The Writ of Prohibition: Jurisdiction in Early Modern English Law, Vol 4: Prohibitions Enforcing Statutes

Charles Montgomery Gray

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THE WRIT OF PROHIBITION:
Jurisdiction in Early Modern English Law

Charles M. Gray

Volume IV:
Prohibitions Enforcing Statutes
# Table of Contents

GENERAL INTRODUCTION TO VOLUME IV .............................................................. 5  
CHAPTER 1: 21 HEN. VIII, C. 5— ................................................................. 14  
ADMINISTRATION OF INTESTATES’ ESTATES  
Introduction ............................................................................................................... 14  
Text—Summary ....................................................................................................... 40  
Text—The Cases ...................................................................................................... 44  
CHAPTER 2— ECCLESIASTICAL SUIT OUTSIDE DEFENDANT’S HOME DIOCESE ................................................................. 96  
Introduction and Summary ..................................................................................... 96  
Text—the Cases ...................................................................................................... 99  
End Note: 23 Hen. VIII and the High Commission ............................................. 143  
CHAPTER 3— THE JURISDICTION AND POWERS OF THE COURT OF HIGH COMMISSION ................................................................. 151  
Section 1: General Introduction ........................................................................ 151  
End of Section 1 ..................................................................................................... 173  
Section 2—Cheinye v. Frankwell and Caudrey v. Atton: ............................... 174  
Two Cases on the High Commission Not Arising on Prohibition or Habeas Corpus  
Summary .............................................................................................................. 174  
The Cases .............................................................................................................. 175  
Notes to Cheinye and Caudrey .......................................................................... 207  
Section 3: The High Commission before Coke’s Chief Justiceships ............ 212  
Sub-section (a): Elizabethan Cases ................................................................. 212  
Summary ............................................................................................................... 212  
The Cases ............................................................................................................... 214  
Summary ............................................................................................................... 229  
The Cases ............................................................................................................... 232  
End Note; The Official Record in Fuller’s Case ............................................... 267  
Section 4: The High Commission during Coke’s Chief Justiceships ........... 277  
Sub-section (a): Common Pleas Cases (1606-1613) ....................................... 277  
Summary ............................................................................................................... 277  
The Cases ............................................................................................................... 280  
End-note: Sources and details of the 1611 extrajudicial debate. ...................... 317  
Sub-section (b): The King’s Bench during Coke’s Chief Justiceship (1613-1616) .... 326  
Summary ............................................................................................................... 326  
The Cases ............................................................................................................... 326  
Section 5: Cases after Coke’s Chief Justiceships .......................................... 332  
Summary Covering Both Subsections .............................................................. 332  
Sub-section (a): Cases from the Common Pleas after Coke left the Chief Justiceship (1613 to the Civil War Period) ................................................................. 338  
Sub-section (b): King’s Bench Cases after Coke’s Dismissal (1616 to the Civil War Period) ................................................................. 376  
INDICES ............................................................................................................. 387  
Subject Index ....................................................................................................... 387
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GENERAL INTRODUCTION TO VOLUME IV

This Introduction deals in the abstract with the common law courts’ virtual monopoly of statutory construction. Two questions are considered: (a) Why the common law’s “monopoly” is open to doubt. (The historical setting for the doubts is the Reformation’s integration of the ecclesiastical courts into the national judicial system, so that they became agencies of the monarch, like the common law courts, and addressees of the statutes. That contrasts with agencies of Rome, the activities of which could be regulated and inhibited by secular law, but not directly commanded by Parliamentary legislation or otherwise.) (b) Why, as I conclude, the common law monopoly almost had to prevail notwithstanding plausible doubts. There was a good deal of political controversy over these questions in the period of this study. In keeping with the policy explained in Vol. I, however, I do not deal with the literature of this controversy. Rather, I analyze the issues abstractly in the light of my treatment of the main lines of jurisdictional law in Vols. I-III. As in several comparable Introductions in those volumes, I stand back, not only from the specifics of out-of-court controversy, but from the case law itself. I am aiming at a focus on the issues that may help to make the cases understandable in a way that the surface of law reports usually cannot do. In fact, the deep questions about the common law monopoly rarely surface in the cases treated in Vol. IV. These are cases that show the common law courts dealing with concrete problems of statutory construction which concern the jurisdiction and powers of ecclesiastical courts. Vol. IV takes up groups of such cases, sizable ones, where the common law’s authority to interpret statutes enabled them to define the law on several matters involving non-common law courts. Miscellaneous examples occur elsewhere in the study. The common law’s authority itself—its “monopoly”—amounts to a massive legal fact; there was little occasion to stir it up in the cases that depend on it.

*                              *                              *

In the range of types of Prohibitions, a distinct place needs to be reserved for those based on statutes. Such Prohibitions overlap with other types, but they involve a problem of their own. For present purposes, it is overlap with “ambit of remediable wrong” Prohibitions (Vol. III) that matters. Suppose A makes a claim in an ecclesiastical court against B and B seeks a Prohibition on the ground that A’s claim is simply “unlawful”, simply ought not to be listened to by any court. In other words, B does not contend that there is any “paradigmatic” infringement of the common law court’s territory, nor that A’s suit is misplaced as among “foreign” courts. We have seen that the bases for Prohibitions of the sort B is seeking could be somewhat variable and indeed somewhat hard to pin down. In some cases it could be said fairly straightforwardly that the common law—or standards so firmly embedded in traditional English law that they bind all courts in England—rendered the claim “unlawful”. In other cases, one is perhaps best advised to translate “unlawful” into “unreasonable”—the ecclesiastical claim simply seeks to impose an unfair burden on the subject. In still others, the ecclesiastical law itself could be invoked with some specificity—as if to say, “This claim is bad by ecclesiastical law; the stakes are such that a common law court should make sure that the ecclesiastical...
court does not violate its own rules.” Now let us consider another possibility: B says that A’s ecclesiastical claim is “unlawful” because of a statute.

From one point of view, invoking a statute may seem to make the a fortiori case: If common law courts may prohibit ecclesiastical suits where there is no “paradigmatic” infringement—one the relatively vague ground that peremptory common law standards, or reasonableness, are likely to be violated—then surely they may prohibit suits which a black-and-white statute renders unlawful. If there is some doubt about the common law’s title to control the “ambit of remediable wrong” in general—when the common law’s own direct interest is not threatened and the standards by which control is exercised are a little hard to specify—then surely there is at least less doubt about its title to enforce the “ambit” laid down in the statute book. From another point of view, however, bringing in a statute may seem to make the common law’s right to intervene more dubious, rather than more certain.

The reason for that possibility lies in the universal bindingness and notoriety of statutes. Ecclesiastical courts are just as obliged to obey statutory directives as common law courts. Should it not be presumed that they will obey them? If B thinks that A’s ecclesiastical suit is unlawful, should he not say so in the ecclesiastical court, instead of seeking a Prohibition? By contrast, it is questionable whether ecclesiastical courts are “obliged to obey” imperatives generated by English custom but without basis in their own legal sources For example, if there were any validity in the argument that the common law concept of joint tenancy ought to prevail in all English contexts—so that both joint tenants should participate in an ecclesiastical suit for tithes—it would behoove the common law courts to enforce the requirement on the ecclesiastical courts, but would not necessarily behoove the latter to enforce it on themselves. On the one hand, there is the simple “obligation to obey”, and surely ecclesiastical courts are bound as instrumentalities of the King and the respublica to do as the statutes order; on the other hand, there is what might be called “liability to have a superior standard imposed on one”—carrying a duty not to complain if one is prevented from going by one’s own standard, but hardly the duty, or even the right, to look outside those standards for oneself.

(An analogue for this distinction can be found in federal-constitutional systems such as the American. Certainly courts of the subordinate states are “obliged to obey” the national constitution, but should they take its imperatives into account as federal courts should, or as they themselves should take account of state law? To what extent may they, or even ought they, settle the case as state law requires, merely accepting the liability of having the result overturned, or the case removed from their hands, if a party should seek to raise a national-constitutional question in a federal court? The distinction can perhaps also be reflected in moral experience. We perhaps perceive some situations as such that we simply ought to act in one specific way rather than another, as if commanded by a moral law one has no respectable choice but to obey. Are there other situations in which we see it as our right, or even our duty, to follow moral lights peculiar to ourselves and characteristically at odds with what we half suspect may ultimately have been “the right thing to do”—to follow such lights, of course, “under correction”, not here of an external authority, but of experience itself, including experience of other people’s capacity to adjust to the moral order we create? We should accept the liabilities incumbent on fallible
and sociable creatures, but need we, or ought we, always to settle our problems moralistically?)

A similar point may be made in terms of “notoriety”, as opposed to “bindingness”. Statutes are open to all; they specify the law in black and white for all to see. By the familiar fiction, acts of Parliament are Everyman’s act, for Everyman is complicit in their making, having participated by representative if not in person. The fiction expresses “bindingness”—for being complicit I cannot disclaim the statute’s rightness and authority—but even more obviously it expresses “notoriety”: I am surely estopped to deny knowledge of what the law requires in so far as the law is “positive” in a statute of my own putative making—the more so when the metaphysical presumption, so to speak, is empirically reinforced (for statutes are frozen in writing, can always be referred to, are promulgated so that people have real warning of what they are in any case bound to know.) By contrast, *lex non scripta* is in some senses cut off from universal access—if ultimately knowable by everyone in the community, still requiring extraction with the help of appropriate skills. Despite the more inclusive presumption that Everyman has notice of all the law, there remains a shadow between the fiction and the reality when we assert the claims of specialized capacities to “find” the law. Such a claim is asserted if one joins the chorus, in which Coke’s was the strongest voice, hymning “artificial reason.” As against the “natural” rationalism that would maintain Everyman’s capacity to discover the law’s requirements by reflective application of his ordinary reason and common moral sense, the chorus insisted that intense training in a particular legal tradition was essential for finding the what and why and rational necessity of English legal rules, things that ‘artless’ reason was bound to misperceive. From another angle, one asserts a “specialized capacity” if one holds that the customary component of the law is only available to folk-memory, incapable of being found by the non-mystical procedure of taking evidence of usage, which is probably the reason why an ecclesiastical court should not try a *modus* even if it is perfectly willing to.

The application of these general ideas to our present concern is simply that “foreign” courts would seem to have access to statutory law as they do not to unwritten law. An ecclesiastical judge should be able to see his duty, in so far as that duty is prescribed by act of Parliament, by looking at the statute book. In an ultimate presumptive sense he may be said to “know” the unwritten law as well, and see his duty in so far as it is based thereon, but he cannot really be expected to have access to what is outside his specialized tradition. Only a common lawyer can strictly know the rules about English joint tenancy or the like, and, still more important, only he can understand the idea of which the rules are the expression—the rationale, virtue, and “weight” of a legal idea generated by English tradition, an idea which is quite possibly strange to other systems of law. To repeat the example, if one senses that an ecclesiastical claim violates the nature of joint tenancy and ought not to, the common law court should immediately decide to prohibit or not prohibit, according as it conceives or “weights” the idea of joint tenancy (i.e., as it considers that ecclesiastical courts are bound or not bound to imitate the common law with respect to such questions as one joint tenant’s standing to sue alone.) There is no point in waiting to see how the ecclesiastical court handles the claim before it, because the ecclesiastical judge cannot be expected to have access to the relevant lore. Even if he were to do the right thing, whatever that may be, it would be, as it were, by accident. *Per contra*, one may argue, the ecclesiastical judge has perfect
access to the statute book; therefore one should at least wait and see whether he follows
the statutory directives in point—directives aimed as much at him as at any other court,
and in a realistic sense as manifest to him as to others.

Though this line of argument is most appropriate when straightforward
knowledge of common law rules and their policy is demanded, it is not entirely
inappropriate when the objection to a “foreign” claim is its vaguer unreasonable ness.
There are of course good grounds for assimilating “reason” to statutes, rather than to the
common law: Everyone has equal access to “reason”, as—by my argument—to statutes.
Therefore ecclesiastical claims should not be stopped at the first opportunity if there is
nothing more to be said against them than that they are unreasonable. There are scraps of
warrant for that proposition. If, however, one takes the elusive and expandable idea of
“artificial reason” seriously, it may be possible to put “binding or pervasive common law
standards” and “mere reasonableness” on one side of a line and statutes on the other.
Granting that “natural reason” is universally accessible, it can still be argued that “natural
reason” is never a sufficient basis for solving a legal problem—that in legal matters some
specific tradition necessarily does, and ought to, shape the sense of reasonableness. It
might be civil or ecclesiastical law, it might be English law, but one or another must and
should mediate for the naked natural capacity. If this is granted, then perhaps within one
community there is room for only one “artificial reason”. Perhaps the common law
should never be readier to take over than when a “foreign” claim is challenged for
reasonableness, because it is “the artificial reason of the law” that should assess that
challenge. Otherwise it will be assessed by a competing “artificial reason”, and a
fundamental, abstract discordance will be introduced into the legal system—more
fundamental because more general or abstract than disharmony brought about by failure
to dispose of closely analogous particular problems by a single rule. Again per contra,
the definiteness of a written statute may differentiate it; ecclesiastical courts may lack
access to the appropriate kind of “artificial reason” as and because they do not have
access to specific legal lore; the statutes are there to see.

The only sort of objection to an ecclesiastical claim that seems, if anything less fit
to move a common law court to immediate action than a statute-based objection, is the
surmise that the claim is invalid by ecclesiastical law itself. Although we have seen (in
Vol. III) a few signs of willingness to preserve ecclesiastical courts from the temptation
to misapply their own law, there are much stronger signs of unwillingness to do that.
Granting that it is utterly inappropriate for common law courts to hold ecclesiastical
courts to responsible application of their own law, a rule for statute-based surmises might
be projected: Viz., to say a claim in an ecclesiastical court is bad by virtue of a statute
amounts to saying it is bad by ecclesiastical law, for statute law is law in all courts.
Therefore common law courts should no more intervene to block that claim than to block
one that appears to be bad by other criteria of ecclesiastical law. At least they should not
intervene until all remedies are exhausted within the ecclesiastical system.

The last sentence above, points to the next problem, for which I have made
allowance by the way in spelling out the arguments above. One might maintain that
ecclesiastical courts should have first crack, but only first crack, at statute-based
objections to claims brought before them. I.e., B comes to a common law court and
surmises that A’s ecclesiastical suit against him is unlawful by statute. The common law
ought at this point to refuse Prohibition. But at a later point—upon a showing that the
statute-based objection was raised in the ecclesiastical court and incorrectly overruled—Prohibition lies. One alternative to that is to refuse Prohibition definitively, whatever happens: The objection should be made in the ecclesiastical court; what the ecclesiastical court says about the statute goes, subject to ecclesiastical appeal (which ultimately may mean appeal to the monarch, depending on whether the statute creating the Delegates preserved or cut off petitioning the monarch for review of that court’s decisions.) The other alternative is to debate the meaning of the statute at once, if there is anything to debate, and prohibit if the ecclesiastical claim is deemed invalid by the statute as construed. Let us now ask whether there is anything to be said for the first, or moderate, position as against both of the extreme options.

In the first place, we have in Vol. II encountered one context in which common law courts were disposed to give ecclesiastical courts “first crack” at statutes, yet willing to prohibit if a statute was in fact misconstrued or ignored: X sues Y in an ecclesiastical court, perfectly properly prima facie. Y pleads facts which, if true, should allegedly defeat X’s claim by virtue of a statute. Y seeks a Prohibition on the ground that the common law should protect him in his statutory rights and therefore should try the facts which, if found in his favor, would make those rights accrue. In other words, he seeks a Prohibition without disallowance surmise. We have seen that the courts were disinclined to prohibit in such cases. That is to say, they were especially inclined to insist on a disallowance surmise—to make plaintiff-in-Prohibition show that he had brought the statute to the ecclesiastical court’s attention and been improperly denied its benefit. There may seem to be no difficulty about applying such precedents to the situation we are now focusing on: A sues B in an ecclesiastical court. B does not want to introduce defensive facts to whose benefit he thinks a statute entitles him, but merely to maintain that A’s claim as stated is bad by statute. Why not proceed in the same way as when defensive pleas are involved—refuse Prohibition now, grant Prohibition when and if it appears that the ecclesiastical court was given a chance to dismiss the claim and improperly failed to do so?

One answer to the “Why not?” is economy. It will save a step if the common law court blocks the claim now, assuming it believes such a claim is forbidden by statute and would have to be blocked if the ecclesiastical court were to misconstrue or ignore the statute. Comity is worth only so much in diseconomy. In the case of defensive pleas, considerations of economy tilt the other way. The quickest way to dispose of the suit is to see whether the ecclesiastical court will take note of the statute and understands it correctly—as one would expect it usually to do, especially when Prohibition remains a threat—for it it does the facts can be tried where the suit is. The protection of statutory rights (which may not be in the least danger) should perhaps not be allowed to serve as pretext for what is likely to be the party’s real motive in such a case—delaying the game and getting a jury trial. Nevertheless, something can be said for the “first crack” approach in both situations. It would make sense to accept the argument above from the “universal bindingness and notoriety” of statutes up to a point, but without drawing the extreme conclusion that “foreign” courts have as absolute a title to interpret statutes as the common law courts. There is arguably a sense in which a “first crack” is simply owed to non-common law jurisdictions under the King and Parliament—a chance to show obedience to law addressed to them, and known to them as other components of English law could not be. Comity is worth something; if the common law reserves the
last word, in the event that the “foreign” court fails to apply the statute correctly, there will be reason to expect a minimum of conflict—to expect that care and advice will be taken to interpret the statute as the common law courts probably would in order to avoid Prohibition. In that way economy would not necessarily be disserved.

On the other hand, good reasons can be given for reserving the last word to the common law. It is not a bad argument to say, as I do above, that statutory requirements are as much part of the ecclesiastical law as any imperative fetched from the peculiar sources of ecclesiastical law, wherefore ecclesiastical courts should be free to interpret statutes without threat of Prohibition, just as, by the best opinion, they are free of that threat however egregiously they misapply the non-statutory part of ecclesiastical law. I think that extreme position was perfectly accessible to ecclesiastical partisans in the 17th century. But in reply one can say several things.

(a) The “notoriety” of statutes can be turned in favor of at least ultimate common law control. There is an obvious sense in which common law judges are not competent by training and experience, however carefully they inform themselves, to judge questions of ordinary ecclesiastical law, wherefore ecclesiastical appeal, and ultimately Parliament’s legislative correction, are the proper checks, rather than Prohibition. But the common law judges do know the statutes, even if they do not know or understand them better than anyone else; their competence to say what the statutes require is at least equal to others’, presumptively even in the case of statutes whose primary reference is to ecclesiastical matters.

(b) The common law judges were in reality the practiced interpreters of statutes. The vast majority of statutes affected matters only appropriate to common law adjudication; the vast number of common law cases requiring statutory interpretation, over a long time, had led to accepted canons of construction, so that “how to interpret a statute” could be regarded as a branch of common law expertise comparable to “how to construe a conveyancing deed”.

(c) The common law courts were the prescriptive interpreters of statutes by virtue of historical facts which post-Reformation defenders of ecclesiastical parity were all-too awkwardly stuck with. Before the Reformation, when the ecclesiastical courts were meaningfully “foreign”, of course the common law courts exclusively interpreted the English statutes. So long as the ecclesiastical courts served the Roman “usurper”, they could clearly not be granted the least competence to enforce statutes designed to fight back against the “usurpation”—as any statute limiting ecclesiastical jurisdiction must be taken to be when England’s one rightful Supreme Head was engaged in resistance to the Roman yoke. Now—as everyone swept up on the Anglican version, or myth, of the past must agree, common lawyer and churchman alike—the right was restored where the right should be; the adversary relationship between the realm and the Church belonged to the past; the Church courts were in a respectable position to claim equal beholdenness to the statute book and hence parity as its interpreters. But meanwhile the common law courts had rather staked out the statutes for themselves! Prohibiting ecclesiastical suits which the statutes made unlawful was old common law practice; perhaps latter-day theory should not prevail against that, even though the practice was grounded in the conditions of a happily forgotten past.

(d) For all that can be said about the equal beholdenness of ecclesiastical courts to statute law, those courts cannot be considered unbiased with respect to the kinds of
statutes they could have been given equal freedom to interpret and enforce. If A sues B and B says that A’s claim is bad by statute, the tendency of what he says is that ecclesiastical jurisdiction is narrower rather than broader. I put it that way because not every statute-based objection to an ecclesiastical claim need go to the boundaries of the jurisdiction. For example, B might confess that he owed an ecclesiastical duty of the sort A was suing to enforce but contend that C rather than A was entitled to that due. In that event, B would not be disputing the “size” of ecclesiastical jurisdiction; no greed for jurisdiction should motivate the ecclesiastical court to construe the statute for or against A’s claim. To make the same point with reference to typical ecclesiastical interests: if B confesses his duty to pay tithes but relies on a statute to argue that C rather than A is entitled to them, no putative bias in favor of tithe-receivers should vitiate the ecclesiastical court’s construction of the statute. All that can be said is that some statutes—actual or conceivable—will restrict the bounds of ecclesiastical jurisdiction or be deleterious to typical ecclesiastical interests and that with respect to those the ecclesiastical courts will not be indifferent interpreters. Perhaps the net tendency of statutes affecting rights asserted in ecclesiastical courts can be expected to be thus restrictive or deleterious, if only because some such statutes date back to the time of “usurpation” and hostility between realm and Church. Moreover, the line between restrictions on ecclesiastical jurisdiction or interests and rules merely identifying the beneficiary of ecclesiastical duties is harder to draw in practice than in theory. Ecclesiastical courts may be suspected of a tendency to require unsatisfied ecclesiastical duties, such as tithe payment, to be satisfied even if the wrong party is suing, for the good practical reason that if a duty to the Church is escaped now by way of a legalism it may be escaped forever in fact. A statute allegedly disqualifying A to sue for something admitted due to someone else might for that reason tend to receive a biased construction even in the absence of any obvious bar to indifference. In any event, the need for common law control to prevent biased interpretation in some cases may be urged as a reason why all claims invalidated by statute should be prohibited, after the ecclesiastical court has had “first crack” if not before. It is simply too burdensome to try to distinguish cases in which a bias is probable from those in which it is not.

It should be observed incidentally that there is no very good reason to dispute the common law courts’ indifference as interpreters of statutes affecting ecclesiastical claims. Here as elsewhere it is possible to be deceived by the “paradigmatic “function of Prohibitions distinguished and analyzed in Vol. III. If in fact every statute limiting ecclesiastical jurisdiction gave jurisdiction to the common law, then ecclesiastical and common law courts would be equally biased interpreters. But such is not the case. We are focusing on statutes which allegedly say that a claim of a certain sort, or a claim brought by a given claimant, is valid nowhere—merely unlawful. Common law courts have no interest in interpreting the statute so as to uphold or deny such a contention (unless a mischievous prejudice against ecclesiastical tribunals and interests, something that can exist but cannot be imputed to courts of law.) Unless motivated by such unreachable private prejudices, why should the judges care about anything but the words and intent of the statute, considering that their own jurisdiction has nothing to gain? Of course a statute might flatly take jurisdiction away from the ecclesiastical court and give it to the common law. In that event, a common law court interpreting and enforcing the statute would be acting as judge in its own cause. But that is unpreventable. The right of the
common law courts to protect their own jurisdictional monopoly—and serve the socially
desirable goal of restricting one type of remediable claim to one place, where consistent
lines of cases can develop—is indisputable. The common law courts could not avoid
deciding controverted cases as to whether a common law remedy is available and hence,
barring exceptions for concurrency, not pursuable elsewhere. They are judges in their
own cause whether or not a statute bears on the question. The only cure for that would be
to erect a special tribunal for the sole purpose of settling jurisdictional questions.
(e) Some risk of conflicting interpretations of one and the same statute would be
incurred if “foreign” courts were conceded full parity as interpreters. “Some risk” is the
proper expression, rather than “high risk” or “certainty”, because the chance that a
statute regulating ecclesiastical rights and remedies would come before a common law
court except by way of Prohibition cannot be regarded as very great. I.e.: If we imagine a
statute defining, say, the duty to pay tithes, and if we assume that common law courts
should never prohibit solely on the ground that an ecclesiastical claim is invalidated by
that statute, there is no obvious likelihood that common law courts will ever have
occasion to look at the statute, and therefore an opportunity to construe it differently than
ecclesiastical courts have come to do. But there remains a risk simply because the
relationship between the temporal and spiritual systems of law was so complex.
Collateral ways can be imagined in which a statute affecting ecclesiastical rights, and
therefore on our assumption normally left to the ecclesiastical courts, would still be thrust
upon the common law judges. Given high standards of comity—full-blooded recognition
of ecclesiastical parity in the interpretation of statutes—common law courts in that
imaginary situation might adopt the policy of following the ecclesiastical interpretation, or
at least allowing it high persuasive authority. But while that is not asking the impossible
it is asking quite a lot. To demand that judges who are expert in statutory construction sit
back and accept a reading with which they disagree is to demand that they repress a
highly respectable sense of superior competence, if not that they violate a sheer duty to
apply the supreme law of the land as they understand it. Therefore parity in interpreting
statutes would almost surely make for some degree of conflicting interpretation. Would
that not be the most scandalous kind of discord within the national legal system—acts of
“the whole body of the realm” taken to mean different things by “members” of equal
authority?
(f) The above reasons seem to me sufficient for the conclusion that the common
law courts must keep ultimate control over the applied meaning of statutes, whether or
not exercise of that control should be restrained by allowing non-common law courts
“first crack.” We may add vaguer considerations without relying on them—which is not
to say that they were not historically operative: the mere “seniority” of the common law
judiciary, hence its predominant claim to perform so obviously important a function as
interpreting the suprema lex in the statute book and protecting the subject in rights which
“the whole body of the realm” has assured to him; the sense in which the common law
judges can be thought of as “chief counsel” to the government in all branches, including
Parliament, so that to their straightforward experience in statutory construction may be
joined the special competence that comes from intimacy with the legislative process—
with the kinds of problems that tend to lead to legislation or the actual ones that have in
particular cases, with the difficulties and conventions of draftsmanship which an
interpreter should be aware of: the sense in which a statute is a “temporal” act even if it
affects “spiritual” matters, hence within the range of the judges’ supreme “temporal” punditry—an ambiguous sense to be sure, if one takes the post-Reformation fusion of temporal and spiritual altogether seriously, but one engrained in habits of thought which were necessary for many practical purposes.

The reasons I have specified against allowing “foreign” courts parity in relation to statutes are compatible with allowing them “first crack”—with holding that the peculiar bindingness and notoriety of statutes justifies a certain generosity toward those courts, a degree of concession to the sense in which statutes affecting ecclesiastical rights are part of the ecclesiastical law. But if the moderate position is excluded, as for the sake of expeditiousness it perhaps should be—if the contest is between the extreme positions—the same reasons count in favor of immediate common law preemption of statutory issues: If an ecclesiastical claim is surmised to be invalid by statute, and the legal proposition of the surmise is true, prohibit at once. In practice that was to all intents the rule. It was not unopposed by partisans of the other extreme, but there is little indication that the opposition got a serious hearing from common lawyers. The moderate position has the attraction of a compromise, but as a practical matter that was not considered either, even though it was in effect adopted in cases of defensive pleas combining a factual allegation with invocation of a statute. In the end, a common law near-monopoly of statutory construction was a legal fact, as it probably should have been or had to be. It is taken for granted in the groups of cases to which the rest of Vol. IV is devoted, groups of cases where the judicial gloss on important statutes was largely written through Prohibition law (and sometimes, when the powers of the High Commission were in question, the law of Habeas corpus.)
CHAPTER 1: 21 HEN. VIII, C. 5—ADMINISTRATION OF INTESTATES’ ESTATES

Introduction

The subject of this chapter is the enforcement of the statute of 21 Hen. VIII, c.5, by Prohibition. The reported cases on this topic which I have found scarcely begin before the 17th century; they become numerous and produce enduring judicial resolution of some issues only in the span between 1618 and the Civil War. The subject is thus a strong example of a phenomenon encountered elsewhere in this study: Elizabethan and 17th century judges required to make sense of Reformation legislation on which there was little or no earlier case law available to them.

21 Hen. VIII is 1529-30, which means that the statute in question here barely counts as “Reformation legislation.” I.e., it was made not only before England’s break with Rome was complete, but before the formal steps toward that consummation—such as the temporary interdiction of appealing ecclesiastical cases to Rome in 1533—had been taken. The gap between passage of the statute and serious efforts to interpret it is the better part of a century in time, and there is also a wide gap between the makers’ perspectives and the interpreters’. It is worth remembering too that early modern people, including lawyers and judges, were not well equipped intellectually to deal with historical distance. As their world—that of ordinary educated people—was still substantially “pre-scientific”, so was it “pre-historical” by the lights of the 19th century and after.

For some of the Introductions in this study, it suffices to explain the basic legal rules and issues that inform the cases. Sometimes, however, and emphatically so in the present instance, it is desirable to range more widely. Why the Prohibition cases on 21 Hen. VIII are difficult can only be seen in focus if one appreciates the complexity of making out the surface meaning and intent of the statute as a whole. Toward the end of the Introduction I shall explain the particular problems that predominate in the Prohibition cases, but first I shall explore the wide constructive context. That exploration, as in some other Introductions in the study, is speculative, because hard evidence directly in point is unavailable, or at any rate it could only be discovered by separate research projects too distractive from my principal purpose of “mapping” the Law of Prohibitions as it appears in reported cases.

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A statute frequently enforced by the common law courts against the ecclesiastical was the second major part of 21 Hen.VIII, c.5. This statute, like the Mortuaries Act, was one of those regulating the Church passed at the first session of the Reformation Parliament. Its first and better-known section was directed against ecclesiastical courts’ taking excessive fees for probate of wills. There was little or no occasion for common law courts to enforce that section by Prohibition. The succeeding section presented significant problems of construction and gave rise to numerous Prohibition cases.

From remedying allegedly extortionate probate fees, 21 Hen. VIII moves on to the administration of intestates’ estates. Although fee-regulation is an incidental feature here, the second section primarily lays down rules for the granting of administration. The
preamble of the act gives no explanation of the mischief behind this part of the legislation, but concentrates entirely on excessive fees and the failure of earlier attempts to prevent them. I.e., there are no clues to the policy of the intestacy section beyond what can be gathered from the enacting language and from the statute’s silence on certain matters that turned out to be doubtful.

The enacting clauses are simple. Ordinaries and other ecclesiastical judges with probate jurisdiction are directed to grant administration of intestates’ goods to the widow or next of kin or both. The statute is express in affirming the ecclesiastical judge’s discretion to choose the widow or nearest relative or both. It proceeds to insure his discretion to choose any one or more among equally close kinsmen who seek administration. Part of the act’s policy thus appears to be to cut off disputes about grants of administration: So long as the grantee is the widow, or a relative than which there is none nearer, or the widow plus one or more such relatives, or several equally close relatives, no statutory right to complain is conferred on any eligible person who happens to be excluded. Excluded eligible persons must either be quiet or seek review by ecclesiastical appeal of the judge’s exercise of discretion. It was to be problematic whether the statute left the second option open. At any rate, the statute seems to cut off all legal claims against preferred co-eligibles—all possibility of seeking more than reconsideration of what the statute clearly labels a discretionary act.

The language next following is somewhat obscure, but it appears to have the same purpose—to protect the ecclesiastical judge’s discretion against contenders for administration. I read it as providing that so long as the widow is among the administrators others do not have to be nearest relatives. I.e., the widow plus a cousin is acceptable, and an excluded brother has no title to complain, but if there is no widow, or if she is excluded, then all administrators must be in the class of nearest relatives. The statute evidently contemplates the commonplace situation where relatives apply for administration and either (a) it is uncertain whether there are, or probable that there are, closer relatives who have not applied or (b) several relatives of unequal degree apply. Within limits, the ecclesiastical judge is in effect told to go ahead and make a decision among active candidates. If there is a widow and she is included, the closest relatives cannot appear later with a right to overturn the arrangements, nor complain about having to share administration with less close relatives. Administrators of estates can proceed with minimum delay and uncertainty. Accordingly, the mischief behind the statute would appear to be a high incidence of litigation and delay owing to uncertainty about the scope of the ecclesiastical judge’s discretion. A further, perhaps less certain, one might be a tendency on judges’ part to show too little respect for the claims of closest relatives and especially of widows. (The statute lays down no criteria for determining propinquity of relationship.)

After saying to whom administration shall and may be granted, the statute proceeds to say a little about what the administrators are to do. It is provided that both administrators and executors must choose two associates for the purpose of preparing an inventory of the estate’s personal property. The associates must be creditors or legatees if such exist and consent to serve. (An estate in the hands of administrators could have legatees in the event that the deceased made a will but failed to designate executors, or in the event that designated executors refused to serve or were dead.) Otherwise, they must come from the closest classes of relatives, but if such cannot be found or induced to serve
any two “honest persons” may be chosen. The inventory made by the executors or administrators must be presented in indenture-duplicate form to the ecclesiastical court. The executors or administrators must swear that it is “good and true.” One copy (half of the indenture) is to be left on file with the ecclesiastical court, the other to be kept by the executors or administrators. Administrators are also required to enter a bond insuring “true administration.”

The statute next appoints a £10 penalty recoverable from any ecclesiastical judge, or subordinate official of such judge, who violates the rules laid down. This penalty was of the basic Qui tam form—half to the King and half to the person who sued successfully for the penalty at common law. The statute provides, however, that only the “party grieved” may in this instance be the plaintiff in such a penalty suit. i.e., there is not an open invitation to any member of the public to sue in the role of a mere “informer.” With respect to what the statute makers clearly had in mind as their paradigm case—where the ecclesiastical judge or subordinate official exacts a higher fee than the statute permits from an executor seeking probate or from an administrator for the grant of letters or administration—there is no problem about identifying the “party grieved”. With respect to other rules concerning the administration of intestates’ estates, there clearly is a problem. For the simplest type of case, suppose that Smith dies intestate leaving a widow and several people in the class of nearest blood-relatives. Suppose that all these apply for administration. (It seems clear from the statute that rights accrue only to those who want administration and take active steps to seek it. “Wanting administration “means wanting the property and claims comprising the estate or a portion thereof, for administrators, assuming they have performed their common law duty of satisfying the decedent’s creditors, are essentially in a position analogous to that of residuary legatees—the tangible property is theirs, and they are free to prosecute any claims they care to. Ecclesiastical law presumably had rules for what constituted timely application and how much time must be allowed for potential applicants to act, but I have no evidence of what they were. Nothing in the text of the statute or in my case material speaks to whether ecclesiastical courts acting too fast or employing unreasonable standards for timely application could be considered to violate the statute. )

Plainly none of our imagined applicants—widow plus several persons counting as next of kin—has a grievance arising under the statute if any one or more of the group is appointed to the exclusion of any others. The statute is simply not violated. It is manifestly violated if no one in the group is appointed, but someone else—another relative or a non-relative. May all the members of the group bring separate suits for the penalty and recover £5 each? The fact that each such suit would contribute £5 to the royal coffers might be a motive for saying “Yes.” On the other hand, there is an oddity in calling any member of the group aggrieved when none of them could be sure of appointment if one or more of them had been chosen. It would take research directly about penalty suits based on 21 Hen. VIII, which might be impossible to carry out to significant results, to ascertain what actually happened and whether either difficulty was perceived and debated (i.e., the difficulty of multiple suits for one offense, dependent on the size of the contingent category “next of kin”, and the difficulty of making out who is aggrieved in some circumstances when the offense is violation of the statute’s eligibility requirements, as opposed to charging excessive fees.) One might in the present context think of the Prohibition as a way around the difficulties, since it would take but one
Prohibition to prevent an offense and plaintiff-in-Prohibition need have no private standing as a “party grieved” (for the latter point, see Vol. I *passim*.) Bear this in mind when we reflect generally on the role of Prohibitions in enforcing 21 Hen. VIII.

Besides recovering the penalty, victims of being charged excessive fees were authorized by the statute to recover the amount of money by which they were overcharged. This provision precedes the penalty, and the penalty is represented as an additional sanction imposed on disobedient ecclesiastical officials. In the abstract, overcharged persons were compensated for their “actual damages” and given the penalty expressly on top of that. “Actual damages” being introduced into the statute, the question arises whether they were recoverable for other infractions than excessive fees. Obviously the statute could be otherwise violated. We have just looked at one form—flouting the eligibility rules by overlooking all those from among whom at least one administrator must be chosen. Other forms—in fact the ones central for Prohibition law—will be discussed below. Obviously too, people could be much more damaged by such other violations than a £5 penalty would compensate. In the simplest case of eligibility-rule violation, where decedent leaves no widow and only one next-of-kin person, say a child or sibling, that person, if by-passed, would lose the whole value of the estate, which could be very large, minus £5. It may seem unjust to let him bear that loss when the victim of a mere overcharge of fees can recover the amount he is overcharged plus £5. In any more complex case, the problem of identifying who has been wronged recurs more acutely than with respect to the penalty.

As far as the penalty is concerned, the worst that could happen is that all members of the possibly numerous class from which at least one administrator must be chosen could recover £5 (and the King £5 x the number of people from that class who seek administration.) That outcome would be the Church’s bad luck, avoidable by obeying the statute, but allowing a sizable number of people to recover the whole value of a large estate surely seems unacceptable. It is perhaps conceivable that all disappointed applicants in the widow plus next-of-kin class could be allowed to recover the value of the estate jointly, but that would have the probably objectionable effect of conferring a windfall on persons all but one of which could be lawfully excluded without any violation of the law.

In the light of these considerations, the best solution is probably that the statute does not give “actual damages” generally to victims of violation, but solely a sum-certain recovery of excessive fees charged. Those entitled to this recovery are then given the penalty in addition. But what of those who have suffered loss otherwise—at least certain loss—in consequence of violation of the statute? Common sense suggests that these victims should be entitled to the penalty even if damages are ruled out for them. The alternative would come to holding that these “parties grieved” have no secular remedy. I.e.: The statute is addressed to the ecclesiastical courts *quoad* all violations except charging fees defined by the statute as excessive. Of course such violations should not be committed, and should be corrected by ecclesiastical appeal, but no common law right is created, unless perhaps a place for Prohibition can be found.

If, however, one resists denying the penalty to those wronged otherwise than by overcharging, the language of the statute furnishes some support. The draftsmanship is poor, but the words may be readable as intended to benefit such “otherwise wronged” at least to the extent of allowing them the penalty. This effect depends on a single phrase:
Before saying that the overcharged may recover the amount of the overcharge, the statute says that all ecclesiastical officials who “do or attempt or cause to be done and attempted against the act in any thing [italics mine]” shall forfeit “so much money as any such person shall take contrary to the present act.” Then the penalty is given in addition. Arguably, perhaps, the phrase “in any thing” should be taken as an acknowledgment that the act as a whole (notably the part on intestacy) can be violated in various ways and an indication of intent that violations other than overcharging be rectified at common law, in a manner not specified but roughly analogous to the remedies provided against takers of undue fees. I have argued that the penalty is the most plausible feature to extend, though we shall see from the cases that some lawyers seem to have thought that “actual damages” were available. There are no signs of the matter’s having been deeply debated. (In favor of a liberal construction of puzzling language, one should note that charging excessive fees is practically the only offense likely to occur in probate cases. That is the offense the statute leads off with and no doubt the main one the statute was enacted to prevent. Arguably the sanctions section of the statute was written to cover that case, but without the intent of foreclosing secular recoveries for the wider range of offenses likely to arise in the secondary category of administration. Possibly a single comprehensive phrase was thrown in to catch that wider range.)

Before one can say how enforceable by secular law 21 Hen. VIII should be, it is necessary to raise broader questions than we have yet asked. So far, we have largely addressed the words of the statute and problems of tort and penal remedies in particular situations. The broader questions concern the purposes of the statute as it touches administration and the relation of those purposes to the interests of the Church. Obviously the statute intends to protect administrators, as well as executors, against excessive fees, and to that end it provides clear remedies. Plainly, however, it intends more.

Negatively, the statute intends that Church courts no longer enjoy nearly full freedom to handle intestates’ estates as they see fit, subject only to canon law and ecclesiastical appeal. (The text below explains one earlier statutory incursion into the field, so mild that it barely qualified full ecclesiastical freedom.) Affirmatively, if it does nothing else, 21 Hen. VIII mandates who at least one administrator shall be. Part of its practical intent is to insure that widows and nearest relatives get at least a share of the estate. It was probably anticipated that for most estates, usually small ones, only those persons would seek administration. The Church lost full freedom to prefer some other purpose to the interests of those parties.

On the other hand, the statute leaves ecclesiastical courts with a great deal of discretion. Its language expressly emphasizes that it does so. Let us combine the large discretionary residue with the assumption that if all members of the class widow-and-nearest-relatives, although they have applied, are excluded, the penalty is recoverable by those excluded. At this point, the ultimate intent of the statute becomes open to question. Were the statute makers really hostile to leaving out widows and next-of-kin altogether, provided applicants in that class received £5 each (and a premium was paid to the King—a sort of license fee for pursuing ecclesiastical purposes rather than serving the familial interests which the statute was to a degree designed to protect?) Does the statute in effect say to ecclesiastical courts, “You are free as you have always been to cause intestates’ estates to be devoted to pious purposes, except that now you must pay for the privilege, in
part by modestly compensating close familial applicants whom you see no reason to
enrich with a share of the estate—nor to burden with the active business of an
administrator”?

Let us now try to visualize why an ecclesiastical court might choose to disobey
the statute at the risk of having to pay the penalty. For this purpose one must posit a fairly
large personal estate, or at any rate a situation in which widows and next-of-kin would be
well provided for without a penny from the personal estate. (That means provided for in
one way or another out of the decedent’s land—a widow by dower rights or a jointure, at
least one next-of-kin by inheritance, i.e., the single male primogenitary heir or all female
nearest relatives. Remember that in 21 Hen. VIII—1529-30—freehold land was not
devisable at all, though there was opportunity to divert land from legal heirs by means of
uses—in modern terms, trusteeship arrangements.)

The ultimate rationale for ecclesiastical jurisdiction in intestacy was that the dead
man’s property should be optimally applied for the benefit of his soul, the Church being
the qualified judge of how the best application could be achieved. While providing for
one’s widow, children, and poor relations counted as a soul-benefiting work, it
approaches a sufficient one only for the modestly circumstanced. Benefactions to
ecclesiastical institutions or to the unrelated poor and indeed Masses for the decedent’s
soul in Purgatory should be imputed aspirations of a well-off intestate, as well as
objective benefits to him. (That is to say, if what the intestate would probably have
provided if he had made a will is taken as the ideal standard for how the ecclesiastical
courts should dispose of his property, there is hardly any generic conflict between
“imputable aspiration” and “objective benefit” under the cultural conditions of 1530.
Ecclesiastical courts presumably had no choice but to impute aspirations to the decedent,
as opposed to formally investigating his actual intentions. The only exception to that is
the special case of an imperfect will attached to the letters of administration. There, if 21
Hen. VIII is to be obeyed and the penalty avoided, administrators must, by express
provision of the statute, meet the eligibility requirements, but once appointed they
become in effect executors to carry out the technically “intestate’s” known wishes.)

In short, ecclesiastical courts traditionally had a duty to look beyond the interests
of widows and nearest relatives. It is not necessary to advert to ecclesiastical greed to
explain why Church courts after the statute of 21 Hen. VIII might be inclined to slight the
statute’s familial solicitude by outright disobedience of the statute and acceptance of the
penalty, or perhaps less expensively in some situations. This is not to deny the reality of
“ecclesiastical greed”—not to make it out as the mere creature of anti-clerical or anti-
Papist prejudice in many shades—but only to emphasize that the courts were supposed to
take the intestate’s soul into account and that doing so inevitably involved directing funds
to ecclesiastical agencies and concerns.

I do not think radical change from “the cultural conditions of 1530” is likely to
have affected the balancing of familial considerations and ecclesiastical interests very
much. In 1530, Catholic religious culture was still intact in England: Papal supremacy
itself was not yet legally impugned; the mere regulation by statute of ecclesiastical legal
proceedings was not unprecedented, though its conceivable scope was of course much
more limited than after the soon-forthcoming “nationalization” of the English Church.
Protestantization of the new national Church progressed by a jagged path from the 1530s
down to the Elizabethan Settlement, and in some de facto ways beyond it. Of course this
process swept away many of the modes in which the property of the dead could be bestowed for the well-being of their souls. Indeed, for those who were well-informed about Protestantism and serious, conscientious, or genuinely convinced of their commitment to it, the very idea of conferring a benefit on the deceased was utterly erroneous. Nevertheless, from the mundane perspective of ecclesiastical courts, I doubt that this momentous history made much difference.

If the Church lost the duty to look to the intestate’s soul, it did not lose an interest that might sometimes lead its courts to pay the penalty and dispose of the estate in ways it deemed better or “more Christian” than what conforming to the letter of 21 Hen. VIII would produce. This interest does not reduce to a “greedy” one in simply diverting wealth to ecclesiastical institutions. For one thing, the probable preferences of the intestate can be plausibly substituted for benefit to his soul. Would a wealthy decedent who made no will—probably owing to unanticipated death or mere carelessness—have wanted his whole estate to go to his immediate family, or at least not outside the family at large? After all, in 16th-17th century England he was presumptively a Christian, and unless a resident alien a member of the Church of England. Could it be inappropriate for the Church to concern itself with his reputation, even if the Church in its reformed state must dismiss as superstitious any way in which it could act effectively from concern with his soul? Finally, even putting aside all reference to doing what the decedent would want, need the Church conceived as the spiritual counterpart of “the whole body of the realm” deny itself power to use its intestacy jurisdiction in part to further the intrinsic ends of a Christian commonwealth? 21 Hen. VIII can be considered a benign secular intervention for insuring that the Church does not overlook its responsibility to the decedent’s family in pursuit of other ends without abandoning those ends.

So much for a defense of ecclesiastical courts’ risking the penalty and simply not observing 21 Hen. VIII. (Risking rather than incurring, since in our imagined cases of a large personal estate or a land-rich family those certainly entitled to administration by 21 Hen. VIII might of course choose not to bother with the penalty. Their motive might be acceptance of the Church’s role and accord with what they could have reason to understand as the Ordinary’s plan for a “public interest” use of the estate. As it were, they might elect to treat the ecclesiastical court as a sort of informal trustee and “charitable adviser.” Retention by the family of particular chattels with personal or sentimental value could easily be built into a “friendly settlement.”) Before ending this speculative excursus we should take note of one further range of considerations. Remember that when there was a widow biological family members not in the nearest category could by the statute be made co-administrators and hence property-recipients along with her. In effect, a needy cousin could be benefited without violating the statute. For that matter, a well-off cousin could without penalty be used as a vehicle for bringing part of the estate to Church-approved employments, if there were a cousin who could be relied on to give most of his share away for charitable or religious ends. More safely, an eligible cousin, or sibling or uncle, in place of a child, rich or poor, might be compelled to give generously for those ends by conditioning his grant of administration on his doing so. Using this technique would usually require giving the appointee a motive to accept administration with the condition by letting him keep a reasonable portion of his prospective share, and of course the maneuver must be free of legal objection—i.e., explicitly conditional grants of administration, or alternatively insisting that the grantee
enter a bond to devote such-and-such a sum or proportion to Church-endorsed purposes, must be perfectly legal. If the method of a bond is used, secular law necessarily intrudes, since the bond must be enforced by action of Debt at common law. A common law court must say whether the condition on the bond is lawful, and so the question arises whether 21 Hen. VIII makes that doubtful. The statute does not at any rate expressly provide that that administration may be offered to an applicant if he will enter such a bond and withheld if he is unwilling to. The compatibility with the statute of a straight conditional grant is open to doubt in the same way—the statute does not authorize such grants, but neither does it forbid them in terms. The difference between the bond and the conditional grant is that the former must give secular courts a shot at the legality of the ecclesiastical technique, while this can hardly be clear for the latter. A penalty suit would probably not lie if the plaintiff is a kinsman who may be appointed but not a widow or nearest relative who must be.

We are now in a position to approach the subject that properly concerns this study, the role of Prohibitions in enforcing 21 Hen. VIII. The broadest question under this rubric is whether Prohibition should ever be used for that purpose. It is generally true that one function of the writ was to prevent non-common law courts from doing what statutes provided they ought not to. This, however, does not mean that letting it perform that function was appropriate for all statutes. It is obvious that a statute could ban using Prohibitions to enforce it by express provision. There seems to be no necessary reason why a statute could not do the same by implication. Is it possible that 21 Hen. VIII should be construed as so implying?

It is a plausible generalization that no activity subjected to a penalty by statute should be stopped by Prohibition. (A penalty, not a punishment. A penalty statute empowers private parties to recover a definite sum of money at common law from the doer of an action specified in the statute, if such private person is willing to undertake the costs and risks of suing for it. Punishments can be various; prosecutions which, if successful, eventuate in a misfeasor’s punishment must be by indictment or criminal information; if punishments are monetary, the fine accrues to the King alone.) At scattered places in this study, Prohibitions are sought to stop actions subject to penalty. (For the example closest to hand, besides those involving 21 Hen. VIII itself, see Ch. 2 of this volume.) In such cases it was commonly argued that the availability of a penal action debarred Prohibition: If Parliament authorized the penal action, should it not be supposed that Parliament meant that to be the sanction for whatever wrong it had recognized or created? Must the statute makers not have considered danger of the penalty a sufficient deterrent and payment of it sufficient amends?

The generalization “No Prohibition where a penalty is provided” is almost certainly over-broad. The miscellaneous instances suggest as much (and Ch. 2 below furnishes a strong example of explicit, argued rejection of the principle for one particular statute.) There are also good intuitive grounds for doubting that it should always be applied. I do not think it is necessary to make a systematic abstract analysis here of why the “No Prohibition” maxim should not be consistently followed, if indeed it should not. Nor shall I analyze the extreme contrary of “No Prohibitions”—that all penalized judicial activity incompatible with statutory requirements should be halted by Prohibition if Prohibition is sought and it is possible or practicable to employ the writ. Between the extreme contrary and “No Prohibitions” tout court there are numerous imaginable
distinctions; general rules covering different types of situation can be proposed, defended, and criticized. Rather than distract attention from our focus on 21 Hen. VIII by commenting on the full abstract range, I shall confine the discussion to two topics. (a) I shall summarize the reflections just above as a specific argument that enforcement of the eligibility requirements for administrators laid down in 21 Hen. VIII represents a type of situation in which Prohibition should probably always be denied. (That does not, of course, mean that the proposed practice cannot be rationally rejected, or sometimes qualified even if generally accepted. Bear in mind that only the eligibility requirements are in question here—in other contexts, still to be discussed, Prohibitions to enforce the statute may be justified even if it they are not quoad eligibility.) (b) I shall deal with a few further considerations, some going to principle and some to practical objections to Prohibitions.

I have argued that there is a sort of situation in which Parliament may intend to make a change in the law, but not quite the one it seems to on the surface, and that statutory intent need not always include the ordinary expectation that the statute be obeyed or conformed with. 21 Hen. VIII, I have argued, fits the type. Certainly the statute makes it illegal as a matter of English secular law to do something that probably cannot be made out as illegal in that sense before. (The “probably” signifies the doubtful possibility that the one medieval statutory intervention in the matter of intestacy constrained the ecclesiastical courts, as opposed to merely exhorting them—see text for this detail.) Certainly too the statute affixes a sanction to ecclesiastical courts’ failing to do what they are in a sense told to—or, alternatively stated, it puts a price-tag thereon. And yet—to play a bit with one of the most bafflingly complex terms or concepts in both legal and everyday discourse—were the makers of 21 Hen. VIII probably “intent” on bringing about the state of affairs to which it seems to point—viz. a strongly family-favoring policy in the handling of intestates’ estates? I have argued that a negative answer to this question is likely to be correct—that the makers would quite probably have expected and welcomed, in the case of large personal estates, ecclesiastical courts’ ignoring the statute at the price of paying the penalty if it was insisted on.

The immediate political circumstances of the statute would seem to count in favor of this conclusion, as well as the cultural conditions prevailing at the time of enactment. 21 Hen. VIII was probably made in part to put pressure on Rome in the matter of the King’s divorce. Keeping pressure moderate can be the way to make it effective. In 1530, it would have made sense to say to Rome something like this: “If you persist in making trouble about the divorce, you can expect more regulatory interference with ecclesiastical practices, and it may grow more drastic. At present, however, we mean only to show that we are ready to interfere by taking some measures for which there is popular demand and which you yourselves must acknowledge to be reasonable reforms. On the other hand, we do not intend or believe that we shall have imposed any serious restrictions on your accustomed way of exercising your jurisdiction. It is the part of the statute concerning intestacy that might seem to threaten your defensible freedom, but close attention to the statute will show that there is nothing of substance to fear. You will
see that you have been subjected only to a requirement to give minimal respect to the interests of the intestate’s family if it is demanded, something we think you will concede to be due. We have, it is true, insured that this be done by putting a charge on flatly disregarding the statute. You need not always, however, go that far in order to settle the estate as you prefer, and if you must the charge is modest compared to what you would hope to gain for ecclesiastical, spiritual, or charitable purposes in any case where the strong measure of disobeying the statute could seem worthwhile. And what, finally, would stand in the way of passing the charge on to the estate as a whole, in effect compensating the Ordinary for any expense he is unable or unwilling to bear out of the ecclesiastical funds he has chosen to favor over familial claims? In sum, though the statute is a threat if you like—a harbinger of more legislation you will not like and a demonstration of our willingness to deal with ecclesiastical problems on our own—it is not a long-run threat to the international Church’s normal operations.”

So visualizing the immediate political exigencies, as well as noting the climate of values and religious beliefs around 1530, makes for the conclusion that using Prohibitions to prevent violation of 21 Hen. VIII’s eligibility rules for administrators would be contrary to the statute’s implied intention. The penalty alone should be relied on to deter violations of all sorts and degrees. The further possibility, compensating the actual damages incurred by persons excluded in violation of the eligibility requirements, should be rejected for the same reason as Prohibitions should be—as over-enforcement, in the case of actual damages by making violation forbiddingly expensive to the Church in the very circumstances that most justify it.

I have argued further that the large changes in the English “ecclesiastical polity” and in its religion after 1530 need not alter the reading of the statute’s original intention that makes for “no Prohibitions.” This last point, however, has complexities that have not yet been explored. It would be natural for the Church hierarchy and officialdom—for those who manned the ecclesiastical courts—to want to hang onto as much discretion in intestacy cases as possible. It is not, I have suggested, impossible to come up with a “purified” or Protestant version of the kind of public interest that could and should be served if the ecclesiastical courts were not in practice rigidly bound or bindable to an exclusive solicitude for familial interests. Of course one would not expect English people many decades beyond the Reformation to have a neutral historical perspective on what legislators in 1530 are likely to have had in mind (and all the solid information I have found touching legal debate on the construction of 21 Hen. VIII is from many decades later—see text.) A general awareness that 21 Hen. VIII limited prior discretion, together with a conviction that ecclesiastical courts’ retaining as much discretion as was plausible would be beneficial to the realm and appropriate to the national Church’s role in its governance, is enough to give churchmen and their sympathizers a legitimate anti-Prohibition case. It does not follow that all or most lay opinion, including that of common law judges, would find that position convincing.

One can reasonably argue that the “plain meaning” of 21 Hen. VIII—never mind a rather fancy construction of intent—is that all the assets and claims of intestates’ estates should go to the family, always at least including widows and next of kin. Competition between the two basic approaches to 21 Hen. VIII may be at work in the actual debates over Prohibitions founded on the statute. A proclivity to see the “plain meaning” as radically family-favoring, may have been reinforced by Protestant distaste for any
ecclesiastical power to divert family wealth to public or pious purposes. Laymen brought up in a thoroughly Protestant environment, and sometimes with personal convictions strongly adverse to practices in the least reminiscent of the “Popish times”, would be more likely to feel this distaste than Bishops and their satellite officials. In addition to a vested interest in their own powers, the latter tended toward one version or another of the *Via media* position, whereby the national Church, without impugning its Protestant core, could and should retain something of its ancient institutional scope. To assess whether the clash of points of view transcending mere law is visible in Prohibition cases springing from 21 Hen. VIII, it is necessary to look more precisely at the issues in those cases, first in the abstract terms of this Introduction and ultimately as the cases appear in the text. (It is better not to call the stringently pro-family interpretation of the statute “Puritan”, though it would of course be supported by Puritans properly so-called. Strong Protestantism could shape a disposition to read ambiguous law as compatible with “true religion” without participating in Puritan demands for changes in the Church’s structure and outward practices, much less tolerating non-conformity in the sense of disobeying clear law.)

There is in the end little reason to embrace the view that no statute made enforceable by a penalty action may also be enforced by Prohibition. One needs to look at particular instances to discern whether a good case can be made against Prohibition when a penalty is available. I have argued that such a case is reasonable and probably preferable if due emphasis is put on the statute’s original intention. Analysis of other statutes may well reach the opposite conclusion, and so may that of 21 Hen. VIII itself with respect to arguably implied provisions beyond the eligibility requirements. We shall soon reach those; most Prohibition law on the statute, or at least most of the Prohibition law on which the courts reached firm conclusions, is about those provisions. As for penalty statutes, there is no *a priori* reason to suppose that the relatively few which regulate the conduct of judicial bodies must be intended to tolerate disobedience so long as the penalty is risked or paid. It is true, as is commonly observed, that penalty actions in general put a “price-tag” on some activity, rather than subject it to a punishment so severe or so uncertain that few would risk it. This incident of a technique of law-enforcement does not mean, however, that when Parliament enacted a penalty statute it always had the same intention within the range from (a) essentially taxing an activity for royal revenue, to (b) a desire to deter the activity and reduce its frequency or its availability to the lower classes by making it more expensive, to (c) a preference for seeing the activity stamped out, even though it is not deeply culpable morally and the best hope for a reasonable rate of enforcement is to create the private stake that characterizes penalty statutes. One would generally expect statutes directed against official acts of non-common law courts to fall in the third category, in which case using Prohibitions to prevent acts of the sort meant to be “stamped out” is surely desirable if it is feasible. My argument, however, has been that there may be exceptions, and that the eligibility requirements of 21 Hen. VIII may well furnish one.

We must now consider whether preventive enforcement of those rules by Prohibition would be feasible, granting its legitimacy in principle. The best argument is probably that it could not be consistently feasible, for which reason it might be wise to avoid complicating the law with distinctions and uncertainties and simply to hold that Prohibition does not lie on surmise of violation of the eligibility rules. So concluding
need not imply that Prohibition is inappropriate for other alleged violations of the statute, which remain to be discussed.

A simple or ideal model of the Prohibition might see it as a necessarily prospective remedy. I.e., non-common law courts may be prohibited from doing something _ultra vires_ that they have not yet done. The real picture is more complicated, but let us for the moment assume the simple model. It seems clear that opportunities to enforce the eligibility requirements of 21 Hen. VIII prospectively would be relatively rare and dependent on special circumstances. Often X would have been appointed administrator before a rival aspirant, Y—or if Prohibition is assumed to lie, any member of the public, Z could complain that X, or X alone, was chosen in violation of the statute. Of course this is not a necessity: Y or Z could learn that X had applied for letters of administration but not yet received them; Y or Z could have found out that the ecclesiastical court was considering appointing X or on the point of doing so. Y would obviously have no right at this point to a penalty action, which is, conversely, retrospective—an illegality must have been committed before it can be penalized; Z would never be entitled to one, and Y might never, depending on the complexities of identifying “parties grieved” discussed above. Prohibition’s availability to people in the position of Y or Z would be advantageous to them and sensible from a public point of view. Two forms of the writ would be employable depending on circumstances: either a mere order not to appoint X or an order not to appoint him unless others, specified as individuals or by class, are also appointed. (Qualified, partial, or conditional Prohibitions are well warranted. See Vol. I, pp. 293 ff. and 361 ff.) So there is no rational objection to Prohibitions enforcing the eligibility rules unless on either or both of two bases (a) Banning violation of those rules subject to the sanctions of Attachment-on-Prohibition is more thoroughgoing enforcement than the statute intends, as argued above. (b) It is unfair and bad judicial practice—on our present assumption that Prohibitions must be prospective—to let some violations, probably a minority, be effectively prevented while many victims of violations, only contingently different from others, are left to the chances of penalty suits and a maximum recovery of £5. Is the inequity not substantial enough to recommend no Prohibitions for eligibility-rules enforcement?

The next question is whether it is correct to say that Prohibitions must be prospective, as we have been provisionally assuming. At least one situation requires a negative answer of sorts: Prohibitions were used to block execution of sentences when they were imposed in cases a common law court considered beyond ecclesiastical jurisdiction. It was firmly held that an ecclesiastical sentence was no bar to Prohibition, subject only to common law courts’ discretion to deny a writ if plaintiff-in-Prohibition’s delay in seeking one was unconscionably long and apt to cause hardship to an adverse private party. (See Vol. I, p. 115 ff.) An order not to carry out a sentence is obviously in a sense prospective: If the ecclesiastical court has gone as far as it can—excommunicated plaintiff-in-Prohibition and even had him committed via _De excommunicato capiendo_—it can still lift the excommunication; failing to do so would presumably be disobeying the Prohibition and generate Attachment proceedings (and if he was kept in prison by the secular authorities he should be liberated on _Habeas corpus_.) In another way, however, it is strained to call a Prohibition after sentence prospective. Efforts to argue that sentences _should_ bar Prohibition (loc. cit., Vol. I) rested on the stricter logicality of insisting that only the not-yet-done can be forbidden. The argument usually failed because of the
doctrine (Vol. I, passim) that the seeker of a Prohibition is an “informer for the King”, who need have no private interest in whether one is granted or not. The public interest in having proper lines of jurisdiction observed in the King’s legal system as a whole was in effect held to trump the logical objection to prohibiting the already-done. If the law was reversed and plaintiff-in-Prohibition was required to have the private interest he usually did have in practice, prospectiveness would probably have been insisted on as a logical necessity. So insisting would have reinforced the practical desirability for all civil law-enforcement that parties with a legally protectable interest act in a timely way to protect it. In the specific case of an interest in jurisdiction, it is desirable that a party not try his luck in one system of courts and only after losing—perhaps after a considerable lapse of time—complain about the jurisdiction of the court he was willing to bet on. Given the public stake in jurisdiction, however, the point above provides a way out: A Prohibition after sentence is not flatly an order not to do what has been done, because it amounts to forbidding execution of the sentenced, an “act” that cannot be done completely so long as the party is unabsolved (and unpardoned, since a secular pardon could wipe out both lay and ecclesiastical sanctions.)

A grant of administration is at least harder to make out as short of a completed act than a sentence in a contentious ecclesiastical suit. It is true that mere appointment of an administrator does not necessarily cut off all further ecclesiastical concern with the estate in question, although there is a strong argument that it does, as we shall see below. At any rate, the estate still needs to be administered—debts to the intestate collected and tangible property taken possession of by whoever is entitled to it. Prohibiting an unlawful appointment already made can be construed as forbidding the ecclesiastical court that made it from dealing further with the estate—from doing anything concerning the estate that it could do if the appointment were lawful. Where would this leave things?

By force of the Prohibition, we are assuming, the original ecclesiastical court is cut off from touching the estate of Intestate Smith in any way. So to speak, it has had its chance and forfeited it by making an appointment not authorized by 21 Hen. VIII. (Whether it could deal further with the estate, and in what ways, if it had made an appointment compatible with the statute is a separate question, irrelevant for the present argument.) The Prohibition is not, however, addressed in terms to ecclesiastical courts superior to the original grantor of administration. Arguably, therefore, the lower court’s grant may be appealed within the ecclesiastical system. There may be problems about such an appeal in ecclesiastical law. (Who has standing to bring the appeal? Need—or may—an appeal of a grant of administration be brought by a private party? If not, may a superior court—presumably the court immediately superior—on its own motion take over for review a matter decided below? In the latter event, a private party who in fact prompted the superior court’s action would count as an informer, as in ex officio suits, rather than a proper appellant.) These questions, however, belong to ecclesiastical law. Common law courts must assume that an appeal brought is lawfully brought as a matter of procedural form. The important points here are: (a) There is no violation of the existing Prohibition in the superior court’s considering the choice of Smith’s administrator. (b) So long as the superior court has not yet decided the appeal, there is no objection on straightforward grounds of prospectiveness to a common law court’s entertaining an application for a new Prohibition addressed to the superior court.
Although in the abstract a Prohibition appropriately sought must be either granted or denied, in reality the common law court would have no choice but to deny a writ. It has already decided that the lower court’s grant was unlawful. Now its only sensible option is to let the higher ecclesiastical court go ahead, reverse the grant below and make a new and lawful one, as if it were the original tribunal. Although, again in the abstract, an appellate case must issue in either affirmation or reversal, again in reality the appellate court would be foolhardy not to reverse. If it affirmed, it would only bring upon itself the fate already suffered by the original court: a new Prohibition, dubiously prospective but by our hypothesis sufficiently so, forbidding the higher court from dealing further with Smith’s estate. Another appeal must be brought if one is available; otherwise, the end of the road has been reached; hope of obtaining a lawful administrator by the obligatory standards of 21 Hen. VIII by means of an appellate court’s seeing the light and obeying the statute must now be abandoned.

