because B is adequately protected by other means -- he can help himself by suing for damages or a penalty, or the serious threat of Praemunire is sufficient deterrent to manifestly improper suits? (Cf. the following realistic case: Parishioner promises to give, and Parson to accept, a sum of money
The Writ of Prohibition:
Jurisdiction in Early Modern English Law

in lieu of this year's tithes. Parson sues for tithes in kind in violation of the agreement. It was argued -- and the argument was usually considered good -- that since an action for breach of contract at common law will lie against Parson, his suit should not be prohibited. Prohibition would amount to a redundant remedy and to specific enforcement of a contract on which the common law allows damages). In general, with respect to Praemunire: When the law makes an act a serious crime, ought it in effect to enjoin the criminal from continuing on his criminous course? With reference to tort remedies: Is it appropriate to treat wrongs as both compensable and stoppable? One way of answering these questions would lead to the paradoxical position that the most unexceptionable-sounding kind of Prohibition is in fact the most questionable. For, obviously, criminal and tort remedies can only apply to one who sues in an improper court in the first instance -- one who ought to have started a common law suit if he wanted to sue at all. One who brings a suit in an ecclesiastical court because that is the only place to start a suit of a given type clearly does no wrong, yet his suit may be prohibitable on several grounds. Should the Prohibition perhaps be confined to originally non-wrongful suits?

(b) Granting that criminal and tort suits can only apply to initially misplaced suits, do they cover all instances thereof? Or is there a line between serious or inexcusable offenses -- especially those worthy of the pains of Praemunire -- and other instances of encroachment on the common law? Let us take it that if A.'s ecclesiastical suit amounts to Praemunire or actionable wrong, then *a fortiori* his suit is prohibitable (the opposite of worrying about whether the suit's criminality or tortiousness might be a bar to Prohibition.) Is the "simplest kind of Prohibition" coterminous with the scope of Praemunire or with that of wrongful litigative vexation? Or are some suits prohibitable on the ground that they ought to have been brought at common law, despite the fact that suing elsewhere is not a crime or a tort?

The point of these questions is largely taxonomic, but legal implications may be wrapped up in them. E.g., if every suit initially misbrought in a "foreign" court is both prohibitable and an offense against the Praemunire statutes, would there ever be any justification for mitigating the rigor of Prohibitions? I.e.: If A. has done something so bad that he ought to suffer the ruinous penalties of Praemunire, B. should probably not be held to have foreclosed himself from prohibiting A.'s suit, by acquiescence in the jurisdiction or other laches. If, on the other hand, only rare and blatant encroachments on the common law
come to Praemunire, there would seem to be less objection to pragmatic discretionary treatment of an unclean party's right to a Prohibition.

For another possibility, if suing in an ecclesiastical court when one should have sued at common law is always prohibitable and always Praemunire, it may be tempting to argue that liability to Praemunire is the test for open-and-shut prohibitability. The suit is one of those evil incursions on the "royal dignity" which the Prohibition is manifestly designed to prevent. But if it is not Praemunire, then prohibitability becomes a more open question. Can any suit which is not initially misplaced, and hence not Praemunire, be regarded as categorically prohibitable under any set of conditions -- as opposed to prohibitable by judicial discretion which need not be exercised with complete consistency? Should the courts perhaps rather lean against prohibiting suits -- say on account of collateral issues arising, or the "foreign" court's disallowance of a plea -- which do not wear that stigma of wrongfulness whose surest mark is danger of Praemunire? If, on the other hand, suits wrongful enough to incur Praemunire (or perhaps even civil actionability) are reduced to a small class of enormities, then all ordinary Prohibitions will tend to seem on the same level. As it were: "Sometimes suits are indisputably prohibitable because they ought to have been brought at common law, but comparatively few even of those are really wrongful. The Prohibition is not a handmaid of Praemunire, but a routine, essentially civil, mode of regulating a mixed legal system. Sometimes Prohibitions may be more disputable than in those paradigm cases where the suit ought to have been brought at common law, but the difference is not that between the wrongful and the non-wrongful. When the question is only 'To regulate or not to regulate?' -- not 'Is this jurisdictional mix-up essentially worse than that?' --, perhaps it does not matter very much what the ground or theory behind the proposed Prohibition is, so long as it will conduce to the smoother or fairer operation of a complicated system."

Because the law of Praemunire could have implications for the theory of Prohibitions, I propose first to look at the scant group of cases that touch on both topics and at a few related cases on penal and tort remedies for wrongful suits. When, if not always, is it Praemunire to bring a non-common lawsuit that should never have been brought? When, if ever, is it an actionable wrong?
B. The Line between Prohibition and Praemunire and between Prohibitable Suits and Suits Constituting Actionable Wrongs

Summary: We have considered how in principle the existence of Praemunire and of actions for vexation in inappropriate courts could make problems for the "paradigmatic" Prohibition, "the simplest kind." There is little authority relevant for this matter. Although not very decisive, it points to two conclusions: (a) No case can be made for not prohibiting when, or merely because, Praemunire or a tort action lies, (b) Many suits are prohibitable and yet do not incur Praemunire or actionability. Among such suits are ones which are not obviously outside the scope of Praemunire or tort, as a legitimate suit which in the first instance must be in a non-common law court surely is. But it is not very clear how the two classes -- criminal/wrongful vs. merely prohibitable -- should be distinguished. In practice, Praemunire was a rara avis, strong medicine unlikely to be applied unless someone misbehaved grievously (or in a manner to which the common law authorities took essentially political exception, as in Coke's famous attempt to have a lawyer indicted for seeking an equitable remedy in the face of a judgment.) Civil actions for wrongful prosecution in non-common law courts were rare too, as one would expect in the light of the Prohibition's availability to cut off the offense. Authority on Praemunire and tort actions is accordingly scanty.

* * *

An early 16th century report, without litigative context,\(^2\) lays down the most important generalization: Prohibition often lies when Praemunire does not. Two examples are given. One is "great trees" -- i.e., where Parson sues for allegedly tithable wood, but the timber in question is in the class exempted by statute. This example is not strong in one sense, because exempt wood was simply exempt -- i.e. not recoverable by either ecclesiastical or common law suit. Praemunire was so vaguely defined that it could have been extended at least to one who knowingly sued for non-tithable products or deliberately misrepresented the nature of the product in question (e.g., knowing the trees cut by Parishioner to be aged oak, or so knowing and expressly saying in one's libel that they were trees in a tithable category.) It

\(^2\) Brooke's New Cases, 150. Undated.
Preventing Direct Encroachment on the Common Law: 
The Paradigmatic Prohibition

would be manifestly unfair to treat a suit brought to test the tithability of a product, or to 
fight out a factual dispute over a product's nature, as a criminal act. The difficulty of sorting 
out deliberate abuse of one's parishioner by ecclesiastical process from bona fide litigation 
over tithability is sufficient reason to take suits for exempt products -- and perhaps all suits 
which should not be brought anywhere -- out of the scope of Praemunire. Virtually any suit 
which could have been brought at common law would be a better candidate for Praemunire 
than "great trees."

The other example in the early report reads "vel pro decimis, de septima parte." I can 
only suppose this refers to customary tithes in excess of the de jure amount. The 
prohibitability of a suit for such tithes would depend on the idea that the common law is the 
judge of customs. Two alternative rules can be projected from that idea. (a) One may sue for 
customary tithes in an ecclesiastical court, just because that is the normal place for tithe 
suits, but if Parishioner-defendant wants to prohibit he may -- i.e. may in effect remove the 

case to the common law in order to dispute that there is such a custom and have that issue 
tried by a jury. Perhaps Parson-plaintiff must start in the ecclesiastical court and thus leave it 
up to defendant where the litigation is to take place. Assuming this sort of rule, it would be 
clearly unfair to punish a man for bringing an ecclesiastical suit. (b) Ecclesiastical courts are 
strictly confined to de jure tithes. A claim to more than 1/10th or to tithes of a normally 
exempt product is not a "spiritual" claim at all, but a temporal right analogous to a rent, 
recoverable only at common law. If this were the rule, it would be quite significant to say 
that an ecclesiastical suit is prohibitable but not Praemunire. As it were, suing in a Church 
court to recover a specialty debt must surely be Praemunire; to recover a tithe-like payment 
based on custom one could and should sue at common law, just as in the case of the debt, but 
an ecclesiastical suit is still not Praemunire.

Of his two examples, the reporter says, "the nature of the action belongs to the Spiritual 
Court, but not the cause in this form. But where 'tis of a lay thing which never appertained to 
the Spiritual Court, of this a Praemunire lies...." An example of a suit within danger of 
Praemunire then follows: Debt against executors on a simple contract. If we take the suit for 
custom-based extra "tithes" as pursuable at common law in the first instance, the comparison 
with Debt against executors suggests a distinction in degrees of excusability, as opposed to 
one between initially appropriate and inappropriate ecclesiastical suits. On the one hand are 
suits which ought not to have been brought in the ecclesiastical court, but whose "nature", or
The Writ of Prohibition:  
Jurisdiction in Early Modern English Law

resemblance to valid spiritual suits, excuses them and makes the strong sanction of Praemunire excessive. On the other hand are suits which "never" belonged to Church courts -- suits notoriously temporal, which anyone with even a layman's presumed knowledge of English institutions would realize had no place in a Church court. (The "never" taken literally could be wishful history, overlooking the early involvement of ecclesiastical courts in contractual matters.) Referring back to the preceding examples, one could then say, "Granting that suits for so-called customary tithes are really for prescriptive temporal payments recoverable at common law, yet when a parson sues in the ecclesiastical court for such a payment, claiming it as what he conceives to be a sort of special tithe, Praemunire is too tough. Or take the worst instance of a suit for 'great trees' -- where plaintiff on the face of his own libel is seeking tithes of aged oaks, in direct contradiction of an old and well-known statute exempting that kind of tree. Even so, the suit is for tithes, and no degree of everyday inexcusability is quite grave enough to expose a parson who resorts to the Church courts seeking tithes, or something in the name of tithes, to the forfeitures of Praemunire."

The reporter's counter-example -- Debt by executors, exemplifying a suit which is both Praemunire and (presumably) prohibitable -- contrasts with my example of Debt on a specialty above, for it is what I call in the introductory section a "negative instance" of an exclusively common law matter. Executors were not liable at common law on the testator's simple contract, in most circumstances, because of their incapacity for wager of law, the method of proof on the general issue in that species of Debt. (That was the reason rather than Actio personalis moritur cum persona. But if executors free from common law liability on that principle were sued in a Church court -- say to compel them to pay damages for a personal tort out of the estate --, the suit would surely be in equal danger of Praemunire.) The justification for the reporter's point must be that ecclesiastical invasion of the notoriously lay field of contract or debt is Praemunire, albeit to enforce a duty for which a common law remedy was not available as against executors. Affinity with the valid ecclesiastical jurisdiction over testamentary matters, or the Church court's theoretical responsibility to look out for the testator's soul, made no difference. Ecclesiastical courts had no more business enforcing (in effect) equitable duties related to contracts against executors than they had enforcing a bargain to sell a horse between living contractors. At the time of this report, the Chancery was in practice compelling executors to satisfy simple-contract debts of the testator. Granting the Cokean proposition that courts of equity are capable of
offending against the *Praemunire* statutes, I should be surprised to hear that one had so offended by entertaining a contractual claim which could not be pursued at common law, including proceedings against executors on simple contracts. Later than this report, when prohibiting courts of equity -- though not the Chancery itself -- became common practice, I would be less confident that the proceedings against executors would escape Prohibition, though they might. The subject could be complicated by the development of *Assumpsit* as a substitute for Debt in the later 16th century. There are no cases in point that I know about. In present terms: Contractual matters were radically out of bounds for Church courts; they were not by "nature" alien to courts of equity, though some suits in equity -- e.g. to enforce an entirely naked or inconsiderate promise -- would almost surely be prohibited when prohibiting courts of equity came into use. (For points of law in this paragraph, see A.W.B. Simpson, *A History of the Common Law of Contract*. Oxford, 1975. Ch. XI.)

In the Elizabethan Blackwell's Case, the Queen's Bench judges identified a suit which they prohibited as an apt candidate for *Praemunire*. (There is no indication of an actual prosecution. The chances are that the judges added enough minatory emphasis to their decision by saying "they are in danger of *Praemunire*." ) The ecclesiastical suit in this case was initially quite legitimate, a legacy claim. The executor-defendant responded with the commonplace plea "No assets" -- i.e., insufficient funds in the estate to satisfy debts and still pay legacies. Thereupon, the plaintiffs took advantage of the flexibility of ecclesiastical procedure and amended their claim to an *Assumpsit*. There would seem to be two possible stories to explain or give color to the plaintiffs' move: (a) Plaintiffs claimed that the sum, which they had originally sought as a legacy, was owed to them by testator in virtue of a contract, so that they were committing *Praemunire* by trying to charge executors on a contract in an ecclesiastical court. Whether the executors would have been chargeable at common law makes a question (the capacity of claims amenable to *Assumpsit* to survive the testator was a vexed matter.) If so, we have the strongest possible case of a suit subject both to Prohibition and to *Praemunire*. If not, color of equity can be given to plaintiffs' probable position: Testator makes a perfectly good contract with A. Not having paid A, Testator on his deathbed devises the sum due to him. A sues Executor for his legacy and is confronted

---

3 T. 19 Eliz., Q.B. Harg. 11, f.34.
with the plea that the estate will not support legacies after specialty debts, for which Executor is liable at common law, are satisfied. Believing he cannot rebut that plea as such, A amends his libel so as to allege the charge on Testator's conscience that lies behind the legacy. He does not contend that he should be satisfied ahead of specialty creditors or that persons entitled by a mere contractual undertaking may normally use ecclesiastical process to compel executors to pay them. Rather, he contends that his legacy should be preferred over other ones (pure gifts) if the estate will support some but not all, and that the legacy jurisdiction of the ecclesiastical court permits it to take account of contractual duties behind legacies for the purpose of ranking them. If this was plaintiffs' position, it got nowhere, for, besides prohibiting, the Court by dictum brought their claim within the scope of Praemunire. As the report above implies, color of equity is no help.

(b) The ecclesiastical plaintiffs claimed that the executor had made a promise to pay the particular legacy left to them, wherefore he should be chargeable out of his own pocket if testator's estate was insufficient. It is harder to give any color to an ecclesiastical suit of this nature than to one conceived as an attempt to confer priority on legacies intended to satisfy contractual duties that would die with the testator.

One Elizabethan case directly concerned with Praemunire sheds a little oblique light. The holding was that a private party who joins with the monarch in prosecuting for Praemunire may not continue if the monarch drops the suit. Leaving aside the problems surrounding this decision as such, one point should be noticed: It was possible for an offended private party to join with the Crown in prosecuting Praemunire in order to recover damages (as the case confirms), but he was at the Crown's mercy. At any rate when the Crown did join in the prosecution, it could by dropping the suit keep the private party from protecting himself through the Praemunire statutes. It is probably further implied in this decision that a Praemunire suit without the Crown's initial collaboration was impossible. (The case suggests considerable confusion over how the rara avis, Praemunire, was supposed to work. The decision was reached by ignoring or overturning some cited precedents.) Since the non—common law courts generally enjoyed government favor, the likelihood would be slight of those courts and their suitors being often bothered by public

4 The Queen and Dean of Christchurch's Case. M. 26/27 Eliz., Q.B. 1 Leonard, 292.
Preventing Direct Encroachment on the Common Law: 
The Paradigmatic Prohibition

prosecution. The Prohibition was all the more necessary for the subject's protection. The alleged violation of the statutes in this case was bringing what amounted to an action of Trespass to land in an ecclesiastical court, presumably as open-and-shut an instance as possible.

A nota from the Jacobean Common Pleas ⁵ gives one firm example of Praemunire: Parishioner severs and sets out his tithes. A stranger takes them. Parson sues the stranger in an ecclesiastical court. The reason is that this ecclesiastical suit is indistinguishable from any action of Trespass for taking another's goods, because the effect of severance is to vest the property in the produce in Parson. The nota adds that a suit against Parishioner for exactly the same thing -- severing tithes and carrying off what is now Parson's property -- is not prohibitable, much less Praemunire. This rule, as to prohibitability, is owing to modification of the common law by statute. (See Sub-sect. F below.) There is reason to doubt that such a suit against Parishioner would be Praemunire even if statute had not intervened to affect prohibitability. (In the absence of statute, the suit against Parishioner would certainly be subject to Prohibition, because Trespass for taking Parson's goods would lie. The common law action continued to lie after the statute, which had the effect of creating concurrent remedies.) See Coke's observation on the scope of Praemunire just below.

A Jacobean report of Dr. Trevor's Case ⁶ like Blackwell above, furnishes a dictum on when a prohibitable suit is also Praemunire. The case is almost certainly the same as that reported as Roebotham v. Dr. Trevor, where the merits of prohibiting are discussed (Sub-sect. D below), but the reports going to that say nothing about Praemunire. In brief, Trevor sued in the Court of audience seeking reinstatement in an ecclesiastical office which he claimed to hold for life and from which his superior, a bishop, had purported to expel him, as well as disturbing him in the office. The Common Pleas prohibited on the ground that an office for life is a temporal freehold whether its functions are ecclesiastical or lay, and therefore that the office—holder may and must sue at common law if he is disturbed (by Action on the Case) or put out (where an Assize would lie.) After giving the decision, the report continues as follows: "And it was said that it was a gracious time, otherwise Dr. Dunn

---

⁵ H. 6 Jac. 1 Brownlow and Goldesborough, 30.
⁶ H. 8 Jac. C.P. Add. 25,215, f.78b.
[the judge of the Audience] would have incurred a *Praemunire* for holding plea of that which is temporal. And Lord Coke said that it was said in his ears that no *Praemunire* lies at this day, because the spiritual and temporal jurisdiction is in one sovereign, but he would advise all persons to know that the opinion of himself and all his brothers, Justices of England, is that *Praemunire* lies at this day as well as in any time before." The dictum as applied to the principal case tends to suggest that bringing any claim assertable at common law in an ecclesiastical court is *Praemunire*. For if one thinks of "degree of excusability", it seems harsh to regard suing for an ecclesiastical office in an ecclesiastical court as a crime (spared only by "grace"). Some kinds of contentions between ecclesiastical persons (e.g., parson and vicar) belonged in Church courts, as did claims to some pecuniary dues (so called spiritual pensions) easily confused with temporal annuities. Dr. Trevor and Dr. Dunn perhaps had some excuse for supposing that the archepiscopal Audience was a lawful place to sue a bishop for what might be construed as "administrative malfeasance" by ecclesiastical standards, as well as a common law disseisin or disturbance, subject to no greater threat than the bishop's non-acquiescence manifested by his seeking a Prohibition.

The larger generalization in *Dr. Trevor*, that *Praemunire* is not obsolete, not solely appropriate to "popish times", occurs in richer form in another document. An entry in the posthumous miscellany published as Vol. XII of Coke's reports deals with the status and scope of *Praemunire*. This *nota* refers to particular cases but is not specifically tied to any one. *Dr. Trevor* could have been the occasion for Coke's writing the note. It starts by citing the two major ecclesiastical apologists, Dr. Cosin and Dr. Ridley, for the erroneous doctrine that vesting ecclesiastical jurisdiction in the Crown rendered *Praemunire* obsolete. Coke then adds the churchmen's further false contention that at least the High Commission cannot commit *Praemunire*, since that court was created by statute centuries after the *Praemunire* acts. Both propositions were resolved to be erroneous, Coke says, by "divers Justices", "this very term" (but there is no indication of what term he is talking about.) He goes on to state arguments against the ecclesiastics' theory: Supreme ecclesiastical jurisdiction was always in the Crown. The Pope only usurped the King's jurisdiction *de facto*. His usurpation did not bring any rights to the Pope or take any away from the King. A disseisor acquires some

---

7 12 Coke, 37. Undated.
rights and the disseisee stands to lose some when the former takes physical possession, but not so for the usurping Pope. For the Pope never acquired possession of ecclesiastical supremacy in the legal sense of "possession". This is so because the law holds that the King can never be dispossessed of anything he possesses in the right of the Crown. Ergo, there was never a time when the Pope held spiritual jurisdiction in England. The *Praemunire* statutes were not directed against the excesses of the Church in an age of divided sovereignty, because there was never such a time. There is no difference between the time when the statutes were made and the present, except in the legally insignificant *de facto* situation. The statutes were always directed against what they are still directed against -- encroachments on the common law by those exercising the King's ecclesiastical jurisdiction. If it be objected that there is nevertheless something disturbing about regarding the acts of one branch of the King's legal system as aggressions against the King -- about so regarding them when the King is actually in control of that branch -- well, the common law has a special relationship to the King. The Crown is "directed and descendible by the common law"; treason against the King is solely punishable at common law; other courts are the King's agents, but he does not depend on them to define his title and rights and to protect him against ultimate disloyalty; therefore an offense against the common law, alone among the authorities under the Crown, may be spoken of as aggression against the King; other authorities, though equally entitled to act in the King's name as his agents, are nevertheless capable of aggression against the King by way of encroachment on the jurisdiction of the common law. All Prohibitions at least nominally allege an act *contra coronam*; for the language of Prohibitions to make sense, some of the King's courts must be capable of offense against the King; if that is so there is at any rate no absurdity in treating them as capable of the grave offense of *Praemunire*; as it were, if they can do wrong *contra coronam* to the extent of meriting the civil check of Prohibition in the King's name, there is at least no formal reason why they cannot do worse wrong and merit prosecution for *Praemunire*.

For the proposition that encroachment on the common law is to be taken as *contra coronam*, Coke cites a unanimous judicial resolution of 4 Jac. The case is not named or described, and the point is too general to permit identification. The most useful kind of case for Coke's purpose would be one inviting assertion of the public theory of Prohibitions. E.g., it is argued that plaintiff-in-Prohibition is foreclosed by laches, should not be permitted to prohibit his own suit, or the like; the judges reply that the plaintiff's private standing is
irrelevant because Prohibitions essentially protect the King's interest, the plaintiff merely supplying information of the offense. Projecting: Prohibitions really do protect a royal interest. They do not merely use ancient language suggesting such as a matter of form. If the Prohibition's charge of an act contra coronam were idle words, one would conclude that the real end of the writ is only to protect the subject from being sued where he has a right not to be, in which event his standing and conduct ought to be relevant. Treating them as irrelevant implies that the purported royal interest in the lines of jurisdiction is real, whence it follows that especially serious invasions of that interest are punishable by statutes manifestly directed at such offenses. The de facto relationship of offending courts to the King is as much beside the point as the private standing of an informer.

The High Erastian argument above was standard Cokean fare. (Cf. his "treatise", as he called it, on the ecclesiastical supremacy of the Crown appended to Cawdrey's Case, 5 Coke, 1 ff.) I have filled out the argument a little in paraphrasing it. Coke adds some technical points with reference to the High Commission -- ways in which the language of the Praemunire Acts and of the Elizabethan Supremacy Act supports including the Commission in the former. We need not bother with those here.

Having shown that the crime of Praemunire is very much alive, Coke proceeds to lay down rules for distinguishing the scope of Praemunire from the wider scope of Prohibitions: (a) If the cause originally belongs to the ecclesiastical court, Praemunire does not lie, "although in truth the cause, all circumstances being disclosed, belongs to the Court of the King", so that Prohibition does lie. Coke gives two examples of this principle in application. (1) A suit for wood tithes where the parson claims that the wood in question is in the tithable category. This suit is not Praemunire, but it is prohibitable on surmise that the wood is actually aged timber. If it is such timber -- i.e. the surmise is disputed and verified by verdict -- there is still no Praemunire. (2) A suit for tithes when in fact the tithes have been severed and carried away. I.e.: Parishioner performs his duty by cutting the crop and setting out a recognizable 1/10th for Parson in the field. The common law effect is to vest the property in the hay or whatever in Parson, so that he can maintain Trespass for it if either a stranger or Parishioner himself removes Parson's share before he can take physical possession of it; Parishioner has no insurer's responsibility if a stranger takes the hay. So suppose the hay, having been divided and exposed, disappears before Parson can carry it away. Parson sues in an ecclesiastical court for non-payment of the tithe. He and the ecclesiastical court have not
committed *Praemunire* -- without regard, so far as appears, to their state of mind, i.e., whether they knew that Parishioner had satisfied his duty. As Coke in effect says, the law must presume to be true what in most such cases must really be: Parson simply finds no tithe produce in the field when he goes to look for it and supposes the tithes have not been set out. It is not his responsibility to investigate before suing.

Two differences should be noted between the last example and that of "great trees". Whereas the trees should not be sued for at all, the parson whose hay has been carried off can sue at common law and ought to if, without special effort, he knows that Parishioner has satisfied his ecclesiastical duty. (At any rate, if he knows that a stranger has carried off the tithes he ought to sue the stranger at common law. It was usually held that by virtue of statute a parishioner who set out tithes and himself carried them off could be sued in an ecclesiastical court for non-payment, though he was also liable in Trespass at common law -- (see Sub-sect. F below). The existence of concurrent remedies under some conditions might be given as an additional reason against holding an ecclesiastical suit *Praemunire*.)

Secondly, a suit for wood tithes is prohibitable on the surmise "ancient timber", whereas a suit against Parishioner for tithes is not clearly prohibitable on surmise that the tithes were set out and not retaken by Parishioner himself. The reason prohibitability is doubtful in the latter case is that Parishioner can protect himself by pleading payment in the ecclesiastical court. It is arguable that the plea of payment is triable there, subject, perhaps, to common law control of over-strict evidentiary standards (requiring two witnesses to prove payment) and to control of legal error, as if Parishioner were held liable to insure Parson against strangers or natural damage. While there is no very good reason why ecclesiastical courts could not also try the age of trees, two factors tend to distinguish the cases: The exemption of "great trees" was statutory, and the common law arguably had a special responsibility for enforcing statutory rights and immunities. Secondly, there is a generic sense in which the surmise "I am sued for tithes in respect of a product that owes no tithes" merited a Prohibition *prima facie*, whereas "I am sued in respect of an admitted ecclesiastical duty which I have performed" did not. If a suit is not prohibitable, or if its prohibitability is especially controversial, it would be hard to hold it *Praemunire*, except on the paradoxical and untenable theory that suits restrained by the threat of *Praemunire* should not be prohibited.
(b) By way of qualification of rule (a): Even though a suit in a sense originally belongs in the ecclesiastical court, it is Praemunire to bring it there in a form which on its face declares the inappropriateness of doing so. Coke's most straightforward example of this is a version of the "great trees" case: If I sue for wood tithes and say in my very libel that the wood in question comes from timber trees over twenty years of age, it is Praemunire. Note the problem about this conclusion brought out in the discussion above. It would seem unfair to consider suits for de jure non-tithable products Praemunire, and there is no basis for supposing they were so considered. The reason is that there could easily be bona fide controversy over tithability. It was firmly established, for example, that extracted minerals owed no tithes; as a practical matter, it is hard to say that their tithability was disputable in good faith. Nevertheless, I know of no claim that suing for tithes of coal de jure was Praemunire. About other products -- e.g. new ones, such as hops -- there was genuine doubt. "Great trees" are only distinguishable by the fact that their exemption was statutory. Coke should probably be taken as embracing the distinction: To sue for a product exempt by common law is to incur Prohibition but not Praemunire; to sue in terms for a product exempt by statute is to incur both. The notoriety of statute, one would have to say, removes the excusability of flouting one.

Coke's second example is a mortuary delivered to a parson and taken back: If the parson sues for the object given as a mortuary and admits in his libel that it was put in his possession and later removed, Praemunire has been committed. If in fact the mortuary has been given and retaken, but the parson sues on pretense that the duty to render a mortuary was never performed, Prohibition lies but Praemunire does not. This example is close to the case of set-out tithes, to which Coke reverts in illustrating his second rule, except that the tithe case raises problems of its own. Coke says, rather vaguely, that Praemunire is incurred if a parson sues for tithes which have been set out and "matter apparent to the Ecclesiastical Court" shows that the suit should be at common law. When would the condition be met? Plainly it would be Praemunire to sue B. for hay which Parishioner A. had admittedly set out and B. had carried away. Coke's language might he taken to imply that is also Praemunire to sue A for tithe-hay admitting in the libel that it was set out and then taken, either by A. himself or by B., but quaere, as above, whether the suit is prohibitable, much less Praemunire.
It should be noted that Coke cites authority for his examples, but I wonder whether he took full account of latent problems. Rule (a) is hardly questionable, but (b) can perhaps be challenged. How much weight should be given to the mere form of the ecclesiastical complaint? One parson knows perfectly well that all the wood Smith cut was aged oak but sues in terms for tithable wood, realizing that there is no danger of Praemunire and betting that Smith will settle or take his chances on ecclesiastical determination rather than push a Prohibition. Another parson is ignorant of the law but thinks it unfair that Jones should gain enormous profit by liquidating a timber forest without contributing a penny to the Church; he sues honestly for tithes of aged oak (as he heard his neighbor parson had once sued Robinson for tithes of a coal mine.) Admittedly, the two cases are different from the point of view of the ecclesiastical judge (at least until Smith in the first case pleads the truth), but parties were subject to Praemunire too, and it seems unfair to regard the second parson as more culpable than the first. There is perhaps something to be said for the looser "excusability" standard intimated above, by which any tithe suit, or suit with a strong savor of tithes (even, perhaps, against a stranger for, let us say, "obstructing the realization of tithe rights by removing exposed tithes from the original field" would be only prohibitable.

(c) Coke also articulates two fairly obvious further points. (1) Holding plea of an "incident" of a proper ecclesiastical suit is not Praemunire, though the "incident" belongs to the common law and is cause of Prohibition. No examples are given. With reference to the situations above, presumably it is not Praemunire if Parson sues for wood in general terms, Parishioner pleads "ancient oak", and the ecclesiastical court carries on with the suit until prohibited. That is presumably true if "carrying on" means trying a factual dispute about the wood's nature, and perhaps even if it means committing a blatant legal error -- i.e., disallowing the plea of "ancient oak" -- so long as no one bothers to get a Prohibition. A fortiori in cases where introduction of the "incident" could hardly be anticipated, where the ecclesiastical plaintiff and ecclesiastical court are probably entirely clean. (E.g., A. sues for a legacy of a horse and Executor pleads that the horse was conveyed to him -- Executor -- by inter vivos gift. The suit is probably prohibitable on the ground that any controversy about the gift should be tried at common law, but it is clearly not Praemunire for the ecclesiastical court to proceed with the case until prohibited.)

(2) If the cause originally belongs to the common law, proceeding in the forms of ecclesiastical law is no protection against Praemunire. In other words, Praemunire is not
confined to ecclesiastical suits literally identical with the suit which ought to be brought at common law -- as if one were to make a libel indistinguishable from a writ of Trespass in all but the most superficially formal ways. The point seems obvious, but one can understand Coke's bothering to make it. A last-ditch ecclesiastical position is imaginable, which would concede that the *Praemunire* statutes are still alive, but maintain that they apply to competition so direct as to be nearly inconceivable. Differences of procedure, proof, incidental rules, and remedies would be called sufficient to take what amounts to concurrent activity outside the scope of *Praemunire*. Or at any rate, camouflaging claims as distinct in legal theory would be said to remove them from the class of unlawful incursions (as in my fanciful example above -- camouflaging a stranger's trespass against a parson's chattels, viz. tithe hay, as "disturbing the enjoyment of ecclesiastical rights." Although I suggest above that one might have some hesitation about labeling that particular camouflaged suit *Praemunire*, it will do to illustrate the easy plasticity of theories and causes of action, against which warning is appropriate.)

Let us now turn from *Praemunire* to civil actions for improper suits. The few cases on that subject recognize the legitimacy of such actions, but tend to restrict than to much narrower bounds than the Prohibition's, and even than *Praemunire*'s. In Lady Waterhouse v. Bawde, an Action on the Case was brought against one who sued for tithes of exempt timber. It is clear from the language of the Court's decision that the suit was not expressly for wood in the exempt class, but for wood tithes generally, whereas in truth the object was aged timber. That truth was firm, for the case was debated on demurrer -- i.e., plaintiff's claim that the wood sued for was really old timber was admitted in pleading. Plaintiff's counsel urged the generality that whenever a statute forbids suing (for a particular thing or, presumably, in a particular court), persons sued contrary to the statute have suffered a wrong remediable by Action on the Case. The King's Bench rejected that general rule, holding that a civil action will not lie for that offense unless the statute expressly authorizes it. On the other hand, the judges conceded that criminal liability (distinct from *Praemunire* -- liability for a misdemeanor, in other words) flows from such prohibitory statutes even when it is not conferred in terms and though no certain penalty is set. One is prosecutable on Crown

---

8 M. 4 Jac. K.B. Croke Jac., 133; Add. 25,205, f.48b *sub. nom.* Lady Waterhouse v. Neady.
initiative, and a private party may sue for himself and the King, but an injured private person may not sue civilly. The dictum on criminal liability leaves open, however, what counts as violation of relevant statutes. The Court's further remarks in the instant case strongly suggest that no criminal liability would in fact be incurred under the circumstances at hand. For in addition to dealing with the fact that the ecclesiastical suit in this case went against a statute, the judges took up common law liability for bringing an improper suit. As to that, they held that Case will lie for a suit, which, on the face of the libel, ought to be brought at common law. *Quaere* whether the language should be taken literally, with the consequence that no action lies for a suit which ought not to be brought anywhere -- as for "great trees" in terms - - as opposed to a complaint pursuable at common law. The case at hand, in any event, would not support the action: the Court's generalization is that no action lies when the inappropriateness of the "foreign" suit is only brought out by the defendant's plea or "collateral matter." One's right to sue generically for wood tithes, and thereby to raise the question whether the wood was in fact exempt timber, is explicitly endorsed. The situation for which the Court does not specify a solution is a suit for a tithe-free product in terms, (a) where the exemption is at common law or (b) where the exemption is by statute. It would be surprising to find any remedy allowed in situation (a); the Court's position on prohibitory statutes implies that a criminal or penal remedy would lie in situation (b), but not a civil one. (A Year Book precedent was used directly in this case, according to the MS. report: 8 Edw. IV, 13b, for the point that a tort action will not lie for suing for tithes of a manor which is in fact tithe-free.)

*Lady Waterhouse* is briefly mentioned in the report of the earlier Bray v. Partridge⁹ -- presumably the reporter's notation of a later contrasting case, In Bray v. Partridge, Chief Justice Popham and Justice Gawdy held that a tort action will lie when a parson compounds by deed to take some payment in lieu of tithes and then brings an ecclesiastical suit for the tithes. (Unsurprisingly. The interesting question in that situation is whether Prohibition also lies.) After giving this result, the reporter cites *Lady Waterhouse* and by implication distinguishes it by saying that in that sort of case the ecclesiastical plaintiff may not know that no tithes are due. I.e., a man does no wrong by suing for wood tithes generically;

⁹ No reference provided.
The Writ of Prohibition:  
 Jurisdiction in Early Modern English Law

whatever the reality may be, it cannot be presumed that the parson knows that the wood in question falls in the exempt category. (For that matter -- if knowledge can be extended from factual to legal -- should one who sues for tithes of a non-tithable product, de jure or by statute, be held a wrongdoer until he is informed of the law, either by the ecclesiastical court's overruling his complaint or by the issuance of a Prohibition?) Per contra, it is a tort to make what amounts to a contract not to sue for tithes in kind and then to sue against one's own act, for there the ecclesiastical plaintiff must know that the tithes are not due. (The most interesting point about this way of distinguishing is its reliance on the language of estoppel. Alternatively, one might say that merely bringing a lawsuit which ought to be dismissed or prohibited is no tort, save perhaps in limiting cases of direct competition with the common law or unmistakable violation of a statute. By contrast, breach of contract is actionable in principle. "In principle", for whether one who promises not to sue and then sues gives his promissee a contractual action would seem to depend on whether the suit is prohibitable. If it is not, then to bring the ecclesiastical suit successfully is to deny the promisee the benefit of his bargain. But if the ecclesiastical suit is prohibitable, the person who brings it might still be held to have committed a tort, wrongful vexation, forcing the promisee to pursue his Prohibition. In delictual terms, the reporter's distinction between inappropriate but innocent non-common law suits and a suit "against his own deed" is the relevant one.)

In one further case on tort liability, Eaton v. Sharrman, 10 the ecclesiastical suit was for drunkenness, on private complaint. (The report says a "bill" was preferred against Eaton in the spiritual court.) Sharrman's counsel moved to have Eaton's Action on the Case dismissed summarily, for manifest failure to state a cause of action. The Common Pleas refused to oblige him procedurally, but expressed agreement with his substantive point. I.e., the judges would not act until Sharrman put in a demurrer to Eaton's declaration, but they agreed that the tort action would not lie. (I would question whether much doubt about the substantive point, as opposed to a preference for regular procedure, is implied in the insistence on a demurrer, though there might be a shadow of a doubt.) The report is too brief to explain the theory of Eaton's unpromising tort action. I take it to be that ecclesiastical courts simply lack jurisdiction to punish for drunkenness, that offense belonging to such petty common law

10 No reference provided.
agencies as courts leet. That may be a colorable proposition; the simplest construction of the Court's substantive position is to take it as contradicting the same -- i.e. as holding that an ecclesiastical suit for drunkenness is perfectly proper. Another interpretation of the judges' view would be that a suit for drunkenness or similar low-level disorder, though perhaps prohibitable, is close enough to the ecclesiastical sphere to be "excusable". Alternative or additional elements in Eaton's claim might be: (a) While an \textit{ex officio} suit for drunkenness may be justifiable, a privately initiated suit is not. (b) The ecclesiastical suit was literally, and improperly, by bill -- i.e. an informal, equity-style complaint -- instead of by due ecclesiastical process requiring a libel. The significance of the Court's opinion would be altered if such elements were involved, but the report gives us nothing to go on.

Generally speaking, the scope for recovering damages or a penalty when one was improperly sued was limited. Prohibitions were the subject's main protection. It is worth noting further that that protection was not as a rule taken away when a statute expressly attached a penalty to an improper non-common law suit, or to acts by non-common law judges which Prohibitions could be used to prevent. This point is made through scattered cases in various contexts. Suffice it here to cite a fairly strong generalizing decision, with several examples, by the unanimous Jacobean Common Pleas.\cite{footnote} In the principal case, an attempt was made to block Prohibition of an improper suit for a mortuary by the standard laid down for such suits in 21 Hen. VIII, c. 5, on the ground that the statute appointed a penalty for bringing such a suit. The Court held that by giving the penalty the statute did not take away the Prohibition. The same rule was said to hold for penalty suits against the Ordinary for granting administration to persons not eligible under 21 Hen. VIII, c. 5. Prohibitions may still be used to prevent such improper awards of administration. Same law for 23 Hen. VIII, c. 9: Suing in the wrong diocese was made penal, but prohibiting such suits remained open (and was commonplace, one might add.)

The report is unilluminating on the important question whether the remedies are alternatives for the party in one and the same case. May one prohibit the suit and then sue for the penalty? May one recover the penalty and then prohibit the suit? In most circumstances, the penal offense would presumably be committed by bringing the improper suit, though the

\footnote{No reference provided.}
suit were cut off later in its career by Prohibition. In such cases as the improper grant of
administration, the same thing is in a way true -- the grant is the offense, even though a
Prohibition is subsequently obtained to prevent its being given effect. The Prohibition in that
case operates much like an injunction, however; it controls what the ecclesiastical court does
within its jurisdiction. Especially there, but even more generally, there is something odd
about arresting wrongful conduct before it can do any actual damage and then awarding
penal damages against the wrongdoer, though of course it is within Parliament's discretion to
superadd a punitive deterrent to the preventive remedy, and "penal damages" describes
imperfectly the *Qui tam* statute giving the monarch a share of the recovery. The public
interest theory of Prohibitions seems to militate in favor of allowing a Prohibition at any
time, even after a penal recovery. On the other hand, supplying a motive not to get a
Prohibition, or to delay getting one, hardly serves the policy behind the writ. It seems harder
to justify allowing a penal recovery after "the King" has been served and the mischief cut
off, though not prejudicing the penal suit is the way to encourage timely resort to
Prohibitions. It is probably fortunate that the law was not often complicated by parties'
attempting both to prohibit suits and to take advantage of penal statutes.

C. "Paradigmatic" Prohibition: Miscellaneous Instances

"Paradigmatic" Prohibitions -- granted to prevent substantial duplication of common law
remedies (or sought on the perhaps debatable claim that a common law remedy equivalent to
the one pursued in a non-common law court was available) -- tend not to come in large
groups. As I have noted, numerous Prohibitions to the Admiralty belong in this category
(though about some of those there were differences going to their classification among the
16th-17th century lawyers themselves.) Some occur in such areas as defamation and equity.
Three groups, with special problems of their own, are discussed below in this section
(ecclesiastical livings, spiritual pensions, and severed tithes.) Gross violations of common
law jurisdiction -- mere, unconcealed ecclesiastical suits for breach of contract, trespass, and
the like -- of course did not often occur; if they occurred more frequently than law reports
suggest, it would be either because defendants acquiesced or because the suits were
prohibited so unquestioningly that they were not worth reporting (or not known to reporters,
since they would probably have been granted out of open court.) For the rest, paradigmatic Prohibitions are inevitably miscellaneous. In this Sub-section, I shall just list and describe those singular cases which reduce to the paradigmatic type.


The form of this case, which makes a difference for how it is to be analyzed, is not clear from the report. The substance was as follows: By custom Parson was entitled to all the produce from every tenth "land" in lieu of tithes. Parson maintained that the parishioners fraudulently failed to cultivate these "lands", or did not cultivate them as carefully as their own land. He accordingly sued for his de jure tithes. His suit was prohibited on the ground that the fraud was remediable at common law by Action on the Case.

Two alternative scenarios for the case's form are possible: (a) Parson admitted the customary commutation of ordinary duty to pay tithes and alleged the fraud in his libel. Prohibition was sought and granted on the theory that Parson was in effect seeking by ecclesiastical suit an equitable substitute for the Action on the Case. I.e.: He conceded that he was not entitled to de jure tithes, but claimed that he should in justice have them because the parishioners had fraudulently practised to render the modus less valuable than it was intended to be. Were he successful, one should note, Parson might be better off than if he were driven to his common law remedy, for 1/10th of all the parishioners' produce might be worth more than the yield of the specific "lands" assigned to him even if those were honestly cultivated. (In an Action on the Case, the damages ought to be the difference between what Parson's "lands" properly tilled would have brought in and what they actually yielded, barring any proclivity on the jury's part to be more generous.) Whether this would be true of course depends on local circumstances. It goes without saying that Parson's de facto chances of being adequately compensated for his losses from the fraud would be better in the ecclesiastical court than at the hands of tithe-paying local jurors. On this construction, the Prohibition would fall straightforwardly in the paradigm class.

(b) Parson sued for de jure tithes in the common form. Parson as defendant-in-Prohibition then found a way, informally or by motion (perhaps with affidavit as to the facts), to put his story before the Queen's Bench. (It is pretty clear from the report that the Court was aware of the story before granting a Prohibition. It did not come out by way of formal pleading following the grant of a Prohibition.) On this construction, the Court would itself be refusing to do a kind of equity. It would be refusing to use its discretion to remedy
the fraud by denying Prohibition, for the reason that the tort action was already an adequate remedy.

A further possibility to consider is that the fraud could be used defensively against the Prohibition at the formal pleading stage, just not as the basis for blocking the initial grant of Prohibition. I think this unlikely, because the Court sounds pretty convinced that the Action on the Case is Parson's only help, and, as I have suggested, confining him to that would probably be the way to insure that he would not come out better than under the customary arrangement honestly applied. However, the Court was faced with whether to grant Prohibition at all, not with the validity of a plea raising the fraud pursuant to the Prohibition. One cannot, therefore, absolutely rule out the possibility that in the latter circumstances the plea would be upheld. It might in any event be advantageous to Parson to attempt such a plea -- i.e., concede the modus and try to avoid it by alleging the fraud. Perhaps such a plea could be excepted to successfully. If not, Parishioner would either have to demur in law, conceding the fact of the fraud, or to deny the fact, conceding at least formally its legal sufficiency to undo the Prohibition. An admission on record might make it harder to controvert the fraud if Parson later brought an Action on the Case against this or other parishioners, and an honest jury trying the fact of the fraud might find for Parson, with the same effect. A traverse of the fact would at least be a "practice precedent" arguing in favor of the plea's legal sufficiency. Qvaere.

(b) Anon. H. 3 Jac. C.P. Add. 25,205, f.40b.

The profits of a parsonage were sequestered for dilapidations (in effect made over to trustees by ecclesiastical process, because the incumbent was letting the property of the living deteriorate to his successor's damage.) The incumbent presumably -- the report does not say so clearly, but it seems unlikely that anyone else would be interested -- sued the sequestrators (trustees) in the ecclesiastical court for an accounting. The rationale of the suit would presumably be that the incumbent was entitled to the income over and above what the sequestrators reasonably diverted to repairing the property. A Prohibition was granted, no doubt because it seemed plausible prima facie that the proper remedy was an action of Account at common law. The Prohibition was quickly reversed by Consultation on motion, however. Counsel for the sequestrators argued, and the Court agreed, that the accounting was an incident of the ecclesiastical procedure of sequestration.
I take the decision to mean that Account would not lie at common law, rather than that concurrent remedies existed. For the Court invoked the analogy of ancient demesne: As one can stop a common law action to recover land by pleading and proving that the land lies in an ancient demesne manor, so one can stop an action of Account connected with land by so pleading. The analogy would be that one could stop an action of Account relating to the property and income of a parsonage by pleading that the rectory had been duly sequestered and that the defendant was being asked to answer in his capacity of sequestrator. The Court took care to note that a suit in general terms for the profits of a living -- and presumably, therefore, for an accounting concerning the same -- would be prohibitable. The Consultation in this case was solely justified by the circumstance that the ecclesiastical suit was against sequestrators, whose capacity was derived from ecclesiastical law and beyond the notice of the common law, not because the suit concerned ecclesiastical property. On this analysis, the case presents a simple instance of a Prohibition sought on the theory that a common law remedy was available and denied because, on consideration, the judges found that proposition false.

(c) Earl of Shrewsbury v. Roberts. P. 4 Jac. K.B. Harl. 1631, f.327.

Tithes were leased to the Earl and Roberts as tenants in common. The Earl sued Roberts in an ecclesiastical court for taking all the tithes instead of the half to which he was entitled. Prohibition was granted.

The report tells no more, but I think the case is open-and-shut. Either Roberts took the Earl's chattels (severed tithes converted to the tithe-recipient's chattels), for which the Earl ought to sue at common law, or else he took chattels which by common law standards he was entitled to take. The difference depends on how tenancy in common of tithes should be construed. If the Earl and Roberts had been joint tenants, the Earl would be helpless at common law, and his ecclesiastical suit would amount to seeking equitable relief against the rigors of joint tenancy. (Either joint tenant could take all profits from the interest jointly owned, or exploit or liquidate the property, without the other's assent, and the survivor took all on the other's death.) Courts of equity were sometimes prohibited from entertaining suits aimed at mitigating joint tenancy, and ecclesiastical courts surely would be a fortiori. Such a Prohibition would, however, be a "negative instance" of use of the writ to prevent outright encroachment on the common law -- writ granted, not because the common law provided a remedy, but because it reserved the right to determine the law in a particular field. As cases
involving courts of equity show, property law was the most jealously guarded field, more so than contracts, for example.)

Tenancy in common of real estate was like joint tenancy except that either party (or their several heirs) could compel the other to make partition. I assume the same was true of tenancy in common of tithes -- either owner (necessarily of impropriated tithes, for presumably an ordinary rectorship or vicarage cannot be owned jointly or in common), or either lessee, may take all the tithes without doing legal wrong until such time as the interest is partitioned (by dividing the land of the parish into parts in which each has an exclusive interest in the tithes or by assigning tithes in alternate years or of different crops to each.) *Quaere tamen*. If the Earl in this case could enforce sharing prior to partition by common law proceedings, manifestly his ecclesiastical suit should be prohibited.


In this case, a partial Prohibition was used, in effect, to make an ecclesiastical plaintiff drop one of two theories behind a mixed claim. The Queen leased an impropriate rectory for years by letters patent. The lessee covenanted to provide a curate and to keep the chancel of the church in repair. The covenant was incorporated in the letters patent. Now the lessee was sued in an ecclesiastical court to require him to repair the chancel. (By whom does not appear, but it would probably have been the churchwardens.) The ecclesiastical suit was expressly laid on two foundations: (1) *De jure*, the rector, and hence his lessee, should maintain the chancel. (An undoubtedly true proposition quoad the rector. Possibly it is more doubtful quoad his lessee for years, whence the second theory.) (2) The lessee was obliged to repair by force of the covenant and letters patent.

It was manifestly improper to sue on a covenant in an ecclesiastical court, for an action of Covenant would lie at common law. Accordingly, the King's Bench prohibited quoad the covenant. It did not, however, prohibit totally. The report suggests that this was a conscious choice, not a course regarded as entirely obvious, for the judges stated a justification: "...if the King does not want to bring an action on the covenant, the chancel could be ruined entirely before it is repaired." Perhaps it was argued that a suit so inappropriate in part, because it sought to take advantage of a duty solely enforceable at common law, should be stopped peremptorily, driving the ecclesiastical plaintiff to a new suit if he thought he had a good independent *de jure* claim. The Court sensibly avoided any such purism. Perhaps it also avoided a more substantive argument for total Prohibition: that where there are two
duties to the same effect, one assertable at common law (albeit by someone other than the present ecclesiastical plaintiff) and one in the spiritual court, the former swallows up the latter.

Two points of law are implicit in the decision: (a) The parson's lessee is bound \textit{de jure} to repair the chancel. (b) Only the covenantee (here the King) can enforce a covenant of the sort in question -- a covenant to perform an ecclesiastical duty incorporated in letters patent. If a non-party beneficiary, such as the churchwardens representing the parish, could maintain an action at common law, the danger the judges' spoke of -- that the upkeep of the chancel and others' interest therein would be at the King's mercy -- would not exist. The ecclesiastical complaint in so far as it refers to the covenant could be conceived as seeking equitable relief against the general incapacity of third-party beneficiaries of contracts to sue at common law. The decision tends to say that such an attempt should not be countenanced, but it is notable that the Court acknowledged the kind of good reason that might in some circumstances lie behind one and satisfied the demands of justice and convenience by another route -- upholding the lessee's duty to repair the chancel as implicit in the lease and independent of the covenant. There is a little evidence that third-party enforcement of contracts through proper courts of equity was not entirely frowned on.

(e) Sir Thomas Seymore's Case. M. 11 Jac. C.P. Godbolt, 215 (the better report); Moore, 874.

Lady Seymore libeled against her husband for threatening and beating her and concluded her libel by praying alimony. A Prohibition was sought on the ground that the gist of the complaint was assault and battery, not remediable in the ecclesiastical court. Although the reports are not fully explicit on this, it looks as if the claim to a Prohibition gained plausibility from the form of the libel. If the wife had made her libel "sound in divorce" (legal separation with alimony), alleging the violence solely and unmistakably as grounds, ecclesiastical jurisdiction would seem open-and-shut. As it was, she framed her libel so that it seemed to be primarily a complaint about the beating.

Prohibition was denied on two grounds: (a) The assault and battery were merely "inducement" to divorce, a perfectly proper object for an ecclesiastical suit. (b) The wife could not bring an action for the assault and battery, because wives are \textit{sub virga viri} and lack standing to sue at common law. The first ground can scarcely be assessed without precise knowledge of the libel. It is not easily imaginable how the husband's counsel could
have made out that the suit was essentially seeking damages for the abuse under color of seeking alimony, thereby invading common law territory. About all one can say is that the Court did not strain to construe the libel against the wife or ask searching questions as to just what the ecclesiastical court was urged to do and legally entitled to do. (It is possible to imagine a common law court insisting that the libel clearly seek, or that the ecclesiastical law be such as to insure, a decree forbidding cohabitation to both parties and ordering the husband to stay away from the wife, as well as to pay her alimony, until a reconciliation was arranged under the eyes of the court and the decree formally dissolved. So strict a court might see anything less than that -- say a simple decree requiring the husband to pay alimony until the pair was reconciled or resumed cohabitation -- as camouflaged damages for the abuse. The Court in the instant case -- Coke's Common Pleas -- appears to have taken the more permissive view that so long as the suit was within the ambit of marital affairs and its object was named alimony, the ecclesiastical court should be left alone to handle it.

The second ground is formally interesting because it appears to depart from the model: No action will lie at common law (say by the third-party beneficiary of a contract, or against executors on a simple contract), and for that reason an ecclesiastical suit is improper. One would expect the routine tort of battery to be a "preempted common law field", so that any attempt to use ecclesiastical courts to extend liability for it beyond the bounds set by the common law would be cut off. But the Common Pleas did not see it that way in this case, where liability at common law was bounded by the legal incapacity of married women. The Court did not need to get into this matter, for reading the ecclesiastical suit as a divorce case was a sufficient basis for denying Prohibition. It nevertheless gave the unavailability of a common law remedy to the wife as a separate reason, indeed the first reason as Goodbolt's report states the holding. Why it did so makes a question.

The husband's counsel, the report makes clear, relied on the argument that a vague appropriateness to ecclesiastical courts does not justify allowing those courts to duplicate common law remedies. Thus, a clergyman may not proceed in a Church court for assault any more than a layman, notwithstanding the arguable presence of an element of "insulting the cloth" (which was an accepted ecclesiastical crime -- "laying violent hands" on a cleric) over and above the bare civil wrong. (This point was supported by Year Book authority, though the reporter had some doubt of its certainty.) No more, by the argument as I would reconstruct it, may a wife sue a husband for assault in a Church court, though here too a
"vague appropriateness" may arise from ecclesiastical courts' general responsibility for marital affairs, and the "bare civil wrong" is aggravated by "conduct unsuitable to the marital relationship", as it were. The Court in no way disputed the premise, was indeed emphatic that ecclesiastical courts are not a proper forum for tort claims that could be pursued at common law and are not competent to award damages. The Court took issue only with the implication that the unavailability of a common law remedy to the wife was irrelevant. I doubt that the judges meant to suggest that an overt award of damages to an abused wife by an ecclesiastical court would be free from objection, but even an overt award is hard to conceive except in the form of an augmentation of alimony. I.e., in the absence of separation and alimony, it would be meaningless to order a husband to pay a sum of money to his wife in the name of damages, for the wife cohabiting with her spouse or legally obliged to has no capacity to hold independent chattel property. What an ecclesiastical court could perfectly well do, whether or not legally, would be to award the wife £10 a month, say, as reasonable support in view of her expectations and the husband's resources and £50 extra explicitly as damages. The line is thin, however, between explicit damages and taking culpability into account in setting alimony -- simply making the alimony higher when a vicious husband has driven an innocent wife to seek divorce than when blameworthiness is less acute or more divided. I have no reason to think ecclesiastical courts would have been denied discretion to allow for culpability in fixing alimony. While it is not out of the question that the Common Pleas would indulge even an overt award of damages, so long as it was tied to or ostensibly part of alimony, emphasis on the wife's common law incapacity could have a milder use, as little more than reinforcement of an inclination to stay out of marital affairs if at all possible. If we imagine the case of a somewhat loose ecclesiastical decree -- the abusive husband ordered indefinitely to make such-and-such a payment to his estranged wife, how the sum was arrived at uncertain, no provision for when and how the duty to make the payment should be terminated -- the Court would be in a position to say, "There is no 'paradigmatic' encroachment on the common law because the woman is helpless at common law. Therefore we will not meddle." The attitude is quite enlightened. One should note how the sub virga viri doctrine could work to allow relief to abused wives.

Justice Warburton, in Godbolt's report, adds the comment that the wife should recover her litigative expenses against the husband. If this uncontradicted remark has any meaning beyond itself, it would make the point that monetary recoveries by married women against
husbands, save for alimony in the strict sense of support payments, are not ruled out per se. Such a recovery may be in virtue of events prior to conferral of divorced status on the parties. If the wife can be compensated by the ecclesiastical court for her expenses in obtaining a divorce, why not also for the mistreatment providing grounds for divorce?

Godbolt's report registers some kind of disagreement between Chief Justice Coke and Justices Warburton and Nichols, but I find the reporting obscure. The disagreement clearly does not extend to the disposition of the case or the central reasons. The latter judges seem, in any event, to have been the ones to call attention to a further point of law: the existence of a writ in Fitzherbert's *Natura Brevium* by which a wife can compel her husband to give security against using unreasonable correction. How does this cut? It is a basis for saying that married women are not absolutely powerless at common law. If the ecclesiastical court is permitted to award a form of damages for mistreatment, it is not permitted to violate, but rather to fulfill, a policy of the common law itself. If the wife can exact the security bond, she can collect by common law process when it is broken -- and when, presumably, she has achieved separate status such that it is meaningful to speak of her husband as paying her money or under a legal duty to do so. (Does that require a formal ecclesiastical divorce, or only de facto cessation of cohabitation on the same grounds that would constitute forfeiture of the bond?) She is in any event entitled to be paid in virtue of what happened when she was cohabiting. If the common law itself will penalize the husband in the form of forfeiture of his bond, the ecclesiastical court is not contradicting the common law if it penalizes him as a discretionary incident of its divorce jurisdiction. In view of their opinion in this case, this seems the likely direction of the judges' thinking on the significance of the security bond. One could, however, think of it as a disturbing complication -- a basis for saying that the common law provides a protection against marital savagery, so that there is no justification for ecclesiastical law's providing another in the form of damages in effect, or, prospectively, by the threat thereof. By this reasoning, the ecclesiastical court should in principle confine itself to alimony in the narrow sense. A judge so thinking, however, need not in practice look too closely into how alimony is fixed, much less be particularly suspicious of divorce suits because they might, unless carefully drawn to insure the contrary, result in folding a compensatory or punitive element into the alimony.

It is noteworthy that in Godbolt, Coke cites an Abridgment precedent directly in point (31 Edw. 3, Fitzherbert, Attachment on Prohibition, 8: libel by wife against husband for
beating and imprisoning her; Prohibition denied because these wrongs were interpreted as inducement to divorce.)

Moore's brief report of Seymore emphasizes that the wife could not have sued for alimony if she had been cohabiting. I take this for granted in my analysis above: The ecclesiastical court may in the upshot be left quite free to compound alimony and damages, but an end to cohabitation (either pursuant to divorce or before, for the reason that supplies good grounds for divorce) is the prerequisite for any ecclesiastical power to order payment of money. In other words, if an ecclesiastical court should purport to alter the common law status of married women by ordering a husband to pay a wife money while cohabitation continued, it would of course be out of bounds, and calling it "alimony" or "separate maintenance in the same household" would not help. Moore clarifies (Godbolt does not specify this) that Lady Seymore's libel alleged that Sir Thomas's cruelty had made it impossible for her to cohabit with him. I cannot see that omission of this allegation would necessarily alter the case -- the libel could still be read as a petition for divorce with "inducement." *Quaere tamen.* Perhaps a libel simply alleging cruelty and concluding with a request for alimony, not saying expressly either that plaintiff was not now living with her husband or that she wished not to henceforth, would be too suspicious. Moore also reports the court as affirming the legal existence of security bonds against marital misconduct.

A final observation on a possible "political" dimension of this case may not be amiss. Coke's Common Pleas was not friendly to the High Commission's taking marital cases. The legal grounds for that disapproval were excellent, but there was clearly demand for relief from the High Commission, especially on the part of abused wives. Ordinary ecclesiastical courts were presumably felt to be too attached to an old-fashioned, barbarous view of husbands' "corrective" powers, or else too timid about offending upper-class wife-abusers resistant to divorce and alimony. In the present case, we see the Common Pleas taking a basically self-restrained and generous position toward the marital jurisdiction of ordinary ecclesiastical courts. The implication could be, "We are not against humane relief for abused wives, nor disposed to curb the discretion of ecclesiastical courts in providing it. We are only solicitous that the proper ecclesiastical court do the job."

(f) Bucksele v. ------. T. 12 Jac. K.B. 1 Rolle, 57.

This was a simple case. Only a highly permissive attitude toward ecclesiastical jurisdiction could have justified denying Prohibition -- in effect, a theory that ecclesiastical
courts should enjoy at least concurrent jurisdiction over trespasses against Church property. For the ecclesiastical suit was for taking organs out of a church. Chief Justice Coke and Justice Dodderidge granted a Prohibition on the surely correct ground that the churchwardens could maintain Trespass at common law for the taking of such parish property. To take the parish Bible, Coke said, is both felony and sacrilege, but nevertheless an ecclesiastical suit would be inappropriate. For the general proposition that Trespass lies for wrongs in and concerning churches, he cited a case in which it was held that a widow may maintain the action against a parson for removing her dead husband's banner from the church.

The best argument against Prohibition in such a case as this may be from a species of third-party or Church-corporate interest. (Cf. the Widow Page above.) Nothing in the report intimates such an argument, but one can imagine an undertone of parochial controversy. The report does not say who brought the ecclesiastical suit, though it does speak of a libel, which rules out *ex officio* prosecution. Imagine the following: Organs were not in favor with Puritans. Someone of the reformist party removes them. The churchwardens could bring Trespass, but they are of the anti-organ persuasion. Someone of the opposite party -- the parson, an individual parishioner -- brings an ecclesiastical suit. If we knew that the ecclesiastical suit in our actual case was not brought by the churchwardens, it would be arguable that though someone could sue at common law, the actual ecclesiastical plaintiff could not. One could go on to argue that in the case of communal property more people are interested that those who are adequately protected at common law, and that no interested party should be at the mercy of the churchwardens and the majority who elected them. After all, the churchwardens and their electors can hardly be said to have a right to strip the church of any equipment they think it ought not to have (as the parson who disapproved of a private banner was not free to remove it.) Once this general point were conceded, one could argue against prohibiting even though it was the churchwardens who brought the ecclesiastical suit: The character of the property is simply such that trespasses cannot be adequately guarded against without concurrent ecclesiastical authority, except by extending the right to sue at common law beyond the churchwardens (and perhaps even beyond the parson and individual parishioners -- to the bishop, say --, lest parochial autonomy undo the Church.) If any such argument was suggested, it got nowhere with Coke and Dodderidge.
A vicar sued the parson for cutting trees growing in the churchyard, and the libel expressly demanded damages. A Prohibition was granted and a motion for Consultation subsequently denied. From one angle, this seems quite a simple case, but it has a complicating twist. The report suggests that the theory behind the motion for Consultation was that the dispute was between parson and vicar, and therefore appropriate to ecclesiastical jurisdiction. As such, I think, the argument is specious and was seen to be by the Court. It is true that vicar-parson controversies were held to belong to the Church courts, but the context of that rule was litigation originally well-placed in the ecclesiastical court, normally over tithes. Tithe suits and the like ought not to be prohibited when their resolution depended on determining the parson-vicar split; it does not follow that ecclesiastical courts should be allowed to handle matters flagrantly inappropriate to themselves, or exclusively appropriate to the common law, merely because such a dispute was involved. In the case of a suit which could have been brought at common law, it does not follow that common law courts are incompetent to mediate between vicar and parson for the purpose of disposing of their own litigation (though civilian advice might conceivably be called for.)

The judges in *Bellamie* clearly thought that a suit expressly for damages was "flagrantly inappropriate" to the ecclesiastical court. Two points seem problematic, however: (1) Could a suit have been brought at common law in the actual circumstances? The problem arises because the trees in the churchyard were not simply the vicar's (or parson's) property, but rather, like the organs in the last case above, property of the Church or the parish. As Chief Justice Coke and Justice Dodderidge said in *Bellamie*, however, the clergyman had a limited right to cut such trees for the sole purpose of repairing the church. Assuming that the right belonged to the vicar rather than the parson in our case, could the vicar maintain an action against anyone who cut the trees? Is his right private and proprietary enough to support an action? Or should recovery for wrongfully cutting the trees belong to the churchwardens representing the parish? On these questions the taxonomy of the case depends. If the vicar could sue at common law, we have a simple instance of a misplaced suit. If the vicar could not sue, we have a "negative instance" -- i.e., a situation in which this plaintiff has no remedy at common law, but nevertheless may not make a claim of the type in question (to damages for cutting trees) in an ecclesiastical court. On the latter construction, the Prohibition would be rough on the vicar if he bore responsibility for repairing any part of the
The Writ of Prohibition: Jurisdiction in Early Modern English Law

church (the clergyman was normally responsible for maintaining the chancel, parish rates covering the rest.) Coke and Dodderidge cited several examples for the point that was made about organs in Bucksele above: Trespass lies for offenses against common property of the church, such as chalices, surplices, and bells, and hence for churchyard trees. They did not, however, say that the vicar, as opposed to the churchwardens, could sue for such trespasses when he had as much of a private foothold as the right to cut the trees for repairs. My guess would be that the judges' intent was to say that the vicar himself could maintain an action (conceivably Case rather than Trespass?), sed quaere.

(2) How decisive were the damages? The judges' language as reported stresses the impropriety of suing for that object in an ecclesiastical court. (Coke, for example, makes the point that there can be an ecclesiastical suit of a criminal nature for laying violent hands on a clergyman, but not a suit for damages.) Suppose the vicar had sued to try his title to the trees relative to the parson's, or to enjoin the parson under pain of spiritual sanctions. Would the deterrence of liability to Trespass have been considered adequate protection?


In this case, a low-level criminal proceeding was prohibited mainly because the offense was punishable in courts leet, the humblest member of the common law family. At a visitation, the churchwardens presented a man as a railer and sower of discord among neighbors, and the ecclesiastical judge imposed purgation on him. A Prohibition having been granted, Serjeant Chibborne moved for Consultation. His arguments (indicated only by the MS. report) were: (1) "...The common law will not permit a common railer etc." -- as if that were a reason why ecclesiastical proceedings against such offenders should be suffered. It would be a good reason if there were no common law liability, a matter of saying, "The law has no regard for railers even though it does not itself punish them, no protective policy in their favor that could justify restraining ecclesiastical punishment." Is it a good reason if common law liability does exist? Is it arguable that at the pettiest criminal level concurrent jurisdiction has positive merit, because, on the one hand, offenders ought to be punished and, on the other, spiritual sanctions are both sufficient and symbolically appropriate to trouble-making and unneighborliness?

(2) The churchwardens made their presentment under oath (having been charged to present railers and sowers of discord.) Chibborne presumably meant to distinguish the
instant case from private prosecution or *ex officio* proceedings without known accusers. I take his point to be that going after something as petty as railing might be objectionable if the accusation were not pretty well guaranteed to be responsible by the oath and the official setting. Again, the argument seems stronger on the assumption that the offense was not punishable at common law -- a matter of saying that ecclesiastical courts should not be allowed to extend the ambit of petty crime except by procedural forms designed to keep down malicious harrassment. On the other hand, one might argue that concurrent jurisdiction is defensible only if the ecclesiastical form imitates the common law. A court leet was only a presentment jury for some misdemeanors; there is no practical difference between swearing churchwardens to present railers and charging a leet to do the same thing, only a difference of forum and sanctions.

Chief Justice Hobart replied to Chibborne simply by saying that railers are punishable in leets, wherefore the Prohibition should be upheld. He conceded that ecclesiastical courts might have jurisdiction if the railing occurred in a cemetery or similar church precinct. Justice Hutton said that the offense had been made temporal by statute (2 Edw. 6). Justice Winch cited a Falwood's Case, in which an ecclesiastical court had been prohibited from proceeding against a man for irreverent remarks about excommunication (the well-worn comment "that though he was excommunicated, still his corn grew as well as other men's.")

Winch's citation points to the most interesting feature of this case: the proximity of this type of "paradigm" or "common law monopoly" case to "ambit of remediable wrong" situations. If the reason for prohibiting in the instant case was the offense's punishability in a leet, *Falwood* is irrelevant. That is the clearest sort of "libertarian" decision: People should not be pursued anywhere for mere scoffing, even though the object is an ecclesiastical institution and there is a flavor of blasphemy. Winch's apparent thought was, "Neither should they be pursued for mere railing." Yet he did not deny Hobart's view (which the printed reports give as the sole reason for the decision) that railing was not immune, but was an exclusively temporal offense. In practice, the "libertarian" interest would probably be equally well-served either way. The chances of railers' actually being presented in leets was probably slighter than their being presented by churchwardens at the urging of an archdeacon officiously interested in repressing un-Christian conduct. It is unlikely that the judges gave much thought to the conflict of theory implicit in the comparison of Winch's remarks with Hobart's. (Hetley's report has the Court saying that "perhaps" the case would be
more appropriate to a leet, as if the judges were less than sure that anything could be done about railers, only convinced that one way or another the Church authorities must be restrained from bothering them.)

(i) Three reports concerning access-ways to churches can best be discussed together: (1) Brokesby's Case. M. 16 Jac. C.P. Harl. 5149, f.260; (2) Braine's [?] Case. P. 12 Car. C.P. Lansd. 1082, f.54b; (3) Anon. T. 15 Car. K.B. March, 45.

All three of these reports are extremely slight, and one (Braine) is partly illegible. They offer a glimpse, however, of a tricky inter-jurisdictional problem. Let us first summarize the results reported. (1) Brokesby: The report only states a per Curiam opinion that churchwardens who libel against a parishioner for a way to the church should be prohibited, "because the way will be questioned in the Court Christian." (2) Braine: A man was presented in an ecclesiastical court (proceeded against in criminal form) for failure to repair a way leading to the church. (Failure to repair is distinguishable from obstructing the way or actively excluding persons entitled to use it from doing so. Obviously disrepair can come in many degrees and vary in its effects from rendering the way unusable to mildly reducing its convenience or merely making serious deterioration in the future more likely.) Prohibition having been sought and argued for by Serjeant Whittfield, the Court assigned a day to show cause against Prohibition. This move indicates an inclination to prohibit, but enough doubt to recommend listening to argument contra if defendant-in-Prohibition should want to make it. When the case was taken up again, Justice Hutton spoke against Prohibition. His opinion is all that is reported, except for a citation by Justice Vernon (for which see "Note on the Common Law" below.) Hutton thought the ecclesiastical proceeding was not objectionable, because "the way itself is not in question." The rest of his brief speech is hard to make out. He appears to say that a common law action would lie for stopping the way altogether (leaving the implication that one would not lie for failure to repair.) It is not clear that he thought presentment for total obstruction in an ecclesiastical court would be objectionable; a civil suit might be another matter. (3) Anon. March, 45: This report gives in brief the opinions of Justices Berkeley and Croke. They said that a libel (civil suit) in an ecclesiastical court for not repairing a way leading to a church is unobjectionable, but that this is not true of failure to repair a highway. A Prohibition was granted in the instant case, the report adds, because the surmise claimed that the libel was for failure to repair a highway. (A highway is usually defined as a way by which all the world is entitled to pass. It can be an easement on
private land as well as royal property with the status of a highway. Private persons could have a prescriptive duty to repair royal highways. Proprietors should probably be said to have a *de jure* duty to maintain highways, in the sense of rights of way over their own property open to all the public, up to the standard of normal or customary convenience. Obviously a highway can be the way to get to a church, but ways to church need not be highways. Other possible forms cover a considerable range. At one end of the spectrum is the strictly private easement: Owners of Blackacre are entitled to pass by a certain route over Whiteacre, wherever they are going or only for the purpose of going to the church, as the case may be. At the other end is a customary right for all parishioners of St. Mary's in the Vale, but only inhabitants of that parish, to pass over Blackacre, on their way to church or without regard to destination.)

From the three scant reports it is impossible to give a satisfactory statement of the inter-jurisdictional law. We can only catch a few hints and pronounce the law unsettled. It is possible to say something about the shape of the problem. On two points the common law was clear: (a) The holder of what I call a strictly private easement -- i.e, holder "by reason of estate" -- was amply protected. He had real actions and powers of self-help at his disposal in the event of obstruction or exclusion, and the Action on the Case for nuisance was available to him in the event of less radical disturbance of his right, including failure to repair. If he wanted to bring the lesser action for damages when wholly "dispossessed" he was free to. There can be accordingly be little doubt that an ecclesiastical suit by an individual parishioner claiming a right of way to the church for himself and his predecessors in estate would be prohibited. It is not surprising that there are no cases to confirm this.

One of the peculiarities of the access-to-church situation is that most landowners in the parish (and their tenants through them) would probably have been able to prescribe for the right of way in "reason of estate" form. Persons with no interest in land would for the most part be included as family members and servants of the owners and lessees. This could be a reason for denying the ecclesiastical courts any role at all in enforcing prescriptive access to churches. I.e.: It is arguably not a necessary role. There is a high probability that rights of way to a place everyone must go will not be closed off or left in disrepair for long, because there are likely to be numerous people with the grounds and the motive to insist on their private rights. Insistence by even a single person is likely to redound to the general benefit. The remedial upshot of some procedures was abatement of the nuisance -- physical removal
of the obstruction or whatever. Actions on the Case would yield only damages, but the damages are certain to be largely punitive (actual damage to a particular easement-holder forced on a limited number of occasions to take a roundabout way to church is apt to be small and incalculable), and they are likely to grow more punitive if the defendant persists in his misbehavior so that the original plaintiff is driven to sue again or other persons with the same right are forced to bring suit.

There are quite good reasons to prefer keeping ecclesiastical courts out of enforcing access to churches. One reason is the dependence of most rights of way on prescription and the judges' general disposition to say that most prescriptive claims must be tried by jury if disputed. If, on grounds of convenience, one were to allow ecclesiastical courts to enforce prescriptive duties to keep access ways open and in repair, one would have to face the problem of what to do when and if the ecclesiastical defendant comes and surmises that he has no duty. Prohibit and return by Consultation if the jury upholds the duty (in accord with the *modus* model)? Or turn the ecclesiastical courts loose -- let them write the rules about when the running of time obliges landowners in a parish to keep ways open and in repair so that the parishioners can get to church? There is some simplifying virtue in avoiding that problem by holding that claims originally based on prescription, save for a few asserted by churchman against churchman (spiritual pensions), may only be asserted at common law. The probability that any real prescriptive rights of value to all parishioners will be substantially protected by private initiative is reinforcing.

A second reason is that claims to easements "concern the freehold" (as Serjeant Whittfield says in *Braine*. Although they are not spelled out in the report, both this and the preceding argument seem to be made by Whittfield.) Grave question must surely arise about letting ecclesiastical courts give judgments which affect the definition and value of interests in land. Even if disputed prescriptive claims were held triable at common law, there is a principled objection to countenancing such judgments. What is the ultimate difference between telling A. his freehold is encumbered with a "spiritual" easement in B.'s favor and telling C. that D. is the owner of Blackacre "spiritually speaking" (=threatening C. with spiritual sanctions unless he treats D. as the owner.)? An ecclesiastical court that purported to do the latter would be deep within the danger of *Praemunire* and of course would be prohibited.
On the other hand, there are grounds of convenience for not being utterly unwelcoming to ecclesiastical jurisdiction. The common law itself [see (b) below] recognized the inconvenience of enforcing rights belonging to numerous people by individual suit. If it is true de facto that relying on the assertion of private rights would usually assure access to church to all parishioners, it is also true that the method is clumsy and dependent on the threat of multiple suits. As it were, "A. had better keep the way across his land open and repaired -- having been sued by B. --, for if he doesn't, or if he buys B. off, C., D., etc., can sue him, probably adding to the punishment each time." The same effect can be expected from allowing any subject to sue for common nuisances, e.g., obstruction of a highway, but that is just what the common law did not allow [(b) below]. Of course the efficient solution is enjoining the nuisance. Injunctions by courts of equity to prevent the commission, continuation, or repetition of torts, nuisance-creating activities, and infringement of easements were rare in the 17th century, however. The "spiritual injunction" can be seen as a substitute or anticipation.

(b) Individuals could not maintain civil actions for the infringement of easements and other rights belonging to the public generally. The person encumbered with the corresponding duties was presentable (in the 17th century in a court leet) for such breaches of duty as obstructing or failing to repair a highway. The rationale was that reliance on the criminal law was preferable to multiple suits.

Is one who has customarily allowed all inhabitants of a particular parish going to church, but not other wayfarers, to pass over his land presentable for failing to repair the road? In other words, is the criminal remedy available only when the right belongs to all the world, or is it available when smaller but sizable groups of people have used the way? If it is not available in the latter situation, may individual members of the group bring civil actions without regard to capacity to prescribe "by reason of estate"?

To the first question, the fragmentary evidence of our Prohibition cases suggests a negative answer -- the criminal remedy applies only when the right is universal. I have not found other evidence to the contrary. (Of course in practice making out that a common way is open only to a particular class is apt to be difficult. Someone presented for obstructing or not repairing a common way would probably be best advised to pay his fine and open or repair the road. Establishing by legal process that he should not have been presented, because the right of way was confined to too narrow a class of beneficiaries, would usually
have been more trouble than it was worth. On the second question, there is a little evidence that when the encumbered person is not presentable private suits may be brought without prescription "by reason of estate" and notwithstanding the objection to multiple suits.