A complication for the above line of reasoning might seem to arise if the ecclesiastical court of first instance were prohibited by the Common Pleas and then a Prohibition addressed to an appellate court were sought in the King’s Bench, or vice versa. What guarantees that the two common law courts will agree on the meaning of 21 Hen. VIII and the fit of the instant case with the statutory rules? The question is nugatory, however. Although there are aspects of the statute on which common law courts could differ, the basic eligibility requirements are unmistakably clear. I.e., if a widow or one member of the next-of-kin class has applied, a grant that does not include one of those is plainly unlawful and subject to penalty suit. Prohibitability—tout court or after a grant has been made—is another matter, without bearing on the present argument. It is perfectly possible that the Common Pleas might issue a Prohibition after administration had been granted, whereas the King’s Bench believed, say, that the eligibility rules should not be enforced by Prohibition at all. But if the latter were asked to prohibit an appeal, its refusal to do so on that ground comes out in the same place as refusal because the best way to get on with administration in the hands of a lawful administrator may be to rely on ecclesiastical appeal to rectify a mistake below. Another point worth noting is that conditional Prohibitions would be an instrument of simplification if prohibiting an appellate court is called for. I.e., a common law court prohibits an appointment after it has been made; an appeal is brought; Prohibition is sought, ostensibly to stop the appellate proceedings; instead of refusing a writ, the common law court issues one unless the appellate court reverses the grant below.

In sum, the ecclesiastical appellate system may provide an escape-hatch if Prohibitions to the granting tribunal after grant of administration are simply ruled out as illogical, or if they are saved as a way of assuring that the original tribunal abstains from any further measures concerning the estate. The hatch is open, however, only if Prohibition addressed to the lower court does leave higher courts unaffected, and therefore free to overturn an unlawful grant and re-start administration with a lawful administrator. That proposition is seriously dubitable. Suffice it here only to say that the normal force of a Prohibition was to stop all ecclesiastical meddling in a matter held beyond ecclesiastical jurisdiction. Mere grant of a Prohibition at the original level did not by itself kill an ecclesiastical suit, but the only way to keep it alive was to sue in Attachment and force formal pleading. If the Prohibition was upheld by that process, the misbrought ecclesiastical claim was dead, subject only to a common law Writ of Error.
No opportunity for ecclesiastical appeal remained. Why should one anomalously survive in the case of administration?

If Prohibition has been granted at the original level after letters of administration have been unlawfully issued, and there is no way to use the ecclesiastical appellate system, and the effect of the Prohibition is to forbid any further measures by the original court (so that it cannot rectify its own mistake), we have indeed reached the end of the road. That outcome is not disastrous, but awkward. It must mean that the situation now “lies at common law.” Since the wrongfully appointed administrator cannot be removed, he must either be tolerated or resisted. If, say, Smith’s widow has been excluded and wants to resist, I suppose she can take possession of as much tangible property as possible, forcing the wrongful administrator, Jones, to sue her for it, in which suit he should fail if the jury does its duty. If Jones has got possession of some of the late Smith’s property, the widow has an apparent right to sue him for it and should succeed. Complications begin if, say, in addition to his widow Smith left six siblings, being his nearest blood-relatives, any one of whom could lawfully have been made administrator, with or without the widow. Is any member of this group of seven entitled to recover property in Jones’s possession and to hold onto whatever he or she has managed to make off with? Will the vicinage see it that way even if the law does? Further complications come when Jones is sued by a creditor of the estate or undertakes to sue a debtor.

There is no need to spell out arguable solutions to those questions. My point is made. The reader deserves an apology for being led through so many complexities and hypothetical situations, few of which appear openly in the actual cases treated in this chapter. I believe the excursus is necessary, however, to bring out a negative conclusion about 21 Hen. VIII and to clear the ground for what the cases in the text mainly put in question. The negative conclusion is that it would be for the best to hold that Prohibition simply does not lie to enforce the statute’s eligibility requirements for administrators. So to hold is to avoid the quagmire of issues I have suggested. This conclusion agrees with the probable intent of the statute—to make the penalty the remedy for violation of the eligibility rules because violation was meant to be indulged at a price. It also accords with the presumption—a rebuttable presumption rather than a firm rule—that no activity subjected to penalty by statute should be prohibited, My so concluding of course does not mean that the 17th century judges concurred. See the text for the degree to which the legitimacy of eligibility-requirement Prohibitions remained an open question variously answered.

If, in any event, one does conclude for “No Prohibitions” quoad eligibility, what most of the cases and the clearest judicial resolutions are about stands out sharply: They are about what, if anything, ecclesiastical courts may do in intestacy cases after they have granted administration (or conjointly with granting it), whether such grant is lawful by the statute or unlawful (and so subject to penalty.)

Before defining in detail the issues in the main line of 21 Hen. VIII cases, we need to add a few more arguments against eligibility-requirement Prohibitions. Let us now insist on the prospectiveness of Prohibitions and drop the attempt to make out a sort of “constructive prospectiveness” to justify “prohibiting” something that to ordinary appearances has already been done. (This entails saying that a grant of administration is not like a sentence in a contentious suit, which pretty indisputably does not as a rule bar Prohibition—rather, the post-sentence Prohibition is disobeyed if the sentence is executed
or a process of execution continues. Although making a distinction is not inevitable, there is at least an intuitive difference between, on the one hand, taking up an *ultra vires* suit and carrying it through to sentence and, on the other hand, performing an *intra vires* function, albeit mistakenly by a statutory standard. In the latter case, precise statutory intent is unavoidably open to examination. As I have argued, it is at least possible for legislators to intend that enacted standards not be strictly observed, and providing a penalty can be legitimately taken as a basis for inferring such an intention.

With the stipulation that Prohibitions must be straightforwardly prospective, there is no obvious harm in prohibiting a grant of administration that has not been made by the first-instance ecclesiastical court. There is, however, harm in *de facto* whimsicality. I.e., if only an occasional misgrant by the statute’s standards can be prevented—when an interested party is in a position to expect that the ecclesiastical court will ignore those standards—it is hardly fair that other interested or entitled parties should be stuck with a misgrant, which is to say, denied specific relief and thrown back on the penalty. If one is persuaded by the view, which I have been at some pains to inculcate *arguendo*, that the standards of 21 Hen. VIII are not meant to be rigidly observed, the harm of letting some fortunate parties enforce the standards specifically is obvious enough. Again, the best rule would be that Prohibitions sought on the basis of the eligibility requirements should be automatically denied.

Prohibiting an ecclesiastical appeal if the first-instance grant of administration conforms to the statute, and considering Prohibition but denying it in the hope that a misgrant by the letter of the statute may be reversed, are not measures obviously incompatible with straightforward prospectiveness. They do, however, raise issues about the nature of ecclesiastical appeals which a flat “No Prohibitions” rule would avoid. The standard view that appeal suspends an ecclesiastical sentence neatly supports the predominant view that suits are prohibitable after sentence. But is a grant of administration suspended, assuming ecclesiastical law permits it to be appealed? It is hard to believe that common law courts could allow grants unexceptionable by 21 Hen. VIII to be appealed, with the effect of holding up settlement of the estate until appeals are exhausted. If appeal should be prohibited in that case, must it not also be when the first-instance grant is unlawful by the statute? It would surely be strange to hold that the acts of ecclesiastical courts are sometimes suspended and sometimes not. “No Prohibitions to enforce the eligibility requirements” is the way to avoid mazes and anomalies. (Simply prohibiting appeals of grants by the first-instance court, whether such grant is authorized by 21 Hen. VIII or unauthorized, does not, of course, amount to enforcing the eligibility rules by Prohibition, for depending on contingency it can just as well “enforce” a violation of the statute. Such a Prohibition comes to saying that in one way ecclesiastical courts are excluded from acting in intestacy matters once a grant is made—viz they may not entertain appeals aimed at reversing a grant; we shall soon be looking at other forms of post-grant ecclesiastical activity.)

In connection with ecclesiastical appeals, it is worth noting that at the time of 21 Hen. VIII remodeling the Church’s appellate system in England had not even begun. 17th century judges, with whom we shall mostly have to do in the cases, had the fully remodeled system to work with and to take for granted. In considering whether appointments of administrators could be appealed, they would know that appeals from the normally diocesan first-instance court went to the archdiocesan level and finally to
the Delegates. (Appeal from the Delegates, if permissible at all, was not automatic, but achievable only “of grace” by petitioning the monarch to create a special review commission.) In 1530 Rome was still the last resort. In some significant fraction of cases, the archdiocese provided the court of first instance, because it had jurisdiction by “prerogative” if an intestate’s goods (analogously to those of a testator) were located in several dioceses. In those cases, resort to Rome was the only appellate option before appeals to Rome were banned by statute and the Delegates created to handle appeals from the archdiocese. A flat rule against issuing Prohibitions on surmise that an ecclesiastical court might violate or had violated 21 Hen. VIII’s eligibility requirements would have the further advantage of avoiding hopeless tangles with Rome. (The papal court could not be effectively prohibited by an English writ. A private appellant in England could presumably be prohibited from taking an appeal to Rome on the ground that an archdiocesan court had misapplied 21 Hen. VIII, but such a Prohibition would be highly anomalous. It would expose to Attachment and punishment a person not so much as liable to the statutory penalty, besides being incompatible with the normal rule that both a prohibited party and the ecclesiastical judge are liable to Attachment for disobeying a Prohibition, the former if he does not drop his suit and the latter if he persists in pursuing the suit without the party’s cooperation.)

I do not, as I have said above, claim that common law judges decades later than the statute would give historical attention to circumstances and beliefs at the time of its passage, although I hesitate to assert that they would have felt no puzzling gap between how the makers might have wanted the statute to be read and what they themselves might consider the simplest and most useful way of taking it on its face. The purpose of this abstract analysis is in any event to bring out problems and possibilities that may not always have been noticed by the historical actors we shall be looking at.

The last objection against using Prohibitions to see that ecclesiastical courts apply the statute’s eligibility requirements is the simplest: after all else has been said, there remains a strong argument from the nature of statute-enforcing Prohibitions. Let us concede that anything a statute directly forbids ecclesiastical courts to do may be prohibited by the writ. 21 Hen. VIII does not, however, by its terms forbid anything. It specifies standards for appointing administrators, or authorizes ecclesiastical courts to appoint specified persons. It does not say “Thou shalt not” appoint anyone who fails to meet those standards or specifications. Of course it implies “Thou shalt not” and imposes a penalty on judges who do otherwise than the statute authorizes them to. It is nevertheless good statutory construction to take it that when the legislature ventures into inter-jurisdictional territory it will say clearly whether it intends its enactment to be specifically enforced by the well-known writ of Prohibition. Parliament could, after all, have good reasons not so to wish. By this argument, the best way to indicate that Prohibitions may be used is to forbid in express language, which implies that express authorization of Prohibitions is not necessary. One may question whether it makes sense to let a difference of judicial policy hang on the mere contrast between language that unmistakably says “Don’t!” or only implies it. When, however, a statute says nothing about Prohibitions and expressly provides another remedy, there is better reason to presume that Parliament intended to exclude Prohibitions, though the presumption might be overcome if the statute forbade in unmistakable language.
The general maxim “No statute-based Prohibitions unless the statute’s language is expressly prohibitory” is probably hard to confirm from other contexts than that of 21 Hen. VIII. It can, however, be recommended as a formalistic surrogate for deeper arguments. Invoking it obviates the need to worry about whether the original intent of 21 Hen. VIII was that the eligibility rules it prescribes be universally observed, and whether that intent should be upheld under post-Reformation conditions. The maxim is also a way around problems about the sense in which Prohibitions must be prospective and about Prohibitions directed to ecclesiastical appellate courts.

We have now arrived at our principal question, in the sense of the one behind most of the reported cases in the text below. The question in general form is whether 21 Hen. VIII has any operation beyond specifying who must or may be appointed administrator (plus a few procedural requirements, such as that administrators must put in an inventory and a bond.) Assuming A has been granted administration of B’s estate, may the ecclesiastical courts subsequently, or in conjunction with making the appointment, demand anything of A except taking the procedural steps?

The question thus generally stated can be answered with equal generality. Answering it “No” gives the statute a sharp and radical meaning: It confines ecclesiastical courts to appointing administrators. Once an appointment is made, the ecclesiastical system has done the sole job it is now authorized to do; its authority is exhausted. The eligibility rules should of course be observed, but if they are not the ecclesiastical court of first instance has no power to correct its mistake in the form of revoking its grant and making a new one. It may not be quite so clear that there is no way in which appellate ecclesiastical courts could intervene to save the day, but the starkest logic probably says there is none—appointment closes out the ecclesiastical system, not only the court of first instance. Then an unlawful appointment either opens the way to penalty suits, and possibly common law suits for damages—subject to the problems that attend those remedies—or else the appointment counts as a nullity. I.e., so long as an apparent appointment does not conform with the statute it is not an appointment; the original court is free to make another one that does count without violating our stipulation that there be no judicial acts other than appointment; there is no obvious objection to superior ecclesiastical courts’ intervening, as there would presumably be none if the proper first-instance court simply sat on its hands, failing for too long to make an applied-for grant or to take the initiative if there were no applicants.

If one says “Yes” to the general question, what one means can only be examined by looking at the specific post-grant or cum-grant judicial acts that came in question. No logical exception can be taken to saying that some such acts violate the statute while others do not. The text of the statute furnishes no direct assistance. It does not say in general terms that appointing administrators shall henceforth be all ecclesiastical courts may do in intestacy cases. Nor does it speak of particular acts, other than appointment, which henceforth either was or was not to be permitted to ecclesiastical courts. Whatever the statute means in this connection it means by implication. From Parliament’s silence, one can on the general plane draw opposite conclusions: Either (a) it implies that there is no intent to limit any acts formerly permissible for ecclesiastical courts except making appointments not conforming with the eligibility requirements the statute states; or (b) imposing the eligibility rules implies that acts tending to subvert the policy behind those rules must be avoided.
We may turn now to specific controverted questions to which the statute does not speak in terms, but as to which it may have implications. There are three: (1) May a grant of administration be revoked by the ecclesiastical court that made it or a superior court? (2) May ecclesiastical courts require that intestates’ estates be distributed in a certain way (as opposed to simply becoming the property of the administrator or administrators after debts are paid)? (3) May ecclesiastical courts require administrators to account for their handling of the administration?

Various general ideas can be brought to bear on ecclesiastical powers arguably affected by the implications of 21 Hen. VIII. I.e., there are contrary plausible comprehensive answers to the question whether the statute should be taken as abolishing any or all of those powers. With respect to Prohibition cases, there is a further broad question to which different broad answers can be plausibly given: To the extent that the statute is held to limit any ecclesiastical powers by implication, may common law courts use the Prohibition to prevent those powers from being exercised? There are defensible reasons for saying “No.” If that is the right answer, then either the statutory penalty is recoverable or the statute intends that there be no secular remedy for one type of “violation.” Ecclesiastical courts would be free to take the statute as limiting their discretion in more ways than the eligibility rules do, but they would not be compellable.

If, on the other hand, there is no objection in general principle to enforcing implied provisions by Prohibition, it does not follow that the writ should always be granted when an ecclesiastical court is asked to revoke letters of administration, order a distribution, or call an administrator to account. At this point, whether to prohibit or not becomes an essentially practical question: Does preventing exercise of a power in a particular case or situation fulfill the policy of the statute in one way without inadvertently keeping it from being efficiently fulfilled in another way? Generic answers to that question are possible: E.g., distribution orders should always be prohibited, as simply incompatible with the central purpose of the statute, but revocation suits should not be, since they can sometimes be useful means of correcting mistakes in the application of the statute and getting it observed. More specific answers are also possible: E.g., nearly all distributions and revocations should be prohibited, but there is narrow room for exceptions; these may be either ad hoc, in special situations that cannot be described exactly before they occur, or they may be in some recurrent and easily recognized situation for which a simple and uniform legal rule can be stated.

I propose in this discussion to focus on the hard practical problem “When should revocations, distributions, and accountings be prohibited?” rather than belabor the more general questions head-on—the questions “Should Prohibitions be used at all?” and “Is there anything counting as violation of the statute to consider prohibiting?” This emphasis will best introduce what visibly goes on in the cases. The judges could hardly help thinking first about the possible consequences of prohibiting when a Prohibition was sought, though attitudes on the larger questions might affect how they saw the practical one.

(1) Revocation.

There are several plausible practical arguments for several positions on prohibiting revocation suits brought in ecclesiastical courts.
(a) Such suits should always be prohibited. 21 Hen. VIII should be taken to mean by implication that revocation of letters of administration is flatly forbidden; ecclesiastical courts’ pre-statutory power to revoke is abolished.

The practical strength of this position is that it encourages active administration of the estate starting as soon as an administrator is appointed. Debts can be paid and collected, and the administrator can take such steps as are necessary to gain possession of the decedent’s chattel property. Co-administrators can take steps to work out a division of the property. The administrator has no reason to delay for fear that, having taken active steps, he may be removed, compelled to accept new colleagues, or at least to engage in litigation in the form of opposing revocation in an ecclesiastical court. The administrator may have to take the trouble of getting a Prohibition, if a disappointed aspirant brings an ecclesiastical suit, but once “Absolutely no revocations” is known to be the law there would be little point in his doing so. Ecclesiastical courts themselves, knowing that they will be prohibited if they entertain a revocation suit brought by an obdurate would-be administrator, might—in modern language—stop such a suit from being “filed”, sed quaere whether their procedural resources provided a means for so doing (ridding themselves of a suit without hearing before it ripens into a prohibitable object.)

To embrace the strict “No revocations” position, a judge would need to be convinced that prompt carrying-out of administration—satisfied creditors and property in the hands of those entitled as soon as possible—is central among the purposes of 21 Hen. VIII, sufficiently so to take priority over other ends. Such a construction is not implausible, but it presents problems as construction. In a practical perspective, however, it may be the most useful objective to put at the core of the statute’s policy.

The troubling entailment of “No revocations” is that unlawful appointees by the eligibility rules could become unremovable administrators. That need not be a disaster. If an unlawful appointee accepts administration, he is responsible for paying the creditors and subject to common law suit for the money owed (and in case of co-administrators they all are.) The ecclesiastical court is deterred from violating the eligibility rules by the remedy which the statute actually provides, penalty suit. Liability to such suit is probably enough to limit open-eyed unlawful appointments to very few. It gives the ecclesiastical court a motive to avoid inadvertent ones by allowing reasonable time for application and carefully scrutinizing the facts on which competing applicants depend. As argued above, however, there may sometimes be social utility in intentionally unlawful appointments at the price of the penalty. Apart from the social utility of religious or charitable works overseen by the Church, to which some people may subscribe and others not, it can sometimes make sense to appoint an ineligible administrator for his competence to do the work of administration, (Say a friend of the family in lieu of the decedent’s elderly widow and decrepit brother—a friend who can both do the job and be depended on to see that the residue of the estate gets to the widow and brother, taking for himself only enough to cover his expenses.) Here the interest of creditors and the end of prompt settlement, which the “No revocations” rule makes central, are directly served.

The practical advantages of the strict rule are, however, offset by two considerations. First, giving priority to promptitude and debt-payment is liberal construction of 21 Hen. VIII, since the statute’s language focuses entirely on the eligibility rules, as if its only concern were with proper appointment and its consequence of assuring that the estate’s residue go—sometimes wholly and at least in part—to
widows and/or next of kin. Secondly, “No revocations” is an ambiguous way to prompt settlement. While it encourages appointees to get down to business by removing grounds for fearing complications, it also encourages conscientious ecclesiastical courts to move slowly in making the initial appointment. Such a court should want to obey the statute because it is the law, would usually want to obey it to avoid the penalty, and is not only within its rights to want an optimal appointment but commendable for so wanting. (An optimal appointment would be lawful by the statute; would serve the secular purpose of producing a competent and dependable administrator, who would “do the job” promptly and thoroughly; and that also may yield an administrator solicitous for other concerns of the Church.) How does the risk of slow initial proceedings in the ecclesiastical court compare with that of administrators slow to act lest their authority be revoked?

It seems a necessary corollary of a stringent rule against revocation that if explicit ecclesiastical suits seeking it should be automatically prohibited so should appeals of grants of administration. Reversing a grant—whether the appellate court itself makes a new grant or remands to the lower court with orders to start over—is as good as revocation.

(b) A second possible rule is that revocation suits should always be prohibited with one exception: Prohibition should be denied if it is sought on the ground that the grant is unlawful by the eligibility rules; ecclesiastical courts should be allowed to correct clearly mistaken grants.

This option is intuitively attractive: If an ecclesiastical court has misapplied the eligibility rules, sees that it has, and is ready to correct itself by revoking the original grant and replacing it with a lawful one, the most apparent end of 21 Hen. VIII is fulfilled. If a party entitled to be administrator is willing to forgo the penalty and sues for revocation instead, is seems harsh to prohibit his suit, as well as waste motion in an uncomplicated situation. Complicated ones raise problems, but a high incidence of simple cases is perhaps predictable—cases in which an unlawful appointee, knowing the law, would find it pointless to contest an eligible person’s motion for Prohibition. (If as a result of the revocation suit the widow was appointed, the original appointee might have a good chance of being made a co-administrator by the ecclesiastical court.)

It is probably not a major objection to permitting revocation of unlawful grants alone that whether a grant is unlawful may pose problems of law, with the result that time and effort would need to be consumed unraveling those problems, thus delaying active administration. By and large, it would be difficult to claim on legal grounds that a permissible grant was impermissible, since the basic eligibility rules are straightforward. There are some exceptions, however. There is no indication in the statute how some sorts of person fit the eligibility rules. (Half-blood relatives, bastard children, in-laws, married women, the husband of a decedent wife with chattel property of her own, aliens, felons, outlaws, excommunicates.) Let us suppose that administration has been granted to A, half-brother of the decedent; B, his full uncle, sues in the ecclesiastical court to have the grant revoked; A seeks a Prohibition to prevent B’s revocation suit from being entertained. The common law court can grant Prohibition because it thinks a half-brother outranks a full uncle in eligibility or deny Prohibition if it thinks the opposite. Some time must of course be devoted to argument and deliberation about this legal question. There is, however, an attractive generic ground for denying Prohibition, whereby the common law court would be relieved of deciding how to deal with anomalous cases one by one.
One can reasonably hold that by saying nothing about half-blood relatives and other such cases 21 Hen. VIII indicates an intent to leave them to ecclesiastical law. The statute is violated (and the penalty incurred) if an obviously or admittedly remoter kinsman is preferred over a closer one, but in ambiguous cases what counts as propinquity or what effect a disability such as bastardy or alienage has on a candidate’s eligibility remains the ecclesiastical question it was before the statute. Of course that theory is disputable. It still makes practical sense as a legal economy to let the revocation suit go forward. A judge with or without an inclination of his own on such matters as whether a half-brother should outrank a full-blood uncle might prefer not to have to debate the question here and now. Why not wait and see how the revocation suit turns out? Some time would be consumed deliberating these matters, but (in addition to such cases’ being relatively rare) whichever of these analyses the judges adopt, or if a majority cannot agree between them, or Prohibition is denied on grounds specific to the case at hand—the outcome is the same as would obtain if Prohibition were sought to cut off a suit aimed at revoking a manifestly lawful grant. Similarly, a judge opposed to all enforcement of 21 Hen. VIII by Prohibition, or convinced that revocation is simply not ruled out by implication of the statute, could do no more than deny one—again the same result. If, on the other hand, judicial deliberation results in a majority opinion that a half-blood relative does not count as if he were full-blood, the court must grant Prohibition as it would if administration had been granted to a manifestly ineligible person.

Prohibiting only those suits aimed at revoking unlawful grants carries some risk that denying Prohibitions when revocation is sought on other grounds will lead to ecclesiastical courts’ revoking an original lawful grant and making a new unlawful one, but the threat of penalty should prevent that outside the rare case of a deliberately unlawful grant made at the risk of penalty in order to serve an ecclesiastical purpose. The principal pitfall in a policy of allowing ecclesiastical suits to revoke only unlawful grants is that the claim of their unlawfulness may involve uncertain facts. For this, see below.

(c) A third approach would be for common law courts to allow themselves some discretion as to whether to prohibit revocation suits, as opposed both to prohibiting them without exception and to prohibiting them unless the object of the suit is to revoke an unlawful grant. The courts might limit their discretion so that they would usually prohibit efforts to have lawful grants revoked, while acknowledging that in some situations revocation would be advantageous. Suits to revoke unlawful grants would sometimes be prohibited and sometimes not, depending mainly on which course seemed likelier to produce expeditious settlement.

This course seems to me better when it is described in outline than when it is imagined in operation. Restrained discretion is easy to embrace offhand, but it is hard to specify the situations in which departure from general practice is actually useful. Rules such as “Always prohibit revocation suits” or “Always prohibit suits seeking to revoke lawful grants, never ones aimed at having unlawful grants revoked” would save the common law court elaborate particularized debate on what is just or expedient or most consonant with the will of Parliament as expressed in an out-of-date statute. The simple rules also tend to avoid entangling common law courts in clearing up factual uncertainty.

Assuming a flat “No revocations” rule is rejected, what virtue is there in leaving room for discretionary exceptions from the complementary rules “Always
prohibit ecclesiastical suits aimed at revoking lawful grants” and “Never prohibit suits to revoke unlawful grants”? The essential answer quoad lawful grants is that sometimes the original appointee may seem to the common law court asked to prohibit to be a person unlikely to administer the estate competently. If the ecclesiastical court is allowed to revoke, it will probably on reconsideration make a better choice from the point of view of all interested parties, including even the original appointee. To make such situations visualizable, I give an imaginary case below. It will illustrate both the advantages of letting the proposed revocation go forward and the problems that course raises.

Quoad unlawful original grants, the same considerations largely apply. The only reason for making an exception from usual practice would be that the unlawful appointee seems, despite his ineligibility, more likely to administer competently than any apparently available lawful choices. The problems of trying to make an exception are the same as those generated by trying to permit exceptional revocation of a lawful grant.

The imaginary case: Suppose that decedent’s widow, A, has been appointed. B claims to be a large creditor of the estate; he wants to be made administrator and brings a suit to have A’s grant revoked. A seeks a Prohibition to stop B’s revocation suit. B is received as defendant-in-Prohibition to oppose issuance of a writ, as he must be if revocation suits aiming to undo lawful grants are not to be prohibited ipso facto. B’s contention is that A is an elderly and feeble person who cannot be relied on to collect debts owed to the decedent. As a result, per B, he is himself unlikely to be paid in full, and to be paid in part he would have to sue A for her last mite. By B’s theory, justice to himself, the widow’s own interest, and indeed charity would be served if A were replaced as administrator by him, and so he has said in the libel by which he has commenced his ecclesiastical suit. Suppose he has said further that if he is named administrator he will take no exception to an order that he allow the widow for the rest of her life what the ecclesiastical court deems enough to maintain her—specifying her house if it is held by lease (i.e., does not pass to decedent’s common law heir), together with its furnishings and the widow’s personal effects, plus a cash annuity to meet her living expenses.

B’s plan is reasonable on its face. It does, however, involve the assertion of many facts that may be questionable. Just what is the size of B’s claim on the estate in relation to the estate’s value? How large and how probably realizable are the estate’s claims against its debtors? Is the widow, perhaps with assistance she can be expected to get, really incompetent to administer the estate? B’s answers to questions of this sort may be true, but the other side is entitled to dispute them, and some court must verify them before they can be acted on. A common law court that does not consider itself bound to prohibit attempts to have lawful grants revoked can of course, if it thinks B’s scheme convincing prima facie, deny Prohibition and let the ecclesiastical court decide the truth of factual assertions which A, as defendant in the revocation suit, chooses to challenge (on top of judging the merits of B’s plan even if factual doubts are presumed to be or found in his favor.) Once the revocation suit is permitted to go forward, the ecclesiastical court is obliged to decide it correctly. The Church court need not agree with the common law court acting on the motion for Prohibition that A’s removal would be wise, or in accord with accepted ecclesiastical rules and practices, or even consonant with 21 Hen. VIII. Ecclesiastical courts are in many ways the best place for A v. B to be worked out, not least because their fact-finding procedures were well suited to unscrambling a possibly complex set of factual differences. Unfortunately, however,
giving the ecclesiastical system its head is apt to delay for a long time getting an administrator appointed and active administration started. The generous appeals allowed by ecclesiastical law are likely to draw out litigation, and even a conscientious effort at the initial stage to discover all the relevant facts (and avoid reversal on appeal, which by ecclesiastical law could take place on review of factual as well as legal findings) may be prolix.

A court wary of opening the way to dilatory ecclesiastical proceedings could possibly use common law means to ascertain facts it needed to know in order to decide whether to make a discretionary exception from its general practice. Employing these means would delay settlement compared to always prohibiting revocation of lawful grants, but probably less than allowing ecclesiastical courts to decide whether revocation was justified. Common law courts would also avoid the dubious step of exposing lawful grants to revocation on the basis of a mere \textit{prima facie} sense that revocation might make sense in the circumstances of a particular case. The common law path to a solider basis would be as follows:

Prohibitions were sometimes granted by courts not completely confident that they should be (or, on some occasions, courts not really in doubt but faced with defendants-in-Prohibition vehemently insistent that prohibiting them was unjust, whom only the fullest possible hearing would appease.) Plaintiff-in-Prohibition was given his writ on condition that he sue Attachment, pursuant to which plaintiff-in-Prohibition would plead his case formally and defendant-in-Prohibition formally reply. The Attachment suit would end in a judgment that Prohibition should or should not have been granted, conclusive except for liability to a common law Writ of Error. This course was usually taken when the court was confronted by a difficult legal problem which the judges thought should be resolved on formal pleadings. Employing it to get a definitive finding of facts in order for a court to have a sufficient basis for deciding whether to exercise an inherently discretionary power would certainly be unusual. I do not know whether any court would consider it good form in that situation. There does not, however, seem to be any necessary reason to rule it out. Pleadings in Attachment could make factual assertions subject to being traversed and so raising an issue triable by jury. A factual issue and jury trial were commonplace in some routine situations, most familiarly when defendant in a tithe suit sought a Prohibition because he claimed that the in-kind tithe was commuted by custom to a money payment. A verdict that the alleged commutation was or was not customary settled the case. This simple model cannot be applied directly to our A v. B, but it shows that factual determinations can be made in Attachment. One is at least entitled to ask why a verdict (I should think almost necessarily a special verdict ordered by the trial judge) could not be the means to obtain factual determinations in A v. B. The verdict would not settle the case, but only give the common law court a better basis than an impression for deciding whether to take the exceptional discretionary step of not prohibiting an attempt to revoke a lawful grant of administration. So there is possibly a common law way, but are such elaborate and anomalous proceedings really worth undertaking for the sake of undoing one unfortunate appointment?

(d) The final option is to hold that ecclesiastical courts’ power to consider revoking their grants and perhaps to revoke them is left intact by 21 Hen. VIII: suits to revoke should never be prohibited. There is little to be said for this from a practical point
of view. A judge might think that barring revocation altogether would probably not stand up even if it would perhaps be the best rule. Making exceptions would sometimes be hard to resist, at least when an unlawful administrator with no apparent practical advantages over lawful ones desiring administration, or when there were strong reasons of equity and efficiency for replacing one lawful appointee with others equally lawful. Working out a consistent law on permissible exceptions would be difficult, however, and making them ad hoc could lead to complex problems while delaying active administration. Better, therefore, simply to permit revocation suits and trust the ecclesiastical courts to handle them sensibly.

A further possibility should be mentioned in connection with revocation. It is also relevant for distribution and accountings, below. Might it not be better for a party like the creditor in the imaginary A v. B to go to a court of equity? I.e., the best course for the common law court might be to prohibit revocation, realizing that inequities to the creditor could result without compensating benefits to the widow, but recognizing that equity courts could be a possible last resort. I have no idea whether equity would consider providing a remedy in such a case, but perhaps one should be asked. Going to the Chancery or another equity court would arguably be better then inviting delay by long ecclesiastical proceedings or the common law court’s taking a tortuous path to do its own equity in effect. It is also conceivable that the equity option could also apply in some suits to prohibit revocation of an unlawful grant. I.e., if the rule is that revocation of unlawful grants should usually be permitted, but some discretion to go the other way is retained, the best practice for common law courts could be to prohibit and point to equity as a place where the party seeking revocation might find a remedy (presumably an injunction to the administrator to distribute part of the estate, arrived at by finding relevant facts and avoiding the risk of repeated ecclesiastical appeals.)

(2) *Distribution.*

The case for prohibiting all distributions is probably stronger than that for stopping all attempts to have grants of administration revoked and demands for accounting. Getting rid of distributions is difficult not to see as belonging to the heart of 21 Hen. VIII’s intent. The statute is probably best read as mainly intending that the decedent’s closest family connections usually get possession of the property and claims of the estate remaining after creditors are satisfied, promptly and with minimum further ado beyond the appointment of administrators. To facilitate this end, the statute makes specific rules, previously lacking, about who may be appointed. Directly to order a distribution, after appointing administrators or in the process, is to make a direct assault on the statute’s core purpose. Any apparent excess of stringency in ruling out all distributions is mitigated by other factors. The statute straightforwardly allows ecclesiastical courts a wide discretion to achieve the distribution they think best through the appointment process itself, by making choices within the class of eligible appointees. When this cannot be accomplished within the eligibility rules, I have argued, it can still be done by violating those rules at the risk of the penalty. If revoking grants and permitting accountings survive, wholly or partly, opportunities to distribute in effect also survive the initial appointment. Arguably, it would be better to indulge these oblique means to distribution than to make a “direct assault” on the statute’s central purpose. To a degree, there are reasons for such indulgence even though it carries some risk of leading
to “distribution by any other name”—e.g., the argument that revocation of unlawful grants is an efficient way to get administration into lawful hands that spares the ecclesiastical court from being penalized for an acknowledged and perhaps excusable error.

Against this “No distributions” position, one can rationally maintain that it would be wiser to preserve some flexibility, to allow common law courts asked to prohibit a distribution suit room to consider whether in the particular circumstances distribution might be the best way to a fair settlement. As suggested above, however, in support of prohibiting all revocation suits, or at least those aimed at revoking lawful grants, it may be arguable that if ordering distribution is the only way to avoid serious inequity to someone interested in an estate it might be better for an aggrieved party to resort to a court of equity.

(3) Accountings

Ecclesiastical accountings can be seen as a pointless burden on administrators, as a practice that would do no serious harm and might sometimes be useful, or as a de facto threat to fulfillment of 21 Hen. VIII’s ends. For the first position one can argue that if lawful administrators are in place and cannot be removed by revocation of their grants there is simply no need for ecclesiastical courts to supervise how they are getting on with administration. They are accountable to creditors at common law. They are also under a bond in general terms to do their job properly. By requiring the bond Parliament can be said to have intended that liability thereon be the sanction for such purposes as insuring that co-administrators cooperate, to the exclusion of ecclesiastical supervision. The main purpose of accounting would presumably be to see that administrators are making a conscientious effort to realize the estate’s claims, in the form of debts due to the estate or property belonging to the decedent but out of his possession at his death. Whether they do so, however, is their choice. The assets go to them; if they want to give away part of the estate by not pressing claims, that is their privilege. Admittedly, disagreement among co-administrators on what to forgive or to claim, or whether the likelihood and value of realizing a claim is sufficient to justify the attempt, can occur. Perhaps, however, the bond is sufficient incentive to cooperation. Requiring accounting by a single lawful administrator would come to paternalistic interference with how he is serving his own interest; requiring it of co-administrators may come to a form of the same. I.e., appointing co-administrators and their accepting appointment imply trust on the part of both the ecclesiastical court and the appointees that cooperation will come with time; it is in a sense “paternalistic” to keep an eye on them as if the trust were unjustified.

Against this “No accountings” position, one can argue that because the requirements of 21 Hen. VIII are complex and because the powers to revoke and distribute, if either survives at all, are intertwined, a non-coercive means to help estates get settled is desirable. Demanding accounting is of course coercive in the sense that administrators would be compelled by ecclesiastical sanctions to appear and render an honest account, but in the end accounting is a fact-finding procedure. Being informed, the ecclesiastical court would have a benign opportunity to influence the administrators informally—to remind them of their duty and their bond, to suggest as quasi-mediators how differences among co-administrators should be resolved, to make administrators aware of equitable considerations and charitable or religious purposes they might want to keep in mind, though whether they do is ultimately within their discretion.
This permissive position is open to criticism, however; “No accountings” remains defensible. The key objection to giving ecclesiastical courts an opportunity to exercise informal influence is that recommending and urging on the part of a judicial authority can de facto come close to coercion. Good offices gently performed could be benignly helpful to confused or quarreling administrators. If, however, the ecclesiastical court is strongly convinced that a distribution should be made and lets this be known, ignorant administrators might believe they had no choice but to comply. Indeed, the court could harass recalcitrant administrators just by repeated accountings, and sometimes by pursuing them for infractions unconnected with their administratorship. Whether distribution is flatly forbidden by the common law or only regarded as prohibitable unless the court moved to prohibit sees special reason not to, the ecclesiastical court would have achieved its preference by “voluntary” means. However wise or even potentially legal that result may be, it undermines the common law’s authority to interpret and apply 21 Hen. VIII. If, as might be tempting, the ecclesiastical court used its discovered information to take formal steps—ordering a distribution or a revocation of the original grant—procedural complications would be created. (Will a penalty action lie when “disobeying the statute” takes the form of evading implied provisions of 21 Hen. VIII as authoritatively construed by common law courts—as opposed to violation of the express eligibility rules, when entitlement to the penalty clearly accrues? It seems to me that this is an open question. Prohibition would probably be useless to control what amounts to a clandestine distribution or revocation, because the ecclesiastical judgments would normally be faits accomplis—i.e., prospectiveness would be wanting.) In sum, the benefits of non-coercive intervention by way of accountings are outweighed by the danger of its being perverted to subversion of the statute’s policy.

**Text—Summary**

Before the statute of 21 Hen. VIII, c.5, ecclesiastical courts had very broad freedom to handle intestates’ estates. There was one earlier statute limiting that freedom, but not in a strong or clearly enforceable way. 31 Edw. III, Stat. I, c. 11, provided that administration should be assigned to the “plus proschiens et plus loial amis” of the deceased; that such administrators should have the same power as executors to recover debts owed to the decedent; and that administrators “soient accountables as ordinairs si avant come executors sont.” No sanctions are specified for violation of the statute. No specific standards for identifying “plus proschiens et plus loial amis.” Power to recover debts would be given effect simply by the common law’s allowing administrators to sue for such debts. The provision on accountability, if not superseded by implication of 21 Hen. VIII, could be used to argue that ecclesiastical courts may not be prohibited from calling administered to account, though I have no evidence that it was. It was once claimed in a complicated 17th argument century that the “nearest friends” criterion for appointment was not so vague that it could never be the basis for Prohibition. For the most part, however, the earlier statute can be ignored.

The Introduction above, based on the words of 21 Hen. VIII and general reflection, describes the problems one would expect to arise in interpreting and applying the statute. In this study, I have investigated from the evidence of law reports only the
cases that involve the use of Prohibitions to enforce the statute these cases relate to four provisions, one express and the other three arguably, but not certainly, implied by the act.

The statute unmistakably makes rules as to who must be appointed administrator of intestates’ estates and who may sometimes be appointed as additional co-administrators. See the Introduction for the details of these rules. If they were violated, a penalty action against the ecclesiastical judge was given to those deprived of their right to appointment. It is possible, but not certain, that the victims of disobedience could also recover damages beyond the penalty. The question then arises whether Prohibition could ever be issued to prevent ecclesiastical courts from violating the statutory requirements concerning mandatory and permissible administrators. The pros and cons of this are discussed in the abstract in the Introduction. The issue comes up in some of the reported Prohibition cases. It is elaborately argued in a few cases, but not resolved.

Although the statute says nothing about it, ecclesiastical courts’ power to revoke grants of administration and make new ones came to be questioned. It was argued, and controverted, that by implication 21 Hen. VIII banned revocation in all or some circumstances. This issue is taken up in some Prohibition cases. Should attempts to get grants revoked by ecclesiastical suit, ordinarily initiated by parties omitted from the original grant who thought they should be appointed, be prohibited? More precisely, should they always be prohibited on the ground that the statute simply abolished the ecclesiastical power, or never because the statute had no intention to deprive ecclesiastical courts of their pre-statutory power to revoke their grants, or sometimes—unless in the common law judges’ eyes the ecclesiastical court had sufficient reason to reconsider its original grant?

Although, again, the statute is silent, does it by implication provide that ecclesiastical courts may not order administrators to distribute the estate? I.e.: After appointing administrators, or in the process of appointing them, may ecclesiastical courts require that the administrators dispose of the assets of the estate in some designated way, as opposed to keeping them for themselves? May Prohibitions be used to stop attempts by interested parties to obtain, or ecclesiastical courts on their own initiative to make, such distribution orders? These issues too are discussed in the Introduction for the sake of a more comprehensive view of their complexity and the merits of different views than always comes through from the reported discussion in cases. They are, however, well debated in the cases and come closer to decisive resolution than the other questions summarized here.

Finally, may ecclesiastical courts compel appointed administrators to account for their handling of the estate, or does 21 Hen. VIII forbid that? See the Introduction for a general view of what this question involves. There are expressions of opinion on the issue in the cases without firm resolution.

A comprehensive summary of where the cases come down is hard to give, but they present a striking pattern. For a long time between the enactment of 21 Hen. VIII (1529-30) and 1618 there is little sign that Prohibitions were used to enforce the statute in any of the four respects distinguished. Little does not mean absolutely none. In the upshot, however, we have one well-argued Elizabethan case in which the power to revoke administration was raised explicitly, but the court of Common Pleas was evenly divided on that question, and the case was resolved without deciding it. A few Jacobean
reports before 1618 show at least that the effect of 21 Hen. VIII on the law of intestacy was in the air, but there are no decisions actually restricting ecclesiastical power to revoke, distribute, and demand accountings. The one Common Pleas decision reported is a refusal to prohibit accounting, but it contains a dictum that distributions should be prohibited. In one of three King’s Bench cases, revocation is not objected to as such; the case’s issues are whether an appellate court may directly revoke a lower court’s appointment of administrators (as distinct from reversing a lower court’s decision against revocation in a suit seeking it) and, if so, whether the higher court may itself name a new administrator (instead of leaving the next step to the lower court.) The other two King’s Bench cases both present attempts to prohibit, on the basis of 21 Hen. VIII, efforts both to require accountings and to compel a distribution. In one, the common law court was disinclined to prohibit on either score, and in the other the two judges present opposed Prohibition. A major case of 1618 (Torke) is the turning point from the old law to the new. In that case, the Common Pleas under Chief Justice Sir Henry Hobart made a strong decision to prohibit a distribution order. Thereafter, Hobart’s Common Pleas took up or at least touched on distribution, revocation, and accounting in several cases. As of Hobart’s death in 1625, there were questions still hanging, but the legitimacy of enforcing 21 Hen. VIII by Prohibition was established, and so was a general inclination to doubt that the statute left ecclesiastical courts with much of their ancient freedom in intestacy matters. Hobart himself and some of his puisne judges probably arrived at a position understood by themselves to be embracing and radical. I shall state it in the starkest terms, although its advocates may have hesitated to push it quite so far in all details: The statute authorizes ecclesiastical courts to appoint administrators in accord with the eligibility rules it prescribes; what it does not authorize it disauthorizes—ecclesiastical meddling with intestates’ estates beyond the act of appointing an administrator is ultra vires, without regard to practice before the statute or its persistence de facto after the statute; making an appointment exhausts ecclesiastical authority.

After Hobart’s day, this position became a sort of presumptive base for cases on 21 Hen. VIII. It could be challenged around the edges, and the stark version was sometimes qualified in decisions, but it ceased to be arguable that the ecclesiastical courts remained possessed of all or most of their old powers. It is only a little melodramatic to say that a legal revolution occurred. That Hobart’s Common Pleas was the scene of it, rather than either court under Sir Edward Coke—Common Pleas 1606-1613, King’s Bench 1613-1616—will perhaps be surprising. In Ch. 2 below, we shall see Coke championing Prohibitions to enforce another Henrician statute—23 Hen. VIII, c. 9—and settling the law in favor of using them (even though 23 Hen. VIII provides better protection for victims of disobedience by tort and penal remedies than 21 Hen VIII does.) One can only speculate as to why Coke’s courts did not embrace the claim that 21 Hen. VIII had implied provisions enforceable by Prohibition. Accident or want of opportunity hardly seems the likeliest explanation, since that claim had been broached by his time. My guess would be that his courts’ inactivity reflects the side of Coke’s thinking that does not accord with his popular reputation as an enemy of ecclesiastical jurisdiction and eager wielder of the Prohibition to contain it. (For perhaps the best illustration of this side of his jurisprudence, see Vol. II, pp. 207 ff., on the ecclesiastical rule that transactions must be proved by two witnesses. Contrary to judges who thought the rule a foolish burden and
objectionable because discordant with the common law, Coke thought it both practically
useful and merely within the ecclesiastical courts’ rights if applied to transactions
belonging to ecclesiastical cognizance.) It is plausible to suppose that Coke considered
the powers to revoke, distribute, and require accountings useful for getting intestates’
estates settled in the various and complicated circumstances they could present. They had
arguably worked satisfactorily for a long time, including a long time after passage of the
statute that allegedly abolished them. Giving legal force to statutory implications which
Parliament could have made explicit if it wanted to enact them, and which historically—
in 1530—it probably did not want to enact, may have incurred Coke’s disapproval. It
may have been part of his strength and part of his weakness as a judge that he had little
inclination to rid the law of complexities and anomalies for the practical utility of simple
rules. For an illustration of this point, see my Copyhold, Equity and the Common Law
were inclined to hold that manorial custom, which supplied the rules governing the
copyhold tenements newly protected by the common law actions of Trespass and
Ejectment were the same as the generally known common law rules governing analogous
situations unless there was clear evidence to the contrary. Coke was more inclined to
discover historical and conceptual objections to making the manorial systems as much
like the common law system as possible. For persons with interests in copyhold land,
Coke’s point of view made the rules they were subject to less predictable than they might
have been, and abstruse litigative debate more probable, although the “real rights” of the
interested were more deeply understood.

In any event, it was Hobart and his colleagues (some of whom had served with
Coke) who took the law of intestacy in a new direction and put the Prohibition on the
map in that field. General speculation on the motives and intellectual history of the
change wrought by the Hobart Common Pleas has little point when, at last, we can look
directly at what the cases tell us. The change (subject to the ways in which it was not
terribly clear-cut and complete) certainly resulted in legal simplification and reduction of
litigation. I.e., the protraction of ecclesiastical measures beyond appointment of
administrators was at least significantly curtailed. Protection of familial rights, which can
be seen as the statute’s chief end, was in practice fostered. The change was permanent,
notwithstanding qualifications and unsettlement of details.

The qualifications and loose ends can really be appreciated only by examining
what was struggled with, decided, or not decided in the particular cases. For a rough
summary: Of the ecclesiastical powers in question, distribution was the most decisively
ruled out by the Hobart Common Pleas. The ban on distribution held up well in the
period between Hobart’s death and the Civil War and indeed into and beyond the war.
Hobart’s successor as Chief Justice, Sir Thomas Richardson, was adamant in upholding
the principle of “No distributions”, but thought that common law courts should have
discretion to permit it in some circumstances. His proposed qualification was not
embraced by the other judges, however. So long as Hobart sat in the Common Pleas, no
attempts were made in the King’s Bench to prohibit ecclesiastical courts on the basis of
21 Hen. VIII. After Torke, it would have made no sense for parties seeking to prohibit
distributions not to resort to the Common Pleas, and lawyers would have figured from the
implications of that case, as well as from other cases and expressions of opinion in the
Common Pleas, that the chance of prohibiting revocations and accountings would be best

43
in that court. After Hobart’s death the King’s Bench became more active; it followed the
Common Pleas law in essentials. In the end, revocation was less clearly ruled out than
distribution, but in so far as there was any inclination to permit it was probably only in
the situation where it was most useful—when a grant of administration failed to observe
the statute’s eligibility rules and revocation of the original grant would probably be
followed by a new lawful grant. Accounting is less clearly ruled out, or nearly ruled out,
then the other two powers, but there is definite authority against it. Some of the deepest
arguments on 21 Hen. VIII from the Bar comes in late Caroline cases, in which there is
even an intimation that the basic law established by Hobart’s court should be overthrown,
but this came to no decisional effect.

Text—The Cases

Cases on 21 Hen. VIII are mostly late-Jacobean and Caroline. One explanation
of this would be that ecclesiastical courts in the 17th century tried to take on a more active
role in the oversight of estates and prompted challenges. Earlier, by this hypothesis, the
ecclesiastical courts were mostly content to perform their clear role under the statute,
leaving administrators alone once they had been appointed and submitted an inventory. A
later attempt to assume responsibilities reminiscent of pre-Reformation days begot
Prohibition suits and forced the common law courts to think about the meaning of 21
Hen. VIII as they had scarcely done for almost a century. The alternative hypothesis
would be that ecclesiastical power to revoke administration and to order accountings and
distributions was for a long time so firmly recognized that challenging it would have been
futile. This is unlikely, however. It is true that the earliest challenges were not successful;
the law took a decided turn against ecclesiastical power only from 1618. Nevertheless,
interested parties would in all probability have tried to get Prohibitions if the activities of
the ecclesiastical courts had offended them. There would be reported cases, even if they
all eventuated in Prohibition denied. (And as we shall see below, the one piece of
Elizabethan evidence there is shows that judicial opinion was at least not unanimous in
favor of the ecclesiastical power.)

The reports of cases on 21 Hen. VIII on the whole do not give very detailed
discussions of the statute’s construction. Sometimes 21 Hen. VIII is not even mentioned
in brief reports of cases that must turn on it. The cases following, however, would seem
to depend on the statute, whether or not it is referred to.

My only Elizabethan case has been discussed in detail under other headings in
Vols. I (p.322 ff.) and II (P. 317 ff.)—see references there. In summary: the case presents
the Common Pleas split 2-2 on whether administration once granted may be revoked.
Justices Periam and Wyndham said “No”, Justice Walmesley and Chief Justice Anderson
said “Yes.” In the circumstances of the case, there were fairly strong equitable
considerations in favor of taking administration away from the widow and giving it to the
deceased’s common law heir. Periam and Wyndham seem to have thought that 21 Hen.
VIII was a categorical bar to that, whatever the equities. Whether or not they would have
ruled out any limits on the power to revoke and re-grant, Walmesley and Anderson did
not think it was ruled out in the instant case, where the reasons were quite convincing.
The case was complicated by other factors and resolved by something of a compromise,
leaving the deadlock on the imperatives of 21 Hen. VIII intact.
Reynald Hall’s Case\(^1\), the only one from the first decade of James I’s reign, is a briefly reported holding that the Delegates may revoke administration, but may not make a new grant. So far as the main issues on 21 Hen. VIII are concerned, this decision confirms by implication that there is no objection to revocation and re-grant as such. The holding itself is specific to the Delegates (or, no doubt, to any appellate court—many cases on decedents’ estates started in the Prerogative Court of the Archbishop of Canterbury, so that the Delegates were the first court of appeal.) Its negative point—the appellate court may not make a new grant—is unsurprising. The function of appointing administrators belonged to first-instance courts with probate jurisdiction; 21 Hen. VIII can perhaps be taken as insisting that this role be played by those courts. The report does not say, however, that the statute demanded the ruling; it might have been the same if the statute had not existed. The essential point is that an appellate court may not in this way preempt the functions of a lower court. In general, ecclesiastical courts of appeal had powers of preemption. If an appeal was brought on an interlocutory point, the appellate court could if it saw fit take over the suit and give sentence on issues other than the one appealed, including issues of fact. The present holding says that appointment of administrators—which is after all a discretionary function and quite different in nature from deciding suits between adversaries—cannot be swept within a general authority to speed up the resolution of litigation.

The affirmative point in the present holding—an appellate court may revoke the lower court’s grant of administration—is perhaps more problematic. There would seem to be little basis for doubting that the first-instance court’s decision to revoke might be appealed and either upheld (with the consequence that the matter would be remanded to the lower court for the appointment of new administrators) or overruled (with the effect of reinstating the original administrators.) At any rate, I find it hard to see anything in 21 Hen. VIII to interfere with the normal processes of appeal in the ecclesiastical system. A decision to revoke is a decision, at least analogous to a sentence in a lawsuit. Why should it not be scrutinized? By the same token, the first-instance court’s refusal to revoke, when that court has been moved to do so and heard argument, seems a reasonable object of appeal and hardly at odds with the statute. What seems more dubious is going to an appellate court with the first motion for revocation—in effect treating the mere appointment of administrators as a “decision” and “appealing” it in the form of asking the higher court to revoke. If Hall sustains this, it is highly permissive toward ecclesiastical courts, despite its insistence that making a new appointment is improper at the appellate level. Unfortunately, the report of the case does not reveal the circumstances. Interesting technical questions are raised, but one can do no more than indicate them sketchily.

In Mountgomerie v. Clarke (1614),\(^2\) the Common Pleas refused to prohibit a privately initiated ecclesiastical suit to compel an administrator to account for the estate. 21 Hen. VIII is not mentioned, but it must be the basis on which Prohibition was unsuccessfully sought. There is no indication in the reports as to whether any special circumstances were adduced on either side—i.e., grounds on which it might be argued that an accounting was or was not reasonable in the particular case. Noy’s report adds a

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\(^1\) T. 3 Jac. K.B. Add. 25,209, f.67.
\(^2\) H. 11 Jac. C.P. Harl. 5419, f. 92b. The undated Montague v. Clark (Noy, 24) is probably the same case.
dictum: A suit for distribution (“to make a division of the goods.”) should be prohibited. It is noteworthy that one court, at any rate, thought a line could be drawn between “bare accountability” and substantive supervision of how the estate was handled.

In Sotherley’s Case (1616), an infant died intestate and his mother took administration. She was called into the ecclesiastical court both to account and to distribute to the decedent’s kin. The King’s Bench is reported as inclined to deny Prohibition. If there was any hesitation it was probably on the score of the distribution rather than the accounting. The report says expressly that the administratrix was accountable in the ecclesiastical court. It also says that the estate was encumbered by many debts. This fact (presumably stated in the surmise) might be an independent ground for Prohibition with respect to the distribution. I.e., it would be possible to hold that so far as 21 Hen. VIII is concerned administrators may be forced to distribute, but that suits to enforce distribution are premature when there are substantial outstanding debts. (Seeking Prohibition on the ground of such debts would be analogous to an executor’s attempting to prohibit a legacy suit by surmising some version of “No assets”.) The court in Sotherley was more decisive on accountability than on distribution, but that may be because of the claim of heavy debts; if it had any sympathy with the distinction drawn in Mountgomerie there is no positive indication of it in the cursory report, and the next case suggests the contrary.

Sharpe v. Simpson, from the same term and the same court, is identical except for the claim of debts. Administration was again granted to the decedent’s mother. Again kinsmen sued for the dual purpose of securing an accounting and forcing a distribution among “twelve others of near blood.” Prohibition was sought squarely on the statute and denied by Justices Dodderidge and Houghton—presumably the only judges present in court. So far as the report shows, counsel seeking Prohibition came down harder on the distribution than the accounting. He insisted that the statute intends for the nearest relative to whom administration is granted to take all, which does not have to mean that the administrator is free of “bare accountability.” The two judges put the emphasis the other way, saying that “the books” frequently upheld administrators’ liability to account. Nevertheless, they refused Prohibition, with the effect of allowing distribution proceedings to go forward. (Their reference to “the books” is a little mystifying, since decided cases posterior to the statute were infrequent. Evidence of the legality of accountings from earlier than the statute—from “the books” in the sense of the Yearbooks—hardly proves that the statute did not change the law.)

Nothing in the cases above, save for the controverted opinion of two Elizabethan judges as to revocation, goes to give 21 Hen. VIII any effect of restraining ecclesiastical courts from interference with intestates’ estates after the original grant of administration and receipt of an inventory. The first case to go the other way, and it does so explicitly and decisively, is from the Common Pleas in 1618. A good MS. report calls it Torke’s Case; it is unmistakably identical with Tooker v. Loane in Hobart’s Reports.

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3 P. 14 Jac. K.B. Add. 25,211, f.155b.
4 P. 14 Jac. K.B. 1 Rolle, 358.
5 H. 15 Jac, C.P. Harl, 5149, f. 96, sub nom. Torke; Hobart, 191, undated, sub nom. Tooker v. Loane. That the two reports are of the same case is supported, I think beyond a reasonable doubt, by the following considerations: “Torke” and “Tooker” are close.
In Torke, A had sons B, C, and D. B and C predeceased A. When A died intestate, the ecclesiastical court granted administration to D. It also took a bond from him obliging him to make a “rightful distribution” and to share the estate with the children of B and C. The Prohibition case arose when the Delegates purported to compel D to make a particular distribution. The MS. Report does not explain how the matter reached the Delegates, but on this point the generally inferior printed report is helpful. It appears that the court of first instance demanded an accounting from D. (There is nothing in the judicial remarks in Torke to suggest that barely insisting on an account was regarded as objectionable.) When D had accounted, and presumably shown that the estate was ripe for final settlement, the ecclesiastical judge assumed a mediatorial, rather than a judicial, role. He did not impose a particular distribution, but negotiated with D as to how the estate should be divided, presumably on the understanding that the court would accept a reasonable scheme agreed to under its supervision. I.e., it would regard the bond as satisfied and refrain from demanding any other distribution. The solution agreed on was that the estate should be distributed per capita rather than per stirpes. That means that D, each of B’s children, and each of C’s would take equal shares. The contrasting per stirpes method would split the estate three ways, one going to D, one to be divided among B’s children (nine of them as it happened), and one among C’s (who were only three.) The guardian of the children—both B’s and C’s, it seems, all of them apparently infants—appealed to the Delegates.

“Appealed” has an unusual sense here, because there was no judicial decree below. Clearly the guardian went to the Delegates in order to force a distribution on the per stirpes principle. His position was that distribution on that basis was required by ecclesiastical law. His position as to procedure was that resort to the Delegates was appropriate, despite the fact that there was no mistaken sentence to “appeal” in the strict sense. The lower court did not seek to enforce a distribution. Nominally, it was willing to let the administrator dispose of the estate at his discretion. In reality, it put the administrator under the pressure of a bond to make some distribution, and its judicial inaction was the result of an acceptable scheme’s being volunteered. Under these circumstances, I take the guardian’s theory to maintain, there was no place to go except a higher court. Going there is as good as an appeal—an attempt to correct a matter mishandled by an inferior court—even though it is not one in strictness. The point is

Hobart identifies “Tooker” as Giles Tooker, Reader of Lincoln’s Inn, and Charles, his brother, those two men being co-administrators. The MS. does not show that there were two administrators, but refers to the administrator, as to the other parties, by schematic letters—A, B, C, and D. Whether there were two administrators rather than a single one does not matter for the issues in the case. The reports agree on all the legally significant facts, as on the outcome. Hobart gives crucial facts omitted from the MS. (see text), but some remarks by the judges in the fuller MS. report of their opinions only make sense with those facts. The full situation presented by the case, including the Delegates’ involvement, is too unusual to have occurred more than once with any probability. Many reports in Hobart are undated; they can usually be associated with the time of Hobart’s own Chief Justiceship; 15 Jac. is thus as likely a date as any for an undated report in that volume.
reasonable, though it admits of the riposte that it would have been better for the guardian
to sue in the court of first instance for the sort of distribution he thought the law required.
Going straight to the Delegates might have the advantage of efficiency, but it was
questionable procedure. One should note that the guardian was only doing what he
conceived as his duty to see that his charges got what they legally ought to, if, as appears
to have been the case, he represented all the children—not just the three children of C,
who would have done better under the per stirpes principle.

The administrator, D, sought to prohibit the Delegates centrally on the ground that
by 21 Hen.VIII the ecclesiastical courts’ authority is exhausted once administration is
granted, wherefore compelling distributions is simply ultra vires. Remarks by Chief
Justice Hobart (MS. report) suggest, however, that going to the Delegates without a
properly appealable cause was objected to and claimed as a separate ground for
Prohibition. (Like the guardian, the administrator would seem to have been
disinterestedly motivated. The strongest interest in a per stirpes distribution would have
been his. He was only seeking to protect the per capita distribution that he preferred and
the lower court accepted. If forcing a distribution indirectly by means of the bond can be
objected to, the administrator here did not object.)

The MS. report gives the individual opinions of all the judges. They agree in the
upshot (as the printed report confirms), but with some differences in detail; Prohibition
should be granted because under 21 Hen. VIII ecclesiastical courts lack authority to
compel a distribution.

Chief Justice Hobart starts out by dismissing objections specifically directed at
the Delegates’ role. He says in effect that it made no difference in exactly what sense the
Delegates were acting as an “appellate” court. His strict point is probably that it was not
the common law’s business to judge whether there was a properly appealable question,
that being a procedural matter within the ecclesiastical sphere. (“They have appealed
from the Ordinary to the Delegates. And be that an order, decree, or on account of any
other causa gravaminis [interlocutory point] is not material. And for this no Prohibition
will be granted, for it is proper for the jurisdiction of the court.”)

Moving on to the main question, Hobart lays down a premise that cannot be
disputed once objection to the Delegates’ involvement has been cleared away: viz. the
Delegates’ power to order a distribution is as good, but only as good, as the Ordinary’s.
The groundwork thus laid, Hobart announces his stand on 21 Hen. VIII: The statute took
away the ecclesiastical courts’ previous power to compel a particular distribution of
intestates’ goods. There is no question but that the previous power existed; the statute
simply changed the law. The object of the statute is the “preferment” of widows,
children and nearest kin. That policy would be defeated if ecclesiastical courts retained
power to interfere with the discretion of administrators duly appointed under the act’s
standards. Moreover, as a further clue to construction, 21 Hen. VIII in terms puts
administrators, mutatis mutandis, in the same position as executors. Once an
administrator is duly appointed, it is as if the intestate had made a will naming that person
executor. Ecclesiastical courts may as well have power to make an executor distribute the
residue of an estate to non-legatees as power to force a distribution on an administrator.
No one would claim, I take Hobart as saying, that executors ever have any such duty—
i.e., that they are other than residuary legatees when no one else is expressly named as
such. This is the meaning of the statute, and the statute should be enforced by Prohibition.
It is futile to object that ecclesiastical courts have understood the statute differently and have built up a body of usage in accord with their understanding. If that is the case, they have misconstrued the statute, and they and their usage are not its authoritative interpreters.

Justice Warburton agrees entirely on the central point. The only explanatory emphasis he adds is on the penalty clause in 21 Hen. VIII: The statute requires the Ordinary to grant administration to certain persons and subjects him to a penalty if he does otherwise. That is to say, the statute cares that administration goes to the proper close kin. It puts the ecclesiastical judge under the pressure of penal liability to make sure it does. The whole idea is to get administration into the right hands, so that widows and close relatives may enjoy the property themselves, or otherwise deal with it by uncontrolled discretion.

The main interest of Warburton’s opinion lies in his express dicta on two further points: First, as Warburton puts it, once the ecclesiastical judge has granted administration, “he cannot revoke or control the acts of the administration.” He may, however, revoke the letters of administration. I.e., the Ordinary may grant administration to X, then cancel X’s grant and make a new one to Y, without, so far as appears, any reason, or provided only that Y meets the eligibility standards as well as X. Warburton does not explain why the statute should be taken as leaving powers of revocation and re-grant intact while destroying the power to interfere with the administrator’s acts as long as his letters are in force. The following argument will support the distinction: Some power of revocation is desirable for giving effect to the statute’s eligibility requirements. If the Ordinary mistakenly grants administration to an ineligible person, he ought to be able to cancel that grant and make a correct one. It would be foolish to rely on the penalty clause alone to make the Ordinary be careful, when it is possible to give him the means to correct his mistake and fulfill the policy of the statute specifically. But is it not too narrow to hold that administration can be revoked only if the Ordinary has actually violated the statute? The statute gives him discretion among equally eligible candidates. It must intend that he make serious use of his discretion, not toss a coin, as it were. He must abstain from interference with the administrator’s discretion because he has had his chance to use his own to decide, within limits, whose discretion is to be trusted. If he may revoke in order to correct his mistakes in directly applying the stature, it seems hard to deny him power to revoke in order to correct mistakes in the use of his discretionary judgment. Once this is conceded, one might as well say he can revoke at will, for there is no practical way to sort out instances in which revocation corrects a mistaken but considerate use of discretion—as where new information is brought to the Ordinary’s attention,— instances in which it corrects a hasty, inconsiderate grant, and instances in which the Ordinary has simply changed his mind. The common law courts should not burden themselves with assessing the circumstances and reasonableness of acts of revocation.

It should be noted in connection with this argument that conceding an unlimited power to revoke reinforces the point that there is no power to compel distribution. The Ordinary is not debarred from thinking that a certain distribution would be desirable. When there is a choice of candidates, he cannot be prevented from appointing the one he considers most likely to make the desirable distribution, nor from appointing as co-administrators all the co-eligibles among whom he would like to see a distribution, nor
from excluding some co-eligibles because he thinks they should not participate in the
distribution. Moreover, the Ordinary is not debarred from second thoughts. In short, the
Ordinary’s indirect power to influence the distribution of estates is sufficient without
giving him direct means—and therewith the temptation to intervene where the statute
clearly provides he should not, as where the administration is in the hands of a solely
eligible widow and the nearest blood-relatives are minor children, but some other
kinsman persuades the judge he deserves a share of a large estate. To the extent that a
legitimate interest in the distribution of some estates is conceded to the Ordinary, and
revocation is conceded to be the legitimate means, a basis is also provided for defending
accountability. Should the ecclesiastical court not be able to discover whether its
discretionary appointees are realizing the estate’s potential, how large that potential has
turned out to be, and whether any distributive measures have been taken, in order to
consider whether the court’s intentions would stand a better chance of being fulfilled by
new administrators?

Warburton’s second dictum is that the obligation taken from the administrator in
the instant case was void. It would appear that the administrator here was the only
eligible person. (Only surviving son, deemed to be a closer relative than a grandchild.
There is at any rate no sign of a widow.) Assuming that to be true, a question remains as
to whether administration may be granted to a discretionary appointee on condition that
he make a distribution. It is conceivable that in that case the letters of administration
could be conditional in terms, with the effect that if the condition is broken new letters
can be granted. Arguably, getting to the same end by means of a bond would be
insignificantly different and innocuous, though the technique of a bond could be objected
to (and might be by Warburton) on grounds independent of the statute. Use of bonds by
ecclesiastical courts was sometimes objected to in other contexts, simply as going beyond
the limits of spiritual sanctions. (Warburton analogizes a rule to the effect that sheriffs
may not take bonds conditioned on appearances and payments of money, but the parallel
is not explained.)

It seems arguable that making a distribution a condition—straightforwardly if
using a bond is intrinsically objectionable—is not clearly against the policy of the statute
when the administrator is a discretionary choice. To the extent that the ecclesiastical
judge has a legitimate interest, in some cases, in influencing the disposition of the estate,
provided he does so upon his original exercise of discretion or by way of revocation and
re-grant, it seems difficult to exclude conditionality. That he does have a legitimate
interest seems implicit in his power to exclude co-eligibles, though, as I have argued
above, it is possible to say that power is a sufficient means to give effect to the interest.

The opinion of the third member of the court to speak, Justice Winch, presents
some legibility problems, and even apart from that it is not as clear as the other judges’
remarks. Winch unmistakably agrees with the others as to the result in the instant case—
the Delegates should be prohibited. He also agrees as to the central question of
principle—21 Hen. VIII rules out the ecclesiastical court’s power to compel distribution
directly. To what the other judges say to this intent, Winch adds that if an administrator
were to make a distribution by order of the ecclesiastical court he would not be off the
hook in the common law sphere—i.e., would be liable for debts of the estate claimed or
sued for after the distribution. (What is the relevance of this? Common law liability
would surely have survived distribution before the statute, when ecclesiastical power to
compel distribution was unquestioned. A system with no direct way of insuring the administrator’s safety against late-appearing creditors may be regarded as unsatisfactory. Indirect devices are imaginable: Ecclesiastical courts should be careful about ordering distribution prematurely; Prohibitions should prevent their doing so when it could be shown that claims were probably outstanding; there are various possible ways in which Ordinaries and administrators could “take out insurance”—putting off mandatory distribution but taking a bond from the administrator guaranteeing a distribution by a date safely in the future, taking bonds from beneficiaries of the distribution to save the administrator harmless against late creditors’ claims, and the like. But no solution to the inconvenience would be as clean as simply abolishing compulsory distribution—simply giving the residue of the estate to the administrator, indefinitely subject to liability for unsatisfied debts. It is reasonable to argue that the statute intended to improve the law in this respect as in others. Obviously, however, there is no clinching argument from these considerations for concluding that the statute destroyed ecclesiastical powers which it does not clearly abolish in terms.) Finally, Winch repeats Warburton’s point that administration is revocable, again without apparent qualifications.

It is with respect to the bond in the instant case and the relationship between the first-instance court and the Delegates that Winch seems to deviate from the other judges. He makes his point as follows: “But we are in the case of the Delegates, who are remote from the obligation that is taken for the execution of the administration. For though by reason of that bond the Ordinary could make distribution, yet the Delegates may not. [Car coment per reason de cest bond le Ordinary poit faire distribution uncore les delegates neo poiyen]” It seems to me this language can be interpreted in two ways: First, the bond as such is perfectly good, contrary to Warburton. But more is implied than that a suit on the bond could be sustained. The administrator has in effect promised to make a distribution, and there was nothing unlawful about insisting that he do so before giving him administration (even though, as would appear to be the case, he was the only available candidate.) Further, he has implicitly promised to make a distribution that is agreeable to the Ordinary, for it would be absurd to suppose his undertaking is confined to anything that could count as a distribution, such as paying a penny to each of the nephews and nieces. To all practical intents that means “the Ordinary could make distribution”, though in this case he had not done so judicially, but merely agreed to the distribution which the administrator proposed to make. But the administrator promised only the first instance court. The Delegates have nothing to do with it. Therefore Prohibition to the Delegates is justified on the general principle that distribution is not straightforwardly within the power of ecclesiastical courts since 21 Hen. VIII.

Alternatively, instead of espousing such a theory, Winch may be speaking in a highly hypothetical or subjunctive mode: At the very most, perhaps there is nothing unlawful about the bond, and perhaps, having entered the bond, the administrator has in effect estopped himself from doing other than distributing as the Ordinary sees fit. But this is speculative. What is certain is that any power to compel distribution in the special circumstances here belongs to the Ordinary; whereas it is the Delegates who propose to control the distribution in the case before us. The case is therefore easy, for nothing can be said for the Delegates in the absence of a general power in ecclesiastical courts to force distribution, a power which the statute takes away. (Law French grammar is too loose to permit a linguistic resolution of Winch’s meaning.)
The last Justice to give his opinion, Hutton, starts with a historical survey of the law of intestacy. New arguments for the unanimous conclusion that power to distribute did not survive 21 Hen. VIII do not emerge from the survey, but it is interesting to observe that Hutton’s confidence in the conclusion depended in part on his sense of a coherent historical pattern. The pattern comes to a progressive cutting-back on the authority of ecclesiastical courts to determine the disposition of dead men’s goods. The testator and the executor were the first victors. For by “the ancient common law” (attested to by Magna Carta) decedents’ children were entitled to a reasonable share of the estate even when there was a will with executors. By Edward III’s time, that had changed (non-legislatively, Hutton as good as admits by merely stating that the common law had ceased to “allow” the ancient rule.) The testator’s right to exclude his children and the executor’s modern position as residuary legatee in the absence of another designated one became part of the law. The statute of 31 Edw. III started the process of assimilating administrators to executors. It required ecclesiastical courts to appoint administrators, instead of dealing directly with intestates’ estates (just by taking and distributing the tangible assets to charitable and familial beneficiaries, without the intervention of an executor-like figure.) In terms, it made administrators “executor-like” by providing that they should sue and be sued for debts of the estate in the same way as executors. Although he does not spell out the point, Hutton obviously knew that 31 Edw. III did not complete the assimilation—i.e., did not make the administrator as free as an executor to keep the property after satisfying creditors or dispose of it voluntarily as if it were his own. Perhaps Hutton would have said that 31. Edw. III rather intended than merely anticipated the final step, that 21 Hen. VIII did not change the law so much as it pinned down the law which the older statute failed to define. In any event, 21 Hen. VII was the end-point of the history. “The person to whom solely the administration shall be committed is made more certain (than the ‘plus proschiens et plus loialx amis’ of 31 Edw. III),” and from that certainty sprang the consequence all the judges agreed on—disappearance of the last vestige of ecclesiastical power to force a disposition.

From his history, Hutton turns to the bond in the instant case: In so far as a bond taken from administrators obliges them to more than “true administration of the goods” it is void. Note that demanding a bond of administrators is not simply unlawful. Would a bond obliging to “true administration” oblige to more than performance of the statutory duties—to select coadjutors with respect for the prescribed criteria and render a full and true inventory? If not, Hutton’s formulation implies more clearly than Warburton’s that a bond obliging to distribute would be bad in all circumstances—not only when it is exacted from a solely eligible administrator, but equally when entering such a bond is made a condition of the grant of administration to one of several eligibles. If a bond would be void in the latter case, so surely would be a grant expressly on condition that a distribution be made.

Hutton then comes back to the central point about 21 Hen. VIII, speaking to the practical advantages of the court’s position: “The mischief would be great that would ensue if the Ordinary should dispose at his pleasure. For there may be many of equal proximity of blood, on which great confusion will ensue. And admit that there are not many, yet the distribution is often to such as are in a remote degree [of relationship] to the intestate.” The point may perhaps be spelled out as follows: When the equitable case for a given distribution is good, the practical problems of effecting one are likely to be
formidable. In principle, if one co-eligible is chosen administrator, it seems hard to exclude others of equal relationship from shares of an estate large enough to do more than reward the administrator for his trouble. In a really hard case, the unfairness of allowing an administrator chosen by chance or discretion to take all may seem overwhelming. But one should not make bad law by imagining hard cases of the sort the statute is drawn to avoid. The act guarantees administration to the widow and/or at least one child or grandchild (taking issue to be nearest kin) when a widow and offspring exist. Of course those included could mistreat those excluded in that situation, but surely the bonds of nature and the good sense of ecclesiastical judges deserve reliance in simple cases of small family groups. The statute also guarantees inclusion of an issueless widow unless all other administrators are in the class of nearest surviving blood-relatives. The practically problematic case will therefore usually come when a man leaves neither widow nor issue.

In that case, it is quite likely that the eligible kin will be numerous, and the ecclesiastical court is likely to be at the mercy of applicants. In some situations of that sort, the equity of a distribution is in a sense especially compelling—say when no one closer than a cousin is in evidence and who and where other cousins of equal degree are is all but unascertainable. There is no reason why the cousin who gets there first should make off with everything. In a sense, that is worse than a wicked son’s doing so—a son who manages to get the administration and turns his back on his mother and siblings. At least the wicked son is the intestate’s close flesh and blood. The intestate might have made a will appointing that son executor and leaving no legacies to his wife and other children. In theory an administrator is quasi an executor; the ecclesiastical court, supplying the place of a testator, is meant to choose someone the intestate might have chosen. The intestate might scarcely have heard of a cousin who turns up with a valid claim to administration after his death, and is in any event unlikely to have made a discriminatory decision in his favor. Not uncommonly people prefer charity over their cousins; they sometimes show special trust or special favor toward one of their sons. Moreover, it takes a wicked son to scorn his immediate family and his father’s probable wishes; a cousin does not have to be especially wicked to be indifferent to the fortunes of other cousins. The scrupulosity and fairness that might lead him to seek them out and share with them are rather supererogatory virtues, and therefore not to be depended on, for which reason compulsory distribution is tempting.

The temptation should be resisted, however. The abstract justice of seeing that an estate is divided among people who may all have meant equally little to the intestate, and of keeping an enterprising or informed member of that class from enjoying a windfall, is simply not worth the trouble. In such cases, let the ecclesiastical court do its best to avoid injustice when it grants administration in the first place. If they cannot or will not do a perfect job, let the cousins settle their own contentions. Delay and litigation are too high a price to pay for marginal perfections of justice. 21 Hen. VIII seems intended to minimize delay and litigation. The more one thinks about it, the clearer it is that the danger is real, that the policy of heading it off at relatively minor cost makes sense, and that holding the statute to bar distribution is entailed by that policy.

Hutton’s final point goes to the facts of the instant case. He alone of the judges speaks about the specific situation at hand—basically, apart from the complexities of the litigative context, the case of an estate where the natural claimants to share are a
surviving son plus grandchildren of the intestate. This contrasts with the case of remote kinsmen, where arguments for distribution are in a sense compelling, yet ultimately unsound. Hutton’s remark is: “And I hold that the administration may not be committed to the children of the son who is dead, if the intestate has any son alive.” The meaning is clear: Administration was correctly granted in the instant case; children are next of kin in contemplation of 21 Hen. VIII to the exclusion of grandchildren. But what is the bearing of this on the legality of compelling distribution? I suggest the following.

The claim that power to order distribution survived the statute is strongest, though still to be rejected, when one co-eligible is chosen over others. Here the son was eligible and the grandchildren ineligible, so that the grandchildren’s claim to distribution is not even in the strongest class of such claims. If we give the statute a more vigorous or more “substantive” interpretation, the point admits of another formulation: 21 Hen. VIII provides that grandchildren have no legal right to shares. A distribution in their favor would contravene the statute and so be unlawful even if compulsory distributions were not ruled out generally. Any claim the grandchildren have on their uncle, the administrator, is strictly moral. (Such, for example, that a court of equity could not enforce it without violating the maxim “No equity against a statute”.)

What I call the “vigorously” reading of the statute may be questioned, however. To provide that X may be made administrator and Y may not is after all not identical with providing in terms that X is entitled to at least part of the estate and Y to nothing. Construction by intent is necessary to get to such further effect, and there is no certainty that Hutton was ready to go so far. He does not need to in order to argue simply that if excluded co-eligibles may not force a distribution, a fortiori ineligibles may not. (The latter argument alone is not incompatible with saying that a court of equity might properly compel the uncle in our case to satisfy his strong moral obligation to his nephews and nieces. Arguably, perhaps, for the same practical reasons that justify construing the statute against ecclesiastical courts, it should not enforce the weaker moral duty of a cousin to share with other cousins. There is no mention of courts of equity in the discussion, but thinking about their possible role is useful for clarifying the principles. It is not historically inconceivable that this was somewhere in the background of the judges’ consciousness. Whatever the story of how it happened, the Chancery’s involvement in the confused field of decedents’ estates was increasing in the 17th century.)

If one starts from the premise that 21 Hen. VIII goes only to eligibility for administration—i.e., does not settle substantive rights in law and equity to shares of estates—I can imagine arguing contrary to the position I attribute to Hutton. Excluded eligibles may not have at least a better claim to distribution than ineligibles. Arguably, when the ecclesiastical court decides to grant administration to one of several eligible persons, it makes a judgment about what should become of the estate, or at any rate about what risks should be run as to its ultimate disposition. If the court prefers Cousin George and excludes Cousin Harry, it has used its opportunity to make a distributive decision. It has decided that there is no objection to George’s winding up with the residue of the estate and Harry with nothing, or—if there would be some objection to that result—that the risk is acceptable because George can be trusted to use his administrator’s discretion fairly. Therefore the ecclesiastical court should not be allowed to make an explicit distributive decision at the cost of delay and unsettlement. On the other hand, if the court
must appoint Uncle and cannot take account of Nephew’s interest in the choosing of administrators, and assuming that the statute does not make their interests a legal nullity, it is arguable that a distribution should now be compellable.

The last point in the MS. report is a parting word from Chief Justice Hobart. He only endorses Hutton’s history by observing that “the common law was as Hutton has said, but that was disallowed in ancient times and restrained to some particular places.” (i.e., the only vestige of the old law that a distribution could be forced even on executors was certain local customs entitling close relatives to automatic shares of estates.) The printed report adds no substantial information beyond the facts for which I have used it. It gives the court’s conclusion in summary: The Ordinary may not make a distribution for 21 Hen. VIII (miscited as 32 Hen. VIII) “intends a benefit, to the administrator and not an unprofitable burden, and therefore gives a preferment to the wife and next of kin.” Also, a bond insuring distribution cannot be taken (which is explicit only in the opinions of Warburton and Hutton—Winch may have disagreed.) The printed report furnishes the details that Serjeant Harris was the winning lawyer in this important and law-changing case and that the ecclesiastical judge of first instance was the well-known civilian Sir John Bennet. Bennet’s proceedings—taking a bond and effecting a per capita distribution without making a clearly appealable order—have the look of a studied effort to avoid legal issues (about the power to compel distribution, on the one hand, and about the correctness of the per capita scheme in ecclesiastical law, on the other.) Although the case resulted in an unfavorable holding on the power of Ordinaries, the upshot of prohibiting the Delegates was probably to insure that Bennet’s plan for putting equal shares in the hands of all the intestate’s descendants took effect.

Robert Oldfeilde’s Case, from the Common Pleas in the next term, extends the spirit of Torke to mere accountability, which the earlier case did not reach. The report of Oldfeilde ends with an adjournment, but it gives the first-round opinions of the four judges individually, and three of them sound pretty firm on the view that an administrator may not be forced to account. Justice Winch is inclined to disagree, but the tone of his dissent is rather tentative. (Winch was the shakiest member of the court in Torke—the most inclined to think that ecclesiastical courts could sometimes have a basis for ordering distribution and to decide Torke on the exceptional procedural situation.)

In Oldfeilde, a creditor of the estate “procured” the Ordinary to summon the administrator to make account. It might be possible to hold that a creditor may not use the ecclesiastical apparatus (but must bring an Action of Account at common law), whereas the ecclesiastical court, on its own initiative or by “procurement” of kinsmen of the intestate, may require an accounting. There is no sign however, that anything was made of this distinction. It would present practical problems. One could prohibit creditors’ suits cast as private suits (commenced by libel), but it would be hard to prevent a creditor from “procuring” the ecclesiastical court to act ostensibly on its own motion. It is possible, however, and suggested by some of their remarks, that the judges’ focus on the case was affected by the circumstance that the initiative came from a creditor.

Chief Justice Hobart so states his opinion as to make it clear that it does not depend on the motive for the accounting in the instant case: Ecclesiastical courts are

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6 P. 16 Jac. C.P. Harl. 5149, f. 162. The briefly reported case of Sparrow v. Norfolk discussed at the end of Oldfeilde is incorporated in this note.
simply confined to two functions. They are to supervise the proving of the will if there is one, and if there is not to commit administration, and they are “to see that there is a true inventory.” *(Quaere as to exactly what the second function involves. Anything beyond receiving the inventory and making sure that it is verified by oath? Making sure it has been prepared with the help of coadjutors chosen as 21 Hen. VIII appoints? Would an accounting at some point later than submission of the inventory not be a good way of checking on the truth and completeness of that document?) That is all—no accountings and by implication no revocation or distribution.

Having so stated his basic position, Hobart adds an observation that goes to the immediate circumstance of the creditor’s attempt to use the ecclesiastical machinery: An ecclesiastical accounting is not evidence at common law, and creditors may not take any benefit from it, “yet as I understand [or suppose—’intend’] they may examine the account.” I.e., as I take this: The ecclesiastical account will not conclude any common law questions, cannot be pleaded, perhaps cannot be shown as evidence to a jury (to the degree that exclusionary rules for jury-evidence were operative at the time of this case.) But it can be examined by the creditor and so help him indirectly, as a discovery of leads to evidence usable in the common law sphere. Perhaps Hobart also had in mind that the account might be examined by or known to the jurors “off the record” and in that way be prejudicial to the administrator in potential common law proceedings. Jurors, one should remember, were not yet obliged to form their opinion of the truth from evidence presented at a trial. This kind of scrupulosity about incidental spill-over from the “spiritual” sphere to the “temporal” is recurrent in Prohibition law. It militates against ecclesiastical accountings even when they are not sought by a creditor, since the accounting might turn up information useful to creditors though sought on someone else’s initiative.

Justice Huttton takes the same basic stand as Hobart. He says simply that the power of ecclesiastical courts in intestate matters depends entirely on 21 Hen. VIII and that the statute makes no mention of accounting, wherefore to demand one is to “exceed their authority.” Justice Warburton agrees: There is no power to compel an accounting. An administrator may “do it if he likes”—i.e., account voluntarily, being requested. An administrator who renders an account before an ecclesiastical court may not, however, take advantage of it at common law. His *quietus est* from the ecclesiastical judge will do him no good in the temporal sphere (just as, according to Hobart, the opposite sort of finding will be of no formal avail to a creditor and should not be helpful to him informally. Hobart does not consider the possibility that a voluntary account might have incidental practical effects at common law. Warburton does not seem worried about that. 21 Hen. VIII and its companion piece, the Mortuaries Act, were made to restrain ecclesiastical courts from their prior practice of taking excessive fees. (The last observation is presumably intended to imply more than the truism it states: The statutes are restrictive. They are intended to take away pre-existing powers of ecclesiastical courts, including fee-setting powers. From their general spirit one can infer that such powers as authority to demand accountings are taken away in not being confirmed, even though 21 Hen. VIII does not say “henceforth administrators shall not be compelled to account”.)

Justice Winch is reported as doubting whether a Prohibition should be granted and then as saying “it seems not”. He expressly agrees with Hobart and Warburton that an
ecclesiastical accounting “is not regarded in our law.” Winch nevertheless saw a legitimate ecclesiastical interest in accountings, without at the same time claiming any ecclesiastical power to compel distribution or perhaps even to revoke administration: “For it may be proper for the Ordinary to see that the administration [is] or will be well-performed, which he cannot without account.” It is not easy to see what “well performed” means unless, as is perfectly possible, Winch would have defended power of revocation as the ecclesiastical court’s device for exercising some control over the estate’s destiny after committing administration. Otherwise it seems that accounting could do little more than show up ill performance, with the possible effect of giving kinsmen a little moral leverage on the administrator and giving creditors a little help of the sort Hobart and Warburton thought illegitimate. Winch’s relative indulgence toward ecclesiastical courts may be explained by the parallel case of the executor, which he mentions. When there is a will, the ecclesiastical court has a much more convincing ground to concern itself with how the management of the estate has progressed beyond probate. The will cannot be “well performed” unless the legacies are paid, and they are in danger of not being paid unless the executor is conscientious about collecting debts and settling with creditors so as to be in a position to satisfy legatees if assets remain. Would the majority judges dispute that an executor is accountable so long as there are unpaid legatees to protect? If not, it may be noted that 21 Hen. VIII no more positively endorses accounting by executors than by administrators. We have seen it argued that the policy of the law was to put the administrator so far as possible in the position of the executor. If one is accountable, Winch may have thought, so should the other be, though admittedly this is by virtue of formal parallelism if there is no private ecclesiastical interest analogous to the legatee’s to be protected against the administrator. One type of case, however, does transcend “formal parallelism”, furnishing a further reason for preserving the power to require accountings: where the administrator is charged with legacies because the decedent has made a will without naming executors or the named executors have refused. That situation could be distinguished in Prohibition proceedings, but perhaps it would be better to avoid the proliferation of rules and hold that because accounting can sometimes serve a valid ecclesiastical purpose it is never objectionable per se.

The report of Oldfeilde ends with a parting exchange between Hutton and Winch. Hutton comes back with his insistence on what the statute positively authorizes: It requires a “good” inventory; it says nothing about accounting. One step beyond the grant of administration is demanded by the statute (and is presumably in some meaningful sense demandable by the ecclesiastical court—perhaps revocation would be available at least against one who failed to render an inventory, and if not that an order backed by excommunication.) To see another step as demandable is to imagine a figment. Winch replies in effect that he is still unconvinced that any intention to destroy existing ecclesiastical powers, save for those it clearly limits or directs, can be read into the statute: “If the Ordinary had such authority before at common law, it may remain at this day.” (A note of tentativeness still clings to Winch. “It may remain [ceo poyt remayne]” perhaps has the force “it is possible but not certain.”)

A briefly reported Common Pleas case from the same term as Oldfeilde, Sparrow v. Norfolk, accords. The situation was different from that presented in any previous case. B was appointed A’s administrator. B died, making C his executor. D, who is not
identified with respect to his interest in A’s estate, sued C for an accounting. A Prohibition was granted. The reporter appends a quaere. This decision is in line with Oldfeilde in the sense that if an administrator’s executor is not accountable in connection with the estate in the late administrator’s hands, neither presumably would the administrator himself have been. In other words, the straightforward reading of the unexplained decision is that the executor takes over such of his testator’s legal duties as do not die with him; if B were accountable as A’s administrator, so would his executor be; therefore the court’s holding implies that B was not accountable. I can see no argument that C should not be accountable even though B was. The better argument would go the other way: An administrator should not be compelled to account either because he has been appointed by mandate of 21 Hen. VIII or, where the statute leaves discretion, because trust has been reposed in him. Either way, he is meant to enjoy the residual estate in so far as he wants to and his conscience permits. The administrator’s executor, on the other hand, may well be a stranger to the intestate and his kin. He is neither elected by the statute nor chosen by the ecclesiastical court. The ultimate adjustment of rights in such a case may be tricky. Should C, in so far as he turns out to be B’s residuary legatee, enjoy the residue of A’s estate because B might have? Or should C be compelled to distribute to A’s kin because B might, as a kinsman and trusted person, have distributed voluntarily? However such questions should be answered, their very trickiness and dependence on further circumstances (Is C in fact A’s younger son, B’s brother, A’s and B’s only close surviving relative?) lends a certain color to accountability. Let the ecclesiastical court, one might say, at least find out how a potentially complicated, and possibly uncomplicated, situation stands. I should imagine that these considerations explain the reporter’s quaere. The court’s decision, however, amounts to rejection of the argument.

Another Common Pleas report, Brian v. Goddard, probably comes from a year after Oldfeilde and Sparrow. The case is unfortunately not stated. What the report gives are statements by Hutton, Warburton, and Hobart on several points touching 21 Hen. VIII. Hutton says straightforwardly that ecclesiastical courts may not revoke administration granted “to a wife or son, etc., according to 21 Hen. VIII.” Quaere whether discretionary grants to more remote kin are revocable. Hutton then adds “nor may [ecclesiastical courts] do any other thing except [require/cite—?] the administrator to render account. (A word seems to be missing—‘…ne faire ascun auter chose forsque ladministrator pur render account.’) Contrary to his position above, Hutton here seems to uphold bare accountability, while expressly detaching it from liability to revocation. Possibly, were the facts of Brian known, his statement could be explained as tentative and incidental—as it were, “The ecclesiastical court may certainly not revoke, which is the point in question now; it may not do anything beyond granting administration and receiving an inventory, unless perhaps it may demand an accounting.” The confusion of

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7 Harl., 5149, f. 291. Slight uncertainty about the date is owing to confusion in the MS. Several pages are headed P. 16 Jac., but mixed in with others headed P. 17. I believe “17” is right, “16” a scribal error, which is corrected by writing in a “7” over the “6” on some of the pages in question. The case, comes where P. 17 ought to be in the volume. There is only a remote possibility that some cases which ought to have been placed in P. 16 got left out and inserted later with P. 17 cases.
dating is such that Brian could have been decided before Oldfeilde and Sparrow, where
accounting had to be faced head-on.

Warburton says that a widow may refuse administration upon first being
appointed or offered appointment, and that she may also renounce it after having taken it
on and having begun to manage the estate. *Quaere* as to the status of this remark. Does it
state the ecclesiastical law? Does it state an implied proviso of 21 Hen. VIII or other
common law standard enforceable on ecclesiastical courts, were they to take the position
that such refusal is impermissible? A question on the statute could conceivably arise
concerning the right to refuse administration, especially refusing to continue serving after
starting to. Does the ecclesiastical court exhaust its authority when it has set up an
administrator and received an inventory so that it has no authority left to appoint a new
administrator even if the old one purports to resign? The sensible answer is of course
“No”. So to admit, however, concedes a scintilla of continuing interest in the estate, and a
scintilla can be fanned into a flame. It is to concede that granting administration is not a
total divestiture of interest, like an unconditional alienation in fee, and if it is not, need
the ecclesiastical court’s remaining interest be confined to power to re-grant in case of
resignation? Warburton also says that when a married woman is sued as executrix “or
etc.” (read “or administratrix”) “she is a single woman by the civil law.” This remark is
labeled as a statement of the ecclesiastical law. “So what?” is immediately unanswerable,
but see below for the possibility that it bears on a husband’s power to renounce
administration held by his wife prior to their marriage.

Hobart begins by agreeing with Warburton’s last point. He then says that
administration granted *durante minore aetate* is “not in” 21 Hen. VIII, with which the
rest of the judges agreed. This is unlikely to mean that a guardian-administrator cannot be
appointed to serve for a clear or exclusive eligible who is a minor—normally a child or
children of the intestate. It more probably means that the statute imposes no eligibility
requirements on the choice of such a temporary administrator and does not bar revoking
his authority or compelling him to account. This interpretation seems confirmed by
Hobart’s ensuing words: “But when it is to the proper person, then it is in the statute.” I
should take “the proper person” to be the one who may or must be appointed under the
statute, as opposed to the special case of a guardian-administrator, choosing and
supervising whom is up to the ecclesiastical court, to be handled as ecclesiastical law and
the court’s discretion indicate. (*Quaere* whether the statute could be said to require
appointing a guardian-administrator when the next of kin are all infants. Is the
ecclesiastical court free to appoint no administrator until one of the children comes of age
and then to appoint him? To appoint the children despite their infancy, leaving it to the
common law to rule on whether a guardian or next friend may sue for debts and answer
to creditors? If the next of kin are all infants, the ecclesiastical court must presumably
respect their statutory entitlement one way or the other—i.e., may not pass over closer
infants and commit administration to the nearest adult kinsman.)

Hobart then says that if the ecclesiastical court does not commit administration in
accord with the statutory rules there are two and only two remedies: ecclesiastical appeal
and action of Debt for the penalty given in the statute. This is presumably to exclude
Prohibitions as a means of enforcing the eligibility requirements, although they were not
excluded as means to enforce the statute’s implied ban on accounting, revocation, and
distribution. A statutory penalty’s being attached to an act is arguably a good reason why
that act should not be prevented by Prohibition, but in other contexts that argument was not always persuasive. The present context militates in Hobart’s favor, however. Retrospective Prohibitions—prohibiting something after it has already been done—were workable enough when their effect was to prevent the ecclesiastical court from executing its decision. But such Prohibitions would be troublesome if employed after an improper grant of administration, because the only way to obey the Prohibition would be to cancel the grant and make a new one. That would raise the question whether any power to revoke survived 21 Hen. VIII. (It would be difficult in practice to get Prohibitions soon enough to prevent improper grants.) A further application of Hobart’s opinion would be in common law litigation: If administration is granted to X improperly, and if X purports to act as administrator by suing for money owed to the estate, the adverse party may not object that X was ineligible under the statute—for the penalty and ecclesiastical appeal are the sole legal responses to the ecclesiastical court’s error.

Hobart’s remarks on remedies by implication support the general “exhaustible authority” model of the ecclesiastical court’s power after 21 Hen. VIII: Once the court has made X administrator, rightly or wrongly, it has used up all its authority and has nothing more to do with the estate, subject only to the feature of ecclesiastical law that the act of a lower court may be appealed. The ecclesiastical court cannot regain or reassert a concern for the estate, nor may it be told by the common law guardians of the statutes to resume such a concern. If it has erred, once ecclesiastical appeals are exhausted, it has committed an irreversible act. A penalty can be recovered if someone will sue for it. Otherwise, since there is neither turning back nor possibility of re-intervention, an erroneous use of the statutory authority is as good as a correct one.

At the end of his remarks, however, Hobart, in accord with Warburton, backs off from the extreme position that the ecclesiastical system’s authority is to do but a single act and die. For the Chief Justice says: “There is a great difference when the Court Christian would repeal the administration and when the administrator comes to them and would not [ne voet] continue administrator, in which case they may [ils poyent] accept his refusal, but that is their affair [mes cee est lour chose].” The meaning seems clear: Administration may not be revoked, but if an administrator accepts a grant and later seeks to resign, the ecclesiastical court is free to accept his resignation and appoint someone else. Its authority is not so far exhausted as to prevent that. There is no duty to accept such resignation, however. Whether to do so depends on ecclesiastical law, if not on the court’s mere discretion. The statute has nothing to say about it. The effect of declining to accept the resignation would be to leave things as they were—the administrator liable to be sued by creditors, despite his unwillingness to serve, and able to sue for debts if he chooses to. By the theory that says administrators are meant to profit from the estate, failure to take advantage of the opportunity to profit by pursuing debtors is solely the administrator’s affair. There is accordingly nothing wrong with the result from the point of view of common law interests if resignation is not accepted. Creditors will not lose by the administrator’s unwillingness to collect debts if they can demand a common law accounting and recover out of the administrator’s pocket in so far as he has failed to realize the estate’s potential. Consequently, there would be no great “temporal” harm in holding that the ecclesiastical court is absolutely divested of authority after the original grant, so that even a second grant after resignation is barred. The judges quite rightly saw no sense in that.

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After these remarks by the three judges, the report adds a further exchange between Hutton and Warburton. Hutton says: “If a woman takes administration and then takes a husband, she may not renounce administration.” Warburton replies: “That belongs to them and not to this court.” Warburton’s point is clear: It is for the ecclesiastical court to decide whether or not to receive proffered resignations of administration; they may, but need not, as Hobart said. The case of a single or widowed woman who takes administration, then marries and seeks to resign, is no different from any other resignation case. It is harder to tell what Hutton is getting at. Perhaps his meaning is that the woman’s husband may not renounce administration in her name, or that she is not automatically entitled to renounce when she loses her former legal identity as a feme sole, owing to the principle stated earlier by Warburton—that by civil law a feme covert executrix or administratrix is treated as if she were single. Otherwise, the point would have to be that the woman’s resignation may not be accepted when she acts on her own initiative, without her husband’s concurrence. (In typical practical effect: Administrator Alice, John’s widow, may not decide that her new husband is well-enough off, and that she would prefer to see John’s estate go to his blood-relatives, possibly her own children.) The reason for such a rule would in a sense be extraneous to the statute. Whatever the ecclesiastical law on married women’s legal capacity, the common law is that they may not act as independent agents; ecclesiastical courts may not contravene this common law standard and defeat expectations founded on it (the new husband’s). It would be possible to argue, however, that partly in order to avoid just this—acceptance of a married woman’s resignation, necessitating common law intervention to frustrate the ecclesiastical court’s perfectly correct behavior by its own standards—the statute enacted absolute exhaustion of authority by the original grant. It would follow, contrary to Hobart and Warburton, that ecclesiastical courts are not free to re-grant upon any administrator’s purported resignation.

A Common Pleas report from 1620 gives no new case but merely lists some precedents of Prohibitions granted to prevent ecclesiastical courts from compelling administrators to distribute. The report is evidence for what contemporary cases attest—that the powers of ecclesiastical courts in intestacy cases were an agitated and unsettled question. Someone was motivated to look for proof that the common law courts had prohibited distribution earlier than the day before yesterday. The citations are as good proof of that as pure precedents can be: Prohibitions granted, but whether contested and whether reversed is uncertain. In the absence of concordant reports, they cannot be taken to establish what the thin stream of reports before Torke leaves open to doubt. The citations are: (1) Barles v. Launder, P. 34 Eliz. No information except that the Prohibition was “for distribution.” (2) Goddard v. Goddard, P. 38 Eliz. “Simile.” (3) Hussey v. Waters, H. 9 Jac. “Prohibition for distribution after administration of goods and chattels and creditors. Alice, wife of the intestate.” Note that the administrator was presumably the widow, not a remoter kinsman appointed by freer discretion. (4) M. 10 Jac. Jane Smith, Widow, and T.S., Administrator of H.S. sued ex officio to distribute, where the Ordinary had taken an obligation to stand by his order.
Continuing agitation of the question of ecclesiastical powers appears from by-play in a report of 1621. The principal matter is a testamentary question unrelated to 21 Hen. VIII. By way of making the general point that Prohibition lies when a spiritual sentence “crosseth” the common law, Chief Justice Hobart cites an otherwise unreported Barrow’s Case, where he and the rest of the court held that a distribution may not be compelled to children of the intestate. By the “very intention” of 21 Hen. VIII, it was held, the residual estate is meant to remain to the administrator. (We are not told who was competing with the intestate’s children—probably his widow, possibly her new husband.) From the Bar, Henden said to Hobart that he could show a precedent of “that.” He appears to be disagreeing with Hobart, so I suppose he means a precedent that would cut against Hobart’s conclusion in Barrow. Precedents of distribution orders if not contested would signify little; it is not clear, but possible, that Henden had something stronger in mind. The judges in any event expressed a desire to see what he could offer.

The first Caroline case on 21 Hen. VIII is the last one in which Hobart participated. As we have seen, practically all the significant decisions on this statute up to 1625 came from his Common Pleas. His final case is something of a tribute to his court’s expertise, because it arose by reference from the ecclesiastical court. Serjeant Henden moved the Common Pleas for an advisory opinion, certifying that he did so by the desire of Sir Henry Martin, Judge of the Prerogative Court of Canterbury. Instead of acting in a problematic situation and leaving it to the losing party to appeal, bring a penalty suit, or seek a Prohibition—the last awkwardly, because a Prohibition to the Prerogative Court would be retrospective—Martin agreed to wait on the Common Pleas’ direction. Henden proceeded to argue one side of the doubtful point, and Serjeant Ashley argued the other. Adversary debate was clearly pre-arranged to avoid later litigation.

The issue was whether administration may be granted to aliens when, save for their alien status, they are qualified or best-qualified by the standards of 21 Hen. VIII. The reporter in stating the case (probably following Henden’s statement) is careful not to assert that the aliens were more eligible than any non-alien. At any rate, they came forward seeking administration as kinsmen and presumably could have been appointed in the absence of superior claimants if they had been natives. They are described as “the next of kin or rather [ou potius] [persons] who pretend kindred to him [the intestate].” The aliens were subjects of a friendly prince (unspecified), not enemies.

Henden argued that aliens could not be made administrators. In one way, this was an uphill contention, because, as Henden conceded, there was no bar to alien executors. As we have seen, the policy of the law was arguably to put administrators as nearly as possible in the position an executor would occupy if the intestate had made a will. Nevertheless, Henden advanced three arguments. One is the predictable argument from public policy or the general welfare. Aliens are “but adventives here, and go again as speedily as birds in the air.” Such transitory creatures should not be allowed to carry away the substance of the realm. (Although Henden does not state it, there is a reasonable distinction between executors and administrators in these mercantilist and xenophobic terms. Executor-residuary legateses have a shot at the estate after debts and legacies. Administrators in the ordinary case, as 21 Hen. VIII was applied, were free to keep the

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9 P. 19 Jac. C.P. Winch, 11.
10 P. 1 Car. C.P. Harg. 30, f. 208b.
estate after debts. Ceteris paribus, an alien administrator would have a better chance to carry off more of England’s substance than an alien executor. Ecclesiastical power to order distribution would correct the evil and render alien administrators less harmful than alien executors, assuming the power to be broad and discretionary. Wealth liable to be exported could be taxed in favor of English charities if the decedent left no English relatives.

Secondly, Henden argued that the ecclesiastical court may not appoint two administrators or groups of administrators, one for chattels real and the other for chattels personal. Granting the premise, aliens may not be made administrators at all, because aliens may not take real estate, including chattels real. (Presumably, though this is not articulated, it would be too awkward to let the choice of administrators depend on whether the estate actually contained any chattels real. If a testator names an alien executor, is administration to be granted to someone else—an English subject—\textit{quaerendo} chattels real only? In that case, would both the executor and the administrator be suable by creditors, the liability of each being limited to the value of the part of the estate under his control? For a final \textit{quaerendo}: Is it true that an alien may not take chattels real and protect them by actions of Trespass and Ejectment? That is hard law, for it means that a resident alien cannot rent a house or shop save as a tenant at will. There is of course no doubt of aliens’ incapacity to take and defend freeholds.

Finally, Henden claims authority for the proposition that “nearest of blood” in 31 Edw. III, and hence the equivalent expressions in 21 Hen. VIII, should be construed to mean “nearest of blood not attainted of treason or felony or subject to other legal disability.” Alienage, Henden maintains, is a legal disability within this construction, owing to aliens’ incapacity to hold real property. It is a relevant disability because, as the second argument says, the incapacity can sometimes prevent an administrator from acting as one and enjoying the residue of the estate, and if it is true that there cannot be separate administrators for real and personal chattels, the disability must sometimes absolutely bar an alien’s appointment for any purpose. (The contrary seems arguable enough: “Nearest kin” means “next-to-nearest” when the literally closest are persons in high bad odor with the law—convicted traitors and felons, whose own property, including anything that would be left to them out of the intestate’s estate, is forfeit. If the construction is extendable to “other disabilities”, should it not be to comparable ones—outlawry and excommunication perhaps? Are aliens, who suffer from only one disability and otherwise enjoy the full protection of the law in their persons and property, in the same case?)

Interestingly, Serjeant Ashley does not attempt to answer Henden on the merits of aliens’ eligibility, except by asserting that since an alien can be an executor he can be an administrator as well. Having so asserted, Ashley turns to a higher plane: The question belongs to the ecclesiastical court. It is up to it to decide whether there is any objection to an alien administrator. If it decides there is none and appoints one, the common law courts have no basis for interference, assuming the alien appointee is not ineligible, relative to someone else, by the express standards of 21 Hen. VIII, and even then title to interfere by Prohibition can be questioned. The statute mandates the next of kin, subject to discretionary scope in some situations; it says nothing about eligibility in any other terms. In taking this line, Ashley is not undercutting the project of taking an advisory opinion. His position is probably what Sir Henry Martin would like to see upheld. The purpose of the advisory opinion would be served if the Common Pleas were to renounce
its competence to decide (even if it expressed a purely advisory view against aliens—a mere warning against the danger of appointing them, the public disutility, the possibility of complications arising from chattels real, the likelihood of someone’s trying to appeal within the ecclesiastical system.) Martin could go ahead and use his judgment without fear of future trouble from the Common Pleas. Ashley’s position does not lack force. The statute is silent on eligibility apart from familial propinquity, and unless the statute sets standards for the common law courts to enforce, it is hard to see what title they would have to concern themselves. In support of his point, Ashley cites a King’s Bench case from the same term as the present discussion in which he himself was unsuccessful counsel: He tried to prevent an ecclesiastical court from granting administration to a bastard, but was turned down by the King’s Bench on the ground that the appointment of administrators is an ecclesiastical matter.

Ashley’s argument and citation prompted a testy reply by Hobart. The Chief Justice “dislikes that doctrine. It is true that the granting of administration belongs to the ecclesiastical judge. But yet he is guided by statute law as to whom he may grant it to. And if he does not grant it to such person as the statute appoints, we may prohibit…But he commends the judge of the prerogative court for taking their direction, so that both laws may accord in the granting of this administration.” Hobart’s remarks conclude the report except for the information that the court wanted to advise further. There is no discussion by the judges on the merits of aliens’ eligibility.

The exchange between Ashley and Hobart is noteworthy in several respects. In the first place, it puts Hobart squarely behind the proposition that Prohibition lies to enforce the eligibility requirements of 21 Hen. VIII., contrary to his apparent position in Brian v. Goddard. Ashley did not, however, dispute the prohibitability of ecclesiastical courts that misapply the eligibility rules. Hobart may have missed Ashley’s point, for it is surely not that Prohibition is inappropriate if the ecclesiastical court by-passes a widow and son in favor of a third cousin. The point is that there is no basis, even so, for prohibiting if the ecclesiastical court appoints an alien whose eligibility is otherwise clear. But the point is answerable, and perhaps Hobart should be credited with embracing a relevant answer.

Henden had shown the way: The statute requires appointing next of kin. “Next of kin” means “Nearest relative not subject to legal disability.” That it so means is a statutory construction solely within common law competence. To enforce that meaning on the ecclesiastical court is no different from enforcing a much more obvious or literal meaning, as by insisting that administration not be granted to a third cousin in preference to a son. Of course to prevent a grant to an alien requires deciding that “next of kin” actually has the meaning that Henden proposed, and that alienage is among the legal disabilities contemplated by the statute. Hobart made no commitments on those questions. But he was entitled to dislike the doctrine that there could be no basis for interfering with a grant to an alien, that the statute must be construed as favoring or leaving intact the powers of ecclesiastical courts except in so far as literal, unmistakable directions are given for the use of those powers. It is a doctrine that can go against the main achievement of Hobart’s court in the field of intestacy: 21 Hen. VII does not say that a distribution may not be ordered; it only so means by the Common Pleas’ construction. Ashley’s position generalized was that the statute’s silence must have the effect of leaving ecclesiastical courts as free as they were “at common law” to deal with
intestates’ estates. (It is conceivably arguable that, whereas “at common law”—before 31
Edw. III—ecclesiastical courts were so free that no objection could be made to their
choosing a stranger over a son, appointment of an alien would still be controllable. Might
choosing a legal non-person, if an alien is classifiable as such, and putting a foreigner in a
position to make off with the substance of the realm, not be considered so extremely at
odds with the common law and public policy as to be prohibitable? Of course this
suggestion is purely theoretical; there is no sign of it in the report.)

Ashley’s case of the bastard is valuable as a spark of evidence on the King’s
Bench attitude in a field dominated by the Common Pleas. Disproportionate resort to the
Common Pleas suggests that those hoping to prohibit ecclesiastical courts in intestacy
cases realized that their chances were better there. The case of the bastard confirms that
inference to the extent that a single case with peculiar characteristics can. Hobart’s
adverse reaction to the doctrine he had just heard may include King’s Bench doctrine as
he understood it to be and may imply that he would have decided the bastard case
differently. That is uncertain, however; one could concede the ecclesiastical court’s
freedom to appoint a bastard and still contest its authority to choose an alien.

Comparison of the bastard and the alien is tricky. We lack information about
Ashley’s case, but it is likely to have been simple and formally parallel with the alien:
The only really close relative of the intestate in an everyday, “natural” sense is an
illegitimate son. The King’s Bench sees nothing in the statute to bar appointment of an
illegitimate child in preference to remote kinsmen and nothing to require it either—
certainly there are no express words in point. Therefore the court concludes that
Parliament left it up to the ecclesiastical judge to decide, as he presumably could before
the statute law invaded the area of intestacy. A similar way of thinking is possible in the
alien’s case. Are there grounds for distinguishing?

It seems to me that distinctions cutting in both directions can be drawn. Surely
there are stronger policy considerations against alien administrators. A bastard English
subject does not threaten to export the substance of the realm nor to turn into an enemy
fifth columnist when the winds of international politics shift. The only public interest to
be served by disqualifying bastards is the discouragement of incontinence, and that is a
sector of the public interest for which the Church is primarily responsible. Secondly, an
alien’s legal personality is more qualified than a bastard’s. A bastard lacks capacity to
inherit real property of which his ancestors were seised, but in most other respects he is
like anyone else. He is fully competent to take property of all sorts by purchase, unlike an
alien. Moreover, in typical circumstances a bastard is more likely than an alien to fall
within the protective purpose of 21 Hen. VIII. The statute favors flesh and blood—
widows, children, those whom the intestate would probably have favored if he had made
a will. It is likely enough that a man will leave only an illegitimate child and relatively
remote kinsmen, in which event the child will have been the more probable object of the
intestate’s personal concern. It would perhaps be hard to say that the ecclesiastical court
must choose the bastard in that situation, whatever the traditions of ecclesiastical law and
the considerations of public policy in the Church’s special keeping, but it is still harder to
say it may not. By contrast, an Englishman is unlikely to have an alien child or widow.
(Whether that is even a possibility in the case of a legitimate child may make a question.
It depends on whether children born abroad to English parents, an English father, or one
English parent, are natural born subjects of the King. So far as I know, a foreign woman
was not naturalized by marrying an Englishman. Bastards born abroad of English or part-
English parentage would surely be aliens; their incapacity to be heirs of property rested
on the maxim that they have no legal—only biological—ancestors; it is necessarily
implied that they cannot derive nationality or “allegiance” from parents.) A case
involving an alien candidate for administrator will probably be a contest between
comparatively remote kinsmen, for whose rights relative to each other the statute is less
solicitous than for the claims of the really close. For these reasons, one might concede the
correctness of the King’s Bench precedent and still maintain that Prohibition should lie to
prevent appointment of an alien.

Per contra, it can be urged that while 21 Hen. VIII has no apparent anti-alien
intention it cannot be understood as permitting the appointment of bastards. Without
moralizing about incontinence, one may wonder whether a statute that talks about
kinsmen does not have the sense “legitimate kinsmen” in mind. It may be plausible to
suppose that the spirit of the statute favors a bastard over a distant cousin, but if
legitimacy is taken not to matter at all, problems arise and improbabilities seem implied.
If, let us say, the choice is between my two biological nephews, is it likely that a mistake
of my brother’s youth is supposed to have as good a claim on my personal estate as the
legitimate son of my brother, who happens to be my common law heir? More abstractly,
there is an argument that in case of ambiguity statutes should be taken to use words in an
“artificial” legal sense rather than their “natural” sense. The application to 21 Hen. VIII is
that words equivalent to “kin” should be taken the former way—to mean in effect
“persons capable of inheriting land at common law.” This is a more restricted class than
biological kin, not only in that a bastard cannot take as heir from his (biologically) linear
kin, but also in that no (biological) collateral, though legitimate himself, can inherit from
a bastard. The point is not entirely unconvincing, however. Given a strange world where
it was correct to say “In contemplation of law a bastard has no collateral relatives”, one is
obliged at least to ask whether the legislature would have spoken of “relatives” in a sense
that is inconsistent with the maxim. Parliament was still thought of as legislating largely
within the interstices of the common law. That is a basis of sorts for presuming that it
talks the peculiar language of the common law. There is perhaps somewhat more reason
to read for “kin” “kin as the common law understands it for property-law purposes” than
to read “kin subject to no legal disability, even of the limited sort aliens are subject to.”
Thinking along these lines, one might conclude that if the King’s Bench was right in
permitting the ecclesiastical court to appoint a bastard if it chose to, a fortiori it should be
free to appoint an alien; if the King’s Bench should have prohibited appointment of the
bastard, it does not follow that appointment of an alien should be blocked.

No judge besides Hobart speaks in the advisory opinion case. The court did not
announce an opinion on the question before it, but adjourned for further advisement.
There is no report of a resolution later.

After Chief Justice Hobart’s death, the King’s Bench had a larger share of
intestacy cases than before, and some major debates took place in that court. Let us,
however, follow out the post-Hobart Common Pleas decisions before turning to the
King’s Bench. In Fotherley v. Fotherley, 11 the first case from the Common Pleas under
Sir Thomas Richardson’s Chief Justiceship, the ecclesiastical courts’ lack of power to

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11 H. 2 Car. C.P. Harl 5148, f.114; Croke Car..62, sub nom. Fotherby’s Case.
compel distribution was upheld in the face of “strong” argument contra (as Croke’s report calls it.) The exact circumstances, which might be considered to affect the equities though they should probably not be allowed to, are given in the MS. Report: Nicholas had a copyhold worth £40 per annum. Before his death he surrendered the copyhold to the use of Anne his wife for her life. Nicholas died intestate leaving £200 worth of goods (i.e., personal property apart from the copyhold.) By Nicholas’s death the reversion of the copyhold descended to his sister Mary. (I.e., Nicholas and Anne had no children; Nicholas’s heir under the law of the manor governing copyhold—properly speaking, but she was no doubt his common law heir as well, or simply his nearest blood-relative—was his sister.) Administration of the personal estate was granted to Anne. Mary sued to compel distribution, and the ecclesiastical court acceded to the extent of ordering Anne to pay her £20. Anne sought a Prohibition.

Anne’s contention was the straightforward one, supported by earlier cases: 21 Hen. VIII simply deprives the Ordinary of power to compel a distribution. Mary’s contention, so far as the reports bring out the arguments of counsel, was the contrary of that, plus a couple of further wrinkles, at which we shall look just below. The precise circumstances may, however, have been thought to slant the equities in Mary’s favor, and the reporter’s spelling them out may suggest that counsel tried to make something of them explicitly: Here the wife was lawfully appointed sole administratrix, but it would have been equally lawful to appoint the sister or both. The wife was well taken care of by the conveyance of a life-estate in the copyhold. (A common law owner of land could not literally make the same provision for his wife, though he could do the same in effect by creating a jointure or trust. I.e., it was by virtue of the peculiarities of copyhold that Nicholas was able to make what amounts to a direct conveyance to his own wife, so that in a nominal or legalistic sense Anne was in an especially favorable position.) Distant relatives were not trying to make away with part of the estate, but only the one closest relative, whom the ecclesiastical court had left out in the cold. All she got, if £200 represents the net estate, is 10%; all the wife lost was that small portion of the fairly generous increment which the personal estate would add to her already generous life income (annually, £200 divided by her life-expectancy, plus interest on the unexpended part, I would suppose.) One can imagine Mary’s difficult situation, though whether it was really difficult of course depends on other variables: she had an uncertain possibility of a livelihood from the land but nothing in the meantime, and she asked for a modest £20 to tide her over a few precarious years. In short, if ever ecclesiastical power to compel distribution would have a useful purpose it is in this sort of case.

Croke’s report tells us that Serjeants Henden and Finch argued against Prohibition. All that report says about their position is that they argued from the “usual course”—i.e., that ecclesiastical courts made a practice of ordering distribution. The MS. report gives only the speech of Finch, specifying several points. His basic claim was of course that statutory intervention in the field of intestacy did not take away the Ordinary’s power to compel distribution. Despite a good deal of water over the dam, one may say, this position died hard; it deserved to, in that 31 Edw. III and 21 Hen.VIII certainly do not, yet could if they would, destroy such pre-existing power in terms. However, Finch’s remaining arguments suggest that his hopes for a fundamental victory were no brighter than they should have been. He cites an unnamed Prohibition case from Lord Hobart’s time in which, after hearing debate, the court advised an administrator to
submit to distribution. It sounds as if Finch well knew that there was authority from Hobart’s time against him; he found an instance in which the judges would probably have been constrained to prohibit, but for some circumstantial reason preferred not to and put off action in the hope that the administrator could be dissuaded from inequitable insistence on his legal rights. From such an instance he hoped to show that the court’s commitment to “No distribution” was less than absolute—that it might be committed to preventing ecclesiastical judges from directing the final distribution of estates *ad libitum*, but reserved a discretion to permit distribution when the case for a particular form of it was especially strong.

Finch’s second point is more explicitly in the same spirit. He does not go over all the circumstances of the instant case, but relies on one—“because the matter here is small.” I take this as admitting by still clearer implication that as judicial exposition of the law now stood distribution was not compellable, generally speaking. But again Finch hoped to salvage a certain discretion to deny Prohibition: a “small matter”, such as the assignment of one £20 quasi-legacy out of a £200 estate, does not count as the sort of distribution that the statute bars, if it is conceded to bar distribution generally. Perhaps the distinction could be best defended as a legal economy: the prohibiting power does not have to be used whenever an ecclesiastical court exceeds its authority in the slightest technical sense; a margin of discretion is inseparable from the Prohibition, lest it be used vexatiously and the common law courts be burdened with trivia, where there is no substantial deprivation of rights.

Finally, Finch argues that Prohibition should not be granted after ecclesiastical sentence. Again, his tactics show that his real hopes were centered on cracks and side-issues. Finch’s proposal was that Anne should have sought her Prohibition, if she ought to have one at all, before Mary’s suit for distribution was acted on. His ground is dubious, for sentence was far from a categorical bar to Prohibition. It was, however, sometimes regarded as a basis for discretionary denial of a writ (cf. Vol. I, p. 115 ff.), and in the context Finch was trying to create for the present case his point is cogent. It is perhaps arguable that an administrator who wants to avoid a distribution has a special duty to act promptly. There is after all a sense in which an administrator is invited to consider making a distribution of his own will. As 21 Hen. VIII was interpreted, the ecclesiastical court’s authority to work out a final disposition is transferred to the administrator. He may decide not to distribute, but if he suffers an ecclesiastical court to order a given distribution (albeit improperly) he has arguably acquiesced in the proposition that that distribution represents his own judgment of an equitable settlement and is estopped to say later that it does not. Acquiescence in a sentence of distribution can be more plausibly attributed to an administrator than acquiescence in ecclesiastical sentences to ecclesiastical defendants generally. This point would hold for a large-scale, equitably questionable distribution. It holds all the more for the modest and easily defensible one in the present case. Finch need not even argue that every administrator who wants to block a distribution must act before sentence, though that is a reasonable exception from the usual rule on the effect of sentence. It is enough for him to say that Prohibition may be denied in discretion when a particular administrator has weak equitable grounds for objecting to a distribution (which, for a small estate at any rate, might justify denial of Prohibition even before sentence) and compounds his folly by delaying unnecessarily.
The MS. report of Fotherley v. Fotherley proceeds to give the opinions of Chief Justice Richardson and Justice Hutton, mentioning Justice Yelverton as concurring with Hutton on one point. (Croke reports only Hutton’s speech, at greater length.) Richardson knocks down Finch’s contentions one by one. He starts out by saying that the case is not new, citing Torke (sub. nom. Tucker’s Case, misdating it 12 Jac.) as a fully debated decision against distribution. He then says, in direct reply to Finch, that it is irrelevant whether ecclesiastical courts purport to distribute large or small sums—it is unlawful either way. Richardson makes a generalized concession to Finch’s point that Prohibition should be sought without undue delay, but at once takes distribution cases as a group out from under that principle: “…it is true that Prohibition ought to be prayed in due time, but that is in cases that concern interests and rights which depend long and then are settled. There the court will not grant Prohibition. But here you come to the Ordinary and pray distribution and it is granted presently, and therefore a Prohibition cannot be [obtained] sooner.” In other words, administrators are not under a special duty to act promptly to block distribution efforts; on the contrary, suits for distribution are typically disposed of so quickly that administrators cannot be fairly expected to anticipate sentence.

Richardson next says a word about what he takes to be the main practical argument in favor of ecclesiastical power to compel distribution: it is said to be “inconvenient that the wife should have all the estate and the issues nothing.” This Richardson denies: “But that is not inconvenient, for it will make the parents more solicitous to provide for their issues.” What sort of reason that is less than evident. Men will be less likely to neglect providing for their children by will or inter vivos gift if they know there is an appreciable risk of their widows taking all should they die intestate? Maybe so.

Finally, Richardson speaks to the major point of the statutes’ effect on the powers of ecclesiastical courts. He says that before 31 Edw. III distribution was unquestionably compellable, thereby implying that the earlier statute, rather than 21 Hen. VIII, altered the law. (That seems to me a defensible position, in a somewhat left-handed way. 31 Edw. III lays down much less definite rules than 21 Hen. VIII, but it lays down a rule; 21 Hen. VIII no more expressly bars distribution than 31 Edw. III; if the effect of any statute requiring appointment of administrators and indicating who shall be appointed is to remove the ecclesiastical court’s power to control the final disposition, the older statute will do as well as the newer.) Richardson then adds that between 31 Edw. III and 21 Hen. VIII the ecclesiastical court could repeal administration without cause; since 21 Hen. VIII, repeal must be for cause (no indication of what counts as cause.) This dictum confirms that the power to distribute, in Richardson’s view, was destroyed by 31 Edw. III (whether or not contemporaries would have realized that); 21 Hen. VIII cut back ecclesiastical powers still further by banning arbitrary revocation.

Justice Hutton, as reported by the MS., says that Prohibition is undoubtedly grantable, that the statute has “made an interest in the wife”, and that “it is intended that the wife will make distribution to their issues.”(I.e. the law is not against the distribution of estates, but presumes that the administrator is trustworthy to make such a distribution when it is appropriate.) Hutton then adds, with Yelverton’s concurrence, that Mary’s claim to a share of the personal estate in this case was particularly weak owing to her reversion in the intestate’s copyhold. His reason is a technical analogy: In localities
where relatives had a customary, temporal right to part of a dead man’s goods, a relative on whom a reversion in the deceased’s land descended was barred from claiming such share. The point can be made less technically, as the countervailing side of the equitable case in Mary’s favor sketched above: Someone who inherits a valuable interest in land from an intestate has even less business claiming distribution than a close relative absolutely left out.

As reported by Croke, Hutton covers the ground more completely in coming to the same conclusion. He appears to agree with Richardson that 31 Edw. III, rather than 21 Hen. VIII, cut off the power to distribute. Like Richardson, but a little more strongly, he takes 21 Hen. VIII as eliminating the further power to revoke at discretion. (The slight differences are: Hutton says that free revocation is unlawful especially after 21 Hen. VIII, as if to suggest that 31 Edw. III may already have done the job. Whereas Richardson admitted the present-day legality of revocation with cause, Hutton may imply that revocation is now illegal in all cases except to correct a violation of the statutory standards in the original grant of administration. He may also imply that bare accountability before the ecclesiastical court was eliminated at the same time as revocability.) On utilitarian aspects of the case, Hutton observes that power to compel distribution would be mischievous because an administrator might be stuck with debts unrevealed at the time of distribution. The most careful accounting, he says, cannot certainly guard against that. Finally, Hutton cites some of the authority that unquestionably existed on his side. (In addition to Torke, cited as Tooker v. Loan, he mentions two cases not independently reported: A Watts’s Case, 9 Jac., no details. A Clerk’s Case, 20 Jac., where an administrator prohibited an attempt to compel distribution even though, when administration was granted, she had entered an obligation to make such distribution of the residual estate as the Ordinary should appoint.)

The MS. report informs us that Fotherley v. Fotherley was adjourned after the reported discussion, but that a Prohibition was subsequently granted, in accord with all the judicial opinion expressed.

Davies’s Case (1627)12 is sparsely reported: Prohibition granted to block an attempt to make the intestate’s widow-administratrix distribute. An anonymous case from the following term13 confirms the unlawfulness of compelling distribution, but with a touch of qualification. Initially, the puisne judges agreed on that point in the absence of Chief Justice Richardson. The report states their holding in such a way as to put the connection between power to distribute and power to revoke in a slightly different light than usual: Administration granted to the intestate’s wife cannot be revoked, therefore the initial grant exhausts the ecclesiastical court’s power, therefore that court has no power left to force a distribution. In this formulation, irrevocability is the premise on which the absence of distributing power depends. (Contrast the suggestion that power to distribute directly was infringed by statute before power to revoke at will and thereby influence the disposition of the estate indirectly.) The judges added the generality that once administration is duly granted the grantee has an interest of which he may not be

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12 T. 3 Car. C.P. Harl. 1541, f.145b, sub nom. Davys; Littleton. 37, sub nom. Wife of Sir Robert Davies.
13 M. 3 Car. C.P. Littleton, 54; Hetley, 48 (not specifically dated but identical almost verbatim with Littleton.)
deprived by revocation—no indication that there may be a penumbra of lawful revocation for cause, at least undue original grant. The judges are said to have made this firm holding in the face of objection that Prohibitions in such cases had not been granted until recent times—a true enough observation if recent times include Lord Hobart’s day. As in Fotherley, there are hints of a counter-offensive—of lawyers emboldened, with some justification, to make out that recent intestacy law was not very well-founded and to reverse the current.

Two dicta are also reported. I am not sure what one of them means: Per Justice Yelverton, administration may not be granted until a division is made. (Over-hasty grants of administration are unlawful? And controllable? The immediate family of an intestate should be given a chance to split up his visible goods by voluntary agreement before an interest in everything is conferred on someone by a grant of administration? If such a chance is given, there is no need for revocation and distribution? I am not sure.) The other dictum, by Justices Croke and Harvey, contributes a point not previously embraced: An Action on the Case will lie against the ecclesiastical judge if he does not grant administration where he ought—i.e., presumably to those eligible by the statute. This would seem to mean that eligible persons may sue the Ordinary for actual damages—presumably the whole net value of the estate, at least when only one person is eligible. (What the damage to any one of six eligible equally persons excluded by a misappointment would be makes a question.) Availability of an Action on the Case means that the party grieved is not confined to the set penalty provided by 21 Hen. VIII—£10, obviously less than the actual loss that an excluded eligible person might, or solely eligible person would, sustain by failure to obtain administration of any considerable estate. There is no telling whether Croke and Harvey meant this observation to have a bearing on the matters immediately at hand. (It might go with a very strict rule on revocability: Even an egregiously improper grant may not be revoked, because anyone wronged by the same is adequately protected by his action for damages. Administration “duly granted”, and hence irrevocable, means only “granted in a formally sufficient manner by the standards of ecclesiastical law”, not “granted to a statutorily eligible person.”)

This case was reargued later, in Richardson’s presence, Finch contending against Prohibition, as he had in Fotherley. He cited a Davies’s Case on his side, which, however, is clearly not the Davies’s Case just above. (It is more likely to be identical with the nameless case from Hobart’s time which he had relied on in Fotherley.) For Richardson quickly intervenes to concede and distinguish the Davies’s Case now in question: There was such a case, where Prohibition to block distribution was denied. However, that was a case “of extremity.” It was a case of a widow-administratrix who drove the intestate’s son, and apparently her own, from her house and allowed him no maintenance, nor had the son been provided for in any way by his father (by inter vivos gift presumably.) Although he does not say so, Richardson clearly saw no comparable “extremity” in the present case and had no intention to depart from the general rule that distribution is not compellable. He did, however, have the courage of his concession, for he proceeds to articulate the appropriate generalization: ultimately, it lies in the court’s discretion whether or not to prohibit in distribution cases. (In Fotherley, Richardson seems rather to resist yielding to this view, but he may not then have been confronted with a case he remembered that seemed to require it. On the other hand, he may have
modified his opinion towards the indulgent view of ecclesiastical powers that generally characterized him and sometimes divided him from his colleagues. He may have preferred the view that authority to order distribution was not absolutely wrested from ecclesiastical courts by the statutes, but only directed. I.e., the statutes in effect require that the traditional ecclesiastical power be used only to prevent extreme inequity. To base such a position on the statutes, it seems to me, is harder than to attribute either of the more radical effects to them: that they leave the power to distribute intact because they do not mention it, or that by intendment and implication they destroy it utterly. One would perhaps be better advised to argue that every Prohibition, of whatever kind, is ultimately discretionary, that the courts are never obliged to close their eyes and prohibit, whatever the practical effects and the equities. Possibly that is what Richardson meant.) Justices Croke and Harvey did not like what they heard from the Chief Justice. They declined to make an issue of it publicly, but “said secretly between themselves that it was not in the discretion of the court.” Croke and Harvey would presumably have held that Finch’s Davies was simply wrong.