We are now in a position to say what our three reports seem to suggest about the judicial view of an ecclesiastical role in enforcing access-rights:

The last report, March 45, clearly assumes the rule that failure to repair a highway is presentable at common law, wherefore any ecclesiastical involvement is objectionable. That the highway is a way to the church makes no difference. The report implies, on the other hand, that failure to repair a road not classifiable as a highway is not presentable, wherefore ecclesiastical proceedings are unobjectionable (in civil form in the instant case, but presumably criminal form would be equally acceptable.)

Ecclesiastical remedies, where acceptable, would clearly be concurrent with the power of individual parishioners to sue "by reason of estate." Whether they would be concurrent with individual common law suits by parishioners merely qua parishioners is less clear. Suits by individual beneficiaries of rights to some degree public, but not broad enough to be enforced by secular criminal law -- suits qua beneficiary and not "by reason of estate" -- cannot be ruled out of the common law panoply. Suppose, however, an individual parishioner, or a group of parishioners as co-plaintiffs, were to appear at common law seeking to maintain an Action on the Case in the "qua parishioner" form for failure to repair, or to keep open, a way to church not qualifying as a highway. The best prediction is that the attempt would fail on the ground that an ecclesiastical remedy was available and made better sense than a common law remedy -- given the position of the report in March that ecclesiastical jurisdiction is unobjectionable where the secular criminal law does not protect the right. In other words, concurrency would probably not be allowed when it was avoidable.

The reason the ecclesiastical remedy makes better sense is that it is injunctive relief in effect. The earliest of our reports, however, Brokesby, rejects the ecclesiastical remedy in the most sensible of forms -- a suit on behalf of the parish generally, brought by the churchwardens. A fortiori, an ecclesiastical suit by parishioners without the representative capacity of churchwardens would be prohibited, and there is no reason to suppose that ecclesiastical criminal proceedings would be indulged. Thus there are grounds for seeing a shift in judicial attitude between Brokesby and the late report in March. Given the Brokesby position, a court faced with whether to allow an Action on the Case in the "qua parishioner"
form would not be able to rely on the availability of an ecclesiastical remedy as grounds for disallowing a common law one. Whether it would see any need for "qua parishioner" actions over and above actions by local landowners to whose estates the right of way was attached is another matter. A further question for such a court might be whether a common law suit by the churchwardens, with the damages recoverable to the use of the parish, should be treated as the only common law resource besides criminal presentment and private suit "by reason of estate."

In its terms, the report in March is about repairs, not total obstruction. It is compatible with supposing the distinction matters -- i.e., with the rule that ecclesiastical proceedings must be for failure to repair and would be prohibited if drawn to suggest a total denial of access. Justice Hutton in Braine may be taken as supporting that rule, though it is not certainly his meaning. The report in March is too brief to indicate whether the judges would really have limited ecclesiastical suits to failure to repair. The strongest reason for the possible rule would be that common law remedies, except for the criminal one to insure repair of highways, would lie only for full denial of access. That is unlikely to be true of Actions on the Case by persons claiming "by reason of estate." It could be true of the more dubious "qua parishioner" form. Looked at in one way, it would hardly seem to make sense to permit such damage actions for failure to repair, but not for full obstruction. It could conceivably be argued, however, that any complaint of full obstruction, even in the form of a damage suit, has a flavor of property about it. A landowner with a right of way attached to his estate could have a real action in the event of total stoppage. If he preferred, he could bring an Action on the Case, but his complaint remains deprivation of property. Arguably people without a property interest -- parishioners qua parishioners -- should not be suffered to make complaints sounding in deprivation of property. Allowing them to complain of mere failure to repair, though anomalous, may be justifiable because they are in a position very like that of the larger public enjoying the right to have a highway maintained, but lack the criminal-law protection accorded to the latter.

The next question on this line of reasoning is the implications for ecclesiastical jurisdiction. One way to go would be to say that the Action on the Case for failure to repair is available to everyone who can be injured, parishioners generally as well as landowners, so that ecclesiastical courts should stay away. Alternatively, one could say that concurrency is tolerable when the complaint is only failure to repair, just because property interests are not
so closely touhed. A somewhat cynical formulation would be, "If you're going to allow people without a property interest to enforce repairs by Action on the Case, you might as well let them use the more efficient ecclesiastical remedy as well -- two anomalies for the price of one, so to speak." A more conservative version of the last alternative would be to permit only criminal proceedings on the ecclesiastical side, which would have the advantage of duplicating nothing at common law. A measure of concurrency would still be accepted -- ecclesiastical proceedings would be allowed where the common law could do the job, but could do it only in civil form. (There is no real practical difference between ecclesiastical-civil and ecclesiastical-criminal. Either way, the defendant would only be put under spiritual pressure to make the repairs. This is a possible reason for insisting that the proceedings be criminal to avoid the appearance of duplication.) The position is more conservative than that of Berkeley and Croke in March, not necessarily more so that of Hutton in Braine. Where among a considerable variety of possibilities to put Hutton is not worth speculating about when his words are so poorly reported. At any rate, he was willing to concede some role to ecclesiastical jurisdiction in the face of fairly strong argument from the Bar against any such role and contrary to the implications of Brokesby. The evidence is poor, and perhaps the issue is not momentous, but from what is visible, access-ways to church may be one of the subjects on which there was a shift in the pro-ecclesiastical direction by the Caroline Bench.

Note on the Common Law

Blackstone states the basic law I use in the text above. (3 Commentaries, 218 ff.; 4 Comm., 167.) He in turn relies on Coke on Littleton, 56, though without full attention to the details of that passage.

I do not believe there was any uncertainty about the fundamental points. (Landowner with an easement attached to his estate has a range of remedies. "Common" ways are generally protected by criminal law -- presentment -- only. Avoidance of multiple suits is the rationale. An exception is made for members of the public who suffer "particular damage" -- e.g., A. wrongly digs a ditch across a highway and B. falls in; B. may maintain Case for his damage, but C., who is merely prevented from going where he is going via the highway, may not. So much for the crude distinction. There is no need to go into more sophisticated forms of "particular damage."
The nicer point is whether there are any circumstances besides "particular damage" in which an individual member of the public, or of a part of the public entitled to use, may maintain Case even though he is not a landowner with easement attached. (Or, one should add, beneficiary of a *de jure* right of access in virtue of a relationship to land. Coke's note at Co. Litt., 56, is immediately about the right of a tenant at will who has been expelled to access for the purpose of harvesting a crop he sowed before his expulsion. The ex-tenant at will can bring Case for obstructing his way.) Coke in the passage cited seems to say "Yes." He describes a case in which inhabitants of a particular place customarily used A.'s land for the purpose of watering their cattle. An Action on the Case was allowed to inhabitants *qua* inhabitants because A. was not presentable for denying access to the watering-place, so that without the civil action the inhabitants would have been unprotected. Why A was not presentable is not explained.

In the *Co. Litt.* passage, Coke relies centrally on Williams' Case, which he reports independently (5 Coke's Reports, 72. M. 34/35 Eliz. Q.B.). It was firmly said in that case, by a unanimous Court, that rights which are common in the sense of widely shared (though not necessarily universal) cannot as a rule be the basis for Actions on the Case of the "*qua* inhabitant/parishioner" sort. The proposition is supported by earlier authority. Its rationale, avoidance of multiple suits, is also firmly stated. People entitled to such rights are said to be protected by presentment in leets, with the implication that some or most widely-but-not-universally shared rights are so protected. But that does not mean they are all so protected or that Case will not sometimes lie exceptionally. The principal case, indeed, suggests indirectly that the need for occasionally making an exception would be recognized. Less indirectly, it has interesting implications for inter-jurisdictional problems.

In *Williams*, the lord of a manor tried to maintain Case against a clergyman for failing to say divine service in plaintiff's chapel. The clergyman was alleged to have the duty by prescription. Plaintiff prescribed that the duty was to perform service for plaintiff *and the tenants of his manor* I.e., as pleaded, the prescriptive duty had multiple beneficiaries—the tenants as well as the lord. The Court held that the action would not lie. If plaintiff had prescribed for himself and his family only, the action would lie. As it was, the right to have service performed belonged to the tenants too, any of whom could maintain an action if the lord could. Therefore, owing to the inconvenience of multiple suits, none of the beneficiaries could sue.
There is not the least suggestion that the clergymen could be presented in a leet for neglecting to perform service. Rather, the judges told the plaintiff that his remedy was in the ecclesiastical court. From the point of view of the law of Prohibitions, an ecclesiastical suit would be about as unproblematic as possible: No common law remedy, including criminal proceedings. (N.b.--assuming there can be no criminal proceedings clears the recommended ecclesiastical suit.) Customary duty in a clerical person and related to religion, which surely, in the absence of any common law interest in the duty, ecclesiastical courts are free to enforce if they see fit. The only imaginable problem would arise if the clergymen, being sued in the ecclesiastical court, claimed not to owe the duty and claimed legally that whether he owed it should be tried at common law (or at least that the common law -- immemorial -- standard of prescription must be applied.) I would be surprised to see an ecclesiastical suit against the clergymen prohibited in that event. The Court's assuring plaintiff in *Williams* that he had an ecclesiastical remedy and therefore did not need a secular one should perhaps be taken as assurance against Prohibition, no matter what. I.e., should be taken as a way of saying, "We must leave this to ecclesiastical justice, which we have confidence will result in justice's being done. We cannot guarantee that the ecclesiastical court will allow you a remedy, but we will certainly not interfere with it if it does, e.g., by intervening to prevent application of a standard of prescription different from ours (and more favorable to you, in that our immemorial standard is nominally the most stringent.)"

The Court's confidence that an ecclesiastical remedy is an adequate alternative is the most interesting feature of *Williams*. The report has the judges being explicit -- emphasizing that to turn plaintiff down is not to leave him and his co-beneficiaries remediless. This is what I take to suggest indirectly that if he were left remediless he would not be turned down. I.e., in a pinch, the policy against civil suits by individual beneficiaries of widely shared customary rights admits of exceptions. In *Williams*, the Church courts are accepted as, so to speak, "after all part of the legal system" -- a resource the common law courts can fall back on to avoid making an exception from a sensible general policy.

Is there a moral for the access-to-church cases? *Williams* is not mentioned in the meager reports. I can imagine its being used as follows: "We cannot allow suits which duplicate the common law -- when plaintiff is in terms suing for an easement attached to his freehold. Nor will we allow ecclesiastical suits where the secular criminal law would clearly protect the interest in question -- where the suit is in terms for obstructing a highway [or there is some
other basis for saying with certainty that the obstruction is presentable in a leet -- I do not know what this would be.] We would not, however, allow an Action on the Case to individual parishioners *qua* parishioners or to churchwardens. For in so far as these people are not protected by the secular criminal law they are protected by the ecclesiastical law, as *Williams* says. They are not remediless, for if they were we would go against our usual policy and give them a remedy. It follows that ecclesiastical suits not unmistakably infringing common law territory should not be prohibited. Ambiguities should perhaps be resolved against the ecclesiastical plaintiff. Best procedure might be to prohibit when there is any doubt, but to entertain motions for Consultation, allowing the ecclesiastical plaintiff to make out definitely that he is not in a position to sue for the easement as a landowner and to convince us that the obstruction is not presentable in a leet. But *Williams* sustains the principle: In matters of interest to the Church, as access to parish churches is, and where there is no common law remedy, resort to the Church courts is to be encouraged. It is the preferable alternative both to stretching common law remedies and to leaving the party without remedy. When resort to Church courts is to be so encouraged, those courts should be given a free hand, so that their handling prescriptions by their own lights and making judgments touching property are not grounds for Prohibition independent of the ground here rejected -- the bare fact that *some* rights of access to churches are protected at common law. Of course the fact that, say, only some contracts are enforceable at common law does not mean that ecclesiastical courts should be allowed to enforce others. The common law has preempted the field and decided what contracts are enforceable. In the case of customary easements and public rights, the common law's fundamental decision is that they should all, if intrinsically valid, be enforced. It will make exceptions from its general policy as to the *mode* of enforcement if necessary, but it prefers to recognize the ecclesiastical system as a supplementary resource when that is possible."

In *Braine*, the one judicial remark besides Hutton's comes from Justice Vernon in the form of a Year Book citation and an unspecific reference to a statute of Edw. 6. The Year Book (18 Edw. 4, 2) is relevant, but how it cuts is not clear. The case is amusing: A. sued B. for trespass. B. pleaded that the place where the trespass occurred was by local custom a burying-ground, and that the acts alleged to be trespasses against A.'s property consisted in burying a corpse there as the custom permitted. In this lawsuit, B. prayed aid of C. -- an inhabitant of the parish that was the ambit of the custom -- to give evidence that the custom
was as B. claimed, which C. did. A. then sued C. for maintenance. The Year Book holds that it was not maintenance, because C.'s status as an inhabitant of the parish gave him an interest in the custom such that his coming forward to defend it in a lawsuit against someone else was not the kind of gratuitous intervention in others' litigation that counted as maintenance.

Generalized, the Year Book case seems to say that being a member of such a unit as a parish and one of the beneficiaries of a custom applicable to that unit has legal significance. Or better, such status as an inhabitant has legal meaning beyond the obvious and undisputed one: capacity to use the custom defensively -- i.e., to invoke it, as B. did in the Trespass suit behind the Year Book case, when charged with what would be a tort if the custom did not exist and the person relying on it did not belong to the locally-defined class of beneficiaries. Beyond that defensive capacity, the Year Book shows, the inhabitant/beneficiary "has interest" such that litigation about the custom concerns him, even though he is not himself relying on it and may never have occasion to.

What then? One could use the Year Book case as the basis for arguing that if inhabitants "have interest" to that extent, their interest is under the protection of the common law and will confer standing to sue at common law if necessary. I.e.: Though it is no doubt better policy to protect the interest of inhabitants by criminal law, in so far as the criminal law fails to reach all instances of valid (defensively usable) local customs, any inhabitant may bring an Action on the Case when the person owing the duty fails to perform it. Therefore ecclesiastical courts have no role, even when the Inhabitants' interest is also a collective interest of the Church. Alternatively, having said that the inhabitants' interest must be taken seriously because it does not reduce to the right of individual inhabitants to use the custom defensively, one might go on to say that the ecclesiastical system is a handy resource, which should be allowed to do as much of the job of protecting inhabitants' interest as it reasonably can. I.e.: The common law cannot, in the light of such authority as the Year Book case, simply leave local customary rights to be ignored when the criminal law will not protect them. If necessary, "qua inhabitant" Actions on the Case would be allowed (cf. Co. Litt., 56.) But it is not necessary when, owing to the simultaneous institutional interest of the Church, an ecclesiastical remedy is available and is not a matter of the ecclesiastical courts' engaging in inappropriate activities. (This position accords perfectly with Williams.)

Justice Vernon's allusion to legislation of Edw. 6 almost certainly refers to the statute enabling tithe-recipients to complain in ecclesiastical courts that they had been denied
Preventing Direct Encroachment on the Common Law: 
The Paradigmatic Prohibition

reasonable access to the land producing tithable crops for the purpose of viewing and removing their tithes. I defer discussing that legislation and the common law surrounding it to the section of this study concerned with the main body of tithe law. Access to tithes has affinities with access to churches, but there are also major differences. (Basically, access to church depended on customary rights cum private easements. The tithe-recipient was entitled to access as a de jure incident of his right to tithes. Problems of some complexity could arise from this situation. E.g.: Does the recipient have a common law action if denied access, and therefore not an ecclesiastical one save by operation of the statute? Is he confined, in the ecclesiastical court, to complaining of non-payment of tithes when his real complaint is not that the tithes were never set out, but that the payer closed off the most convenient or customary way to get at them? How does the legislation relate to the prior common law?) In alluding to the Edwardian legislation, Vernon might be suggesting something like this: "Ecclesiastical courts may now, at any rate, lawfully enforce one kind of access-right of interest to the Church, so perhaps there would be no harm in letting them enforce another kind. To say 'the equity of the statute' gives them this further power would no doubt be too strong, but at least one can claim a vague Parliamentary encouragement." Alternatively, Vernon could be saying that it took legislation to create clear ecclesiastical jurisdiction over access to tithes and so should it to give them power to meddle in access to churches.

A final point for nicety's sake: In the text above, I have used the term "easement" loosely to include customary rights extending to all parishioners and the like. In proper modern usage, one should confine the word to what I call the "strictly private easement" -- where the owner of a "dominant" tenement has rights over a "subservient" one. In the 17th century, the looser usage was standard. See 6 Coke's Reports, 59b, Gateward's Case, H. 4 Jac. C.P. -- a good case for the general and not very controversial point that customary rights of way and the like are valid in at least the sense "usable defensively." "Easement" signified a mere right to use, of any category, vs. a profit out of someone else's estate.

(j) Vicar of Halifax's Case. M.3 Car. C.P. Littleton, 51; Hetley, 32.

A chaplain under the Vicar sued the Vicar for a salary, claiming a prescriptive title to be paid £ 4 a year. The Vicar sought a Prohibition on two grounds: (a) He alleged that he was entitled to appoint to the chaplaincy and had not appointed the person suing him. (b) He maintained that the prescriptive salary was triable at common law.
There is a difficulty about putting this case in the class of Prohibitions seeking to assure that those who can sue at common law do so. Plaintiff-in-Prohibition's second ground (I shall return to the first) does not say that the ecclesiastical suit was inappropriate \textit{ab initio}, only that the prescription should be tried at common law. The Vicar's position \textit{quatenus} the second ground could be that he was entitled to jury trial on the fact of the usage, but that if the jury upheld it Consultation should issue and the ecclesiastical court be free to enforce payment by spiritual sanctions (and free not to as well, if it found any reason in Church law against requiring payment to be made to the person seeking it.) (Cf. Parishioner sued for tithes allegedly due by custom but not \textit{de jure}. It is probably quite plausible to argue, though I am not sure it is ultimately correct, that the ecclesiastical suit is appropriate as such, that it should be prohibited on Parishioner's surmise of "No such custom", and returned by Consultation if the jury upholds the custom.) It is, however, also possible that the Vicar's second ground was meant to say, "If this salary is recoverable at all, it must be by common law suit."

The only judicial comment reported is by Yelverton, in whose opinion the salary should be classified as spiritual, like the chaplaincy to which it was attached. This view accords with standard opinion on so-called spiritual pensions: Payments due from churchman to churchman and based on prescription were generally recoverable in ecclesiastical courts, save when special circumstances required classifying them as annuities recoverable by the common law writ of Annuity. There is no apparent reason for differentiating a salary for an ecclesiastical office (presumably conditional on performance of services) from a pension, and no basis apparent in this case for taking the salary as an annuity. Yelverton's opinion replies equally well to either construction of the vicar's second ground for Prohibition: If the Vicar meant the chaplain should be suing him at common law, that is wrong with respect to this sort of intra-Church payment -- a common law action will not lie, but there is no objection to an ecclesiastical suit. If the Vicar meant the prescription should be tried at common law and the suit returned by Consultation if it was upheld, that is wrong too, again by analogy with spiritual pensions. For in the case of pensions, once it was clear that Annuity would not lie, there was never any suggestion that the fact of a prescriptive right was not determinable by the ecclesiastical court, by the law on prescription prevailing there.

The rest of the Court clearly accepted Yelverton's opinion as such, for it granted Prohibition only provisionally, until it was determined who had the power of appointment to
Preventing Direct Encroachment on the Common Law: The Paradigmatic Prohibition

the chaplaincy. I.e., the Court showed no disposition to prohibit on the Vicar's second ground, understood either way. What is to be made of the first ground? It is at first sight puzzling. There is no obvious reason why the ecclesiastical court should not decide a dispute about the right to choose the chaplain, since the office was surely spiritual. (The Vicar's most likely rival would be his rector.) The basis for deciding would presumably be prescription, but there seems to be no more objection to the ecclesiastical court's determining that question about prescriptive rights in intra-Church matters than the other one, the existence and amount of the salary. I should expect at least that Prohibition would only be considered on disallowance surmise -- i.e., on some kind of showing that the ecclesiastical court had mishandled the issues raised by the Vicar's plea in the ecclesiastical court that he was not being sued by a lawful holder of the chaplaincy. Furthermore, the Court's disposition is puzzling. How was it to be determined to whom the appointment belonged? I doubt that the Court meant that a factual dispute about the method of appointment should be tried by jury, for there seems to be no better reason for that than for common law trial of the chaplain's entitlement to the salary. I am therefore inclined to think that the Court was merely putting off definitive denial of a Prohibition until it got a surer sense of the situation by informal means. Most probably, it wanted to see a motion for Consultation by the chaplain clarifying the nature of his ecclesiastical claim.

The plausibility of this move will come out if we look at details of what the report tells about the Vicar's surmise. The Vicar did not simply say that he was being sued for the chaplain's salary by a non-holder of the chaplaincy, since appointment by the Vicar defined a holder. In addition, he admitted that the chaplain was "in de son tort". I take this to be an admission that the chaplain had been performing the office. The obscurity about the ecclesiastical suit, making definitive resolution difficult, would therefore be this: Was the chaplain suing on the assumption or pretense that he was the lawful holder of the office (because he claimed that the appointment belonged to someone else who had appointed him, or claimed that he was the Vicar's appointee)? Or was he admittedly suing as de facto chaplain, claiming the salary whether or not he was lawful chaplain, or even though he was not, on the theory that it was the Vicar's duty to pay him so long as he performed the office and no effort was made to remove him? If the chaplain's claim was of the first type, denial of Prohibition seems clearly the right course. If it was of the second type, we might quite possibly have a hard case. Who should say whether someone not lawfully installed in an
The Writ of Prohibition:  
Jurisdiction in Early Modern English Law

ecclesiastical office is entitled to remuneration if he is suffered to perform it, an ecclesiastical judge or the common law judges? If he is entitled, what is the nature of the payment? Arguably, at any rate, it would not count as one of those intra-Church payments, analogous to spiritual pensions, that were left to the Church to evaluate and enforce, but as money due for "temporal" reasons, analogous to quasi-contractual duties to pay for valuable services received, or services done in reasonable expectation that they will be paid for. On that analysis, the suit should be at common law. (*Quaere* by what action.)

(k) Coper's (or Cope's) Case. P. 14 Car. C.P. Harg. 23, f.38 and f.39 (second notation of same case.)

The report of this case is obscure, but the point is dimly visible. The ecclesiastical proceeding is described as a suit to make a building into a parochial chapel. This has the look, not of an ordinary lawsuit, but of a quasi-administrative procedure. The presumable object was to get the building declared a parochial chapel, which would have legal consequences. (The building would come under the control of the parish authorities -- the clergyman to some intents, the churchwardens and vestry to others. It would be dedicated to religious uses and therefore fall under ecclesiastical law in the sense that the conduct of services there would be subject to the Church's rules, it would be a place protected by laws against sacrilege, etc. Attendance at services there would presumably satisfy the compulsory attendance laws, which were enforceable by both lay and ecclesiastical agencies.) The objection to this suit (which was probably prohibited, though the report is not clear) was that the building, originally a chapel belonging to a chantry, was confiscated by the Crown in Edward VI's reign, thereby becoming, like other chantry property "lay fee." It had subsequently been granted by the King to an individual layman and by him to the parishioners. I.e., at the time of the suit it was collective property of the parish. There is no indication of what it was being used for. Plaintiff-in-Prohibition is not identified, but it seems likely that a parish squabble was behind the litigation, some of the parishioners in favor of turning the edifice into a parochial chapel, others opposed. It is tempting to imagine the High Church party in the first role and an alliance of the Puritans and the seculars in the latter, but there is no evidence on the local situation.

I cannot imagine how the parishioners, or part of them, would go about getting the building recognized as a parochial chapel otherwise than in the way they proceeded. If the ecclesiastical proceeding was stopped by Prohibition, it was surely not because the common
law furnished a way to the same end. The Prohibition, or at any rate the claim to Prohibition urged by Serjeant Henden, seems to he based on the idea that an effort to appropriate ordinary property, which the former possessions of chantries undoubtedly were, to Church purposes by ecclesiastical process was somehow like asking a Church court to determine a dispute about property. The analogy seems strained.


Churchwardens lent a sum of money belonging to the parish and received payment when the borrower's obligation fell due. They were sued in an ecclesiastical court for concealing the receipt when they rendered their account to the parish. The ecclesiastical suit was prohibited because an action of Account would lie at common law. The Court distinguished two other cases in which an ecclesiastical suit would be appropriate owing to the unavailability of a common law action in some accounting situations: (1) If churchwardens levy a parish rate to repair the church, parishioners may sue in the ecclesiastical court, but not at common law, to require a true accounting. (2) Executors may be sued to account for the estate in ecclesiastical courts because common law Account does not lie against them.

Owing to a hiatus in the MS., it does not appear who brought the ecclesiastical suit. Here, as in some other cases we have seen, there might conceivably be a discrepancy between the common law and ecclesiastical remedies with respect to standing to sue. I take it that any one or more parishioners could maintain the action of Account which the Court saw as the proper remedy. If by any chance the ecclesiastical plaintiff was someone without standing to sue at common law (the minister? higher Church authorities?) it made no difference: the parish's right to have its property honestly accounted for was adequately protected by temporal law. The report contains a firm statement of familiar grounds against indulging concurrency or near-concurrency: "...[an ecclesiastical suit] is not to be suffered, for by the common law the matter is to be tried by jury, but in the spiritual court matters are to be tried by the course of the ecclesiastical law, viz. by witnesses and the like, and so ad aliud examen trahere."
D. Problems with Paradigmatic Prohibitions: Ecclesiastical Offices

Summary: The cases support the proposition that an ecclesiastical office for life (or longer, if there can be such offices) is a freehold, for dispossession from or disturbance in which common law actions will lie, wherefore ecclesiastical suits should be prohibited. Office-holders with such complaints would generally be well-advised to sue at common law unless they could count on the other party's acquiescence in ecclesiastical jurisdiction. None of the cases, however, presents an altogether simple instance. Complaints apparently of wrongful removal from such offices could contain other issues not necessarily inappropriate to ecclesiastical courts, raising questions about their classification and sometimes about their prohibitability on other grounds than head-on invasion of common law territory. The cases provide no clear authority on whether removal from an ecclesiastical office for term of years can be the basis of common law actions or would be inappropriate to an ecclesiastical court.

* * *

It can be confidently said that an ecclesiastical suit simply and straightforwardly complaining of dispossession from a life office or disturbance in the enjoyment thereof should be prohibited on "paradigmatic" grounds. For a life office is a freehold, recoverable at common law by real action and protectable with respect to disturbance by Action on the Case. Its being an ecclesiastical office makes no difference. The nature of the duties and the incidents of the office (how one is appointed to it, under what conditions it might be forfeited, and the like) do not alter the fact that it is temporal property, although ecclesiastical law might be the source for defining such incidents.

The simplest case, providing the strongest authority for the principle just stated, is Robotham v. Trevor (1612).12 The Bishop of Landafé granted the Chancellorship of his diocese to Dr. Trevor and Griffith for their joint lives. According to Robotham's surmise, Trevor released his interest to Griffith for £ 350. Griffith then died, thus, if the surmise is

12 H. 8 Jac. C.P. 2 Brownlow and Goldesborough, 11; Harl. 4817, f.231b.
true, terminating the estate. The Bishop then granted the Chancellorship to Robotham for life. Trevor had meanwhile become a substitute judge in the Arches. Pretending that he had never validly released his joint interest and was therefore tenant by survivorship, Trevor appointed a deputy to exercise the Landaffe Chancellorship. Then he himself, in his Arches capacity, issued an order (an "inhibition" in ecclesiastical law) enjoining Robotham from disturbing the deputy. Robotham sought a Prohibition to stop (in effect to reverse) Trevor's proceedings as an ecclesiastical judge. His position was that Trevor should be suing at common law if he wanted to maintain that he was still tenant and that Robotham's attempting to exercise the office or his interference with Trevor's deputy constituted disseisin or unlawful disturbance. Trevor's counsel argued that the ecclesiastical nature of the office gave the ecclesiastical courts jurisdiction, but the Common Pleas judges unanimously rebuffed that contention, citing several precedents.

One should note that the outcome, clearly justified as it was in law, is also reinforced by the equities. For the effect of the Prohibition was to stop manifestly abusive behavior -- Trevor's acting as a judge to enforce his version of his own rights. So far as the reports indicate, no attention was paid to this consideration, and the case is too open-and-shut for that to be necessary, but it is likely to have added to the judges' enthusiasm for the Prohibition.

One procedural point in the case is worth noting: Robotham spelled out the merits of his claim against Trevor in his surmise (clearly, for the full facts are reported, and the source must be the surmise) -- that Trevor had released on good consideration, that Griffith was dead, etc. He did not confine himself to what in theory would seem enough: simply that a freehold office had been brought in question in an ecclesiastical court. Robotham's reasons for specifying could be various, including the absence of any reason against telling the full story straightforwardly. But what of the effect? Could Trevor now come and plead to the Prohibition, denying that he made a valid release, thereby permitting the substantive dispute to be tried -- at common law to be sure, but pursuant to the Prohibition? Theory would seem to suggest a negative answer: A man has proceeded in an ecclesiastical court when he can and should protect any valid interest he has by proceeding at common law. He has probably committed a crime and a tort in doing so, (See Sub-sect. B. above for Coke's dictum in this case that Trevor was in danger of Praemunire.) Apart from higher considerations, fees for regular common law process would be lost if the substantive dispute were to be tried
The Writ of Prohibition:
Jurisdiction in Early Modern English Law

pursuant to the Prohibition. Surely the ecclesiastical proceedings should be cut off without hope of revival. Being improper, they should not be revivable by Consultation upon a showing that they were just in substance -- i.e., that Trevor was in fact entitled to the Chancellorship and should win if he were to bring a common law action. Quaere tamen. It should be noted that the abused party, Robotham, though not the common law's own interest in fees and due process, would be better off if the substance could be tried under the Prohibition. If, on the bare determination that a life office was at issue, the ecclesiastical proceedings must be turned off without hope of revival, it might well be Robotham, rather than Trevor, who would be driven to the expense of a separate common law suit. "Turning off" would leave Robotham and Trevor's deputy at each other's throats. If Trevor's case was in fact too weak to defend by any other means than abuse of the ecclesiastical judgeship he happened to hold, he might not have sufficient motive to sue at common law. But he would have plenty of motive to sit back and let the deputy make difficulties for Robotham, until Robotham either gave up or took the litigative initiative. It is conceivable that Robotham specified the merits in his surmise in the hope of having the merits tried here and now, but since the reports end with the granting of the Prohibition there is no way of knowing whether anything further happened. If Trevor's case was in fact weak, he would have had no reason to attempt a substantive plea to the Prohibition and reason enough to "sit back and let the deputy make difficulties."

A briefly reported case from 1618\(^\text{13}\) appears to have a mixture of elements similar to that of Robotham v. Trevor. All we are told is that one Archdeacon of Exeter granted the office of Registrar to an infant, and that his successor as Archdeacon granted the same office to another person of full age. The second grantor proposed to determine the right as between the two grantees. A Prohibition was issued.

The report does not say that the grants were for life, but there is nothing to suggest they were not. Whether Church offices for term of years should be regarded as temporal like life-estates is a question on which I have found no evidence. That aside, there would seem to be clear occasion for a "paradigmatic" Prohibition, though a moment's hesitation may be in order inasmuch as the report tells nothing about the litigative situation. (Cf. the cases below

\(^{13}\) Anon. M. 15 Jac. K.B. Add. 26,213, f.20l.
illustrating complexities in the application of the Robotham principle. In the present case, problems about the effect of a grant of an ecclesiastical office to an infant could be a complicating factor. Might the grant -- unlike a conveyance of ordinary property to a minor -- be such a nullity as to destroy the analogy between litigation over land and over offices on which the common law monopoly could perhaps be said to depend? It is pointless to speculate on this case without more information.)

As in Robotham v. Trevor, Prohibition could also possibly be justified on other grounds, viz. as a means of preventing the Archdeacon from sitting as judge in a case that cut close to his own interest. A Prohibition with that rationale would raise its own problems: Should the ecclesiastical system be trusted to correct improprieties on the part of its judges, as it should be left to correct legal errors by its own standards on appeal?

In Dr. Barker v. Bishop of Oxford (1624), the King's Bench found application of the doctrine of Robotham v. Trevor rather difficult. In this case, the Bishop granted the office of Vicar General and Commissary to Barker for life. Later, in his capacity as Ordinary, the Bishop issued an order forbidding the diocesan Registrar from recording any of Barker's acts and forbidding all persons from paying him fees, thereby effectually dispossessing him of his office. Barker sued the Bishop in an ecclesiastical court (unspecified -- confusion between the roles of judge and party is not a problem in this case) for dispossessing him by the allegedly unwarranted official act of "inhibiting" the Registrar and fee-payers. The Bishop sought a Prohibition because the litigation concerned freehold. From a remark by Justice Dodderidge, it appears that the underlying dispute was over whether Barker had forfeited the office or whether, in any event, the Bishop had observed proper form in claiming the forfeiture. (The office was granted by letters patent, but Barker was discharged without corresponding formality on grounds of forfeiture. The validity of a parol discharge to countervail the patent was in question. Nothing is reported about the reason for the claimed forfeiture. It seems likely that Barker would have been disputing the substance as well as the form, but that is uncertain.)

After two judicial remarks, both seemingly skeptical as to whether Prohibition would lie, the case was adjourned, and there are no direct reports of a subsequent hearing. (A reference

---

14 P. 21 Jac. K.B. 2 Rolle, 306.
in a later case is discussed below.) Justice Dodderidge expressed doubt as to "whether there is any question in the common law on this discharge [by parol where the grant was by patent.]" I would suggest spelling out the thought as follows: Though it is true that a Church office for life is a temporal freehold, and as such protectable at common law, it does not follow that ecclesiastical courts are excluded from every kind of litigation concerned with such offices. Perhaps they are excluded only from the determination of certain kinds of issues on which the common law is notably competent or from issues which could arise in identical form in litigation over land or secular offices -- e.g., whether Dr. Trevor supra attempted to release his life-estate to his joint tenant (a jury issue), or whether he made an effectual conveyance (a mere question of property law, on which the ecclesiastical law can hardly be imagined to differ from the common law and would probably not be suffered to.) Questions about the incidents of ecclesiastical offices, such as whether they are subject to parol discharge upon forfeiture even though granted by patent (or perhaps -- cf. the last case above -- whether grant of such office to an infant has any legal effect) are not intrinsically inappropriate to ecclesiastical courts. If it appears that such incidents are in question, perhaps Prohibition should be denied, even though that would probably make for a degree of concurrent jurisdiction over life offices. (For, given the premise that the office is a temporal freehold, I see no basis for excluding common law jurisdiction. I.e.: If Barker had brought a common law suit for the alleged dispossession, I assume he would have had a good cause of action, even if the common law court had to inform itself about ecclesiastical rules in order to decide.) It should be noted that the underlying issue in this case as Dodderidge takes it -- the parol discharge -- is not one on which an automatic common law response, as it were, would be possible. Land law furnishes no help, since life-estates could be conveyed without so much as a deed and could be reclaimed for forfeiture by entry. Analogies could no doubt be found in the law of royal offices and patents, but would they be significant? Do the incidents of one type of office say anything about the incidents of others, and is there anything to prevent ecclesiastical offices, severally or generically, from having their own peculiarities?

Chief Justice Ley took another tack, saying that Dr. Barker could have a Prohibition for the very act of disturbance that his ecclesiastical suit complained of. I.e., when the Bishop, by judicial act, "inhibited" the Registrar and fee-payers, Barker was entitled to a Prohibition -- not only to a common law suit for the freehold, which he must surely have been entitled
to. Such a Prohibition would stop the "inhibition" proceedings, or nullify them if they had reached a conclusion. Its rationale would presumably be that the Bishop qua ecclesiastical judge had no business calling Barker's freehold in question. His only course, I take it, would have been to oust Barker in some de facto way -- as by appointing a new Vicar General and leaving it to the rivals to litigate at common law. (Quaere whether the Bishop himself could frame a common law action against Barker for attempting to exercise the office after forfeiting it and being told he was discharged.)

Whereas Dodderidge's remark clearly indicates skepticism about the Prohibition, Ley's intent is not so clear. He could be saying, "Ecclesiastical meddling with life offices is so plainly unlawful that Barker could have stopped the earlier episode of such meddling -- the 'inhibition' proceedings. Surely this further stage of an ultra vires course of events should be stopped." I am inclined, however, to take Ley in the opposite sense, as saying, "Barker could, if he had chosen, have invoked the freehold character of his office to prevent the inhibition proceedings. He chose instead to assert his rights within the ecclesiastical system. At an earlier stage, the Bishop undertook to pass judgment on Barker's freehold in the indirect form of the inhibition proceedings, contrary to jurisdictional propriety. It does not befit the Bishop to complain now, when Barker has submitted the merits of the controversy to further, neutral ecclesiastical scrutiny, and when Barker, the party who is really entitled to the protection of a Prohibition and the benefits of common law process, is willing to forgo them." The justice of Ley's opinion so construed is evident. For "paradigmatic" Prohibitions, it would have the same implication as some Admiralty cases: Prohibitions to insure that litigation which ought to go to the common law does go there may be more plainly justifiable than any other kind, but it is not always fair or practical to give such Prohibitions maximum procedural privilege. A party seeking the simplest and most justifiable sort of Prohibition may have so far acquiesced in the "foreign" jurisdiction, or tried to use it for his own advantage, that the common law's interest in monopolizing some types of litigation must take second place to the private justice of estoppel.

The report of Dr. Barker's Case is indecisive. At most it shows two judges enough in doubt about prohibiting to adjourn the case for further discussion. A reference to Dr. Barker
in the slightly later Dr. Sutton's Case (1628)\(^\text{15}\) suggests that a Prohibition was finally granted in the former, but the reference it confusing because it gives a different impression of the facts of Dr. Barker than the principal report, I shall return to this matter. First let us look at Dr. Sutton itself, for this case supplies an example of Prohibition denied in a dispute over a life office.

Sutton was made Chancellor of Gloucester for life by the Bishop. As we learn in Noy's report (Godbolt does not give this feature), a commission was set up to examine the competence of diocesan Chancellors -- in effect an *ad hoc* ecclesiastical court. The commission investigated Sutton and proposed to deprive him on the ground that he was insufficiently learned in civil and canon law. He sought a Prohibition, but the King's Bench denied it.

Sutton's position was that appointment by the Bishop of Gloucester, whose responsibility it was to determine the competence of his appointee, created a presumption of competence which could not be reexamined, and that the office was a freehold beyond the reach of ecclesiastical authorities. The contention is double-edged. On the one hand, ecclesiastical courts should not meddle with life offices. By implication, if there was any way of getting rid of an ill-qualified officer, it would not be by process of ecclesiastical law. The only means I can imagine would be for the Bishop to dismiss Sutton non-judicially and then try, either himself or through a new appointee, to get a common law determination that the office was forfeited for breach of an implicit condition of competence. On the other hand, it was argued that the Bishop's act of appointment *ipso facto* established the appointee's competence. It is hard to see, on that premise, how either a common law or an ecclesiastical tribunal could ever hold the office vacant on account of the holder's general incompetence (as opposed, perhaps, to specifiable malfeasance.)

Justices Dodderidge and Jones, presumably with the agreement of their brethren, escaped the argument from the freehold character of the office. (Godbolt's report gives the individual remarks of those two judges.) If an office requiring skill is granted for life, Dodderidge said, no freehold passes unless the grantee actually has the requisite skill. Ergo, an ecclesiastical life office is not beyond the reach of ecclesiastical jurisdiction in so far as it appears that the ecclesiastical court is examining the holder's skill. One might generalize as

\(^{15}\) P. 3 Car. K.B. Godbolt, 390; Noy, 91.
follows: Ecclesiastical jurisdiction is inappropriate if there appears to be no question but that the office-holder was once vested with a life-estate (as in Trevor); it is not inappropriate if the question appears to be whether he was ever so vested. The latter sort of question might take the form, "Does the office-holder have the skill requisite for the office?" With reference to an earlier case above, might it not also take the form, "Is this office grantable to an infant?"? (Note that this distinction, though related, is not the same as the one suggested above between questions concerning the "incidents" of an office and questions about mere property transactions involving life offices. Questions like, "Does this office carry certain conditions of forfeiture and certain requirements as to the form in which forfeiture is to be claimed?" concern "incidents" but presuppose a vested life-estate. To forfeit an office or a tenement you must have it, and perhaps someone who has an ecclesiastical office for life is untouchable by ecclesiastical courts even when the question concerns the conditions of forfeiture, as well as the fact of their breach.)

Justice Jones backed up Dodderidge's view that an unskilled Chancellor has no freehold by citing a case involving a herald: The Earl Marshall suspended a life herald "because he was ignorant of his profession, and full of error contrary to the records." The judges held that because he was ignorant he had no freehold in his position. (No specific citation is given.)

Taking it as agreed that Sutton never had a freehold, the nature of his claim to Prohibition shifts. He cannot claim one on the "paradigmatic" ground that any contest over the office must be at common law, but is driven to argue that the commission's depriving him was merely an unlawful act of a sort fit to be controlled by Prohibition. The commission's activity would be like an unwarranted extension of the "ambit of remediable wrong" with an element of intra-ecclesiastical jurisdictional conflict. (I.e.: If one appointed to an office of skill by a person who is trusted to examine his competence is simply immune from reexamination, the commission would be doing the same sort of thing, say, as an ecclesiastical court that holds me liable in defamation for words I should be free to speak. A more moderate position might concede the Bishop's power to proceed against his appointee for incompetence, while denying it to an extraordinary ecclesiastical authority such as the commission. Whether Prohibitions should be used to control lines of jurisdiction within the ecclesiastical system of course makes a question.) Justice Dodderidge recognized just this point -- that once the contention about jurisdiction over freeholds was exorcized, the claim to Prohibition shifted in nature without evaporating altogether. For immediately after stating
the rule on freeholds in offices of skill he said, "A prohibition is for two causes: first to give to us jurisdiction of that which doth belong unto us; and secondly, when a thing is done against the law, and an breach of the law, then we use to grant a prohibition." In other words, Dodderidge distinguished between "paradigmatic" Prohibitions (together, perhaps, with those aimed at getting common law issues resolved at common law) from other varieties.

Explicit recognition of the multiple functions of Prohibitions was rare in the 16th-17th centuries. In application to the present case, I take Dodderidge to be saying that there was no question of infringement of common law jurisdiction, because Sutton was not vested with a freehold, but that a Prohibition of the second type could still be considered, if it could be made out that the ecclesiastical authorities had done something "against the law."

With the case so clarified, the Court proceeded to deny a Prohibition. Godbolt's report states the bare result, but Noy's gives some explanation. On the residual issue, as I have analyzed it by following Dodderidge in Godbolt, the explanation is not worth much. The Court simply saw no illegality, having apparently ascertained that the commissioners were within the scope of their commission. That seems predictable. It would be hard to maintain that the Church may not constitute a special commission to oversee such of its personnel as have no temporal interest in their tenure. With respect to such personnel, whether the Bishop's presumed examination at the time of appointment precludes subsequent or independent reexamination is surely best regarded as a purely ecclesiastical issue.

Noy's report tells a little more, however. The Court is said to have distinguished the present case from "a suit in the Spiritual Court for the profits of that office, supposing the grant of that by the predecessor does not bind the successor, as it was in Dr. Barker's Case. There a prohibition shall be awarded because the profits are temporal. But we in the first case cannot try the sufficiency." This language is confusing with respect to Barker, because the direct report of that case does not suggest that the question was the bindingness of a predecessor's grant. Nor does it suggest that the ecclesiastical suit was for the profits of the office literally speaking -- i.e., for so much money claimed as profits taken by someone without title --, as opposed to possession of the office itself. Be the facts as they may, Barker is certainly distinguishable from Sutton. On any construction, there was no question of Barker's competence and no way in which his having a freehold in the first place was in the clouds -- whether the claim against him was that he had forfeited the office and been duly discharged, or that his estate terminated when a new Bishop succeeded.
In general, the case evidence on ecclesiastical life offices does not permit very firm rules to be stated. In principle, Prohibitions could be used to keep litigation over such offices, being freeholds, in the common law sphere, but the complexities of the subject were such that application of the principle was not clearcut.

E.
Problems of the Paradigmatic Prohibition:
Spiritual Pensions.

Summary: Should an ecclesiastical suit for a pension be prohibited because the action of Annuity would lie at common law to recover the annual payment in question? "Why not?" seems a good question, inasmuch as the availability of an adequate or substantially equivalent common law remedy was generally the best reason for Prohibition. None of the three thoroughly argued cases in this Sub-section resulted in the granting of a Prohibition, however. One, Collier's Case in the Queen's Bench, gives by implication an affirmative answer to the question above, one judge dissenting. The Court was unanimous on the result because the judges did not think Annuity would lie -- whether it would was a difficult question in the circumstances. In Sprat v. Nicholson, by contrast, the Common Pleas answered the question explicitly with a qualified "No", thereby making an exception to the general rule that when there is a common law remedy it must be used. The first qualification is taken for granted in all discussion of ecclesiastical pension suits: They are appropriate to ecclesiastical courts only if between "spiritual persons" and only if the pension amounts to a charge on an ecclesiastical revenue. The second clear qualification is that if the party claiming the pension has once sued for it in Annuity he is barred from ecclesiastical suit in the future.

Authority from the pre-Reformation period was a larger factor in the pension cases than in most areas of Prohibition law. The exceptional step of permitting ecclesiastical suits to duplicate Annuity may have been taken by courts of an earlier generation. It was scarcely "settled law", however, since good authority contra could be and was invoked. What outcome is most faithful to the late-medieval law is an open question.

The third case in this section, Dean and Chapter of Wells v. Goodwin, is best construed as a situation in which Annuity would clearly not lie. It therefore presents, in a form peculiar to itself, the question whether ecclesiastical pension suits could be prohibitable on other
grounds than overlap with Annuity. Prohibition was denied; the case confirms the courts' preference for leaving "spiritual pensions" to the ecclesiastical courts when reason could be found.

* * *

The following looks as if it ought to be law: If a sum allegedly payable by A. to B., in the nature of an annuity, is recoverable at common law by writ of Annuity, an ecclesiastical suit to recover the same should be prohibited. It makes no difference that A. or B. or both of them are churchmen. If a payment of this sort is not recoverable in Annuity, there is at least no obvious reason why it should not be recoverable in an ecclesiastical court, or why its recoverability should not be left to the determination of the ecclesiastical judge, provided that both A. and B. are churchmen and the payment is to be drawn from ecclesiastical revenues. Obviously enough, Church law and Church courts cannot give pecuniary claims to laymen, or impose pecuniary liabilities on them, beyond those which the temporal law creates, or makes it possible for people to create, and provides the means to vindicate. That the Church may recognize further claims and liabilities among its own personnel, exclusively in ways that effect redistribution of the Church's income (that drawn from benefices-tithes, offerings, glebes, etc. --, as opposed to the private or temporal wealth of individual clergymen), seems a plausible proposition if not an irresistible one. At the least, prohibiting ecclesiastical suits for such payments by churchman against churchman would be much more problematic than prohibiting a suit that could just as well have been an action of Annuity.

What I have stated had its defenders. It is a spelled-out version of the argument made by counsel seeking Prohibitions in a couple of cases. It is repudiated by some judicial opinion in favor of the proposition that where churchman is suing churchman for an annual payment drawn from ecclesiastical incomes the ecclesiastical suit should not be prohibited even though Annuity would lie (wherefore inquiring into whether it would lie is unnecessary.) Of the few judges who got a chance to pronounce on this matter, some were not persuaded to accept that proposition, but in the actual circumstances of the cases they thought Annuity would not lie, or at least were too unsure whether it would lie to feel that Prohibition was justified. Nothing suggests any inclination to doubt that quasi-annuities outside the scope of the writ of Annuity could be recovered by churchman against churchman in ecclesiastical courts. I.e., the "spiritual pension" was recognized as a legitimate interest.
Preventing Direct Encroachment on the Common Law:
The Paradigmatic Prohibition

In Collier's (Collyar's) Case (1600), the "pension or annual payment" (as the MS. report calls it) in question was created when a rectory was appropriated in Henry III’s reign. Note at once one feature of the case: The pension could not be claimed on the basis of immemorial prescription, because it came into being at a specifiable time in the past. It was said in argument and affirmed by the Judges that Annuity would lie to recover an annual payment claimed by prescription (in the common law sense -- from time out of mind.) That, however, is irrelevant for this case. If the pension was recoverable in Annuity, it must be because the mode of its creation was equivalent to the other sure way of creating an annuity recoverable by the writ of that name -- viz. grant by deed. One must say "equivalent to" because the complicated ecclesiastical process of establishing an appropriation and distributing the income of the rectory was of course not literally the same as simply granting someone an annuity by deed. The main issue in Collier was whether the pension was as good as an annuity created by deed or whether it should be classed as an ecclesiastical interest without common law equivalent (and therefore, as no one questioned, pursuable in ecclesiastical courts without interference.)

The story of the pension's creation was as follows: The Bishop of Salisbury was the authority in charge of the appropriation process. In the standard way, he set up a vicarage to serve the cure and endowed the vicar with part of the rectory's income. In addition, he made what is called an "ordinance" (using the words "statuimus et ordinamus") requiring the vicar to pay £ 20 per annum to the Precentor of Salisbury cathedral to the use of the Vicars Choral. The substance of the arrangement is easy to understand and, so far as I know, perfectly within the discretion of the bishop overseeing an appropriation. (At any rate, the common law Judges would have no evident title to challenge that and show no inclination to.) The vicar's endowment (of unknown size both absolutely and relative to what the rector retained) was simply cut back by £ 20 p.a. for the benefit of another ecclesiastical institution. In other words, the arrangement for appropriation of the rectory was a three-way split instead of the ordinary two-way split between rector and vicar. The pension sued for in the instant case was the Precentor's £ 20. The central issue was whether an interest conferred by such an "ordinance" was an annuity within the scope of the writ, as it if had been conferred by deed.

16 T. 41 Eliz. Q.B. Croke Elizabeth, 675; Add. 25,203, f.74b (sub. nom. Collyar.)
The case was argued more than once by counsel on both sides, and considerable medieval authority was cited. (See "Note on Authorities" at the end of this Sub-section.) Most significantly, Tanfield, arguing for Prohibition, claimed authority directly in point, viz. a holding that Annuity would lie on a quite similar, if not identical, "ordinance" made by a bishop at the time of an appropriation. In that case, the bishop had ordained that the vicar pay the Prior [= rector, i.e., the head of the monastic house being allowed to appropriate the church] 100/ per year "for" the Sunday offerings. The difference from the instant case is that this "ordinance" involved no third party. It was part of the settlement between rector and vicar and amounts to giving the rector a share of the offerings over and above the share of tithes he was allowed to retain. Of course the difference may be insignificant. Tanfield would no doubt have said that the identity of form was the significant point -- the fact that the annual payment was created by "ordinance" collateral to the principal transaction at an appropriation, viz. the rector's endowment of the vicar, the bishop approving, with a portion of the living.

In the end, the Court denied Prohibition unanimously (strictly, granted Consultation on motion.) There was, however, an important difference of opinion on the law. Justice Gawdy embraced a version of concurrent jurisdiction. He held that the pensioner was free to sue in the ecclesiastical court whether or not he could maintain Annuity. It is not clear whether Gawdy meant that the choice of courts is fully optional, or only that it is optional the first time suit is brought for the pension. I.e.: Having once brought Annuity, is one foreclosed from ever bringing an ecclesiastical suit? Vice versa, does bringing an ecclesiastical suit foreclose one from Annuity? Gawdy does not address these questions (for which see Sprat v. Nicholson below.) He would probably have said at least that bringing Annuity forecloses the ecclesiastical remedy, for that is endorsed by the authority he relied on (Fitzherbert -- see "Note") Gawdy did say expressly that Tanfield’s strong precedent did not count against him. Of course it does not strictly, for the fact that Annuity will lie does not entail that an ecclesiastical suit will not. The trouble is that permitting election of an ecclesiastical tribunal when a common law remedy is available is anomalous judicial policy.

Authority aside, the situation represented by this case illustrates the practical advantages of Gawdy's position. Were it clear where Annuity would lie, were an immemorial prescription or an unmistakable grant absolute prerequisites for the writ, it would perhaps be hard not to insist that the common law action be used when available. In reality, in the kind
of case most likely to be controverted, deciding whether Annuity would lie was not so easy. Authority perhaps supported extending the writ beyond the simple model "prescription or deed", but to decide from case to case whether extension was proper would require repeatedly going into the details of ill-understood medieval ecclesiastical proceedings. Better to indulge a minor degree of incursion on common law territory, in any event only open to clerics suing clerics over pensions taken out of ecclesiastical incomes.

The rest of the Court was more orthodox. According to the superior MS. report, Chief Justice Popham made the three points following in the course of hearing the case. The first and third are his final pronouncement. With respect to these, the report says that Justice Clench expressly agreed and Justice Fenner said nothing to the contrary. The second point was made by Popham and Fenner when the case was argued for the first time. Expounding the three points together is necessary to catch the rather subtle drift of the judges' thinking.

(1) (In Popham's language, MS. report, my italics added), "...every writ of annuity must be brought on prescription or on writing or something of as high nature, which there is not here." This proposition accepts the extension of common law annuities beyond "prescription or deed." What would count as of equally "high nature" is not specified. Popham's statement does not necessarily overturn Tanfield's precedent, because it leaves open the possibility that the bishop's "ordinance" in the earlier case was "high" enough to count, but no way of distinguishing the earlier case from this one is specified.

(2) When Collier was argued the first time, Popham and Fenner made a distinction between different ways of creating pensions by intra-ecclesiastical proceedings, one of which would create an interest protectable by Annuity and the other of which would not. It is not clear, however, that it is the distinction needed to differentiate Tanfield's precedent. In the MS., Popham and Fenner say, "There is a difference where the Ordinary ordains such payment as judge, for there the suit will be in court Christian, and where the patron and Ordinary made a charge in respect of their interest in the Church, for there a writ of annuity lies." (Croke's report states this as a distinction between where the Ordinary ordains the payment as judge and where the patron and Ordinary make a grant in time of vacation, "for there they charge as an interest.") In its terms, the distinction is clear enough: If the duty to pay what amounts to a pension is imposed by the judicial act of a bishop qua ecclesiastical judge, the duty is not enforceable by Annuity; if it is created by a grant to which the bishop is a party -- albeit a grant of a special type peculiar to certain ecclesiastical transactions -- it
is enforceable by Annuity and therefore not in Church courts. The application of the
distinction is less clear. The most probable interpretation of Popham and Fenner is that they
proposed to take the form of an "ordinance" as conclusive evidence of a judicial act. I.e., in
the absence of certainty about just what the 13th century bishop was doing, the best guess is
that when he "ordained" he was speaking as a judge. (Croke's formulation suggests that any
act done in term-time would be presumptively judicial.) The inconvenience of this
interpretation is that it would seem to overturn Tanfield's precedent, where an "ordinance"
was also employed. In neither case does it seem very likely that the "ordinance" would have
been a judicial act in the sense of the resolution of a litigated dispute. The one in Tanfield's
precedent would be more likely to answer that description than the one in the instant case.
(In the precedent, the parties were vicar and parson. They could have had litigation over the
terms of their relationship, resulting in a judicial decision or court-imposed settlement
requiring payment of the pension. In the instant case, it is hard to see how the Precentor and
Vicars Choral could have had a claim against the vicar coming out of the appropriation,
hence hard to imagine litigation resulting in a decree to pay the pension.) For labeling the
"ordinance" judicial, however, it is not necessary that real litigation lay behind it. In both
cases or either one, the bishop may have been doing no more than working out the details of
the "property settlement" attendant on an appropriation. His main act would be giving his
assent to, or joining as a party in, the patron's [=rector's] endowment of the vicar with certain
tithes and other incomes -- the indispensable step for a valid appropriation. This act must be
what Popham and Fenner had in mind as that which is as good as a grant by deed, that which
"charges an interest" (encumbers the rectory, now made over to the patron without duty to
exercise the patronage, with the vicar's rights.) (The act's merely being done in term-time
would hardly seem to detract from its grant-like quality, though the anomalous form of an
"ordinance" issued during vacation might -- since it cannot then be a judicial act -- be taken
as a part of the act of endowment, a sort of amendment or "codicil".) If in both Tanfield's
case and Collier itself the bishop was in practice only filling out the settlement by a
supplementary "ordinance", he might still have employed a judicial form. There is nothing
especially surprising about consciously using such a form, though whether the 13th century
bishop actually thought he was may be doubtful. (Would 13th century bishops have
supposed that they had mere "administrative" authority to decree supplementary features of
an appropriation settlement?) In principle, resort to judicial form for non-judicial purposes is
analogous to such common law practices as conveyancing by feigned recovery. The bishops, wishing to add to or vary the endowments proper, could perfectly well have resorted to a form designed to look like the final step of a lawsuit -- in Collier, to oblige the vicar to make the annual payment to the Precentor as if the latter had a judicially determined just cause to be paid. In formalistic terms, he could have preferred to charge the vicar "personally" rather than to "charge an interest." Whether doing one or the other would make a practical difference in other ways I cannot say, but there is one thing the bishop may quite imaginably have intended to do: viz. to create an interest subject only to spiritual sanctions -- a weaker interest than a common law annuity. If that is a legitimate intention -- and why not? --, the bishop would seem to have used the best formal means at his disposal, a judicial-looking "ordinance".

It seems to me fairly evident that all this was an elaborate means to the end Justice Gawdy was willing to reach more directly. The other judges, I would surmise, were no happier than Gawdy about having to spend time unscrambling the common law effect of ancient ecclesiastical arrangements. Their preference was to say, "If it isn't obviously a common law annuity, let the ecclesiastical courts take care of it." The judges were constrained by precedent, however, from quite saying that, and they were reluctant to violate general principles by holding that ecclesiastical jurisdiction was acceptable at the party's choice even over "obvious common law annuities". They saw as well as Gawdy did that driving a churchman to sue at common law when he was willing to use the ecclesiastical courts made no practical sense. Prohibiting would only give another churchman a chance to gamble on doing better at common law or on wearing out his pensioner by protracting litigation. They preferred, however, the more technically conservative course of narrowing the scope of Annuity as much as possible, thereby dissuading pensioner-clerics without obvious annuities from using the writ and their opponents from seeking Prohibitions. If what one really wants is for churchmen with dubious annuities to go to ecclesiastical courts in the first place and for the churchmen alleged to owe such pensions to stay there, signaling that in practice establishing a right to Annuity is likely to be difficult may have advantages over Gawdy's invitation to litigants to pick the court they prefer. Gawdy's way would cut off Prohibitions, but not Annuity suits in cases where the judges may have suspected that there was no intent, when the pension originated, to create an interest protected by temporal law.
This said about the underlying currents, one must give Popham and Fenner credit for cogency. Even apart from precedents, it is pretty hard to say that the transactions surrounding an appropriation could not create a common law annuity. If an annual payment were made part of the act of endowment, with the probable intent of insuring payment by making temporal enforcement of the duty available, it is hard to consider the mode of creation less "high" than, or significantly different from, an ordinary deed. Not too much should be made of the phrase "charge an interest", because appropriation with endowment does not in itself particularly affect interests in the common law sphere. It just gives the vicar a right to take certain tithes and the like; this right he may enforce directly against parishioners, as opposed to depending on the rector in the manner of a pensioner; the tithes are his property, capable of being leased, converted into his chattels by severance, etc. -- in this sense the common law sphere is touched; but the basic rights the vicar gains must be enforced through the ecclesiastical courts, and even in the post-Reformation period common law courts were reluctant to get involved in quarrels between vicars and parsons over construction and observation of the arrangements made upon appropriation. Even so, an endowment is a kind of conveyancing act, and it has a claim to be taken notice of by the common law in the same way as compositions-real, a similar transaction. (In a composition-real, as in an act of appropriation, bishop, patron, and parson collaborate to extinguish an ecclesiastical right -- to tithes in kind -- and replace it with a money payment. An ecclesiastical suit for tithes in kind would be prohibited if it was alleged to contravene a composition-real, and whether it really did -- construction of the composition -- was a common law matter. The analogy is not exact, but it is not too strained to argue from it that the common law has a responsibility, to the degree that it lies in its power, to see that the terms of endowments are carried out -- e.g., by allowing the writ of Annuity to be used for annuities created by such an endowment. A variant form of composition-real could be used for the purpose of replacing an old appropriation with a new division of income between parson and vicar, though that end could also be accomplished by a court-imposed or "judicial" revision of the original settlement.) An episcopal "ordinance" is less solemn. It might as well be, or cannot with certainty be differentiated from, a judicial act of the bishop, which clearly has no claim to be noticed by the common law. The duty to carry out a sentence or decree or "ordinance" -- whether it is actually the end of a lawsuit or only might
as well be, judging by its form -- is plainly a spiritual duty, as efficacious as people's responsiveness to spiritual sanctions.

It remains a problem that the Popham-Fenner view is hard to square with the black-letter cited by Tanfield. That the judges were sensitive to the problem and did not want to overrule the precedent comes out from their third point. (Since we are in the pre-stare decisis period, this is not so drastic a difficulty as it would have been under the later jurisprudence, but flatly rejecting a Year Book holding was still not easy.)

(3) Finally, Popham -- speaking for Clench and perhaps for Fenner -- gave a reason against Prohibition conceding that an episcop al "ordinance" is "high" enough to create a common law annuity. This is equivalent to conceding that Tanfield's precedent is correct and that it establishes the power of the "ordinance" form, notwithstanding the skepticism of Popham and Fenner. Remember that the second point above was made by Popham and Fenner on the first argument of the case. When Popham spoke his last word, he (though perhaps not Fenner) abandoned that specific line of reasoning in favor of studied vagueness -- the "ordinance" here was just not "high" enough to do duty for a deed. There can be little doubt that Popham's essential reason was what he had earlier expressed, but he did not at the end want to insist that an "ordinance" is per se ineffectual outside the ecclesiastical sphere.

Rather, Popham distinguished the instant case from Tanfield's by distinguishing an "ordinance" which adjusts interests between the parties to an act of appropriation from one which, even if connected with and contemporaneous with such an act, confers rights on strangers. Popham's words (MS.) are: "And though this ordinance were sufficient matter to maintain a writ of annuity, yet the precentor nor the vicars choral are parties." The meaning must be: If we are constrained by precedent to admit than an ordinance extraneous to the endowment can create a common law annuity, we are free to confine the rule of the earlier case to the narrowest possible space. It is not simply legal pedantry to draw the line proposed. For there is a difference in probable intent between "ordaining" a division of offerings -- perhaps where the act of endowment simply omitted them, perhaps inadvertently -- and "ordaining" a handsome share of the appropriated income to a party not included in the basic settlement. The first is so close to the settlement that it can with some color be treated as part of it; the second is a major revision of the whole appropriation. Its legality, if questionable, would be for ecclesiastical law to determine, which is a good reason for leaving it to ecclesiastical courts. (Were a writ of Annuity actually brought for the payment
in question, I would not be surprised to see the legality of the "ordinance" challenged and
civilian advice required.) Assuming the bishop was entitled to transfer a substantial slice of
the vicarage to the Precentor and Vicars Choral by "ordinance", it is probably realistic to
suppose he meant to give his beneficiaries a "merely spiritual" interest. In legal terms, one
can say that if he meant to give them a common law annuity he had the means -- inclusion in
the act of endowment. "Good construction" would hold that when he used the form best
designed to insure that the interest would be "spiritual" that is what he meant to insure. The
realism is that 13th century bishops, with their aspirations to an extensive and independent
ecclesiastical "state", probably meant to monopolize jurisdiction over interests created by
themselves and running between their own people.

Dean and Chapter of Wells v. Goodwin (1606-08)\(^{17}\) is another case of Prohibition
denied because the pension sued for in an ecclesiastical court was classified as "spiritual." This
case does not turn on the availability of a writ of Annuity, but on an unusual attempt to
get a Prohibition, which can only be explained by expounding the case in full. The case does,
however, contribute to understanding how the "spiritual pension" was conceived and the role
the judges were willing to concede to ecclesiastical courts in the enforcement of some
annuity-like interests.

The reports, which agree on the result, cover different parts of a protracted piece of
litigation. Noy only gives the outcome. Add. 25,209 is dated earlier than Harl. 1631, and its
content seems to relate it to an earlier stage of the litigation -- probably an attempt to get a
Consultation on motion after Prohibition had been granted on slight consideration. Harl.
1631, is a thorough report, from which we learn that the case proceeded to formal pleading:
Plaintiff-in-Prohibition declared upon his surmise, defendant-in-Prohibition demurred to the
declaration. In Harl. 1631, the judges speak to the demurrer and hold for defendant-in-
Prohibition. Speeches by Justices Williams, Yelverton, and Tanfield, who were essentially in
agreement, are reported. They were almost certainly the only participating judges, since the
last reported discussion of the case came only a month or two before Chief Justice Popham's
death, when he was probably not well enough to appear in court regularly.

---

\(^{17}\) T.3 - M. 5 Jac. Q.B. Noy, 16 (undated); Add. 25,209, f.63b (T. 3 Jac.); Harl. 1631, f.302b (P. 4 Jac.).
The facts as stated in the surmise and declaration (which the demurrer makes uncontroverted facts) were as follows: An abbot before the dissolution was seised of an appropriated rectory. In 28 Hen. VIII he leased it for seven years, rendering 40 marks rent to himself and a quantity of grain to the vicar. (I do not believe that the vicar's position under this lease would be any stronger than that of a third-party beneficiary of a contract. That would mean that the abbot-lessee would have an action -- Debt or Detinue -- against the lessee if the vicar did not receive his grain, but the vicar himself would be helpless at common law and dependent on the lessor's good graces. If land were leased to A., reserving £ 5 to the lessor, B., and £ 1 to a stranger, C., B. would have a right to distrain on A., but C., I think, would not have one of common right. He could probably be given the right of distraint by express provision in the lease. A lease of a rectory, however, -- which might include some glebe land, but mainly consists of the right to certain tithes -- would not carry any right of distraint and could not be made subject to such right. Nor, I think, was a rent issuing out of such things as tithes or rectories claimable as an annuity, either by the lessor or a stranger-beneficiary -- whereas at least some rents issuing out of land were so claimable if the party entitled lacked, or was willing to waive, the right of distraint. In short, the lease in our case probably generated only a contractual right of action for the rent, and that only in the lessor. Legal construction of the situation is somewhat tricky. Cf. Coke on Littleton, Bk. II, Ch. 12, especially Sect. 219. The lease in the instant case would of course not affect the vicar's rights under his endowment. He was simply made beneficiary of a lease of what the rector retained by the appropriation. For all that appears, the rector may just have been doing his vicar a gratuitous favor. If any consideration passed between the rector and the vicar -- as if, e.g., the vicar had agreed to give up part of his tithes to the rector's lessee in exchange for his share of the rent -- nothing on the record so indicated. Explanation of the unusual lease -- as opposed to its mere legal construction -- figures in the discussion of the case below.) In 30 Hen. VIII, the monastery was surrendered to the King. (Thus the rectory became the King's property subject to the outstanding lease -- the King was entitled to the 40 marks and the vicar's grain, as part of the rent; the vicar's exiguous interest would survive only as a charge on the King's conscience.) After expiration of the lease, Queen Mary conveyed the rectory permanently to the Dean and Chapter of Wells.

Upwards of half a century later, Goodwin, present holder of the vicarage that was benefited by the long-expired lease, sued the Dean and Chapter in an ecclesiastical court for
the grain his predecessor was meant to be paid by the old lease. The reason the ecclesiastical suit was not simply outlandish is that Goodwin based it on a prescriptive claim. I.e.: He of course was not trying to recover rent due by a dead lease, which would in any event have been inappropriate to an ecclesiastical court. He was claiming a pension in the amount of the ancient rent on the ground that this was customarily paid to him by the rector.

There is no certainty that Goodwin mentioned the lease in his ecclesiastical libel, though for reasons that will appear below it is probable that he did. The Dean and Chapter, however, did put the story told here before the ecclesiastical court. They recite in their common law surmise and declaration that they had pleaded the same matter in the ecclesiastical court and been disallowed. For the present, it is sufficient to be clear about one point: Goodwin's suit for a prescriptive pension would not necessarily be destroyed by his admission that he had received nothing from the rector and his lessees before 28 Hen. VIII. If the rectors went on rendering the grain to the vicars after expiration of the lease -- perhaps because they took the lease as evidence of a prior duty in the rector --, the present vicar might have a good prescriptive title by ecclesiastical standards. This could be so even if prior duty were now shown or admitted not to exist -- if the fact before the court was that payment to the vicar out of the proceeds of the rectory was no older than 28 Hen. VIII. For ecclesiastical courts, to the degree that they were free not to conform to the common law, did not insist on immemorial prescription, to which admission or proof of commencement at a definite time is fatal. Whether there is any reason to impose the common law standard on them in the present type of situation is an issue in the case. "Why should there be?" is a good question. Why should long, but not immemorial, usage not generate rights in churchmen against churchmen to payments drawn from ecclesiastical incomes if ecclesiastical law sees fit so to hold?

Add. 25,209 says simply that Goodwin's claim was based on prescription. Harl. 1831 complicates things. It too informs us that his claim was prescriptive -- so the Dean and Chapter themselves say in their pleading. But they say more. First, the surmise/declaration recites that Goodwin was suing them for the grain "by color and pretext of the reservation aforesaid [of rent on the ancient lease]." This may be only allegation by plaintiff-in-Prohibition. I.e., it may be the plaintiffs who first said anything about the lease (originally in the ecclesiastical court.) They may have been saying: "This prescriptive claim cannot be good because it is no older than 28 Hen. VIII. Goodwin is suing us on the pretext that the lease is evidence of a prior duty in the rector, but such duty neither existed in fact nor is
inferrable from the lease, which is perfectly explicable as a gratuitous favor done by one rector to one vicar long ago. Leaving aside as irrelevant anything the vicar took by virtue of the lease, the vicars never received a penny before 28 Hen. VIII. If they have received anything since the expiration of the lease, they have not received it for long enough to support a prescriptive title."

Alternatively, the recitation may he a clue that Goodwin set forth the full facts in his libel. The "pretext", after all, favors him. It cannot be ruled out that fairly regular receipt of the grain since expiration of the lease would be sufficient basis for a prescriptive title, by ecclesiastical standards left to themselves. It would nevertheless strengthen Goodwin's title if he could persuade the ecclesiastical court that the best explanation of the lease was a prior duty on the rector's part. Even a weak, otherwise unexplained, "moral duty" might help. (Mere acknowledgment by a rector decades ago that the vicarage was underendowed and that the services of the Church would be better provided for if the vicar were given a subvention out of the rectory's profits, if respected and continued in another form by subsequent rectors, themselves ecclesiastics except for a short period of royal ownership, could be persuasive. Assuming that ecclesiastical courts in these matters are free to write their own law of prescription, "reasonably long continuance and good reason for the practice" is in itself as sensible a standard as any. It bears a pleasantly ironic resemblance to the common law standard for establishing customs, which must be immemorial, but must also be reasonable in the Judges' eyes. "Reasonable" often meant "for good reason", "on good consideration", something a same person not indifferent to his own interests, but aware that benefiting others can commonly be of benefit to oneself, could once have agreed to.)

Secondly, per Harl. 1631, Goodwin is said to have claimed his grain in the ecclesiastical court "by lawful custom and by composition-real." It is the composition-real that seriously complicates the picture. The suggestion is that Goodwin's libel was two-pronged -- prescription on the one hand, composition-real on the other. What is to be made of this? In the discussion of the case by Bar and Bench, nothing is said about a composition-real save for one reference by Justice Yelverton. The working assumption of all the discussants seems to be that the ecclesiastical claim was prescriptive. The context is one in which a form of composition-real could occur -- the kind that rearranges, subsequent to original endowment, the income distribution for an appropriated parish (as opposed to a formal tithe commutation, the most familiar type of composition-real.) An imaginable composition close
to our case would be: with the bishop and rector (who is both patron and parson) assenting, and in due form, the vicar gives up some of the tithes assigned to him by his endowment (restores them to the rector), in exchange for a fixed payment in money or produce by the rector.

If Goodwin actually had evidence of such a composition, one would expect him to rely on it, either forgetting about prescription or using it as a fall-back position. For a composition would clearly entitle him to his grain, obviating any need to prove prescription or to argue about how much prescription is enough. (It would, to be sure, raise problems of the sort we have seen in Collier. Entitlement by composition would very likely support a writ of Annuity. If that is so, one thing for Goodwin to do would be to bring Annuity, but if he preferred the ecclesiastical court, or wanted to keep the option of falling back on less-than-immemorial prescription open, he would face the possibility of being prohibited because a common law remedy was available. How serious that risk would be depends on judicial proclivity to follow Gawdy in Collier vs. reluctance to take the plunge into concurrency or choice of courts.) The most likely explanation of the mentioned-but-neglected composition-real is that Goodwin did not have a scrap of hard evidence of one. Rather, he argued that the lease was grounds for inferring a composition -- that it was difficult to account for otherwise, preferably not accounted for as a gratuitous favor, and preferably explained by the strongest explanation, a prior legal duty binding the lessor when he made the lease and his successors forever. In this version of it, Goodwin's claim could be described as three-leveled prescription: As it were, "I am entitled by usage alone sufficient to satisfy ecclesiastical standards, but I am all the more entitled because the lease shows I have been rendered the grain for good reason, and the most likely reason is a lost composition-real." The judges, however, took his claim as prescription to all intents. Mention of the composition-real is the strongest ground for inferring that Goodwin set out the story of the lease in his libel. The other side would have no motive to say in its common law pleading that Goodwin claimed by composition-real unless he had done so, and it is very unlikely that he so claimed except by inference through the lease.

Add. 25,209, besides giving the basic facts and the result, and saying that the case was not decided until M. 5 Jac. after several arguments, only reports two questions raised from the Bar by one Hughes of Gray's Inn.. Hughes may be Goodwin's counsel seeking Consultation on motion or counsel on the other side opposing that. In any event, the report
states what he said in the form of questions rather than arguments. The first question is awkwardly formulated ("whether a suggestion that an action is not at common law will be cause to grant Consultation"), but I do not think what Hughes had in mind is mysterious. He seems to be asking whether Prohibition can lie when there is no suggestion that the ecclesiastical plaintiff ought to be suing at common law. The question is naive as a general question, for it must have been evident that Prohibitions were often granted for other reasons. But in the immediate context it is the right question: Could there be any basis for prohibiting a suit for a pension between churchmen except the availability of a common law remedy? The striking feature of Dean and Chapter of Wells is the apparent weakness of plaintiff-in-Prohibition's case and, in the light of that, the resort to formal pleading and the long time it took the Court to reach a decision. Although we do not have enough facts to be sure, Goodwin's suit looks pretty flimsy. (Had he been rendered the grain continually, or ever, since the rectory came into the hands of the Dean and Chapter? Or was he speculating, dubiously enough, on the ecclesiastical court's inferring an old prescriptive title from the lease?) But a flimsy ecclesiastical suit is arguably the farthest thing from a good reason for Prohibition, save when the suit seeks an unacceptable extension of "the ambit of remediable wrong" (as by imposing liability for activities with a strong claim to fall within "the liberty of the subject."). Why should an intra-Church suit for a pension or an augmentation of vicarial income at the rector's expense come within that exception? Why should the ecclesiastical court not be trusted to weed out farfetched claims by one ecclesiastic on the income of another? One suspects that the Dean and Chapter pursued a Prohibition, and persisted until they received a full-dress hearing, because they thought Goodwin's suit outrageous and because they were worried about tenderness to vicars on the ecclesiastical court's part. I.e., they were apprehensive lest the ecclesiastical court take advantage of a slim pretext to transfer income to the working clergyman, the characteristic "poor vicar." But understandable motives do not make a good legal claim. (There may be something to be said against this line of argument -- see below -- but it is persuasive.)

Secondly, Hughes states that "it appears that the vicar is relying on prescription" and asks, "Must that now be found at common law?" This is a harder question. In some contexts, prescriptive claims if disputed factually had to be tried at common law although they arose in ecclesiastical litigation. In those contexts, not only did common law standards necessarily apply to the factual issue; they would, I think -- though here a step of inference is required --

Preventing Direct Encroachment on the Common Law:
The Paradigmatic Prohibition
have been insisted on as a matter of substantive law, as the only basis for a prescriptive title.