In Lady Button’s Case,14 close in date to those above, Richardson’s view that Prohibition is discretionary in distribution cases comes out again. Of the facts we are only told that sisters of the intestate sued the widow-administratrix for distribution and that Prohibition was sought after sentence ordering the same. The report says that various causes for Prohibition were alleged, but that Richardson insisted that 21 Hen. VIII was the only relevant basis. He then went on, however, to say “upon the statute” that “upon conference with the Judges, he conceived that it was in the discretion of the Court to grant a Prohibition in such cases or not.” Perhaps Richardson had conferred with the King’s Bench judges, for two of his Common Pleas colleagues at once expressed their disagreement. Hutton made the basic points—Prohibition must be granted; an administrator is in the same position as an executor, though anciently both were liable to have a distribution forced upon them; in appointing administrators the ecclesiastical court executes its authority and has no more left—with the additional observation that sisters do not have even a colorable claim to distribution, no more than cousins. The thought behind the latter point is that children do have at least a colorable claim—though Hutton believes not a valid one—as against a widow-administratrix. His stated reason for the distinction is that c. 18 of Magna Carta requires that children have a share of their father’s goods but says nothing about brothers and sisters. He would seem to be suggesting that a respectable argument might be made to the effect that it is rather strong medicine to hold that more recent statutes repeal a clause of Magna Carta, yet one must so hold to reach the conclusion that under those statutes distribution is never compellable. Hutton is clearly ready to swallow the strong medicine. He would presumably say that Magna Carta was addressed to a situation that had now been superseded—a situation of uncontrolled ecclesiastical power now superseded by one sufficiently protective of children’s interest on the whole—and could therefore be regarded as “repealed” with equanimity. His immediate point is that the “respectable argument” will only avail a child, not other classes of kin. Behind his sense that a colorable case for limited power to compell distribution could be made from Magna Carta may lie a certain unease about the “natural justice” of contemporary law. Ought the law to permit a widow-administratrix—

14 Hetley, 68. 3-7 Car. C.P.
wicked stepmother perhaps—to shut the intestate’s offspring out? It did so, in Hutton’s opinion, and Hutton had no use for Richardson’s discretionary-Prohibitions approach, but he may have recognized that an inadequacy in the law pushed the Chief Justice into that approach. The inadequacy, however, extended only to neglected children, not to the miscellaneous ranks of other kin. In support of his main position, Hutton cites an otherwise unreported Isabel Tower’s Case, where Prohibition was granted.

Justice Harvey spoke to the same effect as Hutton, mentioning the problem of the “sleeping debt” as a reason against distribution. Harvey contributes a new wrinkle by mentioning a Flame’s Case, in which it was said that if ecclesiastical courts cannot order a distribution after an estate is settled they will get to the same result by compelling distribution before granting administration. The argument would seem to be that distribution is ultimately unpreventable de facto and therefore might as well be permitted as a judicial act of the ecclesiastical court at the most appropriate time. (Just what would compelling distribution before granting administration consist in? Perhaps the range from conditional grants and bonds to less formal but probably more effective techniques—more effective because the enforceability of bonds, at any rate, is questionable. I should suppose that the best way to insure de facto distribution would be to put off a grant and indicate to the preferred candidate that he would be appointed when and if the close relatives had split up the liquidated property by agreement.) To this argument, Harvey replies (or perhaps refers to the answer given in Flame’s Case) that “they have not any such power, for he ought to commit administration if it be demanded.” I.e., it is not so easy to effect a distribution by informal manipulation. Quaere tamen. What is the remedy if the Ordinary drags his feet when an eligible person demands administration? Is there one outside the ecclesiastical system? Anyhow, Harvey adds that “so it was” by unanimous opinion in one Clark’s Case. There is no telling what the form of that case and the significance of the decision were.

The final bit of information in the report of Lady Button is that Justice Yelverton declined to express an opinion about the Ordinary’s power to require distribution, but nevertheless agreed to a Prohibition. It is possible that Yelverton was attracted to Richardson’s approach or worried about the law’s stance and therefore unready to chime in with Hutton and Harvey. The Prohibition in the instant case may of course have had Richardson’s consent as well as Yelverton’s. The last case above indicates that Richardson would usually be inclined to employ his claimed discretion by granting Prohibitions, reserving denial for hardship situations, such as Lady Button’s sisters-in-law may not have been in.

In Gray’s Case,¹⁵ Magna Carta was used by Serjeant Henden to argue for limited powers of distribution. The exigencies of the case were such that Henden had to claim precisely what Hutton in Lady Button said could not be claimed even plausibly on the basis of Magna Carta. For in Gray one brother of the intestate was seeking to compel another brother, the administrator, to distribute. In relying on Magna Carta at all, Henden may have realized that he was playing the last trump card held by the succession of litigants who tried and failed to salvage the distributing powers of ecclesiastical courts (by relying on tradition and the ambiguity of the more recent statutes.) In using it for the purposes of the present case, he had to maintain that a brother is within the same reason

¹⁵ Hetley, 134. 3-7 Car. C.P.
as the widow and children whom Magna Carta protects in terms. So he maintained expressly, while conceding that remoter relatives could not at the present day force distribution.

The reported judicial response to Henden comes from Hutton and Harvey and goes predictably. The two judges do not really take on the general argument from Magna Carta—i.e., show why the modern law, though at odds with the policy of Magna Carta, is a necessary interpretation of modern statutes, which statutes do not crudely repudiate Magna Carta, but create a new and better system, and so render its concerns inoperative. Rather, the judges concentrate on the invalidity of claiming anything for a brother if a claim on behalf of a widow or children were plausible: A younger brother might be given the personal estate as administrator while a quantity of land might descend on an older brother. It is reasonable that the older should have a share of the personalty as well? Why is a brother any more in the same case as a child than a cousin in the same case as a brother? For the rest, amid some garbled remarks that only go to show that Hutton and Harvey remained firm in their anti-distribution opinion, the judges allude to the resources for effecting a distribution in fact when ecclesiastical courts could not effect one de jure. Harvey recollects an instance in which an Ordinary put off granting administration until he had somehow managed to get £600 from a large intestate estate committed to charity. The technique must have been to exact a bond, for Harvey adds, “But…in the time of Sir John Bennet [once judge of the Prerogative—i.e., probate—Court of Canterbury], such an obligation was questioned, and they would not endure the trial of it.” The implication is that a bond obliging one, if appointed administrator, to make a certain disposition of the estate is invalid. Hutton suggests a possible technique, apparently the product of his imagination rather than his experience (for his words are “they might invent a new way”)—viz. to split up the administration, “As if the estate be £400 they might grant administration of the goods, of the value of £100 to the other [i.e., to such person as is deemed entitled to a distributed share].” Hutton hastens to add, and Harvey agrees, that such a grant would be unlawful. Thus, in still another way, there is no danger that abolition of ecclesiastical courts’ power to compel distribution will be nominal abolition.

My last Common Pleas case16 is later (1634) than the cluster above. It is significant because in one dimension it raises a question touched on elsewhere but not put directly in any previous Common Pleas case: May the Prohibition be used to prevent the original probate court from granting administration to an ineligible person? Or are the only remedies the penalty appointed by 21 Hen. VIII (plus perhaps tort liability as suggested above) and (if there is no objection to these latter) revocation and ecclesiastical appeal? The report of the 1634 case furnishes evidence that the court considered Prohibition for that purpose inappropriate. (in keeping with Hobart’s intimation in Brian v. Goddard.) That position is not, however, essential to the decision in the instant case to deny Prohibition, since the court did not think there was an erroneous grant to prohibit. Therefore the case does not count as strict authority against Prohibition to enforce the eligibility requirements as such. In the end, there is no strict authority to that effect, for we shall see that the propriety of using the Prohibition was put before the King’s Bench only in a complicated context, and the case in which the matter was raised was not decisively resolved.

16 M. 10 Car. C.P. Harl. 4813, f. 101.
In the 1634 case a woman died intestate. Her next of kin by blood sought a
Prohibition to prevent the granting of administration to her husband. The report’s
statement of the case suggests that administration had not yet been granted to the
husband, but that the kinsman only feared it might be. (All the report says is, “This term
the case was moved to have a Prohibition to the ecclesiastical court to prohibit the
granting of a letter of administration to the husband [...de prohibite le granting de un
lettre de administration destre grant al baron]”. A remark by counsel later on, however,
suggests that the grant to the husband had already been made. If that was the case, it does
not change the issues, but only adds a further one, viz.: Admitting that it is unlawful to
grant administration to the husband and that the ecclesiastical court could have been
prohibited from ever making such a grant, will Prohibition lie after the grant has been
made? What would be the effect of such a “retrospective” Prohibition? Would it in effect
serve as an injunction to the probate court to repeal the grant or else be found in
disobedience of the Prohibition?

The kinsman’s basic contention was obviously that a husband is ineligible under
21 Hen. VIII. Whereas the statute strongly favors widows, the argument must go, it says
nothing about the case of widowers and ought therefore to be taken to mean that they
have no claim as against blood relatives. This basic point may not, however, have been
the kinsman’s whole argument. The report notes that he surmised that various debts by
bond were due to the wife, the benefit of which should go to her nearest blood-relative
(…et surmise que divers detts per bonds fueront due al feme quell ore esteant mort
appertaine al prochein del kin...) I conjecture that this second line of defense went as
follows: Perhaps there is no objection to making the husband administrator if, so far as
appears, there are no specialty debts due to the wife (even though 21 Hen. VIII says
nothing about widowers.) In that case, all the husband would take—except for the
privilege of satisfying his wife’s creditors—would be the tangible goods she brought to
the marriage, which he would have been free to dispose of as his own during the
coverturn. But the statute cannot intend, inasmuch as it expresses no favor to widowers,
that a husband should make off with the possibly great wealth represented by the wife’s
bonds. If a woman who is the beneficiary of thousands of pounds’ worth of bonds marries
and dies a few weeks later, is her widower to take all and her brother nothing, should an
ecclesiastical court for some reason or none see fit to grant administration to the
widower? (I should suppose that other variables could affect the argument. Suppose, for
example, that the bonds held by a rich lady before marriage all fall due in 1640, and that
she dies in 1636. Is the kinsman’s case against the widower not stronger than if all
the bonds had fallen due, but remained uncollected, at the time of her death? In saying
simply that the bonds were surmised to be “due” to the wife, the report does not resolve
the ambiguity between “due” in the sense of “collectable now, the money capable of
being recovered in an Action of Debt,” and “due” in the mere sense of “owed”.)

The court, on Serjeant Harvey’s motion, rejected the kinsman’s contentions and
denied Prohibition. The judges held that a widower is just as eligible for administration as
a widow. They thought that a widower would clearly have counted as his wife’s “next
and most special friend” when 31 Edw. III was the only statute governing administration
and apparently considered that a reason for holding him eligible under 21 Hen. VIII.
They thought in effect that 21 Hen. VIII’s emphasis on the rights of widows, works in
favor of widowers since, with the sexes reversed, the cases are indistinguishable. (As they
put it, “By the statute of 21 Hen. VIII it seems to be reason that [if, since] the wife will have the administration of her husband’s goods by like proportion [per semblable proporcon] the husband will have administration of his wife.’) For confirmation they cited what is referred to as “the appeal to the Delegates”, where it was resolved that the husband should be his wife’s administrator, rather than her nearest blood-relative. I have no way of identifying the case referred to. We are told that Justices Croke and Jones sat on the Delegates when it was decided, a fact cited to show that the ecclesiastical decision had a common law imprimatur.

Their presence means that the case came after 1625 (Jones was appointed to the King’s Bench in 1624, Croke to the Common Pleas in 1625 and then to the King’s Bench in 1628.) The possibility cannot be excluded that “the appeal to the Delegates” was in the instant case; the definite article so suggests. I.e.: When the probate court appointed the husband, the kinsman went to the Delegates and won. Then the kinsman sought a Prohibition. The court was all the more inclined to deny a writ because to grant one would be to contradict Jones and Croke, though if it had been strongly convinced of the opposite position it would presumably not have hesitated to override them.

These considerations suffice to decide the case. The judges took the occasion, however, to generalize about the use of Prohibitions to enforce 21 Hen. VIII and to suggest that even if the grant to the husband had not been perfectly correct it could not be blocked or undone by Prohibition: “And it was said by the Court that this Court does not intermeddle with the direction or within anything that concerns the committing of administration, but that is totally to be left to them of the ecclesiastical court.” Serjeant Hitcham, presumably representing the kinsman seeking Prohibition, took exception to this generalization, citing the King’s Bench case of Wingate v. Glascock (discussed below) as an instance of a Prohibition granted because administration was awarded contrary to the statute. I shall show under the King’s Bench cases below that Wingate does not clearly endorse prohibiting a misgrant, though it is legitimately citable against the flat proposition—asserted by the court here—that Prohibitions have no place in the implementation of the statute’s eligibility rules. The reporter, probably speaking for himself, answers Hitcham’s argument with a quaere. He makes two basic points against the use of Prohibition: (1) The statute imposes a penalty and therefore intends that a penalty suit should be the remedy against violation of its straight requirements. (I say “its straight requirements” because there seems to be no objection to distinguishing those from less direct effects of the statute. In other words, one can oppose prohibiting when administration is granted to an ineligible person—a “straight” violation—yet support prohibiting what the statute makes an ultra vires act for the ecclesiastical court, such as compelling distribution. It need not follow that a penalty suit would not lie against an ecclesiastical judge who purports to order distribution, or the like—sed quaere.) (2) It is inappropriate to use the Prohibition as a Mandamus in effect—i.e., to order the ecclesiastical judge to repeal its erroneous grant and make a new, correct one. Although such misuse of the Prohibition would be avoidable if a writ were sought before the original grant, that would not be a practical possibility in many cases. In practice, it is better to decide that the eligibility requirements are always or never enforceable by Prohibition than so to enforce them only in the rare case when the Prohibition would have a prospective operation. (I formulate this point by extension from the bare words, “As for us, we may not command them to repeal that administration.”) In addition, the reporter
cites a Common Pleas case (not otherwise reported) in which an alien ambassador died
without kin in England. In that case, he says, the court refused to intermeddle, leaving the
affairs if the ambassador’s estate entirely to the ecclesiastical authorities. No details are
given, so it is impossible to judge what arguments for common law interference might
have been made and rejected.

We may now turn to the smaller body of King’s Bench cases. My only directly
significant one from the later Jacobean years (when a litigant who wanted to prohibit
distribution or accounting had every reason to go to the Common Pleas) is Wingate v.
Glascock.\textsuperscript{17} It is important that this case involves the question that was least resolved in
the Common Pleas—whether the Prohibition can be used to prevent ecclesiastical courts
from misapplying 21 Hen. VIII in their original grant of administration. Chief Justice
Hobart had suggested a negative answer in Brian v. Goddard. He may have changed his
mind later, but after the question had been raised in the King’s Bench in the instant
Wingate v. Glascock. In the last Common Pleas case above, Wingate was relied on for
the position that misapplication of the statute’s eligibility requirements may be controlled
by Prohibition (i.e., the statute does not merely subject the probate judge to a penalty.)
There is room for doubt, however, as to whether the case clearly has that meaning.

In Wingate, the probate court granted administration to a half-brother of the
intestate. This decision was appealed to the Delegates, the appeal being made by a full
sister. Her position must have been that 21 Hen. VIII mandated, or that ecclesiastical law
and good discretion required, preferring the full blood. (Which of those alternatives is not
self-evident, and the report does not help. It would be plausible to ground an appeal on
the theory that next of kin in contemplation of the statute means a full brother or sister in
preference to a half-brother or half-sister, whether or not the full blood in a remoter
degree should be preferred over the half blood in a nearer. It would also be plausible to
concede that the statute enacts no standard for distinguishing such close cases and still to
argue that the probate court’s use of its statutory discretion is reviewable within the
ecclesiastical system, either as a mere act of discretion or because there are standards
governing such cases in the tradition of ecclesiastical law.) A Prohibition was sought
with a surmise that the Delegates proposed to repeal the lower court’s grant and make a
new one to the full sister. (“They intend and say” that they will take those measures.) The
Prohibition was granted. The explanation given in the report is that construction of
statutes belongs to the common law courts, that “this is grounded on 21 H. 8”, and “so we
will determine to whom it ought to be granted.”

At a certain level of generality, this decision does uphold the propriety of
enforcing the eligibility requirements by Prohibition. If the only secular remedy for
ignoring or misconstruing those requirements is a penalty suit, then the full sister should
bring such a suit against the probate judge or, if the Delegates actually did reverse him,
the half-brother should bring such a suit against the Delegates. Pursuant to the penalty
suit, the common law would exercise its prerogative to decide whether the statute was
violated by the appointment of the half-brother in preference to the full sister, or vice
versa. In prohibiting the King’s Bench opted for “preventive relief”, instead of relying
solely on the statute’s penalty clause. Taking the preventive option in such contexts
usually makes sense, at any rate when it can be done in a prospective manner (prohibiting

\textsuperscript{17} M. 21 Jac. K.B. Benloes, 133.
the appointment of Ineligible—or, as here, the replacement of Eligible by Ineligible or No-More-Eligible—before the erroneous step has been taken.)

Before the significance of Wingate can be assessed, however, we must ask just how the court’s preventive action should be conceived. The Prohibition could be based on three alternative theories:

(1) As between a half-brother and a full sister, 21 Hen. VIII requires appointment of the former. If the court prohibited on this premise, it would straightforwardly endorse the enforcement of the eligibility standards by Prohibition. It ought to prohibit an original probate court on the half-brother’s motion if that court “intended and said” that it was going to grant administration to the full sister, as well as prohibiting an appellate court that proposed to undo a correct grant below. The premise here is utterly implausible, however. There is surely no basis in the statute for holding that a half-brother must be preferred over a full sister. Natural expectations go the other way. If one is the closer relative than the other, it would presumably be the one who shares two parents with the deceased. The statute speaks only of propinquity of relationship. It is in no way biased against women; its favor toward widows so testifies.

(2) The statute enacts no preferential standard as between full blood and half blood in equal degree. The probate court therefore exercised perfectly legitimate discretion in choosing the half-brother over the full sister. The effect of the Prohibition is to protect that exercise of discretion—virtually the same thing as preventing groundless revocation of administration (i.e., revocation on no better ground than that the ecclesiastical court has reconsidered its perfectly lawful original decision.) It arguably makes no difference whether such reconsideration takes place in the original probate court or through the forms of ecclesiastical appeal. If the statute makes a decision discretionary, one can say, there is no sense in which it is appealable. This position is entirely plausible. It does not really make for the proposition that the eligibility requirements are enforceable by Prohibition. I.e., one might hold that a probate court which “intends and says” that it is going to appoint a third cousin and exclude a son is not prohibitable. The remedy there is to sue the erring judge for the penalty; the erroneous appointee cannot be prevented from serving as administrator. Without illogic, one can also hold that review of lawful grants, whether by the original or an appellate court, is prohibitable. Both propositions serve the interest of expedition, which may be very important among the purposes of the statute, though the first one is a pretty rough means in that an utterly improper administrator could make off with considerable property if the probate judge were not deterred by a £10 penalty. Liability for actual damages would neutralize the risk of that, however, and ecclesiastical appeal would reduce it. To hold that appellate courts should be prohibited from reviewing lawful grants (whether discretionary-lawful or mandatory-lawful) does not imply that they should be stopped from reversing unlawful ones (though the interest in expedition would be served by prohibiting even that and relying wholly on the dissuasive effect of penalty and damages.)

(3) The decision in Wingate may amount to a weak or provisional Prohibition and so say nothing of importance about the role of Prohibitions in enforcing the eligibility requirements. I.e., the Prohibition may have been no more than an invitation to move for Consultation, granted because the court, as the report says, was insistent on its exclusive right to construe the statute, but was uncertain offhand as to how the case should be
handled. The judges may have thought that the full sister’s claim against the half-brother was quite convincing, or unconvincing, but wanted either way to advise more thoroughly. To prohibit was to stop the ecclesiastical courts from complicating matters by a decision while the common law judges made up their minds about the statute’s meaning and also, perhaps, about the propriety of “preventive relief” against misapplication of the statute. A judge could favor a Prohibition in this spirit even though inclined to doubt the propriety of such relief—i.e., to hold that even when an appellate court is about to reverse a lawful grant, the appellate court should be allowed to make its mistake and face the penalty. A judge in that position would need only to be convinced, in order to prohibit provisionally, that all issues arising from the statute—both what eligibility standards it enacts and how it ought to be enforced—belong to the common law. The report suggests that the contrary may have been urged—i.e., the recognizable though generally unsuccessful view that statutes are addressed to all courts and are to be construed by whatever court a statutory contention is raised in. It would not be surprising to find that view tried out in the intestacy field as a last-ditch effort to reverse the considerable constriction of ecclesiastical courts in the years before this case. That such an effort should be made in the King’s Bench is also unsurprising, because it would almost surely fail in the Common Pleas, whence the constriction had come.

There is no sure basis for choosing between the second explanation of the decision and the third, but a scrap of further evidence supports the second which is probably the more convincing in any event. In a similar case considerably later (Brown v. Wood, below) Wingate was cited straightforwardly for the proposition that half-blood and full-blood relatives of equal degree are equally eligible under 21 Hen. VIII. This only proves that the decision was so understood, but the chances are that it was understood correctly. A more questionable bit of evidence supporting the third explanation is discussed under Mayow below.

My next King’s Bench case,18 and the one most impressively argued in that court, also involves the eligibility requirements. Whether Prohibition is appropriate—as opposed to relying on the penalty—was expressly discussed, as it may not have been in Wingate. In this case, administration was originally granted to the intestate’s uncle (Mayow, his mother’s brother.) Thomain Trumplin sought to reverse the grant in the Arches. Thomain’s relationship to the intestate is not stated in the reports. The intestate’s name was also Trumplin. Thomain may have had a plausible, but not obvious, claim to be the better candidate. I say “not obvious” because the Arches confirmed the grant below—the lower court is not likely to have committed an egregious error—, but “plausible” because after losing in the Arches Thomain went on to the Delegates, as if he believed in his chances. The appeal was pending before the Delegates for two years (a comment on the cost to expeditiousness in letting ecclesiastical process take its course) before Mayow got around to seeking a Prohibition. Such is the case as stated at the beginning of the report. Counsel against Prohibition (Noy) smuggled further facts in, but let us take those as they come.

Serjeant Ashley spoke first, in favor of a Prohibition. His remarks are entirely on the propriety of Prohibition as a remedy, not on the relative titles of Mayow and Thomain

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18 Mayow’s Case, or Mayow (or Maiowe) v. Trumplin. P. 1 Car. K.B. (so dated by MS.—the other, almost identical, report, Latch, 67, is not specifically dated.)
Trumplin to be administrator. He makes the practical point that the £10 penalty in 21 Hen. VIII is a “small restraint.” Some of Ashley’s language may be intended to cut off the argument that an erring judge would be liable for actual damages as well as the penalty. The contention would come to saying that a statute in strictly penal form in effect “permits” the penalized act, subject to a price—i.e., does not make the act a tort, wherefore the only means of enforcing the statute besides the penalty is Prohibition. What Ashley actually does is to emphasize that the statute speaks of granting administration “under” the penalty—which I take to say that the statute is in “strictly penal form”.

Secondly, Ashley makes a clever argument from the history of statutory regulation of intestacy proceedings in ecclesiastical courts: 31 Edw. III erects an eligibility standard for administrators—a vague, but not a meaningless, standard. It requires that administration be granted to the “loyal amies” of the intestate. The requirement is meaningful enough to be violated—as by appointing such “unlawful” persons as an outlaw or one attainted. (By focusing on “loyal”=legalis, rather than 31 Edw. III’s other adjective, “plus proscheins”, Ashley presumably admits that the latter may be too uncertain to give rise to violation. Can the ecclesiastical court’s judgment that A is the “nearest friend” of the deceased be controverted? The statute does not in terms lay down the more manageable standard of “nearest relative”, though it might conceivably be argued that that is the intent of “nearest friend.”) Now, 31 Edw. III does not appoint a penalty. Therefore, since Prohibition is strictly the only way to enforce the statute, Prohibition must have lain to prevent, say, the grant of administration to an outlaw. Then comes 21 Hen. VIII. The new statute did not appear out of the blue, in the manner, let us say, of a penal statute imposing a “price” on the previously lawful act of wearing a green hat on Sunday. Rather, 21 Hen. VIII comes to a continuation, specification, or fulfillment of 31 Edw. III. 21 Hen. VIII adds a penalty for misgranting administration, but it should not be construed as taking away the pre-existing means of preventing misgrants by the going statutory standard—viz. Prohibition. The context of prior related legislation enforceable by Prohibition takes 21 Hen. VIII out of the class of mere penal statutes—granting that statutes strictly in that class ought not to be enforced by Prohibition.

Finally, Ashley claims precedents. The reports at this point are unclear, but he may claim authority for, as well as asserting, the proposition that Prohibition will lie to prevent a grant to the half blood in preference to the full. One citation is clear—a case from M. 21 Jac. That looks suspiciously like Wingate v. Glascock, though it is not certainly identifiable as such either by name or description. All Ashley says is that a Prohibition was granted in M. 21 Jac. on the basis of the “proximity of blood” standard of 21 Hen. VIII—the bare precedent Ashley needs (he admits the Prohibition led to a demurrer and that the parties settled before the case came to judgment.) If the reference is to *Wingate*, the extra information supplied by Ashley tends to confirm my third interpretation above: the Delegates were prohibited from ousting the half-brother in favor of the full sister only to let the parties raise the legal issues formally. For whatever reason, they decided that fighting out those issues was not worthwhile.

On the other side of the present case, Noy both controverted Ashley’s immediate arguments and projected a general theory that transcends them. He took the predictable position that a penal statute with no “negative” language expressly forbidding the act
penalized only subjects the act to the penalty. The act is not made subject to Prohibition (and presumably it is not made a tort either.) Then Noy points out that no Prohibitions were ever grounded on 31 Edw. III. (Ashley had not cited any, only maintained that Prohibition must lie in the event that administration were granted to an “unlawful” person.) From his observation about 31 Edw. III, Noy proceeds to an interpretation: It is not just unprovable that Prohibition will lie to enforce the statute. From the absence of Prohibitions we should conclude that the writ will not lie. Why? Because the statute is a directive to ecclesiastical judges. Whether or not all statutes relevant for ecclesiastical proceedings are construable by ecclesiastical courts, this one is. I.e., the legislature did not intend to take away the ecclesiastical courts’ time-honored exclusive authority over intestates’ estates, but only to tell ecclesiastical courts how to exercise it, trusting them not to disregard the statute.

Why should one say this (short of saying that all statute-enforcing Prohibitions are illegitimate, a position I see no need to force on Noy)? Noy states reasons specific to the case, I believe. In part the argument is from the form of statutes: A statute (like 31 Edw. III) that says “do x” to a judicial authority is not like one that says “do not do y”; the latter probably makes doing y prohibitable; the former does not make doing acts incompatible with x, or doing z instead of x, prohibitable. In addition, Noy claims that 31 Edw. III declares the common law. I am not sure how he knows that, but the point is plausible: 31 Edw. III imposes pretty loose and pretty obvious standards. It is imaginable enough—in the blissful absence of evidence—that the standards it states were already accepted (if neglected or doubted, in the manner of rules that need to be “declared” by statute.) I take the upshot of the point to be that common law interference with intestacy cases was no more justified after 31 Edw. III than before, and surely it was not before. (Because, presumably, any non-legislated standards ecclesiastical courts were subject to in this area were very much part of “their law”—“common law” in the sense of immemorial and binding without a legislative basis, but of no concern to the common law courts, whose law was simply silent on the disposition of dead men’s personal property.)

Finally, I believe that Noy is conscious of policy considerations reinforcing his formalism. More of these in a moment, because he expounds them in connection with alleged further circumstances of the instant case. The effect of his argument from 31 Edw. III is to say, pace Ashley, that this is the context of 21 Hen. VIII: There were standards for the choice of administrators on the statute book, of course standards capable of being violated. But Prohibition did not lie to enforce those standards. Violation was irremediable except by ecclesiastical appeal. Then comes 21 Hen. VIII, a descendent of 31 Edw. III indeed, not “out of the blue”, but within an historical context. What does 21 Hen. VIII alter on the remedial side? One thing only: it appoints a penalty. How can it authorize Prohibitions when they were not authorized before? Even if the general effect of penal statutes were not to confine the remedy to the penalty, one would have to conclude that the statute here in question has that effect. If anything, an “out of the blue” penal statute addressed to a judicial body would be a better occasion for prohibiting the penalized act. For here acts very close to those penalized by 21 Hen. VIII were previously illegal, but still not prohibitable; their earlier non-prohibitability was not the truistic result of the fact that they were perfectly lawful, as in the “out of the blue” case.

I believe that Noy’s argument involves the further point that prohibiting misgrants of administration would have practical drawbacks. The general idea he seems to suggest,
partly through reference to the case at hand, is that discretion is valuable in dealing with intestates’ estates—even discretion to disobey rules conceived as “guidelines” for the ecclesiastical courts. If you like, the eligibility standards of 31 Edw. III and 21 Hen. VIII are usefully regarded as “charged with an equity.” The ecclesiastical courts are by all tradition the experts in intestacy. Their primary responsibility is to see that the estate is efficiently and fairly administered, with a view to the probable preferences of the intestate and the interests of creditors, dependents, and miscellaneous kinsmen. Parliament has told the ecclesiastical courts not to do certain things, such as overlooking a man’s wife or son in favor of his third cousin. Of course the ecclesiastical judges ought to obey these directives, and it can surely be expected that they usually will. They have now been subjected to the pressure of a modest penal liability to see that they do. But if an ecclesiastical court were to disobey the rules—risking the penalty—the presumption should be that the experts have a reason, that they have drawn on a reserve of equitable authority to secure the objective—efficient and fair administration—in the circumstances of the particular case. That objective will not be better attained by translating claims to be administrator into absolute legal rights, enforceable by common law courts by Prohibition. That approach will only promote litigation by self-interested parties and involve the common law counterproductively in matters beyond their expertise and concerning which they cannot know the circumstances as well as the primarily responsible ecclesiastical courts. Is it healthy, for example, to create a situation in which a flagrantly incompetent and dishonest person must be made administrator—in an ambiguous case, because a common law court, without any way of knowing the party’s character, decides by abstract argument that a full sister, say, is a “closer” relative than a half-brother, or an illegitimate son disqualified in relation to a third cousin?

The instant case, according to Noy, was just the sort my question suggests. There is no sign that this information was part of the record (and it does not appear from the report how ambiguous in terms of familial propinquity the claims of Mayow and Trumplin were.) Noy informs us, however, that Mayow was accused before the Delegates of “surreptitiously” obtaining administration and “laboring” to suppress a will. Of the truth and effect of these circumstances, Noy says, the ecclesiastical court is a “competent judge”—with the implication that the “competent judge” would be entitled to deprive him of administration upon an adverse finding, whatever the merits of his familial claim.

Like his arguments in various other cases, Noy’s here is intelligent and ingenious. It is also radical, for though it need not lead to the conclusion that ecclesiastical courts may not be prohibited from ordering accountings and distributions, it points that way. The argument is a pretty fundamental objection to Prohibitions in intestacy cases and to cramping the discretionary scope of ecclesiastical courts in that area. If the eligibility rules are “guidelines”, which it is not necessarily wrong to override in hard cases, why is the same not true of 21 Hen. VIII’s provision (if one sees such a provision in the statute) that the administrator is to take the residual estate and not to be required to distribute it?

It is difficult to judge from the report how successful Noy was. He won his case, at least this round, for we are told that no Prohibition was granted. The judicial response is not reported fully enough to indicate whether the court was at all persuaded of the large proposition that the eligibility requirements are not enforceable by Prohibition. The one judge whose individual remarks are given, Dodderidge, seems to avoid any such major thesis. Dodderidge says to Mayow’s counsel that their application for a Prohibition was
premature, not that they could have no claim to one. His argument may be that the grounds alleged against Mayow in the Delegates—his “undue” appointment and suppression of a will—were at least prima facie, or formally sufficient, grounds for the proceedings there. The Delegates had not passed on these matters, and until they did so unfavorably to Mayow he occupied the position of administrator which he claimed to be entitled to. What did he have to complain about at this point? The answer, surely, is that if Mayow was mandatory administrator he had a reasonable claim not to be troubled. (I.e., The probate court appoints X. A disappointed candidate, Y, appeals the appointment. X seeks a Prohibition, claiming a closer relationship to the deceased than Y’s. It is a strongly defensible, though not obligatory, position that the appellate court should be prohibited at once, assuming the common law court accepts X’s claim. Why wait to see whether the appellate court will actually reverse the grant below? Waiting might have a certain “elegance”—“It is bad form to prohibit a court with jurisdiction when there is no reason to suppose it will use its jurisdiction erroneously”—but the effect would be to expose both X and Y to needless altercation in the appellate court and to delay administration.)

If, on the other hand, Mayow was discretionary administrator, just no less qualified than Trumplin, the case is more complicated. Appellate challenge to his appointment on grounds of unsuitability and corruption might well be justified. (It is not, I think, manifest that every discretionary appointment should be reviewable as such. If the probate court chooses A, it is not at all clear that the equally eligible B is entitled to a mere second try in an appellate court. There is a sense in which a discretionary act is unreviewable because it is discretionary, and the desirability of getting on with administration argues against “second tries”. If, however, B goes to an appellate court with substantial reasons against A—all allegations of controvertible fact bearing on A’s suitability or the manner in which his appointment below was obtained—he surely has a good claim to a hearing. That might be so even if the probate court has had an opportunity to pass on all the matters alleged to the appellate court. A more conservative position would be that appeal is justified—but only justified then—when B has “new evidence”, or his complaint is against the procedural propriety of the lower court’s conduct, rather than the mere way in which it has exercised its judgment. In the case of “new evidence”, it is arguable that B ought to seek revocation in the probate court before appealing, though it is also strongly arguable that the common law courts have no interest in how the ecclesiastical system arranges such procedural matters.) If, however, Trumplin was perfectly entitled to be alleging Mayow’s corruption before the Delegates and seeking to oust him on that ground, it seems that Prohibition ought to be denied definitively. Mayow’s application for a Prohibition was not premature, as Dodderidge says, but simply one that should be turned down. For surely the ecclesiastical court is the competent judge of whether in fact Mayow misbehaved and whether his misconduct was sufficient to justify reversal of a discretionary grant. What does it matter whether the Delegates decide for or against Mayow, given that the decision is theirs. (One can say it matters, but the position implied in saying so is hard to defend. That position would be that common law courts may review the actual decisions of ecclesiastical courts to revoke or reverse administration, even when it is clear on the record that such revocation or reversal is sought for cause, or for a legitimate kind of cause, such as “new evidence” or objection to the procedures of the tribunal that originally granted administration. In the
instant case, the common law court would be entitled to consider—if not the Delegates’ mere findings of fact—at least the Delegates’ conclusion from the facts as found that Mayow’s conduct disqualified him for discretionary appointment. That would surely be to intrude indefensibly on the detailed handling of ecclesiastical business.)

The point of the analysis just above is to say that Dodderidge’s apparent response—“Maybe Prohibition should lie but it is too early to decide”—is open to objection on alternative assumptions about the factual unknowns in the present case. His response can be justified, however, on another hypothesis. This comes to supposing that he was persuaded by part of Noy’s argument, and it involves assuming that Mayow was mandatory administrator (i.e., had a better familial claim than Trumplin.) I suggest the following: Though mandatory administrator by familial relationship, Mayow is removable for such conduct as suppressing a will. Noy correctly maintained that the statutory requirements are not absolute. Ecclesiastical courts do have some “equitable” scope to insure decent administration by appointing a less qualified person by the eligibility standards. But—contrary to Noy—it goes too far to conclude that Prohibition will never lie to enforce those standards. “Equitable” overriding of those standards must be justified, which is to say, the common law court must be convinced that there really are grounds for denying administration to a closer relative. Ecclesiastical courts should not simply be trusted to draw on their “equitable reserve” with proper restraint; they should be prohibited from overriding the standards without sufficient reason. Such overriding of mandatory standards is different from review of discretionary decisions. The latter should not be prohibited (I argue above) in so far as they are bona fide—i.e., matters with a legitimate bearing on the proper exercise of discretion are before the reviewing tribunal; someone disappointed by Tom’s discretion is not merely trying his luck with Dick’s, or having a second go at Tom’s. How the ecclesiastical court deals with a bona fide suit for review of a discretionary decision is irrelevant from the common law point of view. Per contra, “equitable” exceptions to mandatory standards—to rules in whose favor there should be a heavy presumption—have no claim to the common law’s tolerance unless they really are on good consideration. Whether they are can hardly be judged until they are made—hence the justification for Dodderidge’s “Wait and see”. Prohibition now could perhaps be warranted if it were made to appear that an “equitable” exception was being sought on frivolous grounds, though to prohibit in that situation has the aspect of insulting the ecclesiastical court—i.e., not giving it credit for ability to recognize a frivolous appeal, and for the intention of respecting the statute save in very pressing circumstances. In the instant case, at any rate, it seems clear that the claim against Mayow was far from frivolous: if administration should ever be denied to the normally mandatory candidate, it is presumably when he has managed by fraud or conspiracy to suppress a will and make out that the deceased died intestate. On the premise that “equitable” exceptions are permissible, Prohibition would seem justified only if it appeared that the Delegates had denied due process to Mayow, as by finding him guilty of serious misconduct on insufficient evidence. (It should be added that this position of principle is considerably complicated when seen through procedural lenses. If A, being mandatory administrator, comes and says simply “An attempt is being made to displace me”, it is possible that Prohibition should go—i.e., that the prima facie presumption should be that such attempts are unwarranted. The burden would then be on the adverse party to plead that he had alleged “equitable” reasons why the normally
mandatory administrator should be excluded in this case—or, in so far as it is allowable to introduce new facts in connection with a motion for Consultation, to make such a motion. If the “equitable” reasons are not frivolous on their face—and were really alleged—Consultation should go. A must seek a new Prohibition after the ecclesiastical court has actually displaced him, if he still wants to complain. The alternative is always to deny Prohibition when Mandatory Administrator complains simply that an attempt is being made to displace him: It might be that the attempt is based on valid “equitable” considerations, wherefore it is up to Mandatory Administrator to say in his surmise that that is not the case and give the other party an opportunity to contradict him. A choice as to how to “work it” procedurally is forced by the position that exceptions to the mandatory standards can be made, but should not be left to the uncontrolled judgment of ecclesiastical courts, and the options both have disadvantages. If Dodderidge took that position in principle, he was probably spared worrying about the procedural choice by the clear-enough state of things in the case at hand. Probably off the record, it was evident here that there were solid reasons why Mayow should be removed, if the factual allegations against him were true and the Delegates should so establish by rational means.

I have of course attributed a fairly fancy position to Dodderidge on slim evidence, or by an intolerable deal of ratiocination in proportion to the evidence. It is possible that “Maybe a Prohibition, but not yet!” is little more than a delaying tactic in a difficult case, only an indication that Dodderidge did not know how to respond to the arguments of counsel and figured that there was no need to hurry when the Delegates had not (in two years) removed Mayow from administration and might never do so. I am encouraged, however, in my construction of Dodderidge’s position by a further remark he makes at the end of the report. He puts a common law case whose relevance for matters at hand is not immediately evident, but I believe the relevance can be discerned. The common law case is: Ancestor dies when Elder Son is abroad. Younger Son enters on Ancestor’s land. Younger Son is not a disseisor “for the law presumes he preserves the possession for is brother.” But if Elder Son comes home and Younger keeps him out of the land, then Younger Son is a disseisor, or, as Dodderidge adds “the law will not have so good an opinion of him.” The application I propose for this case is as follows: Mandatory Administrator is like Younger Son. He is “in” without wrong; he ought to be administrator. But things can change. Things can happen or come out that change the complexion, cause the law to “lower its opinion.” As a non-disseisor can turn into a disseisor, so a person duly appointed administrator and solely entitled to be may still lose his position. 21 Hen. VIII does not absolutely mandate that anyone is to be administrator of a given estate, merely because of his relationship to the intestate and regardless of all considerations bearing on his fitness. So far Noy was right, but—taking Dodderidge to mean his earlier statement that a Prohibition might ultimately turn out to be appropriate—Noy was wrong in maintaining that ecclesiastical courts should be sole judges of when the statutory standards admit of exceptions.

The other members of the court may have shared this middle position I attribute to Dodderidge. They may have accepted Noy’s arguments more completely. There is after all nothing very startling about his immediate point—that the eligibility requirements are not enforceable by Prohibition, but by penalty suit only. Chief Justice Hobart may once have held that opinion, though he may have wavered from it later. As I suggest above, the
way Noy casts his argument may give it implications beyond that immediate point—one which Hobart, the principal architect of constraints on ecclesiastical courts in intestacy cases, would obviously reject. Whether the King’s Bench judges before whom Noy argued rejected them can only be ascertained from their subsequent behavior. Finally, it is not certain that either Dodderidge or his brethren reached very firm conclusions in Mayow v. Trumplin. They may have joined in a delaying move, denying Prohibition only because that was a respectable thing to do in an undecided frame of mind. All these possibilities are compatible with the denial, the one sure fact.

In Askurt’s [?] Case (1629)19, two King’s Bench judges addressed themselves to the more standard issue of distribution. Their remarks reflect uncertainty. The case appears uncomplicated: A Prohibition was sought on the ground that a probate court proposed to enforce distribution. Counsel moving for Prohibition, Trotman, claimed a recent King’s Bench precedent (Wood v. Wood, “within the last two years”.). Justice Croke and Chief Justice Hyde were the only members of the court present. Croke spoke first and said that several Prohibitions exactly in point had been granted by the Common Pleas when he sat there. Croke was a Common Pleas judge for a little over three years before his removal to the King’s Bench in 1628. His remark confirms the continuity of the Common Pleas position on distribution in the late 1620s. Indeed, he states the theory behind it: In granting administration, the Ordinary exhausts his authority. It is just worth noting that Croke relies on recent Common Pleas precedents known to him personally, rather than stating—as one would be entitled to do in the light of what we have seen of Hobart’s court—that the matter was about as firmly settled as any point of Prohibition law. More noteworthy is the fact that Croke must look to his Common Pleas experience, suggesting that evidence of any resolution of the question by the King’s Bench was thin. Plainly enough, his inclination was to follow the Common Pleas and give uniformity to the law.

Chief Justice Hyde saw things differently. He claimed that there was recent King’s Bench practice and that it pointed the other way—several Prohibitions had lately been denied in such cases. (Hyde had the advantage of about a year and a half’s King’s Bench experience over Croke, having been appointed early in 1627.) Hyde’s explanation of the denied Prohibitions is singular, however: The Prohibitions were refused, he says, because the court was informed that the very point was depending in the Common Pleas. This view of what was going on in the sister court is not totally off base. We have seen that the legality of distributions was at least; newly stirred up in the Common Pleas after Hobart’s death, his successor, Richardson, being inclined to doubt that they were absolutely beyond the power of ecclesiastical courts. My evidence suggests that Richardson’s qualified dissent from the established position failed to move his colleagues. But Hyde may reflect contemporary perception fairly enough: To outsiders, the issue about distribution may have seemed open in the Common Pleas now, whether or not they realized how closed it was under Hobart. Croke, reflecting inside experience in the Common Pleas, may register the awareness that the issue, while newly debated, was not seriously revived. The King’s Bench practice to which Hyde testifies represents a reasonable judicial policy under the circumstances as perceived: Do not grant Prohibitions to block distributions until the Common Pleas has made up its mind; when

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it has, the presumption no doubt should be in favor of following the Common Pleas and achieving uniformity; even if the ultimate duty of the King’s Bench is to decide the merits for itself, it ought not to debate them until the Common Pleas has taken a stand and raised the question whether any view of the merits could be so decisive and important as to justify the considerable inconvenience of discordant practice in the two courts.

In the instant case, Croke and Hyde reached a compromise. They took the inconclusive step of granting a Prohibition nisi only: If the prohibitee wanted to protest before a full court he was free to. Moreover, the reason given for even this small step was “because a long time has passed since the administration was granted.” The rule projected from this reason would be that Prohibition does not lie to prevent distribution—or at least that the King’s Bench ought not to grant such Prohibitions pending a Common Pleas resolution—save in special circumstances, viz. (unless further ones can be imagined) when there has been undue delay in ordering, or bringing suit for, a distribution. An administrator is not entitled (at least so far as the King’s Bench is willing to say at present) to keep the residual estate in every case, but he is entitled to keep it if he has been led to expect that he will be allowed to—if he is appointed, permitted to deal with the estate for years and enjoy anything left over as his own, and only then challenged by a kinsman claiming a share. This position is reasonable on the premise that 21 Hen. VIII does not cut off the probate court’s authority to compel a distribution, though it is subject to the objection that common law courts ought not to scrutinize the mere fairness or good sense of ecclesiastical courts in exercising time-honored powers unaffected by statute. If an administrator thinks that a particular effort to make him distribute is inequitable, he should try to persuade the ecclesiastical court to use its discretion in his favor (or else, perhaps, go to a court of equity.) The general position intimated by the decision would seem to reflect Hyde’s inclinations rather than Croke’s.

In Levanne’s (or Vandamp’s) Case of 1630, the King’s Bench got around to head-on discussion of the power to distribute and decided unanimously that ecclesiastical courts have no such power. (Hyde was still Chief Justice and so can be said to have been converted from any former reluctance.) To this case belongs the honor of pre-Civil War finality: the two principal courts were at last firmly in accord on the effect of 21 Hen. VIII. The facts of the case were such that a narrow-grounds decision in favor of Prohibition would have been conceivable, but the court avoided any such course and held decisively that the grant of administration exhausts ecclesiastical authority in all circumstances. The factual peculiarity of the instant case was that the proposed beneficiaries of the distribution were not, so far as the record showed, kinsmen of the intestate. (The MS. Report says that they were “on the matter [the matter shown, the record] strangers to the intestate.” Croke’s report says that the party seeking distribution claimed that the residual estate was large and that in such circumstances the Ordinary was entitled to order a distribution among “friends” of the intestate. I take it that Croke’s “friends” is used advisedly; to communicate what the MS. Says—that here more was claimed than power to distribute among relatives, or relatives nearly or just as close as the administrator, and that that was claimed because the aspiring distributees were not kin, or

at any rate close kin.) It might be conceivable to hold that ecclesiastical courts retain power to make a fair intra-familial adjustment by appointing one kinsman administrator to start with, and then, if the residual estate is large enough, requiring him to share with other equal or nearly equal kinsmen. One could hold at the same time that 21 Hen. VIII, with its clear familial bias, deprived ecclesiastical courts of their former discretion to require a distribution to mere “friends” or to charities. But the court did not take this way, nor is there any sign that it considered doing so.

Sir John Banks, who at this time held the preferment of Prince’s Attorney, argued in favor of a Prohibition. There is nothing in his argument that had not been said before, though it gives the appearance, especially from the MS., of being a careful speech, covering all predictable reasons against distribution. (The policy of the law since 31 Edw. III has been to put administrators in the same position as executors; its policy is certainly against the old powers of ecclesiastical courts to require any distribution they like, including to extra-familial “pious uses”—with perhaps the implication that either all distributing power is taken away or the full old power remains, which surely cannot be; protection of administrators against creditors who turn up late in the day is an important effect and intention of the statutory ban on distribution; the correct theory, in sum, is that the grant of administration exhausts ecclesiastical authority.) Germyn on the other side (reported only by Croke) tried to get around the argument from late-appearing creditors by contending that probate courts “will” (should and habitually have, I suppose) take security from distributees to restore sufficient goods to the administrator to satisfy such late claims. Otherwise, Germyn just asserts that it is unfair for the administrator to take all. He concedes that claims to distribution ought to depend on an averment that all debts—and legacies where a court-appointed administrator is executing a will—have been satisfied. (That means procedurally, I suppose, that common law courts should prohibit distribution if the administrator surmises that debts or legacies remain unsatisfied—not merely that ecclesiastical courts ought to require claimants to distribution to make a controvertible allegation that debts and legacies are fully satisfied, conscience and ecclesiastical appeal being the only controls to assure that they actually do.)

To all intents, the court unanimously embraced Banks’ position. According to Croke’s report, the judges expressly answered Germyn’s contention that the late-appearing creditor poses no real problem in the light of ecclesiastical practice. They said in effect that that might be true as a practical matter, but they would not leave it to ecclesiastical discretion to provide protection for the administrator. Conceivably, one could hold that distribution suits are prohibitable upon surmise that the probate court has not required the distributees to give security, or does not propose to. There is no sign that this possibility was considered, but no reason why it should be when the court was clearly sold on the general “exhaustion of authority” theory. In keeping with that theory, the judges, according to Croke, added a dictum: revocation of administration at pleasure, as well as distribution, is now ruled out, though both were within ecclesiastical power “at common law.” (The possibility of revocation for cause remains open. There is no indication of what this court would count as cause.)

The MS. report tells us that the court, so to speak, “dared” defendant-in-Prohibition to demur. (“And the Court said that the defendant could demur thereon if he is so hardy.”) The significance of so saying is hard to be sure about. So far as I know, the
court could not prevent an unsuccessful defendant-in-Prohibition from forcing formal pleading and gaining a second chance to argue the merits on demurrer. Pointing out the still-open possibility of a demurrer may have opposite intents (as a few instances in Vols. I-III also show.) It could be a way of quieting a vehement and protesting lawyer—as it were (to Germyn here), “We know you don’t like it, but we are going to prohibit your client anyhow. If you’re all that convinced we’re wrong you can always demur—but think it over, because as we now see the issues it would take a hardy man to suppose he could persuade us with another try.” On the other hand, a note of uncertainty may be implied—“It looks awfully clear to us that distribution suits must be prohibited across the board. But admittedly the issue is a hard one, and we won’t say flatly that reargument would be a waste of time. So if you’re convinced enough of your case to try again against the odds, go ahead. We won’t be irritated with you if demur, as if you were indulging in frivolous litigative warfare.”

The MS. also reports individual remarks by two judges, Jones and Croke. Jones states the position taken by the whole court in a slightly original way. The granting of administration, he says, puts the “possession and property” of the intestate’s goods in the administrator, wherefore the ecclesiastical court may not make any disposition of them. The touch of originality is in translating the agreed-on conclusion into the language of property. As, for example, tithes set out become the parson’s property—and therefore arguably cease to be of any concern to ecclesiastical courts—so the act of granting administration vests the property in the administrator, albeit encumbered with the intestate’s debts. How could the probate judge have authority to tell the administrator what to do with his own? Thinking of the matter this way is neat, though it adds no strength to the conclusion. There might even be inconveniences. E.g., an administrator appointed to execute a will for default of executors is subject to ecclesiastical compulsion to pay legacies. The property may be his if you want to say so, but where there is a will it is “spiritually” encumbered. It has not, like the severed tithes, passed out of the ecclesiastical sphere, so that it is simply the administrator’s common law property. If still liable to ecclesiastical interference quoad legacies, why not quoad distribution too, unless there are reasons besides the state of the property why distribution is ruled out?

Secondly, Jones points to the Common Pleas practice as justification for this court’s following suit. He testifies to general awareness that authority unfavorable to ecclesiastical courts in intestacy cases was concentrated in the Common Pleas. Croke does likewise in his individual speech, which consists entirely in calling attention to his own experience as a Common Pleas judge. This time, instead of numerous precedents vaguely, he cites one case specifically: a Briscoe’s Case (not independently reported under that name) where, Croke says, a Prohibition was granted after long debate for the reasons urged in the instant case by Banks.

Jones’s final individual contribution is to add a qualification: Although ecclesiastical courts may not compel distribution, they may require an administrator to account for how he has disposed of the estate. This is a bit more liberal toward ecclesiastical power than some Common Pleas opinion from Hobart’s day. The same is true of another qualification contributed by Jones and Croke together: A “contract or agreement” between the Ordinary and the administrator that a certain distribution shall be made “alters the law.” (Quaere as to the meaning. The probate judge says, “I will grant you administration if you will distribute any net estate in the following way’’; the would-
be administrator replies, “I agree to do so and will accept administration on those terms.” Now the ecclesiastical court may order the administrator to make the agreed distribution—i.e., may enforce the contract specifically? The Ordinary—or the intended beneficiaries of the distribution—are not confined to seeking a remedy in law or equity for breach of the contract, if the distribution is not effected? If the answer is “Yes”, then would a condition written into the letters of administration have the same effect as the “contract” I describe? Is a bond conditioned on the administrator’s making a certain distribution a good bond? One can go on spinning out such questions in the shadow of Jones’s and Croke’s generality. The generality at least dissociates the two judges from the opposite sweeping opinion—that indirect ways of securing a distribution are as illegal as the outright way.) Jones and Croke, in sum, advocated practically significant qualifications on the austere doctrine that 21 Hen. VIII deprives ecclesiastical courts of all authority in intestacy cases except the power to make an unconditional grant of administration in keeping with the statute’s eligibility rules and to receive an inventory. For a bare duty to account on the administrator’s part gives the ecclesiastical court a handle to exercise informal pressure on him, and the probate court’s right to effect a distribution by “contract” is a significant hole in the “No distribution” position. There is no basis, however, for associating the full court with these qualifying dicta, and the unanimous endorsement of “No distribution” as such is the main importance of Levanne.

A few further King’s Bench cases come from the Civil War period. The court’s opinion in Brown v. Wood 21 confirms the general theory that the grant of administration exhausts the ecclesiastical court’s authority, with the consequence, in this case, that a valid discretionary grant may not be revoked. The grant in Brown v. Wood itself was held invalid, however, and therefore the suit to repeal was not prohibited. The rule of decision would be that ecclesiastical courts (original or appellate, presumably) are free to correct their own misapplications of 21 Hen. VIII by revocation; they are not stuck with the erroneous grant and liable to a penalty suit. This is a reasonable and predictable position. In reaching the conclusion that the grant in the instant case was invalid, he court added to the detailed gloss on 21 Hen. VIII.

In Brown v. Wood, the probate court granted administration to a half-sister of the intestate and her husband. A full brother of the deceased sued to revoke, whereupon the half-sister and her husband sought a Prohibition. The court agreed that the full brother had no better claim to be administrator than the half-sister, citing Wingate v. Glascock (above.) It also agreed that ecclesiastical courts may not revoke valid discretionary grants, relying on the “exhaustion of authority” theory. In the present circumstances, that is to say, it would be improper and prohibitable to take administration away from a half-sister and give it to a full brother. Doing so could not be justified by any intra-ecclesiastical definition of familial propinquity nor by the mere reasonableness of preferring the full blood. (It is perhaps reasonable to say that preferring the half blood to the full blood is a poor exercise of discretion— unlike, say, appointing one cousin rather than another of equal degree, when there is no difference unless in discretionarily assessed trustworthiness or competence. But in the court’s view this is irrelevant: the statute insists that when A is just as eligible as B, A’s appointment must stand in spite of what is in a sense good cause for reconsidering it. So holding is not necessarily.

21 M. 23 Car. K.B. Aleyn, 36. Style. 74, anonymous, is clearly the same case.
incompatible with permitting A to be replaced for still better reason—as when it comes to
light that he has behaved fraudulently.) The court went on, however, to hold that the
grant to the half-sister and her husband was unlawful under 21 Hen. VIII. The same
would clearly be true if she had been a full sister. The point of construction, which seems
correct, is that the statute favors relatives, not in-laws. It does not intend that an
intestate’s brother-in-law should enjoy his property apart from the normal operation of
the law concerning married women. The judges added that if the grant in the instant case
had been limited to the duration of the coverture it would perhaps be valid. (I.e., “Mary
and her husband John shall be co-administrators for as long as Mary is alive, but
thereafter John shall not be administrator” might be acceptable.) The “perhaps” is the
interesting point: The judges were not sure that the statute permitted appointment of an
in-law even when the practical effect would be no different from “the normal operation of
the law concerning married women.” Indeed it is hard to see how the statute literally
construed could so permit. There is probably also a practical advantage in going by the
letter: Allowing a sort of administratorship pur auter vie would require proceedings for
a new appointment should the wife die first and raise the question whether a sort of
ecclesiastical future interest could be created in the original grant by way of anticipating
that contingency—all unnecessary bother. Because the grant as it stood was unlawful, the
King’s Bench refused to prohibit the suit for revocation.

Hill v. Bird (1648) 22 arose from a nephew’s attempt to prevent a niece from
making off with all the intestate’s property. The niece obtained administration, and the
nephew then sued in the alternative, asking the ecclesiastical court either to revoke the
grant to the niece or to order distribution of a share to him. His position would seem to be
that he and his equally related cousin were entitled to equal parts of the estate, but he left
it to the probate court whether the result should be obtained by a new grant of co-
administration or by a distribution. Either way, his suit ought to be prohibited on pretty
well established principles: qua suit for distribution and probably qua suit for revocation
(if a grant to Eligible A is irrevocable despite the existence of Equally Eligible B.) In the
event, the court prohibited (nisi, it should be noted) quoad the distribution only. This
decision, however, is probably reflective of a special circumstance pointed out by counsel
(i.e., does not mean that revocation is generally within the powers of ecclesiastical
courts.) In this case, the grant to the niece was not absolute, but conditioned upon her
producing an inventory. (Expressly so conditioned, I take it. All administrators had a
statutory duty to put in an inventory, but their appointment was presumably not as a rule
made conditional on their doing so.) Counsel accordingly argued that the grant to the
niece was “not yet settled”, wherefore the probate court was still free to withdraw it and
substitute another. I can only make sense of the court’s disposition by assuming that this
point was accepted. The only judicial remarks reported are those of Justice Rolle, and
they go rather strongly to insist that revocation is outside the normal scope of
ecclesiastical courts. There is at least no sign that Rolle and the rest of the court were at
variance, and Alleyn’s report has Justice Bacon “not denying” Rolle’s general point. In
Style’s report, Rolle says first that a brother’s daughter and a sister’s son (the parties in

22 P. 24 Car. K.B. Style, 102; Aleyn, 56. The two reports complement each other without
contradiction. Style is the more complete and gives the conclusion, but some of the points
stand out more clearly in Aleyn.
this case) are in equal degree and that the Ordinary may grant administration to either. That says that the discretionary choice of the niece was no error and thus that there is no color for ousting her. Subsequently in Style, and in Aleyn as well, Rolle says that failure to put in an inventory or to render an account is no basis for revocation: the administrator may be compelled to do those things by ecclesiastical process (quod nota as to the account), but may not be discharged because he fails to. In view of this opinion, and assuming Rolle’s concurrence in the decision not to prohibit quoad revocation, I can only suppose that the grant to the niece in this case was held immature—in effect, no more than an indication that she would be appointed if she submitted an inventory, and therefore not such an act as to exhaust the ecclesiastical court’s authority.

Two further points were discussed in Hill v. Bird. The nephew seems to have based his claim to a share, partly if not wholly, on an agreement with the niece or among the deceased’s kinsmen more generally. If this was the essence of his claim, his case is the more plausible. That is to say, his position may have been as follows: We concede, if necessary, that if Eligible A is definitely appointed his grant may not be revoked in favor of a fairer grant of co-administration to Eligible A and Equally Eligible B, nor may A be compelled to make a distribution to B. The case is altered, however, if A and B have made an agreement to share the estate. The ecclesiastical court is entitled to take notice of the agreement, ordering a distribution that will implement it or, as a possible alternative, rearranging the administration to produce that result. In effect, appointment of an eligible administrator may exhaust the court’s “legal” authority, but does not dry up the reserve of “equitable” power to do minimal justice. While “law” may tolerate a niece’s taking all and a nephew nothing (and there is no complaining about the justice of statutory law), “equity” surely cannot tolerate the niece’s enjoyment of her legal rights in the face of her own agreement. This argument, however, was firmly rejected by Justice Rolle and presumably by the rest of the court. An agreement among the parties cannot confer jurisdiction on a court, Rolle says (citing Torke’s Case sub nom. Tucker v. Bone.)

The final feature of Hill v. Bird is that there were more kinsmen of the deceased than the niece and nephew, perhaps others of equal degree. The agreement on which the nephew tried to rely is likely to have involved this larger group of relatives. Hale, seeking a Prohibition, sought to have it so drawn as to run against all the interested kinsmen, rather than the nephew alone. It is hard to say exactly what that would have meant as to form, but it is clear enough what Hale was driving at in substance—some sort of “to whom it may concern” Prohibition, which would render liable to Attachment any other kinsman who came forward to make trouble for the niece after the nephew had failed. The utility of such a Prohibition cannot be denied: it would head off foreseeable litigative vexation and permit the niece to get on with administering the estate. Hale failed in this attempt, however; the “logical individualism” of Prohibitions (see the discussion of this concept in Vol. I) won out. As Justice Rolle said, a Prohibition must go against some certain person; joint Prohibitions covering a number of co-litigants are unobjectionable, but it is impossible to prohibit merely potential litigants.

A further late case raises the question whether Prohibitions should be used to enforce the eligibility requirements in the first instance and touches on the revocability of grants to one of several co-eligibles. Here a man made a will naming two executors, but

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23 M. 24 Car. K.B. Style, 147.
both executors predeceased him. The testator died leaving two sisters, one of whom was appointed administratrix. The other sister sought a Prohibition to block that appointment on the ground that she was entitled to be co-administratrix. I.e., the excluded sister did not sue for revocation or distribution, but tried to force the probate judge to repeal his first grant and make a new one. Prohibition was denied. The report does not show whether the court relied on one or the other, or both, of the available reasons. (1) Prohibition does not lie to enforce the eligibility requirements, at least not with retrospective effect, even if the ecclesiastical court has flagrantly violated those requirements. (2) Appointing one eligible person and excluding another is a perfectly legitimate exercise of the probate court’s discretion. The report does, however, have the court saying that she may appeal if she wants to protest the grant of administration. The remark points to the first reason for denying Prohibition and comes to a firm statement on a question that earlier cases do not firmly resolve. The court here does not say that appointing one sister and leaving out the other was unobjectionable. It at least intimates that that might not be the case by positively mentioning the possibility of an ecclesiastical appeal. “Appeal, not Prohibition, is your remedy” seems to be what the court asserts. The relation between revocation suits and appeal comes to mind. Would this court have refused to prohibit the excluded sister’s suit for revocation? If so, it would go in the face of most authority, unless there is something special about the circumstances of this case. If not, the court’s position takes the following shape: An excluded co-eligible may not sue to revoke, but he will not be prohibited from appealing the original grant. Though the effect of a successful appeal would be to undo the grant, the formal difference between a revocation suit and an appeal is crucial. Though an appellate court may be prohibited from reversing a correct mandatory grant below, it will not be prohibited from reviewing a discretionary decision among co-eligibles. This position contradicts the probable meaning of Wingate v. Glascock above. Wingate, however, is subject to problems of interpretation, and by and large the cases are not clear as to whether attempts to revoke administration directly are distinguishable from using the appellate process to the same end.

The question remains whether there is anything special about the instant case—any better-than-usual reason why the excluded sister should have been included, hence why her appeal would be plausible and even why a revocation suit brought by her might be acceptable. I believe an affirmative answer can be defended. There is no telling whether any such argument was made in the case, but it may be significant that the reporter so much as states the particular facts—the existence of a will, the death of the two executors. Something may have been made of them. The theory of administration may arguably be that the ecclesiastical court supplies the place of a testator. For that reason, there are normally no more checks on the ecclesiastical court’s discretion than 21 Hen. VIII expressly puts on it. An intestate might, if he had got around to making a will, have appointed one of his two sisters executrix and sole legatee, leaving the other out in the cold. The statute does not expressly prevent the probate judge from making the same choice, and if he does he must be presumed to have acted responsibly to effect the dead man’s probable desires—in loco testatoris, as it were. There is no sufficient basis for presuming otherwise, and the statute seems to trust the ecclesiastical court’s discretion when it confers it—when it refuses the opportunity to make such rules as “Closest relatives of equal degree shall always be co-administrators.” Under this theory, however,
evidence going to show the deceased’s actual intentions should be allowed to rebut the normal presumption. If the ecclesiastical court is in effect to choose the dead man’s executor, it should do so in the light of what is known—or “legally known”—of his intentions; only when there is no on-the-record knowledge of his desires may all the discretion the statute allows be used. So here. We know that the deceased did not favor one sister, or either (unless by leaving them legacies, about which there is no information.) He wanted two other people—two, not one—to be his executors and, presumably, residuary legatees. Administrators must now be put in the place of executors. I.e., by the usual practice, the now-executorless will would be annexed to the letters of administration; the administrators would be liable to satisfy any legacies and entitled to the residue. Under the circumstances, the best inference about the dead man’s intentions is that he would prefer to see both sisters in co-administration. He was indifferent between them and toward them, so far as appears. Since by accident they are to have what was intended for others, would he not prefer that they have equal shares of it? And would he not sooner trust the two of them to execute his legacies—checking on each other—than one whom he showed no sign of trusting?