Take the commonplace *modus* case: Parishioner's claim that he is entitled to pay money instead of tithes in kind must be tried at common law if the parishioner requests it, or, in principle, if any member of the public sees fit to bring a Prohibition. Parishioner's claim, being tried at common law, must of course meet the immemorialness standard. Then let us imagine what is unlikely to happen: Parishioner pleads his customary commutation in the ecclesiastical court and does not seek a Prohibition. Parson (or a stranger) seeks one, alleging that a custom whose existence he controverts has come in question and arguing that ecclesiastical standards are different. (I.e., plaintiff-in-Prohibition claims that the ecclesiastical law makes it too easy for Parishioner to establish his commutation. This is of course contrary to the expectations that in reality lay behind the practice of prohibiting on surmise of a *modus* -- the expectation that ecclesiastical courts would not recognize unqualifiedly the power of usage to commute tithes in kind, or else that compared to juries they would be too critical of the evidence for such customs, even though their standard was nominally more liberal than the common law's.) I do not think there is any chance that Prohibition would be denied. I think that result is implicit in the public-interest theory of Prohibitions. (It does not matter that Parishioner is willing to take his chances in the ecclesiastical court, and even if Parson -- having sued there and being a cleric -- were estopped to complain, the rule still holds: if the suit is prohibitable on the initiative of one or the other of the parties, it is prohibitable tout court and should be prohibited on "information" supplied by a stranger. Strains on this rule are examined in Vol. I of this study. I doubt that it would come under strain when trial of customs affecting tithes was in question.) If this is granted, what stands in the way of the proposition that the common law standard of prescription is binding throughout the legal system? (=Any suit turning on prescription should be prohibited unless application of the common law standard in the "foreign" court can be assured. It does not follow that every such suit should be prohibitable merely by pointing out that a claim based on prescription had been advanced, on the *modus* model, as opposed to surmising, at least *pro forma*, that the ecclesiastical court intended to or probably would employ a standard of prescription less rigorous than immemorialness. N.b. that in *Dean and Chapter of Wells* plaintiffs-in-Prohibition used a disallowance surmise. There are difficulties -- see below -- about pinning down the "error" they attributed to the ecclesiastical court. Their plea there does not clearly say more than that Goodwin's
complaint was untrue as to fact. It may perhaps, however, be taken as insisting that Goodwin had no immemorial right and implying that the ecclesiastical court, in disallowing the plea, showed that it did not consider itself bound by the immemorialness standard. More direct assertion of the last point might have been better strategy.) I take it that Hughes was asking how free ecclesiastical courts are to understand prescriptive claims as they like. The reply would seem to be that common law standards apply only when lay interests are involved, as in most tithe cases. ("Lay interests" of course refers to something more and something different than the personal status of the parties. Duty to pay tithes was an encumbrance on "lay" property' -- no less "lay" if a particular piece belonged to a churchman or an ecclesiastical institution. An ecclesiastical income, from tithes or other sources, arguably contrasts: a fortiori when it is in the hands of a churchman -- i.e., someone other than an impropiator.)

We may now turn to Harl. 1631 and the arguments on demurrer to plaintiff-in- Prohibition's declaration. From the Bar, Edwards argued for Goodwin, making two points: (a) The surmise and declaration appeared to say that Goodwin claimed by color of the ancient lease. But this was not and could not be Goodwin's claim, which was simply for a prescriptive pension. (This is, I believe, an objection to the form of the declaration over and above the substance. The Dean and Chapter, in pursuit of a Prohibition, were misrepresenting the libel they were objecting to. I doubt that from Edwards's point of view there would be any way of salvaging the surmise/declaration, but its formal incoherence as it stood was an objection to it. If the Dean and Chapter had said straightforwardly that Goodwin was claiming by prescription, denied his title, and argued that the prescription should be tried at common law, they would incur Edwards's second point, but not his first.) (b) Authority supports the proposition that intra-ecclesiastical pensions may be recovered in ecclesiastical courts. (I.e., the law is settled; there is no need to debate why some prescriptions must be tried at common law and others left to ecclesiastical courts, presumably without control over the standard of prescription.)

The three judges who speak all in essence accept Edwards's contention, but there are differences of nuance (and some difficulties about saying just what their reported language means.) Justice Williams confined himself to the formal objection to the surmise/declaration. Although he probably agreed with the inclination of all judicial opinion to leave "spiritual pensions" to the Church, at least when they could be cleared of duplicating Annuity, he does
not commit himself to more than the defectiveness of the surmise/declaration. He reinforces the basic point -- that the Dean and Chapter have not spoken in a manner that responds to, or amounts to relevant controversion of, what Goodwin's libel claimed -- in two ways: (a) The surmise relied on a stranger's reservation of rent. I.e., the matter used to rebut Goodwin was the abbot's lease reserving part of the rent to the vicar, not that of the Dean and Chapter themselves. The suggestion is that their case would be better, though not necessarily good, if the lease had been their own. I would construe this as follows: The Dean and Chapter are in effect being criticized for "pleading their evidence." The most they could do with the ancient lease was to produce it as evidence in their attempt to defeat the prescription. It would not be conclusive, but at least relevant, in an effort to show that the lease was the commencement of payment, if not the whole explanation of any provable render of grain to the vicars, and to maintain that an older or different commencement must be made out to establish the prescription, even by ecclesiastical standards if those are not to be interfered with. An identical lease by the Dean and Chapter themselves would likewise be no more than evidence. It would not inevitably defeat a prescriptive claim governed by any possible standard of prescription, but it would be strong evidence, probably fatal by the immemorial standard. If pleaded in Prohibition, therefore, it would be a way of saying the prescription could not be immemorial and so raising the question whether ecclesiastical courts must insist on immemorialness. (A different question, pointing to a different rule of law, would be whether the prescription must have the possibility of being immemorial. One could hold that this possibility must appear and still leave ecclesiastical courts quite free to make prescription easy by their handling of evidence -- accepting recent practice as sufficient prima facie proof, making tenuous inferences of older practice from such evidence as the ancient lease in this case, etc. "Make easy" of course means "make nominally easier than at common law." The fundamental difference between the ecclesiastical and common law systems, it is important to remember, is that the former made factual determinations on evidence and the latter made them by jury. Juries were told to endorse prescriptions only if they were immemorial, but the trial judge's power to keep them to a respectably critical standard of proof is very doubtful. For the most part, "the common law demands immemorialness" means that if facts inconsistent with immemorial continuance were admitted in pleading or found by special verdict the prescription would fail.) Had the lease been the Dean and Chapter's own, it would show that for seven years not very long ago the
vicar took his grain by virtue of the lease. The trier would want to be quite sure that the only evidence of actual payment did not fall in those seven years. Payment after expiration could be suspicious: Can we be sure the lessee did not remain in possession and continue to pay the rent? Or that the Dean and Chapter did not pay the vicar a time of two because they mistakenly inferred from the lease that they owed the grain, but afterwards discovered the mistake and ceased? Under a non-common law standard of prescription, none of this would absolutely destroy Goodwin's claim. The lease could still be used to infer a prior duty, and the vicar's being paid for seven years by virtue of the lease could only mean that for that period the Dean and Chapter chose to pay what they already owed in that form. Under the common law standard, *quaere* whether payment for seven years of an annuity due by prescription in the odd form of rent reserved on a lease to a stranger would not be a fatal interruption of the usage. (Suppose a person owing a prescriptive annuity of £10 charged his own land with a rent for term of years in favor of the annuitant and in the same amount. Suppose it a conceded fact that during the term the £10 and only that were paid. Suppose at least once in the term of years the party entitled to the money distrained on the charged land to force payment -- so that we are sure that what he collected during that time he claimed as a rent. Would the prescriptive annuity revive when the term of the rent expired? I assume that conversion of an annuity into a rent charge in fee would extinguish the prescriptive annuity. The party would have an annuity by deed if he chose to enforce it by writ of Annuity, or an interest solely enforceable by distraint, if by distraining once he waived his right to Annuity. [Cf. Sprat v. Nicholson below for this rule -- a rent charge may be recovered in Annuity only so long as the holder does not take advantage of his power to distrain.] ) Williams, in any event, seems to suggest that an allegation of the same peculiar lease by the Dean and Chapter themselves, while still in strictness "pleading evidence", might come so close to mere denial of Goodwin's prescription that it would not, at any rate, obviously vitiate the pleading. As he puts it, "such foreign matter" as the abbot's lease is clearly vitiating. Whether pleading in better form would be of any avail to get a Prohibition remains an open question.

(b) Williams seems to say in addition that the reservation of rent to a stranger on the abbot's lease was a void reservation. I have given above the analysis of the lease which seems to me probably correct. Saying that the reservation of rent to the vicar was "void" can be taken as a blunt way of putting what I say -- the vicar was a legally impotent beneficiary
of a contract; the lessee would owe the lessor what was purportedly reserved to the vicar, but the vicar would only have a claim on the lessor's conscience. (I am of course not sure that this is Williams's analysis. A more drastic position would be that property, including land itself, cannot be leased so as to charge the term of years with a rent payable to someone other than the lessor, even though the lease purports to give the stranger power of distraint. It is more likely to be law that tithes, rectories, and incorporeal property generally "cannot" be leased with reservation of rent to a stranger.) Even though the reservation of rent was "void", the evidentiary value of the abbot's lease is still not wiped out. If the abbot only meant to benefit the vicar -- and probably succeeded in practice, because the lessee, though without legal duty to pay the vicar, would have had no motive not to satisfy his lessor in the form stipulated in the lease --, the lease would still provide a basis for arguing for a prior duty, a lost composition-real, or a mere "good reason" for the customary pension. But these arguments, unlike claiming commencement by the lease, are on Goodwin's side. The foreignness of the lease from anything like meeting or refuting Goodwin's prescriptive claim is all the greater if Goodwin's predecessors took no valid interest under it. They could not have received their grain for seven years by virtue of the lease in a legal sense, whatever the effect on their prescriptive title would be if they had.

Justice Yelverton speaks to the same effect with a few additional twists. (a) He is the only judge to mention a composition-real, just in the form of saying indefinitely that Goodwin claimed either by composition or prescription, but whichever way, allegation of the lease was no way to meet his claim. (b) Like Williams, he attached significance to the fact that the reservation of rent was a stranger's act rather than the Dean and Chapter's. He calls it a "late" reservation, although it was nearly a century ago. The implication is that the same transaction at a much earlier date could be alleged with at least somewhat greater plausibility. I suppose the reason would be that commencement by the lease would be more convincing if it were more remote, and that payment by virtue of the lease for a brief latter-day period would not be harmful to the prescription. (c) Yelverton contributes a significant additional fact, viz. that Goodwin claimed a larger sum for his prescriptive pension than what was reserved to his predecessor in the lease. Again, the discrepancy does not undermine all possibility of arguing from the lease to the prescriptive title by way of prior duty or "good reason." The abbot could have arranged through the lease for payment of only part of what he owed the vicar, and his acknowledgment of in some sense owing something
coud conceivably strengthen the effect of regular payment of a larger sum by more recent rectors. But in the artificial world of pleading, "He was once paid £5 by reservation of rent" is perhaps more "foreign" to "I do not owe him £10 by prescription" than "He was once paid £10..."

(d) Finally, Yelverton goes to the substance and says "...the seisin of a pension will not make an issue here, for then all pensions would be tried outside the Court Christian." In other words, ecclesiastical pension suits are not to be prohibited on surmise that the ecclesiastical plaintiff was never seised, was not seised long enough ago to sustain a prescription (by whatever standard), or was not continuously seised (owing to an arguable interruption of the payment qua pension because an equivalent sum was received as rent or otherwise.) It is presumably implied that if such pension suits are prohibitable at all, it is because they duplicate common law Annuity. Yelverton would seem as unenthusiastic as other judges about diverting pension suits from the ecclesiastical courts. He was presumably right in saying that "all" pensions would be diverted if seisin of them were made a common law issue -- all, that is, which the ecclesiastical defendant wanted to divert. For merely denying that a pension is due by prescription is in one form or another denying that the pensioner was, in common law parlance, seised -- i.e, as a matter of logic, there can be no prescriptive right to be paid until one has been paid (rights to payment founded on grant are different, though their effectualness and procedures for protecting them can be affected by seisin. Seisin in this context means having been paid, vs. having a right to be.)

Justice Tanfield's opinion is the most substantive. He does not bother with the inelegance of the pleading, only says that its "force" is to deny that Goodwin was seised of the pension and that that is insufficient for a Prohibition in this case. He proceeds to speak about the effect of Reformation legislation, which is otherwise unmentioned in the reports. To understand Tanfield's position, it is necessary to look at what the legislation basically provided. Tanfield advances an interpretation of its detailed application. The reporter queries his construction at the end of the report, quite plausibly, as I shall show.

Sect. XV of 31 Hen. 8, c. 13 -- the fundamental statute for the dissolution of the monasteries -- saves in general terms the interests of strangers in the monastic property. Pensions charged on the monasteries and their possessions are mentioned among other interests. A pension charged on an appropriated living or rectory belonging to a monastery is obviously included. The statute of 34 Hen. 8, c. 19, refers to the general saving in the earlier
act and recites that ecclesiastical persons holding such protected interests -- pensions expressly included -- were nevertheless having trouble collecting what they were owed from the present holders of former monastic possessions. It recites further that such ecclesiastical persons had no "direct" way to recover what they were entitled to from the present holders. Why they lacked a sufficient remedy and just what is meant by "direct" are puzzling points. The snag must have been that ecclesiastical courts were unsure of their title, or thought they had none, to entertain suits for such interests against lay holders of ex-monastic possessions. Perhaps also attempts to recover such things as pensions at common law had failed, when the interest was not one protectable at common law before 31 Hen. 8, such as a pension incapable of supporting Annuity. If the reference to a "direct" way implies the existence of indirect ones, the latter could possibly be proceedings in the Court of Augmentations or equitable remedies (which the Augmentations might be one vehicle for, with respect to claims on ex-monastic property.)

In any event, the enacting part of 34 Hen. 8 authorizes ecclesiastical persons with such interests charged on monastic property to sue for them as they would have before the dissolution, against whoever now holds the property charged. That means they are authorized to sue in ecclesiastical courts, whether the defendant is clerical or lay. (Except, of course, when the King himself still holds the property charged. He must be besought in the Court of Augmentations. An express proviso covers the case where the King has conveyed monastic property to X. free of encumbrance by pensions and the like: The King's alienee, if sued, is to be discharged on showing the document releasing him from the encumbrance, and the claimant of the pension or similar interest is to go to the Augmentations to seek satisfaction from the King.) The statute is express that the suits it authorizes are to be decided according to the ecclesiastical law. In a separate section (Sect. V), however, it covers the possibility that some of the interests in question may be protectable at common law: In that case it authorizes common law suit. No examples are given, but an annual payment amenable to Annuity would seem to be an obvious one. The statute certainly does not authorize an ecclesiastical remedy where the remedy before the dissolution would have been temporal.

(Could the confusion ensuing on the dissolution have extended even to the liability of present holders -- successors to the monasteries through the King -- for such things as common law annuities? Possibly, though doubt on that score is hard to square with 31 Hen.
8. Could it be argued that the King undertook to satisfy the interests of ecclesiastics with claims on monasteries, but that his grants of monastic property to others should be taken as free of such claims even in the absence of express disencumbrance? The proviso in 34 Hen. 8 suggests that express disencumbrance may not have been unusual, which of course argues that it was necessary. An intention to turn all pensioners of the monasteries -- even common law annuitants -- into permanent royal pensioners is perhaps not incredible. Some of them became that in any case by the King's relieving his grantees of responsibility for them. Construing 31 Hen. 8 as having that effect would be to let it destroy vested legal rights. For however safely they could rely on the royal conscience and the Court of Augmentations, "permanent royal pensioners" would have lost remedial powers they had before, some of them at common law.)

34 Hen. 8's authorization of ecclesiastical suits contains an important qualification, however. It is on this that Tanfield's opinion in Dean and Chapter of Wells bears. The statute provides that the ex-monastic pensioners could sue the present holder if the claimant was "in possession" within ten years before the dissolution. Possession (the word of the statute, rather than seisin, but in this context which word makes no difference) of an interest consisting in a right to recurrent payments means receiving payment. Thus the statute clearly meant to bar ecclesiastical suits by, e.g., "spiritual pensioners" against the King's alienees when the pension had been in abeyance for ten years before the dissolution, however good the pensioner's right was in itself. Before the dissolution there was no such requirement, at least as far as the secular law was concerned; ecclesiastical courts were free to enforce a pension they thought was well-founded without regard to whether the pensioner had recent possession -- a prescriptive pension that had gone unpaid for longer than ten years, or a pension with another basis sufficient in the court's eyes though it had never been paid.

Where pensioners not in possession within ten years of the dissolution were meant to be left by this provision makes a question. That their interests were meant to perish for lack or lapse of possession seems hard and unlikely in the light of the saving in 31 Hen. 8; I would assume they were left as "permanent royal pensioners", in potenti at any rate. I.e., they were deprived of power to recover against the King's alienees, but they could try to make a case in the Augmentations that they had valid claims on the monastery which the King ought to satisfy. A more critical attitude toward claims unsupported by recent possession could probably be expected of the Augmentations than of ecclesiastical judges, had the latter been
given a free hand to evaluate any churchman's claim against the successors of the monasteries, especially lay successors. (There is no reason to think that claims assertable against the monasteries, and hence their successors, at common law were subject to the recent possession rule. Those claims are dealt with in a separate section of the statute, where there is no language suggesting such a rule. Clearly the common law's normal rules on when seisin must be shown to make out a claim to a rent or annuity, and what lapses of enjoyment would destroy a prescriptive interest of such nature, would apply in those cases.)

In our case, Goodwin at best made no claim on the record that his predecessor was in possession of the pension within ten years of the dissolution. (At worst, he made no claim that he or any preceding vicar since the expiration of the ancient lease was possessed of it, but was merely pushing the contention that the lease was grounds for inferring a right.) The Dean and Chapter of Wells were successors through the monarch to the monastic property on which the alleged pension was originally charged. It would seem, therefore, that Goodwin was ineligible to maintain an ecclesiastical suit against the Dean and Chapter by 34 Hen. 8. Therefore his suit should be prohibited, unless defects in plaintiff-in-Prohibition's pleading were in themselves grounds for denying a writ. This is what the reporter thought, the basis for his skepticism about Tanfield's opinion.

Tanfield's view appears to be that the recent possession provision in 34 Hen. 8 applies only to ecclesiastical suits against a lay successor to the monastery, which the Dean and Chapter were not. He is explicit that where the litigation is between churchmen, not only recent seisin, but any seisin, is irrelevant. I.e., though Goodwin were suing (as he very likely was) without visible pretense that he or any specified predecessor ever received payment, save perhaps by virtue of the old lease (and that only because de facto the lessee paid the then-vicar, if he did), it is still up to the ecclesiastical court to make what it will of Goodwin's claim. The only basis for Prohibition would be contravention of the statute, and there was none as Tanfield read the statute.

Like the reporter, I find the reading hard to reconcile with the letter of the act. In broader terms, it makes sense. There is probably no reason to suppose that ecclesiastical courts between 31 and 34 Hen. 8 would have had any reluctance to entertain suits against clerical institutions that found themselves in possession of monastic property and, by the most straightforward construction of 31 Hen. 8, liable for charges on behalf of other clerics formerly borne by the monasteries. The "mischief" behind 34 Hen. 8 must have been that
suits against laymen for pensions and the like were unprecedented and so of unclear legality, and 31 Hen. 8 was not understood to authorize them; suits against churchmen were not a problem, so 34 Hen. 8 has nothing to do with them. Secondly, if the intent of 34 Hen. 8 was not to destroy pensions unsupported by recent possession, only to protect the successors of the monasteries against flimsy claims and the danger of ecclesiastical courts' looking too kindly on them at the expense of lay defendants, there is no good reason to bring ecclesiastics within the recent possession rule. The Church courts could be expected, if anything, to be biased against dubious claimants of Goodwin's ilk seeking benefits out of the pockets of their brother churchmen. If they might sometimes lean the other way, say by seizing an opportunity to increase a vicar's livelihood from the resources of a Dean and Chapter who could afford it, can one really say that the makers of the statute were concerned about that, or meant to command the common law judges to concern themselves with such clerical affairs? Time and change would no doubt have wiped out most charges on the monasteries so uncertain that they could not meet the possession-within-ten-years test, though the Reformation statutes may not have contemplated their perishing utterly. The Court of Augmentations was long deceased. It is a safe guess that if a cleric in 1607 dug out a claim to a pension that had admittedly not been paid later than something like 1526 and, being debarred from suing the present lay successor of the monastery, petitioned the King as of right, his de facto chance of success would be slim even if ingenuity could paint his legal position as not hopeless. Survival of a few such pensions, or at least a shot at making a case for them, when fortune put an ecclesiastic in the position of the suable party, might be a modest fulfillment of what Parliament foresaw.

So far as the report shows, Tanfield did not argue the construction of the statutes in the elaborate manner of my reconstruction. His language only expresses his conclusion: "There are now two kinds of pensions. One, temporal, are only those that were appurtenant to certain dissolved religious houses or issuing out of them, so that he who is to have it or he who is to pay it is now a layman, where it derives under the title given to the King by the dissolution. Spiritual pensions are those which a spiritual man has from another by spiritual contract or composition. [Tanfield does not separately note prescription in a less-than-immemorial sense as a possible basis for such pensions. I assume, however, that he would regard it as the ecclesiastical courts' business if they wanted to uphold pensions so based, and only suggests that what they would infer from usage would ultimately be a "contract or
composition". He may have thought that a pension allegedly based on immemorial prescription would support Annuity though running between churchmen. He may have thought the same of a pension claimed unmistakably to rest on a proper and directly provable composition real. So he argued as counsel in Collier. "Composition" here may be intentionally indefinite.] And he who sues for the first in Court Christian ought to prove that seisin was had within 10 years before the dissolution of the monastery...Otherwise Prohibition [will be] granted, and there the seisin is traversable, and that is by the statute of 34 H. 8. But if the pension is merely spiritual, then they shall sue in Court Christian for it, though no seisin was ever had of it. And it seems to me that this pension is merely spiritual, viz. between parson and vicar, and so the seisin is not material..."

Tanfield's opinion may be the best clue to the whole story of Dean and Chapter of Wells, a strange case. Tanfield showed the cleanest way to the result the whole Court agreed on, the correct result surely, and I believe the desired result of all judges in this case and others -- to leave the disputes over pension rights within the Church to ecclesiastical justice: If a churchman's ecclesiastical suit for a pension could not be an annuity suit, and if it cannot, being against a lay successor of a monastery, be faulted for failure to show possession within ten years of the dissolution, Prohibition does not lie. Why did the other judges not embrace this simple formula? Why did the Court take so long over the case? The answer must be that the other judges were at least uneasy with Tanfield's construction of 34 Hen. 8, which, although plausible as interpretation by intent, collides with the embarrassing fact that the statute does not say the recent possession requirement only applies when a lay defendant is sued. The other judges, by my hypothesis, did not want to repudiate Tanfield's construction explicitly, because then it might be incumbent on them to prohibit Goodwin's suit, and if that was avoidable, a declaration from the Bench that the possession-within-ten-years rule applied universally to suits against successors to the monasteries would encourage Prohibitions relying thereon in intra-Church cases. They therefore took advantage of the opportunity plaintiff-in-Prohibition gave them to evade talking about the statute.

The Dean and Chapter did not seek Prohibition by invoking the statute and claiming that Goodwin had not alleged possession within ten years of the dissolution. Perhaps not resting on that ground was a mistake, but it is also possible that it was an anticipation of Tanfield's position -- the result of a prediction that if push came to shove a majority of the Court would prefer Tanfield's construction of the statute to inviting Prohibitions and causing "spiritual
pensions" that might survive ecclesiastical scrutiny to perish. It is hard to say just what theory plaintiff-in-Prohibition adopted instead, and that was most of what undid him. It was more than convincing to say that he had simply failed to state a coherent ground for Prohibition, though given the chance to do so in formal pleading. At that stage, if not earlier, a judge who thought Goodwin probably should have shown possession within ten years could at least plausibly feel obliged to respond to the claim to Prohibition strictly as pleaded. In a sense, of course, the Dean and Chapter were asserting "no seisin within ten years", in the form "no seisin at all" as it were, "The whole effect of this outrageous lawsuit against us is to claim a pension that has never been paid on the basis of an ancient lease which can only go to prove that anything Goodwin's predecessors ever took from us was not received as a pension, but by virtue of the lease." But, having said nothing about the statute, why should the Dean and Chapter have the advantage of it, even if Tanfield were wrong and they were entitled to? For the rest, what the Dean and Chapter urged to have a Prohibition was flawed in various ways pointed out by the judges. Most basically, plaintiff-in Prohibition simply did not state a reason why Goodwin's claim could not be good, if the ecclesiastical court interpreted the facts in his favor. Apart from the statute, lack of seisin need not be fatal, and the matter put forward to argue lack of seisin need not prove it. And were Goodwin's claim certainly hopeless by ecclesiastical standards, or any rational standard, that would be poor -- though perhaps tempting -- reason for Prohibition. In short, Consultation was justified so many ways that the Court was able to avoid commitment on the one point that may have been divisive. Formal pleading was probably allowed because plaintiff-in-Prohibition wanted it and because the judges needed time to figure out how best to approach the case. A unanimous disposition not to prohibit was probably offset in some of the judges' minds by two considerations contra -- the arguable applicability of the possession-within-ten-years rule even when the ecclesiastical defendant was a churchman and the perhaps arguable position that claims as radically weak as Goodwin's should not be entrusted to ecclesiastical discretion. The decision in effect rejects the second possibility while leaving the first in the clouds, probably with minimum practical consequences, since pension claims with pre-Reformation roots not so much as supported by possession close to the time of the Reformation must have been rare.
In Sprat v. Nicholson (1612 or 1613)\(^{18}\) the Common Pleas under Coke decided unanimously to follow Fitzherbert and adopt what should probably be considered the optimum solution for "spiritual pension" cases. In effect, the Court refused to say that annual payments by spiritual person to spiritual person capable of supporting Annuity are intrinsically under the jurisdiction of either the common law or the ecclesiastical system. This was not to adopt concurrent jurisdiction in the sense that a party entitled to common law Annuity could on any occasion of non-receipt choose between Annuity and an ecclesiastical suit. Rather, the Court held that the party has a choice in the first place, but must make a once-and-for-all choice. Details and problems of this rule are discussed below. One thing it certainly means: Prohibition will not lie on surmise that the ecclesiastical plaintiff could have maintained Annuity. It will only lie on surmise that he or his predecessor in title actually has at some past time brought Annuity for the payment now claimed by ecclesiastical suit. The activity illustrated in Collier -- deliberation about whether the manner in which ecclesiastical pensions were created was sufficient to constitute a common law annuity -- is thereby finessed. Let us look at Sprat in full before going more deeply into the "election of jurisdictions" rule.

The reports agree that a sub-deacon or sub-dean of Exeter was suing a parson for a pension issuing out of the parsonage. Godbolt says that the libel claimed the pension "*tam per realem compositionem, quam per antiquam et laudabilem consuetudinem.*" The MS. says the ecclesiastical plaintiff libeled for a pension "on" a composition-real "from" time immemorial. The slight difference is that according to the MS. the ecclesiastical claim invoked the immemorialness standard, wherefore Annuity would probably lie. Godbolt's version leaves it in doubt whether an "ancient and laudable custom" must be taken, when invoked in ecclesiastical litigation, to mean an immemorial one, and hence whether *qua* prescriptive payment the pension would support Annuity. Combining composition-real and prescription probably means (cf. *Dean and Chapter of Wells*) that the ecclesiastical plaintiff had no evidence of the composition independent of the fact that he had been paid over a long period. He was inviting the ecclesiastical court to infer from the usage that his pension

\(^{18}\) T. 10 Jac. C.P. Godbolt, 196: Add. 25,210, f.4. (The MS. is *sub nom* Parson of St. Justus v. Brocke and is dated either M. 9 or M. 10 Jac. It is manifestly the same case, however.)
originated from a composition. One could presumably invite a common law court and jury in Annuity to make the same inference, provided the usage was unmistakably immemorial. It is perhaps arguable that if one is going to claim an annual payment on the basis of a composition-real, one must bring Annuity, and if the only way of establishing the composition is prescription, one must assert immemorial prescription. I.e., if one is appealing to a lower ecclesiastical standard of prescription, one must avoid claiming a composition-real, though an ecclesiastical suit so appealing is not as such prohibitable. But this case rejects that argument.

The reports agree that Serjeant Dodderidge sought a Prohibition for the ecclesiastical defendant. Godbolt has Dodderidge saying somewhat vaguely that both elements of the libel -- prescription and composition-real -- are "temporal grounds." The MS. has Dodderidge saying specifically that Annuity lies and citing Year Book authority. (See "Note".)

The basic resolution of the unanimous Court is the same in both reports: Prohibition should be denied because when both parties are spiritual persons the plaintiff may choose whether to sue in the ecclesiastical court or at common law. There is no declaration as to whether Annuity would lie in the instant case, for there was no need for one.

The reports go on to qualify the holding. The first qualification is common to both of them, except that it is given in garbled form in Godbolt. That report says that Prohibition would lie "if the parson had been party to the suit." That makes no sense, since the ecclesiastical defendant was a parson. The MS. shows beyond doubt that "parson" is a mistake for "patron". It is hard to imagine the patron's being made party to a pension suit, but here again the MS. brings out what the judges were in all probability talking about -- the composition, not the suit.

The MS. says that the holding (choice of courts) would not apply if the patron were party to the composition "or there is [or he has] a deed of it" ["ou que ad fait de ceo"]. The meaning would seem to be that an annual payment founded on a proper composition real (requiring the patron's assent), for which there is the evidence of a deed, must be claimed as a common law annuity. A prescriptive pension, on the other hand, may be claimed as a common law annuity (and asserted as an immemorial right), but may also be claimed as a mere "spiritual pension" (and, presumably, be recovered if it passes whatever standard of prescription the ecclesiastical court sees fit to enforce.)
Discriminating the two kinds of claim would seem to pose a problem. Obviously in the instant case the claim was classified as essentially prescriptive despite the allegation of a composition-real (in slightly different forms in the two versions of the libel.) Presumably if ecclesiastical defendant came forward and showed that ecclesiastical plaintiff had put a deed in evidence, or some other documentation of the patron's involvement in the transaction from which the pension sprang, he could have a Prohibition, and so if the libel specified such a transaction or asserted the existence of documents embodying a proper composition-real. But ecclesiastical defendant would have little motive to get a Prohibition, with the effect of driving the other party to Annuity, unless he had realistic hope of defeating an Annuity suit by showing that the documents or transaction claimed by the other side to constitute a composition-real failed to, owing to inauthenticity or legal insufficiency. Ecclesiastical plaintiff would seem to be safe from Prohibition grounded on his libel alone if he was vague about the basis of his claim or if he wrote the libel to suggest that usage was the only evidence of a composition-real. He could perhaps be exposed to Prohibition at a later stage, if he undertook to prove a composition-real directly, but language in the libel merely consistent with the possibility that he might make such an attempt would not expose him. (There is no logical incompatibility between having been paid long enough to confer a right by ecclesiastical standards and being able to prove a composition directly. Immemorial prescription and proof of commencement are, of course, incompatible.) In short, the Court's exception for a composition to which the patron was party is not likely to catch many cases. A churchman with a good composition-real in his pocket might as well sue in the ecclesiastical court, if he finds it cheaper or more convenient and has confidence in the power of ecclesiastical sanctions to compel a fellow churchman, for Prohibition is unlikely to be sought. One with no more than hope of making out a composition-real, perhaps with some usage to count on, perhaps some other evidence short of a hard and fast deed or a patron's confirmation, perhaps a remote inference such as Goodwin in Dean and Chapter of Wells was probably banking on, can almost certainly frame a libel to avoid Prohibition.

The reason for distinguishing transactions involving the patron from other bases for pensions, including immemorial prescription, seems to me essentially formalistic. The interest of the patron would be affected by any decision upholding a pension -- a common law decision, direct or in a Prohibition case, that Annuity would lie for the payment in question or an ecclesiastical decision. If the parsonage is encumbered with a pension, it is
worth less, and so is the right to present to the living. To hold, therefore, that ecclesiastical courts must not enforce pensions founded on a proper composition-real is more to insist on "the principle of the thing" than to show solicitude for the patron's interest. The principle is just that patronage rights were indisputably lay interests, whether they happened to be held by a layman or a cleric. They were the most ancient of things affecting the Church and its interests which Church courts must nevertheless not touch. (The Constitutions of Clarendon from Hen. II's reign affirm the point.) Derivatively, a transaction involving the patron has a lay flavor such that it must not be put in question in ecclesiastical courts or be the foundation of purely ecclesiastical rights. Though formalistic, the position is consistent with the practice of prohibiting tithe suits if Parishioner surmised that a composition-real entitled him to pay a commutation. (By contrast, tithe suits were not usually prohibited if a mere contract to take money instead of tithes was surmised. In the latter case, Parishioner was told, "Pay your tithes in kind if the ecclesiastical court makes you, and sue Parson for breach of contract if you've suffered loss." He could have been told the same thing in the case of the composition-real, but was not because of the peculiarity of the transaction. Note the irony that a patron who agreed to a commutation at some time in the past would qua patron share the parson's interest at a later time of price inflation in breaking the commutation. Interests were served by prohibiting tithe suits brought in the face of a composition-real, but they were the parishioner's interest, not the patron's.)

In Godbolt's report (the MS. omits this), the Court next announces the critical "once and-for-all-choice" rule: Once the party has sued for his pension at common law, Prohibition will lie if he sues for it later in an ecclesiastical court, "because by the first suit he hath determined his election." Several points of interpretation arise on this rule, which, as we have already noted in Collier, enjoyed Fitzherbert's imprimatur. Is one foreclosed from an ecclesiastical suit, even in a later year, whether one wins or loses at common law? Does one foreclose one's successors -- future vicars, sub-deans, or whatever -- or only oneself? Does the rule work in reverse? I.e., would Annuity be barred by showing that plaintiff or his predecessor in title had previously sued for the pension in an ecclesiastical court? What is the rationale of the rule? On the answer to the last question, the answer to the others would largely depend. The "because" clause in the report rather reiterates the rule than justifies it.

Making the pensioner "determine his election" has a clearly benign tendency to discourage shopping and vexation -- taking a shot at the common law on pretense that your
pension is founded on a provable composition-real or on immemorial prescription, resorting to the ecclesiastical court when you fail, perhaps coming back to the common law in another year in hope of a friendlier jury (combined with hope that an earlier verdict will not be used to estop you, if you did not drop your suit before verdict.) Although the rule is not stated to work in reverse, there are also possibilities of abuse the other way around, though less acute ones -- failing in the ecclesiastical court one year, putting your opponent to the trouble of common law litigation the next, though your prospects there may be even more forlorn; succeeding in the ecclesiastical court on a prescription claimed as immemorial with such heartening effect that the next time you're not paid you try to convert the pension into a common law annuity, hoping the favorable ecclesiastical judgment can be used to help persuade the jury your claim is true. If, as I suspect, the judges fundamentally wanted to be rid of churchmen's pension suits, having the rule work both ways would be efficacious. It would give the particular pensioner, at least, one and only one chance to choose. Another step in stringency would be to hold a predecessor's choice in either direction against the present claimant.

Thus, the "election" rule makes practical sense, especially if it works in both directions, but to some extent if it works in only one. Besides its practical advantages, a common law analogy may have suggested it: Rents enforceable by distraint could also be enforced by writ of Annuity, but tenant of the rent must choose once and for all -- resorting to Annuity bars one from ever distraining, and *vice versa* (see Coke on Littleton, Sect. 219.) Following out the analogy would lead to giving the temporal/spiritual election rule maximum extent. (It works both ways; bringing suit in one place forecloses suing in the other whether one wins or loses; suit in one place bars one's successors in title, as well as oneself, from suing in the other.) It seems fairly strong, however, to imagine a common law court refusing Annuity on a showing that plaintiff's predecessor in title had once brought an ecclesiastical suit. (The form of that would normally be holding it a good plea for defendant in Annuity to allege the earlier ecclesiastical suit.) This involves giving a kind of notice or kind of parity to the ecclesiastical system that seems a little surprising. It is here the analogy with choosing between Annuity and distraint fails, for both of those are common law remedies. (Looked at procedurally, the analogy perhaps fails a little further: If an earlier ecclesiastical suit is a good plea to bar Annuity, it must be issuable. The ecclesiastical suit would be a fact presumptively within the notice of common law jurors. I.e., it would not be a fact triable by
Preventing Direct Encroachment on the Common Law:  
The Paradigmatic Prohibition

record. Is there a problem about that *per se* -- about asking a jury whether plaintiff or his predecessor "went into the spiritual realm", so to speak, and sought in one of its tribunals recovery of the payment he is now suing for at common law? If not, there remains the difference that distraint alleged to bar Annuity would sometimes be triable by record -- if the distraint led to a Replevin. If the party charged simply paid the rent on being distrained, and assuming that the *in pais* fact of distraint is as good a bar to Annuity as a Replevin, there would be a jury question in the wholly temporal case, as in the temporal-spiritual one. It would, however, be a straightforward jury question -- what happens *in pais* is just what jurors are supposed to know. Litigative events in the ecclesiastical sphere are at least a special class of fact.) On the other hand, interpreting the election rule as two-directional gets to the result the judges probably wanted, and the common law analogy makes it easier to overcome the scruple I express. In any event, I see no reason to doubt that a single try at Annuity, successful or not, would bar ecclesiastical suit forever (=justify Prohibition.) Were the surmise in Prohibition to be disputed factually, the issue would be triable by record.

There is certainly an oddity in saying that an interest is not on its face either temporal or spiritual, but only becomes one or the other according as the first entitled person to resort to litigation decides to take it. But the oddity is a better one to put up with than concurrency persisting beyond the first election -- the alternative if the common law courts were to avoid case-by-case debate over whether pensions were amenable to recovery by Annuity or not. The election rule in all probability would work toward the result of keeping "spiritual pension" cases in the ecclesiastical courts. Taken in the stronger sense (ecclesiastical suit bars Annuity), the rule should discourage plaintiffs from resorting to Annuity. The chance that an ecclesiastical suit was brought at some time in the past would be too good to risk (or prior ecclesiastical suit might be claimed successfully on slim evidence -- jurors as well as judges might be unenthusiastic about enforcing pensions between ecclesiastical persons.) If the rule is taken in the weaker sense (Annuity bars ecclesiastical suits), claimants would be well-advised to use the ecclesiastical court. Being prohibited and driven to Annuity is all they would have to fear. (*Praemunire* would be at most an outside reason for anxiety.) Ecclesiastical defendant would have no motive to seek Prohibition by surmising a *successful* Annuity suit, with probable *res judicata* effect, against himself or his predecessor.

Remaining points in the reports shed some light on the matters above. In Godbolt, Coke cites a Year Book case (22 Edw. 4. 24) in which Trespass at common law was not allowed
because an ecclesiastical remedy was appropriate in the circumstances. Parson sued Vicar in Trespass for taking wood claimed as tithes by both parties. The action was denied because the parties were spiritual persons and the right of tithes was in question. This decision is consistent with the courts' usual policy of not prohibiting ecclesiastical suits when the dispute was about which tithes Vicar and Parson were respectively entitled to under the act of appropriation. In application to the present case, the citation at least makes the point that there are subjects intrinsically suitable to ecclesiastical courts, which common law courts ought at any rate to prefer seeing handled there and to stay away from themselves so far as possible -- Parson-Vicar disputes over the right to tithes on the one hand, "spiritual pensions" on the other. But the Year Book case may have more interesting implications for expounding the choice-of-jurisdictions rule. The decision is strong in the sense that it involves refusal of a common law remedy where the formal elements of a good cause of action were present. I.e., Vicar was complaining that Parson took secular property (severed tithes converted to chattels) belonging to him; Parson was asserting the standard defense that the goods he took were his own. The common law nevertheless declined jurisdiction because the underlying property dispute turned on an ecclesiastical question and because the parties were spiritual. There would be a certain analogy, and comparable "strength", in declining jurisdiction over an Annuity claim perfectly sufficient in itself on the combined grounds that the payment in question had been sued for in an ecclesiastical court and that there is no intrinsic objection to ecclesiastical jurisdiction over pension claims by spiritual person against spiritual person. In other words, Coke's case might argue for taking the choice-of-jurisdiction rule as two-directional -- Annuity is forever barred once the pensioner has declared that he understands or prefers his interest to be ecclesiastical, even though he could have chosen the other way.

In contrast to his Year Book citation, Coke states the rule that whether a chapel is presentative or donative is a common law issue triable by jury. That issue means whether the minister of a chapel is merely an appointee of someone with the right of appointment, or whether his position is like that of a parish incumbent, viz. someone has the right to present a candidate to the bishop, who has the duty to scrutinize the nominee, the right to reject for cause, and the ultimate power to do the appointive act. In general, mention of this rule only makes the point that some issues which may superficially look appropriate to ecclesiastical courts in fact belong to the common law, whereas some claims that look appropriate to the common law -- a pension that might support Annuity, simple damages for taking chattels --
either may or must be pursued in ecclesiastical courts. The distinction nicely illustrates Coke's affection for subtle differences in the law which the lay mind is apt to miss. More specifically, Coke's reference goes to reinforce the point in *Sprat* that the common law has a particular interest in litigation concerning the Church and churchmen when rights of presentation come in question. Not only is a dispute about the ownership of a right of presentation exclusively a common law issue; so is a dispute about whether there is any right of presentation with respect to a particular ecclesiastical position. (If a chapel were admitted to be donative, I take it that disputes among churchmen -- which of rival churchmen has the donation, whether a clergyman was in fact given the chaplaincy by a clerical donor, etc. -- would be entirely appropriate to ecclesiastical jurisdiction.) If the common law's sensitivity to interests in the right of presentment extends beyond the paradigm case -- disputes over who owns the right -- to the preliminary question whether there is any right of presentation to be sensitive about, one should be alert to other possibilities of extension also. It might be implied that any suit for a pension unmistakably based on a proper composition real must be a common law Annuity suit, because the patron's interest in the living is touched.

The last piece of information from Godbolt is that it was said in the case that the statute of 34 Hen. 8, c. 19, authorized ecclesiastical suits against laymen for pensions, but that it had been held that this authorization did not extend to the High Commission. 34 Hen. 8, discussed under *Dean and Chapter of Wells* above, certainly so provides. For the point on the High Commission, Sir Anthony Roper's Case was cited (it is also recounted, without context, in the MS.) *Roper* is discussed in this study with other cases on the jurisdiction of the High Commission. Its mention in *Sprat* is incidental. For the present context, only two points are worth noting: (a) By effect of the statute, otherwise unobjectionable ecclesiastical suits for pensions are not vitiated by the personal lay status of one party, (b) *Roper* serves as a judicial precedent showing that the statute was so taken: In holding that Roper could not be sued for a pension in the High Commission (owing to the statutory restriction of that court, by 1 Eliz., c.1, to serious ecclesiastical crimes), the judges affirmed that despite being a layman he could, as successor to monastic property, be sued in an ordinary ecclesiastical court.

The MS. contributes one further detail. It mentions that it was said in this case that ecclesiastical courts regarded ten years as sufficient time to establish prescriptive rights for the Church and forty years to establish them against the Church. I do not know how accurate
this is, or how uniform the rules were across time and the ecclesiastical system. The ten-year/forty-year rule is uninformative as to how long the usage must be to generate a right to a spiritual pension, which is not evidently for or against "the Church", but only for one churchman against another. That the ecclesiastical law of prescription was different from the common law is undoubtedly true; the practical meaning of that depends on how free ecclesiastical courts were left to entertain claims based on prescription and to apply their own standards in such cases. Mention of the ecclesiastical law, sharply divergent from the common law as it was, in the course of discussion of Sprat underscores a point of importance: In considering what to do about spiritual pension cases, the judges knew they were considering whether to turn them over in large measure to a system in which prescriptive rights were much easier to establish, at least formally, than at common law. It would not be surprising if this gave some judges pause. There is no indication, however, that in the end they blinked at this effect. Having written off to the ecclesiastical courts as much spiritual pension business as possible, the judges show no sign of proposing to curb ecclesiastical law.

Note on Authorities

(1) The clearest authority against prohibiting in spiritual pension cases, even though Annuity would lie, is Fitzherbert's Natura Brevium, 51b. This is relied on by Hyde, moving for Consultation from the Bar, and by Justice Gawdy in Collier and by the Court speaking through Coke in Sprat. Under the topic "Consultation", Fitzherbert simply states the rule in general terms -- suits for such pensions should not be prohibited, including ones based on prescription which would support Annuity. (Only those based on prescription are mentioned. Fitzherbert is thus consistent with the probable holding in Sprat that pensions based on a directly provable or documented composition real can only be recovered in Annuity.) Fitzherbert does not justify the rule by authority or reason. Therefore, although he clearly had influence, it is not surprising that lawyers who thought they had better authority contra (Tanfield in Collier, Dodderidge in Sprat) paid no attention to him so far as the reports indicate. I.e., there was no particular reason to spend time refuting or explaining away Fitzherbert. He was a recognized "sage", and he would no doubt have been given credit for having some sort of case-law grounds for his opinion, but he is not very formidable authority against definite case law of an older vintage than his early-16th century treatise.
Preventing Direct Encroachment on the Common Law: 
The Paradigmatic Prohibition

Fitzherbert adds that ecclesiastical suits will be prohibited if the pensioner has previously sued Annuity. I.e., he embraces the choice-of-jurisdiction rule affirmed in Sprat, stating it in its most conservative form (Annuity bars ecclesiastical suit, but not vice versa so far as appears.)

(2) In addition to Fitzherbert, Hyde in Collier opposing Prohibition, cites Y.B. 11 Hen. 4. 84b-85. This complex case does not support Fitzherbert's position that a party entitled to Annuity on a prescriptive basis, if he is a clerical person, and if he has not previously resorted to Annuity, may bring an ecclesiastical suit without danger of Prohibition. Rather, it supports the Popham-Fenner position in Collier that a pension ordered by a bishop in judicial form or capacity is exclusively recoverable in ecclesiastical courts (=will not support Annuity.) It supports that position quite well, though not simply.

Behind the Y.B case, there had been earlier ecclesiastical litigation between an abbot and a prebendary of Chichester cathedral over the right to certain tithes. That litigation ended in a settlement, a feature of which was that the prebend should be charged with an annual payment to the abbot and that the prebendary should be liable to a penalty if that sum was unpaid. The Y.B. case is an action of Debt for the penalty. There were issues apart from Jurisdiction, mainly whether the penalty clause was binding on the successors of the party originally obliged to pay the pension. One issue, however, was whether the penalty should be sued for in an ecclesiastical court rather than at common law.

The common law Court had before it an indenture embodying the settlement, a deed of the Dean and Chapter of Chichester (a party in interest though not a principal party, because the prebend was held of Chichester cathedral), and a "ratification" by the Bishop. These documents do not add up to an unmistakable grant of an annuity cum penalty. One might, I suppose, stop there and say, in the language of Collier, that the mode of creation was not "high" enough to make a common law annuity. There was plenty of written evidence, and the transaction resembles a composition-real. (The Dean and Chapter's position with respect to the prebend is substantially like that of the patron of a parochial living. Both they and the Bishop confirmed the pension.) Even so, what was evidenced as actually conferring the annual payment comes to a contract. Therefore, one might argue, the payment is insufficiently based to be more than a spiritual pension. It is not necessary to worry about whether the duty to pay the money is of "judicial" origin and consequently enforceable only in the tribunal whose judicial act it implements. Enough to say it is not a temporal duty. It
may be a spiritual one, if the ecclesiastical courts choose to take note of it, but it cannot be enforced at common law.

The next question, on the assumption that the pension is recoverable only in the ecclesiastical court, is whether the penalty also must be recovered there if at all. At least one judge, Hankford, says "Yes" to that -- the penalty is an "incident" of the pension and accordingly under the same jurisdiction. That conclusion may not be inevitable. One of the puzzling things about the case is that the abbot and prebendary would seem to have made a good temporal contract, subject to problems about the original parties' power to bind their successors, which are discussed in the report. Waiving those, I think there would be no way in medieval temporal law to enforce the contract from year to year. An agreement to pay so much a year over a certain period was not enforceable until the period ended. In other words, as basis for a right to be paid in a given year, the agreement in our case must stand as an annuity or fail. But a penalty stipulated to be recoverable if the payment in any given year is not made is, I think, enforceable in principle: e.g., if the penalty were embodied in a bond conditioned on payee's receipt of his yearly payment. A temporal bond conditioned on payment from year to year of an admittedly spiritual pension would be perfectly good, I should think. The same may not be true of a penalty embodied in an indenture, but the discussion in this case hardly suggests that. I.e., there is no evident disposition to say that there is simply no foundation for an action of Debt for the penalty, even if the indenture and supporting documents were interpreted as creating a temporal annuity and successors were bound.

As to the status of the pension, however: Some remarks in the case suggest, that it could be considered to fall short of a temporal annuity whether created by "judicial" act or not. But the two speakers I can identify as judges use the judicial/non-judicial distinction. One of them, Hill, says clearly that if the penalty arises out of a judgment before an ecclesiastical court "by way of plea" the penalty must be enforced in the ecclesiastical court; if it arises from an accord "taken out of court" it may be pleaded at common law. This is close to Popham and Fenner in Collier. Hill appears to be uncommitted as to which class the penalty in the instant case should be put in. Hankford, on the other hand, seems to assume, without explanation, that the penalty and the pension on which it depends are "judicial", for he speaks of "such a penal sum adjudged by judges spiritual", and says it cannot be demanded except in the Court Christian.
Preventing Direct Encroachment on the Common Law:
The Paradigmatic Prohibition

It is somewhat mysterious, as it is in Collier, just how the pension *cum* penalty was conceived as "judicial". In the Y.B. case it is at least clear, as it is not in Collier, that there was in fact a lawsuit, which ended in one of the parties' agreeing to pay the pension and to give it teeth by stipulating the penalty. I think the peculiar institutional setting may explain why such an ending to a lawsuit very nearly must be taken as a judicial act rather than a mere agreement of the parties: How could the parties validly settle their dispute by agreeing to the pension and penalty without involving the Bishop -- the same person as the judge -- as a confirming party? It is true that his capacities as judge and as party-in-interest are distinguishable, but it is surely probable, when a lawsuit ends in an accord which the judge could deny effect by withholding his ratification, that the settlement comes to his decision as to the proper resolution of the case, even if it is originally suggested by the principal parties. Perhaps such litigation, if it does not end in a judgment or sentence or judicial order, can only end in a "consent decree." I.e., from an ecclesiastical point of view, owing to the judge's interest, it cannot be simply settled between the parties. Perhaps it can be settled in the form of a temporal contract, but then it can have no ecclesiastical effect. And *quoad* the annuity, if not necessarily *quoad* the penalty, they could not create a temporal interest merely by contract. Their only hope of creating a temporal annuity lay in doing more than agreeing -- in approximating the solemnity of a grant. That would require the consent of the bishop and the patron, and could be the consequence of the bishop's willingness in his judicial capacity to see the lawsuit end in the creation of a temporal interest. Its creation would be none the less efficacious for that. An agreement by itself, though with the concurrence of bishop and patron sufficient to raise an ecclesiastical interest, could not raise a temporal one.

(3) Fitzherbert's Abridgment. 19 Edw. 3. Jurisdiction, 28. Cited by Tanfield from the Bar in Collier.

This case is a clear holding by two judges (Hillary and Wilughby), over objection, that Annuity will lie for a churchman-to-churchman pension alleged to rest on immemorial prescription only. That is what Tanfield used it for, but he also takes advantage of the further implication in this case that an ecclesiastical suit for such a pension is *not* appropriate.

Counsel for defendant made two objections when Annuity was brought and plaintiff counted on prescription: (a) Defendant, alleged to owe the pension to a bishop, was an archdeacon [? -- I have trouble reading the word, but his title does not matter.] Counsel maintained that this "official who has only spiritual correction by reason of office" was
incapable of being charged with such a payment. (I think the point is that the office did not by its nature carry a property endowment out of which a charge on all successive holders could issue.) (b) Prohibition does not lie if a rector is sued for a pension, by provision of the so-called statute *Circumspecte agatis*. (Counsel clearly imply that the present churchman v. churchman suit is indistinguishable though not actually against a rector.)

Hillary and Wilughby rejected both arguments. As to the second, they said that *Circumspecte agatis* is not an authentic statute. (That is certainly true historically. The degree to which the proposition would have been accepted in the 17th century I cannot say.) Tanfield takes up the point. Rejection of the authority of *Circumspecte agatis* and absence of any other evidence that an ecclesiastical suit for a prescriptive pension would escape Prohibition implies that Prohibition *would* lie to stop such a suit -- a stronger proposition and more useful to Tanfield than the proposition that such a pension would support Annuity.

(4) The words of *Circumspecte agatis* are: "... si Prelatus alicujus ecclesie petet pensionem a Rectore sibi debitam omnes hujus pensiones Faciende sunt in foro ecclesiastico."

Edwards, arguing for Consultation in *Dean and Chapter of Wells*, cites the statute of *Articuli cleri* for the proposition that pensions of the sort in that case were exclusively recoverable in ecclesiastical courts. I think he meant *Circumspecte agatis*. *Circumspecte agatis* is also cited in the MS. report of *Sprat* as agreeing with the decision there. It does agree with it in a general way. But even if it was cited from the Bench, which is unclear, the reference does not amount to a very significant endorsement of the authority of the pseudo-statute. Since there was other authority behind the decision (Fitzherbert), as well as oblique reasons from other features of the law, and uncertainty as to whether Annuity would lie, the force of the citation could be only to say, "Any effect that can be given to *Circumspecte agatis* supports the decision -- peremptorily if it is actually a statute, but even if it is something else it represents an ancient opinion that Prohibition will not lie." As to what it is if not a statute, in Godbolt's report of *Collier*, Tanfield calls it "only an ordinance" (which, while not peremptory, would still express a deliberate royal judgment a long time ago.) In the MS., he calls it "an ordinance of the prelates" (which would be highly discountable, as an expression of an interested view of the law.) It is the MS. that reflects what Justice Wilughby says in the Abridgment: "...the prelates made it themselves." Justice Hillary only says generally that it is not a statute.
(5) Y.B. 3 Edw. 4. 12b. Also cited by Tanfield in *Collier*.

In this case, the annual payment was based on what should probably on its face be construed as a tight composition-real. The judicial holding, by Chief Justice Danby alone, is that Annuity will lie and an ecclesiastical remedy will not (which clearly implies that an ecclesiastical suit should be Prohibited.) The composition may have come out of litigation, however, so that in a sense the case militates against distinguishing pensions founded on the "judicial" act of an ecclesiastical judge. But it does not dispose of *Collier* or the Popham-Fenner position there, because the pension in *Collier*, originating from a bishop's "ordinance", can be distinguished from, and regarded as more properly judicial than, the pension in the Y.B. case. Though not used in *Sprat*, the Y.B. supports the apparent opinion of the Court in that case that pensions arising from a composition-real directly provable, vs. inferable from usage, are exclusively recoverable by Annuity.

The Y.B. case was Annuity by a prior v. a parson. The prior's count said that there was debate between the parties' predecessors over a portion of tithes. (It is not express that the "debate" reached the stage of a lawsuit.) In consequence of the debate, there was a composition, whereby the parson got the tithes and the prior an annuity out of the parson's church. Plaintiff alleged, that the parson's patron and the Ordinary were parties and showed a deed. (It is this allegation with documentation that makes the composition properly "real.") Finally, plaintiff alleged that defendant was seised of the tithes. (I.e., the composition was put into effect and was still in effect-- "fulfilled on plaintiff's side", one would say, if plaintiff were suing on a contract. I am somewhat surprised to see this last allegation in an action of Annuity. Quaere as to the law. If an annuity is granted with recitation that it is in consideration of continuing services on the grantee's part, is it unrecoverable if the services were (a) never performed or (b) discontinued though once performed? The case suggests an affirmative answer, but can it be generalized beyond circumstances like those of the case itself-- where the annuity is distinctly alleged to have come out of a settlement or other contract and its "considerateness" does not have to be gathered from the language of the grant itself?)

Defendant's counsel, Littleton, denied that his client was seised of the tithes (presumably meaning now seised), and plaintiff was willing to take issue on that. Littleton then objected that the Court lacked jurisdiction to try that issue because right of tithes would come into debate. He does not say directly that the suit should not be brought at common law (= the
The Writ of Prohibition:  
Jurisdiction in Early Modern English Law

interest sued for is not a common law annuity owing to its mode of creation, viz. an ecclesiastical transaction, possibly the outcome of ecclesiastical litigation in the form of a "consent decree.") Nor could he very well say that, having already denied a presumably material part of plaintiff's claim, as opposed to demanding judgment on the count. Littleton's approach is more indirect. But has it any merit? In what sense would the right of tithes come in question if the common law were to try whether defendant was seised of them, now or at any other time? Littleton's strategy seems to me to come closest to making sense if the composition is indeed assumed to be a "consent decree", tantamount to a judgment by the ecclesiastical court. If it is taken that way, then the common law would be asked by the pleading to decide whether the "judicial act" of the ecclesiastical judge was executed on one side and therefore ought to be executed on the other. The common law would not in strictness be deciding the right of tithes, but it would arguably be cutting very close to a normal "incident" of ecclesiastical jurisdiction over the right of tithes (the subject of the litigation behind the "consent decree.")

In any event, Littleton was firmly rebuffed by Danby: "The plaintiff may not have remedy for his annuity in the Court Christian, because the annuity is a temporal thing, and you cannot give another court jurisdiction..."

(6) Fitzherbert’s Abridgment. 20 Edw. 3. Annuity, 32.

This case was Tanfield's Exhibit A -- "our very case in effect" -- in Collier. As described by him, it is discussed in the text above. His description is not challenged so far as the reports show. It is possible that the judges knew the Abridgment case and saw that it was not quite as close to Collier as Tanfield would have it. But I argue in the text that they more probably thought 20 Edw. 3 was embarrassingly indistinguishable in its main point (effect of an episcopal "ordinance") and therefore found another way of distinguishing (involvement of a third party in Collier, vs. parson and vicar alone.)

Tanfield's representation of the Abridgment case is not seriously misleading, but two details make it somewhat less perfect for his purposes than he would have it. (a) The "ordinance" was embodied in a deed of the bishop, which was proffered. The deed was in some way evidence of the patron's complicity. (I put it this was because I find it hard to imagine just what the deed said. The words of the Abridgment are "...put forward a deed witnessing that he ?had received in the presence of the patron by the hand. ..." [. . . tesm que il ?au resceu al pres. le patron par le man]. My best guess is that the deed recited that the
patron -- in this case the same person as the prior/parson/annuitant -- had received payment of that which was ordained, and that the deed said "patron" on purpose to catch all the elements of a composition-real. His receipt of payment would give him seisin as payee, but it would also show his "complicity" in the arrangement as patron. In sum, the "ordinance" in Collier was more "naked" than in 20 Edw. 3; the question was whether it was as "high" as a deed, whereas in 20 Edw. 3 there was a deed, though its being essentially evidence of an "ordinance" could be urged as a reason for saying the two cases really raised the same question -- an "ordinance's" efficacy.

(b) The holding in 20 Edw. 3 is the opinion of one judge, Wilughby. He clearly thought, as against counsel's objection that the duty to pay a pension "for" offerings was spiritual, that the Annuity suit was perfectly well-brought, or that the duty was temporal. He does not, however, say that an "ordinance" is as good a foundation for a temporal annuity as anything, but rather emphasizes the deed (". . .the ordinance of the Ordinary by deed is a temporal contract" -- my italics). Wilughby adds a further thought, which is puzzling and perhaps enlightening: "... and though he has no more than 3d. [in] offerings, he will have his 100 [shillings]."

This sounds like familiar contract-law talk -- "price doesn't affect the validity of the contract", "so long as there is some consideration, we will not concern ourselves with whether there is a fair or 'equal' exchange", or the like. What is the point in our context? The annuity was created as part of an officially supervised apportionment of incomes and was clearly conceived as an exchange, not of course a merely voluntary one, but in the sense that the aim of the arrangement was a distribution of risks such as the parties might under some conditions agree on voluntarily. The vicar got the offerings, the rector 100/ per year. The arrangement is only intelligible as an attempt to give some advantages and disadvantages to each party -- the rector a secure 100/, which he might not realize if the offerings were simply assigned to him, the vicar a chance at some income from offerings, if he was successful in stirring up his parishioners to be generous, offset by the risk that he might be worse off than if the offerings had simply been made part of the rectorial income. (Structuring incentives would, seem to have entered into the medieval bishop's calculations.) Now, it might be argued that it is the nature of such an arrangement to be somewhat experimental or open-ended. I.e., the "ordaining" bishop intended that it should be subject to revision, and even ad hoc non-enforcement, if it failed to work out more or less as a "fair exchange." The rector
The Writ of Prohibition:  
Jurisdiction in Early Modern English Law

was not meant to be assured of 100/ forever, irrespective of whether the particular parochial income it was related to was in a net way capable of supporting it. If experience showed over a number of years that the offerings consistently fell short of 100/, the bishop would cease to enforce the pension, or "ordain" a figure better approximating something like the average value of the offerings, perhaps minus enough to stimulate the vicar by hope of profit as well as fear of loss. (The kind of figure an average or "reasonable" farmer of a tax or similar income would consider.) Even in a given year, the bishop might want to reserve the right not to enforce, or to mitigate, the pension, should the vicar be exposed to serious loss without fault.

This interpretation of the "ordinance" of course amounts to a good reason for treating the pension it created as spiritual, or preserving exclusive ecclesiastical jurisdiction. In proclaiming the indifference or near-indifference of whether the pension approximated the value of the offerings, Justice Wilughby was presumably reinforcing his contrary view that the ecclesiastical transaction created a temporal annuity solely recoverable at common law. The existence of the deed seems central to his so concluding. He may, therefore, have been saying, "While the ordinance by itself could reasonably be taken as creating a flexible ecclesiastical interest, once there is a deed flexibility is out of the question. The bishop has, so to speak, stepped into the temporal sphere, where he has granted a 100/ annuity -- "for" the offerings, to be sure, but he has cut off any basis for arguing that the annuity in fact bears no relation to the offerings." This line of reasoning, by highlighting the deed still more, has a tendency to dissociate 20 Edw. 3 still further. ("Indifference or near-indifference": To be literal, Wilughby does not say that the annuity would be good if there were no offerings, but if the offerings were drastically short of 100/. Cf. the last case above. If an annuity is known, from its face or otherwise, to have been granted "for" something/for a reason/on some consideration/in exchange for something, and it is known that the grantor has not received that "for" which the annuity was granted, or that the purpose behind the annuity is impossible, or has not been accomplished in fact, can recovery of the annuity be stopped? An annuity not bestowed by a private person, but "administratively" [or "judicially"] imposed as part of such proceedings as appropriation of a rectory, is a special case within the general question. All Wilughby is firm on is that realistic accomplishment of the purpose, or receipt of the benefit, "for" which the annuity was granted is irrelevant. Perhaps an annuity granted "for" something that does not exist, or turns out not to exist, would be in trouble.
E.g., suppose an appropriation gave tithes of a certain product to Vicar or Rector and required the other to pay a pension "for" those tithes, and the product either never was, or ceased to be, grown in the parish.)

For the rest, the Abridgment report of 20 Edw. 3 contains only a little sparring over technicalities of the deed (properly dated? parties properly named?). If a valid deed was essential for the proposition that Annuity would lie, invalidation of the deed on technicalities could change the case, but attempts so to invalidate it got nowhere. (Those attempts by defendant's counsel are rebuffed by "Sharde", who sounds as if he is speaking as a judge rather than as counsel for the other side, but the only judge he could plausibly be, Shardelowe, is said by Foss to have died in 18 Edw. III, two years before this case as dated.)

(7) Fitzherbert's Abridgment. 16 Edw. 3. Annuity, 23. Cited by Dodderidge, arguing for Prohibition in Sprat.

At a few points, I find the Abridgment impossible to read and to translate into visualizable events. The case certainly shows Annuity by churchman against churchman, on a prescriptive title, sustained in the face of various objections by counsel. Only Justice Hillary speaks from the Bench, but he speaks for the Court, for counsel accept his dismissal of their points and move on. This much is enough for Dodderidge's minimum purpose of showing that Annuity would lie in circumstances like those of Sprat (from which it does not automatically follow that an ecclesiastical suit should be prohibited.)

Whether further details of the Abridgment case make it more useful for Dodderidge or reduce its similarity to Sprat I hesitate to say. The initial objection to the Annuity suit seems to be than an annuity cannot be claimed by churchman against churchman purely by prescription -- by prescription unexplained, so to speak. That makes sense when one considers that intra-Church pensions were not owed by natural person to natural person, but by the representative of one spiritual corporation to that of another. Natural A. may become legally bound to confer some benefit on Natural B. just by repeatedly conferring it for long enough. If one wants to say the (immemorial) usage points ultimately to a grant, very well -- there is no reason A. could not have granted B. such an interest as an annuity "before the time of memory. " Obviously the pro tempore holder of, say, Parsonage C cannot grant a permanent benefit to the holders of Vicarage D or Bishopric E "just like that" -- cannot subject all successive holders of C to a detriment just because it is the present holder's whim. By the same token, it would seem that the present holder of C cannot, by de facto benefiting
the holders of D or E, start a course of usage which will end in subjecting all successors in C to a detriment. Must there not be some -- well -- "consideration", something visible to show that what has ex hypothesi been going on forever is reasonable, serves some interest of the corporation subject to the detriment, or at least the larger interest of the Church, or at any rate had the assent of those officially responsible for that larger interest? (In the case of presentative livings, making out that the interest of the patron was not harmed without his assent would seem to be a further necessity.) To this query, it may be possible to reply with the standard defense of prescriptive rights: if it has been going on that long (preferably forever), it must be reasonable, it must be assumed that all relevant consents were obtained, that all relevant interests harmed were somehow compensated. (It is worth remembering that the "standard defense" did not work for special local customs, as opposed to private prescriptions, for they were subject to a judicial test for reasonableness.)

In the Abridgment case, plaintiff’s standing on prescription alone is not defended as such. Instead, his counsel put forward deeds meant in some way to explain the annuity. It is here that the report loses me -- as to just what ancient transactions were shown to the Court and how they tended to clothe the naked prescription. Plaintiff’s move does, however, suggest that objection to its nakedness was well-taken. Application to Sprat is tantalizing. Should one say that the formula used there ("tam per realem compositionem, quam per antiquam et laudabilem consuetudinem" or "on a composition-real paid from time immemorial", depending on which report one follows) is pretty much what should be used in an Annuity suit: a pro forma suggestion in one’s count that what one intended the usage to show was a composition-real, implying that one could produce some kind of evidence of a composition (though not head-on evidence, which would remove the need for relying on prescription)? If Dodderidge paid full attention to the case he cited, it would be in his interest to say that Annuity would lie if plaintiff counted pretty much in the same terms as those he libeled in, even though it might not if he rested on "naked" prescription.

The rest of the Abridgment case is on whether the deed put forward by plaintiff was the right kind of deed for his purpose and whether, having started out with pure prescription, he contradicted his claim by relying on the deed. On the latter point, I am not sure whether defendant was in the end willing to concede that pure prescription is sufficient (but plaintiff must stick to it) or whether he was arguing that plaintiff should not be allowed to substitute a good claim for the bad one he started with. In any event, objection to plaintiff’s pleading on
these scores was overruled. Justice Hillary thought everything plaintiff had said after the first objection to his count was "pursuant" to his original claim and did not amount to claiming the annuity on two separate and incompatible grounds at the same time. Hillary clearly thought that "pursuing" the prescriptive claim was commendable -- as he says, "[it was] only to show commencement because they are people of Holy Church" -- but I am not sure enough of the reading of his remaining words to say whether he thought it was necessary.

(8) Fitzherbert's Abridgment. 16 Edw. 3. Annuity, 24. Also cited by Dodderidge in Sprat.

This case does not seem to me to prove more than that Annuity would lie on a composition somewhat short of a perfect composition-real. Plaintiff claimed that the annuity was created by episcopal "ordinance" in the context of "debate" between predecessors of the present parties. There is not enough information to tell what the trouble and the process leading up to the "ordinance" were, but (a) deeds were shown and (b) what was ordained was a two-way compromise or settlement. Plaintiff's predecessor "gave" certain tithes to defendant's predecessor, and the latter "granted" the annuity to the former. Defendant's only objection to plaintiff's claim was that nothing showed the patron's assent, defendant being a parson. Plaintiff replied by admitting that the patron's assent was not made out, but maintaining that it did not need to be. For, per plaintiff, defendant was seised of the tithes and therefore had quid pro quo. Note the implication: The annuity, coming out of a settlement arrived at through ecclesiastical processes, would not stand on its own, but only if the payer was actually enjoying that in consideration of which the duty to pay the annuity was imposed on him. The Court agreed with plaintiff and gave judgment for him when defendant did not deny seisin of the tithes.

The case seems more specifically useful to Tanfield in Collier, or as ammunition against the view that pensions created by "judicial" act are not common law annuities, than to Dodderidge in Sprat. A close look at authorities in the manner of this note points up the hit-and-miss character of "legal research" in the 17th century (to which, even so, the appearance of the 16th century Abridgments was a considerable aid.) It is salutary to reflect on how difficult to obey stare decisis would have been if it had been the rule, and how its not being the rule permitted pretty casual use of the technology available.
(9) Y.B. 22 Edw. 4. 24. Cited by Coke in collateral support of the decision in Sprat.

The case certainly says in essence what Coke vouches it for. The complexities are not caught in a summary statement, however, and the case is a good illustration of the problems of jurisdictional law as they were seen in the Year Book period.

Defendant in Trespass, a parson, pleaded a prescriptive title to tithes of "underwood" in his appropriated parish. He alleged that the wood in question was severed (=his chattel property) when plaintiff, the vicar, came and claimed it as his tithes. Defendant took the wood, as he was entitled to, and therefore was not liable in Trespass for taking plaintiff's wood.

Plaintiff's first objection to this plea was the technical one that defendant failed to give color to plaintiff's claim because he did not say plaintiff ever had possession of the wood. (This means in effect that defendant should have pleaded "Not guilty". One was not supposed to plead specially unless one, so to speak, admitted the plausibility of the other side's claim. Normally, for A. to say that he did no wrong in taking chattels from B. because they belonged to A., A. ought to make it clear that he did take the goods out of B.'s possession. Otherwise, he would leave it implied that he did not do the act alleged to be a trespass at all, or that B.'s suit had no prima facie plausibility -- which "Not guilty" is the correct way to assert.) All the judges present agreed in overruling this objection. (In their opinion, plaintiff's coming and claiming the wood as his tithes gave him not only the property but the possession as well -- no further physical act was necessary to gain possession. By saying that plaintiff came and claimed as tithes, therefore, defendant did "give color" -- i.e., admitted plaintiff had possession to be rightfully infringed by himself.) All this is of course never-never-land pleading logic. Plaintiff had property and possession if the tithes belonged to him, and defendant committed no trespass if they belonged to him. The real issue, and the source of a jurisdictional problem, was to whom they belonged.

The Court reached the jurisdictional problem by a route that is itself significant. The parties did not raise it. Justice Choke asked defendant's counsel why they had not objected to the jurisdiction. Counsel said they thought they were barred by a technicality. (A rule that one could not plead to the jurisdiction after an imparlance.) Thereupon Justice Catesby said the Court was free to follow its discretion even though defendant had foreclosed himself, and that it ought not to entertain this case because the issue -- right of tithes between Parson and Vicar -- was an ecclesiastical one. For an important article of Prohibition law -- that there is
a public stake in keeping the lines of jurisdiction straight, which should prevail over the
mistakes and accidents by which litigants can sometimes cut themselves off from
complaining about jurisdiction -- this episode of judicial insistence that jurisdiction be
discussed may be counted an ancestor.

The jurisdictional question was then argued in some depth. Plaintiff's counsel found
several ways of maintaining that common law jurisdiction was appropriate despite the sense
in which the issue was "As between Parson and Vicar, which is entitled to these particular
tithes?" It was argued that if the issue in a suit in form like the present one were the bounds
of parishes, the common law would have jurisdiction. (I.e.: Parson A sues Parson B for
trespass, viz. taking A's chattels in the form of severed tithes due to him. B pleads that the
place where he took the produce is in his parish, not A's, and he took it as his own property,
viz. severed tithes.) In the days of developed Prohibition law, this example would hardly
carry weight as a model for disposing of the present case, because parish boundaries came to
be a well-recognized common law issue. Tithe suits properly brought in ecclesiastical courts
were prohibited because parish boundaries had come in question, and the common law was
regarded as the exclusive tribunal for trying them. Right of tithes between Parson and Vicar,
by contrast, was close to the leading example of an issue that ought, at the least, to be left to
the ecclesiastical court when it arose there. In the 15th century, it would seem, the two issues
did not have the look of polar opposites. In either case, cleric was contending with cleric
over "Whose tithes are these?", and that looked like an ecclesiastical question, whatever sub-
question -- bounds of parishes or some other -- it depended on. And yet, per counsel, which
was confirmed from the Bench, when the larger question came up in the bounds-of-parishes
form through the ordinary channel of an action of Trespass, the common law would dispose
of it. Why not when the larger question arose through the same channel in another form, as
in the instant case?

Next it was argued that the issue in this case was not right of tithes between Parson and
Vicar in the abstract, but whether plaintiff or defendant had a prescriptive title to the
particular tithes in dispute. Serjeant Townshend, making this point, hovers a bit between
implying that determination of prescriptive title is exclusively, or at least especially,
appropriate to the common law and the milder proposition that the issue, having arisen in a
common law suit and not being inappropriately to common law trial, should be disposed of
there. (His generalization of the milder version is that the common law should retain
jurisdiction "when the Court is lawfully seised, and lay people can as well have notice as the people of Holy Church, whether he and his predecessors have continued to have, etc. , there is good reason to try [it] here.") I.e., suitability to jury trial is the test, given that the case was properly in the common law court in the first place. Whether the parson or vicar has customarily taken a certain product as tithes is as open to neighborhood observation as anything else juries are asked to try. The issue depends neither on ecclesiastical expertise -- as, e.g., the terms or construction of an appropriation would -- nor on the observation of facts to which only clerics would normally have access.

This argument was answered from the Bar with the argument that though the case turned on prescriptive title, the prescription was spiritual and therefore triable only in an ecclesiastical court. Serjeant Tremaile, so arguing, does not take up the difference between ecclesiastical law and common law with respect to the time requisite to establish a prescriptive title. Rather, his argument goes as follows: Every prescription has a commencement. Every commencement is either temporal or spiritual. The prescriptive right to tithes in question in this case must have had a spiritual commencement. If the commencement is spiritual so is the continuance, and vice versa. Ergo everything about the prescription in this case is spiritual and exclusively appropriate to ecclesiastical evaluation.

This rather slickly formalistic argument is pregnant with deep problems about the theory of prescription and the coordination of two legal systems in both of which prescription figured prominently. The very notion that every prescription has a commencement presents problems on the common law side, where the immemorialness standard obtained, that do not arise on the ecclesiastical side. (The common law's problems are soluble by the theory that usage is ultimately evidence of a grant lost to memory, but that theory will not work for local customs sanctioned by time. The doctrine that such customs must be reasonable as well as immemorial was a problem-laden epicycle to cover that embarrassment. Applying it often led to argument as to whether usages in principle extending through infinite time could be imagined originating "reasonably" -- usually meaning as an arrangement to which all those affected might agree without coercion, in "reasonable" hope of advantage to themselves. There is a perfectly serious sense in which accounting for some prescriptive rights compelled invention of the social contract.) But let us not worry about the depths. Tremaile's meaning in application to the present situation is clear enough.
The reason why the prescriptive right to tithes in question in this case must have a spiritual commencement, as Tremaile's words show, is subtler than the bare conventional truth that tithes are "spiritual things." It is that the vicar or parson could only have a prescriptive right to the tithes if he commenced by claiming the wood as tithes. It is the claiming-as-tithes that is an inherently spiritual act, not the bare taking or receiving of the produce. The latter could conceivably generate, over sufficient time, a temporal right to the produce in the nature of a rent, but it would not be a right to tithes. Claiming-as-tithes is presumably inherently spiritual because it could only be colorably done by a spiritual man, or because the claim would not have been listened to by the parishioners -- who must after all have habitually paid the claimant if he has a prescriptive right -- unless it drew on the lore of churchmen, unless it made a case in terms of that "foreign" law or transactions within that "foreign" realm. The claim or case need not be ultimately correct or warranted, but whether it is manifestly a question for ecclesiastical courts.

Tremaile speaks abstractly and thereby suggests problems that go beyond the case at hand. (E.g., what if a clergyman prescribes to take as tithes a product that is not, or is not indisputably, tithable de jure? Must his prescription be supposed to start with the spiritual act of claiming-as-tithes? Or, because it goes "against common right", should it be taken, not as a pretense to have exceptional tithes, but a merely temporal interest resembling a rent?) For the purposes of the present case, however, there is a simple, and cogent, reason why the prescription must have had a "spiritual commencement." The contest was between Vicar and Parson. How could a prescriptive right in either of them to particular tithes be anything other than a basis for inferring the terms of original appropriation (which ex hypothesi must be "lost" or unamenable to direct proof, for otherwise there would be no need for prescription)? Commencement must have taken the form of the clergyman's claiming, rightly or wrongly, that the act of appropriation entitled him to the tithes in question. That must surely be a "spiritual act", referring as it does to official proceedings in the ecclesiastical sphere. (The only alternative is to imagine Vicar or Parson prescribing against the terms of the appropriation -- Vicar claiming to have taken what was assigned to Parson or vice versa. But that is inconceivable under the common law standard of prescription: Admission that an assignment was made and then Vicar started collecting what had been assigned to Parson would on its face say that the practice did not extend into immemorial time. On the ecclesiastical side, prescription against the appropriation is perfectly conceivable -- Vicar
could concede that wood tithes were retained by Parson at the time of appropriation, but that he had actually received those tithes for the last forty years, say. Whether this is a good reason, if true, to permit Vicar to go on taking them, however, is surely an ecclesiastical question.)

The next speaker, Justice Catesby, rejects Townshend's argument -- that common law jurisdiction is at least unobjectionable because the issue is a prescriptive title -- squarely on the ground that ecclesiastical standards of prescription differ from the common law's. He is quite emphatic about the "mischief" that would be done if the common law invalidated a title that would be upheld under ecclesiastical standards. Today the common law says that Vicar may not recover damages against Parson because Vicar has been taking tithes of wood long enough to be entitled; tomorrow Vicar can go into an ecclesiastical court and compel a parishioner to pay him wood tithes; he can probably also enjoin Parson from taking such tithes in the future, and for that matter to compensate him for wrongfully taking the ones that were the subject of the common law suit. This, Catesby clearly suggests, is an intolerable state of uncoordination between the two legal systems.

Chief Justice Brian agreed with Catesby (and the other judge present, Choke, who first brought up the matter of jurisdiction, says nothing to the contrary.) Brian's own words are addressed to distinguishing the bounds-of-parishes case, which he concedes, and annuity cases from the instant case. The bounds case, he says, does not "directly" put the right of tithes in question, because if the land where produce was taken as tithes is in Parish X, there is no question but that Parson of X is entitled to any tithes from that land as against Parson of Y. (The opposite of "directly" in Brian's language is "inclusively" -- determination of the bounds question includes determining the right of tithes, but there is no controvertible issue about the right of tithes from Blackacre, given the proposition that Blackacre is in Parish X. It does not necessarily follow that ecclesiastical courts must accept the proposition as true for their purposes -- e.g., are barred from deciding Blackacre is in Y when Parson of X sues the occupant of Blackacre for his tithes. It is an open question what Brian would say to that. "Barred" would mean compellable by Prohibition not to reopen the bounds issue, as ecclesiastical courts would certainly be in later times, when they were prohibitable from taking it up in the first instance.)

On annuities, Brian puts the two standard cases: (a) Writ of Annuity by churchman against churchman, where plaintiff claims by defendant's grant; (b) Same case, but plaintiff
claims the annuity by immemorial prescription. His point is that common law determination of those suits -- which he obviously thinks well-brought at common law -- avoids "direct" infringement of ecclesiastical territory. The annuity cases are like the bounds case and unlike the instant case, which is "directly" about who is entitled to tithes.

By later lights, the argument seems odd. When interests that meet the criteria for common law annuities are claimed, why should they not be sued for at common law? There may be similar interests that fail to meet those criteria for which an ecclesiastical remedy is available, provided of course that they run between churchmen. But surely there is no need to apologize for entertaining suits to recover common law annuities at common law, no need to suggest that to do so is somehow to take on what really belongs to ecclesiastical courts, though in so "indirect" a way that there is no harm in it. Brian's opinion shows that these are not his lights. "Is Churchman A entitled to a pension from Churchman B?" looks as inherently ecclesiastical to him as "Which of two clerics is entitled to such-and-such tithes?"

The reason must be that under the pre-Reformation regime "the people of Holy Church" had the aspect of foreign nationals. For all their inevitable involvement with secular law, affairs between them that could be of no concern one way or the other to laymen belonged to the Church in a deeper sense than when the Church's legal system had become just another jurisdiction under the Crown. The practical reality that Annuity would lie for some annual payments between churchmen had a flavor of anomaly and needed justification. Brian's way of justifying it seems a little tenuous, but perhaps the best way there is. The argument would seem to be that the questions "directly" responded to at common law -- "Is this a valid deed?", "Has A. paid B. £ 10 a year from time immemorial?" -- just happen to sweep up, as it were, questions of entitlement between clerics. If the answer is "No", nothing in the ecclesiastical sphere is altered -- the loser at common law may well have rights assertable in the ecclesiastical system, either on a different basis (such as less-than-immemorial prescription) or because the ecclesiastical court would evaluate the same claim differently. If the answer is "Yes" -- the tricky case -- , one must argue that ecclesiastical interests are no more affected than when the common law says Blackacre is in Parish X. In all probability, the ecclesiastical courts would have no reason not to accept the duly established temporal realities -- to let Parson of X recover tithes from Blackacre, to regard Churchman B as entitled to an annuity from Churchman A and enforce it themselves if so requested in the future. But who is to say that the Church cannot prevent its people from taking advantage of
their secular rights against each other -- at strongest enjoining them, like a court of equity, from doing so, at least declining to enforce those rights themselves? Later, Prohibitions would almost certainly be used to block non-recognition or frustration of common law determinations. As I say above, Parson of X would be protected in his right to tithes from any place determined at common law to be in Parish X, and more than that, would be assured common law determination of the boundaries if anyone challenged his view of them. Ecclesiastical suit for an annuity once recovered at common law would be prohibited so far as the Fitzherbert-S prat view prevailed (if that position does not extend farther and bar ecclesiastical suit when the pension has been unsuccessfully claimed as a common law annuity.) The most extreme case would be unlikely to occur, but I should be surprised to find any ecclesiastical attempt to prevent churchmen from suing for their pensions as common law annuities tolerated. I.e., I should expect Prohibition to be used to prevent spiritual sanctions from being visited on a cleric for so doing. It is of course speculative to wonder whether by Brian's lights these later results would be questionable, but his approach seems to me to invite the speculation.

Ironically, at the same time, Brian's opinion can be seen as in a way a medieval foothold for the anomalous choice-of-jurisdictions position in Fitzherbert and Sprat. Brian's view that churchmen's claims on churchmen essentially belong to ecclesiastical jurisdiction, so that temporal handling of them needs to be conceived as "indirect" to be permissible, provides a certain warrant for holding that if clerics prefer to sue in an ecclesiastical court they are free to, even though Annuity would lie. Practical considerations may be the main explanation for the rule, but the tenderness toward ecclesiastical jurisdiction it implies can be connected with the outlook of the Year Book period. When Tanfield in Collier and Dodderidge in Sprat opposed the rule, they were in a sense advocating an approach consistent with modern assumptions and would have been entitled to say that there were echoes of the old order in the other side's position. Whether Coke, citing 22 Edw., caught the possible implication in the only words actually about annuities in the Y.B. case is uncertain. One should not put such things past Coke, nor assume that the "modern approach" to inter-jurisdictional questions would necessarily have appealed to him at the cost of breaking with tradition.

The Y.B. case ends with a last effort by plaintiff's counsel to save the Court's jurisdiction. Serjeant Pigot asserts that when a vicar's endowment is augmented by composition-real and "part of that augmentation comes in debate" it would be tried at
common law. I think he must be visualizing a case like the present one -- Trespass ultimately turning on a Parson-Vicar controversy, except that Vicar expressly claims the tithe-produce in debate by such composition rather than by prescription. Pigot presumably means the Trespass case would be disposed of at common law, either on "Not guilty" pleaded or on a plea specifically denying the existence or the alleged terms of the composition-in-augmentation. It is not obvious why Pigot should think that case clear and therefore a model for the present one. As usual in the Year Books, it is hard to tell whether an assertion of this sort might be based on recollection of an actual case; at least there is no sign of that. On the reason alone, I suppose the concurrence of the patron in the composition could be said to make it a "temporal act" (which is very much in line with later law, including that on annuities in so far as it insists that a pension founded on a proper and directly provable composition-real is exclusively, or even optionally, amenable to writ of Annuity.)

Pigot's argument, however, is vigorously rebuffed by Justice Catesby (clearly with the agreement of the other judges, for the report ends with the notation "And then the Court was ousted of jurisdiction.") Catesby says in effect that an augmentation by composition is *par excellence* an ecclesiastical act, though of course it requires the assent of the patron (who, we should remember, is also the parson when the living is appropriated.) "For that to be defeated in this Court by matter of fact", he says, "scil, by verdict, can in no way be."

**F. Severed Tithes Converted to Chattels**

*Summary:* Numerous attempts were made to get Prohibitions by taking advantage of the rule that severance of predial tithes (separation of 1/10th of the crop from the rest in the field) converts the severed tithes into Parson's chattels, so that he may maintain an action of Trespass against anyone who takes or damages them. In the abstract, it might seem that the rule would provide a "paradigmatic" ground for Prohibition: If Parson is in a position to protect himself at common law after severance, what business has he resorting to the ecclesiastical court? Practical application of this idea presented difficulties, however, and the cases involving it yield a messy picture. The cases overwhelmingly imply that when Parson sues Parishioner in the ecclesiastical court merely for not paying his tithes, Parishioner may not have a Prohibition on the bare
surmise that he had severed the tithes, wherefore Parson was now in a position to sue
him in Trespass. The reason is that such a surmise amounts to no more than a claim that
Parishioner had paid his tithes, or satisfied the ecclesiastical duty he was sued for
failure to perform. It made no sense to say that ecclesiastical courts could not try that
question, or to transfer trial of "Were the tithes paid or not?" to the common law on
Parishioner's request. That would be, among other things, to differentiate that question
from analogous ones arising in ecclesiastical suits, such as "Was the legacy paid or
not?". In addition, assuming the undeniable legitimacy of ecclesiastical jurisdiction over
claims to tithes, Prohibition on bare surmise of severance would permit Parishioner to
defraud Parson of his ecclesiastical remedy by severing the tithes and quickly retaking them.
Some judges, however, seem to have been unsure even on these points, and they are not very
firmly articulated in the reports. If, on the other hand, an ecclesiastical suit was brought for
admittedly severed tithes, it would have been agreed that in principle Prohibition lay in most
cases. The principle could rarely be given effect, however, owing to the intervention of
statutes made at the time of the Reformation. Suffice it to say that the statutes gave
ecclesiastical courts a considerable measure of power to proceed against tithe-payers who
had severed but then prevented Parson from realising physical possession of his tithes (as by
severing nominally and hastily retaking or by cutting off Parson's access.) The cases contain
a good deal of exposition of this poorly drafted legislation. A clearly stated and agreed-on
interpretation of the statutes at their problematic points and a firm understanding of exactly
how they altered the common law does not emerge.

* * *

1. Introductory

It was a firm rule of the common law that "severance" of tithes makes them the property
of Parson (or Vicar where the living was appropriated and the particular tithes in question
were part of Vicar's endowment.) Another formulation would be that the act of "severing"
was the act of paying. With reference to the most important class of tithes -- hay, grain, and
similar crops -- to "sever" was to set out 1/10th visibly apart from the other 9/10ths in the
field where the crop grew. (What constituted the act of payment in the case of products not
harvested all at once annually and easily divisible then and there was necessarily more
problematic.)
Some consequences of this rule are obvious: The tithe-payer, once he had done his duty by severing the tithes, was not the tithe-recipient's insurer against mishap. If the weather or an extraordinary act of God should destroy or damage the produce before Parson could or did carry it off, it was Parson's bad luck. If the tithes were taken or tortiously damaged by a stranger, Parson could bring an action of Trespass against the taker or tortfeasor. The tithe-payer had no liability for Parson's loss and no rights against the stranger as if his goods had been taken, for the goods were no longer his.

Questions will begin to arise with the next steps in the logic. It seems clear that if the severed tithes are taken or damaged by the same person who severed them, Trespass will lie against him as well as against a stranger. For torts by A. against B.'s property are such whether the property was only just transferred from A. to B. or not. But is it so clear that Parishioner has paid his tithes if he retakes what he has severed? Perhaps one would be inclined to say, "Yes, he has paid, has satisfied his tithe-paying duty, whatever liabilities his subsequent behavior has brought upon him", were it not for the obvious possibility of fraud. (Parishioner makes the required severance, but almost instantly carries off Parson's share. Or, assuming that Parson is responsible for keeping abreast of the harvest and Parishioner has no duty to give him notice when his tithes are ready, suppose that Parishioner "practises" to take advantage of Parson's ignorance -- severs and quickly retakes when Parson is known to be briefly absent from the parish or occupied in carrying off other people's tithes. Or Parishioner deliberately misinforms Parson. Or he shuts off the usual access-way to the field, so that Parson cannot promptly collect the duly severed tithes sitting in the field.)

Fraud would not be a problem, however, were it not for the larger problem of coordinating ecclesiastical and common law jurisdictions. In one sense, fraudulent behavior would do Parishioner no good. He is liable at common law if he retakes the tithes (=takes Parson's property), and it would not be surprising to find bad faith rewarded with punitive damages in common law litigation. In another sense, the fraud would be harmful, for its effect is to deprive Parson of the tribunal of his choice and ecclesiastical courts of their normal function of enforcing payment of tithes. I.e., if the ecclesiastical court must treat the tithe as paid once severance is shown, however nominal or guileful the act of severance was, Parson is driven to the common law. However adequately he is protected there, he is almost certainly driven to trouble and expense greater than that of an ecclesiastical suit, and he incurs such risk as there is of anti-clerical juries. So -- Is there room for any exception from
The Writ of Prohibition: Jurisdiction in Early Modern English Law

the principle that severed tithes are Parson's chattels and as such within the exclusive protection of the common law?

This is necessarily a question of Prohibition law. It admits of several forms: (a) Suppose Parson simply sues Parishioner in an ecclesiastical court for unpaid tithes. Parishioner seeks a Prohibition by surmising that he severed the tithes and retook them himself, wherefore Parson should be suing him in Trespass. Merely surmising severance is probably an unsound basis for Prohibition, because the surmise says in essence "I paid my tithes", which seems par excellence to raise an ecclesiastical issue. Can the additional language -- as it were, "I 'paid', but only in the sense that I went through the motions of severing and retook" - - arguably be regarded as surpluse? (b) Being sued for tithes simpliciter, Parishioner surmises that he alleged severance and retaking in the ecclesiastical court, but his plea was disallowed. I.e., his complaint is that the ecclesiastical court improperly refused to treat severance-and-retaking as satisfaction of his tithe-paying duty, (c) Parson suing in the ecclesiastical court admits on the face of his libel that Parishioner severed, but claims he retook. (Variations: The libel specifies the character of the retaking in a sense unfavorable to Parishioner -- his behavior was designedly fraudulent; the retaking was at least suspiciously hasty; whether or not with deliberate intent to keep Parson from removing his tithes, Parishioner obstructed the usual or best access-way, and being thus at fault himself retook the tithes when they were not promptly fetched.) In the third procedural situation, the case for Prohibition seems strong, indeed "paradigmatic." On his own showing, and as evidenced by the libel (a copy of which in a tithe suit must be appended to the surmise -- see Vol. I of the study for this requirement), Parson has sued in an ecclesiastical court for the secular wrong of taking chattels, where an action of Trespass is available to him. In the second procedural situation, the same basic argument for Prohibition can be made, subject to problems inherent in disallowance surmises. I.e.: Plaintiff-in-Prohibition surmises that on the facts as they are ecclesiastical plaintiff could have had an action of Trespass, and that the ecclesiastical court has refused to deny itself jurisdiction on that account. Is it, however, apparent that the ecclesiastical court has so refused, or would refuse if the severance were already proved to its satisfaction? Should the surmise not say specifically that the severance was admitted by Parson in his ecclesiastical pleading or that the ecclesiastical court had ruled in terms that severance-and-retaking does not constitute payment? Without such specific allegation, does the second procedural situation not reduce to the first? It seems,
then, that the only occasion for taking advantage of the undoubted rule that severance converts tithes to chattels would probably be the one unlikely to occur: when Parson complains in terms about a retaking. For if well-advised, Parson should complain of non-payment simply, making it difficult, though perhaps not impossible under all circumstances, for Parishioner to pursue a Prohibition.

Statute arguably cut off the possibility of Prohibition in the residual situation -- where retaking after severance is expressly complained of in the ecclesiastical court or is otherwise before the common law court as an established fact. I.e., Reformation legislation may have conferred jurisdiction on ecclesiastical courts in some or all severance-and-retaking cases. "Arguably" and "may have" are necessary expressions, because the language of the statutes hardly indicates an unmistakable Parliamentary intent. Three connected statutes, all basically addressed to making it clear that lay impropiators could and should sue in ecclesiastical courts for the tithes they were entitled to, are mentioned in the cases: 27 Hen. 8, c. 20; 32 Hen. 8, c. 7; 2/3 Edw. 6, c. 13. It is very hard to see how the first two of these statutes could be thought to alter the common law with respect to retaken tithes. 32 Hen. 8 goes slightly beyond declaring the duty to pay tithes (and then providing that they may be sued for in ecclesiastical courts whatever the status of the entitled tithe-recipient), for it says that payers must "fully, truly, and effectually divide, set out, yield, or pay" the tithes. The adverbs may provide a slim basis for arguing that at least some instances of severance followed by retaking should be construed as falling short of "full, true, and effectual" payment -- notably where there is expressly alleged fraudulent intent or the retaking is so immediate as to imply such intent, or at least to permit the inference that there was no distinct and completed act of severing. 2/3 Edw. 6 supplies rather more ammunition of the same sort. The language in this statute essentially saying that those who owe tithes should pay them expresses this as a duty "truly and justly, without Fraud or Guile" to "divide, set out, yield and pay", and it provides that no person shall carry away tithe produce "before ha hath justly divided or set forth for the Tithe thereof the Tenth part." The words I have italicized provide some ground for arguing that a nominal or dishonestly intended severance, while presumably effective to convert the produce into Parson's chattels, is not a fulfillment of the duty the ecclesiastical courts are authorized by the statute to enforce and hence no basis for Prohibition. Sect. II of the act authorizes double damages (i.e., twice the value of the tithes) if any person "carry away his Corn or Hay or his other predial Tithes, before the tithe thereof be set forth; or
willingly withdraw his Tithes of the same or of such other things whereof predial tithes ought to he paid; or do stop or let the Parson...to view or carry away [his tithes]; by Reason whereof the said Tithe or Tenth is lost, impaired or hurt..." The "or willingly withdraw" clause seems to contrast with the preceding "carry away...before the tithe ...be set forth" -- thus to contemplate carrying away after a setting forth, which accords with the ordinary use of "withdraw." But bringing the latter form of misconduct within the double damages provision seems indecisive as to the power of ecclesiastical courts to proceed with open eyes against one who severs and retakes, as well as against one who fails to sever. One could reasonably argue that Parson's remedy against a retaker is Trespass and that the statute directs the common law court to award double damages to the successful plaintiff. It in fact says that the double damages are due if the offense is duly proved "before the Spiritual Judge or any other Judge to whom heretofore he might have made complaint." Sect. II does clearly bring within the concept of not paying one's tithes -- and hence within the power of ecclesiastical courts to proceed as for non-payment and to award double damages -- the act of denying Parson access to the place where the tithes are grown, provided the denial results in loss or "hurt" or "impairment" of the tithes (vs. mere delay or inconvenience in carrying them away, presumably.) The best argument for relaxation of the common law effect of severing tithes probably derives from this provision. The statute makes it a good cause of action in the ecclesiastical court to come and say one has been denied access and so has not received one's tithes (or not received them in as good condition as they would have been in if Parishioner had not kept them from being fetched.) It is logically possible to hold that a suit on such a claim, though good prima facie, should be prohibited on surmise that the tithes in question were severed. But that is an odd intent to attribute to Parliament. If, pursuant to the Prohibition, it were found that the tithes were indeed severed, what would Parson's remedy be? He does not obviously have an action for taking his chattels, for Parishioner did not necessarily retake the tithes. Of course that is probably what he would have done, but for all we know "on the record", he may have left the severed tithes to rot. Possibly it would be a common law wrong (remediable by Action on the Case?) for A. to keep Parson away from his chattels lying in A.'s field until they perished or were taken by a stranger. I.e., the tithe-payer's usual non-liability as an insurer does not apply when his wrongful act is the cause of the loss. But is that the law? In any event, the action would only be for single damages. The statute could be taken to authorize a common law action for double damages specific to the
Preventing Direct Encroachment on the Common Law:
The Paradigmatic Prohibition

case where Parson's tithes, now in the form of chattels, have been lost to him without an act of retaking, at least so far as Parson knows. But no such action is given expressly, and the whole emphasis of the statute is on reinforcing ecclesiastical jurisdiction. It is therefore unlikely that Parliament intended for suits claiming loss or "impairment" of tithes owing to denial of access to be prohibited. If, after the statute, severance is not fatal to ecclesiastical jurisdiction in one case, it is a small, though not an inevitable, step to conclude that the effect of the statute is to make it non-fatal henceforth in the remaining case as well -- the case of severance and retaking, at least when it is aggravated by apparent fraud or such haste in the retaking as to render the severance nominal.

Furthermore, and confusingly, the main body of 2/3 Edw. 6 (Sect. I) provides for the award of treble damages in some circumstances. The language is: "...no Person shall from henceforth take or carry away any such or like Tithes, which have been yielded or paid within the [last] forty years or of Right ought to have been paid...before he hath justly [my emphasis] divided or set forth for the Tithe thereof the tenth Part of the same, or otherwise agreed for the same Tithes with the Parson, Vicar, or other Owner, Proprietary, or Fermor of the same Tithes; under the Pain of Forfeiture of the treble value of the Tithes so taken or carried away." Whereas Sect. II unmistakably authorizes ecclesiastical courts to award double damages, it is not clear that Sect. I contemplates ecclesiastical courts at all (as opposed to common law suits for treble damages founded on the statute.) Whereas Sect. II refers in part to acts after severance, Sect. I can be read as referring only to taking away produce that ought to be rendered as tithes before it is severed. The word "justly" interferes with that, however. If at least egregious or fraudulent forms of severance and retaking can be construed as failure to sever at all, or to effect a "just" severance within the statute's intent, there is a basis for arguing that parishioners who have in a literal or nominal sense "severed" may be liable for the treble damages of Sect. I and not only the double damages of Sect. II. Coordination of the two sections gave the courts trouble.

All in all, there is a reasonable argument that the statutes, at any rate 2/3 Edw. 6, modified the law in several ways, though it can certainly be objected that the statute-makers gave no explicit attention to the maxim "severance converts tithes to chattels" and how problems predictably arising from that maxim were to be dealt with. More detailed problems concerning the statutes will appear in the cases.
2. The Cases

We may now turn to the cases in which attempts were made to get Prohibitions by invoking the principle that severed tithes are the recipient's chattels and as such protectable at common law. Gerrard's Case (1584)\(^\text{19}\) holds that a simple tithe suit cannot be Prohibited on surmise that Parishioner severed the tithes and a stranger carried them away. The stated reason is that Parishioner could plead the same matter in the ecclesiastical court. I.e., all he is really saying is that he paid his tithes, which raises an issue manifestly within ecclesiastical jurisdiction. The same reason would hold if the tithes had been retaken by the payer himself, as opposed to taken by a stranger. There is a practical difference, however: One might expect a retaker to get short shrift in the ecclesiastical court on the factual issue of severance, whereas Parishioner who had done his duty could not without gross impropriety be made to insure Parson against a stranger's intrusion. The "gross impropriety" would surely be controllable on disallowance surmise, but that procedure should just as surely be demanded. What I call "short shrift on the factual issue" -- a mere tendency on the ecclesiastical court's part to overlook evidence of severance when it appeared that the severance, if any, was quickly followed by a retaking -- is unlikely to be much disapproved by common law judges. That does not necessarily exclude Prohibition on explicit surmise that the ecclesiastical court has treated severance-and-retaking as no-severance, but again it seems that explicitness should be required, lest the plea of payment be turned into an issue triable at common law. I speak here without reference to the statutes, which may well remove any tincture of error from treating most cases of retaking as instances of non -- payment. The statutes clearly do not affect the circumstances of Gerrard itself. Nothing in them suggests shifting the risk of a stranger's intrusion from Parson to Parishioner.

Subsequent cases from the Elizabethan Queen's Bench reflect some uncertainty and division of opinion. An anonymous report from 1590\(^\text{20}\) has the Court saying that after severance there can never be an ecclesiastical suit because the tithes are converted to chattels and Trespass lies. A decision to grant Prohibition is not unmistakably reported, but the opinion points that way -- contrary to my suggestion that a mere surmise of severance should

\(^{19}\) 26 Eliz. Q.B. 4 Leonard, 7.
not be grounds for prohibiting a tithe suit. The surmise in the instant case appears to have done no more than assert the severance. The reported words of counsel arguing against Prohibition fail to state what seems the obvious point: that a surmise of severance amounts only to a claim of payment. Rather, counsel says that Prohibition should not lie because his client -- Parson -- had not "accepted" the severed tithes. That presumably means that Parson did not regard the severed produce as an honest 1/10th and therefore did not carry away what was severed. The implication would be that if he had carried away less than a full 1/10th, at any rate without protestation that he was accepting this as partial payment only, his suit for the residue should be prohibited. That is a separate point of some interest, and _quaere_ as to its correctness. The fact remains that counsel does not dispute the Court's apparent view that surmise of severance is grounds for Prohibition. It may, however, be significant that Parson _de facto_ conceded the severance -- i.e., claimed that he was entitled to sue for the tithes in full when he had refused to accept the admittedly severed produce as an honest 1/10th. The report unfortunately does not give enough procedural detail to make it clear whether this concession was in some way "on the record." In principle, at least, there is a distinction between seeking a Prohibition simply by saying "The tithes were severed" (="I have paid my tithes") and seeking one on the ground that Parson is suing for tithes which he admits to have been severed -- here in the special sense of "partially paid but refused because Parson is entitled to hold out for full payment." (Whether he is in fact so entitled makes a separate question.)

The Court's opinion in this case adds a feature to the statement of the basic rules about the effects of severance. _Per_ the Court, if the party severs his tithes _and gives the parson notice_, Parson is henceforth barred from ecclesiastical suit. I do not specify a notice requirement in my own statement of the rules above because I have not found it consistently said to be part of the law. This case supports an active duty on Parishioner's part to give notice (and leaves the question whether Parson may sue for his tithes when the duty has not been performed even though he was aware of the severance from his own knowledge.) For all that appears from other discussions, it was Parson's responsibility to inform himself. Justice Fenner in this case cited _Articuli cleri_ (9 Edw. 2., c. 1) for the proposition that

---

20 Anon. M. 32/33 Eliz. Q.B. Add. 25,200, f.25.
The Writ of Prohibition:  
Jurisdiction in Early Modern English Law

severance converts tithes to chattels. The citation is dubious, however, for the chapter referred to is about the effect of a sale of tithes (a cleric who has sold his tithes may not sue for the purchase price in an ecclesiastical court because the sale converts the tithes to chattels), rather than about the effect of severance. Modern statutes are not mentioned in this case.

A brief note on Leigh v. Wood (1597)\(^{21}\) reports agreement on two propositions in an otherwise undescribed Prohibition case: (a) If tithes are set out and a stranger takes them, there will be no suit in the ecclesiastical court. Construed in one sense, this states the indisputable: Parson has no ecclesiastical claim against the stranger, but must pursue him in Trespass. Construed another way, it contradicts Gerrard above and is disputable: Prohibition lies on surmise that Parishioner is being sued for tithes when he has severed, at any rate if the surmise says that Parson's failure to realize his tithes is owing to a stranger's intrusion. Granting the correctness of this, it remains arguable that Prohibition should not lie on a surmise of severance without any explanation, or without an admission that Parson's suit is colorable because the tithes never reached his hands. A further step would be to argue that an admission of Parishioner's wrong -- i.e. a retaking by him -- does not count; Parishioner may not take advantage of his own tort to frustrate Parson's ecclesiastical suit, even though he is not in all circumstances confined to pleading payment in the ecclesiastical court, at least in the first instance. This is a possible route to the next point below. (b) An ecclesiastical suit is appropriate if Parishioner has not set out his tithes (obviously) or if he sets them out and takes them back himself. It does not appear from this report whether the important (italicized) point was reached with the help of the statutes or not. As I have already suggested, I do not think it absolutely requires the statutes. (Cf. just above and under Gerrard.)

A case of 1598\(^{22}\) is better evidence than the last two reports, and what it principally shows is a serious split in the Queen's Bench. Here the surmise alleged severance and went on to say that Parishioner detained what he had severed for reasonable cause (but the cause was not specified.) In effect, plaintiff-in-Prohibition said that he converted the tithes into

\(^{21}\) M. 39/40 Eliz. Q.B. Moore, 912.

\(^{22}\) Anon. P. 40 Eliz. Q.B. Croke Eliz., 607.
Parson's chattels and lawfully took those chattels, as he might have done with other property belonging to Parson that happened to be in his physical control (presumably by way of satisfying a debt.) Parishioner did not rely on a bare surmise of severance, amounting to a claim of payment. The case is therefore indirect evidence that such a surmise by itself would not have been even arguable grounds for Prohibition. Rather, the surmise is analogous to alleging severance and taking by a stranger -- admission that Parson did not gain physical possession of the tithes accompanied by a purportedly reasonable explanation of why he failed to. ("Purportedly reasonable" in contrast to a confession that Parishioner simply retook the severed produce without right. It may have been ill-advised for Parishioner in this case to omit specifying by what right the produce was detained after conversion to chattels -- an omission in the surmise which the reporter found interesting enough to note explicitly. Plaintiff-in-Prohibition's theory was presumably that specification was unnecessary -- that it was enough to make the ecclesiastical suit colorable by admitting that Parson never realized his tithes and to claim generally that the retaking was not fraudulent or arbitrary.) The case proceeded to formal pleading and was argued on demurrer to the surmise/declaration.

Justices Fenner and Clench favored upholding the Prohibition on the ground that severance converted the produce to Parson's chattels, so that actions of both Trespass and Detinue were available to Parson if he wanted to complain about Parishioner's detainer of the goods. Justice Gawdy and Chief Justice Popham took the opposite view. They held that although Parson could sue at common law, an ecclesiastical suit was also appropriate because the taker of the severed tithes was the severer himself. They said expressly that Parson's only remedy would be at common law if a stranger had taken the produce (leaving the ambiguity discussed under the last report above -- Do they mean only that the stranger could not he sued in an ecclesiastical court, or that a suit against Parishioner would be prohibited on surmise that the tithes were severed and taken by a stranger, without a claim that plaintiff-in-Prohibition was prevented from taking advantage of the facts in his favor in the ecclesiastical court? Probably the latter.) Gawdy and Popham relied on statute, specifically on 32 Hen. 8 rather than 2/3 Edw. 6. (32 Hen. 8 commands all persons owing tithes to "divide, set out, yield or pay" them and proceeds to say that anyone who "detains or-withholds" the same may be sued in an ecclesiastical court. Gawdy and Popham interpreted "detains or-withholds" as referring to acts after severance as well as mere failure to sever -- reasonably enough perhaps, but as I have suggested, the policy of the statute with respect to
The events after severance is less clear.) The judges on neither side go into niceties. Fenner and Clench were clearly not bothered by the generality of plaintiff—in—Prohibition's claim that he retook the tithes with justification. Gawdy and Popham were unmoved by his claiming a justification, albeit generally. The latter argue for their position by pointing out the danger of fraud if Parishioner by "secretly" severing can cut off Parson's ecclesiastical remedy. They make nothing of the present Parishioner's denial of fraud in his surmise by claiming a just retention of Parson's property. The report ends in an adjournment. If the deadlock was not broken, the demurrer would not be upheld and the Prohibition would stand.

The two reports of Brooke v. Parson of D. (1600) differ in small ways. I shall go by the MS. and indicate the differences in Noy at the end -- only one is of possible significance. Brooke agreed with the Parson to pay a sum of money in lieu of tithes. Despite the agreement, Parson came at harvest time and took 1/10th of Brooke's hay. Brooke stopped him while he was hauling off the hay and took it out of his possession. Parson then sued Brooke in the ecclesiastical court on 2/3 Edw. 6. i.e. he sued for multiple damages, but his resting his ecclesiastical suit on the statute may also have been meant to clear it of any substantive doubt. Justices Gawdy and Fenner, alone in court, both favored. Prohibition and apparently granted one without participation by the other judges. The only indication of their thinking is Fenner's general invocation of the rule that severance converts tithes to chattels. (The possibly material way in which Noy's report differs is that it says that despite the commutation agreement "...the due tithes were sever’d, and exposed, and the parson takes them and carries them may..." i.e., Noy has Parishioner rather unaccountably severing the tithes even though he thought he had no duty to do so, whereas the MS. suggests that Parson simply helped himself to what looked like 1/10th of the undifferentiated crop. Noy's version makes Fenner's invocation of the conversion-to-chattels maxim in the MS. more plausible. The other scenario requires a different rule -- not an unreasonable rule, but one that cannot he considered law with equal assurance: If Parishioner fails to sever, but Parson acquires physical possession of as much produce as ought in normal circumstances to have been severed, the produce is Parson's secular property. Quaere. For the rest, the MS. is the better

23 M. 42/43 Eliz. Q.B. Add. 25,203, f.387b; Noy, 40 (undated, sub. nom. Brooks' Case.)
Preventing Direct Encroachment on the Common Law:  
The Paradigmatic Prohibition

report. Noy does not specify that Parson's ecclesiastical suit relied on 2/3 Edw. 6. It has Prohibition granted without indicating that this was the act of only two judges and without a hint of the reasoning.)

The reports of Brooke are spare, but the issues are interesting- Let us assume that one way or another the tithe-produce in Parson's hands was his secular property, protectable against any taker, payer included, by action of Trespass. Is there any argument for denying Prohibition on the facts of this case? It seems to me there are two possibilities,

(a) Brooke, one might argue, is in the same position as any Parishioner who severs and retakes. It does not matter that he took Parson's chattels out of his physical possession, as opposed to taking them before physical possession was gained. But ecclesiastical jurisdiction is not destroyed when the payer himself retakes, at any rate not since the statutes. Ergo Parson's ecclesiastical claim against Brooke is not destroyed.

Judging by the last case above, Justice Gawdy, though not Fenner, subscribed to the proposition that an ecclesiastical suit is appropriate against a retaker. How then might Gawdy distinguish the instant case? In one way, retaking out of Parson's physical possession seems a worse wrong or a more blatant trespass than retaking before physical possession is gained. On the other hand, it is a more unmistakable taking, more like any other trespass (justified or not.) It is not construable as non-payment in effect, as a guileful way of paying which, though in strictness of law it perhaps is paying, is really a ruse to avoid payment and at the same time to debar parson from his normal ecclesiastical remedy. If we take the statutes as the basis, or at least the sure basis, for keeping the ecclesiastical remedy alive beyond the birth of the secular remedy, it is reasonable to construe the statutes as extending, at most, only to retakings prior to the produce's passing out of Parishioner's physical control (retakings which in the nature of things, even if innocent or justified, must follow on severance fairly promptly.) After all, Parliament cannot have intended to keep the ecclesiastical remedy alive forever.

(b) The second possible argument against Prohibition takes into account the circumstance that Parson allegedly acted against his agreement. That may seem hardly to cut in his favor, but in a curious way it perhaps does. If instead of taking the produce as tithes, Parson had sued for it notwithstanding his agreement, the ecclesiastical court would not by the normal rule be prohibited. Parishioner could plead his bargain in the ecclesiastical court, but if that court refused to recognize its validity, or to believe evidence of its reality, and
ordered payment of the tithes in kind, Parishioner would be driven to his common law suit for breach of contract. If Parson had successfully made off with the produce in violation of his agreement, Parishioner again would have no recourse except a contract suit. Having been lucky or vigorous enough to get the goods back in his possession by self-help, Parishioner is better off than he would be under the alternative scenarios. Parson can sue him in Trespass, but his chance of success would not be good. (Parishioner could perhaps not justify the taking by a special plea, but the chance of his being acquitted on the general issue would probably be good when the jury saw that Parishioner was only helping himself to what his deal entitled him to.) One might, I think, have some doubt about leaving Parishioner sitting prettier than if events had been slightly different -- in effect, Parishioner would have enforced specifically, with a touch of violence, a kind of contract that could not normally be so enforced. Keeping the ecclesiastical remedy open, as if this were a case of simple severance-and-retaking, would be a way of preserving consistency in the principle that tithe-payers who make commutation bargains can only expect contract damages if Parson chooses to disregard the agreement. There is no sign, however, that this line of argument occurred to the judges, and it should perhaps not prevail over the point that the instant case was not one of simple severance-and-retaking.

Webb v. Petts, 24 undated but from the same Court as the cases above, reiterates the rule that Prohibition will lie on surmise that the tithes were severed but taken by a stranger before Parson gained physical possession. The report is explicit to that effect. I.e., the meaning is clearly that Parishioner may not be sued in an ecclesiastical court and is not driven to plead the severance there before seeking Prohibition. Gerrard is more clearly overruled than in earlier cases that suggest the same propensity to overrule it.

The last major case from the Elizabethan Queen's Bench, Heale v. Spratt (1602), 25 is reported by Coke, but better reported in a MS., which I shall principally use. Chief Justice Popham, now in his last days, did not participate. Division among the puisne justices still

---

24 Noy, 44. Approximate dating based on mention of Chief Justice Popham and Justices Fenner and Yelverton by name. See Part I for their differences over a procedural point.

25 T.44 Eliz. Q.B. Add. 25,203, f.505b; 13 Coke's Reports, 23 (Sprat v. Heal.)
appears, but in the rather complicated circumstances of the case they agreed to uphold a
Prohibition on motion for Consultation.

Spratt sued Heale in the ecclesiastical court for non-payment of tithes in the sense of not
severing. I.e., the libel was explicit that there was no severance. Heale pleaded that he had
severed -- i.e., in common law parlance, traversed plaintiff's claim. Ecclesiastical procedure,
however, did not require the pleading to stop there with issue joined. Plaintiff was allowed to
make a further plea, wherein, without conceding that the tithes were severed, he alleged that
Heale had carried off the tithes after the "pretensed" severance. I.e., in its final form,
plaintiff's pleading was in effect "He did not sever, but if he did, he himself carried off the
severed produce." That is of course bad pleading by common law standards, but not so in the
ecclesiastical system. The context is a good one for noting the realism of the looser
ecclesiastical canons of pleading, for Parson who arrived and found no tithes waiting for him
in the field might be genuinely unsure which had occurred, no severance or nominal
severance and hasty retaking. On this pleading, the ecclesiastical court proceeded to give
sentence for treble damages against Heale.

Heale now obtained a Prohibition on a surmise with two elements: (a) He stated as a fact
that he severed and concluded that the tithes were lay chattels which should be sued for at
common law. (b) He alleged that 2/3 Edw. 6 gave only double, not treble, damages. The
theory of this surmise is rather hard to make out. The first element taken independently is a
dubious ground for Prohibition. We have not seen it ruled out, but have noted intimations in
the cases that some explanation of the tithes' disappearance needed to be surmised, as
opposed to the bare fact of severance/payment. As to the second element: It is not true that
2/3 Edw. 6 "does not give" treble damages. It "gives" both treble and double damages,
depending on circumstances. It possibly leaves some doubt as to whether ecclesiastical
courts are empowered to give treble damages or confined to double. The best reading of the
surmise is probably that it is directed essentially at the award of treble damages, with the
first element doing duty as a semi-independent ground. (We shall see that in the end the
Court upheld the Prohibition on a version of that "semi-independent ground", by-passing the
damage award as such.)

I would propose the following as a spelled out translation of the surmise as a whole: The
award of treble damages was clearly unlawful. The reason is that if 2/3 Edw. 6 authorizes
ecclesiastical courts to award, treble damages at all, it does so only when defendant is
The Writ of Prohibition:  
Jurisdiction in Early Modern English Law

convicted of evading his tithe-paying duty in the most extreme sense, viz. failing to sever (without the excuse of a commutation agreement or the like.) Lesser derelictions, such as denying Parson access to the severed tithes, are subject only to double damages. This case as finally pleaded must be construed as a case of "lesser dereliction", viz. retaking after severance. Therefore execution of the sentence should be prohibited (minimally quoad 1/3rd, but preferably simpliciter, because the ecclesiastical court violated its statute-based authority by misconceiving the nature of the claim before it. I.e., it was not free, as the pleading shaped the case, to proceed as if the complaint were of non-severance rather than severance-and-retaking.) Plaintiff-in-Prohibition reserves, however, the right to argue that the ecclesiastical suit was prohibitable before sentence -- if not when it was first brought, on bare surmise of severance, at least after severance was pleaded and the ecclesiastical court declined to try the issue raised thereby -- "Severed or not?" The underlying rule -- severance converts tithes to chattels -- must at least mean that when Parishioner pleads severance the ecclesiastical court is obliged to establish straightforwardly whether severance took place. If it did, defendant would be discharged with respect to the present litigation. Then, arguably, Parson's only recourse would be a common law suit if he believed someone -- present Parishioner included -- had taken what are now indisputably his chattels. (Having tried and failed to sue for non-severance of tithes, Parson has lost any option he may have had before, by statute or otherwise, to bring an ecclesiastical suit for the distinct offense of severance-and-retaking.) Even if he has not lost that option, Parson at least might prefer to proceed at common law against the taker or retaker of his chattels. From his point of view, the prospect of damages enforced by secular sanctions would be open to him (and as against a retaker statutory multiple damages at common law need not he ruled out.) If Parson took the common law option, the person charged with taking the chattels -- this Parishioner if he is to be accused of retaking -- would enjoy the temporal process he might prefer.

Consultation being moved for, Shirley argued first for defendant-in-Prohibition. He defended the award of treble damages on the ground that by the statute if Parishioner severs and immediately carries away what he has severed no legal severance has taken place. ["Immediately": The word in the MS. is "maintenant." The force is probably "immediately". I.e., Shirley was probably willing to concede that only some instances of severance-and-retaking amount to non-severance, viz. when the retaking is so immediate that the severance must be taken as nominal and fraudulent.] Spelled out, Shirley's theory is: (a) The statute
distinguishes mere non-payment, subject to treble damages, from "lesser derelictions" subject to double. (b) Ecclesiastical courts are empowered to award treble damages in the first case. (c) The statute counts at least the most flagrant cases of severance-and-retaking as non-severance. (d) The complaint in this case, as finally pleaded, was either flagrant severance-and-retaking or non-severance. Which one makes no difference. Treble damages were appropriate to either. Therefore there is no basis for objecting to the way the ecclesiastical court allowed the case to be framed.

Justices Gawdy and Yelverton agreed with Shirley. (I shall not pause to argue for and against the construction of 2/3 Edw. 6 they and he adopted. I have said enough to suggest that the drafting of the statute virtually required the courts to rewrite it along the lines they considered reasonable and in accord with its general intent. It is hard to find express language for distinguishing two kinds of severance-and-retaking, but common sense rather recommends it. I.e., it makes sense to regard extremely nominal severance, almost certainly done with fraudulent purpose, as non-severance; the statute gives ecclesiastical courts jurisdiction and power to award double damages for acts clearly less flagrant than merely not paying one's tithes -- e.g., obstructing access, an act which might have the same flavor as instantaneous retaking but need not.) Predictably in view of his earlier opinions, Justice Fenner disagreed with Shirley. Here again, Fenner did no more than reiterate the rule that severance converts to chattels and say generally that the statute was not intended to help Parson "in such case," The application of his opinion to the complicated circumstances of this case is not clear -- it need go no farther than support for the theory of the surmise which I reconstruct above.

Despite the 2-1 majority of those present, Consultation was not granted. (Unsurprisingly. I think reversal of a Prohibition on motion without a majority of the full Court would have been improper if not unlawful, even if Gawdy and Yelverton had been firmly convinced that Consultation was appropriate. The sequel shows they were not, despite their agreement with Shirley's argument as far as it went.) Rather, the Court proceeded to hear argument in favor of Consultation from Spratt's other lawyer, Tanfield.

The best way to expound the rest of the case will be to look to the outcome and return to Tanfield, for his argument was designed to head off the result that in the end came about. The essential point about the outcome is that although two of the judges agreed with Shirley, none of them thought his main contention cut in favor of Consultation, at least not clearly
enough to justify granting one on motion. As the Court came down, its opinion can be expressed as follows (with the qualification that the precise reasoning is that of Gawdy and Yelverton, but Fenner concurred in the result and with the crucial step in the argument):

Covinous severance with immediate retaking is equivalent to non-severance, as Shirley said. Therefore Parson's ecclesiastical claim as finally pleaded amounts to a claim of non-severance, (=Parson did not really change his claim when he added "but if the tithes were severed they were retaken." He complained of non-severance in two forms, having started out complaining of it in only one, but he was still complaining about the same thing.) The state of the case, then, is this: Ecclesiastical suit for non-severance; defendant comes and surmises (a) that he severed, (b) that he pleaded the severance in the ecclesiastical court, and (c) that the plea was disallowed. Surely this is sufficient basis for Prohibition.

Now, the surprising thing in this analysis is the statement that the plea was disallowed, or that the foundation of the Prohibition was in effect a disallowance surmise. The statement is express in the Court's opinion. [... quant le partye surmist icy queil avoit devide et sett oute les dismes et que il avoit pleade ceo en lespiritual Courts queux noil allowe le plea est reson de graunt prohibicion.] In describing the surmise, however, the report does not mention disallowance, and it is not evident from the facts (which were of course recited in the surmise) that the ecclesiastical court did disallow defendant's plea. It is possible that the surmise used the language of disallowance, and that this simply does not appear from the reporter's summary. But that does not solve the problem: What did the ecclesiastical court do that could be considered disallowance of a plea?

I think the answer must be: The ecclesiastical court did not allow defendant simply to deny non-severance and to have trial on the issue raised by the first head-on clash in the parties' pleading. This it was obliged to do and failed to. In a sense, it was bound by common law standards of pleading, not because that is a general rule, but in fairness to Parishioner in the exercise of powers which were, after all, statutory. Parishioner is sued for not severing his tithes; he is exposed, by statute, to heavy damages if he loses; he throws down the gauntlet and says he did sever; he is entitled to have the question he has raised answered -- to be discharged if he is telling the truth and to incur the liability he has risked if he is not. The ecclesiastical court's error was permitting Parson to go on pleading. It is true that his additional pleading was in a sense harmless, because he did no more than restate his complaint of non-severance in other terms. Parishioner might (I assume) lose on evidence
that he severed and immediately retook. (Justice Gawdy says in so many words that Parishioner would lose on stipulated evidence at common law if, pursuant to the Prohibition, issue were taken on whether he severed or not.) But this is irrelevant. The present point is a formal one: The ecclesiastical court as good as disallowed Parishioner's original plea because it did not treat it as the final step in the pleading process and move to trial. The formal grounds for Prohibition are sufficient, wherefore if defendant-in-Prohibition wants a Consultation he must plead to the Prohibition (as the Court expressly orders him to do at the end of the report.) I take it that he would retain the option to challenge the Prohibition legally, as well as to deny plaintiff-in-Prohibition's factual surmise that he severed the tithes. I.e., defendant-in-Prohibition might by demurrer to the declaration as the declaration turns out to be, or by some form of special pleading, controvert the proposition that the ecclesiastical court did in effect disallow Parishioner's original plea. But if he is to do that it must be in formal pleading. Defendant-in-Prohibition has not shaken plaintiff-in-Prohibition's prima facie claim to a Prohibition so as to merit Consultation on motion, which is the only question before the Court.

My analysis comes to saying that "disallowance" is used a little loosely by the Court. The ecclesiastical judge did not literally say, "You may not plead thus-and-so." Not giving defendant's plea its ordinary and straightforward legal effect (whether or not this would make any practical difference for the outcome of the ecclesiastical litigation) is, however, legitimately assimilable to simply keeping defendant from making a plea he is entitled to make. At the least, the assimilation is plausible enough to disrecommend Consultation on motion. Given classification of the case as based on disallowance surmise, Prohibition should surely lie. While it is hard to imagine literal disallowance of a plea saying only "I severed (= paid) my tithes", it is not impossible. An ecclesiastical court could conceivably take the position that some further allegation is necessary for a good defensive plea ("I severed and did not retake myself", "I severed and gave Parson notice", etc.) Prohibition should surely lie on surmise of a disallowance implying any such position. This is not because such imaginable positions are necessarily unreasonable or even incorrect by common law standards. (We have seen it said on one occasion that tithes are not converted to chattels until Parson has been given notice.) The reason is the maxim -- severance converts to chattels. For this entails that any question as to just when the conversion takes place --before or after Parson has notice, always or only if the severance is not nominal and
The Writ of Prohibition:  
Jurisdiction in Early Modern English Law

fraudulent, etc. -- is a common law question. If statute has in any way altered the common law, just how it has altered it is equally a common law question (by the usual, though theoretically controvertible, rule that the statutes mean what the *common law* judges say they mean.) One might say that the common law issue "When exactly does conversion to chattels occur?" preempts what in abstract theory should be considered an ecclesiastical question, "When has the duty to pay tithes been satisfied?"

Tanfield's argument for Consultation anticipates and attempts to meet the position that finally prevailed with the Court. The argument is that Parson's ecclesiastical claim in final form was both of non-severance and severance-with-retaking, whereas Parishioner's surmise (construed as "I severed -- I pleaded the severance -- I was disallowed") speaks only to the first claim. Therefore, Prohibition ought preferably to be denied altogether (it takes a double surmise to stop a suit based on a double libel), but if not altogether at least *quoad* the second claim. So to argue, Tanfield must produce a theory of the ecclesiastical proceedings, for which there is no good common law analogue. He does so by maintaining that the pleadings in the ecclesiastical court amount to revising the original libel. The premise of this contention is that a "double" claim of the sort in question (Parishioner did not sever, but if he did he retook) is in itself acceptable in ecclesiastical law. This granted, the next step is that if the libel had originally so said it would have had to be met by a "double" surmise. Next -- although the original libel was not "double", and although there was a process in the nature of pleading (defendant spoke, plaintiff spoke again and only at that point inserted his alternative claim), in the upshot the case was as if the libel had been "double" in the first place.

Before the Court announced, and Justice Gawdy elaborated, the general grounds for denying Consultation, which I reconstruct above, it answered Tanfield's formalism with its own counter-version: Parson's insertion of his alternative claim in the process of pleading does *not* count as revision of the original libel, so that the surmise is open to the objection that it responded "singly" to a "double" libel. Rather, "that which comes in later as an addition to the libel is only in the manner of a replication to the answer which the defendant made to the libel", and "the force and substance of the suit consists in the first libel" (which was "single" and therefore adequately met by a "single" surmise.) One should probably say that Tanfield had the better formal interpretation of the goings on in the ecclesiastical court, for it is not very convincing to call the addition of an alternative claim a "replication" in
Preventing Direct Encroachment on the Common Law:  
The Paradigmatic Prohibition

anything like the common law sense. Realistically, I suspect, the Court was unwilling to look very hard at reasons for putting the best face on ecclesiastical proceedings which from a common law point of view were bizarre in more ways than one, especially to the end of granting Consultation on motion.

Coke's report of this case is in general accord with the MS. I have used, but it does not render the close texture of the discussion. Without so much as saying the context was motion for Consultation and without making it clear in terms that the motion was denied, Coke gives two "resolutions" of the court: (a) Where there is fraudulent intent, severing-and-retaking does not count as severing within 2/3 Edw. 6. (b) Parson could not sue for treble damages in the ecclesiastical court. The first point was undoubtedly the Court's opinion. The second may have been, though Gawdy and Yelverton in response to Shirley seem not so to hold. It would serve as a separate reason for Prohibition post sentence for treble damages, but it was not central to the disposition of the case. Just what it means makes a question: The statute simply does not authorize the award of treble damages by ecclesiastical courts (but requires a common law suit based on the statute if treble damages are to be sought), or the statute confines treble damages to mere non-severance, as opposed to fraudulent severance-and-retaking whether claimed simpliciter or in the alternative?

Two further Queen's Bench are not reported independently, but cited by Coke in a Common Pleas report from 6 Jac.26 (a) Parson of Frettenden, 43 Eliz. This is briefly stated as a holding that severing "privately" and immediately taking back does not count as severing at all, because 2/3 Edw. 6 speaks of severing "truly" and "without fraud." (b) Baker's Case, 44 Eliz. Coke's one-sentence summary does not tell enough to permit much analysis of what looks like an interesting case. The summarized rule is: If the producer sells growing grain to X., then cuts the grain and severs the tenth part, then by X.'s command takes the severed grain, Parson may maintain an action "on the statute" against the producer and is not confined to suing the vendee, X. What would the legal construction be? Before or after the statute, Parson could maintain Trespass against X. for taking through his agent, the vendor-producer, what the severance makes Parson's property. Were there no statute, Parson

26 M. 6 Jac. C.P. Add. 25,215, f.68b. The citations in this report are very likely those given in Forde v. Pomroy (Note 29 below), which are dated 43 and 45 Eliz. and 1 Jac.
could not maintain Trespass against the producer, because he acted only as the agent for the owner of 9/10ths of the crop, who in taking the other 1/10th as well counts as a stranger-taker. Ecclesiastical suit against X. would clearly be ruled out. What if Parson brought an ecclesiastical suit against the producer? It should not be prohibited on mere surmise of severance, but should be on surmise explaining that the producer had divested himself of interest in the grain and acted only as a stranger's agent? The statute authorizes suit against the producer, presumably for double damages, as severer and retaker. Does that mean an ecclesiastical suit would resist Prohibition, or that a special common law suit on the statute is given, or both. Quaere generally.

Turning now to the Common Pleas: In the only Elizabethan case (1601) 27 division appears as to the extent to which the statute of 2/3 Edw. 6 changed the common law. Parishioner was sued for locking a gate so that Parson could not get at the severed tithes. A Prohibition was obtained on the ground that the severance turned the tithes into chattels for taking which Trespass would lie. There is nothing in this case to suggest that Parson's complaint was not straightforwardly and from the start of denial of access, admitting the severance. i.e., Prohibition was not granted to stop a simple tithe suit on mere surmise of severance, but to stop a suit which by Parson's own admission was redundant with Trespass. Almost without question (save for the possibility that some forms of "severance" patently designed to make sure that Parson has no chance of gaining physical possession do not count as severance even at common law), the Prohibition would be clear-cut in the absence of statutory intervention. The issue was whether the statute made a difference. That seems to have given the Court some trouble, for we are told that Consultation was granted only after several motions. Granted it was, however, 3-1. (The briefest of the reports adds the qualification that one would expect: Though the ecclesiastical court has jurisdiction to proceed as for unpaid tithes, Parson must take the tithes within a "reasonable" time or Parishioner is justified in stopping the gate or pasturing the land.)

27 T. 43 Eliz. C.P. Lansd. 1058, f.22b; Add. 25,202, f.22b (slightly briefer but substantially in agreement with Lansd. 1058, f. 22b; gives plaintiff's name as Blackwell); Lansd. 1058, f.4b (dated H.43, brief note clearly of the same case from an earlier term.)
Preventing Direct Encroachment on the Common Law:
The Paradigmatic Prohibition

The trouble may have come from reluctance to undo a Prohibition on motion, when at common law the Prohibition was almost certainly well-granted and the Court was not unanimous, rather than from particular doubt on the merits on the part of the majority (Chief Justice Anderson and Justices Walmesley and Warburton.) The best of the reports gives individual speeches by Anderson and Walmesley, the former of which reflects a slightly surprising way of thinking about the problem and therefore suggests that the Chief Justice may have had some difficulty reaching the conclusion that Prohibition would not lie post the statute. Walmesley takes the straightforward position that the statute gives the ecclesiastical court jurisdiction over the type of complaint in question (severance with exclusion -- though the case gives no occasion for refining the concept, perhaps severance with immediate exclusion arguing fraudulent purpose would be the correct description) and therefore, surely, over the "proof" as well. I.e., as Walmesley says, given the statute, there is no basis for contending that whether the gate was in fact locked should be tried at common law. Andersen, on the other hand, invokes the common (though indeterminately applicable) principle that jurisdiction over the "principal" carries jurisdiction over the "incidents." He puts the case of an ecclesiastical suit for a legacy of a horse where defendant-executor pleads that the testator gave him the horse by _inter vivos_ gift. _Per_ Anderson (soundly enough, I think, in that sort of case), the ecclesiastical court has jurisdiction to try whether the horse was in fact given to the executor, but will be prohibited if it disallows the gift (rules by implication that the legacy should prevail over the gift, and probably also if the ecclesiastical court purports to determine any controversy about the validity of the gift or proposes to insist on two witnesses to prove it.) Applied to the present case, the principle would seem to mean that since the ecclesiastical court has jurisdiction over the denial of access to tithes, it may, so to speak, step into common law territory and deal with a case involving chattels -- as its foothold in a legacy case enables it to "step into common law territory" and try whether A. during his life made a gift to B. That is true enough, but, one is tempted to say, a somewhat fancy way of coming to the result when, as Walmesley suggests, you need only say that the statute has made it possible to complain in the ecclesiastical court that tithes, even though severed, have in effect not been paid owing to denial of access. It looks as if Anderson was worried about the "step into common law territory", notwithstanding the statute, and needed to look for a parallel to justify what he perceived as anomalous.
This is to say that Anderson may have been somewhat drawn to the position of the
dissenter, Justice Kingsmill. Kingsmill sounds like Fenner in the Queen's Bench cases. He
says simply, "My brothers' opinion is against me, since after severance the parson will have
trespass, and they are as his own chattels." The applied meaning is a little puzzling, since it
is hard to deny that 2/3 Edw. 6 in some way enables ecclesiastical courts to proceed against,
so to speak, non-literal forms of not paying one's tithes, or ways of seeing that Parson does
not get them even if they are technically "paid" -- severance and retaking, blocking access.
The narrowest construction of the statute would be that ecclesiastical courts may entertain
only suits for mere non-payment, but may count as such some "non-literal" forms. I.e., they
may not be prohibited by surmising severance-and-retaking, or-and-denial-of-access (no
more than by surmising bare severance), or by claiming that the evidence showed severance-
and-retaking-or-denial. A suit founded on admission of severance, however, is not within the
statute. This is the position I am inclined to attribute to Kingsmill, and to suppose that
Anderson did not find clearly wrong.

After the three-judge majority came down for Consultation, Parishioner's counsel tried to
save his Prohibition by asserting that "they in the spiritual court will not allow our proof." The
Chief Justice replied: "This is matter not contained in your Prohibition. But admitting it,
yet inasmuch as the proof is given to them by the statute, if they will not allow the proof,
appeal lies to a superior court there, and not a Prohibition." Warburton and Walmesley
agreed. It would of course be irregular, though perhaps not always out of the question, to
reconsider granting Consultation on motion on the basis of new information now supplied by
plaintiff-in-Prohibition but not included in his surmise. It is not evident what disallowance of
proof would mean in such a case as this. If it were specifically alleged that Parishioner
claimed he did not lock the gate and that two witnesses were demanded to prove this
negative fact, the case for Prohibition would probably be strong. One would have a peculiar
form of two-witness-rule case -- insistence on two witnesses would not have a deleterious
collateral effect on common law interests (the strongest case for Prohibition to bar
application of the rule), but it would raise the question whether ecclesiastical courts are as
free to employ the rule when exercising statutory jurisdiction as when they are operating in
their own inherent sphere in ways that do not touch the common law sphere. Perhaps also an
allegation of proof-disallowance specific enough to imply abuse or legal mistake -- as if the
ecclesiastical court seemed to be holding Parishioner bound to do more than not obstruct
access deliberately, say to insure Parson against accidental or third-party impediments to his carrying off his tithes -- would sustain a Prohibition. On the other hand, a bare allegation that the ecclesiastical court overruled Parishioner's evidence, or thought he failed to prove that the gate was not locked, is surely no grounds for Prohibition. In short, on their premises, the majority judges were clearly right to say that any complaint about the ecclesiastical court's handling of Parishioner's proof should be made by ecclesiastical appeal. Kingsmill, dissenting on the main point, may have thought that a nominal disallowance surmise would support Prohibition, even conceding contrary to his opinion that Prohibition would not lie without one.

A final small touch in this case is Justice Walmesley's citation of a rule from 13 Edw. 3 that "chasing a tithe lamb" is spiritual. I am not sure exactly what situation this contemplates, but it has a tantalizing implication: that some forms of interference with the realization of tithes, as opposed to flatly "not paying" them, are within ecclesiastical cognizance even apart from modern statutes. Though he does not develop the idea, nor need to, I would suppose that that is what he meant to suggest -- that it is not totally clear that an ecclesiastical suit for, e.g., egregious forms of denial of access to paid or "chattelized" tithes, would be prohibitable even if the statute had not been made.

Starke v. Phillips (1605)\(^{28}\) in the upshot yields no more for the purposes of this topic than a holding that Prohibition will not lie on mere surmise of severance. The chief point of interest is the use of two Year Book cases to assert that severance does not by itself convert tithes to chattels, but only sale of the produce. Out of context, that is a misleading way of stating what the Year Book cases (30 Edw. 3., 5; and 38 Edw. 3, 6) say, but they are perfectly relevant in the special circumstances of \textit{Starke}.

In the principal case, Prohibition was sought to stop an ecclesiastical suit on two grounds: (a) The suit was between adjoining parsons and the issue was to which parish the tithes in question belonged; (b) The tithes were severed. Counsel opposing Prohibition cited the Year Book cases \textit{quoad} the second ground. The Court "clearly held accordingly" that Prohibition should not be granted for that reason, though it proceeded to grant a writ on the first ground (because parish boundaries were put in question, Justice Warburton expressing

\(^{28}\) M. 3 Jac. C.P. Add. 25,205, f.40.
doubt as to whether Prohibition was appropriate without an allegation that the parties were actually at issue on the parish bounds in the ecclesiastical court.)

There is no need to discuss all features of the rather complex Year Book cases. Both were actions of Trespass between clerics in which the right to the tithes being sued for as chattels was controverted. The question was whether the common law court should refuse jurisdiction because the issue — right of tithes between clerics — was appropriate to an ecclesiastical court. In one case jurisdiction was refused definitively, and in the other there is at least judicial opinion that way. Whether a common law court in the post-Reformation period would literally follow this precedent — deny itself jurisdiction in an action of Trespass already launched for chattels in the form of admittedly severed tithes — I do not know. It is a virtual certainty that it would not in one right-of-tithes situation, which one of the Year Book cases represents — viz. where the right depends on the bounds of parishes. But at least for the purposes of a Prohibition case (abstracting from the fact that Starke itself was disposable under modern law as a bounds-of-parishes situation), the precedents have some force. They say that the bare fact of severance, and consequent availability of Trespass as a rule, is not always reason for excluding ecclesiastical courts. The trouble with making much of these 14th century cases in the 17th is that the bare fact of severance was in practice never grounds for prohibiting ecclesiastical suits. In so far as uncertainty about this practice survived, the Year Book cases were reason to have no doubt about denying Prohibition on bare surmise of severance in the specific circumstances of Starke. Those cases do not deny the rule that severance converts to chattels or claim that conversion takes place only if the produce is sold. They assume the rule, but argue that in some intra-Church cases ecclesiastical jurisdiction over the underlying issue preempts the common law jurisdiction that is normally the consequence of the rule. Sale is relevant only in the sense that if the litigation were not between Parson A and Parson B but between one of them and the other’s lay vendee common law jurisdiction would presumably be clear.

A case of 1608 (when Coke was Chief Justice), again, comes in the upshot only to a grant of Consultation where the Prohibition was awarded for no further reason than that Parishioner said he had severed his tithes. Like Chief Justice Anderson above, the Court

---

used the language of "principal and incident" to express a point that seems too obvious to require the language: "...the payment is accessory to the principal plea"; if one is sued for a legacy one may plead that the legacy was paid or released, and the ecclesiastical court may determine whether it was, and likewise when one is sued for tithes; tithe suits are prohibitable on surmise of a *modus*, because (*per* this Court) a *modus* is not an allowable plea in the ecclesiastical court (but -- obviously, I should say -- payment is an allowable plea); tithe suits are prohibitable when the bounds of parishes are in question, "because that will prejudice the inheritance of various men" (but obviously a determination that A. has or has not paid his tithes will affect no one's interest but the parties'.)

Like Starke v. Phillips, this case testifies to the persistence of the idea that Prohibition would lie on bare surmise of severance even though the idea enjoyed no success. The present report gives a couple of hints as to why. In the first place, it tells us that plaintiff-in-Prohibition surmised that he had paid "according to" the statute of Edw. 6 There may have been speculation that the statute gave the tithe-payer some rights he would not have had before, as well as the tithe-recipient. I.e., although without the statute it would not make much sense to keep ecclesiastical courts from determining whether duties enforceable there had been satisfied (assuming the definition of the duty to be either acceptable to or beyond the scrutiny of common law courts), one might argue that an express claim to have satisfied a duty now declared and insisted on by statute should be determined at common law. I do not think this is a good argument; it is at odds with the general purpose of the statute to insure and even mildly expand ecclesiastical jurisdiction; but it may have helped keep hope of getting Prohibitions on mere surmise of severance alive.

More significantly, the report tells us that one judge, Foster, had doubts about the decision (though it is not clear that he finally dissented.) The words in the MS. that express his doubts are: "car il dit que lour ley ne voile adjudge que les dismes sont bien settout si ne mitt pur le Parson & avoyer cee." This is not perfectly lucid, but I think the translation would be: "for he said that their law will not adjudge that the tithes are well set out unless [Parishioner] sends for the parson and [the latter is permitted or has an opportunity] to see it." The idea comes through: Foster was not confident that ecclesiastical courts would judge pleas of payment fairly, because he suspected they would not adhere to the rule that the act of severing is the act of payment (i.e., would put some further burden on Parishioner -- to give Parson notice or, one step further, to say in claiming payment not only that Parson was
notified but that he actually saw the 1/10th severed from the 9/10ths.) The rest of the Court is reported as saying in reply to Foster "that it will be such a setting out as the spiritual law requires [que serra tiel setting out le quel le spiritual ley require &c,"

This language too is somewhat cryptic. The words suggest, however: "What counts as severance in an ecclesiastical case is a matter of ecclesiastical law. An ecclesiastical court could not, for its own purposes, mistake what it means to sever or set out tithes, except by standards internal to the ecclesiastical system enforceable by appeal." This is much stronger than suggesting to Foster that we not cross bridges until we come to them -- i.e., withhold Prohibition until Parishioner actually complains by disallowance surmise that an excessive burden has been put on him. The stronger position is cogent. It is not inconsistent with saying that the common law is exclusively entitled to say what constitutes severance so as to vest property in Parson -- i.e., entitled so to say in an action of Trespass or other common law proceeding in which it comes in question whether or just when Parson X became the owner of certain goods. From one point of view, it would be an embarrassing anomaly for ecclesiastical courts to have one standard for "when tithes are deemed paid" and common law courts to have another for "when produce rendered as tithes ceases to be Parishioner's property and becomes Parson's." From another point of view, the discrepancy makes little practical difference, and the principle -- when an ecclesiastical duty is satisfied is a matter of ecclesiastical law -- may be worth conserving. Whether or not the majority actually took the strong position, one can appreciate Foster's worries -- about the "embarrassing anomaly", but more to the point, about mistreatment of tithe-payers without real warrant in ecclesiastical law, though ecclesiastical courts, original and appellate, might find warrant if it suited their convenience. The short route to avoiding those arguable evils would be using the principle severance-converts-to-chattels as the basis for prohibiting on bare surmise of severance. The longer route would be to enforce on disallowance surmise a common standard for what constitutes satisfaction of the tithe-paying duty and for what "severance" means. The cost of the latter approach would be imposing standards on ecclesiastical courts in circumstances where that is probably less justifiable than in the limited range of cases (discussed in Vol. II of the study) in which their operations in their own sphere were subjected to common law control. Different degrees of trust of ecclesiastical courts and different degrees of willingness to put up with what they did, trustworthy or not, in the interest of the principle of a mixed
legal system -- deep tensions in jurisdictional law -- may be reflected in the exchange between Foster and the majority in this case.

A final point in the case is the Court's statement that an ecclesiastical suit for treble value would be prohibited (among the various kinds of prohibitable tithe suits mentioned in contrast to the kind in question here.) This could mean that the treble damages section of 2/3 Edw. 6 simply does not refer to ecclesiastical courts, but contemplates a temporal action on the statute. The next case below, however, suggests that this was not the Court's opinion. Could it be argued that the statutory treble damages (but not double) are so punitive that any controversy as to whether they have been incurred (=any claim that the tithes were severed) must by the intent of the statute be tried at common law? In any event, the statement of facts in the instant case says that the ecclesiastical suit was "to have the value of them [the tithes] according to the ecclesiastical law." I.e., the suit was apparently for single damages, not even the double damages ecclesiastical courts undoubtedly had power to award. The explanation for giving up the possibility of double damages, unless it was a desire to offend parishioners as little as possible, must be apprehension of Prohibition on the ground I suggest above: the argument that Parson's right to double damages is statutory, wherefore common law courts have a title to try a claim of payment which they lack in the case of a de jure ecclesiastical suit for the mere value of the tithes. It is not, however, clear that a suit for double damages would be any more prohibitable than one for single damages.

In Forde v. Pomroy, undated but probably from Coke's Common Pleas, the husband of a female impropriator sued for treble damages on 2/3 Edw. 6 without joining his wife. The suit was ecclesiastical, for the report says that the debated points were "moved on Prohibition." There is no sign of objection to the treble damages suit as such (cf. the last case above.) Radical non-payment was not complained of, but immediate retaking after severance. Two questions were discussed. First, whether severance-and-immediate-retaking counts as severance at all. To this the Court said "No", citing several cases as so adjudging (by date only.) As we have seen, liability for treble damages follows from that. The second question was whether the husband could sue for the treble damages without making his wife co-plaintiff. On this, the Court did not give a definitive ruling, but took the question under

30 2 Brownlow and Goldesborough, 9. (Cf. Note 25 above.)
advisement. It was, however, inclined to think that the wife must be joined. The reason was that the statute gave the suit to the "proprietor" of the tithes. Although a husband could admittedly bring a personal action without his wife, it seemed doubtful that he could be regarded as "proprietor" entitled to the statutory suit -- the wife should be considered the "proprietor" and the husband as entitled to sue only jointly with her, as in the case of a real action for land which the husband claims in the right of his wife. Not enough litigative context is reported in this case to shed light on the question raised under the last one: whether, granting that an ecclesiastical suit for treble damages is unobjectionable as such, any factual controversy arising therein should be tried at common law. In the present case, there is likely to have been no factual controversy. I.e., the two critical facts -- that the tithes were severed and retaken and that the suit was by the husband _solus_ -- were clear on the record. The legal questions could have arisen on motion for Prohibition, the surmise reciting those facts, on motion for Consultation, or on formal pleading to a Prohibition.

Quilope's Case (1613 -- after Coke left the Common Pleas)\(^\text{31}\) contains several rulings. It is not well-reported or indicative of context. One ruling is that Prohibition lies on a showing that tithes were severed and retaken. That presumably means that Prohibition lies (a) if, being sued merely for non-payment, Parishioner surmises severance and admits retaking (but if he surmises severance alone Prohibition does not lie); and (b) if the libel admits severance and asserts retaking, no matter what. For the report goes on to qualify: if the tithes are severed and _immediately_ retaken, no title vests in Parson because it is covin. This is unsurprising in substance, but the accent in this report is different than in others. It is one thing to say that Prohibition will not lie if the ecclesiastical suit claims immediate retaking or unless the surmise, in admitting the retaking, recites that it was not immediate or fraudulent. This report seems rather to suggest that there will be a Prohibition in every case in which there appears to have been a retaking. Pursuant to the Prohibition (which must mean on formal pleading), Parson can try to show that there was fraud and therefore no proper severance and no conversion to chattels. If he succeeds, of course the case will return to the ecclesiastical court on Consultation -- there was no reason for Prohibition because it has turned out that the alleged reason (Parson could have maintained Trespass for his chattels)

\(^\text{31}\) M. 11 Jac. C. P. Add. 25,210, f.22b.
was based on an untruth. *Quaere.* More clearly than other reports, this one states as a rule of the common law, which could be invoked in an action of Trespass or other proceeding concerned with the ownership of the tithe produce, that covinous severance is no severance. A rule of the common law contrasts to a right in ecclesiastical courts, protected against Prohibition by statute if not originating from statute, to proceed as for non-payment of tithes when they think a technical severance was not *bona fide.*

Secondly, the report of *Quilope* says that by 2/3 Edw. 6 Parson may recover double damages in the ecclesiastical court if he is "disturbed" in taking tithes which have admittedly been severed, and treble damages at common law. The first part of the proposition is certainly true; I find the second part -- treble damages are recoverable for "disturbance", as opposed to radical non-payment -- hard to reconcile with the terms of the statute. Where this leaves treble damages in other circumstances is uncertain. The report goes on to add that against a stranger, as opposed to the payer, Parson's only remedy is common law Trespass -- clearly true if it means that the "disturbing" or tithe-taking stranger cannot be sued in an ecclesiastical court, but in itself indecisive as to whether Prohibition will lie on "I severed but a stranger took." The first point in *Quilope* above certainly suggests an affirmative answer. (A curious speculation might be whether a stranger, sued by Parson at common law, could conceivably take advantage of the rule announced here that covinous severance vests no property. Suppose Parishioner and the stranger conspired for the former to do the act of severance and the stranger to rush in *eo instante* and carry off the produce.)

A third point in *Quilope* seems to be that conversion to chattels would override the usual rule that disputes about the right of tithes between clergies belong to the ecclesiastical courts. As the report puts it, if the ecclesiastical defendant claims as Parson of A and plaintiff as Parson of B, the action must still be at common law because after severance the dispute is about secular property. I am not quite sure what situation to visualise for the application of this idea. The only likely one I can think of would be: Parishioner severs and A takes; Parson sues A; A, a clergyman, pleads that he is entitled to the tithes and took them accordingly, either because Parishioner's land is in his parish or because he is Vicar endowed with the particular tithes in question. I should think the suit rather obviously prohibitable as a suit against a stranger (and, in one version, because the bounds of parishes are brought in question.) Perhaps an attempt was made to invoke right-of-tithes-is-an-ecclesiastical-matter to the contrary, surely inappropriately. As legal evidence, the report of *Quilope* is nearly
valueless for want of explanation of the thinking behind the points on the surface, but as historical evidence it adds something to the sense I have that into the 17th century how to handle severed tithes cases was still unsettled.

A very brief note of Spencer's Case (1617)\textsuperscript{32} gives only a statement by Justice Hutton that ecclesiastical law required Parishioner to give Parson notice of severance and some sort of affirmation by the Court that the common law was contrary. The meaning of Hutton's point must be that a plea of payment cannot be sustained by proving severance alone, but only by showing severance and notice. Noy's report has the Court "adjudging" that the common law did not oblige Parishioner to give notice. The MS. has it "saying" "at common law there may not [or cannot] be such a custom". The suggestion in this odd formulation is that not only is there no notice requirement in the common law itself, but any alleged customary variant making notice necessary to vest the property in Parson would be unreasonable. In any event, though we have seen notice mentioned inconclusively in a few reports, there is no reason to think it was essential to effect the property transfer. It is Hutton's statement about the ecclesiastical law in \textit{Spencer} that has disturbing implications. Were it clear and notorious that ecclesiastical courts would insist on making out notice to establish payment, Prohibition on bare surmise of severance would gain justifiability, though it remains possible to hold that one must complain of insistence on notice in the specific case by disallowance surmise. My guess would be that even if giving notice was an ideal part of the tithe-payer's duty by ecclesiastical law, judges would not in practice demand it and so bring on inevitable Prohibitions -- by one path or the other.

My final Common Pleas case is late (1642).\textsuperscript{33} Parson's libel recited that Parishioner severed his tithes, but complained that he so arranged things that the tithes could only be carried away through Parishioner's yard. When Parson was carrying them by that route, Parishioner, being an officer, attached the tithes for an assessment to the poor (and converted them to his own use, the report says -- i.e., apparently, having got ahold of the produce by pretense of attaching it, he abused his office and converted it, instead of holding it as security for payment of the poor-rate.) Prohibition was sought on the ground that Parson's

\textsuperscript{32} Noy, 20 (undated); Harl. 5149, f. 37, dated M. 15 Jac.
\textsuperscript{33} Anon. H. 17 Car. C. P. March, 157.
action for the severed tithes was Trespass. Counsel for Parson argued to the contrary that the libel was based on 2/3 Edw. 6 as an instance of stopping Parson from carrying off his tithes. The Court granted Prohibition on the ground that if Parson wanted to sue on the statute he should have mentioned it in his libel. This narrow-grounds basis for resolving the case is unanticipated in earlier decisions. It is reasonable, but hardly inevitable. I.e., is it clear that notice should not be taken of the statute, even though it is not expressly relied on by the ecclesiastical plaintiff? Whether the ecclesiastical suit in this case actually falls within the statute seems open to argument. It is hardly a complaint of denial of access, though the libel was apparently written to suggest contrivance to insure that Parson could not slip away with his tithes without falling into Parishioner's trap. It is a case of retaking, but not immediate retaking, and in the first instance not an ordinary case of retaking by the payer, since he acted in his capacity as an officer. Yet he converted the tithes to his own use, and the whole scheme looks no less like a fraud to cut off Parson's ecclesiastical remedy than does a simple case of nominal severance and hasty retaking. Decision on a procedural point has the advantage of avoiding a struggle with these oddities, or perhaps postponing it until there was formal pleading on the Prohibition. The case may be sufficiently puzzling for formal disposition to be desirable, should the parties feel strongly enough to press for it.