A final case, from the Commonwealth period, 24 accords with earlier decisions against indirect means of effecting distributions. In this case, Davis v. Matthews, an intestate’s widow and nearest kinsman agreed that the widow would take administration, but would enter a bond guaranteeing a distribution. The agreement came out of a family dispute over who should be administrator. The “contract” would seem to amount to the kinsman’s undertaking not to seek administration for himself or to challenge the widow’s proceedings to gain it in exchange for her undertaking to enter the bond. She carried out the contract in the first instance—i.e., obliged herself (presumably to the probate court rather than the kinsman) to make the distribution. But then she failed to distribute and was sued in the Prerogative Court (as of 1655 the secularized successor to the old ecclesiastical tribunal.) The plaintiff was probably the kinsman with whom the administratrix had made the original agreement, but other relatives—beneficiaries of the distribution on which he bond was conditioned—may have been involved. The widow sought a Prohibition.

Counsel arguing against Prohibition conceded both that distribution is not directly compellable and that probate courts may not force it indirectly by requiring a distribution-bond whenever they like. A distinction was urged, however: Mandatory administrator may not be compelled to enter a distribution-bond or denied administration unless he does; on the other hand, such a bond may be taken from one co-eligible when he is appointed over other co-eligibles. The distinction at once makes sense and controverts earlier opinion. It is of course implicit in counsel’s position that under appropriate circumstances a distribution-bond is not only valid, but specifically enforceable by the probate courts. There is no sign from the report that counsel tried to make anything of the widow’s prior agreement to enter the bond. In other words, they talk as if the case would be the same if the probate court had demanded the bond on its own initiative, or without any preceding history. That the agreement could affect the equities is arguable, however. (Granting that even a discretionary administrator may not as a rule be forced to distribute by means of a bond, an exception may still be made

24 P. 1655. Upper Bench. Style, 455.
where there are strong equitable considerations—as where the person who becomes administrator expressly promises other members of the family that he will share with them and undertakes to secure that promise by a bond, and by his conduct deceives the other relatives into letting him assume administration unopposed.

Counsel in favor of Prohibition did little more than contradict the other side: Distribution-bonds may never be required; allowing them is incompatible with the theory that probate courts exhaust all their authority by the bare act of appointing an administrator—and surely authority is not exhausted if it extends, not only to demanding a bond, but forcing the administrator to carry out the promise implied in the bond; as distribution-bonds are illegal, so are conditional grants of administration. The court disposed of the case by awarding a Prohibition nisi. It is not clear, however, that the judges agreed with the contentions of the widow’s counsel. The only member of the court to speak individually, Chief Justice Glyn, by implication accepts the other side’s starting point, though not its conclusion. Glyn holds that the bond should not have been taken, and that the consequent proceedings of the Prerogative Court should be prohibited, but he so holds because the widow was quasi-mandatory administrator. He is explicit about his thinking in this behalf: Admittedly 21 Hen. VIII permits the appointment of the widow or the nearest kinsman. In strictness, by the language of the statute, a widow chosen in preference to the nearest relative is a discretionarily chosen co-eligible. By common practice, however, widows are preferred over next of kin, and they ought to be unless there is a special reason to depart from the practice, as where the husband-intestate has made inter vivos arrangements for his wife’s support in widowhood. Therefore widow-administratrices should enjoy the whole estate and should not be required to share with other relatives, by the device of a bond or otherwise. Room is left for counsel’s contention that a true discretionary administrator—such as the niece preferred over the nephew or the sister over the sister in the cases above—may in one way or another be made to distribute the estate. Glyn does not embrace that proposition, but confines himself to what is necessary for the case at hand; he nevertheless lends it countenance. The widow’s counsel stated what one can probably call the orthodox position, and that was rather more conspicuously not embraced by the Chief Justice. Glyn’s view that widows should be preferred over next of kin and the common practice of probate courts that he relies on make good policy sense. He does not dress his opinion up to give it analytic respectability—as by arguing that practice “expounds” the statute, so that the statute “really means” that widows who are not otherwise provided for must be granted administration even though it does not say so. Glyn may be censured for his jurisprudence but praised for his honesty.
CHAPTER 2—ECCLESIASTICAL SUIT OUTSIDE DEFENDANT’S HOME DIOCESE

Introduction and Summary

23 Hen. VIII, c.9, essentially provides that people may not be cited into an ecclesiastical court outside the diocese (or peculiar jurisdiction) in which they live. There is some difference of opinion in the cases as to which of two purposes the statute was primarily made for, but it in any event serves both: (1) Protection of the subject against the inconvenience of travel to remote places and the like. (2) Preservation of order in the ecclesiastical system as a per se good. The practically important mischief behind the statute was plaintiffs’ resorting to archdiocesan courts in preference to local ones and archepiscopal willingness to take first-instance cases. Among other effects, the practice deprived the defendant of one of the two appeals to which parties were entitled in ecclesiastical litigation.

23 Hen. VIII was virtually never enforced by Prohibition in the 16th century. (Note the parallel with 21 Hen. VIII, the statute discussed in Ch. 1 above.) The first major issue resolved in the 17th was that Prohibition would lie to stop a suit brought in violation of the statute. That was problematic because the statute appointed a penalty recoverable from the ecclesiastical judge who cited a defendant out of his home diocese. (Again, cf. 21 Hen. VIII.) It is uncertain whether earlier judicial opinion was firm that the availability of a penalty barred Prohibition. There may simply have been very few attempts to get Prohibitions, because the statute was rarely violated and because the penalty was perceived as adequate compensation by any parties who were inconvenienced by being sued away from home. Preference for archdiocesan courts on the part of plaintiffs may have increased in the 17th century, and those courts may have become more receptive, giving rise for the first time to serious demand for Prohibitions. A mixture of circumstances and motives may have entered into such a change; it is hard to see clues to them in reported cases. It would not be surprising if the upper echelons of the Church and the civil law profession came to favor more aggressive archdiocesan tribunals, not necessarily from aggrandizing motives alone, but equally from ambition for a more efficient and higher-quality legal system—avoidance of tedious appeals, more competent handling of complex cases at the first-instance level. On the side of the litigant, preference for specific enforcement of statutory rights via Prohibition could have a strategic motive. If the stakes in the litigation are high enough, there is an obvious advantage in challenging one’s opponent to fight over a Prohibition; then, if he declines to fight or loses, to have two appeals still ahead. As the chance of the statute’s being violated increased, so naturally did the chance of high-stakes cases occurring and of their involving determined, sophisticatedly advised, or “strategically” litigious defendants. The wider context of the statute’s judicial history remains quite speculative. It is perfectly possible that pre-Jacobean professional opinion, though not much tested, was clearly unfavorable to Prohibitions; the penalty was a satisfactory-enough remedy for, and deterrent to, violation of the statute. Greater enthusiasm for Prohibitions as a remedy, or the conviction that there was a public interest in the specific enforcement of jurisdictional
lines despite alternatives and regardless of practicalities, may explain to a significant degree the high incidence of 17th century Prohibition cases on 23 Hen. VIII. Breakthrough in any event came from a court in which those attitudes were especially strong—the Common Pleas during Coke’s Chief Justiceship. Throughout the first half of the 17th century, the great majority of cases on the statute were in the Common Pleas. The King’s Bench eventually had little choice but to follow the lines laid down by the Common Pleas, but the former court was visibly cool toward Prohibitions on 23 Hen. VIII. Left to itself, it would quite possibly have held that the penalty was the only remedy. Coke as Chief Justice of the King’s Bench was unable to turn it around completely.

Once Prohibitions to enforce the statute could clearly be sought, numerous issues concerning its exact meaning arose. (There is no sign that any of these had been explored earlier in penalty suits.) Some cases involve details of construction and hardly admit of summary. The major issues indicated here were not all decisively resolved. The judicial gloss on the statute had several loose ends at the time of the Civil War.

The following propositions were established beyond serious challengeability:

(1) Prohibition will lie to stop an ecclesiastical suit that violates 23 Hen, VIII. If, however, a party cited outside his home diocese waits until the improper ecclesiastical tribunal has given sentence against him Prohibition will be denied. This qualification is an exception to the general rule that delaying until after sentence is not a bar to Prohibition, save in case of very long or abusive delay. (See Vol. I, pp. 115 ff., for the general rule.)

(2) Archepiscopal courts do not have sweeping powers to take cases away from inferior courts. In a few cases, civilian counsel argued on behalf of the Archbishop of Canterbury that usage or the Archbishop’s inherent prerogative gave him as much first-instance jurisdiction, concurrent with that of lower courts, as he chose to assume. These claims were firmly repudiated. They tend to make a mockery of the statute. If in effect it did not apply to archdiocesan courts, its preamble, which calls attention exclusively to the problem of archepiscopal usurpation, would be in vain. The statute would be addressed to Bishops encroaching on other Bishops, which for practical purposes was not much of a problem, and to the protection of archdeaconries and peculiar against Bishops, which was not an agreed-on object of the statute at all (see below.) As a corollary: There are a couple of decisions that the basic proposition still holds even though the defendant is not forced to travel beyond the physical bounds of his diocese—as if the Archbishop moves his court to a diocese where it does not normally sit, or a party living in the diocese of London is cited into the Arches (an archdiocesan court permanently located in London.)

(3) Among its several exceptions—which caused most of the problems of construction—statute saves the Archbishop of Canterbury’s prerogative to prove wills when the testator has goods located in several dioceses (the Prerogative Court of Canterbury.) This proviso was extended in one way and restricted in another. (a) Though the statute says nothing about it, the Archbishop has an analogous prerogative to handle intestates’ estates when the deceased had goods in more than one diocese. (b) Prerogative to prove the will does not carry with it jurisdiction over legacy suits arising from the will. The executor must be sued for legacies where he lives, except when there are several executors resident in different dioceses—then archdiocesan jurisdiction is appropriate.

In contrast to the issues above, the following ones were much less clearly resolved:
By far the most problematic feature of the statute was an exception for suits removed to a higher court by request of the lower court to which it would normally belong. The statute does not say that any suit may be removed by such request, but that any suit which ecclesiastical law permitted to be so removed may be. There were some small issues on the meaning of this proviso, such as whether the request can be made by a Bishop’s deputy and whether it needs to be sealed. There are holdings on these matters of form, but they do not add up to certain resolution. The big questions were (a) what the ecclesiastical law does permit and how this is to be discovered; (b) whether the request must recite reasons for requesting removal and, if so, what reasons are sufficient. The second question in a sense falls under the first—Does ecclesiastical law require reasons to be stated, and does it have a restricted list of good reasons? It is arguable, however, that the statute barred indiscriminate removal even if ecclesiastical law did not, or could not be proved to.

These issues did not really arise in the Common Pleas when Coke was Chief Justice. In some ways the most important decision about 23 Hen. VIII was made by the Common Pleas under his successor, Hobart (Jones v. Jones.) It was held that reasons must be given and that not just any reason is valid, by force of the statute if not ecclesiastical law. (The reason actually given in the case at hand was ruled insufficient.) The logic of this decision is vulnerable, however. It was vigorously attacked from the Bar by William Noy in subsequent cases, but in the upshot neither confirmed nor reversed.

In the end, the most important issue remained in nubibus. It is a critical issue because if suits could be removed by the mere request of the lower court the statute would be in danger of subversion. Lower courts would probably have had motive enough to “unload” embarrassing or difficult cases on their own initiative; in addition, they would have been subject to pressure from archepiscopal courts when the latter chose to “request permission” to take a case. The underlying problem was establishing that ecclesiastical law put any restrictions on removal in the face of civilian testimony to the contrary and, failing that, finding any ascertainable restrictions in the statute itself. As with other statutes from the Reformation period with which later courts had to struggle, this one was a masterpiece of confusing draftsmanship at vital points.

(1) In less than perfectly clear language, the statute makes an exception for the situation where a resident of Diocese A offends, or does the act which gives rise to an ecclesiastical complaint, in Diocese B. In that general type of case, the court of B could proceed without violating the statute. One would expect legal problems from this provision, and they occur in a few cases. There are too few, however, and there is too little articulation of principle in those, to permit abstracting many rules. Clearly if an inhabitant of A came into B and committed an ecclesiastical crime he could be prosecuted in B so long as he remained there. Prediction would be less reliable for variants (returns to A, goes to C, leaves B but comes back after an interval, etc.) Clearly an inhabitant of A cultivating land in B could be sued for tithes there from in B. Defamatory words spoken in B by an inhabitant of A probably fall under the rule for crimes committed in B (owing to the mixture of criminal and civil elements in ecclesiastical defamation.) For the rest, prospective plaintiffs would be well-advised to sue where the defendant lived. Except for the duty to pay tithes, rates, and the like, and the duty to refrain from overt criminal acts, breach of ecclesiastical duties can usually not be very plausibly "located" elsewhere than where the party happens to be; the statute
plainly says he may not be sued where he “happens to be”, but where he lives. (The concept of residence is not really explored in the cases. It arises in only one, where an attorney who spent much of the year in London but had a “permanent address” elsewhere was sued in London. It was held that the suit was improper; his regular and durable “business address” did not count.)

(2) The statute expressly protects peculiar jurisdictions and their inhabitants. There was some question, however, as to whether they were protected against diocesan encroachment, or only archdiocesan. For good reason, some judges were disposed not to intervene when an inhabitant of a peculiar was cited into the Bishop’s court. (The party was not forced to travel beyond his home diocese and was not deprived of an appeal. The title of peculiar to exclude the Bishop from concurrent jurisdiction would sometimes not withstand scrutiny. Even if citation out of peculiar to the diocesan courts was a violation of the statute, it is arguably so petty a violation that the penalty would always be an adequate remedy.) Archdeacons commonly had first-instance jurisdiction, in practice or by custom, in sub-districts of the diocese. An Archdeacon might arguably have the privileges of a peculiar, but some judges would have said he could not, and in any event making out a title to exclude the Bishop from concurrency could be tricky. Best advice to a parson cited into the diocesan court from a peculiar or archdeaconry would be, “You have a chance for a Prohibition, but with the difficulties you are likely to encounter it is scarcely worth seeking one.”

Trends in the construction of the statute over the period 1600-1650 do not stand out strongly. There is a slight tilt away from willingness to grant Prohibitions on the part of the Caroline courts, but no real departure from earlier law to the degree it was settled.

Text—the Cases

A statute frequently enforced by Prohibition was 23 Hen. VIII, c.9. This act was made to preserve localism in ecclesiastical justice. Subject to a number of exceptions, it provided that people should not be sued for ecclesiastical causes outside the diocese in which they lived. Prohibition cases on the statute bring together several general and recurrent themes: The authority of the principal common law courts to interpret statutes and enforce their interpretation by Prohibition; the legitimacy of common law enforcement by Prohibition of intra-ecclesiastical lines of jurisdiction; whether provision for punitive damages or for a penalty in a statute should be taken to exclude its enforcement by Prohibition. Numerous cases on 23 Hen. VIII raise these questions explicitly or implicitly, along with detailed questions about the meaning of the act.

For whatever reason, the judicial gloss on 23 Hen. VIII was mainly written by the Common Pleas when Coke was Chief Justice there. I have found no reported Prohibition cases on the statute from Elizabeth’s reign. The manuscript version of Justice Hutton’s reports contains a list of practice precedents—i.e., Prohibitions granted on the basis of the statute, but without any indication as to whether the writ was contested or of judicial reasoning. It is likely that all the precedents are from the Common Pleas, where Hutton

23 Harl. 4831, among reports from H. 1 Car. The cases listed are as follows: (1) Fowle, H. 6 Jac—wrongful citation from diocese of Coventry and Lichfield to Court of Audience. (2) Hurst, H. 7 Jac.—Winchester to Arches, suit for tithes. (3)Wells, M. 7
practiced as a Serjeant from 1603 and served as a judge after Coke left that court. One precedent on the list comes from 43 Eliz., as compared to one from P. 2 Jac. (pre-Coke) and ten from 6-12 Jac. (the Cokean period.)

From M. 44/45 Eliz., I have a penalty or damage suit on 23 Hen. VIII—as opposed to a Prohibition suit. One of the reports of this case (see note for the substance) gives the information that the statute was discontinued at one time but revived by the Supremacy Act of 1 Eliz. It was discontinued in the sense that it was repealed, along with several pieces of Henrician legislation concerning the Church, by 1 and 2 Philip and Mary, c.8. 1 Eliz. “revived” it (by that term, without revision) together with the other repealed statutes. The reporting of this fact suggests that 23 Hen. VII and suits based on it were not as familiar as they later became.

My earliest Jacobean report bearing on the statute comes from the King’s Bench in 1605. It gives a remark by Justice Yelverton apparently connected with a case before

Jac.—Norwich to Arches, for scandalous words (4) Powell. T. 8 Jac.—“consimile”...(5) Fitton. H. 7 Jac.—to Archbishop of York. (6) Foster. P. 12 Jac.—“consimile”. (7) Rudd et al. 43 Eliz.—sole Elizabethan case, see text; from a peculiar in Rutland called Ledington; only case on the list about episcopal encroachment on peculiars. (8) Brydges. M. 9 Jac.—to Arches, defamation; close enough in date to the reported case of that name (Note 16 below) but substance does not look the same. (9) White. M. 9 Jac.—Oxford to Arches, legacy. (10) Derby. M/ 9 Jac.—matrimonial. (11) Plombe. P.2 Jac.—Norwich to Canterbury, the See of Norwich being vacant, a circumstance that occurs in none of the reported cases. (12) Vincent. M. 8 Jac.

For what bare precedents are worth, the 12 cases listed are significant evidence in addition to the cases following in the text for a brisk Jacobean trade in enforcing 23 Hen. VIII by Prohibition, since there is little or no overlap with reported cases. The list ends with one precedent of a penalty suit on the statute—same case as nest note below; evidence of such suits is very sparse.

26 M. 44/45 Eliz. C.P. Lansd. 1074, f. 405b; Lansd. 1058, f. 55 sub. nom Maghen v. Bakington. Bakington or Babongyon was Chancellor of the Bishop of Coventry and Lichfield, who cited Maghen or Mighen out of a peculiar—quod nota—ex officio for the offense of keeping a school without the Bishop’s license. The Chancellor denied that he had cited M. for that, but rather for publishing schismatical opinions; he also denied that plaintiff lived in a peculiar. M. demurred to this plea, which was held insufficient on two grounds of form: (a) the alleged schismatical opinions should have been specified; (b) B. should not have admitted citing M. and alleged affirmatively that he cited him for a different cause—rather, he should have simply confessed or denied what M. said, that he was cited for keeping an unlicensed school. The reporter thought, however, that judgment was stayed because M.’s declaration was also insufficient, for not showing whom the peculiar belonged to and “other defects.” (Lansd. 1074 gives these full facts; the other report says only that a penalty action was brought on the statute.)

27 T. 3 Jac. K.B. Add. 25,209, f. 65 (Of the persons appearing in the report besides Yelverton, Harris is identified as “the old—or senior—serjeant”; Winckorne is identified as counsel in the case. The way in which the two lawyers are presented is what makes me think that Harris was probably not counsel in the case, but advising the court on his own—the point in question was certainly not a familiar one for the King’s Bench.)
the court (for the report says that one Winckorne, who was of counsel “in the case”, agreed with Yelverton, and that “the suit” concerned matrimony.) Yelverton’s opinion was that although 23 Hen. VIII appoints a penalty, “yet a man may not sue another out of the diocese although he agree to pay the penalty in the statute.” I take this as saying that a suit brought out of the proper diocese should be prohibited despite the alternative of the penalty; as it were, the statute says “Thou shalt not”, as opposed to merely putting a price-tag on suits in the wrong diocese, and “Thou shalt not” should be given effect by Prohibition. Yelverton’s formulation may, however, have a narrower meaning. In speaking of the ecclesiastical plaintiff’s “agreeing” to pay the statutory penalty, he could have had a literal agreement in mind. One might argue that whether or not suits contrary to the statute are generally prohibitable despite the availability of the penalty, they should in any event not be prohibited if the plaintiff expressly agrees to pay the defendant £5 and the King £5—the sum at which the statute may be said to value the offense, and which could conceivably be said to “liquidate” the double tort damages which the offended party is also entitled to recover. If that is arguable, Yelverton rejected the argument. Winckorne agreed with him, but Serjeant Harris, who may be speaking for himself rather than as counsel (see note) is reported as holding the contrary. He may have been addressing the special case of an explicit agreement, but may also have differed from Yelverton on the general effect of appending a penalty to a “Thou shalt not”. The latter point was soon to be resolved by the Common Pleas in favor of Prohibition.

In contrast with these faint beginnings, I have 15 reported cases plus 1 nota, which may or may not relate to a separate case, from the Common Pleas in the years 1608-1613, during Coke’s Chief Justiceship. For what bare precedents are worth, Hutton’s list above adds a few more. These figures compare with 5 from the King’s Bench in all of James I’s reign, 7 Common Pleas cases plus a nota from that reign after Coke left the court, 6 plus a nota from the Caroline Common Pleas, and only 1 from the Caroline King’s Bench. Because of the Common Pleas’ preponderance, I shall deal with all cases from that court before turning to the King’s Bench.

The first significant case, Lewis and Rochester v. Proctor, 28 is much the greatest. General questions—the common law judges’ authority to construe statutes concerned with the Church, the prohibitability of suits punishable by penalty action—were discussed explicitly, and there was thorough debate on the whole meaning of 23 Hen. VIII along the way to deciding the immediate issue. The decision to grant Prohibition in this deeply argued case probably opened the gates to the numerous subsequent Prohibitions based on the statute. The immediate issue of construction was whether the statute applied to inhabitants of the diocese of London sued in the archdiocesan court of Arches, which was located in the city of London. The act manifestly applies, for example, if an inhabitant of Bath and Wells is sued before the Bishop of Coventry and Lichfield in respect of a crime or tort in no way committed within the diocese of Coventry and Lichfield. Lewis and Rochester, however, lived in Essex within the diocese of London and were sued in the Arches for tithes grown in Essex. To answer in the Arches they would not have had to go physically out of their home diocese. Among other arguments

against a Prohibition, it was urged that 23 Hen. VIII did not apply in these circumstances. (The Arches was held in the church of St. Mary le Bowe, that parish, along with a dozen others, being part of the Archbishop of Canterbury’s London peculiar. A peculiar is the ecclesiastical equivalent of a franchise: an area carved out from a diocese and not subject to the Bishop’s courts. If Lewis and Rochester had lived in St. Mary le Bowe, or perhaps elsewhere in the Archbishop’s peculiar, they would without question have been suable in the Arches; indeed, it would almost certainly violate 23 Hen. VIII to sue them before the Bishop of London. As it was, they claimed that they could only be sued in the diocesan courts, irrespective of the physical location of the Arches.)

The reports of this case are of two sorts. Harl. 4817 and Brownlow give narrative accounts, differing only in that each contributes details which the other lacks. Coke and Lansd. 601 give the court’s resolutions with almost no narrative. The latter reports are the same except for small ways in which one supplies what the other omits. Both have the marks of authentic Cokean products. Lansd. 601 is a MS. version of 12 Coke, containing some material not included in the printed volume. Lewis and Rochester found its way to 13 Coke rather than 12 Coke. Neither of these posthumous volumes is of the quality of the 11 volumes published in Coke’s lifetime. The report of Lewis and Rochester, however, in both versions, is typical of Coke’s style. He preferred not to recount the unfolding of a case, with the separate arguments of counsel and the judges, but to gather what he thought was decided in the form of “resolutions.” Aside from the omission of sometimes significant details, this method tends to make the “resolutions” look more deliberate and coherent than what the judges actually said in discussing and deciding the case. Coke was not inhibited about reordering what had been said and adding arguments or authorities. Sometimes material misrepresentation of the events in the courtroom resulted. In the present instance, however, there is no real conflict between Coke’s “resolutions” and the “motion picture” of the case. He may have added some points that he did not express orally in court, but most of what he says was resolved did indeed come out in the discussion. I shall nevertheless, in view of the contrasting character of the reports, proceed by following and combining the narrative accounts, then add the further points that Coke’s summary contributes.

When Lewis and Rochester sought their Prohibition, they of course set out their basic claim: they lived in Essex; the tithes were grown there; suing them in the Arches instead of the diocese of London violated 23 Hen. VIII. But one further allegation is significant: they said expressly that the Bishop of London had not given his license for the suit to be in the Arches. Including this allegation was probably prudent pleading, rather than necessary. 23 Hen. VIII provides that when a Bishop or other inferior ecclesiastical judge requests a superior judge to take a case, the higher court may take it without violating the statute. As we shall see, the exact meaning of this provision was problematic. I doubt, in the light of other cases, that plaintiff-in-Prohibition had a “pleading burden” to say negatively that the inferior judge had made no request or given no license, but one might as well say so.

The court’s first move was to assign a day to show cause against Prohibition. I.e., the judges did not grant a Prohibition at once, leaving defendant-in-Prohibition to move for Consultation or to plead formally if he had anything to say for himself. Neither did they withhold all commitment until arguments for Prohibition were developed. In this case, giving a day to hear argument against Prohibition had a special character. It seems
evident that what the judges expected and wanted to hear was civilian argument. According to Harl. 4817, the first thing the judges said was that they wanted to be informed by civilians of usage since the statute. The legal implication of that desire should not be taken too literally, but it is still significant. The judges apparently wanted to know whether the Arches had made a practice of entertaining cases throughout the diocese of London, outside the Archbishop’s peculiar. I doubt that they would have held the usage conclusive—i.e., that if the Archbishop had regularly assumed jurisdiction he was entitled to—but they could still have been justified in thinking it relevant. Perhaps consistent usage in the Archbishop’s favor would argue implied consent by the Bishop, thereby at least raising the question whether tacit assent to a general assumption of concurrent jurisdiction fell within the statutory exception for requests by inferior judges to superior. In any event, the judges wanted to know what had been going on in the ecclesiastical sphere. This confirms what negative evidence from the many years between 23 Hen. VIII and 1608 suggests: attempts to get Prohibitions based on the statute were very unfamiliar. So basic a point as standard ecclesiastical practice in London had apparently not been looked into judicially before.

Accordingly, three civilians appeared and argued—Dr. Farrand, Dr. Martin, and an anonymous third. As it turned out, they did a great deal more than inform the court of the ecclesiastical practice, indeed more than argue the narrow issue in the immediate case (whether a citation to appear within the physical borders of London diocese falls under the statute.) Rather, they made sweeping arguments against the enforcement of 23 Hen. VIII by Prohibition and in favor of virtually exempting the Archbishop of Canterbury from it. I wonder whether such argument is not what the court expected and invited. There is no indication that common law counsel spoke against the Prohibition, whereas Serjeant Dodderidge made a full-scale argument on the other side. Civilian counsel did not appear as adversaries on both sides. Rather, they seem to be speaking for the Archbishop and the ecclesiastical establishment, more than for the defendant-in-Prohibition. In sum, it looks to me as if the judges knew they had a novel issue on their hands, knew that routine handling of the case possibly eventuating in a Prohibition would offend the Church authorities and their political friends, and therefore opted for the grand manner—a full opportunity for the Archbishop to represent his interest and a fundamental treatment of the issues.

The civilians’ basic theory was that the Archbishop had full concurrent jurisdiction throughout his province—i.e., that he could entertain any suit in any diocese if he chose to and if, in the case of civil litigation, the plaintiff chose to go to an archdiocesan rather than a diocesan court. As was shown on the other side to the point of over-kill, this theory comes close to reducing 23 Hen. VIII to unintelligibility. Among other objections, it involves the premise that the statute does not mean what it seems to say—that suits must be brought in the court of the diocese where the defendant lives, with certain specified exceptions—but rather that it confines suits to the defendant’s home diocese in so far as the ecclesiastical law already so confines them. Because the Archbishop by ecclesiastical law has concurrent jurisdiction in every diocese, says the theory, he has it notwithstanding the statute. Construed by intent (though the civilians did not articulate this point), the statute does not mean to take away any jurisdiction that was previously valid by ecclesiastical standards. The civilians realized, however, that their theory tended to make the statute pointless and attempted to show that it would have
served some purpose even admitting their concurrency doctrine. For they conceded that the Archbishop could not take over suits already commenced in diocesan courts except by way of appeal (and they could of course have made the obvious point that there are other situations presumably covered by the statute, such as my imaginary case of a Bath and Wells suit pursued in Coventry and Lichfield.) In the abstract, without too much attention to the precise language, the act could be intended to reinforce such pre-existing ecclesiastical rules as that against archiepiscopal “disseisin” of a Bishop already possessed of a suit.

Secondly, the civilians claimed that all usage supported their concurrency doctrine. As we shall see, Dodderidge and the court came close to conceding this factual assertion, though they did not give legal weight to the usage. Dr. Martin made the curiously precise statement that in the period before the statute the Archbishop exercised concurrent jurisdiction for 427 years before any complaint was made, after which someone objected to the Pope and the Pope held that people from any diocese could be cited to the Archbishops. I know nothing of what Martin was referring to, but his figure is not senseless. It could say that the usage continued from William I’s establishment of separate ecclesiastical courts down to shortly before the Reformation, when the Pope settled the first controversy in the Archbishop’s favor. If that happened, the Archbishop would have been confidently and routinely exercising concurrent jurisdiction in 1531-32, when the statute was made and when the Pope, after all, was not yet excluded from the English ecclesiastical system. One can rationally ask whether the statute-makers are likely to have meant such established and recently confirmed practice to be henceforth illegal (without, incidentally, implying that the Papal judgment should have any force as such.)

The civilians next tried to argue that the Act in Restraint of Appeals—24 Hen. VIII, c.12—proved that concurrent jurisdiction in the Archbishop was recognized as lawful. If that was acknowledged a year after 23 Hen. VIII, it would of course be extremely difficult to say that the earlier statute had made such concurrency unlawful for the future. The language in question was wrenched out of context (as was pointed out in rebuttal), but the act does speak as follows (in Sect. iv): “every…cause now depending or that hereafter shall be commenced…before any of the said Archbishops…shall be before the same Archbishop where the said…cause…shall be so commenced definitively determined…without any other appeal…than is by this act limited.” The civilians took this to show that causes could be lawfully commenced before Archbishops, not just appealed or removed before them (which of course it does show) and then to imply that any ecclesiastical cause could be commenced there. The inference involves a saltus: Why should the act not be taken as acknowledging only that some suits can be commenced before the Archbishops—notably suits against persons living in the dioceses of Canterbury or York or in peculiaris belonging to the Archbishops (reading 24 Hen.VIII in the light of 23 Hen. VIII) and probate suits falling within the Archbishops’ prerogative (which are expressly exempted in 23 Hen. VIII)? Even so, the civilians’ point is not unreasonable. 24 Hen. VIII speaks generally of suits commenced before the Archbishops and does not go out of its way to explain that it is referring only to certain limited categories. To say that 24 Hen.VIII was written on the assumption that suits may be commenced before the Archbishops at will—so long as they have not already been
commenced in a lower court—is only “favorable construction” of words which could have been, but were not, so drawn as to exclude such construction.

Besides their exposition of ecclesiastical law, usage, and understandings at the time of the statute, the civilians also spoke in their initial argument to the policy of the statute as applied to the immediate situation. Coke’s statement of resolutions helps fill out what was said to this intent. (He states the arguments that were made and proceeds to answer them. Brownlow puts the same point, less precisely, in the civilians’ lead-off speech.) The general point is that the statute only meant to protect people against being summoned to remote ecclesiastical courts and therefore did not apply when they were summoned to one place in London diocese rather than another. This comes to an argument by way of concession, because one could throw away the claim of general concurrent jurisdiction in the Archbishop and still maintain that the act was meant to take effect—or at least should be “specifically enforced” by Prohibition—only when the subject would be put to material inconvenience. More precisely, the civilians relied on two places: (a) The title of the act, “That no person shall be cited out of the diocese where he or she dwelleth.” I.e., the title expounds the strict meaning—no one shall be cited to appear outside the physical limits of the diocese where he lives, and the act has no force until someone is so cited, as had not happened in this case. (b) The opening words of the preamble—“Where great number of the King’s subjects…have been…called to appear…far from and out of the diocese where such men be inhabitant and dwelling…” (My italics indicate the language emphasized.)

After the civilians had made the above points, Chief Justice Coke interrupted with a counter-argument: Canon 94 among the canons made by Convocation and given the royal assent in 1604 expressly confirmed 23 Hen. VIII by providing that no one except inhabitants of the Archbishop of Canterbury’s diocese should be cited to the Arches. The civilians answered in two ways. Dr. Farrand argued that the Archbishopric of Canterbury was vacant when the canons were made (between the death of Whitgift and the appointment of Bancroft.) Under those circumstances, a canon deprivatory of the Archbishop’s jurisdiction was not binding, according to Farrand (“but it is a feeble response”, says the reporter of Harl. 4817.) Dr. Martin argued that the canon was void by virtue of 25 Hen. VIII, c. 19—the Act for the Submission of the Clergy, which provides that canons contrary to the laws and customs of the realm shall not be valid. Martin’s contention was that the long usage which he had just asserted was the sort of custom or prescription that the statute had in mind.

Before giving up the floor, the civilians added two further bricks to their edifice. First they argued that the exposition of the act, because it was an ecclesiastical statute, belonged to them. Translated into procedural context, the argument comes to the basic case against enforcing statutes governing ecclesiastical jurisdiction by Prohibition. The common law courts could not be excluded from dealing with 23 Hen. VIII altogether, because the statute gives damage and penalty actions, which must be brought at common law. Were its meaning to come in question in such an action, the common law courts must interpret the statute; the most they could do by way of self-denial would be to defer to known ecclesiastical opinion and consult civilians. But the self-denial of refusing Prohibition regardless of the merits—trusting the ecclesiastical court to deny itself if a statute so requires—can be practiced strictly. Secondly, the civilians argued that the Bishop of London had consented to the suit in the Arches by the tacit or passive means of
not protesting it. Dr. Martin said that the Bishop had notice; I suppose he meant constructive notice or notice of the Archbishop’s general practice of taking cases in London and other dioceses, though it is remotely possible that he intended a factual statement—an unpleaded denial of plaintiff-in-Prohibitions’s stated claim that the Bishop had not given notice. This argument depends for its force on the premise that an inferior judge’s failure to protest falls within the statute’s exception for cases in which such inferior judge requests a superior to take a suit. The statute expressly incorporates the ecclesiastical law on this point by exempting removals-by-request on condition that they are lawful by ecclesiastical standards. If by ecclesiastical law a superior judge may defeat the jurisdiction of an inferior simply by taking a case, provided the inferior judge has notice and registers no protest, it is plausible that there is no violation of the statute.

At this juncture, by the most likely construction of the sequence, the civilians left off and Serjeant Dodderidge made his detailed argument in favor of Prohibition. He started by simply denying the concurrency theory as a matter or law: the Archbishop has original jurisdiction in his own diocese and peculiars and nowhere else. Yet Dodderidge conceded that there was at least a good deal of usage to give color to concurrency. He rather explained this fact than denied it: In the Papist times the Archbishop exercised legatine authority derived from the Pope—as legatus natus, or possessor of legatine power without special appointment. Pursuant to that authority he could (by then-current ecclesiastical standards) and in fact did entertain suits in all the dioceses under him. Now, however, such legatine authority was abolished together with all other powers in or derived from the Pope. By the standard Anglican theory, it was usurped in its day, like all Papal power; in any event, the ecclesiastical law of that time and usage erected on it were now irrelevant. But obviously there was “at least a great deal of usage”, de facto. Dodderidge avoids saying that the usage changed with the law; perhaps he realized that it had not; but any usage of concurrent jurisdiction since the Reformation lacked such color of legitimacy as the same usage before the Reformation had and was therefore entitled to no legal force. Such was Dodderidge’s general position. On the Arches specifically, however, he maintained that its authority did not extend beyond the parish of St. Mary le Bowe. Legally it never could reach, and factually it never had, beyond that parish. The Archbishop’s Court of Audience was and remained the proper forum for such other original jurisdiction as he could lawfully exercise—at this day, the court to which inhabitants of the other London parishes in his peculiar should be cited.

Dodderidge next insisted that the 1604 canon was “great proof” of his position. On a general plane, he argued that an act of Convocation, involving the whole episcopal bench and various deans and Church-law experts, could hardly be based on ignorance of ecclesiastical law or indifference to the Archbishop’s interests. More specifically, he went to the “legislative history”: The Bishops of London, Lincoln, and Winchester had “grudged” at citations of their diocesan subjects into the Arches, but had been reluctant to complain when the Archbishopric was occupied. (In practice, though Dodderidge does not put it so baldly, this probably means the Bishops were afraid to complain, or pessimistic about their chances of success, when Whitgift, with his strong personal backing from Queen Elizabeth, was in office. Note how this point amounts to a still more explicit concession on Dodderidge’s part that the usage was as the civilians said it was. ) The complaints were brought out in the open during the vacancy, when Dr. Bancroft, now Archbishop of Canterbury, was the presiding office of Convocation. (In Brownlow’s
account, Coke, speaking later, reinforces this point by adding that the jurisdiction of Canterbury was temporarily committed to Bancroft at the time the canon was made, while Bancroft was still Bishop of London.) So much, Dodderidge thought, for Dr. Farrand’s argument from the vacancy of the See in the actual circumstances, even assuming that something could be said for it in the abstract.

Dodderidge turned next to construction of 23 Hen. VIII itself—to showing that the act makes no sense if it is taken as contemplating that the Archbishops were perfectly entitled to exercise concurrent jurisdiction. He asserts the general intent of the statute to curb the Archbishops, without insisting as strongly as he might have on the way the preamble makes that intent very hard to doubt, and then focuses on the strongly persuasive effect of two provisos: The act expressly provides that the Archbishops may take heresy cases if the inferior judge consents (and here the language about assent is looser than in the exemption for cases removed by request) or if “he do not his duty in punishment of the same.” The act also expressly saves the Archbishop of Canterbury’s prerogative jurisdiction in probate (i.e., his prerogative to supervise probate of wills when the decedent had goods in more than one diocese—the usual definition of the prerogative, later affirmed in cases on 23 Hen. VIII, though the statute refers to it without definition.) These savings, Dodderidge argues, would be purposeless if, in the eyes of the statute-makers, the Archbishop could take any diocesan case.

Finally, Dodderidge answered the civilians’ argument from the Appeals Act. His point here is only what common sense and a sense of context must assert against the civilians’ nicety: The Appeals Act has nothing to do with distributing ecclesiastical jurisdiction within England, but only with preventing appeals from being taken to Rome. It mentions suits commenced before the Archbishops because there is after all such a category—cases arising in their own dioceses—and to close all holes the Appeals Act had to provide that such suits be settled by the Archbishops and not appealed to Rome. (The act does of course provide for such cases to be appealed into the Chancery—or to the Delegates as the practice was worked out—in contradistinction to diocesan cases, which went to the archdiocese first and then to the Chancery/Delegates.)

Upon these arguments, the court gave its opinion, except that after Coke had spoken for the court the civilians were allowed to try one more approach, which proved as unsuccessful as their original ones. Prohibition was granted by a majority of Coke, Warburton, Foster, and Daniel, no one except the Chief Justice speaking individually. Justice Walmesley dissented (according to Brownlow—other reports leave his dissent to be inferred from the fact that he is not heard from) on a ground to which he was much devoted—viz. the position that the Common Pleas, unlike the King’s Bench, could not prohibit unless a “foreign” court proposed to interfere in a case actually pending before the Common Pleas. (Brownlow says that the civilians urged this point too.) In other words, so far as the evidence shows, Walmesley did not dissent on the substance, though his position may have masked substantive disagreement, or at least distaste for the result.) Apart from his belief that the Common Pleas had no standing to prohibit without an action pending, Walmesley was especially reluctant to prohibit one ecclesiastical court from encroaching on another—a position he would probably, or at least could logically, have held if he had sat on the King’s Bench rather than the Common Pleas. Covertly or overtly, Walmesley’s generally conservative approach to Prohibitions may be reflected in
his dissent, whether or not he was persuaded by the civilians’ dubious interpretation of 23 Hen. VIII.

Coke and the majority in effect adopted everything Dodderidge had argued as the court’s opinion. It is clear, however, that Coke added further points, whether or not he said in open court all that he later formulated into resolutions. In giving Coke’s opinion, I shall omit what only repeats Dodderidge and combine the resolutions with other sources in a composite picture of his contribution. To start with, Coke was explicit in asserting the common law judges’ authority to expound statutes dealing with ecclesiastical matters. He cited cases in support of this proposition and explained one of them. (2 Hen. IV, c. 15, permitted ecclesiastical judges to imprison persons holding erroneous opinions. In Henry VII’s reign, a man was committed for saying that he ought not to pay tithes to his curate. The man brought False Imprisonment, and in disposing of that case the common law judges debated what “erroneous opinions” the statute applied to.) Whether title to pass on ecclesiastical matters in the course of expounding a statute in order to dispose of a common law action entails that statutes should be enforced on Church courts by Prohibition may be doubted, but Coke clearly had no doubts. Lewis and Rochester was meant to settle that question for 23 Hen. VIII, and it can probably be regarded as having done so.

On the general meaning of the statute, Coke emphasized the preamble, as Dodderidge had not; from the preamble it appears that archiepiscopal infringement of diocesan jurisdiction was the center of the makers’ concern. On the other hand, Coke went to some length to show that the preamble’s reference to citation to far-distant courts should not be taken as restrictive. (Various other statutes called attention to the “greater mischief” in their preambles, but had been held to apply to lesser instances of the same mischief.) The benefit of the act for the subject, Coke said, was only in part to save people travel to remote places; the other benefit of localism—trial in the place where one is best known—was also intended, and another purpose was to insure people maximum appellate recourse. A few reinforcing points from minute linguistic features of the act may be omitted. They add up to a meaning that can scarcely be doubted and illustrate Coke’s gift for taking a document apart.

On the immediate question, whether citation to an archdiocesan court within London is citation out of the home diocese as the statute means it, Coke argued that “diocese” refers to jurisdiction, not to a physical circumference. He thought that the etymology of “diocese” supported this interpretation and that precise language in the statute removed all doubt. (The penalty clause imposed the £10 forfeiture for citing men out of their home diocese “or other jurisdiction”, thus showing that by “diocese” the makers meant a jurisdiction and not a place.) Coke also noted that the statute protects peculiars and people living in them against diocesan and archdiocesan courts; he thought it particularly absurd to suppose that the statute did not by the same token protect diocesan courts against peculiars, such as the Arches was. Finally, he pointed out how extendable the civilian position was even without the full concurrency doctrine, for the Archbishop had peculiars in several other dioceses besides London. If citation to any such peculiar geographically within the diocese did not violate the statute one might as well admit full concurrency for most practical purposes, despite the overwhelming objections to admitting it developed by Dodderidge with some additions by Coke himself.
After Coke had spoken, Dr. Martin shot his reserve arrow: The statute imposes a penalty, therefore it should not be enforced by Prohibition. This argument remains cogent even if one throws away the rest of the civilians’ case; plainly they did not want to use it until the rest of their case had to be thrown away. Besides his bare theory, Martin had a prospectively embarrassing further fact to lean on: In this very case, earlier in the same term, Rochester had sought a Prohibition in the King’s Bench and been turned down. Martin does not say that the King’s Bench made the decision because it thought that the penalty was an adequate remedy and the only one intended by the statute-makers, but the context in which he introduces the decision suggests that that was the reason.

The Common Pleas shows no sign of being moved by what the King’s Bench had done, unless to be painstaking in refuting Martin’s theory. The judges held “that when any judges of any court are prohibited to do anything, if they proceed against the statute Prohibition lies.” (Harl. 4817. The words of the two reports in resolution form are virtually identical on this point.) Considerable support, direct and analogical, was adduced for the rule, some of it in open court, though Coke may have added more in formulating the resolutions. Various statutes limiting various courts in the common law sphere (the Steward and Marshall, the Constable of Dover, the Justices of Assize) were cited as acts which could be or had been enforced by Prohibition. I suspect the value of emphasizing these examples is that they point to the generality or neutrality of the rule: The Common Pleas was not insisting on its power to prohibit the oft-prohibited ecclesiastical courts even when Parliament had provided a penalty; it was insisting on its power to enforce by Prohibition any statute limiting the jurisdiction of any court, whatever features beyond the essential mandate, such as a penalty clause, the statute might have. But after the point is made in completely general form two specifically ecclesiastical instances are added. In the MS. version of Coke’s resolutions, it is said that Prohibition would lie to the Chancellor if anyone lodged an appeal in the Chancery contrary to the Act in Restraint of Appeals (24 Hen. VIII, c. 12), even though the statute imposes penalties and even though the matter is purely spiritual. (I assume the contemplated offense would be trying to by-pass the archdiocesan level and go directly to the Chancery, where the statute provided ecclesiastical appeals should go after the archiepiscopal court had ruled on them, instead of to Rome as theretofore.) Harl. 4817 and the printed Coke both cite the Mortuaries Act (21 Hen. VIII, c. 6) as one that appoints a penalty, but on which prohibition nevertheless lies. In 13 Coke, 23 Hen. VIII is said to be stronger than 21 Hen. VIII because the former was made to maintain the jurisdiction of Ordinaries, as well as for the people’s ease. In other words, it is plausible, though not valid, to argue that an act made solely for the protection of the subject will serve its purpose if the injured party can recover the appointed penalty; the Mortuaries Act, protecting people against excessive mortuary fees, is such a statute. 23 Hen. VIII, on the other hand, is meant to do more than make up for the injury a man might suffer in being forced to travel, say, from Cornwall to Canterbury; it is intended, in addition, to prevent one ecclesiastical court from doing what another ought to be doing, and that specific effect—the control of jurisdiction—is what Prohibitions exist to secure. (It is of course true that the double damages and penalty remedies in 23 Hen. VIII would dissuade from violation of the statute and thus of the lines of jurisdiction which the statute was meant to reinforce, but surely the interest of courts in their jurisdiction is both incompensable and important enough to protect by a specific remedy.) It is of some
significance for later cases, in which the question arose again, if Lewis and Rochester can be taken as deciding *inter alia* that 23 Hen. VIII had a double purpose—to protect both the subject and the ecclesiastical courts.

*Exempla* more analogous than directly in point enrich the meaning of the court’s holding that Prohibition lies despite the penalty. The MS. Coke cites a provision of the Statute of Gloucester inflicting punishment on the sheriff if he fails to put his name on returns of writs and says that omission of his name is legal error notwithstanding the penal provision. In other words, statutes that penalize some form of feasance or non-feasance may generate other legal consequences than the penalty itself—whether award of a Prohibition or reversal of a judgment in Error. 13 Coke cites a Year Book holding that anyone who does something prohibited by a statute may be fined for “contempt of the law.” That is (I take it), a statute which in plain language *forbids* is to be taken seriously as forbidding. Such a statute makes it a criminal offense (sub-felonious of course) to do the thing forbidden, even though it does not do so expressly or appoint a definite penalty, and even though some other sanction or consequence (such as nullity in a transaction or error in legal proceedings) would be generated by the statute. By the same token, an act which forbids a court from doing something should be “taken seriously as forbidding”, and enforced by the available means of Prohibition, even though another consequence—such as liability to a penalty—is generated by the act.

Finally, the conclusion that the penalty did not close off Prohibition was reinforced in three ways, though the principle that any prohibitory statute addressed to courts may be given effect by Prohibition can support that conclusion unassisted. First, a *nota* at the end of Harl. 4817 (which may come from the reporter rather than the court) calls attention to the structure of 23 Hen. VIII: the statute first forbids suing people out of their diocese, then in a later clause gives the penalty, wherefore Prohibition clearly lies. This argument makes it possible to jettison the general principle or demote it to a rule of construction and still save the conclusion. I.e.: Maybe a statute which contains no distinct prohibitory language, or merely implies that something on the part of courts is forbidden in the very language that subjects it to a penalty, is meant not to be enforced by Prohibition—as if 23 Hen. VIII were to say nothing more than “Let suits outside the proper diocese be subject to a £10 penalty.” But if a statute, like the actual 23 Hen. VIII, says “Thou shalt not” and then, as it were after pausing and taking a new breath, adds “And if thou dost, thou shalt be subject to a £10 penalty”, the priority and independence of the direct imperative signifies an intent that it be directly enforced by Prohibition—or that it generate other consequences than the penalty, as in the analogical cases above. I say “maybe” to the concession, however: I do not think the decision in Lewis and Rochester has to be reduced to a constructive decision based on the way the prohibitory and penalty clauses are strung together in 23 Hen. VIII. The court might have held that Prohibition was appropriate in view of the act’s purpose even if the negative imperative addressed to ecclesiastical tribunals had not been so clearly separate from the penal clause.

Secondly, in both versions of Coke, what amounts to a utilitarian argument is added to the formal principle that a penalty does not foreclose Prohibition. If everyone offended under the statute, it is said, is put to his action (for the penalty or punitive damages) “suits and vexation” will increase; Prohibition is the “shortest and more easy way.” A judicial attitude toward penalty statutes is indicated—a fairly drastic, though
perhaps not a surprising attitude toward a commonplace mode of law-enforcement. Perhaps the feeling could be expressed by saying that the private or semi-private suit is a necessary evil, necessary to secure enforcement in the absence of an extensive state prosecutorial system but evil, among numerous other reasons because the device comes to a legislative invitation to litigate. Even when such litigation is not abusive—not the work of professional informers or a matter of exploiting obsolete or unimportant statutes for profit or vexation—it is likely to be expensive for the litigants and costly in the time of lawyers, judges, and jurors relative to the use of Prohibitions (especially in contexts like that of 23 Hen. VIII, where issues of fact are unlikely to arise on the Prohibition.) Enforcement by dissuasion exacts a cost; it is fortunate that sometimes—when Prohibitions are appropriate—more efficient enforcement of significant policies can be achieved at less cost, and simply without increasing the incidence of quasi-civil litigation (which at least in theory Prohibitions were not, but rather public proceedings, “for the King”. See the extensive documentation of this general point in Vol. I, passim.) If there were no other reason for enforcing 23 Hen. VIII by Prohibition notwithstanding the penalty, it would still be practical and socially healthy to do so.

Lastly, it is noted at the end of the printed Coke that the King could dispense with the penalty, but that the subject would still have the Prohibition. As a legal fact this is probably accurate enough. The King could undoubtedly dispense with the half of the £10 penalty going to himself, and I think there is little doubt that a non obstante would bar an informer from recovering his half except when a suit brought by an informer was already pending when the dispensation was granted. (It is much more doubtful whether the suit for double damages which 23 Hen. VIII also provides—a suit by the party who is cited out of his diocese and has suffered actual damage—could be cut off by a non obstante. None of the discussion in the reports is specific to that provision, however.) On the other hand, there is probably little doubt that 23 Hen. VIII as a whole, or qua an imperative distinct from the “price-tag” penalty clause, should be held beyond the dispensing power—as a general act for the public benefit and not concerned with the minutiae of economic and social regulation, but rather with the fair and orderly operation of the whole ecclesiastical legal system and with the preservation of jurisdictional lines regarded as correct by standards extraneous to the statute itself. As an argument for enforcement by Prohibition despite the penalty, the observation on the dispensing power goes to demonstrate the further inconvenience of the counter-position. To put the point in the form of a rhetorical question addressed to an objector: Do you really want to say that 23 Hen. VIII (leaving aside the double-damages clause) is a dispensable statute—that the King if he is so inclined may remove the statutory obstacle to making a man travel from one end of the realm to the other to answer ecclesiastical suits, or may permit a favored Archbishop to gobble up his diocesans’ jurisdiction? A not entirely trusting attitude toward imaginable royal preferences may be implied in Coke’s asking something like that question.

Lewis and Rochester v. Proctor opened a chapter in Prohibition law, for further cases on 23 Hen. VIII came quickly in the Common Pleas. Before taking up those cases we must note an immediate sequel, in the King’s Bench as it happened. A few years later (1611), Proctor sued Rochester there in Debt for the same tithes as he had earlier been
prohibited from recovering in the Arches. I.e., instead of going to the diocesan courts of London, the parson sought to take advantage of the statute of 2 Edw. VI, c.XXX, which permitted an action of Debt to be brought for the value of unpaid tithes in some circumstances. Rochester pleaded that he had been sued for the same tithes in the Arches and that the suit there had been prohibited upon 23 Hen. VIII, but that sentence had been given against him in the Arches before the Prohibition. Upon this plea he demanded judgment—i.e., claimed that a new temporal action for the tithes could not be maintained when the tithes had already been awarded by an ecclesiastical court, even though real recovery, or execution of the Arches’ sentence, had been cut off by Prohibition. The King’s Bench was inclined to hold against Rochester—i.e., that the action of Debt was maintainable—but the case was adjourned and not further reported, so that it is inconclusive on its rather interesting point. It does, however, introduce a further fact about the earlier Lewis and Rochester—the sentence in the Arches. If the sentence had been handed down at the time the Prohibition case was argued, there would have been good grounds against prohibiting. (There are good reasons for exempting Prohibitions on 23 Hen. VIII from the general rule that ecclesiastical sentence is no bar to Prohibition save in especially aggravated circumstances. This is noted in the discussion of the foreclosing effect of sentence in Vol. I, pp. 115 ff., and we shall see further evidence.) Leaving the sentence unmentioned in Lewis and Rochester may have been part of the price for having one side argued by civilians aiming at a comprehensive vindication of the Archbishop’s jurisdiction. On the other hand, it is possible that the Arches’ sentence came before Prohibition was finally granted, but not soon enough to put before the court. (It would have had to be introduced informally, but there is no necessary reason why it could not have been. The procedure adopted in Lewis and Rochester, probably in deference to archiepiscopal sensibilities, of allowing lengthy argument before granting Prohibition—as opposed to granting a writ for sufficient prima facie cause and letting the defense move for Consultation—of course permits the ecclesiastical suit to go on, and perhaps to produce a sentence, before a decision on the Prohibition is reached. An advantage of granting Prohibition quickly is that a genuinely prior sentence can be used by the defense and one hastily obtained at the last minute can be discounted.)

Turning now to the cases that came to Coke’s Common Pleas in the wake of Lewis and Rochester: Salmon v. Wilson (1609) first raises the problem of construction of 23 Hen. VIII that was to prove most persistent—the exact meaning of the provision that an inferior ecclesiastical judge may request a superior to take a case, when and if “the law civil or canon doth affirm execution of such request or instance of jurisdiction to be lawful or tolerable.” In Salmon v. Wilson the doubt was whether a request to an Archbishop to take a diocesan case is valid if it comes from the Bishop’s Commissary instead of the Bishop himself. The language of the statute rather suggests that it is not valid, for it speaks of request being made by “any Bishop or any inferior judge having under him jurisdiction in his own right and title or by commission.” I think the natural reading is that the Bishop and only the Bishop may request removal of a diocesan case to the Archbishop, while an Archdeacon may request removal from his court to the diocesan level and the judge of a peculiar may make request to the Archbishop (more dubiously to

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30 P. 7 Jac. C.P.. Harg. 52, f. 8b.
the Bishop, as will appear.) In other words, a mere officer under the Bishop, such as his Commissary, is not authorized by the statute to act for the Bishop. By this interpretation, the words “or by commission” at the end refer to a distinct jurisdiction constituted by commission, not to a mere deputizing commission enabling one to serve vice the Bishop in the diocesan court. Such was the conclusion of Coke and Justice Foster in Salmon v. Wilson. The report does not give their reasoning, but I think it must have been as I suggest. Justices Daniel and Warburton, however, said “secretment” that they held the contrary, because the Bishop has committed all his authority to the Commissary. (Whether they meant that he had so committed his authority in this particular case or that Bishops ordinarily worked through such general agents, as they did, is not clear.) The reporter’s “secretment” probably points to no dark mystery—just that when the case came up Coke and Foster expressed a decisive opinion, while Daniel and Warburton kept quiet and later said “off the record” in the reporter’s hearing that they were inclined the other way. The report gives no further information; the case was probably put off, and no outcome is known. Justice Walmesley is not heard from. If he, as the judge least disposed to interfere with the ecclesiastical system, participated later, or counsel figured on his participation, there would probably have been a majority against Prohibition. The Daniel-Warburton interpretation might have been based on the somewhat ambiguous words “or by Commission”; it might be based on nothing more than common-sense construction—that the statute can hardly intend to prevent removal requests from being made by the de facto presiding officer of a diocesan court, who is trusted with general authority by the Bishop and is in a better position than the Bishop himself to know whether removal would be reasonable and lawful in a given case. One might wonder, in view of the statute’s express incorporation of ecclesiastical law in the clause in question, whether civilian opinion should be taken on the legality of a Commissary’s removal request. I think that could be argued both ways—in the negative by urging that the statute strictly construed provides that the Bishop alone is competent to request removal, and then adds as a further requirement that his request must meet ecclesiastical standards of legality.

Smith’s Case, from the same term as Salmon v. Wilson, involved another proviso in 23 Hen. VIII. The report gives only a holding, no context. Although the principal decision is not stated clearly, I believe it comes to saying that the saving of the Archbishop of Canterbury’s prerogative in probate extends to administration of intestates’ estates and entails that administrators appointed by the Prerogative Court should account there. The saving in question speaks only of the Archbishop’s prerogative “for calling any person out of the Diocese where he…inhabit[s]…for probate of any testament…” That is to say, the statute does not mention intestacy cases. That the court meant to hold that they are included when the circumstances are parallel to those in which the Archbishop had probate prerogative (when the testator—and now the intestate—had goods in several dioceses) appears from the one point that is entirely clear in the report. This is a remark by Coke that if the statute contained no saving for the Archbishop’s prerogative the common law would still make an exception for that. Reason: where the Bishop cannot determine a matter, the Archbishop must. Application: Bishops cannot deal with probate cases when the estate is not all in one diocese. The

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31 P. 7 Jac. CP. Harg. 52, f.8b.
same reason holds when an intestate leaves property in several dioceses, and it follows that if the Archbishop may commit administration in such cases the administrators should account to him—which is the principal holding.

The statute’s exception for suits removed to a higher court by request came in question in Hawes’s Case.32 This case involved the Court of High Commission and is therefore discussed in the End Note following this chapter. High Commission cases are treated separately in the End Note because they touch the special question whether 23 Hen. VIII applied to the High Commission at all. The holding in Hawes, however, is probably not confined to the High Commission, but valid for any pair of ecclesiastical courts. Abstracting from procedural peculiarities of the High Commission case, that holding can be expressed as follows: Whatever the other exact rules about removal of suits from one ecclesiastical court to another at the request of the original judge—which 23 Hen. VIII certainly permits—one form of removal is not allowed by the statute, viz. removal of a suit in medias res, as opposed to when it is first brought, or before the original court has made any determinations of fact or law.

Hawes was prosecuted for adultery in an Ordinary’s court and censured for the offense. Then, because he did not perform the censure (meaning presumably that he did not do a prescribed penitential act or, instead or in addition, disobeyed an instruction to “sin no more”) the Ordinary “consented” that “the High Commission should have the punishment of him.” The High Commission took the case. The report says that Hawes was “convicted” before that court and then punished (by imprisonment, which, unlike regular ecclesiastical courts, the Commission arguably had power to impose—see End Note.) The report’s language suggests that the High Commission re-tried Hawes, instead of taking his previous conviction as sufficient and punishing him forthwith. If that is what happened, it suggests that the Commission doubted whether 23 Hen. VIII permitted regular ecclesiastical courts to turn over convicted offenders merely to have them punished by another ecclesiastical court more likely to be effective. (The High Commission would be the obvious candidate for greater effectuality, but other superior courts might find it might find it easier than a local one so much as to excommunicate an obstreperous and perhaps powerful local figure.) Re-trying the party, as if the case had been forwarded by the original court before any action taken, may have seemed to furnish an argument that the removal was within 23 Hen. VIII.

The Common Pleas, however, held per curiam that Hawes was not lawfully punished. If indeed re-trial in the High Commission took place and was intended to buttress the removal, the judges were unimpressed. Chief Justice Coke summed up the holding by saying the original court’s consent must be “before the suit commenced”, and the reporter notes that this was not denied. There may be some question as to whether Coke’s rule overstates the result. If “before the suit commenced” means no more than “before the original court has taken any decisional steps” there is no problem. Quaere whether “commenced” could have a starker meaning than that. There is a hint in the language of the report that Justice Walmesley was a bit anxious lest the decision be taken to say more about the construction of 23 Hen. VIII than the immediate point it makes—no removal to the High Commission, or perhaps elsewhere, for punitive purposes only. (See the End Note for the probable purport of Walmesley’s remark.)

32 T. 7 Jac. C.P. Harg. 52., f. 19b.
A case of 1610 \(^{33}\) reopened the general questions settled in *Lewis and Rochester*. All the report tells is that a Prohibition was sought and granted on 23 Hen. VIII to stop a suit in the Prerogative Court of Canterbury, and that usage in the reigns of Henry VIII and Queen Mary was urged against a Prohibition. In those reigns, it was argued, the Archbishop cited men from all dioceses in his province to the Prerogative Court without the Ordinary’s consent. (It is notable that Elizabethan or other distinguishably post-Reformation usage—later Henrician or Edwardian—was *not* urged. Counsel’s theory must have been that the Papist usage that could be discovered was relevant because it pointed to what would have been regarded as lawful at the time 23 Hen. VIII was made.) The court replied as it had in *Lewis and Rochester*: the usage cited was explicable by the Archbishop’s legatine authority, now abolished.

In Langdale’s Case, later the same year,\(^{34}\) two points may have been decided. (The report states what was resolved in the sparsest general terms.) (a) A Prohibition on 23 Hen. VIII need not be sought at the earliest possible moment, or before the improper court has taken any steps to deal with the suit. (b) The party who causes another to be cited out of the latter’s home diocese may prohibit his own suit. The first point is not surprising; the second seems hard to justify and is contradicted by later holdings. Self-prohibition was generally permissible (see Vol I, pp. 161, ff.) but it seems doubtful whether Prohibitions on 23 Hen. VIII should fall within the general rule. If A has had B cited out of B’s diocese, and B has no objection, why should A be allowed to have second thoughts and stop the suit? The rhetorical question loses its force, however, if the purpose of 23 Hen. VIII is as much to uphold proper jurisdictional lines and protect the lower courts as to save the subject trouble. That the first purpose is as clear and important as the second may have been held in *Lewis and Rochester; Langdale* says so indirectly.

In 1611 \(^{35}\), the court was first faced with the precise meaning of residency (“inhabiting and dwelling”) in 23 Hen. VIII. A King’s Bench attorney who ordinarily lived in the diocese of Peterborough was sued in the Arches (as executor, for a legacy) during term—i.e., when he was in London more than fleetingly, to practice his profession throughout the term (and presumably he came every term, therefore spending a substantial fraction of each year in London.) The suit was prohibited. Coke distinguished “remaining” (“*demurrant*” in Law French no doubt) from living/dwelling/inhabiting and said that a lawyer who stays at an Inn of Court, as well as an attorney who stays at an Inn of Chancery, may not be sued in the Arches. Presumably he cannot be sued in a London diocesan court either, if he has a regular “residence” elsewhere and only keeps premises in an Inn as a temporary “residence” *cum* “office” or “business address.” (There is no 17th century vocabulary quite adequate to the distinctions.) A case could conceivably be made for archdiocesan courts such as the Arches, in contradistinction to London diocese, precisely for such situations of genuinely “divided residence”; the report does not tell whether that was argued. In so far as the purpose of the statute is to save people travel and the like, the suit in the instant case can hardly be considered against the policy of the

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\(^{33}\) T. 8 Jac. C.P. 2 Brownlow and Goldesborough, 38. This report contributes the information that the only *legatis nati* in Christendom were the two English Archbishops and the Archbishops of Pisa and Rheims.

\(^{10}\) M. 8 Jac. C. P.. Harg. 15, f.236b.

\(^{35}\) H. 8 Jac.. C.P. Brownlow and Goldesborough, 12.
statute. The decision does, of course, cut off a form of archdiocesan encroachment on diocesan jurisdiction which could be of more than trivial importance, in view of the number of people of substance who maintained “second residences” in London. A touch of 17th century sentiment may be seen in the decision—a tendency to think of a professional man’s real home as his “country”, however much time he spent in London earning the means of country life. It is worth noting that the plaintiff-in-Prohibition here came to the Common Pleas even though he was a King’s Bench attorney, an indication that enforcement and favorable construction of 23 Hen. VIII was more likely to be obtainable in the Common Pleas.

Another report from 1611 confirms the holding in *Lewis and Rochester* that the penalty given in 23 Hen. VIII is no bar to Prohibition. The report is not related to any specific case. Whatever the context, the judges gave several examples of situations in which the existence of a penalty is no obstacle to Prohibition and went on to assert the general prohibiting power of the Common Pleas over Walmesley’s usual dissent on that question.

Jones v. Boyer, later in 1611, presents the first extensive technical debate on the removal-by-request proviso. It also led to extra-judicial discussion of other issues arising from 23 Hen. VIII. Boyer, an inhabitant of the diocese of Llandaff, was sued as executor in the Arches, for his testator’s dilapidations. i.e., Jones succeeded testator in an ecclesiastical living; he sued executor to be compensated out of the estate for deterioration of the permanent value of the living caused or suffered by testator. Boyer sought a Prohibition. Jones alleged (whether by a proper plea or informally does not appear) that the Bishop of Llandaff’s Commissary or Vicar General had transmitted the suit to the Archbishop by letters under seal.