One case, Reynolls v. Hayes,34 comes from the King's Bench during Coke's Chief Justiceship there (1614). The effect of severance is only touched on incidentally. There was an ecclesiastical suit for simple failure to pay tithes. Parishioner pleaded arbitrament and obtained a Prohibition on surmise of the same. Consultation was sought on the ground that plaintiff-in-Prohibition was required to prove his suggestion within six months and had not done so. Three judges -- Coke, Croke, and Dodderidge -- thought Consultation should be granted for that reason. (The procedural requirement of prima facie proof of surmises, and the present case as a problematic one under that rule, are discussed in Vol. I of the study.) Coke then went on to say that Consultation should be granted on the merits as well, because the pleading of arbitrament is not sufficient cause for Prohibition. I.e.: like "I have paid the tithes I am sued for", "My dispute with Parson over the tithes I am sued for was submitted to arbitration" is, if contradicted, perfectly triable by an ecclesiastical court. Though Coke does

34 T. 12 Jac. K. B. 1 Rolle, 55.
not spell out the point, I should think there is no doubt that mishandling of a plea of arbitrament by the ecclesiastical court could be complained about by disallowance surmise. The argument is only that arbitrament is an acceptable plea in ecclesiastical law and that mere factual questions -- Did the parties agree to go to arbitration? Did the arbitrator make such-and-such an award? --, being as triable by one court as another, ought to be tried by the court with jurisdiction over the controversy in which they arise. Justice Houghton, who apparently dissented on the applicability of the proof-within-six-months rule, agreed with Coke that a mere claim of arbitrament is not reason for Prohibition. Croke and Dodderidge disagreed or at least were skeptical, for without elaborating objections they insisted that Consultation should be granted on the procedural point alone. Reasons for skepticism are not hard to imagine. Apart from mere distrust of ecclesiastical courts' willingness to judge the tithe-payer's defense fairly, it is arguable that to plead arbitrament is to plead a secular contract and that gives the common law a per se interest in a way that pleading no more than satisfaction of an ecclesiastical duty (payment) does not. (To this one may reply that pleading another form of secular contract in the ecclesiastical court -- a commutation agreement not embodied in a composition-real -- was ordinarily not a basis for Prohibition.) Note that in this case as in others it was Coke who was relatively respectful of ecclesiastical courts or solicitous for "good manners" in a mixed legal system.

At this stage of the discussion, Justice Dodderidge remarked that because severance converts tithes to chattels Parson may not sue for severed tithes in the ecclesiastical court. Why in the context it occurred to him to make this observation is not self-evident, for there is no sign that severance was admitted or claimed in the principal case. I can only suppose he was thinking of possible parallels to support his view that Prohibition will lie if Parishioner surmises arbitrament. It does not seem to me a powerful argument, but one could perhaps suggest that if Prohibition will lie because Parson could sue in Trespass for the produce he is seeking to recover as tithes it will also lie when the parties have in effect substituted a secular agreement for their ecclesiastical rights and duties (an agreement on which either party could sue at common law if the other failed to carry it out.) In any event, Coke immediately spoke to straighten Dodderidge out: The general principle is correct -- severance/conversion-to-chattels bars ecclesiastical suit for the produce as tithes. But the question whether severance has occurred is triable in the ecclesiastical court. In other words, Prohibition will not lie on bare surmise of severance when one is simply sued for non-
payment of tithes; it will lie if admittedly severed tithes are sued for (and presumably on disallowance surmise if the ecclesiastical court puts some kind of improper obstacle in the way of Parishioner's making out there that he indeed severed.) The point must be understood as leaving aside statutory emendation of the common law, on which Coke does not comment. Dodderidge at once conceded that Coke was right. Coke's point about severance is the relevant one for the present case: Whether Parishioner severed so as to confer common law rights on Parson is determinable by the ecclesiastical court, and so is whether an arbitration agreement was made with the effect of giving Parishioner a defense against the tithe claim (and common law rights to both parties.)

It may be helpful to note that exploration of the possibility of granting Consultation on the merits in this case was motivated by a problem as to whether defendant-in-Prohibition should be awarded double costs. Statutory double costs would probably have been awardable if the cause of Consultation was failure to prove the surmise within six months, but not if Consultation was appropriate on the merits. Despite Dodderidge's concession to Coke on the matter of severed tithes, there is no indication that he and Croke were converted to Coke's view of the principal case, and the report ends with the Court's taking the question of double costs under advisement.

Two undated reports remain to be mentioned. One is a brief note of a King's Bench judgment:35 If Parishioner severs tithes, and before Parson comes Parishioner takes them into his barn with the rest of the corn, he is liable for treble damages under 2/3 Edw. 6 because such severance and retaking does not count as severance. What this does not say clearly is that ecclesiastical courts may award the treble damages and that immediate, unexplained, or fraudulent retaking must be made out for the treble damages to be actually awardable. Exactly how the generality expressed in this report should be qualified remains uncertain from the cases above.

Birkenden v. Denwood36 is uncertain as to court as well as undated. Agreement is reported on the proposition that severing and retaking on the same day approximately six hours after the severance is non-severance within 2/3 Edw. 6. The fact that this case was on

35 Harl. 4817, f.217.
36 Add. 25,215, f.74b.
special verdict probably explains the occurrence, at last, of a specific holding as to when retaking is immediate enough to mean that an apparent or literal severance was no severance in law. How the point on severance fits Birkenden as a whole is not clear. The main issue in the case is whether Parson's collector of tithes could license Parishioner to take away his crop without severing the tithes. (The Court said "No", by analogy with the rule that a rent collector may not discharge the rent.)
II. Prohibitions to Protect One Non-Common Law Court Against Another

In Section I above, we have looked at Prohibition cases involving the principle that suits should not be brought in non-common law courts when a common law remedy was available to the complainant. We have seen that the principle is not altogether simple when it is analyzed in the abstract, and the cases have shown that it tended to hit snags when in was invoked in practice. It remains the "paradigamic" ground for Prohibitions, in the sense that common law courts never had so clear an interest in stopping proceedings in other courts as when their own role was encroached on or threatened with duplication.

Their interest in stopping a suit in one non-common law court when it ought to have been brought in another is certainly less clear, perhaps non-existent. In this Section, I shall look at the handful of cases that touch on whether Prohibition will lie to police the lines of jurisdiction within and between non-common law systems. That problem does not really arise in the large subject-matter categories of cases taken up later in the study. To be sure, intra-ecclesiastical jurisdiction was frequently regulated by Prohibition in two contexts: (a) Prohibitions to prevent the High Commission from encroaching on the ordinary ecclesiastical courts: (b) Prohibitions to keep people from being sued in ecclesiastical courts outside their home dioceses. These Prohibitions, however, proceed essentially from the common law courts' claimed authority to enforce the statutes as construed by themselves on the non-common law courts, including statutory limitations on those courts’ jurisdiction. The most one can say about those categories in relation to the present one is that strong agreement, pro or con, on the common law courts' title to regulate intra-ecclesiastical jurisdiction outside the role of enforcing statutes could have influenced the spirit in which cases on jurisdictional statutes were handled. In fact, the cases in this Section are too few and miscellaneous to have generated consensus through experience, and in the most significant of them it is disagreement that stands out. Owing to the paucity and variety of the cases, I shall simply discuss them one by one. The jurisdictional Statues are dealt with in later parts of the study.
The Writ of Prohibition: 
Jurisdiction in Early Modern English Law

(1) The Case of the Orphans of London. P. 35 Eliz. Q.B. 5 Coke's Reports, 73b.

It was resolved that Prohibition lies to prevent orphans under the "government" (guardianship) of the Lord Mayor by the custom of London from suing in ecclesiastical courts or the Court of Requests for various objects (money due by the custom of London, devises and accountings are specified.) Though the effect of this holding is to protect a customary or franchisal jurisdiction -- as opposed, say, to protecting one regular ecclesiastical court against another -- the distinction is not very important, because it is the quasi-ecclesiastical and equitable side of the Lord Mayor and Aldermen's jurisdiction that was protected. Ecclesiastical and equity courts were not trusted to deny themselves jurisdiction over matters generically appropriate to them, but delegated to the London franchise. There is perhaps no reason to trust them to stay out of each other's de jure -- i.e., non-franchisal --territory, but it is arguable that common law courts have more business protecting customary franchises than enforcing jurisdictional limits arising under "foreign" law.

No reasoning is given in the report of Orphans of London, but the decision was used as a precedent in later cases in this Section.

(2) Anon. T. 42 Eliz. C.P. Lansd. 1065, f. 56b.

This case presents a significant and divided discussion of common law title to regulate non-common law jurisdiction. A cleric was proceeded against for incontinency before the Bishop of Peterborough. A Prohibition was sought on the ground that this cleric ought to be under the jurisdiction of the Dean and Chapter of Lincoln. Prohibition was granted and then reconsidered, probably on motion for Consultation. Why it was claimed that jurisdiction belonged to the Dean and Chapter does not appear. There is nothing to suggest that the statute of 23 Hen. 8, c. 9, which required ecclesiastical suits to be brought in the diocese where defendant lived and was often enforced by Prohibition, was involved.

The judges went straight to the question of principle. Justice Walmesley led off by saying that Prohibition would not lie because the suit was "merely spiritual." Justice Glanville replied with a strong and explicit assertion of the common law's power to police all lines of jurisdiction: "...if one spiritual judge usurps the authority and jurisdiction of another spiritual judge, the Justices of the common law have supreme authority and superintendancy over them, and that by the common law. And this opinion he grounds on the book of 20 Edw. III, Title Excommunication, 9: where Prohibition issued against the Bishop of Norwich
since he summoned the abbot of E., who is exempt from every Ordinary jurisdiction."
Justice Kingsmill spoke next, supporting Walmsley and distinguishing Glanville's case:
"The wrong which the complaint is about is spiritual, scil. for incontinency, and so, whether
the jurisdiction belongs to one or the other of them is all one to us, for it will be determined
by their law. And the reason of the case in 20 Edw. III seems to be because the Abbey was
of the King's foundation, so that prejudice might come to the King thereby."

The debate so far needs little comment. The weight of common sense on the Walmsley-
Kingsmill side should not be underestimated. Why should it matter to the common law
judges whether a purely ecclesiastical proceeding was in one Church court or another? If it
matters to those who administer the ecclesiastical system, surely they have their own way of
rectifying jurisdictional errors -- and as far as that goes, have they not a right to be insouciant
about jurisdiction? (In defense of this intuition at its weakest point, the statutes regulating
intra-ecclesiastical jurisdiction could be brought in, though they are not mentioned in the
discussion: Arguably, Parliament had decided when it did matter that particular ecclesiastical
courts stay in a delimited sphere, and the judges had no reason or right to go farther. The
subject was specifically protected against being cited into a remote diocese and subjected to
the extraordinary sanctions of the High Commission in inappropriate cases, beyond which it
is hard to see how the subject had much interest in intra-ecclesiastical jurisdiction, especially
the lay subject.) Glanville no doubt had a commendable vision of an orderly legal system
under a single "superintendancy", but to make out that the common law was the
superintendent by the common law he had to hold on pretty hard to the single medieval reed
he had found. (In modern perspective, it can only seem fantastic to suggest that in the pre-
Reformation period a common law court would have intervened in a case like the present
one. The 14th century case must be explicable by collateral royal interest, as Kingsmill said
it was. The 16th-l7th century lawyer's perspective was distorted by the propensity -- and for
the sake of legal continuity the need -- to believe that the Reformation restored an
ecclesiastical-legal order that was never really lost, never successfully usurped even "in
possession." This view, classically embodied in Coke's treatise on the ecclesiastical law
prefacing Vol. 5 of his Reports, is nicely illustrated by Glanville's bland assumption that a
case from Edw. III could straightforwardly support common law policing of intra-
ecclesiastical jurisdiction. Were his purpose theoretical, he might say that it is just this sort
of precedent that shows the common law's continuous possession of its aboriginal powers, a
facet of the King's uninterrupted possession of his Headship of the Church. It would be
dubious, however, to attribute any greater historical realism to Walmesley and Kingsmill.
They just saw no reason to take on the policing role and saw through Glanville's precedent.)

The debate becomes more interesting at the next stage. Not having got very far with
authority, Glanville shifted to analogy, pointing out that when the bounds of parishes come
in question in ecclesiastical suits Prohibitions will be issued to permit trial of the bounds at
common law. Walmesley responded by denying that this is true, but across the board the
practice was as Glanville says it was. (Bounds-of-parishes cases have their history and
complexities, which will be discussed systematically later in this study. I do not mean to
suggest flatly that Glanville was right and Walmesley wrong as of the time of this case, only
that Glanville could have found plenty of support at that time and that his position turned out
to be the prevailing one. Walmesley was a generally conservative judge, who may well have
continued to dissent on bounds of parishes when most opinion was on the other side.) Our
immediate question is why bounds of parishes should seem a useful analogy for the problem
at hand.

In the event, bounds of parishes became a "common law issue." Various reasons can be
given for that -- where the boundary runs is a matter of custom appropriately triable by jury;
more people than the parties to a particular ecclesiastical suit have an interest in where the
boundary is, and it is better to get the matter settled and the strangers bound by a verdict than
to leave them unbound but possibly prejudiced by an ecclesiastical decision; the boundaries
can come in issue in common law litigation and for purposes other than determining such
ecclesiastical questions as whether tithes from a certain place should go to Parson of A or
Parson of B, for which reason it is better to have a single decision-maker than possibly
contradictory decisions from different tribunals. If one thinks of bounds of parishes as a
"common law issue", there does not seem to be much mileage in Glanville's analogy.
Granting that there are good reasons why some issues arising in ecclesiastical suits,
including this one, should be tried at common law, the last thing that seems to follow is that
common law courts should set up as controllers of intra-ecclesiastical jurisdiction (insisting
on lines of jurisdiction which may not even be an issue from the ecclesiastical point of
view.) Clearly, then, Glanville's way of seeing what he regards as the rule on bounds of
parishes must be different.
Prohibitions to Protect
One Non-Common Law Court Against Another

At the lowest level, his argument may only be that Prohibitions beyond the "paradigmatic" type are possible. I.e., in order to grant Prohibitions, the common law court need not have a self-protective interest (the concept of which may be expandable from the strict paradigm to, e.g., the statute-enforcing Prohibition or the Prohibition meant to keep interests protected by the common law from being collaterally prejudiced by ecclesiastical determinations.) When one surveys the law of Prohibitions as a whole, it seems obvious that the writ was not confined to the "paradigmatic" use and its nearest relatives, but how evident that was at given moments in the history we are looking at is always an open question. If Justice Walmesley would have acknowledged that extensions were working their way into the practice, he would have condemned them as unsound. Arguing with Walmesley as Glanville was, it is something even to make out the generality that narrow "interest." in the common law court is not necessary to justify Prohibition (though Glanville's bounds-of-parishes example failed royally with Walmesley.)

It is something, but still not much. Actually, the bounds-of-parishes example has better potential than merely for sustaining the generality. Prohibition to insure common law trial of the boundaries issue usually came when Parson of A sued Parishioner for tithes and the latter claimed he had paid or should pay his tithes to Parson of B because the land lay in B. The issue arose as an incident of a distinctly ecclesiastical question, right of tithes as between two clerics. It is highly arguable that the underlying question is of interest to the Church and a matter of indifference to the temporal order and the common law (as Walmesley expressly argues in this case, concluding that Prohibition will not lie merely because parish boundaries are incidentally in question too.) In another formally similar situation Prohibitions were regularly refused -- where Parishioner is sued for tithes by Parson and claims that the tithes have been or should be paid to Vicar. "Right of tithes concerns only the Church" was always invoked to justify such refusals. If, therefore, for the kinds of reasons I suggest above, common law courts were ready to intrude in right-of-tithes cases -- viz. when settlement of parish boundaries was necessary to decide them --, it argues fairly strongly for common law intervention in matters of predominant, and ultimately exclusive, ecclesiastical interest. There remains a substantial step from bounds-of-parishes to intra-ecclesiastical jurisdiction with respect to an incontinent clergyman, but Glanville's argument cuts the step down to reasonable size, as it were. He could not sell his premise to Walmesley (and presumably
Kingsmill, who does not comment on the bounds-of-parishes analogy, but sticks with Walmesley at the end); he may have had some effect on Chief Justice Anderson.

Anderson, speaking after the exchanges above, takes a middle position. All he says is: "I would like to know what remedy there is in their law if one spiritual court usurps on another." The implication is that Anderson would at least consider Prohibition, but was unwilling to act in ignorance of how the ecclesiastical system dealt with internal jurisdictional controversies. He would presumably be at least tempted by Glanville's "superintendancy" if it turned out that ecclesiastical law was truly indifferent to which court a complaint like the present, one was in, or if it made no provision or inadequate provision for letting someone in plaintiff-in-Prohibition's position except to the jurisdiction. If it turned out that jurisdictional rules and procedure for taking advantage of them existed, Prohibition would be unjustifiable, unless perhaps -- dubiously, for the remedy ought to be by ecclesiastical appeal -- on specific complaint that the particular ecclesiastical court had disregarded the rules it was bound by.

Walmesley and Kingsmill replied to Anderson; "They undoubtedly have a course for that." This is ambiguous as between "We must presume that as a civilized legal system they have the rules and procedures in question, but even if they do not it is no concern of ours" and "Inquiring into anything so obvious is a waste of time, but if someone actually claimed before us that he was a victim of jurisdictional chaos we should perhaps in spite of everything have to consider intervening." The case was, however, adjourned until civilians could be consulted, in accordance with Anderson's wishes. Walmesley and Kingsmill had no choice but to go along, because they did not have the votes to reverse the granted Prohibition.


I may not be justified in putting this case in this Section, since it is not clear that it was perceived as presenting a problem between jurisdictions outside the common law system. I place it here because the question can be seen, and possibly was, as whether courts of equity should be protected by Prohibition against ecclesiastical courts (or whether ecclesiastical courts should be prevented from doing their own equity where relief from a court of equity would probably be obtainable and, if sought or provided there, would probably be free of common law interference.)
A man in his last illness made a will. Later, he said to his executor, "I will, that B. shall have 20 pounds more, if you can spare it." The executor said, "Yes forsooth." No codicil was added to the will. B. sued for the £20 as for a legacy in an ecclesiastical court. The executor sought a Prohibition.

The Court first asserted the principle "...that although this Court hath not power to hold plea of the thing libelled for there in the Spiritual Court, yet it hath power to limit the jurisdiction of other Courts; and if they abuse their authority, to grant a prohibition." As late as 1615, this may seem so evidently true that it need hardly be stated. One should be careful about so supposing, however. Although no arguments from the Bar are reported, it is not unlikely to have been urged that the Court lacked interest because there was no encroachment on its own jurisdiction. Instances of Prohibitions unmistakably used to prevent "abuse of authority" by non-common law courts were relatively rare and anomalous. Most of them are collected in Section III below, under the rubric of Prohibitions issued to keep non-common law courts from extending "the ambit of remediable wrong" excessively. Some Prohibitions in other categories can be assimilated to that type, but there are often ambiguities. What is too crude is using language that suggests that the "paradigmatic" Prohibition is the only legitimate kind, other varieties being at least problematic enough to require apology or insistence that the scope of Prohibition is not so narrow. The Court's language in this case is guilty of that crudity in seeming to say, as it were, "Prohibitions are too grantable when the common law court has no power to hold plea of the thing libelled for there in the Spiritual Court." It would be more accurate to say that after the range of clearly legitimate Prohibitions is added up (the "paradigmatic" type, "negative instances" of that where the common law has preempted a field, statute-enforcing Prohibitions, Prohibitions to prevent non-common law courts from contradicting the common law at a fundamental level or endangering secular interests collaterally, Prohibitions to insure that certain issues were tried or judicially determined at common law) there remains a residue, which is problematic. The King's Bench in this case, like Justice Glanville in the last one, was ready to venture into the residual territory. It was properly express about its authority to.

In the event, the Court adjourned the instant case to advise on what it perceived as the problem: Is it appropriate for the ecclesiastical court, if it sees fit, to enforce as a legacy in effect what is not properly a legacy because it is not incorporated into the will? In my vocabulary, may an ecclesiastical court, having undoubted jurisdiction to enforce legacies,
extend "the ambit of remediable wrong" in its testamentary field to include non-payment of the sum in question -- testator's oral addition to his will to which the executor has assented? Is there any reason not to leave that to the ecclesiastical court's discretion and to control by appeal within the ecclesiastical system? Is it sufficient reason that the ecclesiastical suit is unusual? It is interesting that the King's Bench (under Coke) was uncertain about that, rather than ready to say that ecclesiastical courts have been given authority to compel payment of proper legacies but only that, and they should be confined to their authority.

In terms, the Court treats the case as an "ambit of remediable wrong" case. Nothing is said to suggest that the trouble with the ecclesiastical suit was that it should be in a court of equity (or, conversely, that the best reason for not rushing to Prohibition might be that the testator's beneficiary could turn to a court of equity if he failed in the ecclesiastical court -- as it were, "Nothing more is at stake than jurisdiction outside the common law system, and perhaps that is no concern of ours.") The Court does, however, venture a classification of the interest being pursued in the ecclesiastical court. The judges say they are in doubt as to whether the ecclesiastical court should be allowed to treat the object of the suit as a legacy or as good as a legacy because what it really is a fidei commissum. That is in effect "Latin for a trust", and indeed a trust seems the correct analysis: Testator charged the residue of his estate after debts and satisfaction of legacies in his will -- the residue which would go to the executor: -- with a trust to pay £20 to B. if there was enough left to permit it; the executor acknowledged that he took the estate so charged. Since the enforcement of trusts was the central activity of courts of equity, it seems likely that it would have crossed the Court's mind that the issue might be "Should we restrain the ecclesiastical court from setting up its own branch of the trust business at the expense of courts of equity?" (Alternatively: "Should we let ecclesiastical courts go ahead and enforce some trusts connected with their testamentary business, when, whether we altogether approve of it or not, we cannot prevent people from going to courts of equity claiming the benefit of trusts?") Convenience would recommend indulging ecclesiastical courts. That is where people who thought they were owed legacies went. Arguably there is nothing gained by chasing them to equity. (In suggesting that the common law courts, whatever their ultimate attitude, would not have interfered with breach of trust suits in courts of equity, I am judging by the Prohibition cases in which minor courts of equity, though not the Chancery itself, were kept from entertaining some kinds of suits which the judges thought inappropriate equitable claims.) Absence of
mention of courts of equity is not terribly surprising if I am right in my impression (from such evidence as the writings of Coke, Chief Justice of the Court discussing *Cartwright*) that common lawyers had trouble recognizing equity in their intellectual scheme of the legal system. That is not the same thing as inability to accept its everyday utility and importance and even to respect its rights, despite tensions reflected in such episodes as Coke's dispute with Lord Ellesmere over equitable intervention after common law judgment, at its height around the time of this case. I would suspect, however, that solicitousness for courts of equity was not so much a motive behind the Court's considering a Prohibition in *Cartwright* as indifference to where equity was done was a motive behind holding back from Prohibition.


This report, a brief note, is not of a Prohibition case, but it is worth observing in connection with the line between courts of equity and ecclesiastical courts. A parson sued a number of his parishioners for tithes in a court of equity (whether the Chancery or a lesser one does not appear.) The parson's purpose in this irregular proceeding was to avoid multiple litigation. The idea is perfectly sensible. There was probably a squabble in the parish about tithing customs. Parson believed that he could get the matter settled by the ecclesiastical courts (perhaps with the assistance of the common law, if Prohibitions based on *modi* would be a predictable consequence of suing there) only by bringing a number of suits against separate parishioners or for different products. He hoped to avoid expense, loss of time, and the risk of inconsistent results from suit to suit by seeking a comprehensive equity decree. His hope was in vain, however, for the equity court dismissed the bill on the ground that the ecclesiastical courts should not be deprived of their lawful jurisdiction.

For Prohibition law it is of some interest to speculate whether the equity suit should be prohibited if the court of equity had not restrained itself. (If it was a Chancery suit it almost certainly would not he, but if brought in one of the lesser equity courts Prohibition would just as certainly be considered, whatever the result.) Readiness to protect ecclesiastical courts against equitable encroachment is probably more predictable than the reverse. On the other hand, reasonable resort to equity to overcome procedural inconveniences of ecclesiastical law, without threat to the substantive law, is at least as justifiable as the same thing with respect to the common law. The outcome could depend on how inflexible ecclesiastical courts were deemed actually to be and on whether in the judges' view they
should be encouraged to "do their own equity" in situations like that of the present case. Would there be any objection to an ecclesiastical court's allowing a parson to sue his parishioners collectively to the end of settling tithing disputes by a comprehensive decree? would it be preferable, in view of the subject matter, to have such a decree backed by spiritual sanctions rather than temporal liability for contempt of a court of equity?

(5) Archdeacon of Richmond's Case. T.3 Car. C.P. Littleton, 42.

The report of this case as a whole is unclear, but it contains a firm resolution that for Prohibition to lie it is not necessary that the common law itself be in a position to provide a remedy. The context for the generality was clearly protection of one ecclesiastical court against another. For one thing, Orphans of London, above, was cited as authority. So far as one can tell from the garbled report, the dispute seems to have been over whether the Archdeacon had peculiar jurisdiction as against the Archbishop of York. It looks as if Prohibition may have been denied in the event, despite the general principle that it would be appropriate to enforce intra-ecclesiastical lines of jurisdiction, on the ground that the Archdeacon's prescriptive title to jurisdiction was mere "matter of fact" determinable within the ecclesiastical system. If that is correct, the implication would be that only some intra-ecclesiastical lines of jurisdiction are enforceable by Prohibition, presumably those based on grant and those so notorious and well-established that they can be considered part of "the law of the land" (e.g., the Bishop's basic first-instance jurisdiction as against the Archbishop.) This comes to saying, reasonably, that trial by a lay jury of whether usage gave one churchman the right to exercise jurisdiction at the expense of another churchman entitled to it de jure is hardly defensible.

(6) Read et. al. v. Rands. Undated. Harl. 4817, f. 204. (Probably C.P., from which most of the reports in this MS. come.)

Prohibition was sought jointly by a prebendary and parishioners of L. The prebendary claimed peculiar jurisdiction over the parish of L. for probate, administration of intestate estates, and punishment of ecclesiastical offenses. The ground for Prohibition was that the Official of the Dean and Chapter of Lincoln, who had general ecclesiastical jurisdiction over the county of Rutland, where L. was located, had tried to draw parishioners of L. into the Dean and Chapter's court to the disherison of the prebend. Prohibition was apparently granted, but it was reversed by a per Curiam opinion. The Court called the matter "merely
spiritual" and compared it to a spiritual pension and to a case in which "..a Bishop usurps jurisdiction in a place which is not in his diocese."

At the end of the report, Orphans of London is cited (barely cited with a vide.) Since that case hardly cuts in favor of the decision (though it is not inconsistent), the citation is probably the reporter's addition. Read counts against the general proposition that the common law courts have a responsibility to enforce jurisdictional lines within the ecclesiastical system, but how strongly makes a question. Although this does not appear from the report, it seems likely that the prebendary's claim would have been prescriptive. At any rate, the contrary does not appear. The surmise said that the prebendary was "seised in fee in the right of his prebend" of the peculiar jurisdiction. It was evidently written to suggest that he was being deprived of his property, which the common law had an interest or a duty to prevent. (The suggestion has some weight. One could distinguish between protecting jurisdiction as such -- say a bishop's against an archbishop -- from protecting someone's secular property in an interest such as a prebend from damage by deprivation of jurisdiction -- which of course means income -- constituting part of the interest. To the argument that the latter is more legitimate than the former, the reply is available that the property holder should be suing at common law for the deprivation, not trying to prevent it by Prohibition.) The surmise does not, however, appear to have alleged any ultimate basis of the prebendary's title to jurisdiction, leaving it to be inferred that when it came to making out his title usage is all he would have to show. As the last case above may hold, and as I argue there, it is one thing to say that Prohibitions may be used to protect Church courts against each other and something else to impose common law trial and common law standards of prescription whenever a churchman claims special jurisdictional privileges by reason of usage. It is possible to embrace general "superintendancy" over the ecclesiastical system and at the same time to hold that whether exceptions are to be allowed to the fundamental distribution of ecclesiastical jurisdiction by virtue of the running of time is only the Church's business.

The Court's example of a bishop who "usurps" jurisdiction outside his diocese seems to exemplify no more than a peculiar jurisdiction good by prescription if it is good at all. If the instant case was seen as like that, then the Court's idea of the "merely spiritual" may be confined to prescriptive peculiars and not extend to all intra-ecclesiastical jurisdictional issues unaffected by statute. It cannot be ruled out, however, that the Court took the full
"hands off" position of Justice Walmesley in Case #2 above. Even though they can be distinguished, this case and the last expose a danger in the contrary "superintendancy" position of Justice Glanville: Once into the exercise of that role, the Courts would be obliged to decide whether to limit it. If prescriptive peculiars seemed the place to draw the line, reasons would have to be found for why the holders of such ecclesiastical franchises were less entitled to common law protection than other jurisdictional interests inside the Church. It seems to me easier to intuit that that is the line to draw than to find satisfactory reasons. As for the intuition: Does it not smack almost of indecorum for secular judges to tell the Church it must accept a patchwork of petty jurisdictions and irregularities? Insisting that the Church adhere to its basic and well-known distribution of jurisdiction, as an almost "constitutional" feature of the national legal system, seems much more defensible. But was there any real risk of the Church's not adhering to it, at any rate in ways that were not already regulated by statute?


I have left this case until the end, because it has only an oblique relation to the other cases in this Section. It is not a complaint by the party sued in one non-common law court that he ought to be sued in another, but an instance of Prohibition sought to assure determination at common law of issues arising in an ecclesiastical suit. I place it here because it invites reflection on what is "merely spiritual" and what is of interest to the common law in a context close to jurisdiction.

The Archbishop of Canterbury sued Roberts, a prebendary of Norwich, for procurations (a fee due to an episcopal Visitor from the clerics subject to visitation.) The suit was in the archdiocesan Court of Audience, but there was no objection to that nor, so far as I know, any ground on which the jurisdiction could be objected to. (The Archbishop's suing in a court that was nominally his is of course no more remarkable than the King's suing in any royal court.) Roberts's defense in substance was that the Archbishop had improperly exercised visitation powers in the diocese of Norwich when the bishopric was vacant. He was therefore not entitled to procurations appurtenant to the unlawful visitation. Per Roberts, the proper method of visitation during an episcopal vacancy was set up by a composition between the Archbishop and what was then the Prior and Convent of Norwich, settling a longstanding dispute, in the year 1200. (The Prior and Convent were to nominate three persons as Visitors, of which the Archbishop was to choose two to perform the office; the Archbishop
Prohibitions to Protect
One Non-Common Law Court Against Another

was to have only half of the profits from the visitation.) By Roberts's legal theory, this ancient composition was still in force despite the "translation" of the Prior and Convent of Norwich into the Dean and Chapter of Norwich by letters patent of Henry VIII. The Archbishop in the instant case had allegedly disregarded this long-established arrangement and performed the visitation himself. He was improperly suing for procurations dependent on the improper visitation.

The case is in its way about "Which of two ecclesiastics should exercise jurisdiction?", since visitation was essentially a judicial function (the main role of the Visitor was to take presentments of misconduct under the ecclesiastical law and to punish the malfeasors.) As a Prohibition case, it involves the problem "To what extent and for what reasons do common law courts have interest to intervene in such controversies, rather than leave them to be fought out in the ecclesiastical courts?"

Through his lawyers, Serjeants Hitcham and Richardson, Roberts sought a Prohibition on three grounds. As the argument phrases it, there are three "matters in law" justifying and recommending common law intervention, viz.: (a) whether the ancient composition, being embodied in an indenture and ratified by the Dean and Chapter of Canterbury, was "good" -- i.e., a valid and conclusive settlement of the method of visitation for at least the period when one of the parties, the Prior and Convent of Norwich, was in existence; (b) whether the power of visitation during episcopal vacancies belongs "of common right" to the Dean and Chapter of Norwich or whether instead the Archbishop has that power throughout his province: (c) whether the composition between the Archbishop and the Prior and Convent is still in force or terminated as of the "translation" of the old corporation into a new one.

In the event, no decision was made as to whether to grant Prohibition. Serjeant Hendon (whether speaking as the Archbishop's counsel or for himself does not appear) informed the Court that the case had been referred by the King's direction to the assize justices in Norfolk ("the Lord Chief Justice", presumably Montagu of the King's Bench, and Justice Dodderidge.) According to Hendon, they had heard counsel for both parties and certified their opinion that the old composition and the old corporation were terminated, that the present corporation -- Dean and Chapter -- was in fact founded by Edward VI, and therefore that the visitation power now belonged to the King. The Court accordingly adjourned the instant case, assigning a day to hear the report of the Chief Justice and Dodderidge and to hear counsel on both sides. (The status of the assize justices’ report was of course only that
of an advisory opinion informing the King of his rights, but it was obviously entitled to respectful attention.)

For the purposes of the present topic, the three proffered reasons for Prohibition are worth scrutiny. The third seems to me an open-and-shut and sufficient basis for prohibiting. A question of the law of corporations arising in an ecclesiastical case, involved with the construction and effect of royal letters patent and with deep general issues concerning the status of successor organizations to bodies dissolved at the Reformation, is about as good a candidate for a "common law issue" as one could imagine. The first reason is probably good grounds for Prohibition. That depends, however, on how one is prepared to deal with the inherently nebulous and difficult subject of ancient compositions. (Cf. spiritual pensions above.) Rights in themselves ecclesiastical but arising from a "composition-real" were certainly in some circumstances and perhaps in all regarded as under common law protection. The composition in the present case may qualify as a "composition-real". Whether it does is no doubt a common law question, but one that can be debated in the process of deciding whether to grant a Prohibition.

The second reason for Prohibition is the most interesting. Is it the business of common law courts to decide whether "of common right" power of visitation in the diocese of Norwich during vacancies belongs to the Archbishop or the Dean and Chapter? In claiming that it is, Serjeants Hitcham and Richardson seem to me to embrace a version of the theory that the common law has a "superintendancy" over the ecclesiastical system. There is a "common right" as to who performs the functions of the Church -- surely the fully judicial function of deciding ecclesiastical cases, if this is true of the relatively minor and occasional function of visiting when there is no one in the office normally charged with that. In some sense, who performs these functions is not a matter of ecclesiastical law dismissable to ecclesiastical justice, but a matter of "the law", or the order of government in the realm as a whole, for which the common law courts are ultimately responsible. Just what that sense is, just what "common right" means in this context, demands exploration at the theoretical level which it never really got. Full-dress debate of the present case might have produced such discussion, had the case not been sidetracked by (perfectly proper) royal intervention. I have at any rate found no report of a sequel. My guess would be that the original ecclesiastical suit was dropped, since the assize justices had already gone into the matter with apparent care and concluded that the Archbishop had no right to visit.
It may bear repeating, in the light of a clearer assertion than heretofore that there is a "common right" distribution of ecclesiastical functions to be "superintended" by the common law courts, what I have argued above: This doctrine is compatible with a modified version of the "superintendancy", which its very vocabulary assists. Viz.: The common law courts are responsible to determine what the "common right" distribution is and to see that it is observed, but they should not intervene to enforce prescriptive derogations from "common right" jurisdiction (nor, presumably, to prevent ecclesiastical courts from upholding them by their own standards of prescription.)

A detail of the MS. of this case may be telling: In the margin there is a citation to what must be *Orphans of London*. (The volume of Coke's *Reports* is miscited, but the page is right.) This shows that someone, probably the reporter, saw that the common law's title to reach beyond a self-protective function was relevant in the case.
III.
Prohibitions to Control the Ambit of Remediable Wrong, 
or Merely to Prevent Imposition of Unwarranted Liability

A. Introductory

In this final Section, we shall look at cases in which Prohibitions were sought, and sometimes obtained, on no further ground than that a suit in a non-common law court aimed at imposing a liability on someone when it should not be imposed on him. I.e.: In these cases, it could not be claimed that in granting Prohibition the common law court would be protecting its own jurisdiction either in the direct sense (non-common law plaintiff could just as well be bringing a common law suit) or in the less direct (e.g., a particular promise is not actionable at common law, but the field of contract belongs to the common law so that a "foreign" court purporting to extend the range of actionable promises would be encroaching on common law jurisdiction.) Nor could it be claimed that the non-common law court was violating statutory standards which the common law judges were responsible for interpreting and enforcing. Prohibition could not be justified as the means of insuring common law determination of an issue appropriate to such determination, but which happened to arise in an originally well-brought non-common lawsuit (e.g., jury trial of a customary *modus decimandi*, judicial exposition of a common law instrument such as a lease.) Neither could it be justified as necessary to keep interests protected by the common law from being accidentally prejudiced (e.g., by authentication or disauthentication of a contested will in an ecclesiastical court when the will, comprising both land and goods, was likely to be contested again in common law litigation.)

Finally, the cases in this Section cannot quite be brought within the principles that tend to justify using the Prohibition to regulate jurisdiction between non-common law courts. We have seen in Section II above that the judges hardly took on that regulatory function. They debated about it explicitly a few times; opposition to intervening between non-common law courts is if anything the predominant note. Jurisdictional conflict outside the common law system did, however, provide the context for the strongest articulation we have of a broad
negative principle: Prohibitions are not confined to protecting the common law's own interests -- not confined to the "paradigm" function and others that can be seen (though they do not all have to be, especially Prohibitions to enforce statutes) as relatively modest deviations from the "paradigm". This principle was not universally subscribed, but it was firmly stated and sturdily held by those who believed in it. It obviously extends to the kind of case considered in the present section: If self-protective interest or something resembling it need not be made out, Prohibitions might be used simply to prevent non-common law courts from enlarging "the ambit of remediable wrong" in ways the common law judges thought objectionable. Finding a reason why they should be so used is not, however, the same as finding one for preventing encroachment by one non-common law court on another's territory. The cases in Section II do not yield an affirmative principle as clear as the negative one. "Superintendancy" over the legal system beyond the common law's own borders was claimed (and disputed), but the character and rationale of that do not receive real discussion in the cases. Two theories can be constructed. The first is specific to the common law courts' title to regulate non-common law jurisdictional lines. It posits that "the law of the land" comprises a scheme of mixed jurisdiction -- besides the common law, there are courts of equity, ecclesiastical courts, Admiralty courts. The scheme includes a basic distribution of jurisdiction within the non-common law branches (for practical purposes, this is significant only for the ecclesiastical branch.) Although there can be argument about the modes and limits of this common law function, the theory insists that it is the right and duty of the common law courts, as "senior partner" in the mixed system, to see that the scheme is observed. The theory entails, e.g., that courts of equity should be compelled not to do what ecclesiastical courts are intended to do, and that ecclesiastical suits should be confined by Prohibition to the correct ecclesiastical court (within the basic or "common right" schema, if not the distribution of ecclesiastical jurisdiction as modified by prescriptive franchises.) The theory does not entail, e.g., that an ecclesiastical suit to which no other ecclesiastical court has a claim, and which cannot be appropriate to any other kind of court (common law, equity, or Admiralty), and which is not ruled out as a legitimate kind of suit by statute, might be prohibited. (The only assumption that could give the theory that entailment is unrealistically generous to equity for the period we are concerned with. It could be said that any complaint that falls outside the common law's own sphere, and that does not appear to be a customary or plausible ecclesiastical or Admiralty complaint, should be taken to equity.
Restraining the ecclesiastical or Admiralty court would then be protecting courts of equity. Equity would be conceived as the always-open residual resort and the ultimate judge of whether to give relief when no other court would do so, or be allowed to consider doing so. This line of thought would no doubt have appealed to some 17th century Chancellors. It would have been unacceptable to common law judges, who used Prohibitions to make sure that courts of equity did not have the last word as to whether the otherwise remediless should have relief, and who show little concern for whether equity was reserved to courts specialized in exercising it."

The second theory of common law "superintendancy", which does reach the "ambit of remediable wrong", is perhaps best expressed in the metaphor of agency: Each type of non-common law court has been authorized to provide relief in listed and specifically described situations. These "agents" have a considerable discretion to judge whether facts called to their attention meet the descriptions. On the other hand (in principle, whatever the modalities), they have no discretion to extend the relief they provide to situations analogous to those specified in their authority. In that way, they are not quite "really courts". They are not assigned an area of human relationships and told they are the judges of the law's reach in that area; they are told "Do this and this and this". So long as there is no threat to the common law's own interest, they are left to do those things free of petty supervision that would imply distrust of their ability to understand their commission. But when a claim to relief comes along whose inclusion in a commission visualized as a list of specifics is dubious, it is not for the non-common law court to evaluate its merit. Rather, it is the common law courts' job to say, e.g., "Ecclesiastical courts are not authorized to listen to complaints like this (even though neither we ourselves nor any other court we know about would entertain them.)"

Where the specified and delimited "authorities" of non-common law courts come from is a metaphysical question to which no articulated answer can be found. One can only say from "the law", "the law of the land", "the common law, or common custom of the realm, in a sense that transcends 'common law' in the everyday operational sense -- viz. the rules and procedures of one set of courts". The common law in that "everyday operational sense" of course included the Prohibition and the power to use it at least self-protectively -- a power of self-protection not enjoyed by non-common law courts, and therefore at its most modest a badge of the common law courts' superiority. But does the power extend to controlling "the
prohibitions to control the ambit of remediable wrong, or merely to prevent imposition of unwarranted liability

ambit of remediable wrong" throughout the English legal order? Does "the law" in the wider, vaguer sense exist, save as it is embodied in the statutes? Does it delimit the authority of the non-common law courts in the way I have suggested? Is it uniquely accessible to the common law judges? Towards answering the questions, one can cite some judges' willingness to negate the view that protecting the common law in the narrower sense is the only proper use of Prohibitions. One cannot point to explicit elaborations of the second type of theory outlined above -- i.e., a theory stronger than is needed to justify policing non-common law jurisdictions in conflict or potential conflict with each other. Whether the stronger theory was implicitly held by many or some judges depends on the implications of the cases in this Section.

The cases are scrappy and miscellaneous. There are not many granted and sustained Prohibitions. Perhaps, therefore, the best conclusion will be that the judges did not subscribe to the view that "the ambit of remediable wrong" was within their control. In other words, when an unusual or dubious-looking complaint was made in an ecclesiastical court, and was more or less within its bailiwick, the chances were on the whole good that the ecclesiastical court would be left to decide whether the complaint was cause for granting relief. ("More or less within its bailiwick". Speculatively, one can imagine an attempt to use the ecclesiastical courts to impose liability for an activity previously unregulated by law when the activity has no visible affinity with ordinary ecclesiastical business -- say a modern tort, such as infringement of privacy, were complained of. Wrongs of that sort could conceivably be seen as breaches of the too-capacious duty of Christian neighborliness, and so the example is a little less than totally fantastic. It is still a long way from ecclesiastical routine, and there are of course no instances of anything so interesting. The shaky ecclesiastical claims which defendants occasionally tried to quash by Prohibition were plainly within the general purview of ecclesiastical law. To the degree that the attempts at Prohibition failed, one would have reason to speak of ecclesiastical courts having a "general purview", within which they were the judges of what is an actionable complaint -- a "general purview" as opposed to what I have described as a list-like authority to provide relief in predetermined actionable situations). As it happens, all the cases in this Section are ecclesiastical. (I shall say a further word below about the delicate bearing of equity on the present topic.)

Within the subject-matter categories to be taken up later in this study, some Prohibitions can be analyzed as regulating the mere "ambit of remediable wrong", but rarely
unambiguously. E.g., in some defamation cases, the common law courts seem to be asked to say to the ecclesiastical court nothing more than, " Liability simply must not be attached to this utterance (ordinarily a familiar scurrility) -- it is too foolish to use the law to restrain such unrestrainable everyday name-calling, and objectionable to put an undue bridle on people's right to speak." Defamation, as the inter-jurisdictional branch of the subject was developed, especially lends itself to what I have called the "agency" view of non-common law courts: The ecclesiastical courts are authorized to remedy one form of defamation -- viz. imputations of ecclesiastical offences, such as heresy or incontinency; beyond that they have no license to judge what is defamatory, or defamatory enough to merit spiritual sanctions; they are more severely limited than by the duty not to give relief when the common law would do so. On the other hand, defamation was a peculiar field in that it was shared between ecclesiastical and common law; what is shared is not preempted. Yet because it was shared there were special imperatives toward consistency in the handling of similar complaints in different tribunals. For this reason, it was arguable (see the cases on this in Vol. II of the study) that certain standards adopted by the common law in its part of the field were binding on ecclesiastical courts when their jurisdiction was unquestionable (e.g., truth is a defense to defamation.) It takes only a further step to argue that although common law courts do not have a monopoly to hear and assess complaints of defamation, they have preempted the fundamental question, "What utterances are defamatory?" (Just as it would arguably be intolerable for English law, taken as a single national system, to treat truth sometimes as a defense and sometimes not, so would be the spectacle of legal sub-systems under the same roof taking different views of the care people must take to avoid offensiveness in casual speech.) In sum, while questions can be asked about the common law courts' interest in checking ecclesiastical courts in defamation cases except when they were ready to give a remedy themselves, there are answers short of asserting a generalized control over "the ambit of remediable wrong."

One class of Prohibitions to the Admiralty may seem on the surface to imply that there are complaints the Admiralty simply lacks authority to entertain, though they are not entertainable anywhere else. I refer to attempts to stop the Admiralty from taking cases arising on foreign land (vs. at sea, where the Admiralty manifestly had jurisdiction, and in England, where it manifestly did not.) The appearance is misleading, however. Some judges were not comfortable with prohibiting the Admiralty in such cases simply for the reason that
Prohibitions to Control the Ambit of Remediable Wrong,
or Merely to Prevent Imposition of Unwarranted Liability

a common law remedy was de facto available (by using a fiction.) Some of these managed to read the statutes as confining the Admiralty to the sea. They may have been expressing their sense that a "merely positive" statutory ban presented fewer problems than defending inherent common law powers to restrict other courts without self-protective interest. In addition, there were grounds of a sort for saying that in taking foreign cases the Admiralty was infringing the jurisdiction of another non-common law court, that of the Constable and Marshall. It is probably a fair conclusion that the Constable and Marshall were resurrected from the dead (principally by Coke) in order to make out that there was provision for determining foreign suits in England, so that the Admiralty's taking them was both unnecessary and usurpatious. Again, part of the impulse may have been to avoid hard questions about title to control the "ambit of remediable wrong" -- controlling lines of jurisdiction between non-common law courts seemed easier to justify, whether it really is or not. (Note the assumption behind this anticipation of matters to be discussed later in the study: Some judges wanted to cut the Admiralty out of foreign cases. That was not because anyone thought it undesirable to provide an English tribunal for such cases. The reason was that the modern common law, by fictionalizing away its venue requirements, was itself capable of handling them. It was awkward, however, to prohibit the Admiralty from "paradigmatic" encroachment on the common law when the latter did not truly have jurisdiction, only a fictitious way to avoid the consequences of lacking it. My suggestion here is that the search for a sounder basis for Prohibition may have evoked the thought that inherent common law power to keep inherently limited agents within their authorities was not a promising basis. One might be tempted to claim such inherent power when faced with a silly complaint in an ecclesiastical court; faced with a serious project -- eliminating as no longer necessary a once-useful and established activity of a popular mercantile court --, one might be led to wonder whether the "inherent power" can be seriously defended.)

As I have already intimated, Prohibitions to courts of equity are in a sense a tricky special case under the present topic. There is a way in which virtually every such Prohibition controls the "ambit of remediable wrong" -- i.e., expresses the common law view of what a court of equity should and should not be free to consider doing. Few Prohibitions can be brought under a simple self-protective function. I.e., although an equity suit could be objectionable for crudely duplicating a common law remedy, those objected to by parties seeking Prohibitions were almost never of that sort. Only very rarely was an equity suit
objected to because it encroached on ecclesiastical territory. The objection was almost always that the equitable relief sought simply ought not to be allowed, or that the national system of law was better off without the equitable remedy proposed. The implication of making that objection in Prohibition cases, and of the common law courts’ weighing it on the merits, is that those courts, and not the courts of equity themselves, are the judge.

Accordingly, it is perfectly correct to say that one "ambit" was defined by the common law courts, whether or not they claimed power to define all non-common law ambits. A series of qualifications must at once be added: (a) Prohibitions to courts of equity are a drop in the sea of Prohibitions. They were so small a part of the practice that it would be unsurprising if they had little analogical or suggestive force in more familiar territory (as I think was the case.) (b) The equity tract of Prohibition law has the very peculiar feature that the major court of equity -- the Chancery -- was never prohibited. Whether in principle it could be was a speculative question; an affirmative answer was occasionally given, but the point was hardly beyond argument. Only minor equity courts were prohibited. One of those, the Requests, had a dubious title even to exist, and the others -- the Councils of Wales and the North -- were natural candidates for common law regulation because their mixed (only partly equitable) jurisdiction was dependent on and delimited by statute and royal commission. In restraining the discretion of those courts to evaluate equitable claims, the common law courts were guided by what they thought was Chancery practice. I.e., it is doubtful that the common law judges would have prohibited, say, a Requests suit if they thought the claim was already recognized by the Chancery as a good equitable complaint, whatever their own view of it. I do not think the judges always knew what the Chancery would do, and there is no sign that they habitually asked. In that sense, they in fact used their own judgment as to what is or is not a good equitable complaint. But they were in a position to say, and perhaps would have been willing to, "We are not ultimately the judge of equity -- if you think you have a good equitable claim you can go to the Chancery, and it is unlikely we will interfere -- in the meanwhile, we do not intend to let low-ranking courts consider equitable complaints which we do not think good and assume the Chancery would not." (c) In their actual evaluation of equitable suits, the judges were quite permissive toward the lesser equity courts, with one major exception: They were intolerant of proposed equitable mitigations of the common law of real property. They were not particularly disposed to regard fields such as contract as preempted by themselves as against courts of equity (in
contrast to ecclesiastical courts.) Real property was another matter. The judges probably saw
the structure of property law as under their special protection and made little distinction
between encroachment on that and encroachment on their jurisdiction \textit{simpliciter} -- suing
outside when one could sue at common law or, owing to preemption of a field or issue,
should. The fusion is not entirely rational, but it is not surprising. The Chancellor's habit of
deferring to the common law judges on property questions would have encouraged it.
Confronted with my statement that they purported to regulate at least the ambit of equity, the
judges might well have denied that they did -- "Look at our reluctance to prohibit courts of
equity in most areas. We really do no more than insure that marginal courts of equity
observe the understanding, to which the Chancellors themselves subscribe, that there is an
equity-proof core of property rules." (See appendix for more on these points.)

When these peculiarities are taken into account, the equity Prohibitions do not count
very strongly against my suggestion above that "ambit of remediable wrong" cases do not
pervade the major subject-matter categories -- that they are instead a rather eccentric hodge-
podge from which common law title to control that ambit can hardly be deduced. One
important group of ecclesiastical Prohibitions cuts the other way: The common law courts
certainly insisted on their power to decide what products are intrinsically subject to tithes.
Most products were tithable, but some were pretty clearly not, apart from the timber trees
exempt by statute -- notably minerals --, and sometimes -- e.g., in the case of new
agricultural products -- tithability was open to argument. Besides the liability to tithes of
the product as such, there were debates on such questions as whether tithes were due on a
second crop of hay and whether the producer owed tithes of gleanings inevitably or non-
 fraudulently left behind at harvest. Without doubt, the courts prohibited when they thought
tithes were demanded without \textit{de jure} warrant or warrant of special custom.

Nothing could be less surprising. Obviously enough, the Church courts were unlikely to
be trusted to write the Church's tax code in a way that was fair to lay interests. But what of
the theoretical implications?

Tithes were the largest subject of ecclesiastical jurisdiction, but the ecclesiastical courts
were not judges of the \textit{general} question "What is the scope and nature of the Christian's duty
to pay tithes?" The "agency" model seems to fit here: Ecclesiastical courts are authorized to
award recovery of tithes of grain and hay and many other things, but the list eventually runs
out. When its borders are uncertain, it is for the common law courts to say where it ends. It is
not for the ecclesiastical courts to deliberate as to whether justice and the realization of Christian duty require taxing the profits or some of the profits from, say, a coal mine. If the common law courts say coal is not on the list, it is not.

It is possible to argue that common law control over tithability is a special case because the duty to pay tithes -- unlike some other Christian duties embodied in the ecclesiastical law -- is ultimately secular. There have been famous debates on the moral source of that duty -- the law of God, the law of the Church, or the human law of particular countries? I shall not enter into those. It is sufficient here to note that control over tithability could have served as a practical model for more generalized control over "the ambit of remediable wrong." With philosophic and antiquarian effort, it might be explained away, but so long as it was the practice it was available to encourage the thought that in other areas of ecclesiastical law as well there must be some things Church courts "just can't do" -- can't be the judges of whether to do, even when those things are appropriate to their general line of business. The cases in this Section do not, however, suggest that the model was very efficacious towards putting flesh on the proposition (itself not universally endorsed) that Prohibitions are not exclusively for protecting the common law's own interests.

I do not want to imply that using Prohibitions to control "the ambit of remediable wrong" is less justifiable than using them to police non-common law lines of jurisdiction. There is a light in which the opposite is true. In one way, intra-ecclesiastical jurisdiction seems an apt subject for utter indifference on the common law's part. As it were, "If they don't care, why in the world should we?" (Assuring that courts of equity handle equitable complaints and ecclesiastic courts ecclesiastical complaints no doubt deserves more concern.) On the other hand, outrageous, frivolous, liberty-restricting ecclesiastical claims, if listened to by the ecclesiastical court, can bring real harm on people. Good manners in a mixed legal system certainly require hoping that the ecclesiastical courts can be relied on to weed out such claims, but if the hope is misplaced mischief ensues. Assumption by the common law judges of a "superintendent's" prerogative to cut off very dubious complaints might well be the part of wisdom. Cutting them off at once by Prohibition has advantages in efficiency over letting them linger in the ecclesiastical system and perhaps having to intervene later, if an attempt to impose a burdensome and unfair liability on the subject should survive. Trusting that the ecclesiastical authorities will not object to occasional quick surgery, which saves them trouble, is perhaps a truer expression of comity than straining to
trust when trust is not wholehearted. It is important to remember that one of the strengths of the ecclesiastical system was its generosity with appeals. But it makes for ambiguity in the situation we are thinking about. Though one trusts completely that justice will be done by the ecclesiastical courts in the long run, one may not want to run the risk that the first-instance judge, by a foolish and all but certainly reversible decision, will drive the loser to cumbrous appeals.

All in all, a reserve of common law power to control "the ambit of remediable wrong" seems to have so much in its favor that it is hard to doubt its existence. Had very many attempts been made to impose very dubious ecclesiastical liabilities on the subject, the common law judges would probably have taken on a bolder "superintendancy" than they can be said to have assumed. They would have debated the nature of their power more thoroughly than they did. As it was, opportunities were few, stakes were rarely very high. Under these conditions, the judges showed no positive zeal for stretching their powers over the non-common law courts to the farthest limit they could reach. The empirical basis for saying that common law authority extended beyond self-protection (and the numerous outcroppings that can be assimilated to it) is accordingly thin -- which is not to say wholly absent.

Among large issues in the law of Prohibitions, two have particular affinity: (a) Does control of "the ambit of remediable wrong" in all the non-common law systems belong to the common law judges? (b) To what extent, if any, should common law rules and standards be enforced on non-common law courts within their jurisdiction? The second question is the subject of the lengthy Vol. II of this study. It underlies many cases and numerous complex debates. That is not true of the first question. The two should still be considered side by side, for each asks about a problematic stretch of the Prohibition -- the uses farthest out from the "paradigm." The surest thing that can be said about the first question is that some judges would have answered "Yes" and others "No". Counting heads on the basis of the judges' pronouncements and deeds is difficult. Whether the question in its general terms (I do not, of course, mean in my invented terminology) was present in lawyers' minds is perhaps uncertain. What is best evidenced is an impulse in some to believe and in others to doubt that the "paradigmatic" use of the Prohibition was its proper use (not in a narrowly literal sense, but essentially.) It is not clear that the doubters had thought through how to describe and rationalize uses beyond the "paradigm". Hard-fought cases did not force them to. Given,
then, the clouds around the first of the two questions, are there ways of getting an indirect but useful focus on it through the second?

Suppose one were to argue that if common law standards can to some extent be imposed on non-common law courts, it is hard to deny that the "ambit" of the latter is subject to common law control. Spelled out, the argument would run: A picture of the English legal system as a diversity of "separate and equal" sub-systems, except that one of them -- the common law -- possesses unique self-protective powers, will not work. The picture implies that the non-common law sub-systems should be free to go their own way, provided their activities do not encroach on the common law's sphere. But they were not entirely free to go their own way. To a degree, they were required to avoid applying rules in conflict with the common law. The common law in the system as a whole is therefore not reducible to the rules and procedures of one sub-system, including the right and the means of self-protection. In addition, it is "national law", in the sense that its standards, while not comprehensively binding on the non-common law sub-systems, may not simply be ignored by them, as if they were part of the law of Rome or Russia. Besides their commission to do their own business and protect their own sphere, the common law courts have a "superintendancy" to see that a respectable degree of harmony prevails across the whole system. The harmony, moreover, is to be on the common law's terms. I.e., though variations from the "national law" can be justified by the purposes and traditions of non-common law tribunals, variation must not turn into contradiction, and the common law courts reserve authority -- necessarily somewhat discretionary -- to say when it has gone too far. "Superintendancy" being conceded, would there be any sense in confining it to assuring a decent degree of respect for common law standards in cases admittedly within non-common law jurisdiction? Is common law in its aspect of "national law" not likely to include limits on the liabilities any court in England can impose on the subject? If an imaginary legislator were to appoint one member of a set of generally independent courts "superintendent" of the rest, how narrow a "superintendancy" would he probably have in mind? (Or how specific? -- arguably, a "superintendent" not meant to be a detailed overseer or a tyrant must be left room, within intelligible but indefinite guidelines, to work out just what his role is going to be, and even to "play it by ear.")

I have no evidence that an argument along these lines was ever made, but I do not think it is unrealistic. Those who believed in common law "superintendancy" or sensed that self-
Prohibitions to Control the Ambit of Remediable Wrong, or Merely to Prevent Imposition of Unwarranted Liability

Protection did not exhaust the uses of the Prohibition must have thought of the cases in which regulation of the non-common law courts inside their admitted sphere was proposed or imposed. The beholddness of non-common law courts to common law standards may not have been very distinctly picked out among the motifs of those cases, but that something of the sort was sometimes under discussion is hard to miss. Reflection on such cases, however unconscious, must have suggested that "superintendancy" was a fact, and must have prompted the question "If we have it to some intents, why not to others?"

We need to ask, however, whether the argument in the last paragraph is really convincing. It may be suggestive, may have some *prima facie* force, but will it stand up to scrutiny? It seems to me that the argument can be faulted in the premises rather than the inferences. (I speak cursorily here of matters elaborately discussed in Vol. II.) When the upshot of many cases and a good deal of sophisticated debate is formulated, one can seriously doubt whether common law standards were regarded as binding on the non-common law systems (in the weak senses that no one would have proposed exceeding -- "residually binding", "binding when the common law judges see no reason to indulge departure from them, or see reason why in a particular instance jarring law in different 'national' tribunals is inconvenient or unfair to the subject.") "Superintendancy" in one context, inviting extension to others, may not have existed. That it must exist or ought to exist would no doubt have been asserted, but a lawyer skeptical of its existence could cite plenty of empirical evidence. Objections to non-common law holdings because they violated common law standards failed more often than they succeeded. When Prohibitions succeeded in cases where such objections were bruited, it was usually for another reason reducible to the self-protective function. Departure from common law standards was usually not *in itself* the reason for Prohibition; the reason was more likely to be that disposition of cases or issues by non-common law standards would prejudice potential common law litigation against the loser or otherwise weaken his position in secular affairs. Someone believing that common law "superintendancy" *must* be a reality *quoad* enforcement of some kind of duty to observe common law standards across all sub-systems might take it as the clinching argument that statute called for (again, some kind of) conformity or non-contradiction between common law and ecclesiastical law. His opponent could reply, first, that a statutory commission to do one thing is not extendable to another. (If statute insists that ecclesiastical courts must under some circumstances observe common law standards, and it is the common law's
The Writ of Prohibition: 
Jurisdiction in Early Modern English Law

responsibility to enforce the statutes on non-common law courts, then the common law courts must enforce this statute as they understand it. A larger "superintendancy", extending to control of the "ambit of remediable wrong", is in no way implied. He could add that the statute turned out to have virtually no applied meaning. (If it meant anything, it only meant that common law standards must not be violated with the possible effect of prejudicing common law interests. This is entirely different from saying they must be observed when only ecclesiastical interests would be affected. The position is reachable by modest extension of the "paradigmatic" role of Prohibitions without statutory assistance.)

Those are rough generalizations from tangled litigation discussed in Vol. II. I mean only to suggest that finding indirect support for common law authority over "the ambit of remediable wrong" (and for that matter over jurisdictional conflicts between non-common law courts) in the theories and results produced by that litigation is doubtful -- not impossible, but ambiguous. It is time now to inspect the cases which have direct implications for control over the "ambit."

The cases are so mixed in their substance that they can only be presented one-by-one. There is, however, one way of breaking them into larger groups, which I shall use. I shall first look at the cases in which Prohibition was sought because the very nature of the ecclesiastical claim was allegedly unreasonable or "just not a claim ecclesiastical courts are authorized to consider." In a second group of cases, the "matter" of the ecclesiastic suit is unobjectionable (it is a tithe suit or the like), but there is some objection to the "form" (e.g. a suit against A. for this object would be unexceptionable, but this one is brought against B.) The point being made in the application for Prohibition is essentially the same -- "This suit against me is ultra vires, though if it were to succeed there would be no invasion of common law or other non-ecclesiastical territory." A third small group of cases does not strictly belong to this topic, but is close enough (especially to the second group) to include. The topic as a whole is concerned with cases in which the ecclesiastical suit is objected to the moment it is brought. These contrast with cases in which there is initial admission of ecclesiastical jurisdiction and subsequent application for Prohibition, normally by disallowance surmise, in virtue of something the ecclesiastical court has done and ought not to have. The formal contrast is important, despite the jurisprudential common ground there may be between disallowance and "ambit" cases. There are a few reports, however, in which plaintiff-in-Prohibition's objection seems to depend on some step the ecclesiastical court has
taken beyond merely noticing the complaint, but there appears to be no disallowance surmise nor reason for dispensing with one. I place these cases in this Section because they come, like the others, to cries that the ecclesiastical court "just can't do this." In so far as they are not attempts at Prohibition merely bad for want of a disallowance surmise (and adequate grounds for one -- violation of binding common law standards or prejudice to common law interests), they are perhaps complaints that the ecclesiastical court is outside its "ambit" which cheat a bit by referring to litigative events beyond ecclesiastical plaintiff's libel.

Although the cases are too miscellaneous to admit of summary, it may be useful to note before launching into them that they are as a group late cases. Of the 35 in the three Subsections, 31 are post-Elizabethan, 24 come from 1615 or later, and 15 are Caroline. Proposals to stretch the Prohibition to control of the "ambit of remediable wrong", successful or not, tended to be a 17th century phenomenon. Possibly a greater readiness to be innovative on the part of the ecclesiastical courts is reflected. When the proposals came, there was less earlier practice to guide the courts than in most areas of Prohibition law. In the grossest "score-keeping" terms -- Prohibition granted or denied --, the cases come out close to 50-50. The denials, I think, have the greater weight. They show more clearly what they tend to show -- judicial disinclination to assume an extensive "superintendancy" over the ecclesiastical system -- than decisions to grant Prohibition show the opposite. Many, though not all, of the latter can be explained by some incidental consideration; quite at few of the former proceed from articulated principle.

B. Complaints that the Ecclesiastical Complaint is Substantively Inappropriate

(a) Hackluyt v. Bishop. M. 37/38 Eliz. C.P. Harl. , 3209. f. 5; Harl. 4817, f. 154 (Anon., but clearly the same case and the fuller report.)

Churchwardens sued in an ecclesiastical court for several kinds of fees -- for burials, marriages, and christenings in the parish church. They claimed entitlement to these fees by prescription and made out that the prescriptive right was reasonable by saying that the money was to be used for repair and ornamentation of the church.
The Writ of Prohibition: 
Jurisdiction in Early Modern English Law

Prohibition was in fact granted on the ground that the prescription should be tried at common law (following Harl. 4817.) The case was returned by Consultation when it was found that the prescription was as alleged. It is clearly implied that the custom, factually true by common law standards, also met the common law standard of reasonableness. Per Harl. 4817, however, Prohibition was not sought exclusively to secure common law trial of a controverted custom. Rather, the surmise took the position that the ecclesiastical claim was merely unlawful and should be cut off by Prohibition whether or not its prescriptive basis was sound. ("...by the law of this realm...no money for burying, marrying, and baptizing is payable to any ecclesiastical or lay person...") The Court gave no apparent countenance to this large proposition. It showed no interest in debarring ecclesiastical courts from a category of Church-related cases, only in assuring that a prescriptive claim against lay persons be verified as an immemorial custom by common law trial. (I do not think there could be any serious objection to the custom on ordinary grounds of reasonableness. It amounted to defraying by a "users' tax" part of the parish expenses which otherwise would be met out of general taxation. If there was any hope of Prohibition beyond denying the authenticity of the custom and demanding common law trial, it would have been on the basis put forward in the surmise -- a "right to be buried for nothing" which ecclesiastical courts are simply bound to respect.)


This complex case was decided on formal pleading. It contains some further issues, but for present purposes it comes to refusal on the common law court's part to interfere with the ecclesiastical court's construction of the crime of simony. Plaintiff-in-Prohibition essentially maintained that he could not lawfully be proceeded against as a simonia, and in consequence be deprived of his living, in the (uncontested) circumstances of the case. Generally, of course, ecclesiastical courts had authority to punish simony; plaintiff-in-Prohibition was in effect saying that it was unreasonable and unlawful to extend the concept of simony to someone in his position.

The facts were these: One T. Baker bought the next avoidance of a living from the owner of the advowson. The living was already vacant, however, at the time of this transaction. That circumstance had a curious double legal effect. On the one hand, it is what made the parties to the transaction guilty of simony. (There was nothing illegal about purchasing the right to present to an occupied living the next time it became vacant. Giving
money for the privilege of presenting here and now was simony -- virtually the same as
agreeing to pay the patron if he will present a designated person.) On the other hand, the
patron's purported grant of the avoidance was invalid. (I.e., a conveyance of the next
avoidance presupposes that the living is filled when the conveyance is made. If one purports
to grant the next avoidance when the living is vacant, there is no next avoidance to convey
and the grant is a nullity.) T. Baker then proceeded to present his brother, W. Baker, who
was admitted, instituted, and inducted into the living. Up to this point, W. Baker was
ignorant of the transaction between the patron and T. Baker. (So the record showed. One
may of course wonder whether W. Baker had no inkling of how the apparent right to present
to the living got into his brother's hands. His ignorance of the details -- that the living was
vacant when the avoidance was purportedly sold, the handsome consideration of £ 180 -- is
credible enough.) Following W. Baker's induction, however, T. Baker informed him of what
had gone on, including the price. ("...requiring him to have consideration thereof", the report
says. Does that mean, "I am warning you that you may be tainted with simony" or only "I've
paid very good money to put you here, so don't forget your benefactor"? I cannot say
whether in the ecclesiastical court's eyes there could be any difference between someone's
merely discovering the corrupt events behind his presentation and his being informed in a
rather more pointed manner by the principal wrongdoer -- either warned of the danger of
simony or made to understand that something was expected of him. A casuist might argue
that obligation to resign the living is clearer in the second case than in the first.) W. Baker
was then sued for simony in the High Commission (clearly by private complaint. The
interest of the other party named in the report, Rogers, is not specified.)

W. Baker sought a Prohibition on a twofold theory. (1) He should not be pursued for
simony because he did not acquire his living by simony. Rather, he acquired it by
usurpation. That is so because he was presented by someone without title to present -- viz.
the holder of a null and void grant purporting to convey the next avoidance. T. Baker might
be liable to ecclesiastical censures for making a simoniacal contract, but an installed
clergyman is not liable to deprivation for simony unless he is "in" by simony. W. Baker, as a
usurper, no doubt stood to lose his living (certainly as against anyone with better title --
quaere whether ecclesiastical courts could oust a de facto but title-less incumbent without
complaint by an entitled rival.) But losing the living because it was never lawfully his would
be much better than carrying the stigma of simony and its consequence -- disqualification for occupying any benefice in the future, over and above loss of the present one.

In any event, W. Baker should not be regarded as a simoniac, but as an accessory to T. Baker's simony. The immediate relevance of this contention is for a separate element in the case: A general pardon came between W. Baker's finding out about the simoniacal transaction and his being sued in the High Commission. Simony was excepted from the pardon. But if W. Baker was not a simoniac, only an accessory to simony, he would be covered by the pardon -- i.e., accessories to simony were not excepted. (Prohibitions were frequently used to make sure that ecclesiastical courts respected royal and statutory pardons as the common law courts understood them.)

It seem to me, however, that the second ground for Prohibition has some force, and might have been urged, even in the absence of the pardon. In the everyday sense of these legal terms, W. Baker pretty clearly was an accessory after the fact, rather than principal -- assuming that he was really ignorant of the simony until after he was installed in the living, and assuming that some degree of criminality attaches to continuing in a living one now knows to have been corruptly acquired. A complaint that the ecclesiastical court treated as a case of simony what by any reasonable standard should be treated as a lesser offense seems plausible enough to imagine. Can the ecclesiastical court's authority to deal with simony be stretched to sweep up related offenses as if they were no different? There is of course no telling what the practical effect would be if the ecclesiastical court were to distinguish principal from accessory in simony. It is hard to think of an effective sanction against an incumbent, whether he is guilty as principal or as accessory, except for deprivation. Deprivation without disqualification for holding future benefices would, however, be a perfectly possible and fair-seeming punishment for the accessory. Speaking in this case, Justice Warburton said that by the ecclesiastical law that very sanction was applicable to wholly innocent beneficiaries of simony. (I.e., one presented in consequence of a simoniacal bargain between two strangers, who is not privy to it, is deprivable, but not disqualified. "Not privy" presumably means ignorant or faultlessly ignorant of the simony until the facts come out in proceedings aimed at deprivation. "Privy" would include aware-after-the-fact, if we assume -- which plaintiff-in-Prohibition himself admits -- that he was at least an accessory.) Whether the accessory after the fact is more like the wholly innocent clergyman or the full participant in the simony is obviously a debatable question. My
suggestion here is that the ecclesiastical court might be open to criticism for not letting that question be raised, by amalgamating principal and accessory.

The report says that *Baker* was argued several times, which suggests that the judges did not find plaintiff-in-Prohibition's contention plainly meritless. In the end, however, they were unanimous in rejecting both his points. On the first, the Court admitted that W. Baker came in "*quasi per* usurpation." But since the "means" or "cause" of his coming in was a simoniacal contract, the Court saw no reason to distinguish this case from one in which the presenter has, in property-law terms, a valid title to present. I.e., the ecclesiastical court was quite free to treat W. Baker as a simoniacal incumbent, despite his separate liability to be dislodged as a usurper.

On the second point, the Court started off by saying that in simony, as in common law trespass, there simply is no distinction between principal and accessory -- everyone involved in such a way as to incur liability, or at any rate liability with any degree of fault, counts as a principal. The status of this remark is a little puzzling. It can only be a remark about the ecclesiastical law as the common law judges knew or assumed it to be. As such, it rather begs the implicit question whether ecclesiastical jurisdiction over simony *should* be allowed to operate without a distinction between degrees of guilt. (The analogy with trespass seems a rather frail reed, though perhaps reassuring: If the common law operates without the distinction in one context, at least the ecclesiastical rule does not offend against fundamental or deeply English standards of justice.)

Having in effect asserted that the ecclesiastical law was correctly applied (and less than bizarre), the Court fell back to general language: *whether* the ecclesiastical law and natural justice were properly observed is not a question we can ask, ecclesiastical jurisdiction being clear. The generality is hardly controversial as such, though the Court in this case devoted a certain amount of effort to defending it. (Arguing from common law practice: "...it sufficeth to plead a sentence out of the Spiritual Court briefly, without showing the manner thereof, or of their proceedings" because "...this Court cannot take conusance of their proceedings, whether they be lawful or not..."; "...if the Spiritual Court will certify the especial matter upon a certificate of matrimony, or bastardy, or the like, it is not good, but they ought to certify precisely one way or the other; for this Court cannot adjudge of that special matter, but it appertains to their law to determine it.") On the other hand, the Court felt no need to defend its view that ecclesiastical jurisdiction was clear. In the context of *Baker*, the judges
thought of the ecclesiastical courts as having a "general purview" within which they were free to shape the law. Although they may have been somewhat troubled by the implications of that perspective in this case, they did not swing to the contrasting one. I.e., they did not assume the "superintendancy" that would justify the question "Can authority to punish simony really include power to impose full liability for the offense in any marginal or ambiguous case the ecclesiastical court sees fit to assimilate to standard cases?"

The decision in Baker is all the stronger for the fact that the ecclesiastical proceedings had an impact on interests under common law protection. Finding W. Baker guilty of simony and depriving him had the effect of divesting his freehold in the benefice. The Court took express note of this basis for objecting to non-interference with ecclesiastical justice in the matter of simony and brushed it away. ("And although it were said that in the Spiritual Court they ought not to have intermeddled to divest the freehold, which is in the incumbent after the induction; true it is, they should not meddle to alter the freehold; but they meddled only with his manner of obtaining his presentment, which by consequence divested the freehold from him, by the dissolution of his estate, when his admission and institution is avoided.")

(c) Anon. M. 5 Jac. K.B. Harl. 1631, f. 368; Noy, 123 (undated).

This is one of the few cases in which a Prohibition was granted to cut off imposition of an ecclesiastical liability which the common law judges thought unprecedented and mischievous. There is no sign of painful deliberation or of consideration as to whether a modest innovation in a standard ecclesiastical activity might best be left to ecclesiastical scrutiny.

A Bishop's Commissary, at a visitation court, cited various parishioners to appear as presentment jurors in effect (to inform the court of ecclesiastical offenses in the locality.) For failure to appear, the parishioners were excommunicated. Justices Fenner, Williams, and Croke, alone in court, granted a Prohibition on the ground that a visitation official has only the power to cite churchwardens and sidemen for the purpose in question. "For otherwise," said the Court, "he can trouble all the people of the country."

(d) Anon. H.7 Jac. C.P. Add. 25,209, f. 180b.

In this briefly reported case, the Common Pleas refused to consider curtailing ecclesiastical power to punish speech expressing disrespect for the established order in the Church. A man was prosecuted for saying that he would not listen to sermons of those who were ministers by a Bishop. The theory on which he sought Prohibition, which is not stated,
must be that this sort of general and impersonal expression of Puritan sentiment was beyond
the reach of whatever authority ecclesiastical courts had to punish irreligious or disruptive
utterance. The only hint of an explanation of the Court's denial of Prohibition is Chief Justice
Coke's unspecific citation of a case in which it was held that a High Commission prosecution
for calling a parson "knave" was unobjectionable. The implication is that even the most
minor aspersions, which ecclesiastical courts would almost certainly not be allowed to treat
as defamatory if spoken of a lay person, constituted a serious ecclesiastical offense if
directed at a cleric. One could obviously argue that expressions tending to bring a particular
clergyman into disrespect are more serious than impersonal or hypothetical expressions of
opinion. But it is perfectly possible that Coke would have said the opposite -- if it is not only
an offense, but grave enough to be a High Commission matter, to toss the vaguest of
scurrilities at an individual clergyman, surely it is worse to broadcast one's disapproval of
the established system and its ministers.

(e) Reynold's Case. M. 13 Jac. K.B. Moore, 916; 1 Rolle, 259 (sub. nom. Churchwardens
of Uffington v. ---); Add. 25,213, f. 178b.

Here, as in Case (c) above, Prohibition was granted. The effect was again to protect lay
persons against annoying, though hardly grave, proliferation of ecclesiastical duties.
Churchwardens sued a householder for failure to provide the parishioners with bread, beer,
and a resting place in the course of their perambulation of the parish. (The amiable practice
of a communal walk around the parish was ordinarily part of the observance of Rogation
Days.) The basis of the ecclesiastical suit was custom -- the only possible basis for charging
the occupant of a particular house with a duty to refresh the perambulators. Plaintiff-in-
Prohibition did not challenge the custom as to fact, though if he had he would certainly have
been entitled to common law trial of its authenticity. (Not only a lay person, but lay property
as well, would be encumbered.) The Prohibition suit may, however, be construed as no more
than a challenge of the reasonableness of a secular custom. One report (Moore) has the court
saying the custom is unlawful. The others are indefinite, leaving room for ambiguity as
between "The custom is unreasonable by the same standard as would be applied in any
common law case on special customs" and "Whether or not the custom might hold up at
common law, ecclesiastical courts will not be suffered to impose petty special duties on
laymen under color of custom." In contrast to the custom in Case (a) above, the one in the
present case is a good candidate for unreasonableness by ordinary common law standards.
One-sidedness -- the party burdened with an alleged customary duty receives no benefit peculiar to himself -- was the most commonplace objection to customs. There is no way of making out that the householder accustomed to give the parishioners refreshment enjoyed any benefit from the perambulation beyond that shared by all parishioners. The reasonable construction of any de facto usage is the one the Court adopted: "...it is a thing of courtesy, not of duty..." (MS.).

(f) Topsall et al. v. Ferrers. T.15 Jac. C.P. Hobart, 175.

In this case, where Prohibition was again obtained, the decision was squarely on the reasonableness of a custom by ordinary standards. The parson and churchwardens of a London parish sued in the ecclesiastical court on the basis of the following alleged custom: When someone died in the parish and was buried outside it, a sum equivalent to that customarily paid for burying in the parish church was due to the parson and churchwardens. Ferrers's wife died in the parish and was buried elsewhere. The report says the case was debated, which suggests that defendant-in-Prohibition found something to say either in favor of the custom or in favor of leaving it to ecclesiastical judgment. In the event, however, the Court held the custom unreasonable in terms and granted Prohibition. One should probably say that the flaw in the custom was excessive generality: The Court focused on the burden on sojourners -- someone merely passing through or staying at an inn would be forced either to be buried in the strange parish where he happened to die or to pay twice for his burial. Had the custom applied only to inhabitants, serving to prevent evasion of a normal parish fee, it might have held up.


This case, though slightly reported, represents a fairly strong exercise of "superintendancy" over the activities of ecclesiastical courts. An innovative type of suit was prohibited, partly, perhaps, for the mere reason that, it was unheard of -- "a strange attempt", Hobart's report calls it --, though I shall argue that the decision also reflects solicitude for the perceived rights of lay people.

Following the somewhat fuller MS. report: The farmers of a parsonage sued a parishioner for tithes. The parishioner pleaded a modus in the ecclesiastical court. I.e., he did not seek a Prohibition to secure common law trial of his alleged modus, but was content (at least so far) to have the ecclesiastical court assess it. The parishioner then cited various other
Prohibitions to Control the Ambit of Remediable Wrong, or Merely to Prevent Imposition of Unwarranted Liability

parishioners into the ecclesiastical court to testify under oath concerning tithing customs *in perpetuam rei memoriam*. The farmers -- plaintiffs in the original suit -- then sought and obtained a Prohibition to stop the proceeding against the parishioners cited to testify.

Note first that it was not the persons cited who sought the Prohibition. Had they done so, they would have been protesting quite reasonably against an unwonted extension of ecclesiastical liability. Why, in the absence of an established practice, should personally unconcerned people be coerced to come into court and required to testify under oath to make a perpetual record of the customs? It seems likely that the litigant who cited them did so in hope of advantage to himself in the immediate lawsuit. He would probably not have been debarred under ecclesiastical law from compelling non-party testimony going specifically to the issues in that suit. The objection to his attempt would seem to be that he was trying to cast a wider net, to protect himself and other parishioners against the eventuality of future disputes.

Prohibiting at the behest of a litigant presumably interested in suppressing evidence of tithing customs unfavorable to him may seem doubtful. It was, however, accepted doctrine that Prohibition should be awarded when merited, whoever moved for Prohibition and however clean his hands. The Prohibition in this case was disadvantageous to a tithe-payer trying to establish a commutation, but common law trial of the *modus* was open to him for the asking -- a reason for not indulging new procedures designed to improve his position in an ecclesiastical trial.

Against these considerations favoring Prohibition, one can adduce the usefulness of the procedure that was prohibited and the general argument that the ecclesiastical system should be trusted to develop its own ways of doing its own business (subject to the control of its own appellate courts.) Troublesome to individual laity the procedure might be, but the offsetting gains in efficient dispatch of tithe litigation inside the ecclesiastical system and avoidance of litigation could be worth the cost. Those are in any event meritorious goals for a legal system to have, though perhaps ones that should be achieved by Parliamentary legislation rather than interstitially.

(h) Bishopp's Case. H. 16 Jac. K.B. 2 Rolle, 71.

The Prohibition granted in this case is explicable by the proposition that a churchwarden is strictly a temporal officer. I.e., as the King's Bench saw the case, the Court did not intervene to prevent imposition of an unwarranted liability within the general area of
ecclesiastical concern, but to stop ecclesiastical proceedings against a party regarded as simply immune from answerability in ecclesiastical courts. In the circumstances of the case, however, the line between those two things was thin. A strong argument was made against Prohibition, the underlying assumption of which is that the ecclesiastical court was within the "general area of its concern", and Prohibition could possibly have been justified even conceding that.

A churchwarden was sued ex officio (on the ecclesiastical court's initiative rather than a private party's) to account for money received and spent by reason of his office. He sought a Prohibition on surmise that "per legem terrae" he should account to the minister, the succeeding churchwarden, and a majority of the parishioners, and that he had so accounted. This surmise does not state the point that apparently turned out to be decisive: that the office is temporal, wherefore any demand that can be made on the holder to account for his conduct of the office must be in a temporal court. Rather, the theory of the surmise would seem to be that a churchwarden whose account has been accepted by the minister, etc., is discharged. This is represented as a general rule of law barring the ecclesiastical court or any other. Whether or not the ecclesiastical court has an arguably legitimate interest, and whether or not its reopening the accounting would encroach on common law territory, "the law of the land" requires discharged churchwardens to be left alone.

Henden, arguing as counsel against Prohibition, saw that the temporal character of the office was apt to weigh heavily against him. He began by conceding that to various intents the office is temporal: Churchwardens are a secular corporation, competent to sue and be sued in personal actions, which includes power to sue for goods belonging to the church. Henden then said that a sitting churchwarden may bring a common law action against his predecessor as a stranger, "but not as against an officer for things that he does ratione officii." Therefore, Henden concluded, if the ex-churchwarden cannot be forced to account in an ecclesiastical court, there is no remedy against him. I am not sure how to understand this argument, but would suggest the following: Once the retiring churchwarden has accounted to the satisfaction of the minister, etc., he is out of danger of an action of Account -- he cannot be questioned again strictly in respect of his official conduct. But he is not discharged of all liability for his acts in office. If, for example, he has retained property belonging to the church or money received on the church's behalf, his successor may sue him in Trespass. It makes no difference that such items were overlooked or misrepresented in his accounting to
Prohibitions to Control the Ambit of Remediable Wrong, or Merely to Prevent Imposition of Unwarranted Liability

the minister, etc. In a sense, therefore, the accounting can be reopened, but not *qua* accounting. The ex-churchwarden's liability to turn over any property or money he has failed to account for is not, however, different in principle from a stranger's liability -- *anyone* who in the time of the last churchwarden came into possession of the church's property is answerable to the present churchwarden for it. It is no doubt arguable that these common law arrangements are adequate protection for the Church against a former churchwarden who has managed to get his account accepted by the minister, etc., but is not actually square with the Church. *Per* Henden, however, it is desirable that ex-churchwardens be subject to *legal* accounting somewhere, over and above their *in pais* accounting to the minister, etc. At any rate, the ecclesiastical courts are within their rights if they see fit to insist on such a legal accounting, for they have a legitimate interest, and the common law has vacated the field.

Henden went on to argue that a churchwarden is *quodam modo* a spiritual officer and therefore can appropriately be proceeded against in an ecclesiastical court in respect of his office. In support of this, he said, citing the Register, that a parish clerk may sue for his fees in an ecclesiastical court. (This is perhaps not a powerful argument. The point is that a parish clerk was to some intents a temporal officer -- as some Prohibition cases confirm, mostly ones concerning the power to appoint to the office --, yet surely *quodam modo* spiritual if the fees are recoverable in the spiritual court.)

No argument by counsel on the other side is reported. Prohibition was granted. The only indication of the Court's thinking is a brief declaration by Chief Justice Montagu that a churchwarden is a temporal officer "employed in ecclesiastical business" (vs. a temporal but *quodam modo* spiritual one.) The apparent reason for decision was the sensible-enough idea that, whatever else is true, accounting for the conduct of a temporal office cannot be ecclesiastical business. Having failed to convince the Court that the office was in some sense spiritual, Henden got no hearing for his argument that the interest of the parish church was insufficiently protected without an ecclesiastical remedy.

At the end of the report, there is a *quaere* from the reporter: Suppose a retiring churchwarden is requested by the minister to render an account and refuses. Is the ecclesiastical court still powerless to cite him to account there? Montagu's position seems to imply an affirmative answer. "Can that be right?", the reporter is asking. The question would not be a good one if the minister and other parties entitled to an accounting could clearly bring Account at common law. I therefore take it that their common law position was at best
cloudy. (Particularly, where do the minister -- the reporter's example -- and the parishioners stand? The successor churchwardens had corporate status to sue at common law. At least if they had not themselves accepted the predecessor's account, they might not be helpless. But what of the other parties equally entitled to be satisfied?) In short, it looks as if the church's interests may not have been adequately protected without an ecclesiastical role, though Henden as reported did not quite put his finger on the reason why.

With this in mind, one can see how the theory of the surmise as I analyze it above might be a better basis for Prohibition than simply classifying the office as purely temporal. The common law court might insist that ecclesiastical courts not rescrutinize accepted accounts, while permitting them to call ex-churchwardens to account before acceptance by minister, parishioners, and successors. This course requires, however, a willingness to concede generic jurisdiction and assume detailed control over its exercise. The Court's decision implies disapproval of that.


From the Bar in this case came the strongest assertion I have found of common law authority to regulate innovation in the ecclesiastical law. Moving for Prohibition, Serjeant Attoe claimed that his client was the victim of "a novel law of the Church of England" and said, "...it is the prerogative of this court to maintain the freedom of the subjects from foreign invasion and to enclose every court within bounds." The disposition of the case by the King's Bench can be described as a highly ambivalent endorsement of Attoe's proposition.

The Chancellor of Norwich, Redmond, made and published an ordinance that every woman coming for churching after childbirth "according to the law of the Church of England" should be covered with a white veil. Shipden, "being admonished," refused to conform, upon which contempt she was excommunicated, and upon certification to the Chancery a writ De excommunicato capiendo was awarded. (I follow the statement of the case in the report exactly. It presumably comes from the surmise, though the reporter may have supplemented what was admitted therein with further specification of the events picked up from oral interchange in court. The detail to note in that the Chancellor of Norwich seems to have been careful to avoid procedural irregularity. The ordinance was duly publicized. Shipden was admonished before she was punished -- she would presumably have had an opportunity to raise legal objections within the ecclesiastical system to the rule she was accused of violating. The phrase "according to the law of the Church of England" is
Prohibitions to Control the Ambit of Remediable Wrong,
or Merely to Prevent Imposition of Unwarranted Liability

ambiguously placed. It may only recite the obvious -- that churching after childbirth was established practice. On the other hand, the phrase may indicate that the Chancellor of Norwich so drew his ordinance as to disown any claim to make new law or even to expound the old. I.e., he may have purported in terms merely to declare the indisputable rule that a white veil must be worn.)

The Court took neither of two possible courses: (1) It could have refused Prohibition on the ground that the precise rules about churching were purely ecclesiastical business -- if Shipden wanted to complain that she was punished under an unwarranted rule, she must do so through the ecclesiastical courts. (2) The Court could have prohibited on the basis of its impression that the veil requirement was at least dubious. (The judges were at least not confident that the requirement was good ecclesiastical law.) It would then have been necessary to take evidence of what the ecclesiastical law actually was -- either on a motion for Consultation or on formal pleading. The normal, or at any rate the most correct, means to that would be to hear civilian counsel on both sides. Alternatively, decision could simply be deferred until evidence of the ecclesiastical law was taken in court and probably through the agency of the parties. (As it were, "We can neither prohibit nor refuse to until we are informed of the ecclesiastical law. Now let the parties try to convince us one way or the other." This approach probably implies a presumption against Prohibition, in the absence of a strong inclination on the judges part to believe or their own knowledge that Shipden was in the right.) Definitive action without firm knowledge of the ecclesiastical law would be precluded because the requirement in question can hardly be called intrinsically oppressive. I.e., the King's Bench could surely not take the position in this case that whatever the correct ecclesiastical rule the Court would not suffer the Church to afflict the subject with petty regulations over and above its basic requirement that women participate in the churching ceremony. The burden of this Section is to ask whether that type of position was ever taken, and we have found precious little evidence that it was. (Possibly impanelment of random parishioners on visitation juries and some forms of compelling non-party testimony about tithing customs would have been banned even in the face of good evidence or strong ecclesiastical assurances that these practices were well-warranted in Church law. In the actual cases concerned with them, the common law judges probably believed to a moral certainty that no warrant could be made out.)
Instead of either of the courses above, the King's Bench referred the question of the ecclesiastical law to the Archbishop of Canterbury. He called together the six other bishops who happened to be in London, and this ad hoc committee resolved and certified that it was "the ancient custom of the Church of England" for women coming to be churched to wear a veil. Prohibition was thereupon denied.

The Court's way of proceeding can be seen as no more than a sensible short-cut in lieu of the second course I have outlined. Discovering the ecclesiastical law informally -- as opposed to inviting civilian argument -- was by no means unprecedented. I have suggested that discovering it promptly was essential if the Court was neither ready to rule out Prohibition on general principle nor so convinced that Shipden was right that it could responsibly drive the Chancellor of Norwich to his last resort (formal pleading, which would in the end require giving the Chancellor a chance to argue through civilian counsel that he was justified by ecclesiastical law.)

One hint in the report gives me pause about leaving the case at that. The judges are said to have consulted the Archbishop "because it was a novel case which would make a precedent." This suggests a perceived need to justify the reference to the Archbishop -- not as an informal device, because more solemn means to respond to a new and puzzling case are conceivable, but as an appropriate measure at all. How could it have looked possibly inappropriate to seek information about the ecclesiastical law, when there was no reasonable basis for prohibiting without it? For a further question: In what sense was the case novel and a potential precedent-setter?

The most significant reason for regarding the case as delicate would be the Court's realization that it was being asked to enforce the true ecclesiastical law by Prohibition. Being so asked was not exactly a new case, but it was certainly a rare one, especially in such blatant form. A decision to prohibit would be an important precedent -- an invitation to people who thought they were the victims of mistaken ecclesiastical law to seek Prohibitions. The easy way to express these qualms would have been to deny Prohibition. Could the judges have thought that a decision that way might be a dangerous precedent too -- an excessively clear repudiation of authority to use the Prohibition for more than self-protective purposes, a hobbling precedent if serious harm to someone in consequence of an ecclesiastical official's misconstruction of ecclesiastical law should be complained of?
Prohibitions to Control the Ambit of Remediable Wrong, or Merely to Prevent Imposition of Unwarranted Liability

If this catches the judges’ state of mind, their reference to the Archbishop was an intelligent demonstration of judicial reserve. As it were: "We have no relish for meddling in this petty Church matter. We have no zeal for coming to the relief of a Puritan woman bent on making difficulties. [That surely describes Mrs. Shipden. She was ready to go to a lot of trouble to avoid wearing a veil or truckling to an episcopal official.] Yet we are reluctant to deny Prohibition so as to imply that we could never have interest to assume a supervisory role over irresponsible behavior in the ecclesiastical sphere. We would be much happier refusing Prohibition just because there is no reason to think Mrs. Shipden is the victim of misapplied ecclesiastical law, leaving deeper questions open. But we need grounds for believing what we are inclined to believe. Denying Prohibition without manifestly having them would carry just the general implication we are afraid of. We probably could find out what we need to seem to be sure of by more solemn means than taking the opinion of high-ranking churchmen. But that would take time and argument and would display us deliberating about the ecclesiastical law -- something common law courts should be discouraged from doing, though it might be unavoidable in case of more serious possible misconduct than we would face here in the unlikely event that there was any misconduct at all on Dr. Redmond's part. So let us simply ask the Archbishop."

For a final twist: Serjeant Attoe in effect challenged the judges to deny Prohibition if they found the ecclesiastical law against him. For, after his bold declaration of the theory on which Prohibition should be considered, he said (in the form of an offer -- "he offers to the court") that if there was any such custom in the Church of England as the veiling requirement his client would obey. The probable explanation of this move is Attoe's realization that he was representing a Puritan unlikely to enjoy much sympathy at best, and likely to enjoy less if she seemed to be asking for anything beyond her strict rights under the law of the established Church. Attoe presumably wanted to draw real debate about the ecclesiastical law. He may well have had reason to believe that if put to proving that white veils were de rigueur Dr. Redmond would have trouble. The Court's device of taking the Archbishop's word for it was a clever response to Attoe's challenge. (The Archbishop, one might add, played his part intelligently by presenting the Court with the resolution of a unanimous committee of experts.)

Prohibition was denied in this case. It is not clear that the ecclesiastical suit was objected to as inherently unreasonable or abusive, though a procedurally interesting twist in the case suggests that that may have been a basis for seeking Prohibition over and above the principal one. The main basis, unsuccessful in the event, was a claim that the suit contravened statute.

A rectory was appropriated in the reign of Edw. II. The instrument of appropriation contained an express clause empowering the Bishop to augment the vicar's endowment whenever he judged it necessary. At some time in the past (unspecified except as long ago, clearly before the Reformation), the appropriated rectory became part of a prebend belonging to the "Custos of Choristers" of Salisbury Cathedral. The vicar's endowment had once been increased (again at an unspecified past time) from £ 8 to 20 mks. Hitchcocke, the present vicar, sued Hoskins, farmer of the rectory, for an augmentation. The libel recited that the parish was large and that Hoskins held the rectory by a lease for three lives, rendering £ 36 rent as against an annual value of £ 300. (Note the fact, which proved material, that the farmer alone was ecclesiastical defendant; the prebendary-reversioner was not joined.)

Prohibition was sought at least primarily on the ground that the value of the rectory was guaranteed by one or more of the Reformation statutes, so that cutting into it by an augmentation of the vicarage was now forbidden. The Court flatly rejected this contention. The merits of the point of statutory construction need not concern us here. In essence: The rectory in question was continuously in the hands of an undissolved ecclesiastical body, never came to the King's hands, and was never turned into lay fee in the way most appropriated livings were; it was simply untouched by the statutes, in the Court's opinion. The report does not indicate that any other ground for Prohibition was put forward. The Court mentioned the authorization of augmentations in the original endowment and the fact that the power to augment had once been exercised. Pointing to these circumstances seems only to underscore the obvious -- that once the statutes were ruled irrelevant there could be no basic objection to the ecclesiastical suit. The Court's language at most suggests that in the same case without the authorization clause and evidence that the authority to augment had not gone unused over a very long time the judges might have been tempted to intervene. I.e., they might have considered an augmentation suit without such warrant beyond the ecclesiastical court's powers, whatever that court's view of the matter or whatever the ecclesiastical law. I do not think it is at all certain that they would have.
Prohibition was accordingly denied. But in fact the Common Pleas was not happy with the ecclesiastical suit as it stood. While denying Prohibition, the Court "directed" the vicar to proceed against the rector/reversioner as well as the farmer. This is a most unusual procedural step. The ecclesiastical suit could have been prohibited as formally improper though substantively unexceptionable, leaving the vicar to start a new suit. It could have been prohibited conditionally -- unless the vicar recast his present suit to make the reversioner co-defendant. What does resorting to the milder measure, the "direction", signify? Scrupulosity about assuming "superintendancy" over ecclesiastical business, I should think. I.e.: The judges considered the suit against the farmer alone plainly improper. They thought the ecclesiastical court should have seen this and required the suit to be recast. But they were unwilling to use the Prohibition to straighten out proceedings which in the end were the ecclesiastical court's affair. Foreclosed from mandatory action, they could do no more than say in effect to the ecclesiastical plaintiff, "Look, your suit in its present form makes no sense -- revise it, get the question whether you are entitled to an augmentation settled in proper form and everyone concerned, including ourselves, can be at peace." We shall soon see the sequel of the Court's so acting.

First we need to ask what was wrong with suing the farmer alone. On one level, the answer seems fairly obvious. How could it have occurred to the vicar suing for augmentation not to make the ultimate owner of the rectory a party? Surely he would have wanted a judgment that would encumber the rectory with a larger endowment for the indefinite future. It must surely be more than doubtful that a judgment against a lessee for three lives would bind the reversion after termination of the lessee's estate. Could the suit in its present form be anything but a mistake -- or, alternatively, the product of motives either whimsical or disreputable? (For personal reasons the vicar did not want to engage the prebendary/reversioner in a lawsuit. He calculated that the farmer would put up a weaker defense than the reversioner or enjoy less sympathy from the ecclesiastical court than a clerical defendant. He hoped for a judgment against the farmer in full realization that it would not bind the reversioner, but calculated that future rectors -- when the lease expired -- would acquiesce in the augmentation de facto or would in any event have trouble winning a future lawsuit in the face of an earlier judicial determination that an augmentation was necessary.) If the situation is seen in this way, the Court in "directing" the vicar would have been partly advising him of his long-run interest and partly reminding him of his obligation
The Writ of Prohibition:
Jurisdiction in Early Modern English Law

to the Church and his rector. (As it were, "It certainly looks as if you have a good claim to an
augmentation, but it is irresponsible not to pursue one in a form that will give a hearing to all
interested parties and produce a clear legal settlement. If pursuing your purpose properly
goes against your preference or exposes you to some litigative risks you'd rather avoid --
well, if we were the ecclesiastical court we would say 'too bad. ' Anyhow, your preferences
are dubiously in your interest, or that of your successors in the vicarage, whom you should
also be thinking about.")

Thus clean law administration and fairness to the rector recommend suing particular
tenant and reversioner jointly. Can suing the farmer alone be considered unfair to him, apart
from the possibility of mere bias on the ecclesiastical court's part? I think it can, but the
sense is subtle.

The farmer in this case held a "beneficial" lease. He was paying as rent only about 12%
of what he received in income. He had for the most part paid for his temporary interest in
income-yielding property in the form of a fine (lump sum to the lessor at the beginning of
the lease.) He clearly took his estate subject to the power of augmentation. I.e., there is no
suggestion in the case that the farmer was immune from the risk that the vicar's endowment
would be increased during his term. If he did not contract with the lessor to secure him
against this risk, it would presumptively be discounted in the amount of the fine together
with other factors (the uncertainty of how long a lease for three lives will last and mere
futurity -- any fine will be reduced to account for the value to the lessor of cash in hand now
against rental income in the future.) So the farmer would have no complaint if he were sued
jointly with the reversioner and lost income in the event of the vicar's winning his
augmentation.

Against being sued singly, however, he can complain that non-representation of the
rector's putative interest in preventing an augmentation would increase the odds of the
augmentation's being granted. This is not quite the same as saying that the ecclesiastical
court might be tempted to grant the augmentation when it saw the situation in this case:
about 83% of the income from the living going to no ecclesiastical purpose whatever for an
indefinite period of three lives. The temptation would probably be real enough. Of course it
should be resisted by bearing in mind that the rector had already reaped in the form of his
fine -- the ecclesiastical purposes he was responsible for had already been fulfilled. (There is
no cynicism here. The power of appropriating institutions to grant beneficial leases -- in
effect to borrow money -- could be an essential means to their accomplishing the Church's ends, such as building.) But this does not mean that the temptation would not be felt. It would be all the greater if the suit were clearly understood as I have suggested it must be -- as a suit for a temporary augmentation in effect, since the rector could hardly be bound legally by a judgment against the farmer. It does not extend great faith and credit to the ecclesiastical court to suspect it of willingness to soak the lay farmer here and now without necessary prejudice to the rector, but it would not be surprising if the suspicion crossed the judges' minds. Aside from that, however, there remains the following argument:

The justification for appropriations was that some of the income normally tapped by the parish clergy would be better spent for the benefit of the Church as a whole by other ecclesiastical institutions. (That the justification was reduced to absurdity by the laicization of most appropriated livings at the Reformation -- for the benefit of the Crown and its grantees -- is irrelevant for the case at hand.) Vicarial augmentations should clearly not be awarded *only* because the value of the living had increased in such a way that the vicar's share of the income had diminished in proportion to the rector's. The ecclesiastical court should of course consider purchasing power, changes in the magnitude of the vicar's job, and similar circumstances (e.g., clerical marriage.) But once those are allowed for, the controlling criterion should be whether the present income under present conditions is better devoted to one ecclesiastical use or another. Can it really weigh that when the particular ecclesiastical institution to which disposal of the rectorial share of the income is entrusted is not party to the suit? Let us give every benefit of the doubt to the ecclesiastical court on the scores of fair intentions and its own competence to judge the Church's best interest -- the court has no inclination to be hard on the farmer; it understands that he has presumptively paid fair value for his expectations and should not have them reduced unless as a necessary incident of a long-term readjustment in the allotment of an item of Church income; it will be fully judicious in exercising its authority to decide how the Church's general interest can best be served. Even so, can the court -- can *any* court -- do the best possible job without formally hearing all concerned? Try as it may, can it be sure that it has not been unduly swayed by the perhaps patent needs of the vicar when it has not actually heard what the rector (speaking in part as a private party, but also in a sense as a fiduciary for the Church) would say in favor of leaving the lion's share of the income to him for the foreseeable future? In short, it would
simply be better judicial practice -- better insurance against even the aspersion of bias -- for
the ecclesiastical court to insist on a suit against both the lessee and the reversioner.

The report does not indicate firmly which of the various (not mutually exclusive)
reasons for objecting to the ecclesiastical suit most influenced the Common Pleas to "direct"
it recasting. The vicar is said to have been told to sue the rector as well as the tenant "who
has paid a fine and who now has an estate of freehold." Perhaps there is a hint in the
emphasis that unfairness to the farmer in one sense or another was central.

Now for the sequel to the original denial of Prohibition cum "direction." The vicar did
not change his suit as instructed, and the ecclesiastical court proceeded with it in the original
form. The vicar was awarded all the tithes from one village, worth £40, plus a few
miscellaneous revenues -- a very substantial augmentation. Prohibition was moved for anew.

The report does not give a clear account of the arguments on the second round. The
statutes were relied on again and again held inapplicable by the Court. Plaintiff-in-
Prohibition must have hoped that the judges would take stronger action than before when
they saw their "direction" disregarded and contemplated the outcome of the suit with the
reversioner unjoined. There is no firm basis for saying whether the non-statutory objections
to the form of the suit were urged more vigorously than on the first try. The second surmise
does appear to have called attention to the flouted "direction." The result is clearly reported:
Prohibition was again denied. In the upshot, Hitchcocke v. Hoskins is a pretty emphatic
demonstration of judicial reluctance to supervise the handling of litigation substantively
proper to the ecclesiastical courts. Disapproving of what they saw happening in the
ecclesiastical sphere, they first tried an "off the record" way of rectifying it, and when their
attempt failed they still declined to set a precedent of active "superintendancy."

Note: It will be evident that Hitchcocke as it unfolded properly belongs in Sub-section C
below, because apart from statute the form (failure to join an appropriate co-defendant) was
the objection to the ecclesiastical suit rather than the substance of the claim. I have placed it
here owing to affinity with the next case following, which shows that the very legitimacy of
suits for vicarial augmentations could be attacked. It was not attacked in Hitchcocke, and
probably could not have been because of the express authorization of episcopal
 augmentations in the instrument of appropriation. The social importance and legal intricacy
of the problems common to the two cases, however, make it desirable to look at them
together.

This case, like the last, concerns augmentation of vicarial endowments. I shall discuss only one of its elements here. The principal issue is whether the Reformation statutes should be construed as destroying ecclesiastical authority to increase a vicar's endowment as against a lay impropiator. So stated, this issue presupposes that before the statutes the authority existed. Counsel argued, however, about whether it did exist in the days when there were no lay impropiators. I.e., it was urged in favor of Prohibition that even if statute had not intervened, the vicar's suit to have his endowment augmented would have been beyond the scope of ecclesiastical courts; the contrary was urged against Prohibition. I shall deal only with this debate here, leaving aside the intricate arguments over the interpretation of the statutes.

In his ecclesiastical suit, the vicar alleged that he was the minister of a large and populous parish; that it was general ecclesiastical law in the realm that vicars should have a "congruent" portion of tithes and other profits; that the annual income of the impropiated parish was £ 150 as against his income of £ 9.6s. 8d.; that the original license to appropriate the living contained a proviso "quod vicaria perpetua ibidem sufficienter dotata sit"; that the vicar's income was not a "congruent" portion; and that the vicar had unsuccessfully requested the lay rector to increase his portion voluntarily. (In contrast to the last case above, note two points. First, in the previous case the act of appropriation contained express authorization for the Bishop to increase the vicarial endowment, whereas here the closest equivalent at the vicar's disposal was language in the license making it conditional on the endowment's sufficiency. Secondly, the conception of a "congruent" endowment put forward here may be slightly at odds with my argument above that a substantial increase in the disproportion between rectorial and vicarial income is not ipso facto grounds for augmentation. That of course depends on the precise meaning to be given to a vague term. The vicar in the instant case may have taken the position that less than 7% of the income was too little no matter what. If that were accepted, it would from one point of view not matter in Hitchcocke v. Hoskins whether the suit was brought against the farmer alone or the farmer and the reversioner -- the proportions are exclusively relevant, whatever ecclesiastical purposes are being fulfilled by the rival sharers.)
Prohibition was granted in King v. Sutton, in all probability because on first sight the ecclesiastical suit seemed to contravene the statutes protecting lay impropriators. The very well-reported arguments of counsel are on motion for Consultation. The report does not tell whether the motion was granted and contains no indications of judicial opinion.

A good deal of medieval authority was vouched on both sides of the question whether augmentation suits are intrinsically lawful. (See note below.) Counsel maintaining the affirmative conceded that the very nature of an appropriation did not entail the endowment of a vicarage. By the primal ecclesiastical law, unrevised by legislation, the rector of an appropriated living could have the functions of parochial minister performed by a mere hired curate. This was changed by international Church legislation in the middle ages (Council of Vienne, 1311-12.) Bishops were authorized to assign a portion to a vicar in default of the patron-rector's doing so voluntarily. Per counsel opposed to Prohibition, this legislation had been "received" in England and had been the operative law. (By the post-Reformation orthodoxy, that means not only that the legislation had been recognized by the English ecclesiastical courts, but also that it had been countenanced by the secular law.) Counsel favoring Prohibition disputed the reception of the legislation.

Episcopal power to augment endowments does not automatically follow from acceptance of the legislation in some sense. By-passing finer points of interpretation (see note), it was argued in favor of Prohibition that the patron-rector's assent was required to augment an endowment. It was also argued that the monarch's assent was necessary. The reason for that was that at least since the mid-14th century vicars had characteristically been bodies politic. Their existence as such was dependent on royal license. Per the argument, when the King has created a corporation endowed with such-and-such income-producing rights, the ecclesiastical authorities may not on their own cause it to be endowed with more.

Unfortunately, we have no information as to what the judges thought about these matters. They would have been avoidable if the Court was of the opinion that lay impropriators were protected against augmentations by statute. My guess is that they would have come to that conclusion. The meaning of the Reformation statutes was discussed by counsel with much greater care in this case than elsewhere, however, so that guessing is hazardous. In the dimension that is independent of statute, the arguments on both sides assume the common law court's title or responsibility to decide the legitimacy of vicarial augmentation suits per se. The presence of lay interests seems to me to make this inevitable.
If lay impropriators were unheard of, there might be some basis for claiming that whether such suits are legitimate -- a question turning on the meaning of the medieval Church legislation and the implications of English ecclesiastical practice in the light of it -- should be left to the ecclesiastical system. One could then argue that generic ecclesiastical responsibility for the distribution of Church income among clerics implies jurisdiction to determine whether a particular type of suit affecting that is warranted by law. Even if the Reformation statutes did not have the direct effect of protecting lay impropriators against vicarial augmentations, they gave the common law courts an interest in making sure that loss was not unwarrantably imposed on impropriators. They effected this merely by making it possible for laymen to have an economic stake in the value of rectories. Disinterested control of the "ambit of remediable wrong" goes farther.

Note on Authorities

Medieval authority cited in this case is not very decisive for the central non-statutory question: May a vicar sue in an ecclesiastical court for an augmentation of his endowment? There are no examples of attempts, successful or unsuccessful, to prohibit such suits. The evidence consists in collateral remarks in a few Year Book cases. Some tend to support "reception" in England of the international Church's legislation. I.e., they provide reasonable grounds for supposing that not only ecclesiastical officials, but common lawyers and judges as well, acknowledged the Ordinary's power to increase vicarial endowments whether the rector-patron was willing or not (and whether or not such power was expressly conferred on the Ordinary in the original instrument of endowment, as in Hitchcocke v. Hoskins.) Only one piece of comparable evidence was produced on the other side, but it is quite possibly the strongest of these inherently oblique exhibits.

In King v. Sutton, three cases were relied on by counsel urging that the Ordinary did have power to augment:

(1) 2 Hen. 4, 9-10. At the time a vicarage was created, the vicar was made to take an oath not to try to increase his endowment or claim as part of it more than certain specified property. He was also made to enter a bond, payable into the Papal Chamber on forfeiture, guaranteeing that he would not do so. The vicar later brought suit claiming further endowment. The rector-patron thereupon sued the vicar before the Pope's Collector in England, claiming breach of faith or perjury and also forfeiture of the bond. The rector's suit
was prohibited, and subsequently Consultation was sought. The principal issues were whether the Collector had any jurisdiction in England, whether it was in any event the business of a secular court to inquire into intra-ecclesiastical jurisdiction, and incidentally whether the rector's suit would have been unexceptionable in a regular English ecclesiastical court. (The last question was only taken up after the case had been referred to the King's Council and that body had decided against Consultation, probably on the ground that the Collector lacked status as an ecclesiastical judge in England and was preventable from acting as one de facto upon complaint made.)

For the matter we are concerned with, the case only shows that no question was raised about the legality of the vicar's augmentation suit. The ecclesiastical authorities assumed he was entitled to sue, for otherwise they would not have exacted the oath and bond to prevent him from actually bringing suit. Nothing was said by the common lawyers and judges speaking in the Year Book to suggest that they thought the assumption unwarranted, but that is not powerful evidence of their acquiescence -- they were not called upon to decide the point. That the rector did not seek to prohibit the vicar's suit is a basis for inferring that Prohibition would not lie. The inference is at best not overwhelming, and it is weakened by the fact that in the instant case the rector had and used other resources. (The objection to any form of ecclesiastical jurisdiction over the rector's suit, when that is discussed at the end of the report, was fear lest a finding that the vicar had broken his oath would lead in effect to specific enforcement of it. I.e., he would be ordered to do what he had sworn to, which would mean abandoning his augmentation suit. While Prohibition, if available, might have been the surest remedy, the rector was perhaps in a position to achieve the same result without stepping outside the ecclesiastical sphere.)

(2) 40 Edw. 3, 28. This is a long and deep case on whether a vicar may maintain Juris utrum against his rector-patron. (In effect: May the vicar litigate with his rector over title to real property comprised in the former's endowment -- and by extension, explicitly discussed in the report, over real-estate interests of the sort protected by assizes, short of ultimate title?) At several points in the discussion of this problem, it is mentioned that Ordinaries have power to rearrange the distribution of property and incomes between parson and vicar, either by increasing the vicar's share or by doing away with vicarages when the combined value of parsonage and vicarage becomes too little to support both. This is relevant, though not dispositive, for the question of Utrum's availability to vicars. There is a certain oddity in
thinking of the vicar as fully owner of his endowment-property as against the parson, and therefore competent to engage him in a real action, when all he has could be taken away if a third party -- the Ordinary -- holds that changed circumstances require it. (Power to augment by itself, without the counterpart power to disendow, hardly seems to militate in favor of downgrading the vicar's property interest. It is hard to imagine the former power existing by itself, however, and all the observations in the Year Book envisage the counterpart. It would be strange law to hold that the vicar's position may be improved, or at least be kept constant in a relative sense, if the parsonage prospers, but that the vicarage must be left untouched if the parsonage dwindles, or if both livings shrink so far that a merger is the only way to maintain one viable benefice.)

Counsel in King v. Sutton seem to make no more of the case than that it is evidence that common lawyers in the 14th century took the Ordinary's power to augment for granted. I am not sure it is quite as strong as they pretend even for that. One of the speakers in the Year Book, though not others who touch on the point, says that Ordinaries may recast vicarages with the patron's concurrence. No doubt he is speaking casually enough; from his point of view, even if the Ordinary cannot impose a rearrangement when the patron is unwilling, the vicar's interest is still too precarious to be protectable against the parson by real action; that is well-taken in so far as one is thinking about disendowment rather than augmentation. (A patron-rector -- the normal case -- would have no conceivable motive to resist disendowment. The matter is altered if the parsonage and the patronage were severed, which was possible -- see the next case below. Insistence on the patron's assent could refer only to the latter situation, but it is unlikely.) In short, there is a shadow of ambiguity as to whether the Year Book speakers were contemplating episcopal power to force a redistribution of shares between parson and vicar. (There was no question but that the bishop's assent was required to any change the rector-patron is willing to make.)

(3) 31 Hen. 6, 14. This case presents another discussion of whether vicarages can be regarded as sufficiently independent and durable interests to count for certain legal purposes. The Ordinary's power to augment and to disendow is again brought up as a reason for not so regarding them -- for taking them as precarious dependencies of the parsonages over them. The context is the meaning of a statutory rule. Circumspecte Agatis, tracked by another dubious statute, De Regia Prohibitione, provided that ecclesiastical courts should not be prohibited when a rector was suing for tithes amounting to no more than 1/4th of the total
value of his living. The instant case involved a rector's suit for tithes, and one of the issues a propos of whether it should be prohibited was how "1/4th of the value of the living" should be calculated. When a rectory has a dependent vicarage, does this mean 1/4th of the combined value of the parsonage and the vicarage, or 1/4th of the value of the parsonage alone?

Serjeant Yelverton, arguing for the "combined value" theory and to that end for the legal precariousness of vicarages, says that if either the parsonage or the vicarage decays the arrangement between them can be altered. The vicarage may be done away with if the combined value shrinks drastically, and if the vicarage becomes impoverished its share of the combined value may be increased at the parsonage's expense. Yelverton does not say in so many words that these readjustments are merely within the Ordinary's power, but nothing suggests the contrary. He emphasizes the power to augment as much as the power to disendow, and the bishop's power to do the former without the patron's consent is more relevant in the context of this case than for the debate over Utrum above. (If the vicar were only liable under changed conditions to lose all his endowment, there would be some reason to think of the endowment as "less than property in a full sense." If the parson were only liable to have some of his income transferred to the vicar, his capacity to sue without fear of Prohibition would be unstable. Last year he could safely sue for £ 20 because his parsonage was worth £ 100; this year, because the vicar has won a £ 30 augmentation and the parsonage is worth only £ 70, parson's £ 20 suit is over the limit and in danger of Prohibition. Arguably, that is an inconvenience. It is fairer and a better guess at statutory intent to suppose that the parson is entitled to count on the combined value -- a figure which may of course rise or fall from "natural" causes, but which is at least not variable whenever the bishop sees fit to revise the terms of appropriation.)

Ecclesiastical lawyers were present on the occasion reported in the Year Book. (One of them, a Dr. Newton, speaks to a separate technical point of Church law concerning which the common lawyers needed to be informed.) These "Doctors" are reported as concurring with Yelverton. From the Bench, Chief Justice Fortescue takes issue with Yelverton's conclusion. I.e., he takes vicarages to be autonomous and presumptively perpetual entities, rather than precarious dependencies, and for that reason concludes that "1/4th of the value of the living" refers to the value of the parsonage alone. His ground is that the parson, originally patron, may convey the patronage of the vicarage to someone else while retaining...
the property and income-rights of the parsonage. Fortescue admits expressly, however, that "the vicarage or parsonage can be in such decay that all the vicarage will be rejoined to the parsonage." He does not in so many words make the further concession that if the vicarage decays, or even shrinks in proportion to the value of the parsonage, it may be augmented. He makes no distinction between disendowment and augmentation, however, and leaves it to be understood that he has no quarrel with Yelverton's premises as to episcopal power, only with his inference therefrom. There is no other expression of judicial opinion.

Though hardly head-on, 31 Hen. 6 is the best evidence proffered for pre-Reformation consensus that episcopal power to augment vicarial endowments existed in England. This seems to have been acknowledged by the lawyers on the other side in King v. Sutton -- i.e., those arguing that power of augmentation without the rector-patron's assent was not accepted in England. For they proposed a way around that Year Book (while saying nothing about their opponents' weaker citations.)

Their argument is that the discussion in 31 Hen. 6 has reference to conditions before the statute of 14 Edw. 3, c. 17, which they take as decisive for conferring corporate status on vicars. (This is part of counsel's larger contention, which I have indicated in the text above, that vicars are bodies politic, bodies politic cannot be created without royal license, and therefore at least royal assent -- over and above the bishop's judgment -- is necessary for any alteration of vicars' endowments. These counsel were willing to concede as a possibility, though not a certainty, that pre-corporate vicarages could be augmented or abolished by Ordinaries acting alone.) It makes legalistic sense to argue that the discussion in 31 Hen. 6 was about that "pre-corporate" period, because at issue in the Year Book was the meaning of statutes from the time before 14 Edw. 3 (Circumspecte Agatis was a reputed statute of 13 Edw. 1, and De Regia Prohibitione was recorded among statutes of uncertain date from the time of Hen. 3 and the first two Edwards.) Realistically, there can surely be no doubt that Yelverton and Fortescue thought they were talking about the law of the 1450s. If complications arising from vicars' corporate status occurred to them, they would probably have said what perfectly well can be: corporate status and the need for royal license to appropriate a parish in the first place do not necessarily imply that bishops may not revise the terms of appropriations under changed conditions.

With or without fancy footwork, counsel opposed to augmentations could well say that that the other side had not proved its case. Did they have good evidence to prove their own?
They put heavy reliance on 22 Edw. 4. 24, claiming that Year Book as "express authority that at common law he [the Ordinary] may not increase [a vicar's endowment] without the assent of the patron." I have discussed this Year Book case extensively above ("Note on Authorities" following "Spiritual Pensions" -- I-E -- Case #9.) All that is relevant for present purposes is the exchange between Pigot and Catesby at the end of that report.

Pigot, from the Bar, takes the position that the terms of a vicarial augmentation with the patron's assent may be tried at common law if they come in question there in due course (as if, by analogy with the instant case in the Year Book -- which did not involve an augmentation --, an action of Trespass between parson and vicar turns out to depend on which one is entitled to certain tithes.) Pigot says nothing about augmentations on the authority of the bishop alone. It would be nothing to his purpose to do so -- if those were lawful, which Pigot says nothing about, they might well be considered so "purely spiritual" that the terms would be untriable at common law, whereas the patron's involvement in a resettlement lends it temporal flavor.

Justice Catesby, with the apparent concurrence of the other judges, disagrees with Pigot. His position is that an augmentation with the patron's assent may not be tried at common law because notwithstanding the patron's involvement it is a strictly "spiritual" act, tantamount to a judgment in an infra vires ecclesiastical suit. No more than Pigot did Catesby have direct occasion to comment on whether an augmentation may be imposed without the patron's assent. His words do, however, seem to express an opinion on that. Whereas Pigot simply puts the perfectly possible case of a consensual augmentation and proceeds with his point that factual issues about its terms are triable at common law, Catesby begins his reply as follows: "That case cannot be law for this cause: for there is no augmentation unless it is by the parson, by the patron, and by the Ordinary, and by their assent, and also, none will be made unless for insufficiency of the vicar's previous endowment. And when such augmentation is made, a spiritual act is made [etc. -- to the conclusion that a jury may not say what the 'spiritual act' provided.]" Although Catesby in the case at hand was not called on to say whether every lawful augmentation is with the patron's assent, he certainly appears to say that it is. Even if his opinion is wholly incidental, it is a rather sharper position on the question than anything shown contra. As the opinion is stated, moreover, "wholly incidental" seems too strong. Catesby does not say: An augmentation with the patron's assent is a spiritual act -- one on the Ordinary's authority alone (if that were possible, as it is
not) would be a spiritual act even more obviously." Rather, he says: "An augmentation with the patron's assent is a spiritual act because it is the only kind there is." The thought would seem to be that when the ecclesiastical authorities have no choice but to involve the patron, and so to give a "temporal flavor" to their act, it is improper to classify it as any the less spiritual. If the option of imposing an augmentation by mere episcopal authority existed, there might be somewhat more basis for Pigot's position -- some reason to say that when the less "pure" option is taken, augmentation with the patron's agreement, there is enough of a temporal foothold to justify common law trial of the terms when they are controverted in common law litigation. The Ordinary could have insured his act against being scrutinized by a jury by leaving the patron out, but he did not. (Of course Catesby's line of reasoning reflects pre-Reformation sensitivity toward the integrity of the spiritual sphere.)

Thus, though Catesby's and his brothers' opinion is hardly "a judicial precedent directly in point", and although it hardly outweighs contrary evidence of the historical reality -- what most lawyers, secular and ecclesiastical, thought before the Reformation legislation and the laicization of impropriations complicated the law on vicarial augmentations -- it is probably the strongest authority put forward in the highly artificial game being played in King v. Sutton. The game required tortuous exploitation of straws in the Year Books, because there was no better evidence as to whether episcopal power to augment was ever countenanced by the common law. From the point of view of the 17th century lawyers, that countenancing was crucial. It was not enough for the international Church to have endorsed such power and for the ecclesiastical courts in England to have assumed they had it. 22 Edw. 4 is the only authority adverse to the episcopal power, but it is both later and sharper than the contrary authority. The lawyers who relied on it knew what they were doing.

There are several more citations in King v. Sutton, some in the margin probably additions by the reporter. I do not think it is necessary to review these. Some go to show that appropriation required the King's license, at least in "modern times" (but "modern times" -- since 14 Edw. 3 -- were only a few decades short of the period during which the international Church concerned itself with seeing that adequately endowed vicarages were provided when livings were appropriated.) I do not think the license requirement was disputed in itself. The question about that was whether it implied a need for royal assent when the terms of an appropriation were altered, with or without the patron's assent. Counsel arguing for the episcopal power conceded that bishops did not have power to create new
appropriations simply on their own, but maintained that this said nothing about their power
to readjust the vicar's share of existing appropriations. Counsel *contra* argued that
"readjusting" was as good as creating anew. Various citations are given in the margin to
support the rule that bishops may not appropriate a living *de novo* without involving either
the rector-patron or the King. Again, I do not think the rule was itself disputed, only its
bearing on augmentations.

(1) Anon. T. 13 Car. C.P. Harg. 23, f. 12b.

The Common Pleas in this case was inclined to prohibit a criminal prosecution, but had
enough hesitation to assign a day for further consideration. No final result is reported.

A parishioner was sued *ex officio* on the presentation of churchwardens, "because he
opens his windows and doors of his house next adjoining to the cemetery there." The man
sought a Prohibition on surmise (1) that his house was ancient and the windows and doors
thereof ancient too and (2) that he had no other windows and doors. The Court expressed its
inclination to prohibit by saying that one may not make new windows and doors opening on
a cemetery, but the ecclesiastical court may not restrain the use of ancient ones.

Whatever belief the regulation in question arose from, the judges seem not to have
doubted the Church's power to regulate the character and use of private property adjacent to
graveyards. It would be unsurprising to hold that a strict prescriptive title will prevail against
the ecclesiastical power and is triable at common law. Whether the protection the Court was
inclined to extend to "ancient" houses as "anciently" used would require a proper
prescriptive title is uncertain. This could be the source of the Court's hesitation to prohibit.
The judges may have thought that the ecclesiastical law surely made allowance for old
houses and the reasonable convenience of their occupants. They may have been reluctant to
prohibit without some evidence that the parishioner could not help himself in the
ecclesiastical court by pleading the circumstances. At the same time, they may have been
ready to enforce common sense and fairness by Prohibition without demanding that the
parishioner claim immemorial usage. (The case calls to mind the doctrine of "ancient lights"
in the common law of nuisance: The owner of a house was entitled not to have his light
impaired by new building close by, although many other commodities or value-enhancing
features of property were not similarly protected. This right was contingent on the
"ancientness" of the house and its mode of access to light, but the owner was not, I believe,
Prohibitions to Control the Ambit of Remediable Wrong, or Merely to Prevent Imposition of Unwarranted Liability

required to make out that his house had stood in its present form from time immemorial, so that evidence, say, that it was built a hundred years ago would be fatal to the right.)

C.

Objection to the Form of the Ecclesiastical Suit, where the Type or Substantive Purpose of the Suit is Unobjectionable


Parishioner being sued for tithes of grass sought a Prohibition on the ground that the person suing him did not have valid title to the grass-tithes. (He had allegedly been granted them without deed, which was insufficient in law to pass title). The surmise contained a claim of disallowance. Whether plaintiff-in-Prohibition had actually tried to dispute his opponent's title and been rebuffed by the ecclesiastical court, or was asserting that disputing a tithe-claimant's title was notoriously no plea in ecclesiastical law, is unclear.

I doubt that at a later date Prohibition would have been seriously considered in this case. In the mid-1580s, plaintiff-in-Prohibition enjoyed only a brief success. The Court originally granted a writ. All the report suggests about the judges' thinking is that they were worried about encroaching on the ecclesiastical territory of tithe law, but were reassured by the consideration that tithes were to some intents secular property (e.g., amenable to recovery in a real action.)

On a later day, however, the Court granted Consultation. On thinking it over, the judges had come to what was to be standard law: From the point of view of the tithe-payer, it does not matter whether the party suing in the ecclesiastical court is entitled to the tithes or not, for the tithe-paying duty is satisfied by severing the tithes. If he severed, he should plead payment; if he did not, he has no claim on anyone's protection. (Complications can of course arise. If Parishioner is sued by A., who is not entitled to the tithes, and cannot plead severance, he may be ordered to pay A the value of the tithes and may carry out the order. If he is then sued by the entitled person, B., it is obviously the ecclesiastical court's responsibility to see that Parishioner is not charged again. But surely the common law courts should not concern themselves until they see disregard for this elementary demand of justice. It would not be irrational to go the way the Court was first inclined to in the instant case, just because of the possibility of complications. I.e., there is something to be said for the
common law court's insisting that the ecclesiastical court look into entitlement to the tithes on the first opportunity in order to avoid the risk that the truly entitled person will turn up later, perhaps claiming that the compensation awarded or paid to the wrong person was under-assessed. It is much more an expression of comity toward the ecclesiastical system, however, go the way the Queen's Bench finally went -- to trust the ecclesiastical court to find a sensible means to avoid future imbroglios. It is also better, surely, to encourage parishioners to sever their tithes -- not to withhold them on the calculation that they will be sued by a disentitled party and, by disputing his right, can enlist common law assistance to gain time before they are forced to pay the person entitled.

While in the end denying Prohibition, the judges gave two examples of good surmises contrasting with the present one. The first is only a modus, a too-obvious example were the case not relatively early, before it was quite settled that surmising a modus without pretense that one had tried to establish the commutation in the ecclesiastical court was sufficient grounds for Prohibition. The second example is a variant on surmising that one is sued by a party without title: Parishioner surmises that he is sued by A., whereas B. is actually entitled and he has contracted with B. to pay money instead of tithes in kind. It seems arguable that Prohibition should not be granted here unless Parishioner shows that he has tried to plead this defense in the ecclesiastical court, but otherwise the example is convincing. It does not seem to collide with the widely held position that a suit for tithes in the face of one's own bargain is not prohibitable, because Parishioner can sue for breach of contract if he is forced to pay in kind (or, realistically, to pay an assessed equivalent of the tithes in kind that is higher than the sum bargained for.) When the entitled party has not sued, he has not broken his contract, and one cannot say, as in the principal case, that Parishioner should have severed.

(b) Mortimer's Case. M.9 Jac. C.P. Harg. 15, f. 256.

The Prohibition granted in this case may only illustrate the usefulness of the writ for "traffic control" purposes between the common law and ecclesiastical spheres. An incumbent clergyman leased his glebe for rent. He was then deprived of his benefice on grounds of drunkenness. The Ordinary proceeded to sequester the profits of the glebe. (This move was in its general nature routine and unexceptionable. When a living was vacant, the Ordinary usually "sequestered" its property, which only means that he in effect assigned it to trustees or administrators for the period of vacancy.) The late parson's lessee was then cited into the
Prohibitions to Control the Ambit of Remediable Wrong, or Merely to Prevent Imposition of Unwarranted Liability

ecclesiastical court to respond concerning the profits of the glebe. (That is as much as the report says. I.e., just what view of the lessee's position the ecclesiastical authorities took, and what they wanted to find out from him or expected to require him to do, is not specified. There are only two possible constructions of his position, however: either his lease was terminated by the deprivation of his lessor so that he should stay off the property and return any profits taken since the deprivation, or he should pay his rent covering the time since the deprivation to the sequestrators. Either way, there does not seem to be anything obviously inappropriate about citing him into the ecclesiastical court.) In the meantime, however, the lessee had started an action of Trespass in the Common Pleas against servants of the Ordinary for taking profits from the glebe. (The lessee's view of his position was obviously at minimum that his lease remained in force. See below for a sense in which it could go beyond that.)

Prohibition was granted until the common law suit was discussed. I.e., the judges committed themselves to no opinion of the ecclesiastical proceedings against the lessee, except that they should be delayed until common law litigation involving the same cluster of issues was resolved and their own view of the lessee's situation was worked out. For the rest, the report gives some hints of the Court's thinking about the substance, but only in a tentative tone. The judges said that the lessor's deprivation "perhaps" destroyed the lease, but added, "it may be that the cause of deprivation is remitted, for there may be a pardon by Act of Parliament of which they will not take notice." Since there is nothing to suggest that the lessee actually relied on a Parliamentary pardon, I take this language as only clearing the temporary Prohibition of lingering doubt. I.e., if the judges almost definitely thought the lease had perished, they could be criticized for holding up even for the time being ecclesiastical proceedings that are hard to fault on that premise. They would only be saying, so to speak, "You never know -- if this Prohibition were sought squarely on the substance, without the complication of the simultaneous common law suit, other factors justifying our intervention might be pointed to, though from what we know now we would probably conclude that the ecclesiastical court was within its rights." Secondly, the judges "doubted" whether the Church authorities could sequester the rent on the lease "because it is lay fee." I would construe this as speaking to the alternative assumption that the lease remained in force. The lessee would still owe the rent, but it would make a question whether the right to the rent could be assigned to the sequestrators in the same way as physical property in the
hands of the deprived parson. If not, I suppose payment of the rent could not be enforced
until installation of a new parson, who would have an action for back rent if he was not
satisfied voluntarily. The ecclesiastical court would have no business calling the lessee to
account. (This is what I refer to above as the most favorable view of the lessee's position: he
is still lessee and he owes nothing to the sequestrators. If he did owe them the rent, the
ecclesiastical court might have a foothold to cite him for purposes of accounting, even
though their remedy for actual unpaid rent would be at common law. E.g., the ecclesiastical
court might be entitled to find out whether the lessee had paid the deprived parson rent
covering a period in the midst of which the deprivation took place. The point would only be
to discover information on the basis of which the deprivee might be pursued for profits in
effect taken after the deprivation.)

(c) Sir W. Dethick and Stoke's Case. T. 9 Jac. C.P. Godbolt, 181.

This looks suspiciously like a High Commission case, except that there is no positive
indication that it is -- neither express designation as such nor discussion of the peculiar
powers of the High Commission and their warrant. If it is an ordinary ecclesiastical case,
then a regular ecclesiastical court was told it could not do what the High Commission often
claimed power to -- sometimes successfully, sometimes not, amid a great deal of debate:
punish a person convicted of an ecclesiastical crime by fine and imprisonment. The
ecclesiastical suit was unexceptionable in substance (certainly as a suit in a regular court,
and probably as a High Commission suit, though the location of the line between offenses
serious enough for the Commission and ones too minor was controverted): A clergyman
sued for defamation ("bald priest, rascally priest") and for striking him. Apart from the
special claims of the High Commission, the case is open-and-shut as a matter of acceptable
procedure; whatever can be said in this context or that for leaving the ecclesiastical courts to
find their own way, nothing can be said for allowing them to use secular sanctions. I do not
mean there could be no rational or political argument for that, just no legal one. The best
evidence of the firmness of the rule stated in the present case -- excommunication is the
Church's ultimate sanction -- is the tortured debate in the courts as to whether the High
Commission was exempted by statute and royal patent. Godbolt's report of Dethick does not
say it was a Prohibition case (it could have been a Habeas Corpus); if it was, Prohibition
would of course have been granted.
Prohibitions to Control the Ambit of Remediable Wrong, or Merely to Prevent Imposition of Unwarranted Liability

(d) Childe v. Caninge. 16 Jac. Two reports labeled K. B.: Lansd. 1080, f. 58 (M.16) and 2 Rolle, 78 (H.16, sub. nom. Cannen's Case); one labeled C.P. -- Harl. 5149, f. 263 (T. 16-the earliest term.) Clearly Prohibition was sought first in the C.P. and after failure there in the K.B.

A man mowed his hay and set it in a rick on the land. i.e., he did not satisfy his tithe-paying duty by severing 1/10th, and Parson did not get possession of his tithes de facto by removing them from the rick (if that is something he could have done with legal impunity.) The grower then leased the land to X. and sold him the ricked hay. If X. knew the tithes had not been paid, he could have detached Parson's share or otherwise arranged for Parson to get it, but he evidently did not -- either he hauled off all the hay or it still stood in the rick untouched. In any event, Parson sued X. for his tithes. X. sought a Prohibition on the ground that he could not be made answerable for tithes owed by the original producer. A suit against that producer would obviously be unexceptionable. The issue was whether in circumstances like these the ecclesiastical court could if it saw fit extend liability to the lessee-vendee.

When the case came up in the Common Pleas, Chief Justice Hobart was inclined to think Prohibition should be denied. He said in so many words that Parson ought to be suing the original producer rather than the vendee, but he thought -- probably a little less than decisively -- that owing to the "merely spiritual" character of a straight suit for tithes the vendee's only remedy was to plead the facts in the ecclesiastical court and persuade it that the suit was inappropriate. If the suit had been for double damages on the statute of 2/3 Edw. 6, Hobart said, Prohibition would certainly lie, but not clearly so for a simple suit.

Justice Hutton, the only other judge heard from, said it was a "good question" whether Prohibition would lie, showing that he too was less than sure his inclination was right. He leaned the other way, however, towards Prohibition. Hutton put a slightly variant case: Suppose A. contracts to cut his hay or grain, shock it, and sell it to B., and that A. tells B, Parson is satisfied for his tithes. In this case, per Hutton, B. will certainly have a Prohibition if Parson sues him. In application to the case as it was, I take Hutton to be saying, as it were, "If we leave the present suit against a vendee to the ecclesiastical court's discretion, we shall soon have another in which we would find it very difficult to do so -- a case where the vendee unmistakably acted in good faith, in reliance on what the person with the primary duty to pay tithes told him or even warranted by contract."
In the event, the Common Pleas denied Prohibition. But this, the report says, was "because [on a later day] the case appeared in another manner." There is no specification of how the case was restated so as to make refusing Prohibition easier. Hobart is said to have given the same sort of reason he had given before.

The King's Bench granted a Prohibition in the same case, per Rolle's brief report. The MS., from one term earlier, has the Court assigning a day to show cause why Prohibition should not be granted and reports the words of one, judge, Dodderidge: "No one must pay tithe except the proprietor, and if I house my corn and sell it in the barn, the parson shall not have tithes from the vendee, and that is in effect this case." Like Hutton in the Common Pleas, Dodderidge was warning against temptation: In the instant case, there might be no great harm if the ecclesiastical court were to compel the vendee to pay the value of the tithes. When he took over the land as lessee and found the harvested hay ricked in the field, he should probably have taken the initiative to ascertain whether the tithes were satisfied, and if they were not it would have been easy for him to render them in kind. Hutton imagined the clearest case in which it is impossible to say this -- when the vendee has been assured that the tithes were taken care of (either paid in kind or satisfied by an agreed money payment.) Dodderidge imagined the case in which the equities are less clearly in the vendee's favor, but where it is still hard to put any of the blame for Parson's disappointment in him. How can a man who buys grain sitting in the producer's barn, perhaps some time after harvest, be expected not to assume that the tithe or an equivalent has been paid?

It seems to me that overcoming Hobart's scruples about respect for ecclesiastical jurisdiction was well-advised. To go a step beyond what Hutton and Dodderidge articulated: Should one not be pretty wary about trusting ecclesiastical courts to discharge the vendee, at least when he is not clearly blameworthy or complicit in the evasion of tithes? In most cases, at any rate, tithe suits must have been brought after in-kind payment had ceased to be practicable. Usually Parson would be suing to compel payment of the value of the lost tithes. If he sues a vendee instead of the producer, it must ordinarily be because of legal reachability -- the vendee is easier to find, or his financial capacity to carry out an order to pay money is greater. The Church's principal interest is in seeing that Parson gets his due. It would not be entirely unrespectable for the ecclesiastical court to lean toward making the vendee pay -- the here-and-now defendant whom Parson has picked as the more promising party to sue. Trusting the ecclesiastical court to avoid indulging this leaning at the cost of
serious unfairness to the vendee might be justified, but that does not mean it would not be indulged in ambiguous circumstances -- at the cost of tempting vendee-defendants to seek Prohibitions and in the end driving the common law courts to split hairs as to just when holding the vendee liable is and is not tolerable. "No tithe suits against vendees" has the advantages of a simplifying rule. An exception for the case in which Parson alleges fraudulent complicity in terms would be reasonable.

Moreover, to run the risk that if left alone ecclesiastical courts will be tender toward suits against vendees is to invite contract disputes. A vendee forced to pay tithes is apt to claim that the vendor implicitly or explicitly insured him against this liability. Unnecessary common law suits would be generated. In addition, the vendee ordered to pay would be put in an awkward position: Should he pay and hope to recoup from the producer? Should he bear the spiritual sanctions while he tries to persuade the vendor that the latter assumed responsibility for the tithes? Is there any legal means of determining who is contractually responsible except paying and bringing a common law action? One could go on with permutations. The firm rule "Producer alone is liable" would simplify contracting. If there is some reason to shift the responsibility (e.g., sale of a standing crop where it is agreed that the vendee will cut it), the parties can make an explicit arrangement which ecclesiastical courts need never hear about (vendee undertakes or gives a bond to compensate vendor if the former should fail to sever the tithes and the latter should he compelled to pay.)

(e) Anon. H. 16 Jac. C.P. Harl. 5149, f. 263.

This report is close to Childe v. Caninge in date and in subject, but the judicial statements it contains would not seem to have been made in that case. No context is reported, only pronouncements by Chief Justice Hobart and Justice Hutton on the liability of vendees of crops for parish rates, rather than tithes. Hobart puts the case where A. sells his hay to B. and then the parish is rated for repairing the church. (A sale of standing or future hay must be contemplated to allow for a gap in time between the sale and the levying of the tax.) In the Chief Justice's opinion, A. will be liable for the rate if he is an inhabitant of the parish, but if he is not B. will be liable. (I am not sure that this assumes B. is an inhabitant. I do not think non-resident owners or tenants of land were necessarily exempt from rates. Quaere whether there would be any point in preferring the vendee over the vendor as between two non-residents.) In support of this opinion, Hobart said it had been decided in "this court" that if A. cuts his grass and sells it to B., A. is liable for tithes, "for otherwise the
6th or 7th vendee could be charged for the tithes, and it was due at the 1st cutting." Going by the evidence we have, this is misrecollection of Childe v. Caninge. It was the King's Bench rather than the Common Pleas that stood firm for vendor's liability, and in his initial comment on the recent case Hobart does not seem to have thought of the strong reason for that rule which he now stated -- the problem that would be raised by subsequent purchasers if the ecclesiastical court was allowed to impose liability on the first vendee in tempting circumstances. He may of course have come around on further consideration.

Hutton, who in Childe was at least skeptical of allowing vendees to be sued for tithes at all, drew a fine distinction quoad rates: "If I sell my corn crop...before it is cut, the vendee shall not pay for the repair of the Church [so far as appears, not even if the vendor is non-resident and the vendee resident]; the same law if it is the grass of my meadow. But if I grant the crop of my meadow to someone, it is otherwise. For here the grantee has some interest in the land." I am not sure of the property-law basis for this distinction. Saying "I grant you the crop of my meadow" conveys a right of entry to cut the hay and relieves me of any duty to cut it, whereas saying "I [agree to] sell you the [growing] grass of my meadow [in exchange for so much]" only makes a contract? (The construction of the contract, with respect to who should cut the hay or what counts as delivery to the vendee, does not matter -- it remains a mere contract, and the realty is untouched. Hutton's view was clearly that liability for parish rates cannot be imposed on anyone who is not in at least a minimal sense a landholder in the parish.)

Since there is no indication of litigative context in the report, one can only say that an ecclesiastical suit against a vendee for rates would probably be prohibited in the simplest situation (the churchwardens -- normal plaintiffs in a suit for rates -- just elect to sue the vendee), but not in all circumstances. The two judges do not seem in perfect agreement on the exceptions.


In this case, Parishioner being sued for tithes wanted in effect to invoke the defense that the parish he lived in was an impropriation without a vicar, and that the suit was brought by a mere stipendiary curate lacking any title to tithes. This would all but certainly have been a good ecclesiastical defense. (Barring special custom, tithes were due to the rector or, in an appropriated parish with vicarage, partly to rector and partly to vicar. A curate who was simply paid a salary by the incumbent to perform the ministerial duties had no right to
tithes.) So the Court thought. In the event, it refused Prohibition and told Parishioner to plead his defense in the ecclesiastical court (with, however, the significant addition that Prohibition would be granted if the defense were disallowed.)

Parishioner's counsel clearly anticipated this response. They tried to draw the surmise in such a way that cutting off the suit at once by Prohibition could be justified. Although they apparently stated their basic point more or less as I have, they put their initial emphasis on a technicality of form: ecclesiastical plaintiff in his libel failed to say expressly that he was admitted, instituted, and inducted into a living. I.e., the libel did not make out unmistakably that plaintiff was a benefice-holder so as to be entitled to tithes in virtue of the position he held. By Parishioner's theory, a tithes suit that leaves the plaintiff's title unstated or ambiguous is prohibitive without further ado -- as it were, just anybody cannot be suffered to claim tithes; a completely absurd or unwarranted tithes suit, as far as the claimant's title is concerned, should be cut off without waiting on the ecclesiastical court; it does not matter how likely it is that such a suit would not survive ecclesiastical scrutiny.

I do not think the Court flatly rejected this theory. Rather, speaking through Justice Dodderidge, it held that ecclesiastical plaintiff in the instant case had said enough -- had adequately stated his title to be a tithe-recipient, or had at least probably made a formally sufficient libel by ecclesiastical standards. (He had said he was curatus, which Dodderidge thought implied a claim to be a vicar, and for that matter had said that he was "rite & legitime admissus & legitime investitus." All he omitted to say was that he was inducted, and Dodderidge said that in canon law -- though in English law it would not count as an equivalent expression -- the word "investitus" comprehends "inductus.") Accordingly, the Court denied Prohibition and told Parishioner that if he wanted to claim that in fact he was being sued by a stipendiary curate he should so plead in the ecclesiastical court.

Parishioner's counsel, Banks, having failed with his principal contention, then said that his real claim was that there was no vicar in the impropriated parish and that he had so indicated in his surmise. As Banks must have expected, the Court told him that he could not have a Prohibition on that suggestion because it was inconsistent with the libel. (The libel as read by the Court substantially claimed that plaintiff was a vicar. Parishioner could not have a Prohibition on surmise that he was being sued by someone who was neither vicar nor parson when so surmising came only to controverting the factual truth of the libel. It is implied that there is no reason why its factual truth should be tried at common law. It is also
probably implied that Prohibition would lie if the libel failed to state -- substantially enough by ecclesiastical standards if not with ideal tightness -- any title to receive tithes. I.e., it would probably not be assumed that the ecclesiastical court would dismiss such a defective complaint, or would not be thought necessary in comity to give it a chance to.)

Both after rejecting Banks's first argument and after rebuffing his attempt to save the Prohibition by admitting his real contention, the Court said that disallowance of the plea -- that there was no vicar, and ecclesiastical plaintiff was actually a stipendiary curate -- would be grounds for Prohibition. This seems less than self-evident. Would such an act of disallowance not arguably be so clear an error in ecclesiastical law that it ought to be left to appeal? The Court's position is still unsurprising. The judges may not have much expected that the plea would be disallowed. If it were, the need to protect impropriators against any ecclesiastical temptation to divert revenue to the working clergyman would outweigh considerations of comity.

(g) Dr. Clea v. his Chaplain. H.2 Car. C.P. Littleton, 19; Harl. 5148, f. 113 (identical report.)

The Prohibition granted in this case is probably best seen as the quick way to put an end to litigation when nicety about principle would only have caused it to drag on unnecessarily. Dr. Clea was Vicar of Halifax, in whose parish there were several chapels of ease. One of the chaplains sued Clea for arrears of salary, claiming that the Vicar customarily paid each chaplain £ 4 a year. The report is not at all clear as to the theory on which Clea sought a Prohibition. It could have been that the salary must be claimed as a common law prescriptive right or not at all. The real dispute between the parties turned out to be over the method of choosing the chaplain: Clea's original argument for Prohibition may have been that he was sued by a pretender to, or unlawful de facto occupant of, the chaplaincy whom he had no duty to pay. Neither of these arguments is very convincing.

The report gives an argument against Prohibition from the Bar. Counsel said first that the chaplain was elected and paid his basic keep ("as much as suffices to his livelihood") by the inhabitants (presumably of the district served by the chapel.) He then said that the chaplain lacked corporate capacity to prescribe at common law for the further stipend payable by the Vicar, wherefore he appropriately sued in the ecclesiastical court. This may be a good reason, sed quaere -- I would not take it for granted that an "ancient" chaplain could not make out a prescriptive title to his stipend, even if he does not count as a
corporation sole in the manner of a parson or vicar. Perhaps the chaplain here was just not ancient enough. There is no obvious reason why that should preclude him from trying to take advantage of shorter usage in the ecclesiastical court. It is not evident that the argument from want of corporate capacity depends in any way on the previous point. I.e., if the chaplain was appointable otherwise and received all his income from the Vicar, would his status not still make him be helpless at common law, if indeed he was helpless?

The next remark from the Bar brings out the underlying dispute and explains why the chaplain's lawyer asserted his version of the inhabitants' role. Henden, presumably representing the Vicar, said, "The matter is to try the title with the vicar, whether the inhabitants ought to elect." This hardly amounts to an argument for Prohibition. (Why should the Vicar not plead in the ecclesiastical court that he was sued by an improperly elected chaplain, and why should one doubt the ecclesiastical court's competence to decide the rights of that? Prohibitions were sometimes granted to protect laymen's customary right to elect to Church offices, but here the alleged beneficiary of lay electoral powers was the ecclesiastical plaintiff, and it was the Vicar disputing those powers who sought common law assistance.) The Court, however, was prepared to speak to "the matter." It declared that the Vicar was entitled to choose his chaplains "of mere right" because he held the parish cure and paid them salaries. The inhabitants' contribution to the chaplain's upkeep, said the judges, was "only a benevolence."

The report then concludes with: "And because the chaplain who sued for the 4 £ was removed and another chosen by the vicar, a Prohibition was granted." This generally puzzling case is no less so at the end. The Prohibition seems to rest on the fact of the chaplain's removal (however that came to the Court's attention) rather than any reason why the ecclesiastical suit should be considered out of place. I wonder whether the judges did not simply think the chaplain's suit so sure to go nowhere in the ecclesiastical court that they might as well put an end to it. (One would expect the ecclesiastical court to share the opinion that control over the chaplaincies belonged to the incumbent clergyman. When the Common Pleas judges so opined, they must have been saying what they thought the ecclesiastical law indisputably was, for the secular law could hardly have a rule on the subject. The judges seem to have attached some importance to the Vicar's payment of a salary to the chaplains, suggesting that if they had been wholly dependent on the inhabitants there might be better reason to deny Prohibition – i.e., to let the ecclesiastical court decide whether usage had
modified common right. I can see no reason to prevent it from considering that in so intra-
Church a controversy. Whether or not the chaplains could claim their salaries by prescription
at common law, what objection could there be to their trying to claim them by looser
ecclesiastical standards of prescription?)

(h) Anon. M. 3 Car. C.P. Littleton, 72.

This brief report presents a simple instance of the problem that arose in more complex
form in Wrothmeal v. Gill above: a tithe suit by a party without title as a tithe-recipient. Here
the ecclesiastical plaintiff was chaplain of a chapel of ease. The report describes his office as
neither presentative nor donative. (Some chaplaincies were quasi-benefices with a patron --
"presentative." Some were regular positions to which someone had a vested right to appoint
without going through the process of presentation -- "donative." I take it that the residue,
represented by this case, would be positions to which the incumbent might appoint if he
wanted to have services in the chapel and preferred not to attend to them himself, but with
no status beyond that of a hired assistant paid what the parties agreed on.) Prohibition was
granted. This result accords with the intimations in Wrothmeal that tithe suits by someone
incompetent to receive tithes should not be left to ecclesiastical disposal, even if there was
no particular reason to suppose they would succeed there.

(i) Tomson's Case. M. 3 Car. C.P. Littleton, 60.

Tomson, supposing himself an incumbent clergyman, sued his predecessor's executors
for dilapidations. As a type of ecclesiastical claim, this was unexceptionable. (Succeeding
holder of the benefice sues predecessor or his estate for the ecclesiastical equivalent of waste
committed by a temporary tenant at common law -- neglect of the property causing
diminution of value or repair-expenses to the successor.) Prohibition was sought on the
ground that Tomson was not lawfully incumbent. The reason for this was that Tomson had
been presented by the King owing to the minority of the regular patron, and the King
allegedly had no title to present. The defect in his title was mistake of fact. I.e., the patron
was not a minor, but was mistakenly supposed to be. (The monarch's prerogative to exercise
the presentment rights of patrons within age was as such clear.) Plaintiff-in-Prohibition's (the
executors') counsel argued that when the King mistakes his title to present to a living the
presentation is void, and that the question of whether someone is an incumbent should be
determined at common law.
Prohibitions to Control the Ambit of Remediable Wrong, or Merely to Prevent Imposition of Unwarranted Liability

Prohibition was denied. The judges said that whether or not he ultimately ought to be, Tomson was now incumbent and entitled to sue as such. They said that they could not take notice of the King's bad presentment -- meaning, clearly, that they could not, pursuant to a Prohibition, go into whether it was bad or not. For they added that if someone brought an action of *Quaere Impedit* challenging Tomson's incumbency, and it appeared that the King did not have cause to present, then the instant ecclesiastical suit or a similar one could be prohibited.

This decision does not really concede any territory to ecclesiastical judgment. I would expect to see the suit prohibited on Tomson's initiative if the ecclesiastical court purported to examine the validity of the King's presentation! The Court's position was just that a proper ecclesiastical suit should not be stopped, and the fulfillment of ecclesiastical duties be evaded or delayed, because someone interested in the advowson might attempt to void the King's presentation and dislodge Tomson. If such an attempt were actually made, with apparent good grounds, there might be some point in holding off settlement of dilapidation claims until a clearly lawful incumbent was installed to pursue them. Going into title to the living now, and perhaps concluding that Tomson was improperly presented, would confer a windfall on those with an interest in invalidating his title while increasing the chances that the dilapidations would never be paid for. (Even if Tomson was found to be without right, the patron would have to make up his mind to present -- where acquiescing in the King's mistake and avoiding possible litigation with the Crown might be the better part of valor --, the bishop's acceptance of his nominee would have to be secured, and the ceremonies of installation performed, before a dilapidations suit could be brought. In the meantime, the predecessor's estate might be exhausted, his executors dead, and their executors untraceable or asset-less.) Moreover, it makes little difference who receives any sum recovered for dilapidations, since the purpose of the recovery is to restore the living to its former condition. No doubt someone in precarious possession of a benefice might be tempted to "pocket the cash", but surely he would do so subject to the risk of suit for dilapidations by his successor. Surely also the predecessor -- the executors in the instant case -- would be quits when he satisfied one judgment, albeit by paying a possessor without title, and would be protected by Prohibition if an ecclesiastical court by any chance purported to charge him twice.
It should be noted that all the reasoning against Prohibition here would apply equally in a tithe suit. I.e., if an apparent incumbent in Tomson's position sued for tithes and Parishioner sought a Prohibition by taking the same sort of exception to his title, it would be folly to grant a writ. That people pay their tithes is more important than that they pay them to someone with a clear title, and by paying -- i.e., severing -- Parishioner can insure himself against any future vexation. Plainly the tithe-payer should not be allowed to put off doing his duty against some future time when a clearly entitled incumbent might sue him for the value of back tithes, by which time non-payment might be hard to prove and the value hard to establish. It would not be surprising, though the report does not suggest it, if the judges had the parallel with tithes in mind when they refused to prohibit the present suit for dilapidations -- i.e., if they foresaw the prospect of attempts to prohibit tithe suits by disputing Parson's incumbency once a precedent was set in the other situation.