The court asked civilians to appear and inform it as to the legality of the request by ecclesiastical standards. Drs. Talbot and Martin came and argued that it was lawful. From nothing that they or the judges said does it appear that the legality of a request by a Commissary, rather than the Bishop himself, was doubted. This is further evidence, in conjunction with the case on this point above, that the court, whether or not still split, was at least by a majority inclined to hold the Commissary competent to act for the Bishop. Instead, the issue was whether the letter of request needed to recite the reasons why the request was being made. Apparently there was no such recitation in the instant case; at least it was not alleged. Talbot and Martin maintained that the reasons did not need to be rehearsed. The rationale of this negative rule, as they represented it, was that there might be a number of reasons. (Not a terribly convincing rationale, but perhaps the point is that there were so many different sufficient reasons, several of which might apply in a given case, that it would be tedious to require them all to be rehearsed and a source of trouble to make the requester select one, which might not be the best.)

After making this general argument, Talbot and Martin went on to represent the case at hand as more complex than my statement and the report have it. It seems that the suit had originally been brought in an Archdeacon’s court and decided there, so that what the Bishop’s Commissary really requested was that the Archbishop take an appeal that

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36 P. 9 Jac. C. P. Harg. 15, f.242b

116
would ordinarily lie to the Bishop, rather than a first-instance case. According to the civilians, an appeal could legally go from Archdeacon to Archbishop; ergo (as I reconstruct the reasoning), the Bishop or his deputy may turn over an appellate case to the Archbishop. Even if the cause for transmitting a first-instance case must be recited, an appellate case can be transmitted without reason shown.

The court took no action immediately after the civilians had spoken. When the case was moved again, Coke said he had conferred with another civilian in the meantime and discovered that Talbot and Martin were wrong on one point: an Archdeacon may not transmit a case directly to the Archbishop for appellate hearing (he may make such a transmission to a Patriarch, but the Archbishop of Canterbury is not a Patriarch.) On this occasion, the judges agreed that a Bishop must transmit a case before it is “commenced” in his court, but there is nothing to suggest that that point had any relevance for Boyer v. Jones. No decision of that case is reported, nor is any further discussion of whether the reasons for a removal need to be rehearsed in the letter of request.

The MS. report (which may have been written by Justice Warburton) goes on, however: Afterwards a conference took place at Serjeants’ Inn between the Common Pleas judges (“us”) and three civilians, Sir John Bennet, Dr. Martin, and Dr. James. Several important questions about 23 Hen. VIII were discussed, but not, so far as appears, the issues in Jones v. Boyer. My guess would be that the case was still undecided when the conference was held, but that consensus on the case itself was a less important or more easily attained goal than working out wider disagreements and misunderstandings. As in Lewis and Rochester, so in Jones v. Boyer, civilians had represented the Church position. In the latter case, a combination of genuine doubt—far more likely on the technical ecclesiastical issue of what constitutes a sufficient letter of request than on the broad claims advanced for the Archbishop in Lewis and Rochester—and a desire for peace with the Church lawyers prompted the conference. Perhaps consensus was not hard to come by in Jones v. Boyer itself. Grounds for denying Prohibition were strong; it was in the event denied unless counsel, duly discouraged, dropped the attempt to get a writ. (At least a majority of the court probably had no quarrel with the Commissary’s request. One need not accept that the ecclesiastical law always sanctioned removal without reason shown to hold that forwarding an appeal to the normally-appellate archdiocesan level is perfectly reasonable and therefore probably lawful.) But more important matters were taken up at the conference, and these the report tells about.

First, the civilians proposed an interpretation of the saving for probate prerogative in 23 Hen. VIII: “By equity and construction” legacy suits based on wills proved in the Prerogative Court must be brought in that court. In other words, when the statute saves “the prerogative of the …Archbishop…for calling any person…out of the diocese …for probate of any testament”, it means to save testamentary jurisdiction generally in so far as the Archbishop is lawfully “possessed” of a will by virtue of its having been proved before him. The Archbishop may indisputably (assuming the testator had goods in several dioceses) summon Executor out of Bath and Wells to prove the will in the Prerogative Court. By the same token, per the civilians, Legatee may subsequently cause Executor to be cited into the Prerogative Court to demand payment of a legacy in the same will. (Cf. the analogous, though more convincing, point in the poorly reported case above—Note 7: Prerogative jurisdiction to appoint administrators of an intestate’s estate entails
jurisdiction to summon an administrator living in Bath and Wells for the purpose of accounting.)

No consensus was reached by the conference on this matter. All the judges held “fortement” contra: The statute saves only what it literally saves, the prerogative for probate. A legacy suit is as independent of the prior probate proceedings as an action of Debt brought by the executor to recover money due to the estate (for which probate was also a prerequisite.) In defense of the judges’ position, one should observe that there is a significant sense in which the Bishop of Winchester “cannot” conduct probate proceedings when part of the testator’s goods are in Bath and Wells. I.e.,—for the real sense of the “cannot”—there is no basis for choosing between the two Bishops, so that it is reasonable to assign the probate function to the Archbishop. (Again, cf. the case at Note 7.) Once probate has “activated” the executor’s capacity and made him liable to legacy suits, there is no difficulty about saying the executor should be sued where he lives, in accord with the statute. Working with this line of reasoning, the judges went on to make a concession: If there are several executors who live in different dioceses, a legacy suit must be brought against them jointly; since they cannot be sued in any diocese, they must be sued before the Archbishop. The civilians did not at once give up their claim to a wider legacy jurisdiction for the Archbishop, but resorted to their familiar litany: Usage supported the citation of inhabitants of London in any cause, and citation from anywhere in the archdiocese when a will had been proved in an archdiocesan court. The judges only replied. “that is the greater and longer tort”—I suppose the sense is “a worse mistake, and ‘older hat’, than the construction of the statute you just proposed.”

The rest of the report is a summary of three cases, presumably noted by the reporter just because they relate to the subject of the conference. One of them, Bridges’s Case, came a few months after Jones v. Boyer and is independently reported—see below. The other two are undated and are not reported separately. In the first, a man lived in a peculiar but occupied land in the diocese of London outside the peculiar. He was sued in the diocesan court for tithes produced by that land and sought a Prohibition on the ground that he should have been sued in the peculiar. Prohibition was refused because he “cannot” be sued in the peculiar in this case. Here as in other contexts, “cannot” is not literal—it all depends on the competence one ascribes to courts to reach beyond their ordinary ambit when in some sense they “have jurisdiction” (here because the peculiar was the proper court, following 23 Hen. VIII, in respect of the tithe-payer’s person.) I think, however, that the decision in fact accords with the verbal meaning of the statute, though the drafting is none too clear on this score. The act makes an exception “for any spiritual offence committed or done…or neglected to be done contrary to right or duty by the Bishop, Archdeacon, Commissary, Official, or other having spiritual jurisdiction…or by any other person…within the diocese or other jurisdiction whereunto he…shall be cited…” I take it that not paying tithes due from land in London diocese is committing a spiritual offense (or neglecting a spiritual duty) “within” London diocese, so that the offender may be cited into the diocesan courts of London even though his dwelling place is elsewhere. The statute is puzzling in that it recites the titles of various judicial officials and seems to contemplate primarily offenses committed by such persons. The meaning is presumably the reasonable one that a complaint against the Commissary of Bath and Wells can be taken to an archdiocesan court even though the Commissary lives in Bath and Wells. But the statute eventually gets to “any other person” and therefore seems to do
in effect what could have been done more straightforwardly—viz. make an exception for the situation where a man lives in X but does a criminal or tortious act whence an ecclesiastical cause arises in Y, in which case he may be sued in Y. This is plainly a large and important exception.

The other case, Edmonds's, on essentially the same issue, complicates the interpretation. It was reportedly held in this case that if a man who ordinarily lives in London goes to the diocese of Salisbury, commits adultery there, and then returns to London, he may not now be sued in Salisbury. 23 Hen. VIII requires that he be proceeded against again in London—no apparent problem about London’s taking notice of acts committed in Salisbury. On the other hand, if the adulterer had been sued in Salisbury before returning to London, there would be no objection. He may not invoke his normal residence to stop the Salisbury suit. This result is contradicted by Bridges’s Case, as the reporter notes. It seems to me unreachable by the verbal construction of the statute I give above. Therefore it must proceed from common-sense construction of intent. The latter sort of construction could reconcile the apparently inconsistent tithe case above by saying that Parliament might plausibly have meant that people ought to be sued for agricultural tithes where the land lies, but that for crimes and personal torts the ecclesiastical authorities were meant in all circumstances to refrain from what the act is directed against—e.g., making a man travel from London to Salisbury (even a bad man who has sinned in Salisbury.) Common law habits of mind could lead one to see a resemblance between suits for agricultural tithes and actions touching land—“local” actions at common law, meaning the jury must come from where the land lies, as opposed to “transitory” personal actions triable in any venue. The resemblance is quite misleading, because the common law distinction depends on the theory that issues touching land should not be decided by jurors without putative personal knowledge of the facts—i.e., should not be decided merely on evidence presented to the jury. Since all ecclesiastical causes involving factual disputes were decided on evidence (without jury) there is no true analogy. It is nevertheless conceivable that Parliament—reflecting “common law habits of mind”—could have intended a distinction, an exception all but exclusively for tithe cases.

Whether the tithe case is correct or not, there is a good common-sense argument for deciding the adultery case as it was decided in Edmonds. For if the statute does not insist that crimes and personal torts be tried where the defendant lives, and not where he allegedly did wrong, the statute seems in significant measure to be directed against something unlikely to occur often. The Bishop of X is unlikely to proceed against an inhabitant of Y for no reason at all, or merely because he is asked to by someone whose convenience it suits or who wants to vex the defendant. The foreseeable situation is that the Bishop of X will see fit to entertain a suit against an inhabitant of Y when the latter has done something giving rise to a cause of action within X. This does not, of course, speak to archiepiscopal encroachment, the main mischief behind the statute, but the act also applies to Bishop encroaching on Bishop, and it is reasonable to suppose that the intent was not to except away most realistic cases in that category. Nevertheless, this interpretation may go against the words of the statute.
Another case from 1611, Hutton v. Grimball, has been dealt with in Vol., I, p. 170, as a special instance of refusal to prohibit after ecclesiastical sentence. A party was sued in the wrong diocese for defamation and found innocent of the offense. Costs were accordingly awarded to him. The losing plaintiff sought to prohibit recovery of the costs against him on the basis of 23 Hen. VIII. The court denied Prohibition with obvious justice, “because the statute of 23 Hen. VIII does not give any advantage to the party plaintiff who draws the other out of his jurisdiction, but solely to the defendant.”

Dasset v. Johnson, the same year, touches on a matter discussed at the conference following Jones v. Boyer. What the litigation was about in this case is not specified, but it was probably a legacy suit. The question was which diocese a suit belongs in when one executor lives in X and the other in Y. The judges seem to have agreed on two points: (a) The place where the will was made does not decide the question, “for the statute is for the person solely.” I.e., the statute forbids bringing suit in Y against a single executor living in X, although the will was made in Y. As it were, not performing a will made in Y is not an ecclesiastical offense or neglect of duty committed in Y, like the Londoner’s act of adultery in Salisbury. One should not deviate from this principle in order to solve the problem of two executors with different residences. (b) If one of the two executors lives in the Archbishop’s diocese, the Archbishop should have jurisdiction by reason of his superior dignity. As to whether the Archbishop may take jurisdiction when neither executor lives in his diocese, the judges were inclined to say “Yes” in virtue of the impossibility of assigning jurisdiction on any other principle, but they were not so sure as on the occasion of the Serjeants’ Inn conference. The case was adjourned and does not reappear. (The only alternative to opting for the Archbishop or else attaching significance to where the will was made would presumably be to hold that suit may be brought in the diocese where either executor lives, and that citing the other executor into that diocese does not violate 23 Hen. VIII. This is on the assumption that suit must be brought against all executors jointly. Would there be any risk of common law interference in suing one executor singly, assuming that the ecclesiastical court was willing to permit that? I should think not.)

Bridges’ Case, at the beginning of 1612, raises the question of ecclesiastical wrongs committed in a diocese other than that in which the wrongdoer lives. It resolves this contrary to Edmonds above. (The chronological order of these cases is unascertainable.) The case, like Edmonds, was adultery committed in Salisbury by one who normally lived in London and had returned there by the time he was cited into the Salisbury court. The holding that he could be proceeded against in Salisbury was posited on the words of 23 Hen. VIII in the way I indicate above, though the court also recited the maxims “actor sequitur forum rei” and “ubi delinquit ibi punietur.” The judges also pointed out that in ecclesiastical law the judge of the place where the offense is committed may punish it, as if to suggest that if the verbal meaning of the statute were in

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38 M. 9 Jac. C.P. Harg. 15, f. 255.
39 M. 9 Jac. C.P. Harg. 15, f.261.
40 H. 9 Jac. C.P. Harg. 15, f.261b. An anonymous and undated report at 1 Brownlow and Goldesborough, 45, may be this case or may be Edmonds, cited at the Serjeants’ Inn conference following Jones v. Boyer—Note 13 above. Bridges is also fully described in the report of that conference.
doubt ecclesiastical law would be relevant to expound it. (Incorporation of ecclesiastical law in the clause on removal might suggest the view that it has expository relevance otherwise.) The reports of Bridges are not particularly helpful on the limits of the principle it espouses. Adultery is a crime of some gravity; acts constituting it are necessarily done in definite places. Would, say, defamatory words spoken in Salisbury by a visiting Londoner be prosecutable in Salisbury? Could a divorce suit grounded in adultery be pursued there against someone resident elsewhere? A few hints in the Harg. 15 report rather stir up such questions than answer them. The report says “these offenses” are “local”—pointing, as it were, to such criminal offenses as adultery. But what would other examples be, and what acts in the ecclesiastical sphere are not “local”? (To the degree that common law analogies are at work—as they clearly seem to be, though perhaps with dubious relevance—criminal cases were “local” at common law, perhaps with a doubtful penumbra for such semi-criminal ones as prosecutions on penal statutes. “Semi-criminality” characterizes such ecclesiastical causes as defamation. We have already seen tithe suits “localized”, perhaps by analogy with claims to and torts involving land. Obvious ecclesiastical equivalents to the “transitory” class at common law—suits for money owed and for damages arising from personal torts—are hard to find. Legacy suits perhaps have the clearest resemblance; we have already seen that those must be brought where the executor lived.) One other example given in Bridges is false doctrine preached at Paul’s Cross, which ought to be prosecuted in London rather than the preacher’s diocese of residence—another criminal example. In stating the instant case, the MS. report speaks of someone who is incontinent away from home “and detected in that flagrant crime in the diocese where it is committed.” Is there a hint of limitations in “detected” and “flagrant”—e.g., that ex officio prosecution of the Salisbury adulterer in Salisbury is lawful, but no prosecution on private complaint even though the matter is “criminal” in the sense that the party would be liable to spiritual punishment if convicted? In any event, Bridges is firm in its immediate holding; it was confirmed with exactly the same examples in the slightly later James’s Case.

The facts of Stone (?) v. Grigg (1612) are not given, but several resolutions on 23 Hen. VIII are reported. The judges agreed that the statute is violated if the Archbishop of Canterbury or any other Bishop cites a man living in his diocese into a peculiar belonging to such Archbishop or Bishop outside the diocese. This seems fairly obvious—inhabitants of the diocese of Canterbury, for example, are protected from having to travel to London to answer in the Arches. But perhaps there is a bit of a puzzle about the statute’s meaning when the effect of citing someone out of his home diocese is to cite him before the same judge as he would in any event have to answer before. (Nominally the same, because in practice the peculiar and the diocesan court would be presided over by different deputes of the Bishop.) More likely to be a real problem is the situation of which, so far as I know, the Arches was the only example: The peculiar belongs to the Archbishop and in practice operates as an archdiocesan court (i.e., does the legitimate appellate and prerogative work of the archdiocese, as opposed merely to serving as a first-instance court for inhabitants of the peculiar.) The removal-by-request provision of the statute must mean that the Archbishop could “request himself” to take in his archdiocesan court suits brought in his diocesan court and perhaps in his peculiar

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41 P. 10 Jac. C.P. Harg. 15., f.263b.
(depending on whether he is entitled to skip over the Bishop of the diocese where the peculiar is located.) It is possibly arguable that no form of request is necessary in that situation—inhabitants of an Archbishop’s diocese (and perhaps his peculiars) are simply liable to citation into the archdiocesan courts, the citation implying that the Archbishop has “requested himself.” Applied to this special context, the holding would mean that whatever it does in practice the Arches is properly speaking only a peculiar. That was suggested in Lewis and Rochester, which the present holding modestly extends (an inhabitant of Canterbury diocese is as much within the statute as an inhabitant of London diocese.)

The second point in the report is not a resolution but a doubt, whether the reporter’s or the court’s is not clear. The premise for the doubt is that “it seems by the words of the statute that by license of the diocesan the Archbishop may cite in any diocese.” “Seems” is weak if the meaning is only that any Bishop may—in due form and provided that ecclesiastical law permits—request the Archbishop to take over a case, for the statute certainly provides that. Perhaps the word reflects uncertainty about what “due form” is—e.g., whether a Bishop may give his Archbishop a general license, as opposed to making request in each case. The unanswered question is whether this principle applies to a peculiar belonging to an Archbishop located in someone else’s diocese—e.g., the Arches, which the present case is in all probability about. The answer should probably be “no”, given the point above—the Arches is only a peculiar even though it functions as an archdiocesan court. For the statute permits removal-by-request only from inferior to superior judge, and peculiars are presumably not superior to dioceses even when they belong to a personal superior of the Bishop. This is a puzzling and practically inconvenient result, however, since the Bishop of London would be doing an inhabitant of his diocese a favor—saving him travel—if he licensed the Archbishop sitting in the Arches to take a case which he wanted to forward to the higher level. (Nominally, anyhow. The point would be realistic for an equivalent of the Arches located in Lincolnshire, since the regular archdiocesan courts commonly sat in greater London.)

The other intelligible resolution in the report restates a point we have already encountered: If 23 Hen. VIII did not contain an express proviso for probate prerogative, it would still be treated as an exception. It was “stated as a rule” that when the party “cannot” have a remedy in an inferior court a superior court may provide one. The report is garbled or incomplete at the end. There appears to be discussion of the jurisdictional consequences of a will’s being proved in the Prerogative Court—whether later proceedings connected with the will, such as legacy suits, may or must be in diocesan courts—but it is unclear.

Fraunces v. Powell, also 1612, 42 indicates answers to a couple of questions raised in cases above: (a) A Bishop may give his Archbishop a general license to take diocesan cases, so far as the statute is concerned, provided that is warranted by ecclesiastical law. The instant case was adjourned until civilians could be heard on the point of ecclesiastical law. It was a case of alleged encroachment on London diocese by the Arches. The court’s action therefore implies that a general license could benefit an archiepiscopal peculiar as well as regular archdiocesan courts, ecclesiastical law permitting. In announcing the

42 P. 10 Jac. C.P. Godbolt, 190.
disposition, Coke said that Prohibition would lie in the instant case unless the general license existed and was valid in ecclesiastical law.

(b) It is reported as held that defamation, which the instant case was about, may be punished by the ecclesiastical court in whose precinct the words were spoken, although the speaker does not live there. (Note that this need not imply that the place where this semi-criminal wrong was committed has exclusive jurisdiction, as against the place where the defendant is resident. Whether it does would presumably be an intra-ecclesiastical matter.)

Save for dicta below, one cannot say more about Fraunces v. Powell. Full facts are not reported. We are not told exactly where plaintiff-in-Prohibition lived, nor whether and how an episcopal license to the Archbishop to take any diocesan case he liked in the Arches was asserted as a fact. We are informed that the alleged defamatory words were spoken in St. Sepulcher’s parish, London. There may be a lurking question as to whether that parish was part of the Archbishop’s peculiar. In Lewis and Rochester, we encountered the judicial opinion that the Arches as a peculiar court was confined to St. Mary le Bowe, where the words in question here were not spoken. It is reported as “said” in Fraunces (but by whom does not appear) that the peculiar covered thirteen parishes, which is the traditional view. It is possible that once the outstanding question of ecclesiastical law was settled the court would have to come back to the extent of the peculiar and whether St. Sepulcher’s belonged to it. There is no report of the case beyond the adjournment.

In addition to these points directly bearing on the case, Coke made two further observations in Fraunces. (1) He affirmed that 23 Hen. VIII was made to protect inferior ecclesiastical jurisdictions—as opposed merely to saving the subject inconvenience. Indeed, he said that that was the “principal cause” of the statute. (2) He said that the act was made “in affirmance of the common law.” In support of this, he cited two Year Book cases in which it was said that excommunication in a “foreign” diocese is void. Assuming the position is tenable, I am not sure that it would have any implications after the statute, sed quaere. The point that the statute may be enforced by Prohibition, not only by penalty suit, is at least assisted by the theory that the act is declaratory, if in the absence of the statute Prohibition would lie to stop a suit in a jurisdiction counting as “foreign” (whatever the criteria of foreignness.) For then the penalty would clearly be a superadded remedy, since the statute does not expressly take away any pre-existing power to prohibit. The prohibitability of “foreign” suits at common law does not automatically follow from decisions on the validity of excommunications in the contexts where the common law had occasion to pass on that—to decide whether a person had incurred the civil disabilities entailed by excommunication or whether De excommunicato capiendo would lie. We have seen in Vol. III, pp. 155 ff., that the courts were reluctant to use Prohibition to keep one ecclesiastical court from infringing on another in the unusual cases where that was complained of but where 23 Hen. VIII was not involved.

James’s Case, from the next term, 43 is not reported factually, but in the form of propositions on which the judges agreed, none of them new. (a) Bridges was affirmed. (b) The probate proviso, being designed to uphold archdiocesan jurisdiction where diocesan will not work, does not carry the power to entertain legacy suits with it. (c) Exceptions

43 M. 10 Jac. C. P. Add. 25,210, f.9.
not express in the statute may be construed in for cases in the “equal mischief” and where justice cannot be done otherwise. The example given is the Archbishop’s power to grant administration in intestacy cases parallel to those covered by the probate prerogative—when the intestate has goods in several dioceses. The last point, probably the specific example of intestacy, was said to have been adjudged in Edward VI’s time and by divers precedents since.

Goruen v. Pym, the same term, in a sense adds little beyond the obvious to the gloss on 23 Hen. VIII. The statute makes a plain and unqualified exception for appeals. In this case, citation out of the home diocese was apparently alleged as one reason for Prohibition, but the citation was in consequence of an appeal to the Archbishop. 23 Hen. VIII is not actually mentioned in the report, but I think it must certainly have been invoked. Assuming it was, the court said that there was no violation of the statute. The only point of interest is how it could have occurred to plaintiff-in-Prohibition to rely on 23 Hen. VIII.

His doing so can be made intelligible, though the attempt was not successful. Pym sued for a pew in the diocesan court. The Bishop made the equivalent of an order to quiet possession in Pym’s favor—i.e., awarded him possession of the pew pending trial of the right at common law. This step is explained by the fact that in some circumstances a man could have a temporal right to a pew. The Bishop’s court in this case apparently held that Pym might or might not have such a right, a question that only common law litigation could determine, and that meanwhile, from an ecclesiastical point of view and by tentative appearances, Pym was entitled to possession. (I say “from an ecclesiastical point of view” because it was probably law that if Pym lacked a common law title to the pew the Bishop was free to settle the right to use it by ecclesiastical standards, or perhaps by standardless discretion. In other words, the diocesan court was probably not doing exactly what a court of equity does when it awards temporary possession—acting merely on “tentative appearances”—though the distinction is a thin one.

Goruen then appealed to the archdiocese. Pym sought to prohibit the appellate suit partly as a violation of 23 Hen. VIII and partly because the matter was temporal. I construe his claim, comprising these two elements, as arguing that the suit to the Archbishop was not a bona fide appeal, such as 23 Hen. VIII excepts. I.e: A definitive sentence in an inferior ecclesiastical court is appealable, and citation of appellee out of his home diocese is perfectly legal. The same is no doubt true of a normal interlocutory appeal—when a non-dispositive point of ecclesiastical law has allegedly been misdecided. Here, however, the diocesan court had only made an order based on the proposition that the real issue was determinable at common law. Goruen’s proper move was to sue at common law if he wanted to assert a right to the pew against Pym. If he was not willing to take that step, it is at least arguable that he should be stuck with the Bishop’s disposition—on the theory that where temporal right to a pew does not exist in either disputant the Bishop has a mere discretion to assign the seat and end the quarrel, and therefore cannot commit an appealable error. When Goruen appealed to the Archbishop, he violated the policy of 23 Hen. VIII, though it may be hard to maintain that he violated the letter. He caused Pym to be cited into an archdiocesan court when there was no excuse for so vexing him.

44 M. 10 Jac. C.P. Add. 25,210, f.9b.
The Common Pleas was probably well-advised in going by the surface of 23 Hen. VIII—i.e., in holding that an appeal in form is an appeal so far as the statute is concerned. In denying a Prohibition, I doubt that the judges committed themselves to more than that. They laid down some rules about title to pews (in brief, that a donor who has always paid for the upkeep of a seat and used it exclusively has a right protectable at common law, and otherwise that the settlement of disputes about pews belongs to the Bishop, subject to power in the parson and churchwardens to assign them if they can agree.) I see no commitment one way or the other as to whether the Archbishop may interfere with the Bishop’s disposition once it is established that there is no temporal interest. The decision seems only to say that there was no objection at the present stage to asking the Archbishop to review the Bishop’s order for any flaws in the application of the ecclesiastical law or in the finding of facts. An archiepiscopal order reversing a definitive episcopal decision about the use of a pew—temporal interest having been ruled out—could conceivably be an ecclesiastical error, but it would be a very feeble candidate for Prohibition. The holding in Goruen says that an attempt to get the Archbishop to reverse a tentative order intended to invite common law litigation is at least an equally feeble candidate, whether or not the Archbishop ought to entertain such an application.

We now leave Coke’s Common Pleas for later cases in the same court, which continued to handle many more Prohibitions on 23 Hen. VIII than the King’s Bench. Jones v. Jones (1618) 45 is an elaborately argued case on the exact meaning of the statute’s exception for suits removed to a higher court at the request of a lower. The suit in this case, concerning tithes, was transmitted from the diocese of Llandaff to Sir Daniel Dunn, Chancellor of the Arches. There is an unclarity in the reports as to who requested the transmission, an Archdeacon, with jurisdiction subordinate to the Bishop’s, or the Bishop’s Commissary. In the MS. report, Chief Justice Hobart speaks to both issues—whether an Archdeacon may transmit a first-instance case to the Archbishop, by-passing the Bishop, and whether a Bishop’s Commissary, as opposed to the Bishop in person, may transmit. It is likely that both things happened, in a sense: i.e., the suit was brought in an Archdeacon’s court, but the request, instead of simply by-passing the diocesan level, was forwarded over the Commissary’s name. The initiative may have come from the Archdeacon, but the Commissary was willing to comply. There was no merely formal objection to the request. It was by letter, and reasons were recited—viz. that no civilians were available in the locality to argue the case, and the requester, whoever should be counted as such, did not understand its issues.

Prohibition was granted, but the court permitted the case to be argued at length subsequently. First, in keeping with the statute’s incorporation of ecclesiastical law in the section on removal, civilians were heard. On two occasions, Dr. Talbot, Dr. Duck, and another appeared. Typically, they stated an extreme case, claiming that there were no limits in ecclesiastical law on an inferior judge’s power to request removal, instead of maintaining only that the request in this case was by a competent person and for good cause. The sincerity of their position—and so far as I know its correctness in ecclesiastical law—appears from the fact that Duck, who seems to have been retained to argue for plaintiff-in-Prohibition against Talbot, in some sense conceded this point. (What he said for his client is not reported. He may have argued that the request must

45 H. 15 Jac. C.P. Hobart, 185 (undated); Harl. 5149, f. 46.
come from the Bishop himself, conceding only that no reasons need be given.) It is possible that in the end the civilians did not insist on an absolute carte blanche to request removal, since Hobart says later in the report that they had recited twenty-one good causes for removal. It seems surprising that the reasons alleged in this case were not, according to Hobart, among the twenty-one, since the absence of learned counsel and a learned judge in a remote Welsh diocese seems on its face a reasonable ground. If the civilians listed twenty-one separate grounds, their contention may have been the one we encountered above—that grounds were so numerous that none need be rehearsed, and so none that are rehearsed can be called insufficient.

After the civilians, Serjeant Bawtrie spoke in favor of Prohibition, making three arguments: (a) The letter in this case was addressed to Dunn specifically. Dunn was now dead. Therefore there was not a sufficient request to the Arches, or a request which other officers of that court, or Dunn’s successor, could act on. (b) The Bishop is required by the words of the statute to make removal requests himself. Besides the immediate words, which taken literally seem to say this, Bawtrie argued from the language directly following: The act says that the inferior judge (not the inferior judge or his deputy) may make request to have the suit examined by the Archbishop “or his substitute.” The omission of “or his substitute/deputy” in the first clause cannot be taken as an accident or elision of an understood term when the next clause is careful to include “or his substitute.” (c) Complete freedom on the Bishop’s part to transmit suits, as maintained by the civilians, would undermine the statute. (Nothing said about the ecclesiastical sufficiency or intrinsic reasonableness of the causes shown in the instant case.)

Hobart spoke first from the Bench, holding that the request was made by a competent person, because the Bishop’s Chancellor or Commissary holds his office by commission, and the act allows transmittal by an inferior judge “in his own right…or by commission.” Justice Winch disagreed, holding that a special commission would be valid to this intent, but not a general one. I.e., I take it, one deputized to handle a particular case may request its removal, and presumably a commission to do the specific act of requesting removal of a suit would be good, but a deputy with general authority to perform judicial acts in the Bishop’s stead may not request removal. It would be unreasonable, Winch thought, if Commissaries—the agents who did most of the Bishop’s judicial work in every diocese—could give away their principals’ jurisdiction at will. (Surely a good point. One hardly makes a general agent to exercise one’s jurisdiction with the intent that he may remit its exercise and enjoy an easy life.) Hobart replied with reinforcement of his position: The Bishop and his Chancellor/Commissary are a single office. The Chancellor may act generally in the Bishop’s name and may only so act—i.e., has no competence to act in his own name. The statute speaks of the Bishop or other officer and must by the “or other” mean the Chancellor. (On the last point, it should be observed that the removal clause itself does not speak of “other officer.” Hobart probably meant that the expression is used elsewhere in the statute, implying that the makers assumed, and in some places showed they assumed, the commonplace fact that most episcopal jurisdiction was exercised through deputies.)

Hobart also held that an Archdeacon may not transmit a suit directly to the Archbishop, but he speaks in such a way as to confirm my supposition that the immediate issue was a Chancellor’s request. (The power of an Archdeacon to by-pass the Bishop is not irrelevant, because if the Chancellor’s competence to make request is denied, as by
Winch, it might still be argued that the transmission in the instant case was lawful since it really came from the Archdeacon and was only forwarded by the Chancellor—or forwarded with a notation of “No objection”, which, though an understandable precaution, would be superfluous if the Archdeacon was a competent requester. Hobart cut off this possibility, however.)

Finally, Hobart made a couple of remarks on the sufficiency of the reasons for removal. Those I shall subsume under his lengthier opinion on that point. For after the exchange between Hobart and Winch the case was adjourned. When it was moved again, later in the same term, the court (except for Winch, who was absent but would presumably have gone along) upheld the Prohibition, Hobart delivering a careful construction of the statute. The decision should be taken as holding that the reasons for removal alleged in this case were insufficient and as repudiating the civilian theory that any reasons or none would do. The Chancellor’s competence to make request therefore becomes a moot point. In any event, no judge spoke to that except Hobart and Winch, who differed.

In his own report of the case, Hobart may have elaborated what he said in open court, but the MS. suggests too that his speech at the final hearing was based on a close study of the statute. It is a curious feature of both reports that Hobart never says why the reasons for removal in the instant case were invalid, except that they were not on the list of twenty-one reasons recited by the civilians. The only more positive theory I can construct is that an ecclesiastical court’s disclaimer of intellectual adequacy, in itself and its counsel, is too easy for a court that wants to be “off the hook” to make, too hard to challenge as a statement of fact, and in itself a scandal to the King’s ecclesiastical justice.

What Hobart does is to argue carefully that the statute must in general have a restrictive intent—that it aims at cutting down ecclesiastical litigation outside the defendant’s home diocese, by removal on request or otherwise, and does not intend to open a loophole in the request clause. It may have seemed evident enough to him that an essentially restrictive act could not mean to tolerate removal by “disclaimer of intellectual adequacy.”

Towards making out a generally restrictive intent, Hobart put the subject’s ease back in the place of honor as the statute’s main end, relative to the preservation of diocesan jurisdiction. He supported this ranking of purposes by pointing out that the subject—not the Ordinary bereft of jurisdiction—is given a penalty action. (He is given double damages and would no doubt be the usual beneficiary of suits for the set penalty, but the latter was open to the public and could be brought by the offended ecclesiastical judge as a stranger-informer. It would be a nice point on estoppel whether a judge who requested removal could sue as an informer and argue that his request was invalid!) Emphasizing the subject’s predominant interest is especially useful in connection with the removal clause. If primacy were given to the Ordinary’s interest, it would be pointless to restrict the grounds of removal or the form of request, except for the bare purpose of making sure that a deliberate or “considerate” request was transmitted. There is no compelling reason why inferior ecclesiastical judges should not be free to throw away their statutory rights; throwing away the subject’s rights is something else.

In further reinforcement of the same emphasis, Hobart said that the statute greatly contracted Archbishops’ power to take cases from inferior jurisdictions without their consent compared to what canon law permitted. In other words, Parliament, thinking
primarily of the subject, set out to make things more convenient for him than they would have been if canon law had been allowed to take its course. If this was admittedly done in one respect—for non-consensual intervention by Archbishops—why should one not suppose it was done in another—to restrict removal by consent to a greater degree than it had been restricted before? (In the MS. report, Hobart says that there were twenty-one sufficient reasons in canon law and ten at most under the statute. How he got to the figure, and how he thought the statute might a guide to which ten, does not appear.)

Next, Hobart argued from the form of the removal exemption itself: That clause begins by making a general exception for suits removed by request and then adds a qualification—only in so far as such removal is lawful or tolerable by ecclesiastical law. The qualification would be a “vain correction” if it took nothing away from what the general language gives. This argument goes to say that the extreme civilian position is incompatible with the statute. The more moderate position—that there are twenty-one good reasons in canon law—is compatible enough. (The weakness in Hobart’s position is that he has no basis for saying that any finite list of valid grounds for removal certified as ecclesiastical law is ruled out by a “restrictive” intent, at least if the grounds are all coherent and rational enough to be believable.) Perhaps it is arguable that the statute-makers would not have added the qualifying language if what they deemed to be the canon law really authorized removal of a large number of cases, even so large as twenty-one. Hobart said further that the statute must have been made with the knowledge and advice of canonists and therefore “cannot be supposed to be ignorantly penned.” I.e., the statute-makers did not say “suits may be removed by request in so far as it is lawful by ecclesiastical standards” on the mistaken belief—necessarily mistaken if their putting in the qualification made any sense—that those standards placed no, or very few, or only the most narrowly formal, restrictions on removal. Meaningful restrictions must exist. The present business, as it were—and one might say the assignment for civilians invited to argue in cases such as this—is to specify a plausible, and plausibly narrow, list.

One further argument (MS. report only) is that the extreme civilian position violated a maxim of civil law itself, viz. “forum debet sequi personam”. I.e.: If it were true that any suit may be removed on request, the rational relationship between “forum” and “person” which the maxim endorses would not obtain. One such relationship—by implication the most obvious and important one—has reference to where the “person” lives, where he can appear with minimum inconvenience and can answer to those with direct spiritual supervision over him. (The same maxim was used to argue that the statute excepts cases in which a man commits a spiritual offense outside his home diocese. In that event, there is another “rational relationship”, and it is to be preferred—the “forum’s” responsibility for enforcement of ecclesiastical law when the “person” comes into its ambit and violates the law.

A final note in Hobart’s own report confirms that the existence of a penalty is no bar to Prohibition. There is no sign that this was controverted in Jones. The addition is probably Hobart’s afterthought. (His report, in contrast to the narrative MS., consists largely of the writer’s observations on the case and omits the decision.) Hobart posits his view of the penalty’s effect on the form of the statute: Prohibition may be used because there is prohibitory language independent of the penalty clause; if the statute merely said “if anyone cites another out of his diocese, he shall forfeit £10”, Prohibition would not lie.
Gastlande’s Case, from the same term as Jones v. Jones, holds that Prohibitions on 23 Hen. VIII should not be granted after sentence. The substance is not reported. An opinion by Hobart, dated the same term, makes the same point in general language; it may well relate to the same case.

Westborowe v. Packman, later in 1618, only exemplifies another Prohibition based on the statute, probably implementing the principle that Prerogative probate does not carry with it jurisdiction over ensuing legacy suits. (An executor resident in Colchester was sued in the Arches for a small legacy of 40s. The court gave a day to show cause against prohibition, rather than granting a writ at once. Whether or not this was standard practice in the Common Pleas at the time of the case, it probably makes especially good sense when violation of 23 Hen. VIII was complained of, owing to the likelihood of factually incontrovertible defenses, such as removal-request or sentence. Properly, of course, defenses requiring assertions of fact should be pleaded. It was sometimes convenient to let them be raised by motion for Consultation, and an even shorter route is simply to delay grant of a writ until the court sees what defendant-in-Prohibition has to say for himself. If what he has to say is matter of fact, but fact that probably cannot be disputed save for its legal effect, evading procedural steps beyond the initial application for Prohibition is eminently sane. A propos of sentence, it is of course true that putting off Prohibition gives the ecclesiastical court time to rush to judgment, at any rate if plaintiff-in-Prohibition has appeared there and attempted a defense, and then, foreseeing failure, invoked the statute. Excommunication for non-appearance, rather than default judgment, would, I think, be the normal ecclesiastical sanction if the wrongfully cited party did not show up. It would probably be invalid excommunication for common law purposes, and would perhaps be reversible by Prohibition. Even so, presumably not every inhabitant of Colchester would be tough enough to be indifferent to excommunication in a foreign diocese, and archiepiscopal excommunication could be a greater nuisance. The most prudent thing to do, if one were cited contrary to 23 Hen. VIII, would be to seek a Prohibition at once, but it is not the cheapest thing or in all circumstances the most convenient—as it were, one might as well take now the short trip to London one was planning anyway, appear in the Arches, and hope that the matter can be cleared up to one’s satisfaction there. That is not wholly unbenign. It would be just as well for the executor to pay the small legacy or else convince the Arches it should not be paid now—defenses such as “No assets” or release would normally be listened to by ecclesiastical courts, and if they were not Prohibition could be obtained on the substance.)

Kinge v. Merrial and Anstre (1619) adds a new point to the statutory gloss: Held per curiam that if a man expressly consents to be sued in the Arches when he lives in another diocese, he will be bound by his consent and may not have a Prohibition. “Volenti non fit iniuria”, said Justice Warburton. Chief Justice Hobart stated an important caveat: Merely appearing and pleading in an improper ecclesiastical court will not estop

46 H. 15 Jac. C.P. Harl. 5149, f.82b.
47 H. 15 Jac. C.P. Harl. 5149, f.93b.
48 M. 16 Jac. C.P. Harl 5149, f. 141.
49 H. 16 Jac. C.P. Harl 5149, f. 263.
one from having a Prohibition; the consent implied in such conduct does not count; consent must be express.

Dr. James’s Case (1621) represents another attempt to assert the wide claims for the Archbishop that had been repudiated in Lewis and Rochester. The attempt failed. Some details of the case are singular, but nothing basically new was claimed or held. Dr. James was judge of the Archbishop’s Court of Audience. He was accustomed to hold court sometimes in Southwark, within the diocese of Winchester. He cited people there from remote places in Winchester, and if they did not appear he allegedly excommunicated them and would not absolve them until they consented to transmit their cases to the Archbishop’s court. Thereby 23 Hen. VIII was “utterly illuded.” Surmising these facts, Serjeant More sought a Prohibition on behalf of the parties so cited and also, expressly, on behalf of the Bishop of Winchester.

It was answered on behalf of the Archbishop that no such “art” of transmitting suits had been used. The “art” or trick being denied, the Archbishop went on to claim that he was entitled to sit in any diocese for the purpose of hearing cases arising there. That is to say—as was said—that he had concurrent jurisdiction with the Bishop by prerogative, subject to the expressly conceded limit that he could not cite people to appear outside the physical bounds of their home diocese. For the court held in Southwark, established usage, though not prescription by common law standards, was alleged to back up the Archbishop’s de jure claim—the court had so operated for more than forty years. (This argument is consistent with admitting that a mere ruse to coerce ostensible consent is unlawful, though the ruse was denied as to fact in the instant case.)

The court’s answer to the Archbishop’s contention is reported by Hobart. We are not told that a Prohibition was granted, but the answer leaves no doubt but that the court was prepared to issue one. The judges said first that transmission of cases in the manner alleged directly violated 23 Hen. VIII: If suits were being captured for the Archbishop by sharp practice, unfairly exacted consent would bar no one from Prohibition. (Cf. the insistence on express consent in Kinge above.) But the court held that the Archbishop lacked the right claimed even if no sharp practice was being used. The judges addressed the Archbishop’s contention that no harm occurred to the subject from the claimed archepiscopal prerogative, because no one was compelled to appear outside his physical diocese. They made the point, which we have encountered before, that in so far as the Archbishop takes diocesan cases the subject loses an appeal. A somewhat confused sentence seems to make the point that the Bishop of Winchester himself could not summon people from every place in the diocese (presumably owing to its division into archdeaconries with customary, if not de jure, exclusive right to first-instance jurisdiction in their localities.) The Archbishop would deprive inhabitants of this advantage if he had the authority he claimed. The court went on to enunciate the general doctrine that “the King is the indifferent arbitrator in all jurisdictions, as well spiritual as temporal, and that it is a right of the Crown to distribute them, that is, to declare their bounds.” This is a grandiose way of saying that the common law courts have authority to enforce intra-ecclesiastical lines of jurisdiction. Possibly the counter-generalization was urged in this case. It is apposite enough when the statute is not involved, but of dubious relevance when it is—at most a ground for resolving real doubts about the statute’s detailed

50 M. 19 Jac. C.P. Hobart, 17.
meaning in favor of non-interference with Church courts. Finally, the judges repeated the explanation given in Lewis and Rochester and elsewhere of the appearances that gave some color to the archepiscopal claim to concurrent jurisdiction: such jurisdiction was once exercised by virtue of legatine authority, now “abrogated with the Pope.”

Puckford v. Jessopp, not dated but clearly from Hobart’s Common Pleas, produced one new holding and confirmation of another point. It was held that if a bishopric becomes void, so that the diocesan jurisdiction devolves on the Archbishop, the Archbishop must hold court for diocesan cases within the vacant diocese; citation outside the diocese violates 23 Hen. VIII as much as if the bishopric were occupied. In the instant case, however, Prohibition was sought after sentence and therefore denied, in accord with other decisions.

We now turn to Common Pleas cases from Charles I’s reign. The earliest report is only a statement by Chief Justice Richardson that one who “submits” to a suit in the wrong diocese may not have a Prohibition on 23 Hen. VIII. If “submit” means “expressly and voluntarily consents”, this confirms Kinge and Dr. James.

A second case has novel features. An executor, being sued for a legacy in the Prerogative Court, surmised that he lived in the precinct of the Tower, which he claimed was a peculiar. Counsel opposing Prohibition (Henden) maintained that legacy suits pursuant to wills proved in the archdiocesan courts were within the statute’s saving of the probate prerogative. The contention goes against firm earlier opinion. Henden argued, however, that legacies could not be recovered in courts other than the one where the will was proved, because diocesan tribunals would not meddle with legacies arising from wills proved in the Prerogative Court. Secondly, Henden claimed that the Tower was not a proper ecclesiastical peculiar such as 23 Hen. VIII protected. It was rather a “particular” jurisdiction—meaning the equivalent of a secular franchise where the lord of the manor happens to have the privilege of proving wills in lieu of the Church authorities. By Henden’s theory, a peculiar within the statute must be in effect a diocese cut out from a diocese, where an ecclesiastical judge exercises the full equivalent of the Ordinary’s jurisdiction. And even apart from the law, Henden said, spiritual jurisdiction was not at present being exercised in the place; the Archbishop was not displacing an active lower court. (Might the jurisdiction of the inoperative Tower court not, however, devolve on the Bishop, whom the Archbishop would be displacing? There is no sign that this was argued against Henden.)

Davenport, counsel on the other side, took exception to Henden’s last point. He admitted that ecclesiastical jurisdiction was not being exercised in the Tower at the moment, but represented this as a temporary and legally insignificant phenomenon: The person entitled to exercise it (one report calls him the “lord”, the other the “Commissary”) had recently died and was unreplaced. Also, per Davenport, true ecclesiastical jurisdiction was normally exercised there, so that the precinct was a peculiar within the statute. Finally, it may have been argued (the report is unclear at one

51 Lansd. 1172; Hobart, 178, sub nom. Pickaver’s Case. Hobart speaks in his own report; in the MS. Serjeant Harvey is counsel seeking Prohibition—Harvey became a Serjeant in 1614 and was promoted to the Bench in 1624.
52 P. 3 Car. C.P. Harl. 5148, f. 144b; Hetley, 19 (undated).
53 M. 3 Car. C.P. Littleton, 54; Hetley, 47 (undated).
point) that the statute made no distinction between proper peculiar jurisdiction and such ecclesiastical functions as a lay franchise holder might be entitled to perform.

No decision is reported, but three judges are heard from. Justice Hutton recited the familiar rules for when the Archbishop has probate prerogative, then said it “stands to reason” that legacy suits founded on wills proved in the Prerogative Court should be brought in that court. Offhand, at least, Hutton was inclined to agree with Henden, rejecting earlier authority if he was aware of it. Justice Harvey said that if a will was lawfully proved in the Prerogative Court an inferior court would compel the party to prove it over again. I suppose that cuts in favor of the Prerogative Court’s jurisdiction in the legacy case and comes to qualified agreement with Henden’s statement that without it legacies would go unrecovered: Per Harvey, that is too drastic, but it is true that diocesan courts make it awkward to recover legacies bequeathed in Prerogative-proved wills by insisting that the will be proved again. (Such refusal of faith and credit to the perfectly lawful acts of archdiocesan courts seems quite incredible. It is more so than Henden’s claim that diocesan courts were reluctant to “meddle” with Prerogative-proved wills, a practice which would presumably express the mistaken belief that doing so would infringe the Archbishop’s jurisdiction, or at least be taken by him to do so. Remember he was not only a superior entitled to respect, but the appellate court as well. Indeed, the belief may not be mistaken as ecclesiastical law. Should the diocesan judge “meddle” where the law he is beholden to says he should not, just because he knows—if he knows—that the common law judges think he should, and might frustrate recovery of the legacy altogether by prohibiting the Archbishop? Such are the conundrums of a mixed legal system!) To Harvey, Hutton and Justice Croke replied only “Minus juste”. I.e., they deplored the practice, but did not deny it. There is no judicial comment on other points in the case.

Smith v. Executors of Poyndreill 54 comes in the upshot only to another decision to deny Prohibition on 23 Hen. VIII because sentence had already been given (and in this case affirmed on appeal.) Prohibition was not literally denied, however, but reversed by Consultation on motion. A writ was originally granted to stop a legacy suit in the Prerogative Court where the will had been proved there and the executor lived in another diocese. This grant represents the position established in Coke’s time, notwithstanding Hutton’s and probably Harvey’s flirtation with the contrary in the case above. (The two cases come from the same term. There is no telling which was discussed earlier.) There is, however, a slight sign of wavering in Smith: Among the reasons given for allowing Consultation on motion—besides the sentence and long delay in seeking Prohibition—is the fact that the will had been proved in the Prerogative Court. The judges seem to have thought that letting the Prerogative Court’s affirmed sentence stand, though reasonable in itself, was the more reasonable because that court’s improper exercise of jurisdiction at least had a certain color or excusability. It is almost as if they rather wished the precedents did not require enforcing 23 Hen. VIII quoad legacy suits on Prerogative-proved wills (though nothing is said about being bound by precedents.)

In the Case of Luckin’s Wife (1629) 55, a suit for marital abuse and alimony brought in the Bishop of London’s court was prohibited because defendant lived in a

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54 M 3 Car., C.P. Croke Car., 97.
55 T. 5 Car., C.P. Littleton, 277.
peculiar in Essex, within the territorial bounds of London diocese. There is not room for serious doubt that the statute protects proper peculiars and their inhabitants against the most obvious threat—the courts of the diocese where the peculiar is located. The Common Pleas seems to show some hesitation in this case before granting Prohibition, but that is probably owing to the special character of the peculiar. It originally belonged to a monastery, came to the King by the dissolution, was granted over, and now belonged to the Earl of Warwick. Serjeant Brampton, arguing for Prohibition, was careful to point out that the Earl maintained a bona fide ecclesiastical court, not a “shelter” for people seeking to evade ecclesiastical justice: He had an Ordinary (judge exercising all the judicial functions of a Bishop) and other officers. Brampton also argued that the circumstances of the peculiar cut in favor of respecting its jurisdiction, because it rested on a Parliamentary title (the Statute of Monasteries.) The thought there is probably just that the place’s title to be counted as a peculiar was clear, not that peculiars held by the successors of the monasteries enjoyed any special protection under the statute. There are not many reported cases in which inhabitants of peculiars sought Prohibitions based on 23 Hen. VIII. If there were a lot, there would almost certainly be disputes about whether the alleged peculiar really was one. Prescriptions and medieval grants of privilege would come in question. I am not sure that a peculiar that passed through the King’s hands at the dissolution would be absolutely immune to such disputes (going to whether the monastery really had the jurisdiction which the King thought he took over.) But at least a peculiar granted in terms by the King on the assumption at the monastery held it would be hard to break.

Otherwise, Brampton cited two precedents only going to show that Prohibitions on 23 Hen. VIII had been used to protect peculiars. Justice Hutton tried to distinguish one of them, assigned to 42 Eliz., from the present case. The reason for the Elizabethan Prohibition, Hutton said, was to preserve the party’s appeal from peculiar to Bishop. Here, on the other hand, because the peculiar was lay fee—i.e., an ecclesiastical jurisdiction laicized by the dissolution, analogous to an impropriation—no appeal would lie to the Bishop, but only to the King “as Ordinary” (in his ecclesiastical capacity.) Therefore refusing Prohibition would not deprive the party of one appeal. There is no sign, however, that this nicety led Hutton to dissent from the decision to prohibit, which the words of the statute surely support. It seems obvious enough that preservation of appeals is only one purpose of the statute. Brampton’s other citation is Jones v. Jones, which from date and description must be the major case so-called discussed above. From the direct reports of Jones it does not appear to have involved a peculiar, but transmittal from Archdeacon to Archbishop on the recommendation of the Bishop’s Chancellor. The direct reports are not very clear on the facts, however, and it is possible that the case was appropriate for Brampton’s bare purpose—a precedent of Prohibition on the statute with the effect of protecting a peculiar. The notable point is that he hardly had a flood of precedents, though that did not, as it should not, stand in the way of Prohibition. Chief Justice Richardson made a remark which signifies nothing except that ecclesiastical peculiars were a subject he had given little thought to before. (He suggests that they originated by some sort of arrangement among the Ordinaries and mentions one he happened to know about—probably mere rumination.)

We turn now to King’s Bench cases on 23 Hen. VIII. Save for one mentioned above because it antedates Lewis and Rochester, the earliest is Foster v. Blackburne
Plaintiff-in-Prohibition was cited out of the peculiar of the Arches—to what court we are not told—and sought a Prohibition on 23 Hen. VIII. The brief report contains opposed opinions from Justices Williams and Yelverton, the information that Prohibition was granted, an indication of why it was granted, and a skeptical observation about Prohibitions on 23 Hen. VIII notwithstanding the grant of one in the instant case. Since only the two judges are mentioned, my guess would be that they were alone in court and that Williams, who was against Prohibition, gave way to Yelverton, who was at least inclined to favor one, with the thought that the whole court should resolve the issue and could most conveniently do so on motion for Consultation, if the prohibited party chose to press his case. It is not impossible, however, that other judges were present and that Prohibition was granted by a majority over Williams’ dissent.

In any event, Justice Williams opposed Prohibition because “the statute inflicts punishment on the offender”—i.e., appoints a penalty. Justice Yelverton replied “there are many precedents in the Common Pleas for this.” The report then says that Prohibition was granted and suggests, by a mere “wherefore”, that this was done because of what Yelverton had said about the Common Pleas practice. I.e., either the two judges agreed that a tentative Prohibition to draw full discussion was desirable because whether divergence between the principal courts should be suffered was a serious question or (if the decision was definitive) because the court thought it best to acquiesce in the position of the Common Pleas, which had more experience with the jurisprudence of 23 Hen. VIII. The report then concludes with the remark “...but the surest way is to take the remedy of the statute.” There is no telling whether the explanation of the grant of Prohibition and the final observation reflect what anyone on the Bench said, or only the reporter’s impression of what the judges were thinking (or, with respect to the final observation, the reporter’s own opinion that even if Prohibitions on 23 Hen. VIII had to be accepted for the sake of inter-court harmony they were not a very good idea, and that clients should usually be advised to sue for the penalty. This could of course also be what the judges, including Yelverton, thought and may have indicated.)

Despite the skimpiness of the evidence, Foster is a significant case. It is as explicit an instance as we have—though there are others less explicit—of one principal court’s feeling constrained to follow the other, or at any rate worrying about whether it ought to feel constrained, notwithstanding misgivings. It is most unlikely that the other King’s Bench judges were unaware of the Common Pleas practice until Yelverton pointed it out. Williams had practiced in the Common Pleas as a Serjeant for about a decade before he was elevated to the Bench. It is thus likely that at least he was simply convinced by the respectable theory that the penalty in the statute barred Prohibition and disposed to doubt—again with greater explicitness than cases usually reflect—that one court owes anything to the precedents of the other if they seem mistaken. Indeed, one is tempted to speculate that resisting Coke’s influence—and overlooking the Cokean “leading case”, Lewis and Rochester—could have had its positive attraction to some King’s Bench judges. The suggestion, whoever made it, that suing for the penalty was in any event the “surest way” to take advantage of 23 Hen. VIII makes good sense as advice to lawyers advising clients. Recovering the penalty would probably as a rule cover the

56 T. 9 Jac. K.B. Harg. 32, f.72b.
costs of being sued outside one’s home diocese or peculiar. Why not seek the compensation even if Prohibition were available?

The next King’s Bench case, Pit v. Welby (1613) 57, echoes Foster in the sense that doubt is again expressed as to whether Prohibition will ever lie to enforce 23 Hen. VIII. The case is complicated by the circumstance that it involves an attempt to prohibit the Court of High Commission, as well as by the unusual character of the proceedings against plaintiff-in-Prohibition. For these aspects, see the End Note following this chapter, which deals with the special problem whether the High Commission specifically could be prohibited on the basis of 23 Hen. VIII.

The facts of Pit are not entirely clear as reported, but they seem to have been as follows: A man was arrested by an official identified as “the serjeant of the mace” when he was leaving church after a sermon. The arrestee sued the officer in the High Commission on the ground that such an arrest was unlawful by virtue of a medieval statute (See the End Note for the details of this claim.) The High Commission held that the arrest (for what does not appear) was in itself justified, but that the officer had still violated the statute by making it when the party was coming from church. Accordingly, the Commission awarded the arrestee £6 as what are called “costs” (though they sound more like damages, actual or punitive) “for the contempt” (i.e., I take it, violation of the statute.) The officer sought a Prohibition to halt exaction of the £6, relying on 23 Hen. VIII. The only particular reported is that he was cited out of an unspecified peculiar. It does not seem to be disputed in general that an arrest made in church, or of someone going to or coming from church, was an ecclesiastical offense, though questions were raised in this case about the precise circumstances of the arrest. (See End Note.)

Bulstrode’s report starts with some skirmishing over the substance of the case (the legality of the arrest.) That discussion was cut off when the judges noticed, or someone pointed out to them, that Prohibition was sought on 23 Hen. VIII, not on the substance. The judges then asked whether Prohibitions had been granted on that statute. A clerk of the court—the “Secondary”, whose name was Man—replied that he had never known of any. The question and the answer are appropriate and unsurprising so long as the frame of reference is King’s Bench practice alone. (Foster is an exiguous counter-example that could easily have been forgotten, and the sole Elizabethan case touching 23 Hen VIII probably would have been, even if it were stronger than left-handed recognition that Prohibition on the statute might sometimes be possible.) There is no sign in Pit of any consideration of Common Pleas precedents and what the King’s Bench should do about them. There hardly could have been, since plaintiff-in-Prohibition’s lawyer (Henry Yelverton, son of Justice Sir Christopher Yelverton and later a judge himself) immediately said that his side would not rely on 23 Hen. VIII, but on the merits of the claim against the arresting officer. Later, counsel formally dropped the surmise invoking 23 Hen. VIII and framed a new one going to the merits. It seems probable that the original surmise was hastily drawn, perhaps by an attorney; when the case became the responsibility of a competent barrister, he very reasonably concluded that there was no point in plunging the court into the interpretation of 23 Hen. VIII and the problem of concord with the Common Pleas. The calculation was correct, for Yelverton eventually got his Prohibition on his version of the substance. (See End Note.)

57 P. 11 Jac. K. B. 2 Bulstrode.72.
In a case of 1615 58, the King’s Bench refused to prohibit when a man was cited out of a peculiar to the court of the Archbishop of York. The reason given is that the peculiar was in the diocese of York, so that the Archbishop was acting by force of his episcopal, rather than his metropolitan, power. I do not see how this holding can be squared with the words of the statute (“…no person shall be…cited…before any Ordinary…or any other Judge spiritual out of the diocese or peculiar jurisdiction where [he lives]”) It may be reasonable construction by intent against the words to lean on the preamble and say that the purpose of the statute is to protect dioceses and peculiars against archdiocesan tribunals, but not peculiars against the diocese. We have seen that there were few Common Pleas Prohibitions based on citation out of a peculiar to the Bishop’s court—no flood of precedents across the street. I cannot see, however, why anyone would want to escape the “plain words” on this matter, except someone generally hostile to Prohibitions on the statute. (As it were: “Why don’t these people bring penalty suits? If their gripes are righteous they could put more good money in their pockets than they are likely to have lost. Most of all, I am not disposed to spend my time on Prohibition cases to the end of protecting petty and sometimes questionable ecclesiastical jurisdictions, the inhabitants of which have not even been forced to venture beyond their own diocese. Archepiscopal encroachment on the whole structure of local justice might be a problem worth the courts’ attention.”) This may be close to the attitude of the King’s Bench judges, except for one of them—Coke, now Chief Justice of that court. He is significantly reported absent when this decision was made and is unlikely to have agreed with it, though it does not contradict head-on anything in his Common Pleas record.

Coke did take part in Moore v. Cockein and Saunderson early in 161659. Prohibition was denied in this case, but there is no conflict with Coke’s Common Pleas opinions. The ecclesiastical suit was in the Arches against two co-executors. One of them lived in the peculiar of the Arches and the other did not. Coke and the court held that the suit was not proper to the Arches as a peculiar. I.e.: If one co-executor lives in X and the other in Y, neither X nor Y has jurisdiction, or power under the statute to cite the stranger. For that very reason, however, the suit was within the Archbishop’s prerogative—not the probate prerogative expressly saved by 23 Hen.VIII, but the like case—and outside the statute. Citation into the Arches, so far as the statute is concerned, was as good as citation to any other archdiocesan court. (I do not think there is any conflict between this and vague doubts in Lewis and Rochester about the Arches’ legitimacy as anything but a peculiar. So long as the Archbishop had jurisdiction and was in conformity with the statute, it would be foolish to worry about where he sat—or, realistically, about how he distributed his archiepiscopal jurisdiction among his various deputies. Only when he tried to use the Arches’ location in London as an excuse for usurping jurisdiction was there reason for concern about exactly what that court was. The executor in Moore who did not live in the peculiar lived in London, so the Arches was the most convenient archepiscopal court for him.)

Incidental features of Moore confirm that Prohibitions on 23 Hen. VIII were rare in the King’s Bench and apt to meet fundamental opposition. Prohibition was originally

58 H. 12 Jac. K.B. 1 Rolle, 13.
granted in this case, to be reversed on motion for Consultation later. The original step was apparently taken on Coke’s urging, over the objection that the statute provided a penalty. Coke said that the matter was resolved in the Common Pleas—meaning, presumably, the general enforceability of the statute by Prohibition—, for which he cited a Carlisle’s Case (not independently reported, though it could possibly be an earlier stage of Bishop of Carlisle, just below.) The original grant of Prohibition is explained by the fact that the residence of both executors was not at that point before the court. I.e., the executor who lived in London diocese complained of being cited into the Arches and was clearly entitled to a Prohibition if the King’s Bench was willing to follow Lewis and Rochester. Coke apparently persuaded it to. The existence of a second executor not co-resident with the first came out when Consultation was moved for. Remarks by the puisne judges on the ultimate issue—the appropriateness of archepiscopal jurisdiction when co-executors live in different precincts—perhaps give hints of unfamiliarity with issues concerning the statute, although there is no disagreement on the solution.

The next case, the Bishop of Carlisle’s, came in 1617 or 1618, after Coke’s dismissal. There is no sign of general objection to Prohibitions on 23 Hen. VIII, although a writ was denied in the instant case for very sensible reasons. The Bishop held a living in his own diocese in commendam. He brought a suit for tithes of that benefice in the Archbishop of York’s court. I.e., the Bishop quite properly sued in his superior’s court because as party-plaintiff he ought not to sue in his own. Citing the defendant out of his home diocese was unquestionably lawful under 23 Hen. VIII, for the statute excepts cases in which the otherwise correct judge is himself a party. The complication, however, was that the Bishop of Carlisle had died before the litigation was concluded. His executors revived the tithe suit in the Archbishop’s court, whereupon the defendant there sought a Prohibition, claiming that the circumstances justifying the archepiscopal suit had ceased to obtain. The King’s Bench denied Prohibition on the ground that there is no violation of the statute when a suit has been lawfully commenced in a given jurisdiction and circumstances change later. Justice Dodderidge spoke learnedly for the court. He produced common law parallels designed to say in effect that the ecclesiastical system of permitting a suit to be revived by a litigant’s representatives—i.e., not requiring them to start a new suit—had temporal analogues. The common law would sometimes do what the ecclesiastical law sanctioned—deny a party’s abstract rights in order to bring on-going litigation to a conclusion. Dodderidge also made the practical argument that the archdiocesan suit might have been fully tried and ripe for judgment when the Bishop died. If the executors had to start over in the diocesan court, their testator’s expenses for a virtually complete lawsuit would go down the drain. In sum: While an argument for Prohibition could be made in Bishop of Carlisle on the narrowest verbal construction of 23 Hen. VIII, the judges were surely right to hold that the statute did not intend to interfere with the ecclesiastical system for reviving litigation and to cause a waste of time and money in circumstances like those of this case.

A decision is not reported in Gastrell v. Jones (1623) but the judicial remarks incline against Prohibition. A writ was sought to stop a tithe suit in the Bishop’s court on the ground that the suit should have been brought before an Archdeacon with peculiar

60 Croke Jac., 483, dated P. 16 Jac.; Lansd. 1080, f. 25b, dated P. 15.
61 T. 21 Jac. K.B. 2 Rolle, 357 (plaintiff’s name spelled Gastrill); 2 Rolle, 446.
jurisdiction. It is probable, though not explicit in the reports, that defendant resided in the alleged peculiar, since 23 Hen. VIII was invoked. The alternative would be that the land where the tithes were produced was within that district. In any event, the Prohibition case was pleaded to a demurrer. Details of the pleading are not given; indeed, the reports are generally sketchy. But the judicial remarks suggest that two issues were perceived:

(a) Conceding that what the Archdeacon had should count as a proper peculiar, does the statute protect his jurisdiction against the Bishop? On the second discussion of the case, Chief Justice Ley seems to say “No” to this, on the ground I have argued is dubious—that the statute is directed only against archiepiscopal incursion and forcing people to answer outside the diocese in which they live. In other words, Ley’s opinion appears to apply to any peculiar in the Diocese of X as against the Bishop of X. Possibly, however, his point is narrower—only that it is a contradiction in terms to say that one is an Archdeacon of the Diocese of X and to claim peculiar jurisdiction at the expense of the Bishop of X. At least this Ley clearly held, for he said that even if the Archdeacon’s claim to exclude the Bishop was based on prescription the statute would not protect his jurisdiction. I.e., an Archdeacon who throughout the period of prescription had been sole first-instance judge in a given district had no rights against the Bishop as far as the statute was concerned. The reason is that an Archdeacon by the nature of the office does not have an interest adverse to the Bishop’s. In the beginning, he was presumptively made Archdeacon by the Bishop—in effect, made his agent or delegate—and being in that position he cannot prescribe against the Bishop.

(b) Was it actually made out in this case that the Archdeacon held his position in such a way that he could have peculiar jurisdiction? He does not seem to have shown a prescriptive title. Counsel opposing Prohibition said as much at the second discussion, with the implication, contrary to Ley, that he at least might be within the statute if he had claimed prescription. (At the first discussion, someone—but who is unclear—said more positively that he could take away the Bishop’s jurisdiction by prescription, though the speaker did not think he had set up a prescriptive title.) Rather, it was pleaded that the Archdeacon held his authority “by commission.” The unidentified speaker at the first discussion said that it was not shown by what commission he was authorized. Implication: there might be such a thing as a commission that would give an Archdeacon jurisdiction on such terms that the Bishop would be excluded from concurrent jurisdiction in the district. But as it was, per the speaker, a commission of the requisite sort was not shown. The vaguely pleaded commission might be, as it was put, “by composition”, and that sort would not exclude the Bishop from concurrency. I cannot say just what these terms mean. It sounds as if the commission’s origin in some sort of agreement between the Bishop and the Archdeacon would be fatal to the Archdeacon’s pretensions regardless of what it said. In any event, Justice Dodderidge accepted this line of reasoning and said that he would favor Consultation unless plaintiff-in-Prohibition showed better cause “tomorrow.” Counsel opposing Prohibition at the second discussion stated a somewhat different theory: The Archdeacon’s court must exist either by the Bishop’s “institution” or by prescription; since prescription was not shown, the Archdeacon’s court must have the alternative basis; that being the case, it is “in the Ordinary’s right”, and hence suits may be taken away by the Ordinary. The implications seem to be: (1) One cannot be made—“instituted” or “commissioned”—an Archdeacon by anyone except the Bishop, not even by the King or the Pope. Such higher authorities can perhaps give a peculiar
jurisdiction in the Diocese of X, but they cannot at the same time make the holder Archdeacon. The office by its nature is in the Bishop’s appointment. (2) Whatever the Bishop purports to do, he cannot exclude himself from concurrent jurisdiction in the Archdeacon’s district. Or rather, contrary to Ley, he cannot do so by any other means than not interfering in the Archdeacon’s suits for long enough to generate a prescriptive title in the Archdeacon.

Although the reports of Gastrell are unsatisfactory, the case is of some importance as the only one on 23 Hen. VIII that relates to archdeaconries, a commonplace feature of the ecclesiastical judicial structure. Assuming the rest of the court would have agreed to deny Prohibition, either for Dodderidge’s reason or for Ley’s, the case is at least discouraging to the proposition that people who would ordinarily expect to be sued in Archdeacons’ courts could invoke the statute if cited into the diocesan court. There are too many loose ends, including the difference between the two judges, for it to be fatal for that proposition in all circumstances, but litigants using the case for guidance would be well-advised to obey the Bishop’s citation and not bother with pursuing Prohibitions. A cleaner rule than the case produces—that Archdeacons are not directly within the statute and cannot bring themselves within the protection accorded (verbally at any rate) to peculiars—would make sense. When a reason could be found, the burden of protecting petty jurisdictions and saving the subject only minor inconvenience is something the common law courts could do without.

In two Caroline King’s Bench cases, 23 Hen. VIII is discussed more thoroughly than ever before, principally by William Noy as counsel. Like several cases above in this study, these testify to Noy’s exceptional ability as a lawyer. The first, Arundell and Wife v. Willis and Wife (1628) 62, does not strictly add to the gloss on the statute, because no judicial opinions are reported and decision of an issue apart from 23 Hen. VIII could have determined the case, but some of the most important reflection on the statute occurs in counsel’s arguments.

The ecclesiastical suit, in an archepiscopal court, was for defamation. Arundell’s wife, Joyce, allegedly said that Willis had committed adultery and incest. Arundell et ux. sought a Prohibition, and the case proceeded to formal pleading. Plaintiffs-in-Prohibition pleaded that Joyce lived in the diocese of Exeter when she was summoned to the archdiocesan court, so that 23 Hen. VIII was violated. (The declaration did not say that the words were spoken in Exeter, though nothing to the contrary appears and nothing was made of this.) For the rest, plaintiffs in Prohibition claimed an applicable pardon.

Defendants-in-Prohibition (Willis and his wife, Susan) pleaded that the Vicar General of Exeter, under the Bishop’s seal, had requested the archiepiscopal judge Sir Henry Martin to determine the case. Apparently the only reason given in the request-letter was that the Willises prayed that they might sue outside the diocese. The plea went on to aver, in completely general language, that the canon law allowed such a request for removal. For the rest, the Willises pleaded facts concerning the pardon, intending to make out that it was not applicable. To this plea the Arundells demurred.

Counsel for the Arundells declined to “trouble the court” with arguments going to 23 Hen. VIII. He took this course because he regarded his demurrer as confessing what was pleaded—viz. not only the fact that a request for removal in the form described had

been made, but also that such request was allowable by ecclesiastical law. Accordingly, counsel devoted himself entirely to arguing that the plea going to the pardon, though confessing as to fact, failed to make out that the pardon applied. Counsel on the other side—Noy—did not take the opportunity offered him to omit discussion of 23 Hen.VIII, but spoke at length about it. The bearing of the case on the statute mostly lies in the implications of the lawyers’ strategies.

The Arundells’ counsel would appear to have thrown away a good thing. The removal request had two strikes against it: (a) The Bishop did not make it in person—not necessarily a flaw, but arguably so in the light of several cases. (b) No real reason for removal was recited. Did counsel by demurring to the statement that the canon law allowed “such request or instance” really debar himself from attacking the removal? In a general formulation: When a plea expresses an erroneous legal conclusion (if the one expressed here can be regarded as erroneous), does one confess that the conclusion is true by demurring, as one admits a “fact”? The question is tricky. It would probably not be hopeless to argue that the removal remained attackable as to legality despite the demurrer, whether or not the argument would be successful.

What then was the lawyer’s game? I should suppose he thought he had a winning case, or at least a very promising one, on the matter of the pardon. He may simply have considered it unnecessary to complicate things with a deep pleading question, may have doubted his capacity to develop the necessary arguments, may have sincerely preferred to spare the court. On the other hand, I suspect him of craftiness. He may have hoped to lure the other side into concentrating entirely on the pardon, figuring he was likely to win on that, and if he didn’t, to hold the removal and the effect of the demurrer in reserve. After all, waiving an argument is not the same as demurring. The court would probably be willing to listen if later on the Arundells—perhaps more gracefully through another lawyer—went back to objections to the removal and claimed the demurrer was not concessionary in the crucial respect. Prohibition proceedings were ostensibly in the public interest—a reason both for hearing a waived argument and for at least trying to give the demurrer minimum effect. The meaning of an important statute is also of interest to the public. Even if they were unable to prevent it in the end, the judges could not be entirely happy with statutory interpretation imposed by demurrer, so to speak. Of course a case in which that happened would not be a precedent for cases in which the statute’s meaning was directly at issue, but precedents erode; just why a decision some years ago was made gets forgotten (as we have not infrequently seen happen in Prohibition law.)

My main reason for suspecting art on the side of the Arundells’ counsel is that the opposing lawyer acted as if he knew he was being lured away from the hardest issues—the most important ones from a public point of view—and invited to stake his case on the pardon. He refused to be lured. Declaring that he wanted to speak about the statute, he showed why, in his opinion, the demurrer did indeed confess the legality of the removal. I think he also argued by implication that it was in fact legal, whether the demurrer confessed it or not, though this is less evident.

The opposing counsel was William Noy. His approach admits of two explanations, which are not mutually exclusive. He may have seen, as I suggest, that the other side was trying to maneuver him into saying nothing for the moment about the removal and the demurrer, intending to come back to those issues only in a pinch. He preferred not to be maneuvered and thought it good tactics to impress the court right now with what he
considered strong arguments for the view of the ostensibly waived issues that served his side. Noy may also have had motives of politics or conviction to use the opportunity the case gave him—use it to prove that the interpretation of 23 Hen. VIII favored by the ecclesiastical establishment was correct with respect to at least one section of the act. The section is vital, for if causes could be removed virtually at will, or upon the mere petition of a party who preferred to sue a man outside his home diocese, the establishment would have little more to win. The rule would be that suing in an archdiocesan court—the significant example—requires only the permission of the diocesan in the individual case. This limits what the archdiocesan interest would have liked ideally, but not very much in practice. Permission would probably not be hard to get, especially if the archdiocesan authorities made their desire to take the suit known or “requested permission.” Good advice to a litigant who chose an archdiocesan tribunal would be “Go ahead, but be sure to remind the judge to ask for a letter of permission from the Bishop.” Again, it is important to remember that the archdiocese was the appellate court and that ecclesiastical appeals were wide-open—i.e., all determinations below, including fact-finding, were reviewable. If an appellate court says to the court of first instance, “We want to decide this case ourselves now and obviate the need to decide it later on appeal”, it takes an inferior judge stubbornly insistent on his rights and eager for work to say “No”. Operated in good faith, such a system is not nonsense. Appellate courts could be expected to claim only hard and high-stakes cases likely to be appealed however decided, or less likely than “small potatoes” to be expertly handled at the local level. Good faith may be an idealistic hope for the early 17th century, and even if it obtained the subject would be victimized, contrary to the manifest intent of 23 Hen. VIII. In a sense, Noy may have aspired to do competently what several eminent civilians arguing in Prohibition cases had botched. The judges did not try to prevent him from having his say.

The report of Noy’s argument is not all easy to follow. It would be my guess that the reporter did not catch every articulation in a rather intricate speech. I am reasonably confident of the following reconstruction, however:

For the concessionary effect of the demurrer, Noy cited a Year Book case holding that demurrer to a claim that a living was void by ecclesiastical law confessed that it was void—i.e., bound the court so to take it. The generalization is that pleaded statements about ecclesiastical law must be taken as true if the other party demurs. Note that this is a narrower rule than that “legal conclusions” can be confessed in pleading. The problem in Noy’s argument is whether the narrow rule is sufficient to the needs of the present case. It is of course literally true that defendants-in-Prohibition here made a statement “about ecclesiastical law.” But does the statement not carry an implicit conclusion about the statute? Applying the language of Chief Justice Hobart in Jones v. Jones, is it not implied that the removal section has no “restrictive” effect? I.e., if removal for no reason or virtually any was permissible by ecclesiastical law when the statute was made—and so remained as a pure matter of ecclesiastical law, in abstraction from the statute—the statute altered nothing. Indeed, it endorsed removal to the degree ecclesiastical law permitted. Hobart showed why this reading is implausible, though he was unable to show what limits the statute put on the removal power, if in fact it was previously so broad as to defeat the purpose of the act. I think the following point in Noy’s argument is his answer to this objection.
After Noy’s argument, the judges held per curiam for defendant-in-Prohibition, saying only that the plea was good despite the objections to it. The reporter notes in effect that the decision in this form leaves us in suspense as to what was decided. All that can be said is that a Prohibition on 23 Hen. VIII failed when it almost certainly should not have succeeded. When we cut through the elaborate arguments on a fully pleaded case, we get a removal request from a peculiar to a Bishop, so that the parties were not forced to go outside their home diocese. We get a removal upwards of a criminal prosecution of persons too refractory for the peculiar judge to handle—probably a good enough reason if reasons should be shown. The joint declaration is probably a nearly clinching ground for Prohibition. The denial of Prohibition is not a setback for the policy of the statute, and there was no judicial endorsement of Noy’s strong arguments on the pleading level.

Gobbet’s Case,63 the last on 23 Hen. VIII before the Civil War, turned in part, and in the upshot decisively, on the statute’s removal-by-request provision. The ecclesiastical suit was for defamation, viz. the words “He is a cuckoldy knave.” Counsel seeking Prohibition, Bulstrode, started out arguing that the words simply did not constitute ecclesiastical defamation. In support of this, he relied on the precedent of a Prohibition granted for the words “He is a knave and a cheating knave.” In the instant case, the King’s Bench denied Prohibition on this alleged ground because the precedent and this case were different. The judges were clearly right in making a distinction. To find ecclesiastical defamation in the precedent-case is close to impossible. If the words were defamatory at all, they would be actionable at common law by virtue of the aspersion “cheating.” The only basis for claiming ecclesiastical defamation would have been the theory that vague scurrilities could be prosecuted in ecclesiastical courts, as uncharitable or unneighborly, precisely when and because the common law would not touch them. Most authority, however, held that ecclesiastical defamation required imputation of an ecclesiastical offense. The court in Gobbet took a decidedly liberal, perhaps questionable, view of this requirement of a specific “ecclesiastical interest.” After all, the ecclesiastical plaintiff was not said to have committed an ecclesiastical (sexual) offense, but to have been the victim of his wife’s unchastity. Nevertheless, in denying Prohibition the court said “it is a disgrace to the husband as well as to the wife, because he suffers and connives at it.” This language implies that to be defamed the husband himself must be charged with some kind of wrongdoing within ecclesiastical cognizance—i.e., he should not be taken as simply suing on behalf of his wife. Was the word “cuckoldy” construed as meaning that the husband was cuckolded repeatedly, whence his connivance, or at least unwillingness to discipline his wife—conduct with the flavor of pimping, which in a few cases was treated as an ecclesiastical offense—should be inferred? Or did the judges think the words no more than prima facie defamatory as an imputation of something like pimping, conviction depending on actual proof of the husband’s complicity in his cuckoldry? In any event, the court, except for Chief Justice Richardon, who was absent, denied Prohibition.

Having lost on his first argument, Bulstrode moved for Prohibition on the ground that his client was being sued in the Arches, contrary to 23 Hen. VIII, because it appeared

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by the libel that he spoke the words in London diocese (i.e., not within the peculiar of the Arches.) Note Bulstrode’s assumption that the jurisdictionally decisive fact was where the words were spoken, not where the speaker lived, about which nothing is said. Note also that the appearance of the allegedly decisive fact on the face of the libel is emphasized (but it seems doubtful that a bare, controvertible surmise of that fact would be an inadequate basis for Prohibition. Quaere.) The report introduces Bulstrode’s second motion by a mere “secondly”. It is not clear whether both claims—no actionable ecclesiastical defamation and violation of 23 Hen. VIII—were in the original surmise, or whether the surmise was amended after failing on the first claim. Since, however, Richardson’s absence is not mentioned when the court’s unanimous decision on the second claim is reported, it seems likely that the discussion of that claim was at any rate on a later occasion.

The case for Prohibition now resting solely on 23 Hen. VIII, Justice Jones spoke to say that he was informed by Dr. Duck, the Chancellor of London diocese, that the Archbishop of Canterbury had the Bishop of London’s standing permission to proceed in any London suit begun in an archdiocesan court. (The report’s formulation would seem to preclude removal of a suit already begun in a diocesan court to an archdiocesan one, even if the diocesan judge requested or consented to the removal.) Instead of a more formal mode of consulting civilians, Jones was apparently delegated by the court to confer with Duck, or else he did so on his own initiative. Having reported that Duck told him of a long-existing “composition” between the Bishop and the Archbishop, Jones concluded that the Archbishop enjoyed “quasi a general license.” Satisfied of this fact, he seems to have thought that 23 Henry VIII posed no problem—as far as the statute is concerned, a general permission based on an agreement is as good as ad hoc permission or request to take a particular suit. (The legality of such an arrangement by ecclesiastical law appears to be taken for granted. Duck may of course have assured Jones on this score as well as on the factual score of the “composition” and practice. Whether he did or not, the report gives no indication of concern over the possibly relevant distinction between “What have the ecclesiastical authorities been doing?” and “Is the practice clearly lawful by ecclesiastical standards?”) Jones adds one supporting consideration, whether speaking for himself or passing on an argument made by Duck: “for this reason”, the Archbishop never makes visitation of London diocese. How this cuts is not self-evident. I suppose it goes to show the two-sidedness and therefore genuineness of the “composition”: The Bishop gave up as much of his diocesan jurisdiction as the Archbishop chose to assume; in return, the Archbishop gave up his inherent power to hold visitations of the diocese. I take it that the power of visitation would consist primarily in power to proceed on presentment against offenders normally subject to episcopal jurisdiction. Thus, in exchange for giving up one mode of invading diocesan territory, the Archbishop gained another. Quaere tamen.

The other judges agreed with Jones. At least no discussion after his speech is reported, and Prohibition was denied.

End Note: 23 Hen. VIII and the High Commission

A word needs to be said on the intersection of the law on 23 Hen. VIII and that on the Court of High Commission. That court and its statutory foundation, 1 Eliz. c. 1 (the
Elizabethan Supremacy Act), are treated in detail in Ch. 3 of this Volume. The point to be emphasized while our focus is still on 23 Hen. VIII is twofold: (1) Almost obviously, 23 Hen. VIII did not and could not apply directly to the High Commission. (2) On the other hand, the existence of 23 Hen. VIII had significant influence on the interpretation of 1 Eliz., a highly problematic subject.

The High Commission was an extraordinary ecclesiastical court of first instance. As will appear in Ch. 3, there was extensive judicial debate over whether the Commission could proceed in any recognized ecclesiastical cause if it saw fit, or only in a defined part of the whole territory of ecclesiastical jurisdiction. Granting the latter position, there were many problems as to how the restricted portion appropriate to the High Commission should be defined. If, however, the Commission was to operate at all as a first-instance court with a national, or at least archdiocesan, scope, it could not be banned from summoning people out of their home dioceses. The simplest route to saying that 23 Hen. VIII can never be the basis for objecting to a High Commission prosecution is to say that when 23 Hen. VIII was made the High Commission did not exist. Surely, this argument runs, that statute operates to prevent abuses that could have occurred when it was passed—primarily encroachment by archdiocesan courts on diocesan ones, plus invasion of one Bishop’s jurisdiction by another or encroachment—archepiscopal or episcopal—on smaller entities, peculiaris and perhaps archdeaconries. The Henrician statute simply had nothing to do with a new ecclesiastical court created nearly thirty years later.

I have found one brief report that appears to embrace straightforwardly this way of ruling out all relevance of 23 Hen. VIII for High Commission cases: Ballinger v. Salter (P. 13 Jac. K.B. 1 Rolle, 174, and the nearly identical Harg. 45, f. 29.) No context is reported, only a per curiam holding that 23 Hen. VIII does not extend to the High Commission because that tribunal was erected by 1 Eliz.; as it was put, the intent of 23 Hen. VIII was not to provide for a court that “simply did not exist” (“ne fuit donque in esse”—MS.)

Hawes, above in this chapter (Note 8), is discussed in the text for a general holding plausibly attributable to it: 23 Hen. VIII does not permit removal of suits from the defendant’s home diocese by request of the original court after that court has taken steps to decide the case. (So in the abstract; specifically, the original court may not convict a man of an offense and then request another ecclesiastical court to take over his punishment.) The court requested to handle Hawes’s punishment, however, was the High Commission. The Commission obliged by imprisoning him. Whether it had any power to imprison—not generally, of course, a power of ecclesiastical courts—, and if so, the extent of such authority, were highly controverted questions (see Ch. 3, passim.) But de facto the High Commission imprisoned, and consequently its right to do so—whether in general or in the particular case—was often challenged by habeas corpus, rather than Prohibition. Hawes, being imprisoned, brought a habeas corpus. That writ demands that the jailer justify holding the prisoner. In Hawes, the return on the habeas corpus (jailer’s justificatory statement) told the story spelled out in the text (remission to the High Commission for punishment at the original judge’s request after the party’s conviction.) The question before the Common Pleas was the adequacy of the justification; it was held inadequate per curiam.

Although the report does not tell much about the judges’ thinking, it seems to me clear that the imprisonment was considered unjustified because 23 Hen. VIII did not
permit the original judge to request removal from the diocese for punishment, or for re-trial and punishment, after conviction. Coke stated that rule in generalized form without opposition. The decision in *Habeas corpus* does not, however, support the rule as sharply as a Prohibition stopping the High Commission from accepting the case would have done. Returns on *Habeas corpus* were sometimes held inadequate for not saying enough to permit the common law court to judge the legality of the imprisonment. Of course they were held inadequate if the common law court thought either that the High Commission lacked jurisdiction over the sort of case in question or that its imprisoning power, if it had any, did not extend to such a case. A bare *per curiam* statement that the return in *Hawes* was insufficient could be based on such formal or substantive grounds without necessarily implying the rule that removals by request must be confined to suits which have not yet been “commenced” in the original court. Faced with the holding alone, one could plausibly imagine that the return failed to spell out the reasons for removal in enough detail. (Is mere non-performance of a sentence sufficient reason without some further explanation of why the regular process of excommunication backed by *De excommunicato capiendo* could not be used effectively to reduce the party to conformity?) On the substantive side, it would have been more than plausible—probably correct—in 7 Jac. to say that the High Commission lacked jurisdiction in adultery. Presumably—though this is a separate and significant question—a court with neither first-instance nor appellate jurisdiction over a given offense cannot take over a case involving that offense by request of the original judge. In short, the *per curiam* holding in *Hawes*—reduced to an unexplained “this return is insufficient”—is not strong as a strict precedent, even though it is indicative of judicial thinking on the interpretation of 23 Hen. VIII.

We do, however, have a bit of information beyond the bare holding. The report says that the court also held “that this is not against the clause of the statute [of] 23 H[en.] 8 c. 9, that a superior ordinary by request and consent of the inferior may determine matters out of the proper diocese.” Justice Walmesley then adds “that is another case.” I can only take this further language as saying that the holding is not inconsistent with or subversive of the statute’s conferral of power to remove by request. It does not, obviously enough, deny that the statute affirms such a power in general; nor does it imply that removal to the High Commission is ruled out; nor imply so much as that Prohibition should be granted on a surmise identical with the return on Hawes’s *Habeas corpus* (remember that a Prohibition would be challengeable by Attachment and subject to validation or invalidation on formal pleading.) From Coke’s point of view, such guardedness may tend to understate what *Hawes* could at least arguably be taken to mean. Walmesley at any rate (who was less inclined then Coke to restrict the High Commission’s ecclesiastical jurisdiction and more inclined to restrict its use of secular sanctions—see Ch. 3) wanted to be sure that the court’s hands were free to engage anew with practically any questions on the removal provision of 23 Hen. VIII that might arise in the future. *Quaere*, however, for I do not think the report’s language beyond the bare holding that Hawes’s detention was not sufficiently justified is easy to interpret.

*Pit v. Webly* is discussed in the text (Note 34) for the significant evidence it provides on the King’s Bench view of whether Prohibitions based on 23 Hen. VIII should be granted at all. The suit in which Prohibition was sought in that case was in the High Commission. The Prohibition was in the event, however, not sought on 23 Hen. VIII.
Plaintiff-in-Prohibition started out on that basis, but with the court’s encouragement dropped his claim resting thereon. Instead, he claimed that he had simply committed no offense pursuable in an ecclesiastical court, the High Commission or any other. The complaint against him was an interesting and unusual one—that a public official had committed an ecclesiastical offense by making an arrest in violation of medieval statutes. Plaintiff-in-Prohibition having abandoned his surmise based on 23 Hen. VIII, there was of course no occasion to discuss whether the statute applied to the High Commission. (In the upshot, the Common Pleas was inclined to prohibit, but put off decision pending further consideration. The parties settled, however, before any decision was made. The case is noted again in Ch. 3.)

23 Hen. VIII was frequently mentioned in cases on the jurisdiction of the High Commission (Ch. 3). These references are noted in Ch. 3 when they occur. I shall not discuss them here in so far as they relate to the Commission’s basic or original jurisdiction for the reason stated at the beginning of this Note: Obviously 23 Hen. VIII could not, properly speaking, “apply” to the High Commission without undermining that tribunal and the special purpose it was meant to serve by the statute constituting it, 1 Eliz., c. 1. Therefore when 23 Hen. VIII was invoked by way of claiming that a suit originally brought before the Commission should not have been, 23 Hen. VIII was necessarily being used in an indirect argumentative way, as opposed to taken as actually mandating that the Commission may not touch that sort of suit. The argument from 23 Hen VIII with respect to original High Commission jurisdiction is intelligible and sound. It comes to saying that the policy of 23 Hen. VIII should be taken into account in construing 1 Eliz. The later statute should not be read as undermining the policy of the earlier one more than could be helped, or more than allowing the Commission reasonable scope to accomplish its purposes required. This was all the more true, it was argued, because 1 Eliz., among its many provisions (the section of the act that authorized the High Commission is only a small part of the whole), re-enacted 23 Hen. VIII. The upshot of the argument for the powerful collateral relevance of 23 Hen. VIII is that the High Commission’s jurisdiction was meant to be relatively limited. By this argument, it was not coterminous with ecclesiastical jurisdiction, though one vein of judicial opinion held it to be. Granting some limitation, my “relatively narrow” covers an extensive range of debate about how narrow, a question on which numerous considerations were brought to bear other than upholding the policy of 23 Hen. VIII.

We shall see in Ch. 3 that lawyers relying on 23 Hen. VIII in High Commission cases could sometimes sound as if they thought the act mandated restricting the Commission’s scope with the normal force of statutes. On the delicate score of historic distance, I am not sure that the distinction between an “argument from powerful collateral relevance” and a true “statutory mandate” was quite available to 17th century lawyers. There is indeed one way of taking 1 Eliz. that obviates the need for the distinction: viz. holding that 1 Eliz. positively confers on the Commission jurisdiction over a couple of specified ecclesiastical crimes—probably only heresy and schism—and positively denies it anything else by re-enacting 23 Hen. VIII. Although this position was taken seriously, it demands narrower limits on the Commission than could plausibly, or at least actually, be sustained. The Commission certainly was limited by the common law courts, in part owing to a perceived need to save 23 Hen. VIII from subversion, but it was not kept within the most extreme possible limits, nor probably—cf. Ch. 3—within less narrow
ones reducible to a clear and largely agreed-on general rule. I therefore think the analytic
distinction between “applying” 23 Hen. VIII to the High Commission and trying to
construe 1 Eliz. in a manner reasonably compatible with the policy of 23 Hen. VIII is
ineluctable, whether or not it was recognized by contemporaries in something like my
terms.

There remains one topic to be addressed here: how the process for removal of
suits by request or permission of the diocesan court relates to the High Commission.
Abstractly, two questions about removal arise:

(a) May the original judge ever request or permit removal to the High
Commission, as opposed to another regular ecclesiastical court? Saying “No” makes
sense via the argument that 23 Hen. VIII can hardly be taken as either limiting or
empowering a court that did not yet exist. As bringing a suit originally in the High
Commission could not be objected to as a violation of 23 Hen. VIII, so removing a suit to
the Commission with the diocesan judge’s consent cannot be considered authorized by 23
Hen. VIII. This argument is complicated by the re-enactment of 23 Hen. VIII by 1 Eliz.
itself, but not fatally. It remains arguable that a statute revived without revision still
means what it meant when it was made, and there is no reason to say 23 Hen. VIII meant
that diocesan suits could be moved with consent, not only to then-existing tribunals, but
to any new ones that might be created in the future.

On the other hand, the mere non-reference of 23 Hen. VIII to the High
Commission or any other later-created ecclesiastical court can be used to reach the
opposite conclusion: If suits commenced in a new court cannot violate a statute
antedating that court, why should such a court’s entertainment of a suit removed to it
violate the statute? Removing suits begun elsewhere to the High Commission might be
ruled out—either flatly or unless duly requested by the original court—by construction of
1 Eliz., but not by the merely irrelevant 23 Hen. VIII.

(b) If we grant that there is no in-principle objection to removing suits to the High
Commission, must they, to be so removable, at least fall within substantive High
Commission jurisdiction—i.e., must they be suits which, if brought originally before the
Commission, would be unobjectionable? If, among the various possibilities, 23 Hen. VIII
were taken to have an implied reference to courts created after its enactment so as to
authorize removal to them (subject to the statutory requirement of request in due form),
would any ecclesiastical suit be removable, or only those that could have been pursued
originally in the High Commission? Would a heresy prosecution be clearly removable,
but not a commonplace suit for tithes (a standard example of business inappropriate for
the Commission)?

On these questions, I have found little in the reports. Hawes implies faintly that
removal to the High Commission is per se lawful, but that was not, so far as the report
indicates, held expressly, nor need it have been to justify the decision in that Habeas
corpus case. The most that can be said is that if the judges all thought removal to the
High Commission flatly unlawful they would have had an easy route to liberating the
prisoner. It was not difficult, however, to liberate him unanimously on other grounds, not
all of which were necessarily shared by all the judges. The case furnished a good
opportunity not to have a debate on the tricky and possibly divisive issue whether
removal to the High Commission was lawful at all.
That the issue was divisive in the Caroline Common Pleas appears from the one piece of significant evidence I know of, the case of Coventry and Stamford. The case is discussed at length in Ch. 3. Here I shall summarize it separately only as it bears on the removal power and 23 Hen. VIII. This aspect comes out only in Littleton’s report (M. 4 Car. C.P. Littleton, 194. See Ch. 3 for the full reportorial picture.)

In the course of discussion of whether the suit in question belonged in the High Commission—a discussion one would suppose concerned a suit originally brought there—Justice Hutton observed that it was actually before the Commission by way of removal: The alleged offense (essentially laying violent hands on a clergyman in the course of arresting him unlawfully) was first presented to an Ordinary conducting a visitation. The Ordinary then “certified” this presentment to the High Commission and “prayed in aid.” At this point, Hutton’s only comment on the fact he brought to the court’s attention is that the procedure (referring a presented offense to the High Commission) “may be” and “is usual.” “May be” would seem to mean “is lawful”, though it is perhaps less strong than saying so outright. The thought might be closer to “…is commonly done and so far as I know has not been questioned legally.”

Chief Justice Richardson speaks next, probably with the intent of saying that in his opinion too there is no objection to removal. All he actually says is that the High Commission may “donque” proceed by ecclesiastical censure. I think the force of the “donque” is probably: “Since the suit is properly before the Commission by removal, that court may clearly proceed with the case, but it must confine itself to using regular ecclesiastical sanctions (as punishment if it convicts and for any interlocutory purpose)—i.e., it may not use the secular sanctions which would be available to it in circumstances that do not obtain in this case.” Earlier in the discussion, before the judges were reminded of the removal, Richardson had expressed the same view—i.e., the Commission’s jurisdiction is clear enough, but only ecclesiastical sanctions may be employed.

Justice Yelverton then intervened with a somewhat cryptically stated opinion, but I think the purport is clear: Contrary to Richardson, Prohibition (which was being sought in the case) should not be delayed until the Commission had actually employed secular sanctions. Rather, it should be presumed that the Commission would proceed by fine and imprisonment. There is no point in withholding Prohibition on the off-chance that the Commission will confine itself to spiritual sanctions in a case such that Prohibition would certainly lie if it used secular sanctions. For the merits of this position, see Ch. 3. It has no firm implication for removability as such, but would be compatible with a rule that suits in which secular sanctions are usable may reach the Commission by removal. (It would not be senseless to hold that other courts in the ecclesiastical system may send suits to the High Commission in order take advantage of the temporal procedures uniquely available to it. By contrast, forwarding a suit in which the Commission must use only spiritual sanctions, while not necessarily purposeless in all circumstances, could arguably not have advantages sufficient to compensate for the costs of depriving the losing party of appeals—for there was no regular ecclesiastical appeal from the Commission—and forcing the defendant out of his home diocese. Yelverton’s approach, projected to such a rule, would, however, leave dangling the awkward question whether a suit originally brought in the Commission and not amenable to secular sanctions should be prohibited at once on presumption, or only after secular sanctions are imposed.) In reply to Yelverton, Richardson repeated his opinion, this time straightforwardly: The
Commission should be prohibited if it proceeded otherwise than by ecclesiastical censure, but not before it had actually done so.

The report of Coventry ends, not with a decision to grant or deny Prohibition, but with the court deadlocked on the issue. There is no evidence of the case’s being taken up again. That is unsurprising, because plaintiff-in-Prohibition’s obvious move would have been to drop his effort to get a writ until the High Commission exceeded spiritual sanctions, in which event he could certainly have a Prohibition, and the Commission’s obvious move would have been not to exceed those sanctions, if indeed it chose to carry on with the case at all. The split in the court was Yelverton and Harvey (the latter of whom is not heard from individually) in favor of immediate Prohibition versus Richardson, who of course opposed Prohibition until a sentence was given and secular sanctions were used, and Hutton, who at the end said he was in doubt. Leading up to this outcome, the judges had a final round of discussion on the removability question.

In this last discussion, Richardson assertsOrdinaries’ unlimited power to remit suits to the High Commission if they choose to. (This of course carries no implication that the Commission is free to handle any removed case as it likes, which the Chief Justice clearly did not believe.) Yelverton replies flatly that Ordinaries may not remit to the Commission at will, because doing so is against 23 Hen. VIII. (This is most straightforwardly read as saying that any removal to the Commission is ipso facto unlawful, but it is not absolutely incompatible with the possibility suggested above that removal of a suit amenable to secular sanctions might be countenanced.) Richardson then tries a further argument for removal power, the intent of which I can do little more than guess at. He brings up language in 23 Hen. VIII that gives some indication of circumstances in which removal would be appropriate. The statute does not, as a good deal of litigation in this chapter shows, give exhaustive rules as to what those circumstances are, but it does express say that the Ordinary may remit when some of the parties are fugitives who cannot all be found in a single diocese. The evident meaning is that such suits may be remitted to the regular archdiocesan courts; there is no textual reason to include the as yet non-existent High Commission. One might, however, conjecture that Richardson brought up the fugitives case because there could be special reasons for remitting to the High Commission rather than the regular archiepiscopal authorities in that case. Some of the prospective defendants might have fled beyond the bounds of a single archdiocese. It was sometimes argued (see Ch. 3) that aggravations could render a case prosecutable in the Commission even though it did not involve an offense intrinsically pursuable there; plural offenders who scatter in order not to be triable together in one diocese can plausibly be seen as aggravated offenders. In short, if the High Commission’s non-existence in 23 Hen. VIII is not assumed to stand fatally in the way of removal of suits to the Commission—or perhaps if its re-enactment by 1 Eliz. is considered to overcome that problem—there is an argument from convenience for including the Commission in the provision for removal.

Justice Hutton speaks next, now apparently taking the position that 23 Hen. VIII simply does not permit removal to the High Commission, but only to the original judge’s immediate superior. This is at variance with his earlier suggestion that at least criminal presentments at visitations could lawfully be removed to the Commission, but of course he might have changed his mind after hearing argument and thinking more intently about the problem. It tends, however, to make a mystery of his ultimate doubt. Why was Hutton
now not at one with Yelverton and Harvey, yielding a 3-1 majority for Prohibition? When he expresses his remaining doubt, he explains it by saying that the Commission is proceeding for *reformatio morum*, by which he must certainly mean “criminally” and may mean he was satisfied that the proceedings were actually aimed at spiritual sanctions only. He could possibly have wondered—and he professes no more than uncertainty—whether, even though 23 Hen. VIII does not confer power to remove to the Commission, usage and utility were sufficient to justify it in the case of a criminal presentment so long as there is no reason to suppose secular sanctions will be used. This position is close to the spirit of his first remark on removal, and it might primarily express objection to Yelverton’s surely dubious belief that the Commission’s intent to resort to secular sanctions should be merely presumed. *Quaere tamen.*

After Hutton, Richardson makes an obscurely reported observation, which seems only to say that the present case is an important one on the High Commission. I suppose he is essentially saying to his brethren, apparently united against him, “Be careful of the practical consequences of ruling out removal of any form of ecclesiastical criminal proceeding to the Commission for handling by purely ecclesiastical methods. Is that really in the interest of efficient law enforcement?” Hutton may have been touched by the warning. Then Yelverton intervenes once more, this time to invoke the re-enactment of 23 Hen. VIII by 1 Eliz. on the side of his approach: The re-enactment shows that Parliament was rigorously protective of Ordinaries’ jurisdiction. Why should there be any exceptions? Then the inconclusive final result is reported. I have no evidence that the removal issue was taken up again in the brief remainder of the High Commission’s career (before the Long Parliament’s abolition of the court.) Although the outcome was inconclusive, the weight of opinion in Coventry does not augur well for attempts to remove suits to the Commission.
CHAPTER 3—THE JURISDICTION AND POWERS OF THE COURT OF HIGH COMMISSION

Section 1: General Introduction

Questions about the jurisdiction and powers of the Court of High Commission were essentially questions about who should construe statutes and then about the meaning of a particular statute: the Elizabethan Supremacy Act, 1 Eliz., c. 1. To all practical intents, the statute created the High Commission. More precisely, having “reunited” ecclesiastical jurisdiction to the Crown, the act authorized the monarch to delegate his ecclesiastical jurisdiction to commissioners. That means the monarch was authorized to establish an ecclesiastical court of first instance over and above the regular structure. (The regular structure comprised at the first-instance level diocesan courts, peculiars, Archdeacons’ jurisdictions, and archdiocesan courts to the limited degree that they had “prerogative” to take first-instance cases; over these, appellate jurisdiction was exercised by the archdioceses and ultimately by the statutory court of Delegates.) The monarch was not obliged to set up such an additional tribunal. The High Commission existed because he or she routinely exercised the statutory authority. This was done by successive patents or commissions, not by a once-and-for-all constitutive act. There was never any question but that the additional tribunal could be made a “high” or supreme court in the sense of a court from which there is no ordinary appeal—i.e., no appellate recourse except a petition for review addressed to the monarch. It was always constituted as a “high” court in that sense, though there is no apparent reason why it had to be—i.e., why its decisions could not have been made appealable to the Delegates or to a specially created standing review agency. The monarch would presumably have needed only so to specify in the patent.

The serious practical question about the High Commission was whether 1 Eliz. imposed any limits on the monarch’s authority to constitute such an ecclesiastical court. I shall explain just below what was specifically involved in that problem. Let us first clear the ground of two other matters.

(1) We have by now in this study seen enough practice involving statutes to establish the following propositions as law, though they can be controverted by plausible theoretical arguments and were sometimes challenged: Ultimate authority to construe statutes belongs to the common law judges. Statutes are addressed to non-common law courts and should be obeyed by them voluntarily, but these courts are not finally trusted to interpret them. In this way, they are not the peers of common law courts, which do have authority to interpret statutes directing what common law courts shall or shall not do. In a few situations, a distinction is necessary between “ultimate” and “immediate” power to insist on non-common law obedience to statutes as construed by common law courts. I.e., occasionally Prohibition would be withheld until it was shown that a non-common law court had been urged to take note of a statute in a particular construction and had erroneously refused to. By and large, however, the power was “immediate”: Plaintiff-in-Prohibition had only to surmise that a non-common law court had assumed jurisdiction or was asked to, or had acted within its jurisdiction, contrary to statute; Prohibition would be granted if the common law judges agreed with the interpretation implied in the surmise.
These principles are as applicable to the High Commission and 1 Eliz. as in other contexts. I.e., if we assume that 1 Eliz. limits the powers of the High Commission, then the common law courts, having decided that such-and-such are the limits, may prohibit the High Commission from exceeding them. The High Commission is no more privileged than any other non-common law court to determine for itself whether the statute limits it and, if so, how. This is at any rate true unless there is something special about the High Commission differentiating it from all other non-common law courts. I do not think such a difference was ever contended for. Rather, the general principle that the common law judges have a monopoly to construe statutes was most frequently challenged by or on behalf of the High Commission. That is no doubt because the Commission was a high-level agency with strong backing from the government. Its functions were regarded as important, so that its independence of outside judicial scrutiny seemed especially worth fighting for. Challenges to the common law monopoly were totally unsuccessful, however. I shall note them when they occur in the argument of cases about the High Commission, but it is just as well to anticipate what I think is clear from the cases: The idea that the Commission ought to construe 1 Eliz. for itself was not taken seriously by the only people who counted—the common law judges. They occasionally bothered to overrule that theory when it was occasionally advanced, but there is no sign that it gave them any real intellectual trouble. Whether the High Commission was limited by 1 Eliz. and, if so, what the limits were—these questions caused plenty of trouble and produced variances from judge to judge and court to court. They presume the judges’ title to answer them authoritatively.

(2) I say above that “essentially” and “to all intents” the powers of the High Commission were a question of the meaning of 1 Eliz. The qualifying phrases are required by one consideration: If 1 Eliz., having restored the Crown’s ecclesiastical jurisdiction, had not expressly authorized the monarch to delegate it to commissioners, could he do so anyway? “Yes” is a more than defensible answer. Caudrey’s Case, discussed in detail in Section 2 below, is the best-known occasion on which a common law court said “Yes” judicially (if it actually did so in Caudrey, for which vide infra.) I do not think the answer to the question matters very much, however. If the High Commission clause of 1 Eliz. did not exist, and if we assume that the monarch “at common law” could establish a body equivalent to the High Commission, then it is hard to see how there could be limits on the monarch’s commissioning power within the bounds of ecclesiastical law. If he set up such a body and instructed it to hold plea of murder, he would obviously violate what can only be called constitutional law. By any standard that belongs in the real world, the monarch manifestly could not without Parliament turn a temporal crime, wrong, or claim into a spiritual one, thereby depriving the subject of trial by jury and every other facet of due process of law. On the other hand, I can see no argument from inherent limits on the monarch’s ecclesiastical supremacy that would constrict his power to give a “prerogative High Commission” any or all parts of ecclesiastical jurisdiction. If he set up such a tribunal and authorized it to deal with heresy, fornication, and tithe cases, there would be no basis for doubting it was duly authorized.

Now, this deduction may be sound, but it is based on an assumption contrary to fact. The High Commission clause of 1 Eliz. did exist; the monarch was expressly authorized to establish an extraordinary ecclesiastical tribunal if he saw fit. Let us
assume provisionally that the relevant clause in the statute puts, or purports to put, limits on the monarch’s power to constitute a High Commission. Is there any doubt but that the statutory limits should be enforced, whatever view one takes of the monarch’s power to set up such a body “at common law”? If the monarch had no such power without the statute, then obviously he has only such authority as the statute gives him. If without the statute he could have established a Commission and given it any and all parts of ecclesiastical jurisdiction, then in so far as the statute limits his power—directly or by implication of authorizing him to do less—then the statute cuts back his prior prerogative. One can move onto high royalist ground and maintain that the prerogative in all branches is beyond being restricted by statute (not just the most “absolute” part of the prerogative, which is almost logically illimitable because it amounts to a reserve of emergency powers.) But in my phrase above, that position does not belong in the real world. I do not think it had the least influence on judicial discussion of the Commission’s powers.

When, however, it comes to construction of 1 Eliz.–granting that it could limit powers the monarch may have had before—, attitudes toward the prior powers might make a difference. If I believe that the monarch had no authority to establish a Commission apart from the statute, my only course is to figure out what powers the statute seems by its words, or was probably intended, to confer on him. But suppose I believe that without the statute the monarch could have set up a Commission and given it as much of ecclesiastical jurisdiction as he chose. I may be inclined—ceteris paribus, the language of the act permitting and any intentions of Parliament I feel historically certain about—to hold that the act was not meant to cut back the monarch’s pre-existing powers. I may say that the act “declares the common law”, as indeed it does in general. I.e., in the minds of the makers and their descendants in 16th-17th century England, Queen Elizabeth was not made Supreme Governor of the Church by the Supremacy Act, not merely restored to her father’s statutory position, but repossessed of an immemorial and inseparable adjunct of the Crown, her rightful position “at common law.” It does not automatically follow that every feature of the Supremacy Act, notably the High Commission clause, is also declaratory. There is nevertheless a natural and legitimate presumption that no part of a generally declaratory statute makes wholly new law, save when the contrary is manifest (e.g., when a specific punishment is created and there is no evidence that the “common law” offense declared in the act was previously punishable in just that way) or there is clear textual or historical reason to suppose the contrary. (That the Head of the Church before 1558 lacked power to constitute a High Commission is virtually indemonstrable, for the simple and comic reason that the “common law” Supreme Headship was not, speaking realistically, exercised during the long night of Popery. If one was looking for positive evidence that the power existed, the “pretended” and practiced authority of the Pope to delegate jurisdiction could be invoked, though in English discourse one had to be careful about assuming that what the Pope did was legitimate. It was nevertheless a good argument that specific powers claimed and used by the Pope, rather than intrinsically inappropriate to the Head of the Church, were usurped from the true Head, the English monarch.) Or, instead of emphasizing the declaratory character of the statute, I may simply argue that it is unlikely that Parliament, with Queen Elizabeth’s assent, would have meant to curtail the existing ecclesiastical prerogative, or that statutes should always be construed to save the common law, or the royal prerogative, when at all possible.
This sort of disposition probably affected some judges. The monarch’s power before the statute sometimes comes up in the cases. I suspect that asserting that the monarch had such prior or independent power was usually a step on the way to construing the statute in favor of the Commission. Yet those who adopted a less favorable construction would probably not have denied that the power existed. They would simply have said that there were good reasons to think that the statute curtailed it, that the High Commission clause in 1 Eliz. was not declaratory though most of the statute was, and that other principles of construction suggesting that the power remained unaltered must give way to the makers’ clear contrary intention. Or, even more modestly, they might have said that there were in effect two powers to create a High Commission, one conferred by statute, one “at common law” and unaltered by statute. The latter could in theory be drawn on, but that would have to be done unmistakably, and in practice the monarch always quite clearly drew on the statutory power.

In the practical upshot, it was not necessary to worry much about the common law prerogative, even for those judges who took a broad view of the Commission’s authority and might occasionally invoke the prerogative to help their cause. The statute was enough to worry about. Different judges saw different things in an act so drafted that one is hardly obliged to see anything in particular. Their sense for words, habits of statutory construction, historical beliefs, and policy preferences determined what they saw for the most part. For some, a strong belief that the monarch remained in full possession of the ancient prerogative may have been still another determinant.

In sum, the concrete problems that arose about the High Commission can be regarded simply as questions about the meaning of 1 Eliz. Even if that is not quite true in the most refined sense, the problems are still statutory in the first instance: If the statute means that the Commission may be authorized to do x, then it may do x. Only if the statute means that the Commission could not do x would one need to look for some other basis for permitting it. Only if one is baffled by whether the Commission may do x by the statute need one consider whether anything outside the statute could possibly be relevant.

* * * *

Two sorts of problem about the High Commission arose frequently: (a) its substantive jurisdiction; (b) its sanctions and procedural powers. Both problems are best formulated by conceding that the monarch has in his patent authorized a given activity. E.g., for (a), the monarch has said to the Commission “You may entertain complaints of adultery”; for (b), “You may fine anyone convicted of the offenses over which I have given you jurisdiction.” In both cases, the issue is whether the monarch’s authorization is valid under the statute. Very few cases turn on construction of the monarch’s patent to the Commission. I infer that that was usually either out of doubt or a question that could be by-passed by courts that thought a given authorization would be invalid if conceded to have been made.

Taking substantive jurisdiction first: There was never any doubt that the High Commission could be authorized to proceed against very serious ecclesiastical crimes—e.g., heresy, the most indisputable example. Beyond extremely grave spiritual crimes, what parts of ecclesiastical jurisdiction could be assigned to the Commission was a wide-open question. I shall suggest here the main possibilities that I think can be called
realistic in the light of the cases, indicating the general line of argument that supports each. I shall of course state them in a more explicit and neater form than they usually assumed in contextual discussion.

(1) The monarch may give the Commission any or all parts of ecclesiastical jurisdiction. He is not obliged to set up a Commission at all, nor, if he does, to assign any particular ecclesiastical causes to it. But if he has undisputedly assigned it a given type of cause, then the Commission has jurisdiction (assuming always that it is an ecclesiastical cause, that no attempt has been made to smuggle temporal matters into the ecclesiastical sphere.) The words of the statute, which we shall look at below, are too vague to stand in the way of this conclusion. No contrary intention can be reliably established. As Supreme Governor, the monarch is responsible for seeing that the Church’s legal system does its job effectively (which at some level of generality no one would deny.) It would be sensible to authorize him to assign causes to the Commission when, as the responsible and putatively best informed officer, he thinks it necessary. He would presumably do so when he deemed that the regular courts were not handling some category of business satisfactorily. Parliament cannot have anticipated, and is unlikely to have pretended to, what necessities might be perceived in the future. The common law judges have no competence to assess such necessities, but must assume that the monarch has done so with proper consideration. This construction has the further advantage of leaving the monarch with powers he would probably have in the absence of the High Commission clause of 1 Eliz.

(2) There is a good deal of sense in the first approach, but it has disturbing implications too. It permits the monarch to undermine the jurisdiction of regular ecclesiastical courts and the ordinary expectations of the subject, while, no doubt, assuming that he will not do so except on sober consideration of necessity. Flexibility to manage the ecclesiastical legal system in the interest of effective law enforcement under actual circumstances is valuable, and trusting the monarch to assess those circumstances is basically justifiable. But is it likely that Parliament would have given the monarch an absolutely blank check? It is disturbing to suppose he had such absolute power “at common law”, whether or not one can avoid so supposing. Since Parliament went to the trouble of legislating, it stands to reason that part of its purpose was to restrict the monarch to at least some extent, and the language of the statute encourages more than it discourages seeing some restrictive intention. The danger of relying absolutely on the monarch’s discretion is in any event not to be taken lightly. Localism in the ecclesiastical system could be all-too easily subverted on perfectly honest, perfectly plausible perceptions of necessity. Invite anyone who so desires to start an ecclesiastical suit in a high-ranking, central, competently staffed court and all-too many people will take up the invitation. It may be that for any given matter providing the option will be quite justifiable, because diocesan courts are known by experience to handle some type of business inadequately. (For a realistic example, it might be clear that local courts too often defer to husbands, especially if they are important people, in “divorce” litigation, so that the policy of ecclesiastical law, which aims to enforce decent treatment of wives, is not fulfilled.) Nevertheless, the net effect of diverting a lot of litigation from local courts would be unfortunate. Apart from the interest of those courts in their jurisdiction, such diversion would contribute to the problem it was meant to solve. For if diocesan courts are sometimes not very good, diminishing their practice and sapping their morale will
probably make them worse. From the subject’s point of view, being cited to a supra-local court is an inconvenience to be avoided if other things are equal, and ultimately more than an inconvenience. For there is a sense in which people—Bad Men if you like—have a “right” to fear only those tribunals and authorities that they have been accustomed to think of as over them, and which are represented to them as the “normal” channels. There may be good reasons for providing extraordinary alternatives, but they will have trouble staying extraordinary, and the people they afflict will be aggrieved in their sense of justice. Thus undermining localism, or making it possible to undermine it, would be an evil even without the serious complication of a strong statutory endorsement of ecclesiastical localism—namely, 23 Hen. VIII (revived by 1 Eliz. itself), the statute discussed in detail in Ch.2 above.

Another powerful consideration on the side of restriction is the absence of routine appeal from the High Commission. The right to a de cursu appeal cannot be regarded as absolute in the shadow of 1 Eliz. for in so far as any causes at all can be assigned to the Commission, losing parties can be deprived of appeals. But perhaps the necessity that overrides the expectation of appellate recourse ought to be stronger than the necessity that might be allowed to override localism. Parliament is unlikely to have been willing to risk the right of appeal so far as to entrust it to the monarch’s discretion absolutely.

If, then, we admit values on both sides—the value of giving the monarch discretion to confer jurisdiction on the Commission as unforeseen necessity may require and the value of curbing his discretion so that it is not over-used for plausible but shortsighted reasons—, is there a compromise formula? There are two major candidates:

One is that the monarch may give the Commission any part of criminal jurisdiction appropriate to ecclesiastical courts, but no part of strictly civil. There are problems about discriminating criminal from civil, to some extent problems peculiar to ecclesiastical law. Let us defer those, however, until the cases touch on them. In general defense of this formula, one may urge a legitimate association between “necessity” and the criminal law. I.e., extraordinary measures are usually most justifiable when the ordinary means of enforcing the criminal law are defective. Ordinary channels may not work perfectly for civil purposes, but if they do not, only private interests, mainly pecuniary, will be affected. It must be presumed that everyone loses if the criminal law is not properly enforced. That the criminal part of ecclesiastical law was concerned with morality and respect for religion, rather than basic security in person and property, need not weaken the force of this point. Therefore let the monarch judge the necessity for an extraordinary tribunal in criminal cases, and let the risks be borne, but let his discretion stop there. If localism should be unfortunately subverted, there are some mitigations. A criminal suspect perhaps has less “right” to a particular tribunal than a civil defendant. Diocesan courts can perhaps be presumed less likely to be effective enforcers of criminal law, especially against bold and resistant offenders, than to be adequate settlers of disputes among people who take their troubles to court when they cannot resolve them outside. Perhaps it is worse to deprive a man of a private interest, with a pounds-and-shillings value, without right of appeal than to convict him of a crime without appeal. One can of course say the opposite, but here it is important to remember the peculiar character of ecclesiastical law. Waiving the question whether the High Commission can be authorized to use secular sanctions, ecclesiastical courts could not hurt a convicted “criminal” very seriously. A man erroneously condemned to pay tithes is out of pocket;
one erroneously convicted of fornication need only pay the price of a symbolic act of penitence. In any case, one convicted by the Commission of a grave offense, such as heresy, has no appeal. It is hard to worry about the erroneously convicted fornicator by comparison.

The second approach would say the trouble with the first is that it leaves the monarch free to give the High Commission jurisdiction over extremely petty misdemeanors. In the nature of things, ecclesiastical law covered a good deal that was trivial. Anti-social behavior of the sort that moderns call “criminal” was temporal; heretics are usually few; fornicators and adulterers are doubtless bad and doubtless many, if all-too human; a lot of profaneness and uncharitableness is left over—things a liberal society would consign to merely moral controls, but in which the Church was accorded a legalized interest. It may not matter very much if petty misdemeanors do fall into the High Commission’s hands, just as it does not much matter if speakers of “irreverent words”—like, say, recipients of parking tickets in the modern world—may appeal their convictions. If the monarch sees fit to give the Commission authority over trivia, and if the Commission (if it has any choice when the complaint is privately initiated) consents to bother with them, so what? Yet the desirability of giving the monarch discretion to provide for necessities—the very argument that justifies not construing the statute too stringently against him—is mocked if it leads to an unlimited conveyance of criminal jurisdiction. It hardly can be necessary to supplement the regular courts in order to make sure that swearers and defamers are prosecuted; their escaping punishment altogether is hardly a sufficient evil to outweigh the disutility of violating regular channels. Localism, while dispensable for the sake of catching big offenders, is precisely valuable in the case of petty ones. Petty misbehavers should be punished at home, in front of their neighbors; the diocesan courts should be encouraged to prosecute routine misconduct, to worry about “moral tone” in the districts they are responsible for; they should be under some pressure not to lapse into the role of purely civil courts.

Can we than find a better approach, within the same guidelines, than merely splitting the civil and the criminal? Suppose we agree that the High Commission can be given jurisdiction only over serious matters. Perhaps it is best to say “serious crimes”, but let us say it in a tone that allows for the difficulty of distinguishing civil from criminal in the ecclesiastical sphere—“serious matters with a criminal element”, meaning situations in which it would be lawful to punish someone over and above ordering him to perform acts which mostly reduce to specific execution of a duty to pay money. (E.g., I take it that a tithe-payer can only be ordered to pay his tithes, an executor to pay so much to a legatee, etc. If these duties are contested in good faith, and after losing in litigation the tithe-payer or executor performs the order, there is no basis for considering these persons “criminals”. If there is a penumbra—bad faith refusal to perform these duties before ordered to by a court, for which something like a “punishment” distinct from an order to perform now or face excommunication could be imposed—I have not encountered it through the Prohibition cases. By contrast, I take it that a man sued by his wife seeking alimony on grounds of cruelty and adultery may be punished for those offenses as crimes upon a finding that he committed them, whether or not the wife is awarded the alimony or legally may be in the particular circumstances. ) Then let us not impose too rigid a meaning on “serious matters with a criminal element.” Let us not suppose we can list such matters or recognize them by a mechanical criterion, nor suppose, improbably, that
the statute-makers had a definite or self-applying test in mind. The common law court must in the end simply look at the specific cases in which the Commission’s jurisdiction is contested. They must use a little intuition to discriminate what is serious from what is not, what has a genuine criminal element from what does not, what cases necessity could plausibly justify giving over to an extraordinary tribunal from which there is no appeal. If intuition is shaky, then let the courts avoid it so far as they can and discuss general criteria, but let them acknowledge that there may be several criteria for seriousness, and that these neither were foreseen by Parliament nor can be by anyone a priori. Criteria must be suggested by cases that come up, assessed sometimes for their internal convincingness (Can adultery not be a serious offense when the Ten Commandments forbid it?) and sometimes with a certain judicial notice of the real problems of administering the Church.

This approach is particularly useful with respect to a special problem that recurs in the cases. The approach admits of saying that seriousness is not a kind of universal that inheres in some crimes and not in others, but a function of context. It also helps one keep in mind that what we are trying to do is to uphold the Supreme Governor’s discretion for use when it is necessary—perhaps even when its use is merely innocuous—, and when the monarch’s discretion really is the best basis for determining how ecclesiastical jurisdiction should be distributed, Cases on intra-Church discipline, primarily the prosecution of clerical offenders, point up the advantages of such a position.

If the monarch gives the Commission authority over clergymen charged with certain offenses, is it not hard to object? It is of course legitimate to say that some crimes are simply worse in a clergyman than in a layman. One can put clerical fornication on the most rigid list of serious crimes, while leaving lay fornication off it. But as one shades off into lesser offenses, it will become unconvincing to call them serious even in a clergyman. Is there still not something odd about challenging the Supreme Governor’s title to make clergymen answerable in the ecclesiastical court he thinks most effective in enforcing standards which it is in a sense his business to set? Contrary arguments can be conjured up, but there is a strong point to be made.

Something like “To be a clergyman is a privilege, not a right” seems an appropriate remark. Can a clergyman complain if the Church’s administration is so arranged that he is liable to answer for his crimes where a layman would be spared answering for crimes of comparable gravity? We grant that the monarch is cut off from judging it “necessary” that lay swearers and defamers be liable to High Commission prosecution. His judgment could be plausible enough—there is simply too much such misconduct, and nothing is being done about it—, but we in effect presume that the judgment will undervalue the disutility of violating localism, etc. Is the monarch’s judgment that it is necessary for the Church to be administered internally by a certain schema quite of the same order? Especially, is it not up to the Governor of the Church to say what standards Church personnel shall be held to? He may correctly think that profane laymen are not being punished sufficiently, but we foreclose him from doing anything about it by tampering with jurisdiction. That is in part because it is not the monarch but “the law” that makes swearing a crime and attaches a certain degree of seriousness to it. But surely the monarch has a more creative role as head of the Church to determine how serious profanity in a clergyman is and how much in need of the most effective suppression. His judgment there is a policy judgment about what kind of Church
to have—one that tolerates peccadilloes in its clergy so long as their neighbors and immediate superiors have no complaints or one that is vigilant for “counsels of perfection.” What kind of Church to have is a different question from what kind of country, what incidence of enforcement against laymen who violate some of the lesser rules of ecclesiastical law is desirable. The former is much more clearly within the monarch’s scope and outside the common lawyer’s.

In sum, the vaguest, most flexible approach—“Only serious crimes, to be sure, but keep it open just what that means”—is the best basis for distinguishing laymen from clergymen, Church law as a branch of “the law” for everyone from Church law as an instrument for the internal control of an institution. The approach also admits of a category of aggravation and a regard for the problems of effective enforcement that the Church faced in the concrete circumstances of cases. It is possible that a given offense is too minor as such to be given to the High Commission, but that the monarch’s purported assignment of it should be held valid *quoad* aggravated cases and multiple or incorrigible offenders? Or in so far as regular ecclesiastical courts are actually shown to have tried and failed to bring an offender to justice, or to have been frustrated by such circumstances as a number of offenders involved in a single crime who cannot be reached within a single jurisdiction? Drawing a line between civil and criminal will not yield an affirmative answer, nor will restriction of the Commission to a few specific crimes whose gravity is beyond question in all circumstances. The “vague and flexible” approach can: As it were, “Simply trivial or totally civil matters cannot be assigned to the Commission whatever the monarch purports, but what falls outside those classes cannot be specified until we have a concrete case before us. When we do, we may consider a variety of senses in which a crime can be serious, or in which the reasonableness of letting the Commission handle this case can be made convincing, within a general allegiance to the principle that only ‘serious matters with a criminal element’ may be diverted to the Commission.”

(3) The third approach has been intimated in discussing the alternatives: 1 Eliz. empowers the monarch to set up a High Commission only for a small and special segment of ecclesiastical criminal law. “Very serious crimes” is the correct generic description, but it is mistaken to apply that category in the manner of the approach above. The language of the act and especially the known historical circumstances under which it was passed permit Parliament’s meaning to be specified much more exactly. The courts ought not to intuit what is serious enough as cases come before them or play around with a variety of plausible criteria, under the sway of the incorrect notion that the statute intends to leave room for the monarch to divert causes to the Commission as unforeseen necessities require. The statute enacts a criterion—one criterion—, perhaps not *per verba* simply but by clear intent. The only discretion given the monarch is to decide whether to have a High Commission at all (in effect—for the range of offenses he may assign to it is so narrow that setting it up and assigning it only part of that range is no more than a theoretical possibility.)

Specifically: Heresy and schism may be assigned to the Commission. The statute is express as to those two crimes. Being express, it shows what it has primarily or “paradigmatically” in mind—the most serious forms of religious misconduct. If there is any possibility of going beyond heresy and schism, the paradigm operates to say that it must be into other forms of religious misconduct only slightly less serious, or equally
serious but technically distinguishable—somewhat as one might slide on an analogous secular scale from treason to misprision of treason. Admittedly, however, construction of the statute cannot stop at this point, cannot rest on the conclusion that nothing in the moral section of ecclesiastical law is assignable to the Commission. For there is one, and only one, further important word in the statute: “enormity.” This word points both beyond the species “heresy” and “schism” and beyond the genus “serious religious offenses.” But it does not point in the wide-open direction of any crime that can plausibly be regarded as serious. Rather, the paradigm remains controlling even when it is transcended. “Enormity” admittedly indicates moral offenses and admittedly lacks the specificity of “heresy” and “schism.” But it is to be understood as extending only to those crimes that can really be ranked with heresy and schism. To determine such ranking, one must look at the quality as well as the quantum of the gravity.

“Exorbitant” was sometimes offered as a more descriptive synonym for “enormous.” Both words, I think, were understood by people of the persuasion we are talking about (as opposed to those to whom the words meant no more than “pretty serious”) to touch such qualities as rarity in a world that is at all right-thinking and sociable; abandonment of the spirit to evil, as opposed to letting the flesh slip under temptation; violation of “nature”, where social conformity and conformity to the fundamental institutions of society—Church and Family as well as State—are regarded as “natural”, along with sexual orthodoxy, parental affection, children’s obedience, and the like. The only non-religious offenses ever specifically suggested as eligible High Commission crimes squarely within the present framework were incest and polygamy; both meet the standards I have described. (A comparable secular derivation might go from treason to the misprision, then to petty treason, perhaps to murder, but not to the rest of the felonies, let alone misdemeanors. It is likely that such secular hierarchies influenced thinking about the hierarchy of spiritual crimes for purposes of construing 1 Eliz.)

The extent to which the statute’s language permits or encourages this and alternative approaches will be considered in detail below. The present approach obviously gives greater value than others to the ends served by a restrictive interpretation—localism and preservation of appeals. The most distinctive argument for it, however, was historical construction of intent. The other approaches probably bespeak a certain skepticism about history, or at least unwillingness to base construction on an inevitably fallible version of the statute-makers’ immediate situation. In behalf of the most restrictive reading, it was often urged that Elizabeth’s first Parliament was faced with a special problem: a Catholic bench of Bishops left over from Queen Mary. Those Bishops could obviously not be expected to enforce religious orthodoxy by the restored true standards or conformity to the new Establishment. Least of all could they be expected to enforce orthodoxy and conformity on their clergy, to the end of depriving them of their livings, and on themselves. Therefore the monarch was enabled to set up an extraordinary tribunal. It was never argued that the power to establish a High Commission disappeared as soon as the special problem did; the words of the statute clearly forbade that. One could at most wish that the monarch had seen fit to desist using the power once the Marian Bishops were out of the way. (Some members of the community, notably Puritans, no doubt did so wish. I would be surprised if many judges participated in the wish, precisely because they show few signs of sympathy for Puritans.
Those who took the statute most narrowly still took it in a sense that would often catch Puritans, and most of them would probably have said a special instrument was necessary for that purpose.) What was argued was that the statute, having been made to meet a special problem, intended by its general terms only as much as was needful to meet that problem (with a small penumbra thrown in, and not quite accounted for historically, under the term “enormity.”)

We may turn now to problems about the High Commission’s procedures. The main question, though not the only one, can be stated for its practical upshot as “May the High Commission fine and imprison?” Several complications are concealed underneath that formulation, however.