Finally, the Court was obliged to distinguish one related case, which was very likely urged in favor of Prohibition. The judges conceded that a tithe suit (and no doubt a dilapidations suit as well) would be prohibited on surmise that the ecclesiastical plaintiff, an apparent incumbent, came in by simony. The difference was that installation of a simonist in a living was void *ipso facto* by statute. Whether the difference is significant can perhaps be questioned. It is probably best made so by saying that public policy, expressed in the statute, wants the simonist out of the living as soon as possible and wants him to enjoy none of the perquisites of a lawful incumbent. When the accusation of simony is made, its truth should be determined at once; if it is true, the way should he promptly cleared for the wrongdoer's replacement. By contrast, the beneficiary of the King's mistake (by presumption of law made in good faith) is under no personal cloud, and whether or not he serves out his life in the benefice is an indifferent matter from a public point of view. The Court's reasoning on the distinction from simony cases is not spelled out in the report, however.


The report does not permit wholly confident analysis of this case, but it is worth noting for the odd route to Prohibition taken. We are told that one person claiming to be parish clerk sued another so claiming, and that they differed over the method of election (vestry v. whole parish.) Electoral disputes were a common source of Prohibitions. In this case, unfortunately, the report does not specify the object of the ecclesiastical suit, which makes the ensuing attempt to prohibit it hard to interpret. A standard model for parish electoral
disputes leading to Prohibitions would be: Churchwarden elected by one method sues a parishioner for rates, who claims that his opponent lacks standing to sue as a lawful officer because the customary mode of election is something else; Prohibition lies to insure common law trial of what the custom is, and if it favors the parishioner, to protect him and his fellows in their prescriptive rights. In Hasnet, however, one rival officer was suing the other. The plaintiff could have been seeking a declaration of who was the lawful clerk or an order that his rival refrain from exercising the office. Or he could have had a pecuniary object, as if he sought recovery of fees or stipend paid de facto to the other man.

I dwell on this uncertainty because ecclesiastical defendant did not obtain a Prohibition quite straightforwardly. The report suggests that the King's Bench saw the need for common law trial -- because the electoral custom was in dispute, and the lay parishioners' interest as well as the rival clerks' was concerned -- but found it hard to justify Prohibition as the case was framed. Could the judges have thought, "We cannot very well prevent the ecclesiastical court from expressing itself on how this Church office is to be filled -- in order to prohibit, we need a showing that someone purporting to hold the office in violation of the custom has attempted to use legal coercion qua officer to collect fees due for its exercise or the like"?

In any event, the report says that Prohibition "was to be granted" to stop the original ecclesiastical suit, but that the Court decided to take a different course. It ordered the ecclesiastical defendant, Hasnet, to bring an Action on the Case at common law (presumably for disturbance in an office lawfully held by him -- there is, I think, no question but that a parish clerkship was a secular office in the sense "protectable against dispossession or disturbance at common law", though that need not entail, as I put it above, that an ecclesiastical court would be debarred from "expressing itself" on the incidents of the office from the point of view of Church law.) The action was accordingly brought, issue was joined on the custom, and the verdict went for Hasnet. Then the rival clerk, Parks, persisted in his ecclesiastical suit, Hasnet sought Prohibition again, and a writ was granted, "because it is a matter of custom determinable at common law and this will tend to subvert the verdict." That is to say, the basis for Prohibition finally found, and supported by various citations (not specific enough to recount), was that ecclesiastical courts may be prevented from reopening questions already settled by common law verdict, even though their discussion of such questions would not as such be prohibitable. The Court's need to find such a basis bespeaks scruples about free-and-easy interference in ecclesiastical proceedings. It was probably
tempting in Hasnet to intervene merely because it was evident that sooner or later the electoral custom would have to be determined at common law, but the judges preferred not to determine it pursuant to a formally questionable Prohibition.


Only one point in this confusedly reported case is directly relevant for this Sub-section. Mrs. Cloborn sued her husband for marital cruelty ("...he gave her a box on the ear, and spat in her face, and whirled her about and called her a damned whore.") The ecclesiastical court gave her an *a mensa et thoro* divorce and sentenced Cloborn to pay her £ 4 a week [*sic* -- a large sum] partly as alimony and partly as compensation for litigative costs. Among the grounds apparently alleged for Prohibition was the fact that Mrs. Cloborn had started her suit by oral complaint rather than by libel, although the complaint was later reduced to writing. The Court, speaking through Chief Justice Richardson, held that Prohibition could not be granted on the ground that the ecclesiastical court proceeded in the first instance without libel -- if that was an irregularity at all, it was not reason for the Common Pleas to stop an otherwise unobjectionable ecclesiastical suit ("...we are not Judges of their form.")

Cloborn's counsel urged substantive grounds for Prohibition as well, but the theory or theories on which they were going are not clear from the report. They may have tried to argue that the mistreatment specifically alleged was insufficient to constitute cruelty, at least serious enough cruelty to justify divorce. This contention would put the case among the proper "ambit of remediable wrong" cases discussed in the last Sub-section. I.e., counsel would have been urging that the ecclesiastical courts' generic jurisdiction over marital misconduct and divorce did not leave the definition of cruelty wholly to their judgment. The best reason for supposing this argument was made is Richardson's apparent rejection of it in the words "we cannot examine what is cruelty and what not." It is more evident that Cloborn's lawyers were *inter alia* proposing a disallowance surmise: a defense had been advanced in his behalf and improperly ruled out by the ecclesiastical court -- viz. that he was within his rights, having chastised his wife for sufficient cause (and possibly also that the pair had in any event been reconciled.) The judges were not in principle opposed to a Prohibition of that form. They did not commit themselves, but said that a Prohibition would be considered if a good justification for the chastisement were put forward in the ecclesiastical court and rejected. Just how this had *not* been done, in the case as it was, is unclear. Perhaps the surmise was badly drawn, perhaps it was apparent that although
Cloborn tried somehow to explain himself in the ecclesiastical court, he had not put in a justifying plea in due form. (I do not think the Court's substantive inclination is surprising. It would come to: "We cannot examine what is cruelty, but neither can we permit ecclesiastical courts to take the implied position that husbands have no corrective powers over their wives." A well-formulated case on disallowance surmise would be interesting. It is unlikely that ecclesiastical courts would flatly reject the husband's power to justify conduct which, if gratuitous, might be considered cruelty. But what particular justifications would the common law courts consider sufficient and by what rationale would they draw lines?)


In this briefly reported case, the King's Bench refused to supervise ecclesiastical courts in the generally sensitive area of tithe law. Cattle belonging to A. were pastured for hire on B.'s land. So-called tithe of "agistment" was unquestionably due in this situation. It was conceived as 1/10th of the value of the grass eaten by the cattle, or perhaps alternatively as 1/10th of the cattle's "increase" (If there was a conceptual ambiguity about the tax-base, I do not think it made any practical difference. First, assessment of the amount due would not be more difficult one way or the other. Prohibition cases supply no evidence of the processes by which ecclesiastical courts put a money value on tithes that could not by nature, or could no longer, be paid in kind. This is one aspect of tithe law in which parties do not seem to have reached for common law help, though there must have been disputes. Valuing agistment tithes at 1/10th of the price paid for the pasturage is the easy way, which I would expect to be taken however the base was conceived. Secondly, assuming that method, I can figure no economic difference, for the parties to an agistment contract or the Church, between putting the burden on the cattle-owner or on the landholder.)

In the instant case, Parson sued B. (holder of the land.) Prohibition was sought on the ground that the suit should be against A. (owner of the cattle.) A writ was apparently granted without consideration, but the Court (except for Richardson, now Chief Justice of the King's Bench, who was absent) awarded a Consultation. The report is a bit ambiguous on the judges' view of which party it made better sense to hold liable, but I think their opinion was that the suit as it stood -- against the landholder -- was more reasonable than the alternative. The judges were in any event emphatic that "however that may be" it was the ecclesiastical court's exclusive business to determine who was answerable. Plaintiff-in-
theory must have been that the "true" base for the tax was the cattle-owner's gain, but if the point in defensible it is an empty formalism.

The only requirement of justice is consistency -- that the ecclesiastical courts always hold the same party liable, so that contractors for agistment can figure the tithe liability into the amount of the hire. There is no sign of argument in the instant case that the cattle-owner was usually held liable or that Parson had a choice. (If he was always free to pick either party, contractors could agree that one would save the other harmless in the event of his being held for tithes, but there is no point in making contracting more cumbrous than it need be. Coming down firmly one way or the other would cost the Church nothing, save for the risk that whoever is liable will be insolvent. As the cases above on vendees of tithes show, it is always convenient for the potential plaintiff to have multiple possible targets for a given type of suit, but it is rarely convenient for society.) Before denying Prohibition in the circumstances of Facy v. Longe, one might want to be informed as to whether there was accepted ecclesiastical law and consistent practice with respect to the assignment of liability. How well-informed the Court was, and how well-argued the case, does not come out from the cursory report. Unwillingness to interfere with the resolution of an indifferent question in a standard ecclesiastical area is eminently sensible as such, but other things need to be equal before it can clearly be called a wise decision.

(m) Anon. T. 9 Car. K.B. Harl. 1631. f. 404b.

This case presents the singular spectacle of an *ex officio* suit for tithes. It produced a judicial clash on the propriety of that, but the point was not pushed by counsel seeking Prohibition, and the legality of such a suit was not resolved. The case bears the marks of the Laudian period in the Church: The Chancellor of the diocese of London took it upon himself to see that tithes were paid in a City parish. There is no telling what his motive was. He may have meant to save a poor incumbent the trouble and expense of a civil suit; he may have thought it his business to stand up for the interests of the Church when the incumbent had his own reasons for not suing (was lazy, indifferent to a small item of income, in cahoots with the tithe-payer, or pessimistic -- with apparent reason as the case was -- about the prospect of recovery); or he may have been mainly concerned to assert for its own sake officialdom's right to represent normally "private" ecclesiastical interests, and perhaps he hoped to set a legitimating precedent.
Prohibitions to Control the Ambit of Remediable Wrong,
or Merely to Prevent Imposition of Unwarranted Liability

Prohibition was sought on the standard grounds that the suit put the bounds of parishes in question and that the tithe was commuted by composition real. These alleged grounds may of course not have been true as to fact, but they are a virtually open-and-shut basis for grant of a writ. It is accordingly unsurprising that the report contains no discussion of those grounds and that plaintiff-in-Prohibition took no exception to the *ex officio* suit. It was Chief Justice Richardson who called attention to it: "Can the spiritual court proceed *ex officio* for tithes, being a civil cause? For I conceive that their proceeding *ex officio* was limited solely to criminal causes or matters. By this way they will give tithes to a parson who never sues for them."

Richardson drew two ripostes. One came from Noy, the Attorney General, who was in fact representing plaintiff-in-Prohibition. His going out of his way to support the form of the ecclesiastical suit surely reflects his Attorney Generalship and confirms that the Chancellor of London was experimenting with the newfangledness in favor. No disloyalty to his client on Noy's part is implied -- it would if anything disserve the client's cause to mix up his claim to an easy Prohibition with a high-level and divisive issue. Noy simply asserted: "They may proceed there *ex officio* or at the instance of the party, at their election." Justice Berkeley gave a more pointed, or more "ideological", response: "It is criminal to violate the Canons and rights of the Church."

There the exchange ends. I think it is very unlikely that *ex officio* tithe suits would have survived judicial deliberation, at any rate earlier than the 1630s. They obviously open deep issues about the theory of ecclesiastical justice. Perhaps there are good speculative arguments for Berkeley's view -- in effect that every or nearly every act that gives rise to a cause of action in the ecclesiastical system is a crime if the ecclesiastical judge chooses to treat it as one. There were certainly areas of ecclesiastical law in which the civil-criminal line was ambiguous, notably defamation and marital law. Somewhat toned down from Berkeley would be the position that many acts occasioning just ecclesiastical claims are not crimes in the sense "subject to punishment", but that the Church collectively is a co-party in interest with the offended private party when any such act is committed and may accordingly assume the role of plaintiff. Some countenance can be given to that -- there are certainly senses in which neglect of their interests by individuals with ecclesiastical rights could over time be harmful to successors in those rights and ultimately to the Church as an institution. When all is said, however, I do not think the common law judges, if really forced to consider
it, would have allowed such lay parties as the tithe-payer to be vexed with claims which the individual entitled to them was willing to forgo. The difficulty of drawing lines, or the easiness of reducing the proliferation of *ex officio* suits to absurdity, would militate in favor of unyielding insistence on the boundary between civil and criminal: If a clergyman, perhaps out of charity toward an unfortunate neighbor, cannot with absolute assurance decide to do without some tithes, should a legatee -- who is perfectly free to release his legacy -- feel he is not strictly free to give it up informally by not suing? Moreover, ecclesiastical judges would be given a free hand for arbitrariness, for they would inevitably pick and choose those claims whose vindication they thought necessary or whose private owners they thought worthy of assistance. Nor can the specter of the *ex officio* oath be conjured away: Though the judges were on the whole willing to concede a place to self-incriminatory examination in criminal cases, they could not have welcomed expansion of opportunities to use it and multiplication of problematic cases about it. While the cases in this and the last Sub-section do not bespeak a very strong proclivity to curtail ecclesiastical judgment, those in which Prohibitions were granted are both consistent with and less obviously justified than controlling innovative use of *ex officio* procedure.


These two short reports are probably about the same case. The first (P.15) states the rule that a suit for tithes by one of two joint-tenants of a rectory should not be prohibited. It adds that Prohibition will not lie to stop an ecclesiastical suit for defamation brought by a married woman without making her husband co-plaintiff. The second report (T.15) states a specific case: Two joint-tenants of a rectory agreed with certain parishioners to take a sum of money in lieu of tithes. One of the joint-tenants then brought a tith suit alone. Prohibition was sought on the ground that one ought not to sue without the other. A writ was denied, for the reason that although one of the joint tenants could not sue alone at common law, it might be permissible by ecclesiastical law. The judges did not say the suit was unexceptionable by ecclesiastical standards, but that whether it was did not concern the Court. Such a suit's exceptionability by common law standards made no difference.

Prohibition was presumably sought on the theory that discord between the temporal and spiritual spheres with respect to the implications of joint tenancy was intolerable, or that people were entitled to the expectation that their liability to suit by such tenants was the same in both spheres. It might have been argued that it was especially jarring for joint
tenants of so thoroughly secular an interest as an improper rectory to have privileges as ecclesiastical litigants which they would not enjoy in most transactions and lawsuits affecting their interest. (An ordinary rectory, in the hands of a clerical incumbent, could presumably never be held jointly. The interest's dependence for its very existence on temporal law could be urged as a reason for subjecting it uniformly to common law rules.)

Like the judges, I can see no particular cost in tolerating diversity in this respect and some virtue in permitting it. As in other contexts, the tithe-payer who has not taken the simple step to clear himself of liability to suit -- severing the tithes -- is in a weak position when, having incurred a suit, he tries to take advantage of a legalism (a point of jurisprudential principle or a technicality, as one prefers to see it.) It is worth noting in the present context that if the tithe-payer severs and one joint-tenant carries off all the tithes, not only is it no concern of the payer's -- he has no responsibility to make sure that each joint-tenant gets half --; in addition, the partner left without any produce would be helpless at common law -- a single joint tenant could not convey the interest or bring a lawsuit complaining of dispossession from or trespass against it, but if he took all the profits his partner could not compel him to share. This peculiarity makes it the odder to say that in litigation the tithe-payer is in effect entitled to insist that he not be required to pay to a single joint-tenant the monetary equivalent of tithes due. A further benefit of leaving the ecclesiastical court to its own devices is that while letting the single joint-tenant sue might lead to his recovering the full value, it would not have to -- the court would presumably be free to award him only half.

The rule on a married woman suing singly, stated in the first report, can seem to have more substantive depth than the one on tithe suits by a single joint-tenant. In the former case, non-interference with the ecclesiastical court seems to entail accepting its right to confer legal personality on married women beyond what was accorded them at common law: The woman can be defamed, even though, so to speak, her husband does not feel pinched enough by her loss of fame to bother to sue. One should remember, however, that a married woman can be hit too. No one denied that the pain and indignity were hers, whether or not the husband "felt the pinch." Her incapacity to maintain an action for battery without her husband is essentially a function of the common law remedy, damages, which is to say, of the wife's incapacity to receive to her own use, or to dispose of, chattel property. A strength, indeed the great strength, of ecclesiastical defamation was the place it had for non-pecuniary
remedies -- a forced apology or some form of "spiritual" punishment. Given the remedial difference, it makes little sense to stand in the way of a suit by the woman alone -- I should say neither more nor less than standing in the way of a tithe suit by one joint-tenant. Objecting to either suit involves a preference for uniform rules for the sake of uniformity, or else the feeling that one has a right to depend, regardless of context, on familiar rules encountered in the mainstream of the law. That feeling is most likely to be entertained by such "bad men" as the parishioner who sees an opening to evade his tithes (perhaps because one joint-tenant is known to be out of the country, so that a joint suit is unlikely in the foreseeable future) or the villain who thinks he can get away with defaming a lady (perhaps because her estranged husband would be all too glad to see her defamed.)

My comments so far speak to the general propositions in the first report. We need now to ask whether the specific case in the second report calls for any qualification of the conclusion that prohibiting a tithe suit by a single joint-tenant would never be defensible. The possible difference in that case is the fact that the two joint-tenants jointly agreed to accept money and forgo the tithes in kind, and only one sued in the face of the agreement. Parishioner's being sued by only one would clearly not prevent his having any benefit of the agreement the ecclesiastical court was willing to allow him. Prohibitions were ordinarily not granted to stop tithe suits brought in violation of such agreements -- Parishioner was left to his remedy for breach of contract. But that does not mean the agreement could not be pleaded in the ecclesiastical court or that the court could not take note of it -- discharge Parishioner if he had already paid the agreed sum or order him to pay only that. Could proving the agreement be harder for the parishioner when his adversary was only one of the parties who made it? Possibly -- the plaintiff will probably deny it, the absence of his co-tenant as co-plaintiff may mean that he is out of the court's reach, so that he cannot easily be examined to see whether he would deny the agreement with equal boldness or by testimony consistent with his fellow's. But other contingencies would cut the opposite way: The missing co-plaintiff is an honorable man who will not sue against his own contract, or he is the one whom Parishioner has paid (and now he has quarreled with his co-tenant and will not share the money, driving the latter to sue Parishioner since he cannot enforce sharing at common law) -- honorable or dishonorable, the missing co-plaintiff will be glad to testify in Parishioner's behalf. Disadvantage to Parishioner on this score is too uncertain to count significantly in favor of prohibiting the single, joint-tenant's suit. What about Parishioner's
common law position in the event that the ecclesiastical court orders him to pay the value of the tithes? If he has paid the bargain sum and now is forced to pay another, or if he has not paid it and the tithes are valued at more than the bargain sum, he is entitled to recover his loss by suit for breach of contract. Must he sue both joint-tenants jointly? If so, his right to recoup could be frustrated by the unreachability of one. But if he can reach both, it is to his advantage to have the resources of two people at his disposal to satisfy the judgment. If he can sue either singly, and both are responsible for breach of the joint contract (i.e., including the partner who is personally blameless), he is so much the better off. I do not know how to answer the common law questions in this corner of the doctrine of joint-tenancy, but on the whole there seems little reason to worry about Parishioner's interest.

There is admittedly something odd about a tithe suit by a single joint-tenant. In a sense, allowing it is like countenancing an ex officio suit for tithes (last case above.) For the absence of one of the co-tenants can be taken to imply that the will of the entitled party (a single person in law consisting of two natural persons) is to forgo the tithes -- and yet the ecclesiastical court is permitted to enforce their payment. This is especially true when the single joint-tenant's suit is in the face of an actual expression of that will in a joint commutation agreement, which weakens the possibility that the absent co-tenant is as desirous as the other that the tithes be collected, but is merely prevented by some contingency from participating in the suit. But it is perhaps equally arguable that any act of either joint-tenant expresses the will of the partnership. I can in the end see nothing in the metaphysics of joint-tenancy -- an inherently strange institution -- firm enough to countervail against the common sense grounds for allowing ecclesiastical courts to entertain a single co-tenant's suit if they want to.


Toll was prosecuted ex officio for incontinency, in itself a perfectly lawful proceeding. He sought a Prohibition on the ground that he was neither cited nor presented, but had nevertheless been excommunicated. Prohibition was denied by the two judges present, Reeve and Crawley. Reeve said that citation was not necessary in ex officio proceedings, but that even if it were a requirement of ecclesiastical law, its omission would be remediable only by appeal. Crawley observed that if the party should be returned as cited when in fact he was not, he would have an Action on the Case.
What does the failure to cite Toll mean? Was he convicted without being notified that he was accused and summoned to defend himself? Or was he given informal notice, so that his complaint was only the omission of a technically proper citation? If the latter, refusal of a Prohibition is unremarkable. If the former, the two judges' decision was a strenuous act of self-denial. It is not impossible that they meant to imply a strong position: Ecclesiastical law permits, and should not be kept from permitting, excommunication for a crime when the court is satisfied of its own knowledge that the party is guilty -- it does not matter that he does not find out he is suspected until he learns he is excommunicated -- he must come before the ecclesiastical judge to signify repentance if he wants to purge his excommunication, and perhaps on that occasion he may protest his innocence and secure a hearing on whether he in fact committed the offense -- he can presumably appeal if he then claims the original court mishandled his case, either by a mistaken finding of fact or by denying him a chance to vindicate himself -- but he is not entitled to secular assistance in the name of due process of law -- rather, the Church in its disciplinary jurisdiction is entitled to its own ideas of what process is due.

This position amounts to treating the ecclesiastical judge's private determination, on whatever information he has, that a crime has been committed as equivalent to presentation. Plaintiff-in-Prohibition here complained that he had been neither cited nor presented. I take that as an admission that he would have no basis for disputing his excommunication here and now if he had been named as an incontinent by persons officially impaneled to present ecclesiastical crimes (normally if not always churchwardens at a visitation.) That, I believe, is correct: Such presentation was not mere accusation, like presentment or indictment by a grand jury, but tantamount to conviction, like presentment in a leet or manorial court; sanctions could be imposed at once, subject, in the ecclesiastical case, to any right the party might be allowed to show his innocence in the process of removing the excommunication. There is an obvious basis for arguing that it is less unfair to condemn on presentment than on the mere judgment of an ecclesiastical official. Neither way does the party have an opportunity to defend himself before a sanction is imposed, but at least presentation is a public act, notice of which is perhaps imputable to all, and there are known accusers whose malice could be attacked in the party's effort to clear himself of excommunication (if not otherwise, e.g., by suit for defamation.) Obliterating the distinction is strong. That does not mean that it is indefensible, but less radically questionable ecclesiastical behavior than
Prohibitions to Control the Ambit of Remediable Wrong,
or Merely to Prevent Imposition of Unwarranted Liability

allowing ex officio imposition of sanctions without a hearing was sometimes controlled by Prohibition.

D.

Related Cases: Complaints about the Handling of Initially Unobjectionable Ecclesiastical Suits without Disallowance Surmise.

(a) Collier's Case. P. 37 Eliz. C.P. Add. 25,211, f. 106.

A woman brought an ecclesiastical defamation suit (for calling her "whore"). Judgment was given in the court of first instance (which way is not specified), and the loser appealed. Now a Prohibition was sought on the ground that "arbitrament was made" between the parties. The report gives no chronology -- i.e., does not tell at what stage the parties agreed to arbitrate their differences and the arbitrator made his award. Nor is there information on what the award was or on which party sought Prohibition. Plaintiff-in-Prohibition was in any event presumably trying to stop any further ecclesiastical proceedings (and enforcement of the unreversed original judgment if it was for the ecclesiastical plaintiff.) There is no indication that an effort was made to plead the arbitrament in the ecclesiastical court.

A Prohibition was granted, but clearly without consideration. For the Court (except Chief Justice Anderson, who was absent) expressed opposition to a writ in a tone suggesting that the case seemed pretty obvious; "The matter is clear enough, that the Prohibition does not lie, for the judges in the spiritual court ought to adjudge whether these matters are a good plea or not, and that according to their own laws." If there is a note of impatience in that, the cause may have been that Serjeant Gawdy had consumed more time than the judges thought necessary arguing from a precedent that Prohibition should not lie.

Gawdy claimed to know about a Queen's Bench case from 14 Eliz., which was as follows: A married woman sued for ecclesiastical defamation and recovered damages. (So the report says -- the ecclesiastical court gave essentially the same remedy as one recovering for common law defamation would get, except, of course, that payment of the damages could only be enforced by spiritual sanctions. Such an award is irregular and should probably be regarded as against the ecclesiastical law -- non-monetary remedies in defamation were standard. That does not mean monetary ones could not occur. When and if they did, the case for common law intervention by Prohibition is probably not strong -- the
award would probably be seen as ecclesiastical error correctable by appeal, and the risk of its surviving appeal would not necessarily be regarded as unacceptable. Be that as it may, however, it is possible that Gawdy's statement of his case was inaccurate. It may have been costs, rather than proper damages, that were awarded to the successful plaintiff. One cannot always count on the two forms of compensation being nicely discriminated, and for that matter I am not sure that covert "damages" were not sometimes given under the name of "costs" in ecclesiastical defamation. The principle of Gawdy's case is unaffected by the exact nature of the monetary judgment.) The losing ecclesiastical defendant subsequently sought a Prohibition because "the [successful plaintiff's] husband had released it, yet the judge in Court Christian did not regard the release (for they hold that the husband may not release such matter, which touches his wife in her name) [and] gave judgment..." According to Gawdy, the Queen's Bench granted a Consultation because "...their law ought to try whether it is a good plea or not." (Note that it looks as if there was a disallowance surmise in Gawdy's case, whereas the instant case has the opposite appearance. It is often difficult to be sure either way from reports, and so here. I.e., it is not always unmistakable whether plaintiff-in-Prohibition had actually put in a plea and been rejected, or was claiming that the unacceptability of the proposed plea in ecclesiastical law was notorious, or was taking the position that Prohibition should be granted regardless of whether his defense, or alternatively his reason for release from liability by virtue of events subsequent to incurring it, actually had been ruled out or almost certainly would be.)

As far as Collier is concerned, denial of Prohibition is hard to fault. How far the decision can be generalized is more of a problem. The lack of a disallowance surmise could be a reason for denying a writ. Nothing suggests that it was considered as a reason, however, and it may be arguable that a case like the present one is not the most appropriate place to insist on a disallowance surmise. (The argument: Generally, with certain well-established exceptions, ecclesiastical defendant ought to be made to plead a defense which is available to him from the start, which has a reasonable chance of being allowed, and which, if allowed and if true, will save him from liability. It is a waste of legal machinery to let such a defendant run for help from the common law courts when he can quite likely help himself where he is. On the other hand, when something supervenes after the ecclesiastical suit is under way, in virtue of which the suit is mooted, or judgment for plaintiff should not be enforced, or the case should not be pursued on appeal, there is less clear reason to insist that
the party make his point to the ecclesiastical court before trying for a Prohibition. A nice regard for comity might recommend so insisting. But as a practical matter, when the party must make a new move that could not be anticipated at the beginning of the litigation -- when, so to speak, he must go somewhere -- it makes sense to indulge him when he has gone to the common law court. Now it would waste motion to make the party go back to the ecclesiastical court, though it might have been superior form for him to have gone there first. Better to take on the merits and get things settled -- prohibit if one would have done so on disallowance surmise, refuse Prohibition if not.)

These considerations are not very important for the instant case, since the outcome would probably be the same with a disallowance surmise. Requiring the ecclesiastical court to recognize arbitrament in defamation cannot be squared with the partly criminal character of ecclesiastical defamation. I.e., it would be highly reasonable for ecclesiastical courts to take the position that the parties to a defamation suit are not free to drop the suit and arbitrate their difference. The reason is that once an act of defamation is called to the attention of an ecclesiastical court the Church has an interest in the offender's correction over and above the complainant's interest in satisfaction. (The ecclesiastical court's right to disregard arbitrament if it sees fit would seem to be more doubtful if quarrelling parties were to agree to arbitrate before the launching of a suit. For the strongest case, suppose someone called "whore" threatens suit; the defamer offers arbitration and the offer is accepted; the arbitrator finds either that the aspersion was unjustified or that it was in any event loose-tongued and uncharitable to cast it and orders the payment of money to the woman [The arbitrator in so ordering would be doing what ecclesiastical courts themselves would not do in defamation cases -- giving damages --, but what is to prevent him?]; the money is paid [assume that the woman is single, to avoid complications arising from the status of married women] -- if the woman now breaks her agreement and sues, may the ecclesiastical court still ignore the arbitration, leaving the defamer to get his money back by common law suit for breach of contract? The answer is not obvious. The ecclesiastical law may still be within its rights to insist that defamation is simply not arbitrable, whether in the form of an agreement not to sue or an agreement to drop a suit. But the case is harder. Since the present, case does not seem to have given the Court much trouble, the best guess is that arbitration, if actually resorted to at all, came after commencement of the suit, or for that matter when the appeal
I doubt that the Common Pleas meant to imply that ecclesiastical courts may disregard arbitrament in any kind of case if they are so disposed. It may be that arbitrament must be pleaded and Prohibition sought only on disallowance surmise (at least when the agreement to arbitrate is antecedent to bringing suit.) A good reason for that rule would be the variety of ecclesiastical suits. In some of those arbitrament has no claim to be a good plea in principle (but might still be allowed by discretion -- e.g., in defamation it turns out that the defamer admitted his error before the arbitrator, apologized, perhaps even offered a compensatory payment, which was accepted; the defamee appears to be suing in the face of the arbitration from implacability or in the hope of getting the other party to offer more compensation than the defamee was originally content with.) In other kinds of suit, it is hard to imagine disallowance of the plea of arbitrament, and therefore wise to insist that it be alleged before intervention will be considered. Be that as it may, it is also hard to imagine common law courts always tolerating disregard of the plea, or endorsing the position that it is always within the ecclesiastical courts' discretion whether to recognize the parties' desire to arbitrate disputes amenable to ecclesiastical justice. For a cautionary note, however: Disputes over whether money is due, and if so how much, are the place where standing in the way of arbitration is least rational. For practical purposes, most ecclesiastical disputes over that were about tithes ("for practical purposes" because though a tithe suit claims tithes in kind, not money, a suit will rarely be brought and completed before the produce is consumed and only its money value can be recovered.) But there is a serious obstacle to insisting on recognition of arbitrament in tithe cases: viz., suits in the face of commutation agreements were ordinarily not prohibited, on the ground that Parishioner's contractual rights were protectable at common law. The same can be said about the rights of either party under an arbitration agreement -- if one party violates the agreement and sues or persists in a suit, and the ecclesiastical court rebuffs the plea of arbitrament, the other party can presumably recover any loss, including litigative costs. If, then, insisting that arbitrament be respected in tithe cases is dubious, what about, say, legacy cases? A distinction can be drawn -- it was never, I think, suggested that executors, if sued in the face of a release or the like, must pay the legacy if the ecclesiastical court insists and recoup at common law. But the scope for demanding that arbitrament be regarded as a good ecclesiastical plea has shrunk. It might be
simpler never to demand it than to get into the question when one should and when one
should not. It is not impossible that the Court in the instant case so thought.

I have suggested that the Court may not have been enthusiastic about embracing the
precedent introduced by Serjeant Gawdy. If that case is accepted as good law, it is certainly
a strong precedent. It makes the point that ecclesiastical defamation had a distinctive
character and could not be reduced to perfect parallelism with common law defamation. If a
husband's release of his wife's pecuniary recovery does not have to be acknowledged, a
fortiori (I think one naturally says) ecclesiastical courts are free to regard disputes over
defamation as non-arbitrable owing to the criminal or "corrective" element. But is the
decision in Gawdy's case defensible? Can it be right to keep the defamer under spiritual
pressure to pay money to the wife when any money she receives is the husband's, when the
effect is to thrust money on the husband after he has disclaimed it? One may acknowledge
the ecclesiastical system's title to its (indeed admirable) theory of defamation and of
women's rights thereunder. There is no evident reason why the husband should be able to
release non-monetary forms of satisfaction to the wife (apology, public retraction.) But one
should still, it seems to me, be worried about telling the defamer that if he wants to avoid or
undo excommunication he had better confer enrichment on the husband who has renounced
it. There is of course no certainty that the Court shared these doubts about Gawdy's
precedent. The point is just that the instant case is probably easier and the result reachable
without accepting the precedent.


This case raises issues similar to those in the preceding one, but it was handled very
differently. After starting a defamation suit, the plaintiff, Coke, agreed that if Lambert,
defendant, would pay Coke's proctor a certain sum Coke would drop the suit. I.e., the parties
made a simple form of settlement: Having, presumably, cooled off from the quarrel that
produced the (unspecified) insult, they agreed to retire from the field; defendant admitted
responsibility for the trouble to the extent of agreeing to pay plaintiff's litigative expenses to
date. (The proctor's bill was a modest 12d.) Lambert sought a Prohibition on the ground that
Coke was proceeding with the suit despite the agreement and despite the fact that the proctor
had been paid his 12d. A writ was granted, and Serjeant Houghton, representing Coke,
moved for Consultation.
Houghton did not make a general argument along the lines of the last case above -- that owing to the criminal aspect of defamation the ecclesiastical court should not be compelled to recognize the parties' private settlement. (The case seems to me one in which it would be folly not to recognize the settlement -- it was reached very early in the course of litigation; the man accused of defaming his neighbor acknowledged wrongdoing in a way and was the poorer for it by 12d. plus any litigative expenses of his own. In principle, however, what basis is there for distinguishing arbitrament, which in Collier above the Elizabethan Common Pleas held should be left to ecclesiastical discretion?) Nor did Houghton complain about the absence of a disallowance surmise, of which there is no sign. Rather, he relied on a point of contract law: The parties' agreement, as Houghton put it, was "executory", meaning that it could be and was executed on Lambert's side, but on Coke's could never be said to be fulfilled. I.e., if up to the present Coke had not proceeded, he would not have performed his side of the contract because he might still proceed in the future. (Some assumptions are obviously necessary in order to say that an undertaking not to proceed with a lawsuit is perpetually executory. There must be no formal step by which plaintiff can drop the suit and no rule that the suit dies automatically if he does not actively prosecute it for a certain time. This assumption is at any rate necessary unless the contract is construed so narrowly that it does not impose an affirmative obligation to take any available step to terminate the suit, and then to refrain from starting a new suit for the same cause if the old one is ended either by formal act or by neglect. I.e., an undertaking not to attempt or purport to continue or renew a suit, whether effectually or not, would remain executory forever whatever the law. If the contract is construed as including a duty not to sue again for the same cause, and "sue again" does not mean "purport to", but "actually put defendant in danger of liability", a statute of limitations would render the plaintiff's undertaking performable within a definite time. So, probably, in the specific case of ecclesiastical defamation with its criminal element, would a pardon prior to the second suit. I spell out these complexities because it is possible that Houghton's approach to the case assumes more than can quite safely be assumed. The discussion does not reach those assumptions, however. I have no reason to doubt that what seems to be taken for granted was true at least in the main point -- viz. ecclesiastical law did not evidently or notoriously provide for the termination of a suit once started; the courts might, even if they had some discretion not to, treat suits as indefinitely revivable until disposed of by sentence. There was no relevant statute of limitations. A pardon applying to
Lambert's offense is perhaps the most likely eventuality to undercut the argument that Coke's side of the bargain could never be called performed.)

*Per* Houghton, a contract "executory" in the sense explained could not be "a bar at common law." I would propose the following reconstruction of his argument (which is not elaborated in the report): If X. and Y. exchange mutual promises, Y. cannot sue X. for non-performance until he has performed himself. (While this is not good modern contract law, it is probably correct enough for the early 17th century.) If Y.'s promise is such that it can never be pronounced fulfilled, Y. will never be in a position to complain of non-performance on X.'s side. X. -- assuming his promise to be definitively performable, as Lambert's was in the instant case -- may presumably complain of a breach on Y.'s part and recover anything X. has actually paid by way of performing his side. (I.e., the contract is not such a nullity that X. performs at his peril. I presume his action would be Debt.) But even granting that, the contract is so "out of balance" that it cannot be invoked collaterally against Y. I am not sure of the range of common law applications of this idea. I should suppose Houghton had the following in mind: In consideration of X.'s agreeing to pay him a sum of money, Y. promises never to bring a lawsuit against X., should a cause of action accrue to him. Y. thinks a cause of action has accrued and brings suit. While (I am assuming) X. may subsequently recover the money if he has paid it, he may not plead the contract to bar Y.'s suit. If, by contrast, Y.'s promise is not to sue for a particular, specified cause of action (at any rate one that has already accrued -- the form of the basic settlement), X. may bar the suit by pleading the contract and performance on his side. In application to the present case: Is it not anomalous to let Lambert enforce the contract specifically in effect -- by stopping the ecclesiastical suit -- when, in an analogous situation at common law, he would be powerless to bar Coke from suing him? If its premises (and my construction of it) are correct, the argument has considerable force.

(There is surely no implication that the ecclesiastical court would be obliged to imitate the common law. I.e., if it saw fit to let Lambert plead his contract and to treat it as a bar to further proceedings by Coke, it would be perfectly free to do so. One should simply say that the ecclesiastical law may be different, and that whatever it is it should prevail in an ecclesiastical case. Houghton's point was that the common law court had no business telling the ecclesiastical court that it may *not* do what the former would do itself in an analogous case. It is also important to note the concession implied in Houghton's position: If an
ecclesiastical suit, including defamation, was settled by a contract that was not perpetually executory on one side, enforcing the contract by Prohibition would be unobjectionable. A settlement before commencement of litigation ["If you will pay me so much I will not start an ecclesiastical suit for these words you spoke of me"] would clearly be enforceable by that means. It is only a promise to desist from a suit already begun that would present problems, if indeed the ecclesiastical position was that suits are indefinitely revivable. One in Lambert's position would be best-advised to protect himself by bond forfeitable on the other side's renewing proceedings. Even assuming that Lambert could recover his 12d. once Coke broke the contract, he would not be very adequately protected against what he was presumably interested in avoiding -- the expense and embarrassment of a lawsuit for his hot words.)

Besides Houghton's argument, all that is reported of Coke v. Lambert is the opinion of Justice Gawdy, who thought the Prohibition properly granted and Houghton in error. Gawdy started by saying: "For though the first cause is spiritual, yet the concord is a temporal thing." This seems directed against the general argument that by and large what ecclesiastical courts do with cases in their jurisdiction should be left to them, that to justify intervention common law courts need an interest solider than the bare fact that parties have attempted to settle a dispute within that jurisdiction. Perhaps, however, Gawdy would not have controverted this proposition just as I state it. The strength of Houghton's position is the way it drains "the concord is a temporal thing" of significance: Of course the act of contracting is "temporal", but when the act is largely inert in the temporal sphere, it is perverse to insist on its being given force in the spiritual. Per Houghton, it is "largely inert" because it does not produce a "true contract" in the sense of a pair of obligations either side could enforce on the other; at most, the act in question would generate a temporal right in one party to restitution of money paid in consideration of a promise subsequently broken by an act in the spiritual sphere, and that is too tenuous a foothold for telling the ecclesiastical courts what they must do.

Gawdy could have held that the foothold was not too tenuous, that so long as the "temporal act" had any effect at all (was not a mere nullity in the manner of a "naked promise") the common law court had interest enough to use the means it had (power to prohibit) to see that the parties' intention was carried out. I.e., he could concede that an analogous act would not be a common law bar, but write that off as a perhaps unfortunate
technicality and maintain that the Court should use its opportunity to insure substantial justice. I doubt that he did so hold or so concede, however. For he went on to take apparent issue with Houghton's analysis of the common law. His reported words are: "...[besides being temporal the concord] is also executed on the defendant's part. He may plead it at common law though it is executory on the plaintiff's part." I am constrained to say "apparent issue" because Gawdy does not tell enough to make it altogether clear whether he is disputing Houghton's fundamental claim that someone in a position analogous to Lambert's could not invoke the contract to bar a common law suit in breach thereof. "He may plead it at common law" does not have to mean he may plead it in bar, as opposed to "use it in any way at all, if only for the purpose of recovering his money after Coke's breach." From the tone and context, however, and because it notably strengthens the case for Prohibition, I am inclined to suppose that Gawdy did think Houghton wrong on the common law effect of a settlement like the one in question. (One should probably not be surprised to see differences on basic points of contract law at the time of this case. That the field was agitated and in flux is best known from the history of Assumpsit before Slade's Case. I do not pretend to know how unsettled the particular question between Gawdy and Houghton was.) If Gawdy's stand on the common law was as I suppose, his defense of Prohibition would come to arguing that discord between the temporal and spiritual systems on the expectations a man is entitled to when he settles a lawsuit is intolerable -- perhaps as convincing an instance of an intolerable discord as any.

Gawdy's finished by saying: "And so if one sues an executor in Court Christian for a horse devised to him, [and] the defendant comes and surmises that the testator gave it to him in his life he will have prohibition." The "and so" is the interesting part of this statement. The proposition stated is itself good enough law, except that perhaps it should read "...defendant comes and surmises that he tried to plead [such inter vivos gift of the horse] and was disallowed." The proposition was in any event conceded by the others present in court, the reporter says. Does a solution to the present case follow as clearly as Gawdy seems to have thought? In the legacy case, Prohibition serves to insure that the ecclesiastical court does not award to the legatee a horse that was not testator's to bequeath, and that whether ownership of the horse was conveyed by testator in his lifetime -- a property question -- be resolved at common law. Common law interest in protecting secular property is firmer, though not
necessarily more desirable, than interest to prevent such anomalies as conflicting temporal and spiritual rules on the barring effect of a settlement-contract.

Save for their agreement with Gawdy's case of the executor, nothing of the other judges' views is reported. To summarize, two principal issues remain in the clouds: (1) Is Houghton's analysis of the analogous common law correct, and if so does it unmistakably follow that Prohibition should be denied? (2) Granting, contrary to Houghton, that an agreement analogous to the one in the instant case could be used to bar a common law suit, does it follow that Prohibition should be awarded?

(c) Barton's Case. H. 7 Jac. K.B. 2 Brownlow and Goldesborough, 215.

In this case, the two churchwardens of a parish sued an inhabitant to collect a tax levied for repair of the church. Pending the suit, one churchwarden released and the other persisted in suing. Prohibition was granted, and the case proceeded to formal pleading. The Court decided for Consultation on demurrer (with so little apparent doubt that the case's reaching that stage is surprising.)

Davenport, opposing Prohibition from the Bar, argued primarily that churchwardens are a corporation for the parish church's benefit. He cited authority for this proposition, which there is no reason to consider controversial. The question is what it implies for the case at hand. Davenport's reasoning is not fully articulated, but I think it would clearly be the following: The problem is what to count as an act of the corporation. Its being a "beneficial" corporation does not mean its acts, to be deemed its acts, must in fact benefit the church. I.e.: If the two churchwardens had joined in releasing the tax suit in the present case, it would be released, and Prohibition would presumably lie (perhaps only on disallowance surmise) to insure that the ecclesiastical court treated it as released. It would not matter whether the release was on good consideration or a proper thing for the churchwardens to have done by "fiduciary standards." The rate-payer would be off the hook, whether or not there was a remedy against the churchwardens for careless or corrupt discharge of their office.

Davenport's argument must rather be that the "beneficial" character of the corporation entails a conservative interpretation of the power of a single churchwarden to act for it: Perhaps not every act of the "artificial person" must be the joint act of its two "members." But at the least, to count as a corporate act, the act of only one must be manifestly to the church's benefit. A release is prima facie disadvantageous to the church and therefore requires the participation of both churchwardens. This is true regardless of whether a
particular release, being the act of both churchwardens, would be defensible, as I put it, by "fiduciary standards" -- granted for some reason of equity or charity that might be considered in the church's moral interest, to secure or reward some other service to the church by the releasee justly regarded as equal in value to the tax, or the like.

At the end of his speech, Davenport seems to flirt with the broader proposition that every corporate act of churchwardens must be the joint act of both, for he says generally that the two churchwardens are one "corps" and half of a "corps" cannot release. Even if he meant to suggest the possibility that that should be the rule, however, I suspect he was banking more seriously on the narrower argument I have stated.

Yelverton next spoke from the Bar in favor of Prohibition. He did not dispute Davenport's basic theory, but attempted to make a distinction. Yelverton conceded that one sort of release by a single churchwarden would be ineffectual: Viz. if the churchwardens, as corporate possessors of the goods of the local church, have a trespass claim against someone for taking or damaging those goods, they can only release the claim jointly. (At the least, this is true when the churchwardens have commenced a joint action of Trespass -- it is not completely clear whether Yelverton intended the broader or only the narrower proposition.) On the other hand, per Yelverton, a tax is releasable by a single churchwarden. He first explains this distinction by saying the tax is a "mere thing in action", but justifies it more materially by arguing that one churchwarden cannot sue for the tax and therefore one cannot go on suing after the other has released. This assumes that the release is of some effect: If the two churchwardens start a tax suit, then Churchwarden A releases, he would be barred from carrying on as co-plaintiff -- releasee would be entitled to plead the release, and the ecclesiastical court would be constrainable by Prohibition to exclude him from further participation; by collateral effect, according to Yelverton's argument, Churchwarden B is also barred, because a suit for the tax must be prosecuted at all stages by both. The assumption is not compelling: If the issue is "What counts as a corporate act?", and the release of one member does not, why should the releasor himself, in his corporate capacity, be prevented from continuing with the suit in the face of the release? Why should the release not be considered a mere nullity, which it was the releasee's folly to take? (Or, if the releasee has any pretense to a just grievance, why should he not be left to do what he can for himself at common law against the releasor as an individual? Perhaps under some circumstances, if he paid for the release -- even if what he paid came to the use of the church -- he could claim
deceit.) It may remain arguable, and Yelverton may have wanted to argue, that it is a mere formalistic requirement that suits for parish taxes be commenced and prosecuted throughout by both churchwardens. (So to speak, whatever else they may do singly so as to bind the corporation, both churchwardens must participate in exercises of "prosecutorial discretion.") In the instant case, even if the release were a nullity, the releasor was in fact honoring it by refusing to prosecute further, wherefore the suit is unlawful and should be prohibited. It seems to me, however, that the "formalistic requirement", if it exists, is an awfully weak candidate for enforcement by Prohibition. On the assumption (contrary to Yelverton's) that the releasor himself is not excluded, the common law court could with better grace insist that the ecclesiastical court use its spiritual sanctions to compel the releasor to participate than be the agent of the church's loss for the sake of a formalism.

As for Yelverton's distinguishing churchwardens' claim to be paid a tax, as a "mere thing in action", from their claim to compensation for a tort against the church's property: I find it hard to give this any plausible substance. Of course a tax is a more ghostly "thing" than a piece of property. It does not exist as a duty or an interest until it is voted and assessed against individuals; the taxpayer is free to claim that he owes nothing, or less than is demanded, because the tax was improperly voted or assessed; he in a sense does no wrong in withholding the tax until an ecclesiastical court -- having avoided the pitfalls that often led to Prohibitions in parish-rate cases, notably alleged offenses against customary rights -- tells him he must pay it. To release a claim to a solid chattel is in a sense to convey it; to release a claim to a tax is a lesser act because there is nothing solid enough to be conveyable (wherefore, Yelverton would have it, the latter but not the former is within the competence of a single churchwarden.) But surely these are trifling legalisms. There is no practical difference between doing the church out of a shilling's worth of vested property and a shilling's worth of rates. Permitting a single churchwarden to act for the corporation is neither necessarily right nor necessarily wrong in itself -- that is a question of what the positive law is and whose positive law (secular or ecclesiastical) should prevail, and behind the positive law is a question of prudence in the church's interest. But if the single churchwarden lacks power to do the one "non-beneficial" act, he should lack it to do the other as well.

The report says expressly that the judges interrupted Yelverton and announced that they thought a Consultation should clearly be granted. Chief Justice Fleming proceeded to speak
Prohibitions to Control the Ambit of Remediable Wrong, or Merely to Prevent Imposition of Unwarranted Liability

to the case, so far as appears with the full concurrence of his brethren. His opinion is an important one for the doctrine of Prohibitions. I have amply suggested that Yelverton was going nowhere promising and deserved to be cut off in mid-argument. The significant feature of Fleming's speech is that it repudiates the approach of counsel on both sides, the winner, Davenport, as well as Yelverton. Per Fleming, the whole dispute over the validity and effect of the release was irrelevant. In a common law suit -- e.g., in an action of Trespass for taking property belonging to the church --, he said, the Court might have to debate what to do about a single churchwarden's release. In the instant case, because the suit was in an ecclesiastical court, and that was proper place to sue for a parish tax, the release was of no concern to the King's Bench -- it was simply up to the ecclesiastical court to handle it as ecclesiastical law required.

To formulate the difference of approach: Davenport (and Yelverton as well, in the premise of his argument) took it that there was a "law of the land" on the capacity of churchwardens to act as representatives of a corporation -- a rule that would be applied at common law and should be imposed on ecclesiastical courts. The essential arguments in defense of this point would be: (1) It is unfair to the subject to expose him to the possibility that he cannot always have the same expectations as to the effect of a release by a churchwarden. The unfairness is arguably the greater in a situation where there is no sharp practical demarcation between "spiritual" and "temporal" affairs. I.e., if a man takes a release of a tax from a churchwarden on Monday and a release of a trespass on Tuesday, how is he supposed to know that his legal position may be different in respect of these two transactions? (2) Although churchwardens are for some purposes obliged to sue in ecclesiastical courts (the same can after all be said of lay natural persons), they are in law a secular corporation. Therefore they should be subject to a uniform body of common law rules, to which ecclesiastical courts ought to defer. (The proposition that churchwardens are a secular corporation is more than well-warranted -- it is simply true, though it need not follow from their status as such that the secular law must be the source of all rules concerning them.)

Fleming, on the other hand, saw no inconvenience in the possibility that ecclesiastical and common law might differ on the point in question, each applying its own rule in its own cases. The burden on this position of "high deference" to ecclesiastical independence is to make out in the face of other decisions either that no conflict of rules is as such intolerable or
that conflicting rules on the capacities of churchwardens would not be hard to tolerate compared to other imaginable conflicts. I do not imply that the burden is unsustainable; cases in point (mostly the disallowance cases in Vol. II) are tangled and unclear in their net meaning. In the immediate case, I strongly suspect that Fleming had no fear of serious conflict. I.e.: He agreed with Davenport -- the single churchwarden's release would not bar the other from suing for the corporation at common law. If that is right, Fleming and the rest of the judges could be criticized for asserting the principle of ecclesiastical independence -- a principle the government would smile on -- when doing so was virtually cost-free. But they can also be defended. To say what the judges declined to, and Davenport thought he could persuade them to -- "The ecclesiastical court should obviously not be prohibited because it does not threaten to do anything different from what we would do in an all-but indistinguishable case before us" -- carries the implication, or adds to any impression that might be accumulating from case to case, that conformity with the common law was expected *prima facie* of ecclesiastical law. It is better, Fleming might say, to signal that the presumption runs in the other direction: Usually rule-conflicts between the two systems will be harmless, adjustable-to, or acceptable because the purposes and procedures of ecclesiastical law are just different from those of the common law in the most nearly comparable situations. Sometimes the common law courts may be presented with clear conflicts and strong arguments that injustice would result from them. When nothing of the sort is before the Court -- when there probably is no conflict, and if there were the ecclesiastical rule would be eminently reasonable (as can surely be said of a rule limiting the harm one churchwarden acting alone can do to the corporate interest he is supposed to represent) -- it is best not to speculate and complicate. "What the ecclesiastical courts do with their own cases is their own affair" does not state a foolproof policy, but a simple one with the virtues of simplicity -- the best policy until a real case for an exception is made. It is rather to the credit of the King's Bench in *Barton* that the judges insisted on the simple policy when they could have reached the same result otherwise. The cost of the alternative way would only have been pronouncing on the law, probably not very controversially, beyond the bounds of the case at hand; that may not always he a negligible cost.

(d) Anon. P. 9 Jac. K.B. 1 Bulstrode, 122.

This report is only notable for an incidental point. The principal case was a *Habeas corpus* turning on whether a person imprisoned on a *De excommunicato capiendo* was
bailable, a question of statutory interpretation. In the course of discussion, it was said by the way that ecclesiastical courts would not discharge from excommunication persons handed over to the secular arm by De excommunicato unless they would pay a sum of money and give a bond (presumably insuring future good behavior.) In other words, ecclesiastical courts were being especially tough on excommunicates obdurate enough to require proceeding as far as a De excommunicato. The judges expressed the unanimous opinion that this procedure was unlawful: The excommunicate should be absolved like any other, and if he failed to behave as he undertook to -- without a bond -- in consideration of his absolution, he should be retaken on De excommunicato. (That presumably means without de novo prosecution for the offense he had repeated.) This opinion is in line with others, usually involving the High Commission, restricting ecclesiastical courts to ordinary "spiritual" remedies and sanctions (save for the limited use of fines and imprisonment permitted exclusively to the Commission.) There was no question of a Prohibition in the case at hand, but there can be no doubt that the writ would have been used if called for to prevent extraordinary measures against a special class of ecclesiastical defendants. The report contributes an instance of procedure the common law courts would not tolerate within ecclesiastical jurisdiction.

(e) Thomas Hyat's Case. H. 12 Jac. K.B. Croke Jac., 364.

An ecclesiastical court granted Hyat's wife a separation and alimony on grounds of cruelty. Hyat tried in effect to quash that sentence by Prohibition. His position was that the sentence should not have been given because he had "offered reconciliation, and desired cohabitation, and proffered caution [security] to use her fitly." Prohibition was denied, the judges saying only that the ecclesiastical court was the proper tribunal for separation and alimony and cruelty was a proper basis for ordering them. I should say that Hyat was badly advised to seek a Prohibition, for the case is all but open-and-shut against him. It is extremely hard to find any common law foothold for second-guessing the ecclesiastical judgment that an abusive husband's professions of amendment are unreliable and that a good-behavior bond would not be adequate protection for the wife if she were required to live with him again. (In the related marital case above -- Sub-sect. C, Case [k] --, the husband's claim to Prohibition, though made in a confused way, was strong by comparison, for he was complaining that he was denied a chance to justify the behavior adjudged cruelty. The common law could be said to have a standard of justifiable husbandly "correction", so
that at least a legitimate question arose as to whether ecclesiastical courts must apply the same standard for their purposes.)

In form, Hyat is the next thing to a regular disallowance case. I.e., plaintiff-in-Prohibition clearly had made his point in the ecclesiastical court unsuccessfully and said so, whereas in most of the other cases in this Sub-section the absence of a disallowance surmise is a potential formal ground for denying Prohibition. The only difference is that in an ordinary disallowance case rejection of a defense is complained of; Hyat did not claim to have a defense against his wife's basic contention that she was abused and entitled to a divorce, only grounds for arguing that the sentence of divorce was excessive under the circumstances, including his willingness to guarantee that he would not repeat his misbehavior.

(f) Lloid v. Maddox. P. 14 Jac, K.B. Moore, 917.

This report deals with a situation encountered in several cases arising on disallowance surmise. Here, however, surmise could not be used because the ecclesiastical court did not disallow defendant's plea. It permitted him to plead as he liked, whereupon plaintiff put in a counterplea. Defendant then sought a Prohibition on the ground (one had better say, a bit indefinitely) that the common law court was the appropriate place to unscramble the issues. The ground was shaky, and Prohibition was denied.

The ecclesiastical suit was against an executor for a legacy. The executor pleaded a common law recovery against him in Debt and alleged that after satisfying that judgment he would lack assets from the estate to pay legacies. The legatee replied (1) that the common law recovery was obtained by covin and (2) that the plaintiff in the common law suit against executor had offered to discharge the covinous judgment, but executor refused to have that done. The report only tells us that the question for the Court was whether Prohibition would lie on these facts, and that the Court said "No", the judges noting that the legacy suit could only be brought in an ecclesiastical court and that the covin was perfectly examinable there.

The interesting question is whether any plausible theory in support of Prohibition can be formulated. In so far as plaintiff-in-Prohibition was claiming in general terms that the facts relevant for disposing of an accepted plea of "No assets" should be tried at common law, he clearly had no case for Prohibition. Merely by denying Prohibition, the King's Bench resolved the legal question obviously latent: May an ecclesiastical court, in the process of determining whether in fact an estate is sufficient to pay legacies, refuse to count as a debit a
standing common law judgment against the executor when the judgment was obtained by fraud in which the executor himself was complicit? The judges said "Yes."

The italicized words are important. Were it claimed by legatee that the estate lacked assets only because the executor was the victim of a fraudulent judgment, there would seem to be good reason to stop the ecclesiastical proceedings. This is not because the ecclesiastical court would be particularly incompetent to try the truth of the allegation, but because of the risk -- implied in its allowing legatee so to plead -- that upon verification of the plea it would order payment of the legacy. In other words, the implied ecclesiastical legal position would be that when executor does not "really" owe a creditor as much as the estate can support -- but could if he busied himself reverse or otherwise escape the fraudulent judgment -- he may be ordered to pay the legacy under threat of spiritual sanctions. That is not a position the common law courts could be expected to tolerate. It is not nonsensical, for the executor would obviously have a moral duty to do his best to free the estate of liabilities that could be defeated. It is nevertheless oppressive to subject him to sanctions before he has had a chance, as it were, to go back into the temporal sphere, where his duty must be done. I do not think one can confidently say, at least without the details of a particular fraud, what his resources in the temporal law would be and how certainly he would be able to escape the judgment.

One would have to consider among his "resources" equitable remedies as well as common law ones, informal means as well as formal. (The perpetrator of a fraud, confronted by the victim threatening exposure and legal action, may after all be induced to release his ill-won judgment -- a phenomenon illustrated in a variant form by the instant case.) One approach for a common law court faced with an application for Prohibition in this situation would be to deny a writ until it was shown that the ecclesiastical court actually had ordered payment of the legacy while it remained speculative whether the executor would try to undo the fraudulent judgment and whether with the best effort he would succeed. That contrasts with acting on "implied legal position." There is no necessary reason why the ecclesiastical court could not in such a case resort to a milder remedy -- order executor to take the measures the court thought reasonable to disencumber the estate of a liability it ought not to bear and "report back." Probably, however, given the uncertainties, "prohibit now" would be the better course. The executor would be insured against being unwarrantably charged until the common law court itself had examined questions which it is best qualified to judge. I.e.: Pursuant to the Prohibition, it could try the truth of legatee's claim that the judgment was
obtained by fraud. Having ascertained that the claim was true, it could presumably find a way to pronounce on whether the liability used to sustain executor's plea of "No assets" was defeasible by common law means. If so, Consultation would be appropriate. (Some tangles remain. One court's saying a judgment is defeasible is not the same as its being reversed in the court that awarded it. Procedural flexibility is imaginable -- let the Prohibition stand for the moment, instruct the executor to take measures to undo the judgment, invite the legatee to move for Consultation after a time if nothing has happened.) If the judgment is not defeasible by common law means, the Prohibition would stand. Equitable and informal means for the executor to overcome the liability remain, but I do not suppose the common law court could take note of those. The best advice to the legatee in this pass would be to go to a court of equity. (This hypothetical case may illustrate why the Chancery eventually, though I believe to no great extent in the early 17th century, took over a good deal of testamentary litigation. The Chancery was much better equipped than ecclesiastical courts to deal with incidental issues of fraud and the like. Among other merits, the Chancery had settled habits of consultation with the common law judges on points of common law -- was less condemned to speculate about them and less likely to mistake them than ecclesiastical courts.)

Now, in our actual case, the executor's complicity in the fraudulent judgment on which he tried to rely was sufficiently made out. I.e.; Assuming legatee's plea was true, the judgment-creditor whose claim executor said would consume the estate had admitted that the testator owed him nothing, but that he had been party to a fraudulent judgment designed to make it appear that the estate was encumbered. He is likely so to have admitted on being confronted by the legatee. There is no telling whether he was a witting participant in a fraud, shamed or frightened into admitting it, or someone who did a friend a favor by bringing a feigned action of Debt against him without understanding or inquiring into his friend's purpose. (I can imagine gray areas of semi-fraud in testamentary affairs. Might an executor legitimately worried about undiscovered debts not think of getting a large feigned judgment against himself in order to put off legatees and keep them from suing, intending to have the judgment released when and if it became clear that there was enough to pay legacies?) In any event, when his eyes were opened, the judgment creditor wanted no part of the scheme and offered to release. The executor refused to accept. Although the pleadings as reported do not quite say so in terms, it is an inescapable inference that the executor was party to the
Prohibitions to Control the Ambit of Remediable Wrong, or Merely to Prevent Imposition of Unwarranted Liability

fraud and probably its contriver. The King's Bench was therefore quite justified in denying Prohibition. There was no reason to doubt the ecclesiastical court's competence to try the mere truth of legatee's story and no reason to object to its ordering payment of the legacy if it found the story true.

I would suggest, however, that the hypothetical case discussed above provides the most plausible basis for at least considering Prohibition. The argument would be simply that when fraud in temporal transactions is introduced into an ecclesiastical controversy over the assets of an estate, the common law is generally the best tribunal. Substantively, there is no reason to prohibit if there is a clearly drawn issue in the ecclesiastical court as to whether the executor's own fraud explains the indebtedness he claims for the estate. Formally, it is better to prohibit across the board on executor's showing that fraud has been alleged against him. It may not always be clear from the ecclesiastical pleadings or the account given of them in a surmise whether the executor is represented as a victim of the fraud or a party to it. If executor can as a rule have a Prohibition by surmising generally that fraud in the obtaining of a common law judgment has come in question (which is all he can allege if the legatee has pleaded the fraud generally in the ecclesiastical court), it is in a sense unfair to hold that an executor who has shown the full truth about the ecclesiastical pleadings will lose his Prohibition because facts which he has revealed are against him. Of two equally guilty executors, one would get a Prohibition and the other not, depending on how specifically the other side did or could plead. (Suppose in the instant case that legatee suspected executor of complicity but did not know the strong fact in his favor -- judgment-creditor's offer to release -- and neglected to allege the complicity in terms.) Moreover, executors would be given a motive to suppress the "full truth" in order to get a Prohibition, which can hardly be desirable in itself, and which only throws the burden of bringing the truth out onto the legatee. While it would be possible to evolve more refined rules (Prohibition will lie only if executor surmises expressly that the fraud alleged against him is not a fraud to which he was party), the complexities and variables in the type of situation we are concerned with are such that a simple rule -- "So long as a fraudulent judgment at common law is in question, Prohibition will be granted, and the merits worked out thereafter" -- has advantages.

I do not say that this line of argument is overwhelming, or that on balance the King's Bench was wrong in Lloyd v. Maddox to go at once to the merits on the information before
The Writ of Prohibition: 
Jurisdiction in Early Modern English Law

it, denying Prohibition. The case against Prohibition may be less than open-and-shut, however.

(g) Fowler's Case. Undated -- probably 3 -- 7 Car. C.P. Hetley, 116.

This case is not very clearly reported and is worth noting only for an unusual angle on a fairly common problem. Parishioner being sued for tithes sought a Prohibition merely by surmising the fact that Parson came to the living by simony. The Court's initial opinion that Prohibition would not lie is in line with other cases. (At bottom, the reason for this position was that, simony being an ecclesiastical offense, it was up to the ecclesiastical court to decide what to do when Parishioner asserted in a tithe suit that Parson was a simoniac -- admit the plea and relieve the Parishioner of the duty to pay if the allegation was true or insist that he pay the incumbent in possession until the latter was convicted and removed in separate proceedings. An Elizabethan statute encroached on the ecclesiastical courts' original freedom in this matter, but it was usually held that one wanting to take advantage of the statute must plead it in the ecclesiastical court and use a disallowance surmise to complain of failure to apply it correctly.) In Fowler, however, after the Court expressed its unwillingness to prohibit, counsel came and showed a King's Bench verdict finding that Parson came in by simony and a decree in the Court of Wards "accordingly." Nothing is reported about the context of the verdict and decree. But upon being informed of them the Common Pleas expressed itself as now inclined to prohibit. If the Court acted on its inclination, the case illustrates an anomalous exception to a general policy: Prohibition granted where it would ordinarily not be because it was matter of record at common law that Parson was a simoniac. I think this probably depends on the statute to make sense: The statute made the living void ipso facto if the person occupying it came in by simony, the record made it incontrovertible that the party suing for tithes so came in, therefore plaintiff in the suit could not be a qualified claimant of tithes ("could not be" vs. "might not be, if by one path or another he was found to be a simoniac.")

(h) Anon. M. 15 Car. K.B. March, 73.

Parson and parishioners sued churchwardens for an accounting, won some sort of sentence in their favor, and were awarded their litigative costs. Parson released the costs, but parishioners sued for them. Churchwardens sought a Prohibition on the ground that the costs were jointly assessed, wherefore parishioners were barred by parson's release.
Prohibitions to Control the Ambit of Remediable Wrong, or Merely to Prevent Imposition of Unwarranted Liability

Prohibition was unanimously denied, straightforwardly for the reason that the ecclesiastical law need not conform with the common law on the effect of a release by one of two co-parties, ("...although that in our law, the release of one shall bar the others; yet the action being sued there, and they having conusance thereof, the same is directed according to their law.") In support of the decision, the Court said it had been adjudged that if husband and wife sue for defamation of the wife, sentence is given for plaintiffs, and costs are awarded, if then the husband releases the costs the wife is not bound. This judgment is said to have been "for the reasons given before" -- i.e., presumably, the mere reason that what the ecclesiastical courts do in this matter with their own cases is no concern of the common law courts.

The husband-wife case is stronger than the present case in that there is a distinct oddity about putting the releasee under spiritual pressure to pay money to the wife when it will come to the use of the husband who disclaimed it, and when the litigative costs the money is compensation for must be considered his. Arguably, perhaps, the common law court would have a foothold for intervention when the ecclesiastical law displays a kind of disregard for the "legal reality" of married women's status at common law. (The virtue of the ecclesiastical rule is that the woman after being widowed or divorced would not be debarred from recovering costs incurred in vindicating her honor. If during the coverture the husband in effect contrived to evade his release by putting his wife up to suing alone for the costs, and if -- which is not certain -- the ecclesiastical law would permit that, is it possible that the releasee could maintain an Action on the Case against the husband? If so, there is all the more reason not to interfere with the ecclesiastical law. We are not, it should be noted, told enough about the precedent to know whether the wife sued while the husband or the marriage was still alive. If she did, Prohibition would perhaps have been more tempting.)

In the instant case, it is hard to see any harm in letting the parishioners recover the costs awarded to them and the parson without differentiation. One would suppose that the litigation against the churchwardens was paid for by contributions of the parson and some parishioners, or, perhaps more probably, by parish funds (administered by the present churchwardens -- probably the successors of the churchwardens being sued) plus anything the parson put up. I have no reason to suppose that the ecclesiastical court could not scale down the costs, when the parishioners alone sued for them, to see that individual contributors recovered only what they had put up. If, alternatively, the costs went to the
collective funds of the parish, any amount shown to have been contributed by the parson personally could be deducted. If the ecclesiastical court failed to make such adjustments, the parson would only have succeeded in diverting to the parish or to parishioners willing to incur expenses for the good of the church what he could have had for himself. It makes no sense to let him do others or the church out of their actual costs.

The decision in this case is in line with *Barton* above, except that the instant case is easier. In refusing to prohibit in *Barton* for the reason chosen (the mere right of ecclesiastical courts to go their own way within their jurisdiction), the Court had to get past the objection that churchwardens are a secular corporation and that the capacity of a single churchwarden to release corporate claims could come in question in common law litigation; if it came in question there, the common law for a directly analogous situation might turn out to conflict with the law the ecclesiastical court proposed to apply. There was no comparable foothold to make Prohibition plausible in the instant case. The litigation in question -- parson and parishioners suing churchwardens for an accounting -- could not be significantly analogized with litigation in the temporal sphere, in the way churchwardens suing for rates in an ecclesiastical court can be set alongside churchwardens suing for a trespass at common law. The most that could be said for Prohibition in the present case was that leaving the ecclesiastical court alone would result in an abstract, decontextualized disharmony between the two systems with respect to the capacity of co-parties to release joint costs.
THE WRIT OF PROHIBITION:  
Jurisdiction in Early Modern English Law

Charles M. Gray

Appendix to Volume III: 
The Boundaries of the Equitable Function*

This electronic version was produced with the original publisher's permission by the University of Chicago D'Angelo Law Library.
The Boundaries of the Equitable Function

by CHARLES M. GRAY*

I.

The year 1616 is a landmark in the history of English equity because of what is usually referred to as Lord Coke’s quarrel with the Chancery.¹ The quarrel is ordinarily said to have been resolved in the Chancery’s favor by King James’s declaration of July, 1616, and to have contributed, along with a number of other differences between Coke and the King, to Coke’s dismissal from the Bench. That there was a controversy is certain, nor is there any doubt that the King purported to settle it in favor of the Chancery. Although the importance of any single consideration in the decision to dismiss the Chief Justice is imponderable, Coke’s tactics against the Chancery and the dubious legal position that sustained them were in all probability a major factor. Yet the exact character of the quarrel remains unclear. In one sense the issues were limited, but the immediate issues may be taken to represent only the surface of a deeper, indeed vaguer, disagreement.

At least on the surface, the controversy of 1616 was about the propriety of equitable intervention after judgment at common law. May the Chancery (or other court of equity) enjoin a man from executing a common law judgment when there are intrinsically sound equitable reasons for preventing him from taking advantage of his “legal” rights? Or is the Chancery restricted to enjoining such a man from pursuing a common law judgment? For example, suppose A has fraudulently misrepresented goods sold to B. Let us grant that it is appropriate for a court of equity to prevent A from taking steps to recover the full purchase price. But suppose A sues B at common law for such full price and that A has judgment to recover such sum. May B now go to a court of equity and get an injunction forbidding A from taking steps to collect his judgment debt? Coke’s answer was “No”. While one must avoid

¹History Department, Yale University.

the frequent and egregious tendency to attribute Coke’s opinions to common lawyers and common law judges as a group, there is little doubt that his position on the present issue was the “better opinion”. There are good reasons for it on the level of policy and principle. It expresses the idea, for which there is support in various other legal contexts, that entitled parties should act promptly to take advantage of their entitlements, and especially that they should act before any tribunal proceeds to judgment against them. In addition to raising considerations of orderly and economical law-administration, opposition to equitable intervention after judgment probably had a more “mystical” dimension: It ought not to be implied by the acts of courts of equity that the judgments of common law courts are capable of working injustice; that is implied by enjoining execution of a judgment, whereas enjoining a party from seeking to use the law for unjust advantage implies no more than that the common law, like any other conceivable system, is not airtight against abuse by the unscrupulous. At the same level of principle, there are also good arguments on the other side. The sacrifice of substantive justice to efficient traffic rules for the legal system is always questionable; the desirability of seeking equitable relief before judgment is hard to dispute, but doing so is not likely to be practicable in all cases; the symbolic line between indirectly impugning a judgment and preventing parties from pursuing judgments they will probably obtain is a sophistical line.

Coke’s position against intervention after judgment was not, however, based solely on the principles that support it. He believed that such intervention was directly forbidden by statute. On this score, he was opposed, not by counter-balancing principles, but by the argument that he was grossly and opportunistically misinterpreting the statutes he invoked. If the complexities of this matter may be cut through with a “summary judgment”: It is not manifest that Coke made irresponsible use, though he may have made incorrect use, of one statute — 4 Henry IV, c. 23, which is at least generally directed against calling judgments in question. With respect to another statute (or group of statutes), his position is harder to defend. Coke maintained (with how much agreement on the part of other lawyers is difficult to say) that it was a criminal offense under the ancient Praemunire acts to seek equitable relief after common law judgment. Verbalism and disregard of historical context were necessary to reach that construction, for the Praemunire acts were expressly directed only against the Church. The best that can be said for Coke is that the principle of the acts, uncontradicted by their language, is broader than the application which the statute makers had immediately in mind. That is, while the statutes were aimed at preventing

2. It is notable that St. German (Doctor and Student, Dialogue I, Ch. XVIII) put the same interpretation on this act as Coke did. St. German’s point there seems clearly to be that by virtue of the statute the party is helpless in equity after judgment at common law—not simply that the judgment as such may not be reversed by the Chancery.

ecclesiastical encroachment on the King’s jurisdiction, it may be possible to
see their implied target as any infringement on the regular processes of law
in the realm. Such argument from immediate purpose to underlying princi-
ple is not unheard of in the annals of statutory construction; it cannot be
called wrong; but the contrary canon of construction — that the literal, histor-
ical intent of the legislature has at least a primary claim on attention — was a
fair and powerful weapon in the hands of Coke’s opponents. It is morally
certain that the makers of the Praemunire acts were neither thinking about
equity-common law relations with their conscious minds nor unconsciously
possessed by a principle capable of embracing them; they were simply
writing vague statutes as moves in a continuous skirmish between “tem-
poral” and “spiritual” interests. In short, Coke’s reading of the Praemunire
acts was strained, though not utterly indefensible. Even if his interpretation
had been more plausible, it would have been statesmanlike to refrain from
acting on it too unreservedly. Instead, Coke promoted (unsuccessfully) the
indictment under the statutes of some litigants and their lawyer for resorting
to the Chancery after judgment. That is to say, he proposed to make his point
about the Chancery’s authority by visiting severe criminal sanctions on
people who could not possibly have supposed that in going to the Chancery
they were doing anything seriously wrong.\(^4\) Coke’s use of this tactic testifies
to the strength of his convictions, and perhaps to his despair about making
the point in any other way. As a last or next-to-last straw leading to his
dismissal, the tactic was probably more important than the substance of
Coke’s opinion.

The issues of the controversy about intervention after judgment can
only be stated on the assumption that equitable intervention before judg-
ment is unexceptionable in a given case. There was no political quarrel in the
early seventeenth century about the propriety of equitable activity as such —
across the board or in this or that particular situation. It is possible to
suspect, however, that a larger quarrel was implicit in the controversy over
judgments. Was intervention after judgment objected to for its own sake, or
because Coke and other common lawyers thought that the scope of equitable
activity was too wide and getting wider? (Indeed, was equitable relief after
judgment a convenient target in a still wider campaign — against all the
common law’s competitors, the King’s support for those competitors, and his
persistent meddling with the judicial system?) Did the common lawyers
attack intervention after judgment mainly because it was equity’s most
vulnerable point — at least subject to respectable objection and at best flatly
illegal by the statute book? Would the real value of victory to Coke have been

\(^4\) This states “the principle of the thing.” I have no doubt that if any Chancery
petitioner or his counsel had actually been convicted of Praemunire he would have
been pardoned, and little doubt that the judges would have recommended it. The
Praemunire acts were a sore point even with the churchmen, their admitted target:
arguably they had no application to the Church of England, but only the foreign and
hostile Church of Rome.
a net reduction of equitable relief—directly in the case of parties unlucky or negligent enough to seek it after judgment, and perhaps indirectly by means of a blow to the reputation and confidence of the equity courts, by making them more cautious about supplying remedies lest, having been beaten once, they be attacked again and restricted further?

These are good questions to ask, but one should avoid jumping to conclusions about them. There is no necessity that the judgments controversy be taken as the tip of an iceberg. That debate presents in its immediate terms a perfectly real and significant set of issues about legal policy and the meaning of legislation on the books. A lawyer could regard the role of equity in the English legal system as highly benign, even as deserving of expansion into areas it had not yet touched, and still believe that the equity system must act before the common law system has proceeded to judgment. He would obviously be guilty of no logical contradiction, and one should be wary about seeing so much as an “emotional contradiction.” There is admittedly some prima facie basis for attributing a general disapproval of equity to Coke and others who shared his attitudes, as well as to some strands of seventeenth century thought that do not really share Coke’s point of departure. Such was Coke’s professed belief in the perfection of the common law that he cannot easily be imagined to have been willing to concede the usefulness of an equitable supplement. He concedes it in his literary works with such restraint as to suggest embarrassment. Outside the temple of the law, the Chancery enjoyed some disfavor that may have had more to do with its red tape than with its equitable remedies and was associated unfavorably in some minds with the Crown, the Church, and “discretion”. Anxiety about “discretion”, legal “uncertainty”, and hence equity, also took nourishment from some veins of Puritanism.

However, though it is reasonable to hypothesize that winds of general hostility to equity were blowing in the early seventeenth century, the evidence for such an hypothesis is thin. This paper is intended to furnish a more concrete approach to one aspect of the larger question of attitudes toward equity—namely, what the common law judges in their official capacity thought courts of equity ought and ought not to be doing. The judges in that capacity do not speak for common lawyers as a group, or even necessarily for their own views of a desirable legal order, and of course they do not speak for the public. Nevertheless, their positions have a pretty good claim to represent the legal community, and judges’ opinions of the law are apt to be compatible with their own and their colleagues’ predilections for the law. To the degree that the judges in general, and Coke in particular, cannot be associated with indiscriminate hostility to equity, there is the less reason to see more in the judgments controversy than it presents to the eye, except as such personal factors as Coke’s multifaceted enmity toward Lord Chancellor Ellesmere supply the deeper dimension. While the dispute over Chancery intervention after judgment went on in the political arena—in a setting of other disputes

5. 4 Inst., Ch. VIII.
between the Crown and the common lawyers — control over the operations of
equity was routinely exercised in a spirit far from “indiscriminate hostility”,
though not without its restrictive aspects. The scope of equity was fairly well
settled by principles founded on usage and “the artificial reason of the law.”

II

When may a court of equity provide a remedy? When is it lawful,
appropriate, constructive, harmonious with the institutional discrimination
of law and equity and with the necessary imperfection of even the best legal
system? The question can be stated in timeless form because it is at least not
a defunct one in the Anglo-American system, despite the modern disappear-
ance of separate courts of equity and the longer-standing stereotyping and
precedent-binding of equitable remedies. The subject of this paper is limited
and historical: When may a court of equity provide a remedy by the lights of
English lawyers in the earlier decades of the seventeenth century? That
chronological locus is a significant one even apart from the shadow cast by
the judgments controversy, because in the early seventeenth century equity
was fairly “mature”, on the one hand, and, on the other, still fairly “open,” still
governed by the old-fashioned canons of equitable jurisprudence. It was a
familiar part of the legal system, competent to furnish remedies in some
specifiable situations without serious question, but it was not yet reduced to
the post-Nottingham model which enabled Blackstone, for example, to
conceptualize it as a branch of the law essentially homogeneous with the
others. Courts of equity were still “courts of conscience”, with a still open
warrant to scrutinize the moral acceptability of men’s taking advantage of
their “legal” rights and to enjoin them from doing so.

“When may a court of equity provide a remedy by early seventeenth
century lights?” is really answerable only by working through the uncharted
evidence for what courts of equity were actually doing in the period and how
they came to their decisions in problematic cases. By and large, the scope of
equitable remedies was fought out in the Chancery (by common lawyers,
before Chancellors usually trained as common lawyers). However, the chief
courts of common law were not precluded from dealing formally with the
question. That is true mainly because of those courts’ power to issue writs of
Prohibition. (Occasionally the courts had other procedural openings, such as
review on habeas corpus of commitments for contempt by equity courts.)
The vast majority of Prohibitions sought and issued went to restrain
ecclesiastical courts and the Court of Admiralty, but Prohibitions to courts of
equity exist in some quantity.

7. Here and hereafter, general statements about the law of Prohibitions are not
specifically documented. They are based on my work on Prohibition law across the
board, of which the equity cases are a small corner, and admit of documentation too
extensive to cite meaningfully.
So far as is known, however, the Chancery was never prohibited. It was probably a fact of law, or at least the prevailing opinion, that the Chancery could be prohibited, but it never was. The scope of equity cannot be read off from the law of Prohibitions—as the scope of ecclesiastical courts can be, subject to the ordinary problems of finding consistencies in a mass of case law. There is no law of Prohibitions concerning the great court of equity. But three courts, besides the Church courts and the Admiralty, were frequently prohibited—the Court of Requests, the Council of Wales, and the Council of the North. Of these, the first was to all intents simply a court of equity; the other two exercised limited commonlaw jurisdiction; Star Chamber jurisdiction, and equity jurisdiction. The Requests simply, and the two Councils in their equity departments, were in effect regarded as competent to do whatever was proper for the Chancery to do. When their proceedings (and those of a few other courts, such as the equity branch of the Duchy of Lancaster) came in question in Prohibition cases, the common law judges had a chance to say when courts of equity could and could not provide remedies. Had these minor courts handled a volume of equity business comparable to the Chancery’s, and if attempts to regulate their handling of it by Prohibition had been frequent enough, there would be a comprehensive chapter of the law of Prohibitions defining the scope of equity courts, which would be extrapolable to the Chancery itself. Although these conditions do not obtain, nevertheless some notes toward such a chapter can be sketched out.

The procedural setting of Prohibition cases is simple. The Prohibition was a judicial writ indifferently issuable (for all practical purposes) by the King’s Bench or Common Pleas. A party (usually but not always defendant) in an ecclesiastical, Admiralty, or equity court who hoped to stop the suit there “suggested” or “surmised” his grounds to one or the other of the major common law courts. Adversary debate was often held on such first motion for Prohibition; if a writ was granted without debate, the other party was almost always allowed to move to reverse it (properly, to move for a writ of Consultation, the form by which Prohibitions were set aside.) Most Prohibition cases were settled once a writ was granted and the opposing party had had a chance to argue against issuance on motion if he wanted to, though it was possible to seek a Consultation by more formal means—by pleading to issue and judgment thereon, either upon demurrer or pursuant to trial of a controverted factual question.

The Prohibition is conventionally spoken of as a procedure for controlling jurisdiction. Sometimes it was that in a straightforward sense—when the prohibiting court said in effect that although a claim might well be perfectly good in itself, it should be pursued in a different court from that in which the suit had been commenced. Otherwise, “jurisdiction” is not a very helpful word for indicating what Prohibitions did. Plaintiffs were sometimes prohibited, not for suing in the wrong court, but because the judges thought that no court should give relief for the cause stated. Suits were often prohibited, not because there was doubt of the initial jurisdiction of the court in
which they were brought, but because an issue arising in such a suit was thought fit to be tried by a common law jury or judicially determined by the common law, or because the prohibiting court considered a ruling by the original court contrary to law. These different roles of the Prohibition were typical in different contexts; several of them appear in the cases concerning courts of equity below.

Before taking up those cases, it will be advisable to insist on a question an answer to which has already been implied: Was there any doubt about the general legitimacy of prohibiting courts of equity? The question has a priori validity because the Prohibition was historically and in the vast majority of its modern employments an instrument for controlling the Church courts. (That is to say, the roots of the Prohibition lie in the same situation that produced the Praemunire statutes discussed above.) Before the Reformation, the power to prohibit was power to prevent encroachment of a “foreign”, or supra-national, judicial system on the King’s jurisdiction. Not without challenge, but in fact, the prohibiting power as against Church courts survived the Reformation. Ecclesiastical courts had ceased to be really “foreign”, but their encroachment on lay territory remained a threat. They remained “foreign” in the less literal sense that they were manned by civil lawyers and administered a body of law which had its origin in the medieval international Church and which was at any rate a distinct law, whose rules could sometimes conflict directly with English rules governing the same subject. The often-prohibited Admiralty was “foreign” in the sense that the post-Reformation Church courts were: civilian-run, administering an international body of law capable of substantive conflict with English law. Although it was procedurally similar to the civil law courts (and in one instance — the Court of Requests — was manned by civilians), equity is hardly “foreign” in the same way. For equity was usually thought of as a necessary means to mitigate the rigor of positive law — English or “foreign”. May a writ whose end is the control of “foreign” jurisdictions be used against equity at all?

There are traces in the reports of anxiety lest there might be a reasonable general objection to prohibiting courts of equity. Whether counsel arguing against Prohibitions ever pushed such an objection very hard is difficult to discern, but some lawyers probably tried it out in a few cases. On the other hand, such doubts as there were seem to have been easily overcome; if the general objection was urged it was rejected. In addition to the fact that there are numerous Prohibition cases involving courts of equity argued solely on the merits — that is, on the assumption that at least the minor equity courts were prohibitable in principle — there are several express assertions of the universal scope of Prohibitions, to control any court that gets out of bounds, including courts of equity.

Perhaps the strongest example is Coates and Suckerman v. Warner. The question there, omitting the substance, was whether to prohibit the

---

equitable branch of the Duchy of Lancaster. It is surmised that the general prohibitability of equity got raised — probably by counsel and certainly in the judges’ minds — because the King was one of the plaintiffs in equity and the substantive reasons against Prohibition were weak. Before granting a Prohibition to the King’s discomfiture, the judges wanted to be sure in their minds, and to say unmistakably, that the powers of the King’s Bench, and hence its responsibility, extended to the control of all courts by Prohibition, including the equitable one in question. Coke, C.J., said so decisively.

In another case, no facts are reported except that a Prohibition to the Court of Requests was sought, There may have been an attempt to urge that courts of equity were generally non-prohibitable, for the report has Coke asserting the contrary strongly. In contrast to Coates and Suckerman, where his emphasis is on the universal reach of the Prohibition, here Coke speaks specifically to courts of equity — all of them, not just the Requests. His remarks touch on when equity should be prohibited, and they are not wholly restrictive. He says that it ought to be prohibited when it meddles with common law matters or with freehold. That implies, per exclusionem, that equity should not be prohibited merely because the common law judges do not think an equitable remedy makes sense. That thesis is not easy to adhere to — and what counts as meddling with common law matters and freehold is not simple to discern — but at least Coke embraced the thesis, as did others. Coke also says by the way that equity ought to be prohibited before it gives judgment. In favor of prohibitability in general, Coke adduces two considerations. First, he emphasizes that to sue in equity when one could sue at common law is to draw the matter ad aliud examen’ — that is, to trial without a jury. (He adds a note of mystical appreciation of the common law by pointing out that trial at common law is by twelve jurors, and the ultimate decision of legal issues by twelve judges in the Exchequer Chamber — that is what the subject is not to be deprived of by being drawn into equity.) This emphasis on Coke’s part comes to saying that equity courts are at least “foreign” in procedure, and procedural difference does matter. Secondly, Coke stresses the absence of appellate recourse from equity judgments, in contrast to the common law, where a writ of error on points of law or attainit on a false verdict could be brought. (For this reason, he says of equity courts, “their rules and judgments are as binding as the laws of the Medes and Persians, not to be altered.”) In other words, far from being unprohibitable, courts of equity need especially to be restrained by Prohibition, for there is no other control on them. Common law courts, Coates and Suckerman says expressly, are

Unprinted cases are frequently cited to supplement those in the English Reports (which are referred to by standard citation.) Brackets in this note indicate how the familiar style of legal citation by regnal year, term, and court is abbreviated throughout. Abbreviations for other MSS.: Harl. = Harleian; Lansd. = Lansdowne; Add. = Additional. Occasional omission of a term or court means that the report does not specify.

prohibitable—even superior ones possessing the power of Prohibition, as if the Common Pleas should take a case appropriate to the King’s Bench (an appeal of felony is the example given in Coates and Suckerman)—but it would at least be rational to argue that they may not be prohibited because a wrongful assumption of jurisdiction could be corrected by writ of error. Ecclesiastical courts were prohibitable *par excellence*, but except for the High Commission, which was sometimes said to need confining to a limited jurisdiction because there was no appeal from its determinations, they were controlled by a more comprehensive appellate system than the common law had. Equity, by contrast, could commit the most flagrant encroachment on the common law without so much as guaranteed review by a different or superior court of equity, were it not for the Prohibition. (Bills for review and special commissions occurred, but those were discretionary.)

The last two opinions come from Coke, but there is no sign of dissent from other judges. They at least affirm the authority of the King’s Bench to prohibit equity. The authority of the Common Pleas to prohibit comprehensively was doubted, but the opinion that it may not was a dissenting opinion, and it was not specific to courts of equity. That is, the dissenting opinion held that the Common Pleas may not prohibit *any* extra-common law court unless that court takes a case which is actually pending before the Common Pleas. One of the sharpest discussions of this recurrent issue came in a case where a Prohibition to the Requests was sought, *Chapman v. Boyer.*

Walmesley, J., the leading exponent of the dissenting view, expressed it in that case, while asserting the contrasting general authority of the King’s Bench to prohibit whenever courts got out of line, whether or not its own immediate interest was affected. The other members of the Court, Gawdy, Warburton, and Daniel, were equally explicit on the other side, saying in so many words that there was no difference between the Common Pleas and King’s Bench. The majority relied on c. 11 of Magna Carta for the derivation of the Common Pleas out of the King’s Bench, and hence its participation in the parent court’s powers. The three judges, so holding, granted Prohibition in a case concerning equity, and therefore the decision may be taken as upholding the general prohibitability of equity by the Common Pleas.

Although the Chancery was apparently never prohibited, there seems to be no reason to exclude the Chancery from the sweeping affirmations of the scope of Prohibition above. But is there authority directly in point? There are some special reasons why the minor equity courts that were frequently prohibited should have been. The regional Councils had limited common law jurisdiction as well as general equitable jurisdiction. It is probably inevitable that they would sometimes be prohibited in the former capacity just because simple, positive jurisdictional limits—typically, in the case of these Councils, to personal actions under a certain value—will sometimes be exceeded and sometimes be ambiguous in application. The Council of Wales had a statutory basis, and jurisdiction delimited in general terms by the statute,

so that the common law judges’ usually acknowledged responsibility to see that statutes were obeyed required them to see that that court stayed within bounds. Both Councils were authorized and confined by royal instructions—pursuant to the statute in the case of the Council of Wales; it is sound enough law that royal patents, commissions, et similia were ultimately construable by the common law judges and enforceable, as construed, by Prohibition. Thus the habit of prohibiting, and considering whether to prohibit, the regional Councils was bound to grow up. Theoretically, they could have been regarded as prohibitable only in their common law capacity and insofar as their acts were made out to violate the statute and instructions, leaving their equitable capacity uncontrolled. But it was not always easy to keep the Councils’ common law and equitable capacities apart, and the mere habit of watching over the Councils’ operations would tend to encourage including their equitable ones, in the absence of powerful convictions against prohibiting equity.

The Requests, in its turn, suffered from being not quite respectable. It was in fact allowed to operate as a court of equity, but there was serious doubt about its title, prescriptive or otherwise, to exercise the coercive powers of a court. In addition, it was “foreign” in the sense of civilian-dominated. One should not be too surprised to find a court of dubious reputation, something of a “tenant at sufferance”, controlled by Prohibition, even in the face of reluctance so to control established courts of equity.

Therefore the prohibitability of equity is not quite cleanly raised in the case of the frequently prohibited courts. It comes up absolutely squarely only in the case of the Chancery—the court of equity and the court whose practice tended to be taken as the standard for what lesser equitable tribunals could legitimately do. One Abridgment case—43 Edw. III, Fitzherbert tit. Prohibition—was considered to support the Chancery’s prohibitability. The case is cryptic. It probably lends countenance to the proposition that Prohibition may be used to prevent a party from taking advantage of a Chancery decree to defeat a prior common law judgment. If that is correct, the Abridgment case is at least a meaningful straw to grasp at—an indication that Chancery activity was not utterly beyond the reach of Prohibition—but whether it extends beyond the special situation of equitable intervention after common law judgment seems doubtful. Grasping at the straw, a little uncritically, is perhaps a sign of misgivings.

It is no accident, perhaps, that equity’s prohibitability was discussed with particular consciousness in Coates and Suckerman, where the court in question was a relative rara avis, compared to the frequently prohibited Councils and Requests. Being confronted with a motion to prohibit a court as to which precedents of Prohibition could not easily be produced forced consideration of equity’s general prohibitability, going by implication to the Chancery itself, where precedents were equally hard to find. The very discussion in Coates and Suckerman is a sign of doubt, though it issued in a strong vindication of prohibitability. In one other comparable case, doubt was
less confidently banished. *Vawdrey v. Pannell* 12 concerns the equitable branch of the Palatinate of Chester, another *rara avis*. Prohibition to that court was sought, and there was apparently no question but that it should lie on the merits. The King’s Bench, in the absence of Coke, C. J., told Hyde — the lawyer moving for Prohibition — to show precedents of Prohibitions to “such courts”. (I would propose reading “such courts” as “courts of equity apart from the routinely prohibited Councils and Requests.”) Hyde came back later and reported that he could find no precedents. He argued that Prohibition should nevertheless be granted, as the party’s only remedy. Coke, present this time, delivered himself of the *Coates and Suckerman* position again — *all* courts are within the survey of the King’s Bench. Even so, the judges did not prohibit at once, but postponed the question for advisement and told Hyde to look at 13 Edw. III, tit. Prohibition. That he had evidently not found that scrap of evidence for himself suggests that it was hardly celebrated as the crucial link with tradition. (That the Abridgment case deals with the Chancery of England means that a precedent covering that court would serve, in the judges’ eyes, for the Chancery of Chester. They were concerned with the prohibitability of equity, not of one specific obscure court.) With the possible exception of Coke, the judges were at least reluctant to act on principle without precedent, though — with whatever degree of skepticism about its significance — they suspected that a precedent existed and wanted Hyde to have a go at arguing from it. On the whole, one may say that the power to prohibit courts of equity, while not out of reach of embarrassing questions, can be supported by a reasonable amount of authority besides the frequent practice of prohibiting the regional Councils and Requests. To that practice we now turn.

III

The area where equity was most frequently and consistently prohibited will be examined first. This area has a rough, but by no means exact, correspondence to the field of real property. By general consent, courts of equity were not supposed to “meddle” with real estate in the sense of trying legal title to it or duplicating common law remedies for recovery of, or protection in, landed property. This principle is reflected in simple form in several Prohibition cases. 13 On the other hand, there are important ways in


With respect to the cases cited here and in ensuing notes: there are of course complications in getting from the reports to the general points for which they are cited. These cannot be reflected in article-length treatment. I have prepared brief summaries
which equity was allowed to prevent people from taking advantage of their “legal” rights to real property — by enforcing the duties of trustees of land and the equity of redemption, for example. Courts of equity were also permitted to perform some ancillary functions in the system of real property law.\textsuperscript{14} What they were pretty insistently not allowed to do (besides gratuitous “meddling”) was to infringe certain “maxims” of the common law, as they were usually called — whatever the equities of the individual case, or however indefensible the “maxim” as a rational rule for the generality of cases. A “maxim” was not strictly a “peculiar institution” of the peculiar English system of property law, but operationally it was close to that. When courts of equity were prohibited from violating “maxims” outside the real property area, the “maxims” in question typically had their roots or primary applications in that area.

The idea that some common law rules — such rules dignified into “maxims” (or synonymously, but with a more portentously specious ring, into “principles” and “grounds”) — are inviolable by equity may be regarded as a concretization of the proverb “\textit{Aequitas sequitur legem}”. The saying has a respectable pedigree and an intelligible meaning in the proper philosophic setting. But it is far from obvious that equity can be made to “follow” the law — to fulfill it, like the Gospel, and not destroy — in a respectable or intelligible sense by picking out some rules of law, mostly dealing with one kind of subject matter, for inviolable status. There were quite good reasons for conferring immunity on the “maxims” of property, and those very reasons go to show that “\textit{Aequitas sequitur legem}” misstates the grounds for restraining equity in the area where it was most restrained. But let us first see what “maxims” were protected in fact.

Joint tenancy is a good example. The institution of joint tenancy — whereby the whole tenement goes to the survivor and one partner can take all the profits if he can get away with it — does not make much sense outside its commonest context, the marriage jointure. Outside that context, a man who takes a joint tenancy can be seen as either a fool or a gambler. There is “natural equity” in the position that one who finds himself a joint tenant and wants to convert to a tenancy in common unilaterally should, in most circumstances, be able to do so, partly because the feoffor who creates a joint estate is unlikely to intend all the incidents of the tenure very seriously.\textsuperscript{15}

\vspace{1em}

\textsuperscript{14} For the equity of redemption, \textit{infra}, note 63 and accompanying text. I have no cases specifically concerning trusts in land. For trusts in general, \textit{infra}, note 64. The ancillary functions are discussed \textit{infra}, this section.

\textsuperscript{15} Suppose A. gives a family farm to two bachelor cousins, who plan to cultivate it together and whom A. justifiably trusts to share the profits. A. makes them joint tenants solely because they are likely to have different collateral heirs and he would prefer to see the farm stay in one piece. One of the confirmed bachelors marries belatedly and has issue. The children will have no means of support if their father
A few attempts to overcome joint tenancy in equity were frustrated by Prohibition. *Portington v. Beamount* involved an equity suit against the survivor by an alienee or devisee of his late partner, seeking a decree with the effect of excluding the survivor from half the tenement. A Prohibition was granted on the ground that equity may not go against a “maxim of law”, meaning simply the institution of survivorship. The judges did not, however, propose to ban all equitable interference with joint tenancy, for they qualified their holding with an express statement that equity might enforce an agreement between joint tenants that there should be no survivorship. An earlier case comes to the same result for the sole reported reason that a “ground” of the law was at stake. In this case the survivor was protected against the devisee of a moiety. In another case, a suit to force sharing on a joint tenant who had taken all the profits was prohibited with no further explanation than that the unlucky partner “has no remedy”. Related to the joint tenancy cases, but more commercial in context, is a decision, supported by another cited as precedent, that equity may not require one surety on a penal bond to make contribution to another against whom the whole principal debt and penalty had been recovered. Here the Common Pleas did a little better than incant “joint and several liability is joint and several liability,” for the judges relied in part on the utilitarian consideration that letting contribution among joint sureties in the door would multiply lawsuits.

Dogmatic insistence on hard-to-defend property rules can be seen in a decision prohibiting equity from restraining waste by a life tenant who predeceases his partner and cannot pass half of the farm to his widow and offspring. Leaving out compassion and social policy and thinking only of A.’s intentions: it is arguably less than probable that A.’s desire to preserve the farm as a unit outweighs his desire to benefit both cousins equally in ways that would matter to them; had he anticipated their circumstances as they turned out to be, he probably would not have pursued his purposes by means of a common law joint tenancy.


17. The meaning must be at least that if the partners agree to sever equity may enforce the contract specifically while they are both alive (as by compelling the reluctant one to join in a conveyance to the use of the two partners as tenants in common). A more radical meaning would be that the intended beneficiary (heir or purported devisee of the first to die) may compel the survivor to convey a half-interest—the presence of a contract making the whole difference as compared to the principal case.

18. H. 9 Jac. C.P. Add. 25,210, f. 4.


21. M. 5 Car. C.P. Littleton, 310. The point that the Chancery would restrain lessees despite “without impeachment” clauses was made from the Bench by Richardson, C.J. Yelverton, J., replied that that had not been done since the publication of *Lewis Bowle’s Case* (11 Coke, 79). It is not evident to me that *Bowle* has any implications as to what the Chancery should be doing. One contrary case (Sir John Cope’s) was cited: lessee restrained by the Chancery from ploughing up ancient
not liable at common law (because there was a remainder for life between the defendant in equity and the fee). The decision went in the face of an objection that the Chancery was in the habit of restraining particular tenants protected by “without impeachment of waste” clauses. But this was denied as current practice, and there is an earlier dictum, supported by a cited precedent, that the Chancery may neither defeat a “without impeachment” clause nor restrain tenant in tail after possibility of issue extinct from doing waste. In the same report, Justice Foster said it was resolved that the Chancery may not prevent a man from voiding a conveyance made when he was an infant, whatever the equities. Another instance of insistence that a “maxim”, “principle”, or “ground” of law may not be impugned by equity does not involve real estate, but the rule probably owed its existence to the land cases in which it could be invoked. In Beverley’s Case, a man indebted on a £1000 bond sought to be relieved of liability by a Requests suit because he was non compos mentis when he entered the obligation. The suit was prohibited because it went against the maxim that a man will not be received to stultify himself. In another case “aequitas sequitur legem” was stated as the sole reason for preventing equity from giving effect to a devise of a remainder in personal property. There was no such interest at common law, ergo an equitable equivalent of such an interest could not be created. But the decision is not so starkly limiting as it seems, because it was observed that a remainder in the “use and occupation” of goods could be created by will, though not in the goods themselves.

Apart from the cases holding that “maxims” of English law were beyond equitable emendation and those preventing equity courts from deciding legal issues about real property or duplicating common law remedies, there are several Prohibitions that rather regulate equitable handling of matters touching real estate than exclude it altogether. Courts of equity had some well-known ancillary functions in the real property system. There was no disposition to interfere with those functions, but their boundaries sometimes came in question. For example, the function of quieting possession—that is, ordering one party to a dispute over land to yield possession to the other pending settlement of the rights at common law—was upheld as such, but

22. M. 8 Jac. C.P. Harg. 15, f. 225. The precedent cited is Stepden’s Case.
23. There is a nice case in Doctor and Student (Dialogue I, Ch. XXI) showing how there could be strong equities against a man trying to escape a conveyance made when he was under age. In effect: A shrewd “infant” gets a chance to buy a manor worth £200 at a bargain price of £100. To raise the cash he sells another manor at the fair price of £100. By voiding his conveyance and (as of course he is obliged to) refunding the £100 paid by his purchaser, he ends in a favorable position and hardly seems to need the protection which the law accords to minors.
25. T. 17 Car. C.P. March. 106.
regulated in detail, in several cases. Suits for the discovery and recovery of evidences relating to land are another well-known equitable supplement to the law of real property, and a pervertable one insofar as deciding who was entitled to the documents could slip into usurpation of the common law function of trying title to the land. Prohibition cases relating to such suits tend to be nice about the distinction—that is, to avoid interfering with the discovery process, while insisting that courts of equity stick to that. Some attempts to add new ancillary equitable functions were stopped by Prohibition. As to more material efforts to write an equitable gloss on property law—without, perhaps, infringing its “maxims”—one case holds that equity may not intervene to avoid a long lease—that is, to prevent unjust enrichment of one party to a lease negotiated in a long-outdated market. On the other hand, one case recognizes a substantial equitable right concerning property. It was said there that equity might relieve against one who practices deceitfully to take advantage of a condition—as if A makes a lease to B with a condition of re-entry for non-payment of rent, B pays the rent before it is due, A demands the rent on the due-date and enters for a literal breach of the condition when B refuses to pay again. A special branch of property law from which equity could not be excluded was copyhold. Copyholders with vested estates were protected by the common law actions of Trespass and Ejectment, but persons with mere rights to be admitted to tenancy as alienees or heirs could enforce their rights only through equity. Sometimes the handling of copyhold cases by courts of equity, or their title to handle certain issues in such cases, was challenged by Prohibition when, as a claim to admission, the suit as such was properly before the court of equity.

29. T. 12 Jac. K.B. 1 Rolle, 42 (Beaumont v. Hospital of Wigston).
30. M. 12 Jac. K.B. 1 Rolle, 120.
31. For the general position of copyholders in law and equity, see C. Gray, Copyhold, Equity, and the Common Law (Cambridge, Mass., 1963).

IV

Cases involving real property do not demonstrate a simple propensity to restrain courts of equity, but they are, on the whole, restrictive. "Hands off land" is too strong, but "Handle with care" is not, "Hands off maxims" commanded almost unwavering assent, and the "maxims" consciously recognized and protected have their primary home, though not their exclusive application, in the land law. Let us now look at the field of contract by way of comparison. In general, equity was less restricted there. The going rules of the common law of contracts did not have the same tendency as real property rules to settle into "maxims". The lesser equity courts were prohibited from rewriting some articles of contract law, but the more arresting point is that they were not prevented from interfering with certain others.

Of the various functions of the Prohibition, some were more problematic than others. The least problematic was straightforward protection of the common law's own jurisdiction. For a simple example: Ecclesiastical courts had a recognized jurisdiction in defamation. However, if A sued B in a Church court for words actionable at common law, A's suit would undoubtedly be prohibited. That the procedure, remedy, allowable defenses, etc., in the ecclesiastical court are different does not matter; when A can use the common law and get an adequate remedy if he succeeds, he must sue there. It seems predictable by analogy, for the early seventeenth century, that a standard suit for breach of a considerate contract brought in a court of equity should be prohibited. An exception might indeed be made—in the manner familiar in modern law—if the common law remedy of damages were genuinely inadequate in the circumstances. The focus should be on the need for the equitable remedy of specific performance, and pretended need should get a hard look. The same point can be expressed as a general proposition about courts of equity: They exist to give relief which justice requires, but which the common law does not provide. They have no business supplying essentially concurrent relief in a slightly different version which some people may prefer. These expectations are not, however, consistently borne out by the cases.

There is probably no doubt that an equity suit would be prohibited if brought when an action of Debt would lie. Where Covenant would lie, there are scraps of evidence that specific enforcement of the contract in equity was regarded as inappropriate, although one judge who so held acknowledged that the Chancery would in fact order specific performance of covenants


A special consideration against allowing equity to encroach on Debt is mentioned in some of these cases: the King would lose his "fine"—i.e., a percentage of the sum recovered in Debt payable to the King for the services of his court (said in Archbishop v. Sedgwick to be $1\frac{1}{4}$%).
under seal.\textsuperscript{33} On the other hand, where an Action on the Case, or Assumpsit, was the only common law remedy available, the authority is in conflict. Two mid-Jacobean decisions hold clearly that if Case will lie, equity will be prohibited. The first, \textit{Payne’s Case},\textsuperscript{34} involved a simple duty to pay an agreed sum of money for a service (promisee’s use of her good offices to help promisor get a shop in her master’s house), so that there is no way in which a monetary recovery could be an inadequate remedy. The second decision, in \textit{Bromage v. Genning},\textsuperscript{35} is stronger, because specific performance would have been a meaningful and reasonable remedy. Counsel arguing against a Prohibition urged that point. In the equity suit, promisee on a contract to make a lease sought specific enforcement before the Council of Wales. The three members of the King’s Bench who are heard from in the report—Coke, Dodderidge, and Houghton—held strongly that an equitable remedy would undermine the common law actions of Case (the relevant action here) and Covenant (if the contract had been under seal.) Coke, C. J., expressly embraced the theory of contracts that in effect casts every contract into the alternative: A promisor intends, he said, to leave himself the choice of performing or paying damages. Serjeant Harris, who opposed Prohibition partly on the ground that specific enforcement of such contracts was common in the Chancery, ended by explaining to the Court that he had taken his position against his conscience, only because of the Chancery usage—which is to say, he thought it prudent to apologize to the judges for defending an equitable remedy. In one further case,\textsuperscript{36} at the beginning of Charles I’s reign, the Council of Wales was prohibited from enforcing a contract to convey real estate simply on the ground that it lacked jurisdiction over freehold—nothing said about Chancery practice or whether Assumpsit ought in general to preempt equitable suits for specific performance.

Diametrically opposed to these cases are two reports from Caroline courts.\textsuperscript{37} Neither gives the facts of a controversy at hand, but both contain unambiguous pronouncements that a party who could bring an Action on the Case at common law may sue in equity at his election. These statements are taken to refer to the situation where \textit{only} an Action on the Case would lie.

\textsuperscript{34} M. 11 Jac. C.P. Godbolt, 216.
\textsuperscript{35} P. 14 Jac. K.B. 1 Rolle, 368.
\textsuperscript{36} M. 1 Car. Benloe, 152.
\textsuperscript{37} (1) H. 3 Car. C.P. Littleton, 82 (\textit{per} Richardson, C.J., but “\textit{non fuit negatum.”}) (2) T. 9 Car. K.B. Harl. 1631, f. 412 (\textit{per} Richardson and the Court: “If there is an agreement between any parties touching land or other thing on the infringement of which an action accrues at common law, yet the party may well, upon breach thereof, sue in the Chancery. For at common law damages will be recovered, but in a court of equity, such as the Marches [i.e., Council of Wales] the thing itself will be decreed.” \textit{N.b.} the generality of the language, though it is doubtful that it was meant to extend beyond contracts solely remediable by Assumpsit.
hence not to apply where Debt and Assumpsit were alternative common law remedies. The rationale in both instances is that damages and specific performance are distinct “ends”, so that equity does not infringe the common law if it entertains a complaint which would support an action for damages. There is no indication that extraordinary need for specific performance ought to appear. One circumstantially reported case from late in James I’s reign may accord with these pronouncements; at least it does not support the radically opposite position that where Case is available equity must always, or almost always, stay away. Other fragmentary evidence tends both ways and down the middle.

The second and later tendency— to think of Assumpsit and equity as alternative remedies— is the more surprising with hindsight, but perhaps not so surprising without. Time-lag and equity’s vested interest in enforcing contracts would explain it in part. That is, equity would always have been out of place if it had usurped the function of the ancient contractual actions, but it was for a long time suffered to enforce contracts outside the ancient writs; when Actions on the Case had evolved to the point where an adequate common law remedy was available for most ordinary situations, it may have seemed improper to deprive equity of business it was accustomed to do. The view, expressed by Coke in *Bromage v. Genning*, that promisors normally reserve the option of performing or paying damages, perhaps goes against the grain of ordinary moral sensibility, in contrast to the view that promisees have a right to performance if they want to demand it. The procedural etiquette of Prohibition law may cut the same way: Ought common law courts to prohibit a contractual suit when, in the judgment of the competent equitable tribunal, specific performance might be an appropriate remedy for special reasons? Ought common law courts to demand a plausible showing that that remedy is appropriate in the case at hand, and even if such a showing is offered, are they competent to assess it?

Cases on more complex contractual situations do not on the whole indicate a strong disposition to restrict equity, or to insist that the common law courts have the exclusive authorship of contract law short of a narrow range of cases where the need for specific performance is conceded. Two cases show willingness to permit a suit in equity by a third-party beneficiary of a contract between two other parties. The earlier, *Archdale v. Bennet*, is straightforward: Bennet promised Walton, in consideration of an outstanding debt, to pay £60 to Walton’s daughter upon her marriage; the daughter married Archdale, and she and her husband sued for the money in the Court

---

39. (l) M. 15 Jac. C.P. Harl. 5149, f. 36b (*Howson v. Howson*). (2) H. 16 Jac. K.B. 2 Rolle, 59. (3) 3-7 Car. C.P. Hetley, 107 (*Bristowe’s Case*). (4) P. 3 Car. C.P. Littleton, 33; Hetley, 14; Harl., 5148, f. 139 (*Wiver, Viner, or Wyner v. Lawson*).
40. T. 4 - P. 5 Jac. K.B. Add. 25,211, f. 172b; Lansd. 1111, f. 344a (former report dated T. 4, latter P. 5, but it is probable that the case continued over several terms).
of Requests. A Prohibition was sought on the ground that a common law action by the daughter would lie, a proposition that is probably plausible as of the time of this case.\textsuperscript{41} The King’s Bench rejected that proposition unani-

\textsuperscript{41} See Arthur L. Corbin, “Contracts for the Benefit of Third Persons,” \textit{Law Quarterly Review}, XLVI (1930), 2. Corbin’s view is summed up as follows: “In the 17th century there seemed to be little doubt as to a donee beneficiary. [Donee beneficiary contrasts with creditor beneficiary. The latter appears where A. promises B. to pay C. a debt which B. owes to C. The daughter in \textit{Archdale} is a donee beneficiary.] Such third person was allowed to maintain assumpsit on the promise in numerous cases.”

Most of Corbin’s authority is from later in the 17th century, however. \textit{Archdale} figures as quite strong authority that as of 1607-08 a beneficiary was not able to sue. At the same time, it is good evidence of uncertainty on the point. (A lawyer thought it worthwhile to seek a Prohibition; hope for a Prohibition was apparently allowed to ride entirely on the theory that a common law action would lie — as opposed to the contention that, if one would not, equity ought to “follow the law” by withholding its remedy also; the absence of the latter contention is itself a sign of realization that helplessness in the beneficiary was not a desirable state of affairs.)

The strongest earlier case favoring the beneficiary’s right to sue is \textit{Rockwood} (M. 31/32 Eliz. Q.B. Cro. Eliz., 164), but I believe it is distinguishable. In \textit{Rockwood}, Elder Son-and-Heir promised Father to pay an annual sum to Younger Son in consideration of Father’s refraining from charging Elder Son’s inheritance with a rent payable to Younger Son. The following points are notable: (a) The consideration was a detriment to Younger Son, speaking realistically. It should, I think, be taken as a fact on pleadings that Father was determined to benefit Younger Son — not just thinking about it; he was “bound” to do so in the sense of “certain to do so in the absence of new information which would render his decision irrelevant” — not just morally bound, or bound in the absence of new information going to such things as Younger Son’s moral deservingness. \textit{At that point}, Father was induced to break the “bond” by information “rendering his decision irrelevant” — viz., by awareness that the end his decision was intended to accomplish could be gained by another means, and a preferable one, in the sense that Elder Son would be better satisfied and Younger Son just as satisfied; Younger Son was deprived of something which he as good as had — not just of something which he had more or less good reason to expect. (b) It was express on the record in \textit{Rockwood} that Younger Son was present when Elder Son made his promise and that Younger Son “agreed’. Younger Son was “just as satisfied” on his own word (though objectively it is better to have a rent charge enforceable by distraint than the benefit of a promise). Younger Son not only \textit{lost} something he as good as had; he \textit{gave it up} by the act of “agreeing”; a reified consideration could be said to “pass” from him.

Neither of the conditions present in \textit{Rockwood} obtained in \textit{Archdale}. (The first, though not the second, may be said to have obtained in typical family settlement cases from the later 17th century where beneficiaries were allowed to sue — for example, the leading \textit{Dutton v. Poole}: M. 29 Car. II. K.B. 2 Lev., 210.) That there is no sign of \textit{Rockwood} in the discussion of \textit{Archdale} requires no explanation in view of the general state of reporting and legal memory in the early 17th century. It might, however, have been thought of and dismissed because it seemed manifestly different.

Corbin’s position was that a common law remedy was fairly open to beneficiaries in the 17th century, removing any need for an equitable remedy in typical cases. Disappearance of a common law remedy later on generated an indirect equitable remedy, whereby promisee, being solely entitled to sue at common law, was treated as ben-
mously, however, and proceeded to deny Prohibition, thus taking the position that an equitable remedy was unobjectionable. The other case, *Lea v. Lea*, 42 is singular. King James intervened personally in a dispute between the Leas over land and persuaded one of them to promise him—the King—to pay money to the other, on condition that the latter not molest promisor in his possession of the land. That is to say, the promise as between the King and the promisor was without consideration, although the beneficiary was by the terms of the arrangement to be entitled to the money only on performance of a detrimental condition. When the beneficiary sued in the Requests for his money, it was nevertheless argued for a Prohibition that he could recover by Action on the Case. In contrast to *Archdale v. Bennet*, where there was good consideration as between promisor and promissee, the Court—this time the Common Pleas—did not deny that Case would lie. In the upshot, the Court did nothing at all, except put off decision and advise the parties to settle, because the situation was unprecedented and because it would not do to offend the King.

Related to the beneficiary cases are two more dealing with the equitable liabilities under contracts of persons other than promisor and promisee. In *Frevill v. Ewebancke*, 43 a man was induced to surrender a lease to a Dean and Chapter in consideration of a promise to make him a new one. The corporation instead let the land to the sub-dean, whom the promisee then sued in the Requests. In favor of a Prohibition it was argued that the corporation-promisor ought to have been sued. This argument could imply that a common law action against the corporation would lie, but it might mean simply that an equitable remedy should not be permitted against a non-party to the contract, whether or not the promisee had any common law recourse against the promisor. The Court *per* Coke held that the corporation could not be sued at common law because there was no deed under seal embodying the contract, but that equitable suits against corporations could be brought in the form of suits against individual members, of which the sub-dean was one. In denying Prohibition, the Court held that the promisee had “great equity” on his side. The decision is taken to mean, not that a stranger in the sub-dean’s position could be pursued in equity, but that his complicity in the breach as a member of the corporation afforded equitable grounds against him. (The complicity is presumptive, not a matter of real notice of the contract, for Coke said expressly that the equity suit would be good even if the sub-dean had not been a member when the contract was made.) In a manner, the corporation-promisor—not a party who benefitted by the breach—was the defendant in equity.

---

42. T. 10 Jac. C.P. Godbolt, 198.
43. M. 12 Jac. K.B. 1 Rolle, 82.
In *Mathew’s Case*, A contracted to assign a term of years to B for an annual rent, but instead assigned the term to C. C sued in the Requests to enforce the contract on B—that is, to make him accept from C the assignment which he had agreed to take from A, paying the rent to C. Prohibition was denied on the ground that C was helpless at common law; it is hard to see how the contrary could be maintained. There is a hint in a remark by one of the judges that the Court was skeptical as to whether C ought, or was likely to, recover in equity. If so, the case is an instance of Prohibition denied solely because no common law remedy was available—that is, of the common law court’s not passing on the validity of the equitable claim, at least so long as there seemed to be a chance that the court of equity would reject it.

In *Scarlett’s Case*, the King’s Bench held that an equity suit is appropriate to recover installments under a contract to pay a debt by stages. The common law proposition espoused by the Court was that Case and Covenant, as well as Debt, would not lie until the last payment-date had gone by. There was no apparent disposition to say that an installment creditor is out of luck if particular installments go unpaid, that he must wait until the whole debt is due and take his legal remedy then. There is a degree of implicit economic sophistication in permitting an equitable remedy—disinclination to frown on installment contracts and realization that “time is money.” A somewhat later case from the Common Pleas holds that periodic payments secured by a bond may not be recovered separately in equity, but that situation is distinguishable.

A well-known equitable remedy arose when a specialty debtor paid the debt, but failed to have the bond surrendered or canceled or to take a sealed acquittance. Without adequate evidence to show against the creditor’s bond, he would be required to pay twice at common law; equity commonly intervened to prevent that injustice. There are no signs of attempts to prohibit courts of equity from doing so in the straightforward case. An unsuccessful attempt was made to curtail extension of equitable liability to the creditor’s executor. That is, the creditor was paid, but the bond was not surrendered; the creditor died and his executor sued on the bond; attempting to prohibit the debtor’s equity suit, the executor argued that he was not privy to the payment, if it occurred, and, unlike his testator, had no knowledge on the basis of which he could confute evidence of payment put forward by the debtor. The King’s Bench nevertheless refused to prohibit.

Liberality towards imprudent or unlucky debtors also appears in the following case: A debtor by specialty agreed to deliver certain wares to the creditor in partial satisfaction of the debt and allegedly did so. The creditor subsequently sued for the whole debt. The debtor was not helpless at com-

---

44. M. 15 Jac. C.P. Harl. 5149, f. 43.
45. T. 13 Jac. K.B. 1 Rolle, 211; Harg. 7, f. 61.
46. M. 3 Car. C.P. Littleton, 79; Hetley, 69 (*Feaks v. —*).
47. T. 9 Jac. K.B. 1 Bulstr., 158 (*John Strong v. —*).
mon law in principle because, while he could not have defended against the creditor’s suit for the debt, he could have sued for restitution of the goods or their value. In the actual case, however, he was debarred from doing so by the statute of limitations. Nevertheless, two Justices, Jones and Croke — no other contradicting them — opposed prohibiting the debtor from using the Court of Requests to save himself from having to pay in full. This seems to me a strong decision, since it amounts to letting equity prevail against the statute of limitations collaterally. (There is no doubt that a head-on attempt to frustrate that statute, or any statute, would have been prohibited.) Jones and Croke added an interesting qualification: Equity ought not to intervene if the goods in the instant case had not been delivered with specific reference to the debt being sued for.

As against these cases upholding equity, there are several involving contracts that go the other way. To take the easier points first: various dicta say that a “nude pact” may not be enforced in equity, and would not be by the Chancery, but no cases have been found in which an equity suit was prohibited for being an attempt to compel performance of such an inconsiderate promise. In one case, it was undisputed that a suit in the Requests was to enforce a naked promise to pay £50, but the King’s Bench denied Prohibition because the Requests had proceeded so far as decreeing payment. The judges said expressly that they would have prohibited if the case had been moved before decree. In one singular and complex case, limited willingness to let equity enforce a nude promise can be seen. There is no discussion in my evidence of the interesting questions that one would expect to be engendered by the principle that “nude pacts” are unenforceable — what consideration means, whether reliance on an unsealed promise to make a gift could in any circumstances give rise to a good equitable claim when it would not furnish a cause of action at common law.

A few cases may be dismissed as meritless attempts by imprudent and unfortunate people to get equitable protection, prohibition of which is hard to oppose: a woman who took administration of her husband’s estate under the misimpression that it was encumbered only by petty debts and after settling the estate was sued on various bonds; surety on an obligation whom the creditor promised orally not to sue and nevertheless did; a specialty debtor trying to take advantage of his real creditor’s orally expressed wish that a

49. See C. Gray, ‘Bonham’s Case Reviewed’ (Transactions of the American Philosophical Society, CXVI—1972—.51 ff.) for the general question of whether there may be equity against a statute.

50. (1) M. 8 Jac. C.P. Harg. 15, f. 231b (Hide’s Case). (2) M. 15 Jac. C.P. Harl. 5149, f. 36b (Howson v. Howson). (3) H. 2 Car. C.P. Harl. 5148, f. 106b.


52. Early Car. K.B. Latch, 115 (Vicar of Auford’s Case). The case is intricately involved with the law of tithes and points to no policy for commonplace situations.

53. P. or T. 17 Jac. K.B. Cro. Jac., 535; Lansd. 1080, f. 75 (Jobbin’s Case).

beneficiary-creditor release the obligation (where, moreover, the obligation had long since been converted into a judgment debt and execution had thereon); a vendor who gave credit in a sale highly favorable to himself, then panicked and tried to use equity to exact better security.

More substantial limits were imposed on equity in two cases prohibiting extension of contractual liability from ancestor to heir. This was done in *Chapman v. Boyers* in the case of a promise by the ancestor to make assurance of lands—which is to say, a promise that only the heir could perform specifically, and where a good argument for specific performance as a remedy can be made. In *Bristowe’s Case*, no particulars appear from the report, except that an attempt was made to charge the heir on a parol, though written, contract which would have been remediable, as against the ancestor, by Action of the Case. The probable argument against Prohibition was that sufficient property to cover the debt had come to the heir from the ancestor. A Prohibition was granted even though the Requests had proceeded to a decree against the heir.

Also significant are two cases prohibiting the Requests from intervening in the affairs of insolvents to equalize losses among the creditors and take the debtor off the hook. In both instances, the initiative came from the insolvent. In *Crews v. Draper*, he negotiated an extension with all his creditors but one, then resorted to equity to compel the hold-out to agree to a similar arrangement. In the other case, the bankrupt got some of his creditors to accept part payment in satisfaction and then sought to compel the others to do likewise. The common law judges do not seem to have been disposed to let equity supplement an underdeveloped statutory law of bankruptcy.

As the common law courts did not interfere with equity’s preventing double payment of uncanceled obligations, so there is no significant sign of interference with equitable relief against excessive penalties. The closest

55. H. 45 Eliz. C.P. Lansd. 1058, f. 57.
56. M. 15 Car. K.B. Harg. 378, f. 121 (Colt’s Case, on *Habeas corpus*).
57. M. 3 Jac. C.P. Add. 25,205, f. 33.
58. 3-7 Car. C.P. Hetley, 107.
59. P. 8 Jac. K.B. 1 Bulstr., 19.
60. M. 16 Jac. C.P. Harl. 5149, f. 247b.
61. In connection with penalties, I should like to contribute a scrap of evidence on the common law. 39 Eliz. C.P. Add. 25,199, f. 2, is as follows: A man was obliged by specialty in £ 5. On the due date he made another obligation to pay the same debt but did not have the first obligation surrendered. He paid the second obligation on time. Obligee sued on the unsurrendered first bond. *Per* Walmesley, J.: “You tell us a fable of a foolish fellow who has given two separate obligations for one debt, which does not lie in our power to redress.”

Walmesley’s position is the standard common law “hard line” on uncanceled obligations which have allegedly been paid, but cannot be met with a sealed acquittance: it is the debtor’s folly, and he must pay twice. The reporter adds a *nota* to this case, however, which suggests that the common law line on penalty bonds was not so hard. (The margin in the MS. alongside the report has the heading “Conscience
approach\textsuperscript{62} is a case in which a judgment debtor in execution paid his creditor £ 200, representing the principal debt, plus £ 40, representing costs and damages, in exchange for a release from a £ 400 bond. The debtor then brought an equity suit seeking to reduce the £ 40 to £ 20; he was prohibited.

Common law, or conditional fee, mortgages tend in effect to exact excessive penalties unless controlled by the equity of redemption. The only mortgage case found\textsuperscript{63} does not involve a direct attempt to prohibit protection obligations	extsuperscript{.} (“Their course here”, says the \textit{nota}, “is for the most part that if the defendant will at the first appearance confess the debt or the greater part and tender the rest with costs and forbearance according to 10 in the 100, the Justices will moderate the matter. But if he denies the debt, or does not come until after judgment or verdict, then they will rarely meddle with it, but let the law run.”

The \textit{nota} indicates that the late Elizabethan Common Pleas was administering its own equity in actions of Debt on penalty bonds. Would courts of equity have been permitted to offer more liberal relief? No Prohibition cases test that clearly. \textit{N.b.} the limits of “Common Pleas equity” as described: (a) Its discretionary or less-than-completely-routine character is emphasized. (b) 10 percent of the penalty must be tendered. Quaere whether courts of equity would insist on less. (c) Respect for judgment, and indeed verdict, will \textit{almost} always be shown by the Common Pleas judges administering their own equity. Insistence that equity courts show the like respect is surely the more acceptable for that reason. (d) No relief will be given to debtors who try to make out in the face of an uncancelled obligation that they have paid the principal debt — subject to the qualification that it is sometimes enough to confess that \textit{most} of the principal debt is unpaid.

There is no better evidence that the common law would interfere with equitable relief against penalties than any inferences that can be drawn from the indication above that the Common Pleas was in the habit of furnishing its own. The only Prohibition case suggesting that such interference might occur (H. 7 Jac. C.P. 2 Brownl. and Golds., 297—\textit{Read v. Fisher}) possibly means that a debtor may not be relieved of a penalty if the creditor so much as says in his sworn pleading that the principal debt has not been paid. That comes to an adaptation of the rule in the \textit{nota} above that the debtor must confess the principal debt before relief from the penalty may be considered, even if he has actually paid it. If \textit{Read} so implies, it also implies that relief against penalties by courts of equity is as such appropriate. The sparse report of \textit{Read} is consistent with the proposition that in the case of a non-penal bond equity may not prevent double payment if the creditor will put in a sworn pleading that the debt is unpaid, but I doubt that so extreme a restriction on equity’s power to investigate the truth was law.

\textsuperscript{62} T. 21 Jac. K.B. 2 Rolle, 327. \textit{N.b.} the figures in relation to the last note \textit{supra:} plaintiff in equity was trying to reduce his “costs and damages” to the 10 percent of the penalty said to be the common law standard.

\textsuperscript{63} H. 1 Car. Benloe, 160 (\textit{Edwards v. Woolfe}). Though cursory, the Court’s opinion in this case suggests that bills for foreclosure were routine in the Chancery as of 1625. That does not quarrel with the general position of R.W. Turner (\textit{The Equity of Redemption}, Cambridge, 1931) that “arrival” of the equity of redemption proper (as a routine right, without showing special circumstances to excuse non-payment of the debt) can probably be assigned to Francis Bacon’s Chancellorship. Turner’s thesis is assisted, however, by his taking the first bill to foreclose to be the first one mentioned in
of the mortgagor by the equity of redemption, but it does tend to suggest that
the common law courts would not interfere with that equitable function. The
case presents a suit to foreclose before the Council of Wales. The report does
not give enough facts to permit reconstruction of the mortgagor’s motives in
seeking a Prohibition. He appears to have paid off none of the debt, and hence
may have been in danger of losing the land on worse terms than the Council
of Wales offered him by a decree ordering him to pay the full debt or hold the
land of the mortgagee. Perhaps he hoped to do better in another court of
equity. In any event, the judges refused to prohibit, taking the position that
the case was purely equitable and of a type that was common in the Chan-
cery. This is taken as a sign of readiness to leave the adjustment of interests
between mortgagor and mortgagee to equitable discretion and as an example
of a tendency, also visible in other cases, to take Chancery practice as the
standard for what was permissible in lesser equity courts.64

V

Herewith, we have not completed the story of common law control over
equity’s scope, but we have looked at the main substantive departments of it.
Unreasonable restrictiveness is hard to make out. The strongest line was
drawn around certain “maxims” of the common law, whose enforcement in
the face of all equities may be hard to justify, but whose crumbling by
non-legislative means might be the equally hard-to-justify consequence of
letting equity in the door. It tends to be difficult at first sight to make analytic
sense of distinctions which the phenomena permit one to feel. For example,
if the common law gives no action to a third-party beneficiary of a contract,
why is it not a “maxim” that contractual relations run solely between prom-

reports of Chancery cases (Turner, p. 28). That bill comes from 1629, and, as Turner
argues, it is likely that there would have been a gap between recognition of the equity
of redemption and development of a procedure to cut it off. There are eight years
between Bacon’s fall and 1629, only four between his fall and 1625. If foreclosure
procedure was routine in 1625, there would be grounds for pushing the equity of
redemption back somewhat, notwithstanding Turner’s closely reasoned use of frag-
mentary evidence to sustain the Bacon hypothesis. Turner’s treatment (pp. 27-28)
seems to me unduly influenced by the assumption that the common law attitude, and
especially Coke’s, would have been hostile to equitable development of mortgage law.

64. I omit trusts from the text because there is hardly a coherent body of cases
bearing on them. There is nothing to interfere with the assumption that trusts were
equity’s business. If the minor equity courts were significantly involved with the
construction and enforcement of trusts, there was little effort to prohibit them from
handling such suits as they saw fit. Occasionally Prohibitions were sought to prevent
equity courts from masking as trusts matters which could have been taken care of at
common law, usually by action of Account. The following cases are of this type:

(1) M. 13 Jac. K.B. 1 Rolle, 263 (Powell v. Harris). (2) M. 4 Car. C.P. Littleton, 211;
Hetley, 118 (Goffe v. Skipton). (3) T. 9 Car. K.B. Harl. 1631, f. 405 (Frere v. Dev-
isor and promisee, leaving beneficiaries as much out in the cold as people who rely on “nude pacts”? Why may equity help the third party get his benefit, but may not relieve the widow or orphans of a joint tenant who has died out of season after making a deathbed will purporting to devise a moiety for the support of his unhappy relicts?

For such differences, quite good analytic justifications can in the end be given. With reference to the immediate example: The duty to keep promises is, and ought to be, perceived as “natural” or moral, subject to the difficulties of identifying serious, intended, or properly promissory uses of promissory language—difficulties which, for “nude pacts”, are at least rationally, if not altogether satisfactorily, soluble by formalism. On the other hand, it is arguable that the advantages of having a system of private property transcending the bare protection of possession can only be gained by creating a more or less arbitrarily limited range of possible interests, which people are told clearly how to convey and which they must be stuck with, in spite of equities and intentions, once they have taken them up. Although fairly durable conceptual and moral distinctions account for the legal characteristics under discussion, there is no inconsistency in talking more historical language and suggesting that the common law’s perceived “vested interest” in contractual relationships was less marked than in the inherited system of real property. It is hard to know how much awareness there was that increased economic activity must make contracts a more central feature of the legal fabric, that it must bring a greater variety of contractual situations before the courts and generate a demand for development—whether the famous 16th-17th century development of the common law of contracts itself, or the development of equitable supplements. It was in any event fortunate that need encountered relative indefiniteness, relative non-reduction of contract law to “maxims” and “principles”—the kind of reduction which allowed Littleton’s *Tenures* to be thought of as the property law analogue of Euclid’s *Elements*. A certain willingness to share the field of contracts with equity may have been one consequence. In more symbolic—and simply political—terms, the early 17th century saw stepped-up anxiety about legal certainty, about the legitimacy of rules of law which figured as “certain certainties” when tradition seemed threatened along with the property of the propertied. Any settled rule can theoretically serve in that figurative role, but the fundamental rules of real property were especially eligible, by virtue of their settledness and of their association with those “estates” and “birth-rights” in which men needed to feel secure. Comparable favor was not bestowed upon a single theory of contracts; perhaps it has never come to be. “*Aequitas sequitur legem*” would probably have been invoked by the 17th century judges to account for the rather gerrymandered line they drew around equity’s province. The *sententia* can perhaps be given a sense in which it will do that job, but its usefulness is open to question. It may be better to say simply that a certain rigidity is necessary in the law of property, and therefore that equity should not be allowed to soften the established
structure of interests. To stay away is not to follow, though merely to help people secure what they have within that structure—the conceded ancillary role of equity in the field of property—is indeed a form of following. On the other side, as in the law of contracts, where the need for such a fixed structure is less clear, it may be as well to admit that equitable intervention, insofar as it is allowed, is a matter of correcting the common law, not fulfilling it.

“Aequitas sequitur legem” makes most sense in two contexts. One goes back to Aristotle’s *epieikeia*, which was a conception of refinement or filling-out within the schema of a particular legal system—as opposed to a correction of the law’s shortcomings from an ideal point of view. So conceived, equity follows the law in virtue of the meaning of *epieikeia* or “equity”. But what constrains this equity must be the choice of values that informs a country’s law—the principles of the law, yes, but not mere rules and institutions translated into “maxims” and thence into “principles”. The best reason for treating most operative English “maxims” as fundamentals of the system, immovable before equity, is that they are not expressions of those deep and fruitful value-choices that deserve to be called fundamental and so to control Aristotelian equity. What is arbitrary can be called “fundamental” because there is nothing behind it, as there is nothing behind the deep choices by which a people elects to have one kind of social order rather than another, but to identify the arbitrary element in law with the deep choices underlying law is a confusion based on a superficial similarity. It may be induced by the fact that there are excellent grounds for regarding the arbitrary element as immune from equitable scrutiny and other forms of infringement—because it is arbitrary and because an ordered system of property requires a somewhat arbitrary choice of legally recognized interests and capacities. The confusion, however, was immensely influential in history; it is almost “the English fallacy”; its contribution toward keeping the law from slipping away from its real fundamentals, especially in the constitutional sphere, may have been considerable.

There are, to be sure, some ways in which equity was kept in the follower’s role with respect to properly fundamental value-choices. The

65. The crucial sentence in Aristotle (*Ethics*, V, 1137b) is: “Then when the law speaks generally, and something not covered by the generality happens, it is proper, where the legislator neglects something and has gone wrong in speaking in stark terms, to rectify the omission by what the legislator himself would say if he were present, and if he had known would have provided.”

I do not read Aristotle as meaning that the legislator should be presumed to intend nothing contrary to natural justice. The instruction, I believe, is to imagine the legislator of a particular polity, with his special character and purposes, confronting the misleadingly provided for situation. A fictitious legislator (which the Greek *nomothetes* amounts to anyhow) will do as well as a real one. i.e., non-statutory rules which in their usual stated form have a generality which leaves their applicability to the instant case uncertain or improbable should be construed according to their spirit—but their spirit, as the policies of a particular state.
policy against “nude pacts” — meaning that mere promissory language, or such language merely deemed by a trier of fact to be seriously intended, should not be given legal effect—represents such a choice. Equity showed no substantial propensity to violate it. The idea that a debt is a debt, and that creditors must take their chances in competition with other creditors for limited assets, is pretty fundamental to the decision to be one sort of social order. Equity may have offered a significant threat to that idea, and the common law judges may be thought of as saying that the English commitment to it was too strong to be reversed unless by the legislative means eventually adopted.

However, such confinements of equity to its Aristotelian place were comparatively rare. For the most part, save for protecting the “maxims” whose title to protection does not rest on Aristotelian principles, the judges let equity do justice, with the implicit admission that the common law was an imperfect instrument for doing it. They were commendably disinclined, on the whole, to project fundamental societal choices from the common law’s limitations — as one might, for example, by insisting that a contract by English lights is so profoundly bipartite a transaction that a non-party beneficiary cannot be thought of as having a legal interest. Coke’s projection of the idea that a contract by English lights is not strictly meant to be performed failed to convince his contemporaries. On the whole, the judges did not confuse legal abstractions with important societal choices as, more innocuously, they confused property rules with them. Part of the reason may be that they did not genuinely grasp and work within the Aristotelian conception of the equitable function. Had they done so, they might have been reader to reach for the idea behind the positive rule, to see in the common law, not the perfection of justice, but the sole and sufficient map of the English moral polity. The countervailing intellectual force — making for substantial justice and against overuse of the common law as the key to a romantic Volkgeist more precious than justice — was the conception of equity as natural law, as “conscience”, as the ideal point of view. To early 17th century sensibility — and I suspect this includes a Coke despite his tendency to overrate and overuse the common law — an accommodation between law and its critique, between the native and the universal, was still acceptable. To this effect the one important book on early English equity may have contributed. For St. German’s Doctor and Student, while coming to essentially the same position on equity’s boundaries as the 17th century judges reached in practice, casts equity in the role of critic and corrector of human law, in the persona of the law of nature.66 That the common law owes not subservience but accommo-

66. This point about St. German is left undocumented, since another essay would be required to sustain what is said with the qualifications due to a complex and sometimes ambiguous book. No secondary treatment does justice to it, especially to the sense in which it is about what courts of equity should not be doing. St. German’s influence on the 17th century judges certainly is suspected though they had probably not assimilated all his reasoning.
dation to natural justice is in no way better emphasized than in the sym-
bolism of the judgments controversy: Let it be pretended that the common
law itself is never ultimately unjust (or let it seem that the choices and
commitments it represents can claim to be more precious than justice); let
the etiquette prescribe that title to do justice in the face of the common law is
only title to correct the consciences of those who would seek to make
unscrupulous use of the common law to gain unjust advantages.

A second context in which “Aequitas sequitur legem” can be given a
solid meaning is where equity is seen as a loophole in formalistic rules. In
some cases, such rules can be thought of as half-meant — as made to produce
a benign effect, but not intended to be strictly enforced. For example, it is a
good rule that a sealed bond can only be defeated by a sealed acquittance, for
the rule will encourage care in business and diminish factual controversies
about whether debts have been paid. If equity is permitted to undercut the
rule, it is not because the rule is faulty by a moral standard above the law, but
because it is not meant literally. The common law itself does not hold that
careless people should always or even usually have to pay twice, but only that
a deterrent price should be attached to carelessness. The price consists in
having to bring a suit in equity, with the trouble and risk of failure any lawsuit
involves; in having to sue in time or lose the chance (given the common law
position in the judgments controversy); in having — one may hope, even if
one is willing to leave the determination to equity — to convince the court of
equity that the carelessness was in some way excusable or the hardship of
double payment an undue penalty in the circumstances. For a different kind
of example (cf. Frevill v. Ewebancke above): The institution of corporations
perhaps requires special rules about how a “fictitious person” can act, such
as the rule that it cannot make a parol contract. But the common law does not
intend that corporations should escape their contractual duties when they
fail to observe, and those they deal with neglect to insist on, the form that the
law requires. If, subject to the risks of having to bring a lawsuit promptly,
equitable means can be found to see that fictitious persons are held to the
same basic legal duties as natural persons, the common law is not defeated,
but relieved of the burden of the letter — a necessary letter when the law for
good reasons of utility creates an unnecessary “artificial animal”, but hardly
one meant to give corporations the privilege of victimizing the careless. Some
approved equitable functions can be regarded as fulfilling the law’s whole
policy, as opposed to the part of its policy expressed in formalism. However, it
is strained to make out that all equitable functions that were historically
approved were, or can usefully be, reduced to that kind of fulfilling role. Had
the courts’ theory really been that equity only exists because some common
law rules are meant to be circumventable with extra trouble, equity would
have been more constricted than it was; it is probably easier to find an
important policy behind the literal rule than to place it in the circumventable
class, once those are seen as the two stark options. The established practice
of the Chancery made equity too major a part of the system to be recast as a
poor handmaiden in all departments, and the jurisprudence descending from St. German conferred a higher dignity upon it.

VI

From the point of view of the law of Prohibitions, common law control over equity was special, but not unique. In other contexts as well, the easiest ground for prohibiting was that someone suing outside the common law system could sue at common law. But Prohibitions were not confined to this simple model. The writ was in fact extended to regulate extra-common law entertainment and handling of suits which not only could not be brought at common law, but belonged positively, as abstract types of claims, to the court where they were brought. So equitable suits were sometimes stopped, or not stopped, because of the common law judges’ view of the equitable merits. It was not, nor should one expect it to be, simply up to the courts of equity to decide whether someone without a cause of action at common law was entitled to relief, except that the Chancery’s *de facto* freedom from Prohibition implies a trust in the principal court of equity to discipline itself—a trust not extended to the minor equity courts, nor to the ecclesiastical courts.

However, extension of the Prohibition to regulatory functions beyond protection of the common law’s monopoly over certain types of claim was never wholly unproblematic. “Conservative” and “liberal” strains of thought on the scope of the writ can be seen twisting throughout the law of Prohibitions, the “conservative” tending to oppose prohibiting in the absence of direct threat to the common law’s jurisdiction. Even “liberal” judges did not claim a blanket authority to regulate the law of other jurisdictions. It was a cliché that Prohibitions did not exist to permit review of the “justice” of decisions by prohibitable courts—for example, to undo misapplication of ecclesiastical law by ecclesiastical courts or to frustrate decisions which, rather than wrong by any positive standard, seemed unjustifiable by general canons of fairness and procedural propriety. The “liberal” judge had to look for indirect ways in which the acts of extra-common law courts could be said to infringe interests of special concern to the common law, and could therefore be brought within the range of Prohibition without turning the writ into an indiscriminate instrument of control. The most interesting, and messiest, chapter of Prohibition law resulted from this effort. These themes crop up in Prohibition cases dealing with equity, as elsewhere. The equitable merits of claims—and sometimes the merits of decrees, despite misgivings about going behind a final solution—were in fact debated, but here too the principle was sometimes voiced that the “justice” done by prohibitable courts was not reviewable.

One neat example of the tension between “conservative” and “liberal” approaches to the Prohibition is well documented in the equity cases. In ecclesiastical cases, the question sometimes arose whether one Church court could be prohibited from entertaining a suit that ought to be in another Church court. There was a clear clash in such cases between the “conserva-
tive,” who says “No — Prohibitions are to protect the common law, not to police lines of jurisdiction generally”, and the “liberal” who says the contrary. A similar issue arises when a claim that could be pursued in an ecclesiastical court is pursued in equity. Do the common law courts have interest and standing to interfere? Cases raising that question are also of substantive significance, since they touch on the ultimately important role of equity in testamentary matters, which traditionally belonged to ecclesiastical courts. Several cases are consistent in holding that equity should be prohibited from entertaining a simple claim to a legacy, which could just as well be pursued in an ecclesiastical court, but the cases show no inclination to prevent equity from ordering the payment of legacies which for some special reason could not be recovered in the spiritual court. On the whole, the “liberal” view won out with respect to the common law courts’ title to prevent equity from invading the ecclesiastical sphere; so it did too with respect to protecting one ecclesiastical court from another.67 This result is also, of course, a matter of protecting the defendant against being vexed where he does not expect to be, sometimes to his inconvenience and necessarily so as to expose him to different judges, procedures, or sanctions, whether or not it would mean poorer substantial justice. There are, however, instances in other kinds of cases of effective “judicial restraint”, or success for the “conservative” attitude toward the Prohibition’s purpose.68


(b) The following involve equitable encroachment on the Church’s marital jurisdiction: (1) H. 3 Jac. K.B. Add. 25,205, f. 205. (2) M. 3 Car. C.P. Hetley, 69; Littleton, 78. (3) M. 15 Car. K.B. March, 52.

(c) Miscellaneous testamentary cases: (1) T. 17 Car. K.B. March, 107. (2) H. 2 Jac. K.B. Noy, 3; Lansd. 1111, f. 41a (Executors of Trott v. Taylor). (3) P. 17 or M. 22 Jac. C.P. Winch, 103; Harl. 5149, f. 282a (Buble or Bubbe’s Case).

68. (1) M. 11 Jac. K.B. 2 Bulstr., 142 (Glascock v. Rowley. A complex case, but a strong example of refusal to block execution of an outrageous decree.) (2) H. 16 Jac. C.P. Harl. 5149, f. 264 (Bennet v. Beckwith). (3) M. 22 Jac. K.B. Lansd. 1063, f. 23b (A strong statement of principle: “It was agreed by the Justices that they will not reform the injustice of a decree obtained in the Council of the Marches or the Council at York. for the Councils decree according to equity, and the injustice of a decree in equity may not be amended by the Justices of the one Bench or the other, who have the administration of justice according to the rules of the common law.”) (4) 3-7 Car. C.P. Hetley, 59 (Waddington’s Case). (4) T. 17 Car. C.P. March, 102 (White v. Grubbe. In this case Prohibition was granted. It is significant in the present context because counsel thought it worthwhile to push a view more “conservative” than opposition to reviewing unjust decrees — viz., the position that mere acts of acquiescence by the party could cut off his right to a Prohibition. The attempt failed, but it goes to show the arguability of such a position.)
Besides the cases discussed, there are several—some of them habeas corpus cases—which speak to the procedural powers and sanctions of the equity courts. These cases will not be examined except to say generally that they present a mixture of permissiveness and restrictiveness. Equity was given reasonable scope to do what it must do to be effectual—to back up its decrees by imprisonment for contempt. It was not on the whole permitted to add further or different sanctions. For example, there are some attempts to prevent equity courts from forcing defendants to enter bonds to carry out decrees: ecclesiastical courts were sometimes restrained from doing the same.

VII

In general terms, a solution to the problem posed at the outset of this article, in connection with the judgments controversy of 1616, is implicit in what has been said: An ungenerous attitude or pervasive hostility toward equity, an unremitting propensity to curb the minor equity courts and indirectly to criticize and warn the Chancery, is hard to make out. It seems better to attribute to the judges a fairly coherent, though hardly articulated, theory of the equitable function—not an extravagantly permissive one, for numerous plausible efforts to secure equitable remedies were rebuffed, but a theory that distinguished intelligibly the sphere of restrictiveness from that of generosity. The judgments controversy, in this perspective, would seem to have been essentially about what it was ostensibly about—one point on which the accommodation between law and equity was by common lawyers’ lights unsatisfactory.

Prohibition cases furnish good evidence that equitable intervention after judgment was regarded as objectionable in itself. Indeed, it is not too strong


(b) On miscellaneous sanctions other than imprisonment: (1) H. 13 Jac. K.B. 1 Rolle, 339; Harg. 47, f. 115 (Oliver’s Case). (2) T. 17 Car. C.P. March, 99. (3) 39 Eliz. C.P. Add. 25,199, f. 2.


(d) The following cases show that the power of the Requests to imprison was open to challenge, but was upheld sufficiently to allow the court to operate: (1) P. 41 Eliz. C.P. Lansd. 1065, f. 12b; Noy, 6. (2) P. 43 Eliz. C.P. Lansd. 1058, f. 10. (3) T. 10 Jac. C.P. Godbolt, 198 (Lea v. Lea). (4) 39 Eliz. C.P. Add. 25,199, f. 2. (5) M. 15 Car. K.B. Harg. 378, f. 121 (Cott’s Case).
to say that on the best evidence available such intervention was simply illegal, by virtually unanimous opinion. Objection to it was not an overextended Cokean position, whether or not Coke’s application of the Praemunire statutes to the matter was excessive. For in quite a few cases, scattered in time, the minor equity courts were prohibited because they proposed to give relief in the face of a common law judgment—usually when they would have been unlikely to be prohibited on other grounds. Moreover, there are five cases after 1616 in which Prohibitions were issued mainly to prevent post-judgment intervention. No evidence is found in any report of an actual controversy later than 1616 that the point was so much as debatable, just as no dispute about it has been found in a line of earlier cases going back to the mid-16th century. Prohibition cases are the only objective source of law on the matter, and they say that the law was against Chancellor Ellesmere and King James. From the cases after 1616, it would seem that the King had no factual power to change the law to console him for his manifest lack of legal power to do so. His decree could no doubt assure the Chancery of moral support were it to intervene after judgment in the future; whether the decree in fact affected its habits, in the face of the unconverted common law judges, is unknown.


71. (1) T. or P. 14 Jac. K.B. Harl. 4561, f. 223; 1 Rolle, 380 (Jones v.—. Arbitrator’s award given the same force as a judgment.) (2) T. 14 Jac. K.B. Harl. 4561, f. 223; 1 Rolle, 380 (Skipwith’s Case, reported in Lingham v. Broughton). (3) M. 21 Jac. Benloe, 141 (Reynel’s Case). (4) P. 5 Car. C.P. Littleton, 245. (5) M. 16 Car. K.B. Cro. Car., 595 (Calmedy’s Case). T. 17 Car. C.P. March, 105, rejects what some earlier cases give countenance to— that equity can be cut off by certain common law proceedings short of judgment—while confirming that judgment precludes equity.

72. One report (T. 3 Car. C.P. Littleton, 37; Harl. 5148, f. 145b) states as a nota the Chancery position that proceedings after judgment are unobjectionable. No litigative context is reported from which one can determine whether a judge gave this opinion or whether it represents only a reporter’s impression of the law.
Even apart from their substance, Prohibition cases tend to put the rule against relief after judgment in a context of moderation and accommodation. For there are cases in which the respect demanded for common law judgments was extended reciprocally to equity judgments.\(^73\) Although practice was not totally consistent, the common law courts’ sensitivity to equitable intervention after judgment made it incumbent on themselves to be cautious about prohibiting equity after judgment. Such caution is emphatically not standard Prohibition law. Many attempts were made to persuade the judges that they should not prohibit ecclesiastical courts when Prohibition was sought after judgment; they were never convinced of that as a general principle, though they reserved discretion to refuse Prohibition in the event of especially inexcusable delay. (Admiralty judgments enjoyed considerably more respect.)

Breaking the cases down in more detailed ways does not seem to detract much from the general impression. Coke himself was involved in some restrictive decisions, and in the single case of *Bromage v. Genning* he took an anti-equity position on an important question stronger than was unanimously acceptable (though it commanded the immediate agreement of Coke’s brethren). But he was involved in some permissive decisions too, and, on the whole, there is little basis for supposing that he stood out from the consensus of his profession. If that is correct, it is consistent with his record as a wielder of the Prohibition in other fields. Coke’s reputation as *the* prohibiting judge is exaggerated, largely because he was the leader of the common law forces when the policies of the courts in administering the writ were attacked politically. On the Bench, he was a stickler for precisely drawn jurisdictional boundaries within a complex legal system whose refined differentiation of function he admired; he was by no means always the judge most inclined to cut back the authority and independence of extra-common law courts. His strong, if basically unoriginal, position in the controversy with equity over intervention after judgment is in a way the perfect reflection of a sensibility both tolerant of the “diversity of courts” and aware that a mixed system requires accurate traffic rules—and besides traffic rules, manners (however much Coke forgot his own in controversy).

The practical insignificance of the dispute of 1616 and of the King’s pretended settlement is the point that emerges most conspicuously from the chronology of the cases. The courts’ substantive view of equity’s scope does not seem to have been affected by the quarrel and its purported resolution, as their view of intervention after judgment does not. Different effects are imaginable. The Chancery’s nominal victory in the quarrel might have led to more permissive treatment of equity on the part of judges unwilling to displease the government or to stir up renewed protest by the equity courts.

---

73. *Muskett v. Man* (note 51 supra) is a strong example. For a counter-example, *Bristowe’s Case* (note 58). The cases in note 68 illustrate respect for equity judgments along with the principle for which they are cited there.
On the other hand, “losing” the judgments controversy could conceivably have driven the judges to resist losing more to equity and so to stricter use of the Prohibition. It is tempting to see the first effect when a Richardson, C. J.—a distinctly royalist judge, sparing in various situations about issuing Prohibitions—appears to reverse earlier decisions and offer a great future in contract law to the courts of equity. Indeed, to see a conservative turn on the Bench after Coke’s dismissal in 1616 accords with the pattern throughout Prohibition law—except that it was only a turn, a few degrees without unanimity, hardly proportionate to the government’s extensive efforts to persuade and intimidate the courts into prohibiting less. In the matter of prohibiting equity, most appearances go to suggest that the events of 1616 made no difference. Although these figures are not carefully refined to allow for the ambiguities of many reports and for significances subtler than gross result, they are not likely to be seriously misleading: If one looks at contractual situations more complex than those suits for breach where there was a difference as to the interchangeability of Assumpsit and an equitable remedy, pre-1616 and post-1616 are scarcely distinguishable—five Prohibitions refused before 1616 and five after, six granted before and ten after. Prohibitions to prevent equity from meddling with real estate and infringing the “maxims” of property law were usually granted; ten were granted before 1616 and eleven after. Most attempts to protect ecclesiastical courts against equity came after 1616; in that period, six Prohibitions were granted and four refused. The rough appearances, at any rate, are that politics, royal interference with the judicial process, and generational change had little effect on the common law view of equity’s proper scope.