In the first place, the question of course asks, properly speaking, whether under the statute the monarch may confer power to fine and imprison on the Commission. The problem is best discussed on the assumption that Queen Elizabeth and her successors have purported to grant such power (as they characteristically did.) We need not reach refinements of the question to see that two contradictory answers are possible:

(1) Power to use secular sanctions may not be conferred on the Commission. The statute does not say it may. Without express authorization, there is simply no reason why it should be possible to give the Commission secular sanctions. Whatever part of ecclesiastical jurisdiction may be conferred on it, up to the whole of that jurisdiction, it remains an ecclesiastical court—special or supplementary, “high” or unappealable, but still an ecclesiastical court. Ecclesiastical courts have certain procedures and sanctions—as for sanctions, excommunication; power to order (payments, acts of penitence and apology, behavior conformable to spiritual law and to non-pecuniary decrees in specific cases, “submission”, satisfaction of litigative costs) under threat of excommunication; power to deprive clerics. On excommunication is built the secular arm’s role pursuant to De excommunicato capiendo. That is all. Power to fine and imprison in no way belongs to ecclesiastical courts. If the monarch could create a High Commission without the statute and confer any or all parts of ecclesiastical jurisdiction on it, he still could not give it secular sanctions or otherwise empower it to proceed in any manner except that in which other ecclesiastical courts may proceed. He could no more give it secular sanctions than secular jurisdiction. Only an express statute could alter this, and that is lacking. The closer one is to saying that 1 Eliz. only confirms the monarch’s common law authority, the clearer it is that he may not do more then relocate ecclesiastical jurisdiction with the attendant procedures.

(2) 1 Eliz. does not in unmistakable words allow secular sanctions to be conferred on the Commission. But its language, just by being unspecific, rather encourages than discourages the belief that that was meant to be permissible. Common sense construction by intent points the same way. The idea was to create a special court. It would not be special enough, not enough of a supplement for cases of extraordinary necessity, if it must be confined to ecclesiastical sanctions. Having an extra high-ranking court—jurisdictionally limited perhaps—would be more useful for the situations that justify having one at all if such a court could be given “teeth” that ordinary ecclesiastical courts lacked. If the Commission is only justifiable because the regular courts cannot be depended on to be effective, especially against serious and obstreperous offenders, then it makes sense for the Commission to have the means to be more effective in the way that counts most with the man in the street or the “criminal classes.” So Parliament is likely to
have figured and once this is clear it becomes evident that Parliament chose its language to insure the monarch discretion to authorize secular sanctions. He could not have authorized them at common law, but the statute adds to his powers. Indeed, in order to add this power—rather than cut back the common law powers—might be the best explanation of why Parliament legislated. Of course there are limits. The monarch may no more allow the High Commission to hang people than to prosecute them for felony, but nothing follows as to fining and imprisoning in the various forms these sanctions admit of.

The last phrase, “the various forms”, leads into complications. Power to fine and imprison is not one simple entity. To start with the obvious, fining and imprisoning are two operations. There is no case-authority for the flat proposition that the Commission may be given one of those powers but not the other. Yet they are manifestly not the same in people’s experience, nor do they diverge in the same way from normal ecclesiastical sanctions.

A fine can be little else than a punishment, unless it is a commutation of a punishment. The “unless” could be important. Suppose the Commission were expressly authorized (by its patent) to impose a spiritual sanction or a fine—never both and never imprisonment. (Although this is not a realistic supposition, the first part is not really misleading. An express choice between spiritual punishment and fine was not offered, but I have no reason to doubt that in practice the High Commission did not otherwise afflict those whom it fined, except by imprisonment, which for the moment we omit.) The Commission would then purportedly have a power not enjoyed by other ecclesiastical courts, but the difference can be made to look fairly small. I do not know to what extent, if ever, regular ecclesiastical courts accepted payment of money—to a victim or a charity—in lieu of penitential acts. They professedly did not award damages (only ordered payment of money due in the form of the value of tithes no longer renderable in kind, legacies, and the like.) The power of a complainant to settle with a defendant for money was at least open to question when the complaint had a criminal element—e.g., defamation. Even so, I wonder whether ordinary Church courts were debarred from agreeing to absolve or to forgo any other expression of penitence in consideration of an appropriate payment. Perhaps any such transaction can be represented as volunteered by the party and merely accepted by the court as evidence of a repentant state of mind, with the understanding that the court’s so much as making a suggestion would be improper, let alone telling the party “Either make a payment or go unabsoved.” Power simply to impose a fine payable to the monarch and collectable by Exchequer process (as High Commission fines were) is certainly a significant step beyond any nebulous power to “work out” a monetary satisfaction. The argument is only that it is not a “morally gigantic” step: A special court needing extra “teeth” is allowed to “commute” the spiritual penalty into a payment the party is coercible to make, whether he would prefer the spiritual penalty or not. Though the payment is pretty hard to distinguish from a secular fine, call it a “charitable contribution to the Supreme Governor” to put a better face on it—the notion is not merely risible, for it is intrinsically seemly enough for one who has offended the Church to make peace with it by doing something tangible for the institution. Are these moderate thoughts not as imputable to Parliament as others?

In any event, once the possibility of conceiving a fine as a commutation is considered, compromise paths are opened to the common law courts provided they do not
hold a patent, authorizing fines, invalid on its face. A court could adopt the policy of looking at the size of a fine in relation to the possible spiritual punishment due for the offense in question. The reasonableness of a “commutation” could perhaps come under common law scrutiny more easily than that of a mere secular fine imposed by a body authorized to fine without any discernible limit on its discretion to set the amount.

Imprisonment can be a punishment, a worse one than a fine in most people’s eyes, though of course that depends on quantities. In principle, it can be imposed—indeed chosen by the party—in lieu of something else thought of as the primary punishment—, just as a fine can, and imprisonment *inter alia* can be in lieu of a fine. One can imagine a staunch Puritan who would much rather spend a reasonably determinate martyrdom in jail than make some hypocritical gesture of penitence or submission at the behest of a High Commission whose legitimacy he does not accept, or indeed than pay a fine he regards as illegal. A good deal turns on “reasonably determinate”, to be sure. But is it conceivable that the common law courts, however favorable to the High Commission’s powers, could permit punitive imprisonment without ever looking at the length of the sentence in relation to the offense? Could they possibly permit a man to be imprisoned as long as the Commission pleased, without at least considering after a certain time whether he has paid as full a price as can reasonably be demanded? Perhaps it is conceivable, but it would take a hard man—or one very trusting that the monarch would surely relieve any victim of real abuse. It would take a judge willing to say that an act of Parliament permits the monarch and the High Commission to do anything to certain spiritual offenders short of death and maiming. That is quite different from saying that Parliament meant to allow secular sanctions in reasonable manner and amount.

Besides a punishment, imprisonment can be a means of coercion—“civil” coercion of the sort used by courts of equity, whereby a man is committed only until he performs an order; as the saying has it, he is “handed the keys of the jail.” Various possible positions on the High Commission’s powers open out when one is mindful of this. E.g.: The Commission may neither fine nor imprison punitively, but it may imprison to coerce performance of a spiritual sentence. Or let us try a slightly different formulation: The Commission may if it sees fit imprison a convicted person until he performs a specified spiritual sentence instead of excommunicating him. Leaving aside the pious pretense that it is better to be in jail than out of communion with the Church, there is a sense in which the step from ordinary ecclesiastical process to High Commission process in the form imagined is a modest one. Excommunication was translatable into jail via *De excommunicato capiendo*. What we propose for the Commission is not much more than a short-cut to the kind of coercion most effective with most sinners. Of course there is some loss, for necessity’s sake, in “due process of law.” *De excommunicato* would not lie every time someone was excommunicated *de facto*; the process insured the common law courts a look at the circumstances and legality of the excommunication. The availability of *Habeas corpus*, however, insures that at least as well. A person imprisoned but not excommunicated is in fact better off than someone imprisoned by virtue of *De excommunicato*, because the latter is almost surely warrantably imprisoned—i.e., a return on *Habeas corpus* stating that the prisoner was taken on a *De excommunicato* would be very hard to fault. Imprisonment of an ecclesiastical defendant without the warrant of that writ must be adequately justified by the return on *Habeas corpus*; any way in which the particular imprisonment was
unlawful—conceding the Commission’s generic power to imprison—would show up and the prisoner be delivered. (Realistically, there was nothing de facto to prevent the Commission from both excommunicating and imprisoning a man, simultaneously or sequentially. I cannot say whether the usual practice was to do so. Legally, the question at present under discussion is whether it might not have been plausible to hold that the Commission may imprison if it is willing to forgo excommunication, or at least that if it is to excommunicate at all it must excommunicate first and imprison without the De excommunicato process only after a reasonable lapse of time.)

Permutations can then be generated: E.g.: The Commission may fine as a punishment, but it may not imprison as a punishment. It may imprison to coerce performance of a spiritual sentence, but not to coerce payment of fines, which must be recovered like other debts to the Crown. (As I have already intimated, this latter rule has good support from the cases.) Further complications come in with further procedural resources, ones which were used in practice. E.g.: Suppose the Commission orders a party to perform a spiritual duty (say it orders a man not to abuse his wife); suppose it imposes no secular punishment for past breaches of that duty, but orders the party to enter into a bond payable to the King upon future breach. Is that lawful, assuming it to be explicitly or by implication authorized by the patent? If so, does it represent a step into secular powers notably more modest than all forms of fining or imprisoning? If ordering someone to enter a performance bond is not objectionable as such, how about imprisoning him until he is willing to enter the bond? Imprisoning him to coerce performance of the primary duty after he has breached it, in lieu of suing on the bond? Imprisoning only those who have both refused the option of a bond and violated the court’s order? Fining them?

These observations will suffice to make the following point: “May the High Commission be authorized to fine and imprison?” does not have to be answered “Yes” or “No.” Indeed a radical “Yes” is a nearly untenable position, since it would open the way to perpetual imprisonment and confiscatory fines. Short of a radical “No”, there are numerous moderate positions. Moderation in general can be defended as a reasonable construction of Parliament’s intent: Parliament meant neither to allow the Commission to be given a full set of secular “teeth” nor to keep it from having any at all, thereby failing to supplement the regular ecclesiastical system very significantly. Rather, it intended to let such “teeth” be added as might make a difference in effective law enforcement, without pulling the Commission away from the standard ecclesiastical model more than was necessary to make a difference. A moderate spirit could be implemented by adopting definite rules. An example, only one among various possibilities, would be: “The High Commission may in effect operate like a court of equity. It may order penitential acts, or other fully performable acts in obedience to the law or particular decrees, and coerce performance by imprisonment. It may also imprison when orders reaching into the indefinite future are broken, such as ‘Stop abusing your wife, stay away from her, and pay her so much alimony every month.’ In the latter case, brief punitive imprisonment is justified by the ‘contempt’, but it must be brief. The party must be offered the option of a performance bond if the court is unwilling to assume that ‘brief punitive imprisonment’ will be enough to motivate his amendment, and he may be held for any length of time only if he refuses the bond. That is all. Fines cannot be justified when by this limited power to imprison the Commission has an effective means to see that the essentially
injunctive remedies proper to any ecclesiastical court actually work. If sinners’
indifference to excommunication and the tediousness of translating it into imprisonment
via *De excommunicato* are the trouble with regular ecclesiastical justice—and what else
on the remedial front could be?—the problem has been solved.”

Alternatively, one might be an *ad hoc* moderate, setting no rules as to how far the
Commission may draw on its secular armoury, but inspecting each controverted case to
see if the use of secular sanctions seems justified by the circumstances—e.g., whether
there is evidence that a party has been, or is likely to be, unresponsive to spiritual
sanctions. The formal position behind this approach would be that the monarch’s
authorization of secular sanctions is valid only with an understood proviso: so far as
using such sanctions can be justified as a necessity in particular cases.

The three basic positions suggested so far (no secular sanctions—full power to
fine and imprison at least up to the limit of abusive excess—some secular powers, but
well short of that limit, variously specified) unfortunately do not exhaust the possibilities.
A further complication is introduced by the fact that ecclesiastical courts did not utterly
lack the power to imprison before 1 Eliz. They lacked such power “at common law”, but
a few statutes before 1 Eliz. enabled them to imprison in specific cases, notably heresy
and clerical incontinence. Omitting the details of the reasoning until we reach the cases, it
was arguable that 1 Eliz. intended to preserve these exceptional ecclesiastical powers in
the High Commission, but not in the other ecclesiastical courts. Various positions can be
generated if one grants this. E.g.: The High Commission may imprison for heresy,
because regular ecclesiastical courts once had statutory authority to imprison for that
offense, but it may not imprison for anything else (unless clerical incontinence, for the
same reason, granting that to be within the Commission’s substantive jurisdiction.)
Alternatively: Since the Commission may imprison heretics for the reason stated, it may
imprison generally for the narrow range of offenses within its substantive jurisdiction,
since those are like heresy and are only assignable to the Commission because they are; it
may fine in the same narrow range, since fining is the lesser punishment. Both of these
positions can be reached without taking a stand on whether the Commission could be
given secular sanctions in the absence of earlier statutes extending such sanctions to
ordinary ecclesiastical courts in specific cases. But one can grant the relevance of the
earlier statutes and still take one or another position on the other question.

Secular sanctions were the heart of the problem of what procedural powers could
be given to the High Commission, but not quite all of it. We have already noted the
question whether the Commission may order parties to enter bonds, even if there is no
attempt to back up the order by more than spiritual sanctions. The question may be
variably answerable according to the condition in the bond. (Besides bonds guaranteeing
performance of penance or good behavior in the future, we may instance general bonds to
abide by the award of the court and bonds to reply truthfully to interrogatories. One
should not assume that bonds of all types were equally legal or illegal.)

Another real-life problem is connected with the power to imprison, but not quite
the same: May the Commission be authorized to arrest defendants in the first instance—
i.e., to bring them before the court by attaching their bodies? If one utterly denies that the
Commission can be given imprisoning powers, the answer must be “No”—the
Commission may no more take a man prisoner in order to bring him before the court and
charge or question him than it may sentence him to jail after conviction. But the converse

165
need not hold. One may grant that imprisonment is lawful after conviction, either as a punishment or to coerce performance of another sentence, but still say that attachment of the body at the commencement of a suit or prosecution is unlawful. At that stage, arguably, the Commission must proceed like any other ecclesiastical court—cite the party to appear and excommunicate him if he fails to. In so far as the Commission has any title to use secular sanctions, it must, so to speak, have earned it—by convicting someone of a crime within its jurisdiction. It is much less tolerable to permit an ecclesiastical court to wield secular power over mere suspects or accusees, the more so because those courts could lawfully cite people to appear in criminal cases without telling them why they were cited before their appearance. To permit the High Commission to arrest without revealing its reason is to let it exercise temporal power over people when it may lack any jurisdiction. That is surely deplorable even if such abuse of arresting power would be actionable false imprisonment, though it is of course possible that liability for false imprisonment is a sufficient check on abuse.

The last important procedural power has already been discussed in Vol. II of this study: power to conduct self-incriminatory examination. Suffice it here to say that the Commission could be said to have such examining power where other ecclesiastical courts did or might lack it. We have seen in Vol. II, however, that this theoretical possibility did not come to much in practice. On the whole, the Commission was allowed to use inquisitorial procedure within the same fairly generous limits as other ecclesiastical courts and prevented from using it when other ecclesiastical courts clearly could not—mainly when the tendency of the examination was to expose to temporal detriment and when the articles of examination were not so revealed as to permit the examinee and the common law courts to judge whether they related to an infra vires matter. Here we should note that the Commission’s uncontested power, qua ecclesiastical court, to use inquisition sometimes is capable of involvement with other issues. E.g.: If the Commission proposes to conduct an intrinsically lawful examination and the examinee refuses to respond, may he be imprisoned? Of course not if the Commission may never imprison. But granting that it may do so sometimes, is this case more or less strong than others? Might one argue, for instance, that the Commission really needs imprisoning power to make recalcitrant parties cooperate with its due procedure for discovering the truth within a narrow range of serious offenses—excommunication will do for commonplace offenses and regular courts, but power to get at the truth of suspected heresy must exist somewhere? If we grant that argument, then (by one line) power to imprison cannot be excluded altogether, so it might as well be admitted for other reasonable uses as well—especially, perhaps, if the Commission is confined to heresy and the like. By another line, admitting imprisonment to compel cooperation in discovery procedure entails nothing beyond itself. Because it is necessary to find out heretics, it does not follow that it is necessary to punish even heretics, or to keep them in line in the future. Order them to recant and excommunicate them if they refuse to; if they relapse, prosecute them again or excommunicate them automatically. Once they are routed out, are these spiritual sanctions, with the follow-up of De excommunicato cadiendo, not what the law appoints for heretics?

As the examining power is involved with other issues, so the High Commission’s substantive jurisdiction is involved with its procedural powers. They are analytically separable, but how one resolves the issues about each is bound up with how one resolves
those about the other. I shall not spell out here the ways in which this is so. The general type of question to keep in mind is: If one is convinced that the Commission is confined to a few specifiable grave crimes, ought one to be generous in conceding secular sanctions? Conversely, if one thinks that there would have been little sense in setting up a High Commission without permitting it to be given secular sanctions for at least some purposes, ought one to conclude that it was meant to be restricted to a few definite grave crimes? E.g., does deprivation of appeals not weigh a great deal heavier when a man stands to be fined or imprisoned without appeal than when he is only threatened by spiritual sanctions? On the other hand, quite opposite correlations are possible: Parliament authorized a High Commission when its horizons were dominated by the Marian Bishops. All that was required was a tribunal with jurisdiction over the religious offenses of which those Bishops were guilty, and the ecclesiastical power to deprive was quite sufficient for dealing with them. Therefore no intention either to extend the Commission’s jurisdiction beyond a narrow range of crimes or to give it secular sanctions can be imputed to the legislature. Antithetically: The whole point about 1 Eliz. is that it puts royal discretion to manage the Church and meet unforeseen necessities on a firm statutory basis. The design is to let the monarch relocate ecclesiastical jurisdiction, within very broad if any limits, when he judges that the regular system is not working effectively. The effectiveness that is the end of the design would surely be better served by authorizing the monarch to confer secular powers on the Commission at least for a fairly broad range of possible uses, because merely shifting jurisdiction without any increment of sanctions is not an obviously sufficient way to increase effectiveness when it is putatively urgent to do so.

It will be evident from what has been said that issues about 1 Eliz. and the High Commission were complex and criss-crossing. One ought not to be surprised by what the cases will show: There was a lot of litigation; disentangling the issues and settling them coherently came hard. A relatively super-charged political atmosphere—the government and Church hierarchy strongly committed to the High Commission, loath to accept adverse decisions—added to the judges’ already difficult task of construing baffling legislation and sorting out the plausible policies that one or another interpretation would serve. A further obstacle to the courts’ getting a clear focus on the issues and resolving them decisively was the high incidence of *Habeas corpus* cases occasioned by the Commission’s purported power to imprison.

Although they have their special problems in the present field, Prohibitions are at least relatively capable of raising issues cleanly and comprehensively. In Prohibition, the aggrieved party has the floor. A man might come and say, e.g., that he was ordered to pay alimony by the Commission and imprisoned for refusal to enter a performance bond. He at least has the opportunity to allege and argue that the Commission may not be given jurisdiction in marital cases, may not imprison at all, may not demand a performance bond, and even if it may sometimes imprison and if demanding the bond is not illegal, imprisonment may not be used to enforce this sort of order. The judges may find one ground for prohibiting in all that and prefer to leave other questions unresolved, but at least they have been told, in whatever detail plaintiff-in-Prohibition elects, about what has gone on in the High Commission, and they have been invited to consider several issues at once and as they bear on each other.
In *Habeas corpus*, on the other hand, the jailer—and behind him the committing authority—has the floor. He is challenged to justify the imprisonment without saying a word more than will satisfy that purpose. In *Habeas corpus* cases, therefore, the issues about the High Commission tend to occur without the accompaniment of detailed information. They are also overlaid with independent questions about *Habeas corpus* policy. These questions concern how much detail is required in the justificatory statement as a matter of form, how much benefit of the doubt should be given to a statement that is sufficient for some, but not all, circumstances, and—subsuming the other questions—what the *Habeas corpus* is essentially for and whether it ought in general to be administered with a bias against the prisoner (leaving him to other remedies—Prohibition or False Imprisonment—if, on a fuller showing of circumstances, he can make out the commitment to be unlawful.) In addition, *Habeas corpus* admitted of three results—discharge, bail, and remand. The middle option, bail, could be the basis for compromise or inconclusive dispositions—bailing a man whose commitment might be lawful but where holding him further seemed unnecessary, or bailing one whose commitment was probably not lawful, but where keeping an eye on him seemed a tolerable qualification on his not-quite-clear right to liberty. In sum, though issues about the High Commission’s jurisdiction and procedures could be and often were decided straightforwardly on *Habeas corpus*, the writ had the potentiality of diverting the courts to narrow grounds, technicalities, and discretionary indecision. A practice exclusively based on Prohibition might have conducted to easier settlement of the issues.

The overriding reason why the High Commission issues were hard to resolve is that it is close to anybody’s guess what the relevant clause in 1 Eliz. provides by its very language. I have thought it best to outline the possible paths down which policy preferences and the sense of probable intention might lead a judge before looking at the text of the act. Let us conclude with an inspection of the text and the hints in the language that give some sort of countenance to the different possible positions.

The High Commission clause of 1 Eliz. follows immediately on the heart of the act—viz. The clause which “unites and annexes” to the Crown all jurisdiction and authority which had “heretofore been, or may lawfully be exercised for the visitation of the ecclesiastical state and persons and for reformation, order, and correction of the same, and all manner of errors, heresies, schisms, abuses, offences, contempts, and enormities.” Following thereupon, the act empowers the monarch “by letters patent…to assign…when and as often as your highness…shall think meet and convenient, and for such and so long time as shall please your highness…such person or persons being natural-born subjects…as your majesty shall think meet…to exercise, use, and execute under your highness…all manner of jurisdictions, privileges, and preeminences, in any wise touching or concerning any spiritual or ecclesiastical jurisdiction, within these your realms…and to visit, reform, redress, order, correct, and amend all such errors, heresies, schisms, abuses, offences, contempts, and enormities whatsoever, which by any manner spiritual or ecclesiastical power, authority, or jurisdiction, can or may lawfully be reformed, ordered, redressed, corrected restrained or amended, to the pleasure of Almighty God, and the increase of virtue, and the conservation of the peace and unity of this realm, and that such person or persons so to be…assigned…, after the said letters patent to him or them made and delivered…shall have full power and authority, by virtue of this Act, and the said letters patent, under your highness…to exercise, use, and execute
all the premises, according to the tenor and effect of the said letters patent…” I think it is obvious that this language encourages the proposition that the patentees may be given any or all parts of ecclesiastical subject-matter jurisdiction. It is hard to see off-hand how any other conclusion is possible. Note especially (my italics) “to exercise…all manner of jurisdictions…in any wise touching…any spiritual or ecclesiastical jurisdiction…”

On the other hand, there is nothing in the language obviously encouraging to the notion that the Commission may be given secular sanctions. One can try to get mileage in support of that from “…shall have full power and authority, by virtue of this Act,, and the said letters patent…” and from “…according to the tenor and effect of the said letters patent…” The straightforward reading of this language is that the Commission has authority by virtue of the statute to the extent that the patent, pursuing the statute, gives it authority. Since the statute says nothing whatsoever about secular sanctions, a patent purporting to confer them would seem not to pursue the statute. It may be arguable, however, that the statutory language calls attention to the patent so as to suggest that it is to be an independent source of authority, as opposed to a mere implementation of the statute. Would Parliament have added the “according to the tenor and effect” phrase unless it meant to concede something to the monarch beyond mere power to do what the statute manifestly authorizes (for without the added phrase it would manifestly authorize him to give some or all parts of ecclesiastical jurisdiction cum ecclesiastical sanctions)? I do not find this line convincing, but I believe it had some influence.

More persuasively, one may come down on language seemingly designed not to exclude any powers which by any stretch of the imagination can be regarded as ecclesiastical. If that is what Parliament was trying to say, then there is a case of sorts for the proposition that imprisonment does not utterly and in every sense fail to qualify as an ecclesiastical power. The phrases “All manner of jurisdictions, privileges, and preeminences” and “in any wise touching” are critical for this theory, but especially important is the language of the preceding clause. That clause defines what the monarch has in his hands to convey to the Commission as any powers which have “heretofore been” exercised. It is legitimate to take these words as covering not only the traditional or “common law” ecclesiastical powers, but also any powers ever exercised in the past by virtue of statutes. I have already noted that statutes no longer on the books had once enabled ecclesiastical courts to imprison for heresy and clerical incontinence.

Once the former statutory powers are in the door, they can be generalized with at least some tenuous plausibility. I.e., one can say the powers “heretofore” used to enforce the ecclesiastical law included “power to imprison” or even “power to impose secular sanctions”, as opposed to the mere power to imprison for a couple of specific crimes.

If we switch to the other tack and try to use the words of the act to restrict the Commission’s substantive jurisdiction, there is language that must be got around. One can perhaps argue that the broadest expressions (“all manner”, “in any wise”) are so suspiciously broad that they can be discounted as careless, or as intended only to convey the general idea that ecclesiastical jurisdiction can be delegated to special commissioners. I say “suspiciously broad” partly because comparably vague and inclusive language is not used in the preceding “annexation” clause. One cannot doubt that “all” spiritual jurisdiction was annexed to the Crown in so far as that is a synonymous way of saying the monarch was Supreme Governor—meaning inter alia sole titular head of, and embodiment of the authority of, the entire ecclesiastical legal system. In actually
describing what the monarch has, however, the “annexation” clause does not give a picture of ecclesiastical jurisdiction in every dimension. Rather, it specifies what may be taken as only one dimension of that jurisdiction—“power…for the visitation of the ecclesiastical state and persons [etc.] of errors [etc.].” Ecclesiastical jurisdiction so specified is unmistakably made transferable to patentees by the High Commission clause; part of the language is repeated almost exactly. The specified jurisdiction seems to be made transferable over and above what amounts to “all jurisdiction” (note the “and”), but that does not make much sense. For if the copulative is taken literally, the act would read in effect, “The High Commission may be given any and all ecclesiastical jurisdiction and also one part of it—viz. power to ‘visit, reform, [etc.]…heresies [etc.].’ “Is it not better to construe the relation between the vague preceding words and the more specific subsequent ones as follows: “The monarch’s ecclesiastical jurisdiction may in general principle be transferred to patentees, but what specifically may be transferred is his ecclesiastical jurisdiction in the sense that the basic ‘annexation’ clause above singles out and emphasizes as what is notably repossessed by the Crown from the usurping Pope—viz. power to ‘visit [etc.]’”?

To reach this construction, one perhaps needs to be convinced that Parliament could not have intended to subvert localism or appeals, or that historically it had no purpose in view that would justify risking those consequences. Nevertheless, there is a verbal problem—a problem of making sense of language which on close inspection is rather odd, rather hard to make out as deliberately chosen to give the monarch the freest possible hand. In any event, while attention is focused on the words “to visit [etc.]: heresies [etc.]”, restrictive possibilities are opened.

Take it, as the paraphrase constructed above requires, that the monarch is only authorized to give the Commission power to “visit [etc.].” What does that mean? It is not self-evident that those words describe anything narrower than the whole of ecclesiastical jurisdiction. Let us then proceed by picking out the “weaker” or more general expressions: The Commission may be given power to “redress, order, correct and amend…all offences…which by any manner spiritual or ecclesiastical…jurisdiction…may lawfully be…ordered, redressed, corrected, restrained, or amended [so as to please God and promote virtue, peace, and unity.]” Arguably, an “offence” could be any breach of ecclesiastical law, including breach of such duties as the cultivator’s obligation to pay tithes or an executor’s to fulfill the desires of the testator. Breach of the latter sort of duty may not be punishable, but it is surely subject to “ordering”, “redressing”, or “amending” by ecclesiastical courts. God is presumably pleased if tithes and legacies are paid when they are due, and something like the “general welfare” of a Christian country—if that is not too loose a translation of “peace and unity” plus “virtue”—is presumably served. On the other hand, it is surely fair, and on balance more convincing, to take the words in question as referring exclusively to the criminal side of ecclesiastical law. It is at least legitimate “strict construction” to say that “offences” refers to crimes. If the statute-makers meant all breaches of duty remediable in ecclesiastical courts they could have said so. The surrounding words either refer to specific crimes, such as heresy, or to kinds of activity associative with crime in either legal usage (“contempts”) or popular (“enormities”, “abuses”). “Reform” is also a pointer to criminal law, especially because ecclesiastical law itself spoke of its criminal-penal-penitential side as “pro reformatione morum.” On the whole, it is sensible to discount a
degree of statutory pleonasm in the act’s string of words and to follow the more
manageable ones to the conclusion that only criminal jurisdiction is meant.

Beyond this point, it is unnecessary to elaborate the possibilities of verbal
construction for the most important purposes. The resolution that confines the
Commission to heresy, schism, and maybe some allied religious offenses covered by
“errors”, plus those moral offenses that can be seriously considered equally “enormous”,
can obviously be criticized for sloughing “abuses”, “contempts”, and “offences.” It takes
some discounting for pleonasm plus construction by intent to conclude for only a very
narrow slice of criminal jurisdiction. A looser standard of seriousness is easier to see:
Heresy is high-powered company for utterly trivial “offences”; “abuse” can perhaps be
associated with such all-inclusive expressions as “misbehavior”, but its main affinities are
probably more with “pernicious examples” than with the occasional peccadillo or excess
of spirits; “contempt” may have a degree of specific content—deliberate disrespect for
the Church, which is more serious than “peccadillos”, however it is manifested, and is
faintly redolent of religious error. (As will appear from the cases, there were special
problems about the more technical sense of that word—“contempt of court.”) As “peace
and unity” may be taken to point to criminal jurisdiction by association with the secular
“contra pacem”, so may the expression go to imply some restraint on foolishly
aggrandizing the High Commission: Peace and fellowship are hardly to be served, even if
“virtue” is, by making it possible for high officialdom to harass extremely minor sinners.

A final problem of verbal construction requires notice. The “annexation” clause
singles out, in addition to what is perhaps best identified as criminal jurisdiction
generally, power “for the visitation of the ecclesiastical state and persons, and for
reformation, order, and correction of the same.” The High Commission clause says
nothing about “the ecclesiastical state and persons,” but it does use the word “visit” in
addition to “reform [etc.].” If the High Commission clause stood alone, I do not think
“visit” would cause any difficulty. It would probably go only to reinforce the conclusion
that the act is talking about criminal jurisdiction, for it alludes to an ecclesiastical
procedure that fell on the criminal side: Bishops’ visitations of the localities in their
dioceses, at which presentments of a wide range of offenses were taken. Visitations, like
some secular inquests, had a broader information-gathering function than merely bringing
criminal offences to light and furnishing a basis for prosecution, but their form and
content are primarily associative with the enforcement of criminal law. (Minor enough
aspects of it, one must grant, so that “visit” conceivably militates against a seriousness
standard.) The “annexation” clause, however, connects “visitation” with “the
ecclesiastical state and persons.” It seems to call attention to the Crown’s supervisory
power over what I call above “infra-Church affairs” and over Church personnel. Only
after that does it move on to what looks like criminal jurisdiction in general.

From these observations, two contradictory arguments can be developed. Both
require the premise that quoad laymen the High Commission is largely restricted to
serious crimes. Upon that premise, the question arises whether the same standard applies
to clergymen and to some kinds of “infra-Church affairs” even when they involve
laymen. The first argument is that the word “visit” in the High Commission clause is a
link with the “annexation” clause: The Commission may be given what is mentioned in
the preceding clause—not all ecclesiastical jurisdiction, because the preceding clause
does not speak as generally as that, but criminal jurisdiction, or some part thereof, over
everyone, plus further powers over “the ecclesiastical state and persons.” The latter comprise all criminal offenses by clergy, even if the same crime in a layman would be too minor for the Commission; sanctions only appropriate to clergy, notably deprivation; in so far as ecclesiastical law admits of it, power to punish, deprive, or enjoin clergy and other full-time Church personnel, such as officers of ecclesiastical courts, even without charging them with an offense classified as criminal; more controversially, but perhaps, non-criminal jurisdiction over laymen when they are directly involved in the internal management of the Church or hold Church offices—e.g., churchwardens, parishioners qua electors of churchwardens and parish clerks, lay rectors with respect to some duties.

The contrary argument would exploit the difference between the “annexation” clause and the High Commission clause: Whereas the former seems to speak of a supervisory function in the Supreme Governor, the latter does not repeat that language; all it repeats is the word “visit”, inclusion of which is much less significant than omission of “the ecclesiastical state and persons”; the slight change of language in the later clause should be taken as deliberate—i.e., as signifying that supervision of the clergy and “intra-Church affairs”, while worth singling out as a right and responsibility of the monarch, is not intended to be delegable except as it is comprised in the part of criminal jurisdiction that is made delegable.

With this much guidance to the major issues on the High Commission, we may proceed to the cases. Lesser issues will occasionally arise, but what I have outlined covers nearly all that was problematic. In view of the complexity of this field, it may be helpful if I express a view as to the “best bet”—the position on the main issues that seems to me most recommended by a mixture of verbal construction and policy considerations. In brief: The High Commission ought to be restricted for the most part to serious crimes. There is good warrant for not taking “serious crimes” in the narrowest possible sense—i.e., for letting the High Commission proceed in criminal cases if the monarch seems to have intended it to do so without restriction, and if contextual consideration and defensible general criteria can be invoked to make out that a particular situation is serious enough to justify resort to an extraordinary tribunal. Loosening the standard for clerical offenders is justifiable; one should be shy of letting the Commission take over “intra-Church affairs” to any larger extent than that. Use of secular sanctions is hard to justify except by (a) the argument that Parliament intended to preserve, for the High Commission alone, imprisoning power formerly given to ecclesiastical courts by statute and (b) the argument that coercive imprisonment is a useful short-cut for making an extraordinary tribunal more effective than regular Church courts. I would not think it unreasonable to permit imprisonment in the situations literally covered by earlier repealed statutes and to permit coercive detention subject to safeguards. (Insist on a showing that penitential acts have been prescribed or a course of behavior enjoined and that the party has refused to perform the penance or violated the injunction—in the latter case, perhaps that he has been cited and warned of his danger before commitment; make sure that people are not punished under color of coercive detention—i.e., that they are not held when they express willingness to obey, and that they are given a hearing when it is claimed that they have not done what they agreed to; recognize that coercive imprisonment cannot go on forever—i.e., see that the obdurately disobedient are released when they have paid in substitute form all that their conformity could be worth to the Church in view of the offense in question.) Beyond this I would not go, Power to
fine and to demand performance bonds can only be defended by sophistical arguments. No secular punishments aside from the cases covered by earlier statutes can be found in the words of 1 Eliz. Intent to make the Commission more effective than ordinary ecclesiastical courts is reasonable construction outside the words. It is a sufficient concession to that policy to let the Commission operate by rough analogy to courts of equity—to detain coercively within reason and thereby to get quicker and surer results than “the course of the law” sometimes produced.

End of Section 1
Section 2—Cheinye v. Frankwell and Caudrey v. Atton: Two Cases on the High Commission Not Arising on Prohibition or Habeas Corpus

Summary

This Section is devoted to two special and intricate Elizabethan cases. (See the text just below for their peculiar characteristics and relevance.) With reference to straightforward issues about the High Commission’s jurisdiction and powers, the two cases may be counted as authority for the propositions listed below. They can lay claim to more extensive implications, but for reasons that appear in the text that claim should be regarded with skepticism.

(1) The Commission may proceed against an incontinent clergyman. Whatever other sanctions it may or may not apply, it may deprive such clergyman of his living upon conviction—but this was not seriously controversial once the Commission’s jurisdiction is conceded.

(2) Common law courts may not prevent the Commission from taking a suit on the ground that another suit about the same matter is already pending in a regular ecclesiastical court, assuming the suit is intrinsically appropriate to the Commission. Taking a suit in such circumstances is improper, but the remedy must be found within the ecclesiastical system. This is true despite the fact that there was no routine appeal from the High Commission.

(3) The Commission may proceed against a clergyman who speaks against the Book of Common Prayer or refuses to follow it. It may deprive him of his living upon conviction on the first offense as well as upon a subsequent one. These propositions were problematic because of hard-to-interpret provisions of the Uniformity Act (1 Eliz., c.2), by which the Prayer Book was established and acts of opposition to it defined as crimes. The problem is whether, under the statute, any ecclesiastical court could deprive a minister for his first offense against the Prayer Book. To hold that the Commission may do so is probably to hold that regular ecclesiastical courts also may and then, that there is no objection to the Commission’s doing likewise.
The Cases

Two Elizabethan cases on the High Commission have a special character, for which reason they are treated in a separate Section. These cases, Cheinye v. Frankwell and Caudrey v. Atton, did not arise on Prohibition or Habeas corpus, but by way of special verdicts in common law actions. In both cases, the litigation was between a parson deprived by the High Commission and his successor—litigation to test which party was entitled to the property attached to the benefice. Although the specific issues were different, both cases turned on whether the Commission’s sentence of deprivation was lawful. In both, a jury found the facts and left the validity of the deprivation to the judges. I.e., the schematic form of both verdicts was, “The High Commission purportedly deprived Parson A, after which Parson B was inducted into the living and entered on the property; whether A or B is entitled depends on whether A’s deprivation was valid, which question of law we cannot speak to.”

These cases raise questions about the jurisdiction and powers of the Commission. They therefore have implications for the normal contexts in which those questions came up—Prohibitions and Habeas corpus. At the same time, their special form affects the force of those implications. I.e., it does not automatically follow that analogous Prohibition cases must come out the same way as the special verdict cases. In both Cheinye and Caudrey, the High Commission “won”—the sentences of deprivation were held lawful as far as the common law courts are concerned. The decisions therefore arguably imply that the Commission should not be prohibited in analogous circumstances. But that argument can possibly be opposed by considerations of procedural context—in essence, by maintaining that the judges are freer to look into the propriety of ecclesiastical proceedings in Prohibition than upon a special verdict. The cases are accordingly discussed for their own sakes, though in the end attention is given to their implications for Prohibition law.

Discussing them for their own sakes has certain collateral advantages as well. Both were major cases of considerable difficulty. Cheinye was argued in the Queen’s Bench and then upon a Writ of Error in the Exchequer Chamber, where the judgment below was probably upheld. It therefore represents an especially solemn decision. Caudrey, also a Queen’s Bench case, was a protracted and intricately argued lawsuit. To one of its reporters, Coke, it seemed an outstandingly deliberate and far-reaching decision. Some exception can be taken to Coke’s version of the case, but that does not detract from its importance as a challenge to the lawyers and judges concerned. It presents perhaps the most baffling set of issues ever faced by the courts in a case touching the High Commission, or indeed the general subject of relations between the temporal and spiritual legal systems. Caudrey is much more a case on the Uniformity Act than on the Supremacy Act. Although the former comes up in some Prohibition and Habeas corpus cases, it was never so thoroughly discussed. Giving Caudrey detailed attention is therefore partly justified by the picture it gives of lawyers struggling with another statute touching the Church courts, over and above the ones that were largely interpreted through Prohibition cases.

Both Cheinye and Caudrey were triumphs for Coke’s advocacy. (For Caudrey, this is knowable from manuscript evidence. Coke the reporter does not give himself credit for the victory, and the other printed report, Popham’s, does not name the counsel.)
There is irony in the fact that Coke, who by reputation (and more qualifiedly in reality) became the High Commission’s worst enemy, had succeeded as a practitioner in winning two pro-Commission decisions in notably tricky cases. The intrinsic difficulty of the two cases and the careful attention paid to them by Coke and other good lawyers meant that the debate reached beyond routine issues on the Commission’s competence to the wider jurisprudential and constitutional bearings of those issues. For that reason, I consider the cases worth the space required to work them out—for Caudrey a process complicated by problems about the accuracy of Coke’s report in the light of other partially conflicting ones. On the other hand, for the practical purpose of making out what the courts across the board thought the High Commission could and could not do, the contents of this Section are not particularly important. Neither case represents a commonplace situation. Such questions as whether the High Commission could proceed for adultery and whether it was entitled to use secular sanctions are the practical ones, on which the mass of Prohibition and Habeas corpus law bears, but on which Cheinye and Caudrey cast only oblique light. For the practical questions, the reader may go on Section 3 immediately following.

The facts of Cheinye v. Frankwell (1584-88)64 as found by special verdict were as follows: Cheinye, a beneficed clergyman, was presented to the diocesan court for incontinence. He was given a day to clear himself by compurgation, made default, and was subsequently deprived of his living. On appeal to the Arches, the sentence of deprivation was reversed (why does not appear.) Cheinye was then presented again in the diocesan court for the same act of incontinence and again a day was assigned for making compurgation. Before that day he took a fresh appeal to the Arches (grounds not given.) Pending the appeal, the High Commission summoned Cheinye, again for the same incontinence, and deprived him. Frankwell was admitted to the benefice. Either he or Cheinye sued the other in Trespass for taking away tithes. Title to the tithes depended on whether Cheinye’s deprivation by the High Commission was valid.

Cheinye’s lawyer, Wroth, did not argue that the offense of incontinence in a clergyman was too minor for the High Commission. He did not have to, because another strong argument was available: viz. that the Commission may not take over suits pending in ordinary ecclesiastical courts. The Pope, according to Wroth, had no authority to do that, and the most that 1 Eliz. effected was to give the Queen and her commissioners what the Pope had before. This rule will stand with the proposition that the Commission, if so authorized by the monarch, may take any ecclesiastical case that is not already before another court. Towards showing that it may not steal away pending suits, however, Wroth made what became standard arguments for restricting the Commission: 1 Eliz. does not intend to deprive the ordinary ecclesiastical courts of their jurisdiction by permitting the Commission to be given a blank check. By re-enacting 23 Hen. VIII (cf. Ch. 2 above), 1 Eliz. endorses that statute’s policy of localism. The effect of upholding the Commission in any given case is to deprive the party of the appeals he would have if the suit were in a regular Church court. At one point, Wroth says that lack of an appeal is especially inconvenient when the effect is to “disinherit a parson.” With that he is not too far from suggesting that incontinence is simply not “enormous” enough to be a High Commission matter, even though he does not so argue explicitly. I.e., apart from the

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64 See the extended note to Cheinye at the end of this Section.
argument from the pending suit, it would be difficult to maintain that a clergyman could not be deprived for heresy, say, by the High Commission, appeal or no appeal. Saying that deprivation is too severe a penalty for the statute-makers to have permitted without appeal should probably be understood with the addition “save in the rarest and most serious cases, and incontinence is not one of them.”

Wroth also tried to pick holes in the formal legality of the Commission’s sentence as found by the special verdict. We may omit these arguments, for the court rejected them and they say nothing significant about the Commission’s boundaries. (In effect, the judges held that the special verdict found the fact that the High Commission deprived Cheinye, notwithstanding various ways in which, by strict construction of the verdict, it was arguable that the body called the “High Commission” was not identified correctly and the act of deprivation was not so described as to be unmistakably identifiable as that body’s official act. So holding does not imply that the Commission deprived Cheinye lawfully, the real question.)

On the substance, the Court accepted Wroth’s argument in its narrow sense, but used its very premise to conclude against his client. I.e.: The judges held that the Commission exceeded its authority in taking action against Cheinye when proceedings were pending against him in the regular courts. They so held because, as Wroth had argued, such intervention was contrary to the ecclesiastical law itself, and 1 Eliz. did not permit the Commission to be given powers without a pre-existing basis in the ecclesiastical law. On this premise, however, the court held against Cheinye. So far as this court was concerned, Cheinye was found deprived by ecclesiastical process and therefore not entitled to the tithes. His deprivation was erroneous by ecclesiastical standards, but the proper way to rectify that was by appeal, A common law court was not entitled to take note of an error in ecclesiastical law. Coke, of counsel with Frankwell, was responsible for persuading the court to take this course.

It seems clear from the reports that the majority of the court adopted the position above. Leonard’s report, however, though it accords on that, gives a strong pro-High Commission speech by Chief Justice Wray, which amounts to a concurring opinion. Wray says that one who sues in the Arches may “for his own expedition, and for to procure due punishment against the offender” remove the case to the High Commission. (Why the Arches specifically I do not know. Wray’s rule apparently includes under “one who sues in the Arches” an appellee there—in this case a Bishop or his deputy proceeding on presentment, rather than a private complainant. There appears to be no question of the judge of the Arches requesting removal to the High Commission pursuant to 23 Hen. VIII, as opposed to the party who is ultimately plaintiff, though he is immediately appellee.) It is clearly implied that in Wray’s opinion there was no error. The strict formulation would be that whether there was ecclesiastical error was irrelevant, for it is extremely hard to say that ecclesiastical law generally permitted a party to remove a suit to another, or a higher, court except by appeal. Wray’s position must therefore be that the High Commission had been created precisely in order to permit what ecclesiastical law did not—such removal, for the presumable end of seeing an offender punished by fine or imprisonment (the only very meaningful sense of a “due punishment” which could not just as well be imposed by an ordinary ecclesiastical court.) Again, there is no sign that the Court as a whole agreed with this.
Cheinye then brought a Writ of Error in the new Exchequer Chamber (created by statute in 1585 to review King’s Bench judgments.) Two errors were laid: (a) The King’s Bench was right in principle but wrong in application when it refused to act on its opinion that deprivation was erroneous. Rectification of such error ought to be left to ecclesiastical appeal if that were available, but there was no appeal from the High Commission. Therefore the only remedy was for the King’s Bench to take note of the ecclesiastical law and hold for Cheinye. (b) A further reason why the Commission’s sentence was erroneous was advanced, this one not dependent on ecclesiastical law. Viz.: If 1 Eliz. restricts the Commission in no other way, the statute only permits it to do as much as the monarch authorizes it to. As the Queen’s agents, the Commissioners must pursue their authority, which is to say that their commission should be read as a set of instructions to proceed in such-and-such ways and only those ways. In the present case, going by what the special verdict explicitly or implicitly said about the proceedings, the Commissioners had not pursued their commission. That is because the commission empowered them to give judgment upon proof by witnesses or the party’s confession. In the instant case, they gave judgment against Cheinye without establishing as a fact, by either of those two means, that he committed incontinence. Rather, they took it as a fact when he pleaded the suit in the Arches as a reason why the Commission lacked jurisdiction (as a common law court would take a demurrer on a plea in confession and avoidance of alleged facts.) By Cheinye’s theory, the commission did not refer to a “confession” in this special legal sense, but only to a direct admission of the crime.

How the Writ of Error turned out is not reported, but two judges speak to the two exceptions, both tending to uphold the King’s Bench. The best guess is that the judgment was affirmed. The argument that no appeal was available was made at the Bar by Fenner, now representing Cheinye. Coke, still representing the other side, replied that the de facto lack of an appeal did not interfere with the principle that an error within the ecclesiastical system is beyond the common law’s cognizance. If the Delegates, the highest regular ecclesiastical court of appeal, gave a sentence which a common law court regarded as erroneous, Coke said, it would still be necessary to leave rectification to the ecclesiastical system. There would be no ordinary appeal from the Delegates, but still, in a manner of speaking, “the only remedy is ecclesiastical appeal.” So with the High Commission.

Coke made his point in this high-and-dry way, but it does not have to come to a relentlessly hard rule. As Justice Periam observed, Cheinye was not really foreclosed from reversing the erroneous sentence. According to Periam, civilians had been consulted at an earlier stage of the present case and had certified as a matter of ecclesiastical law that an appeal lay from the High Commission to the monarch. The civilians’ reason was that before the Reformation one could appeal from delegates of the Pope to the Pope himself. (There were grounds for doubting whether the monarch could review decisions by the Delegates, in the sense of the “ecclesiastical supreme court” established by the statute of 25 Hen. VIII, c.19. The question was whether the statute meant to forbid such reviews. A small amount of pre-Civil War litigation on that matter—discussed later in this study—tends to affirm the royal power to grant review commissions “of grace”, though it is less than clearly decisive. Even, however, if the opposite conclusion were reached, I do not think Periam’s point and the civilians’ would be affected. Had the Pope set up a special first-instance court like the High Commission, it would necessarily have been a delegation of his plenary powers, and its decisions would have been appealable to
Rome as all ecclesiastical decisions were before the Reformation. Nothing in the language of 1 Eliz. authorizing the High Commission puts obstacles in the way of royal review of that court’s decisions comparable to those that 25 Hen. VIII argueable, though improbably put in the way of review of the Court of Delegates’ decisions.

In response to Coke, Fenner cited a case from 16 Eliz.: One Foxe was deprived for incontinence on the last day of Parliament; Parliament pardoned the offense; the sentence of deprivation was held void. I suppose this was meant to say that common law courts will sometimes overrule sentences of deprivation without waiting on the ecclesiastical system. (I presume the ecclesiastical court could and should give effect to the pardon. If the first-instance court refused to, the party could presumably appeal the refusal as an error. The ecclesiastical rule that appeal suspends sentence would seem to remove the objection that the appellate court would be intervening to give effect to a pardon that did not exist when the original court gave sentence. Quaere tamen.) Chief Justice Anderson replied to Fenner that his precedent had little force because “it is against a general statute, of which everyone ought to take notice.” I.e. (I take it): Of course common law courts may enforce statutes, and if an ecclesiastical sentence which comes before a common law court is deemed to violate a statute it should of course be treated as void. There is no obligation to take the sentence as valid until it is reversed by an ecclesiastical court. That situation is not like the present one, where the standard by which the ecclesiastical sentence may be deemed invalid is ecclesiastical law. (Anderson assumes that ecclesiastical error by the High Commission does not violate 1 Eliz.; it is no different from error on the part of any other ecclesiastical court. Can the assumption be questioned? Wroth and Fenner can perhaps be criticized for not maintaining the contrary explicitly enough, but allowing the vulnerable argument from appeals to carry too much weight. Is it likely that the statute-makers would have set up a court stringently limited in its subject-matter jurisdiction, confined to criminal cases—in which the Church has a collective interest—, not subject to ordinary appeal, and free to apply any unwarranted version of ecclesiastical law? Setting up such a court is arguably not the same as erecting a final court of appeal and giving it absolutely the last word. The latter of course could administer its law irresponsibly, but the context militates against it—a context of prior decisions submitted for review and of predominantly civil cases in which the court usually has no motive except to do legal justice by its best lights.)

To the second objection—lack of appropriate proof or confession of Cheinye’s incontinence—Justice Periam replied simply that it did not matter whether the Commission had pursued its instructions. The sentence of deprivation was still void—meaning presumably “voidable”, “erroneous” owing to the improper preemption of a suit pending elsewhere. (I do not think Periam could mean that failure to pursue the instructions would itself be an error uncontrollable by common law courts, for that would surely be head-on violation of the statute.) The position is unpersuasive, it seems to me. Why should the invalidity of the Commission’s sentence by statutory standards not be taken note of, even though its invalidity in another sense cannot be reached? Chief Justice Anderson took the bull by the horns more firmly, holding in effect that the offense was sufficiently confessed, so that the instructions were not violated. He reached this via the proposition that a party who appears before the Commission and refuses to answer may be convicted as if he had confessed. Granting that the statute puts no obstacle in the way of treating silence as confession, it follows reasonably enough that a pleading confession,
or admission of guilt merely implied in taking exception to the Commission’s jurisdiction before the Commission, is also as good as a direct confession. The underlying proposition obviously needs defense. Why should the instructions not be narrowly construed, and the statute construed as insisting that they be? There may of course be good answers, including standard canons of construction. The instructions could have been written to explain the sense of “confession” if the intent was to narrow the application of the term, and the statute could have both limited the monarch’s power to instruct and commanded strict construction of any instructions given pursuant to it.

To summarize the Exchequer Chamber stage: Both exceptions to the judgment below were rejected, each on somewhat different grounds, by both judges heard from in the report. No other judge contradicted Periam and Anderson or spoke in favor of Fenner’s objections, so far as the report shows. We may take it as highly probable that the Queen’s Bench decision was upheld and treat it as authority.

Does the Trespass case of Cheinye v. Frankwell have implications for Prohibition cases? I suggest the following: (a) One certainly could use Cheinye as authority for refusing to prohibit if it were complained that the High Commission had taken over a case pending in a regular ecclesiastical court, but I am not sure one would be constrained to. There is a difference between deciding whether to cut off improper ecclesiastical proceedings by Prohibition and dealing with a special verdict in an action between party and party. It makes conservative sense to hold that a verdict finding deprivation goes against the deprivee, even though the common law court believes the deprivation erroneous. There is a way in which the deprivee is at fault for not helping himself within the ecclesiastical system, while his successor in the living cannot be blamed for assuming the benefice was vacant. Prohibitions to keep one ecclesiastical court from infringing on another were always problematic; such infringement could always be represented as error in ecclesiastical law subject to appeal (cf. Vol. III, p.155 ff.) It was not unanimously considered beyond the range of Prohibition, however, and the High Commission is surely a special case—a court whose errors were at least not straightforwardly appealable and the creation of a statute very specifically intended, according to almost all interpretations, not to destroy the vested interests of regular ecclesiastical tribunals.

(b) It was held that the High Commission erred in depriving Cheinye because it was bound by ecclesiastical law and failed to observe it. So holding discountenances the theory that the Commission was not strictly an ecclesiastical court, but a statutory tribunal on which the monarch was authorized to confer powers which ecclesiastical courts did not have de jure. Most controversy was about power to fine and imprison. One could of course, consistently with Cheinye, believe that the unexpressed intent of the statute was to permit conferral of those specific powers—essentially because creating an extraordinary court for a few “enormous” offenses would not have made much sense if the intent was to leave the suppression of enormity to ordinary spiritual sanctions. It is a more general license to the monarch that Cheinye stands in the way of—license in effect to authorize a special variant brand of ecclesiastical law to be administered in the High Commission alone. For example—the direct application of Cheinye, the statute cannot permit the monarch to give the Commission authority to take over suits already pending in other ecclesiastical courts. At any rate, to see such permission it would be necessary to find common sense or contextual reasons for it comparable to the possibly good grounds for the secular sanctions; they would surely be hard to find.
The case may be counted, but not too strongly, in favor of the proposition that clerical incontinence and power to deprive for that offense are within the High Commission’s jurisdiction. Although the contrary was not directly urged, the judges could have decided for Cheinye if they thought the subject matter was *ultra vires* for the Commission; the sentence would not then have been an ecclesiastical error, but simple contravention of the statute.

The second case in this Section, Caudrey (or Cawdry) v. Atton (Acton, or Hatton) is one of the best known on the High Commission. The reason for this is that Coke not only reported the case, but took it as the occasion for what he called his “Treatise on the King’s Ecclesiastical Law.” The “Treatise”, appended to *Caudrey*, is inserted as a special section at the beginning of Vol. 5 of Coke’s Reports. It is a historical demonstration that ecclesiastical supremacy had attached to the English Crown from the remotest time and had been recognized or asserted in one way or another in all ages, so as to keep the title alive even at the nadir of Papal usurpation. The “Treatise” is the classical statement of the lawyer’s version of Anglican Erastianism. In considering Coke’s multifarious and stormy dealings with the ecclesiastical authorities, it is important to remember how implicitly he believed that the Royal Supremacy was an immemorial feature of the law and an inseparable part of the constitution—a belief, be it said, that can cut several ways. It is not the “Treatise” that concerns us here, however, but Caudrey’s Case.

One of the several resolutions in the case, as Coke represents it, suggested the large themes of the “Treatise.” That was the court’s holding, in connection with one of a number of debated points, that the monarch could have created a High Commission without the authorization of 1 Eliz.—could have created it, that is, by virtue of the “common law” ecclesiastical supremacy which the “Treatise” proceeds to prove. *Caudrey* as reported by Coke is the clearest holding to that effect. Publication of the report made this “resolution” widely available knowledge. I have no reason to think the proposition was much doubted in the legal community. The interesting question is what it implies. I have suggested in the Introduction to this Section that the answer is probably “Not much.” There is no sign that Coke himself ever repudiated the “resolution” in *Caudrey* that begot his “Treatise”, but when he was a judge he certainly did not take it to mean that the monarch could confer unlimited jurisdiction on the Commission by prerogative. What may have been implied by asserting the prerogative in *Caudrey* itself will be considered below.

Another question is prior to that one: Did the court in *Caudrey* actually resolve all Coke says it did? Skepticism is permitted by other reports, especially a good MS. (Add 25,211). The MS. does not quarrel with Coke on the basic shape and outcome of the case. The only question, here as on quite a few other occasions, is whether Coke “improved” the case retrospectively, reformulating what was argued and held so as to bring it a little closer than reality to what ought to have been. By stating the question I do not imply an affirmative answer. I shall, however, first discuss the case as it appears in the MS. and then come back to whether Coke’s version is significantly at odds.

About the facts of the case, the reports do not differ in any way that matters for the substance. (There are some discrepancies with collateral implications, principally for the

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*See the extended note on Cheinye and Caudrey at the end of this Section.*
accuracy of Coke’s report—see the Note.) Like Cheinye above, Caudrey arose on a special verdict in a common law action (Trespass according to Coke and the other printed report, Popham; Ejectment according to the major MS., the other MS. saying nothing on this point; the difference does not matter for the legal issues.) Again as in Cheinye, a deprived parson (Caudrey) sued his successor in the living to try the validity of the deprivation. The jury found the manner and cause of Caudrey’s deprivation by special verdict, leaving it to the court to judge its validity. In substance, he was deprived by the High Commission for preaching against the Book of Common Prayer and not using it in the required way in conducting services (which means almost certainly that he was a Puritan.) There were reasons unique to the particular offense and the circumstances for doubting that Caudrey was deprivable (a) by any ecclesiastical court and (b) by the High Commission in any event. (I must let these reasons come out as they arise in argument, instead of summarizing them in advance, in order not to distort the case as argued.) Besides putting the substantive legality of the deprivation in question, the special verdict raised some technical problems—essentially how strictly the verdict should be construed, or whether some arguable flaws or ambiguities should be taken for or against Caudrey.  

Going by the MS., Caudrey’s counsel, Finch, led off with the technical points: (1) The special verdict found that Caudrey was deprived by the High Commission, but it did not find expressly that the members of the Commission were natural-born English subjects, as 1 Eliz. required them to be. Therefore, by Finch’s theory, whether or not the deprivation was substantively lawful, it was not a fact before the court that a lawfully constituted body had pronounced the sentence. Finch maintained that although the judges might know of their own knowledge that the Commissioners were native subjects, they were not entitled to act on that knowledge, but were bound by the record. He argued further that although the special verdict implied that the native-birth requirement was satisfied (by saying that the Commission was appointed “secundum tenorem actus” this was insufficient—strict insistence on explicit findings was required in construing special verdicts. For both of these points he cited various authorities on judicial notice and on going by implication in the matter of special verdicts and related contexts. (2) The special verdict stated that Caudrey was deprived by the Bishop of London (a member of the Commission) “with the assent” of several other named members. Finch maintained that this language failed as a finding that a formally lawful sentence had been given. His reason was that High Commission sentences must (by the terms of the patent presumably, for 1 Eliz. imposes no such requirement) be the joint act of at least three members—whereas the verdict represented the sentence as the act of only one, to which others merely assented. If I understand his drift, Finch argued in support of this point that it is especially important to insist on the formal correctness of ecclesiastical acts, because once their formal correctness is granted their validity by ecclesiastical law may be (though he did not think it was in this case) beyond common law scrutiny.

From these matters, Finch moves on to the substantive validity of the deprivation. He starts off by urging that the offense of speaking against the Prayer Book is not malum in se as a matter of ecclesiastical law or otherwise. It was admittedly an illegal and punishable act in the sense of a malum prohibitum. That is because it was made unlawful and subjected to punishment by the Uniformity Act (1 Eliz., c.2.) But in Finch’s view the statute did not declare pre-existing law, or merely attach specific sanctions to activity that
was already wrongful or intrinsically wrongful. Rather, the statute created—as it were *ex nihilo*—the crime of speaking against the Prayer Book.

Several lines of argument can proceed from the premise that speaking against the Prayer Book is *malum prohibitum* only. Although the report does not make the structure of his speech totally clear, I think Finch can be credited with using the phrase in all the possible ways. He argues for his conclusion—that Caudrey was not validly deprived—both from the premise that the offense is *malum prohibitum* and without that premise. To expound Finch’s argument in its complexity, a preliminary word about the problems of applying the Uniformity Act is necessary.

For clerical opponents of the Prayer Book, the Uniformity Act appoints the following sanctions:

(a) Upon conviction for a first offense, forfeiture of a year’s income from the offender’s benefice plus six months’ imprisonment.

(b) Upon conviction for a second offense (meaning an offense committed after the first conviction), a year’s imprisonment and the offender to be deprived of his benefice *ipso facto*. (i.e., upon a second conviction the living is automatically vacant; it is not necessary to go through the formality of a suit to obtain a judicial sentence of deprivation—an ecclesiastical suit, for only ecclesiastical courts could deprive judicially.)

(c) The statute gives secular courts jurisdiction over all the offenses it creates or appoints sanctions for, including clerical opposition to the Prayer Book. The statute also, however, gives ecclesiastical courts authority to “reform, correct, and punish by the censures of the Church” anyone who commits the offenses specified in the act. i.e., a system of essentially concurrent jurisdiction was set up. How exactly it was meant to work was the source of the problem in *Caudrey* and sometimes a difficulty in other cases. Clearly only secular courts could impose the two clearly secular punishments designated in the act—forfeiture of income and imprisonment (apart from the possibility, not anticipated by the statute-makers or discussed in this case, that the High Commission uniquely might be allowed to use imprisonment as a “censure of the Church”, provided the offense fell under its jurisdiction.) Clearly ecclesiastical courts were not in general debarred from proceeding against the same offense and punishing it by spiritual sanctions. For the instant case, the ecclesiastical role *quoad first offenders* is all that immediately concerns us, for Caudrey was admittedly a first offender. Finch’s job was to show that the role assigned to ecclesiastical courts by the statute did not include power to punish a first offender by one “censure of the Church”, viz. deprivation of the living. That conclusion, however, can be defended in two different forms.

(1) Ecclesiastical courts may not touch a first offender at all; the only procedure available against him is secular prosecution. The reason is that the only punishment to which he is made liable is one that only a secular court can impose. It is helpful, though not essential, to this conclusion to posit that the offense—speaking against the Prayer Book by a clergyman—is a *malum prohibitum*, for committing a *malum prohibitum* can only expose one to the statutory penalty attached to the offense. Arguably, the statutory penalty here is solely forfeiture of income plus imprisonment, to which only a secular court can sentence a man. I say “helpful but not essential” because one could argue that the statute simply or “positively” limits punishment of the first offense to the secular forfeiture and imprisonment, whether the crime is *malum in se or malum prohibitum*. But if one denies that the statute has such an intent or effect, the classification of the
crime makes a difference. An open-and-shut secular *malum prohibitum*—let us say importing Irish horses without a license—is probably not punishable at all except as the statute appoints a penalty—say £10 per horse—and not punishable in any other way, even by a smaller fine. A clear *malum in se* is by definition punishable somehow; discretionarily within limits if neither legislation *nor ius non scriptum* prescribes a definite punishment (such a prescribed punishment could perfectly well be imposable by ecclesiastical courts only.) A statute appointing a definite penalty for a *malum in se* may go to exclude all other punishments, but whether it does is a question of interpretation. If the statute is not construed to have such exclusive effect, penalties that would have been lawful before remain lawful—perhaps not only lesser penalties, but usually lesser ones because it is generally hard to read penalty-creating statutes as not intended to set maximum penalties. There is a certain justification for regarding ecclesiastical sanctions as generically “lesser” than temporal ones, and in any event their different character and purpose tend to suggest that a statute imposing a definite secular penalty for a *malum in se* may not mean to affect concurrent ecclesiastical penalties—granting that ecclesiastical jurisdiction is not tolled by the act imposing the secular penalty (another question of interpretation.)

(2) Ecclesiastical courts are not excluded from proceeding against a first offender, but they may not punish him by deprivation. Rather, they are confined to lesser spiritual sanctions, such as admonition or penance. This position comes to saying the statute does not appoint forfeiture plus imprisonment as the only punishment for the first offense. It appoints those punishments directly and, by the implication of its reservation of ecclesiastical jurisdiction, authority to impose spiritual sanctions for offenses in the statute, “the censures of the Church.” Those “censures”, however, should be taken to mean “censures other than deprivation.” This conclusion can be reached by two routes:

The first is to say that the emendation—“other than deprivation”—is implied by the statute’s making deprivation the consequence of the second offense. It would be odd for Parliament to have provided for *ipso facto* deprivation only after a second offense if it intended for clergymen to be deprivable by ecclesiastical process on the first offense. Once there has been a conviction—a secular one, or even perhaps an ecclesiastical one eventuating in a lesser sanction than deprivation—, it may be perfectly lawful for ecclesiastical courts to proceed for a subsequent offense and deprive. If there are problems about that, we need not reach them. What is clear is that the statute-makers thought deprivation too severe a punishment for a clergyman who has gone wrong only once—or, more precisely, who has not once been called to account and thereby put on warning.

(2) It is not necessary, convincing though it may be to construct an implied limitation on the ecclesiastical censures applicable to a first offender from the statute’s linking deprivation to second offenders. For one thing is even clearer: Surely the statute permits ecclesiastical courts to punish people only by lawful ecclesiastical censures—lawful, that is, by the standards of ecclesiastical law. Now (as we shall see Finch trying to show), ecclesiastical law does not permit deprivation of clergymen because they have committed *mala prohibita*. If it can be proved that speaking against the Prayer Book, at least on the first offense, is unmistakably a *malum prohibitum*, then it follows that Caudrey was wrongfully deprived.
Finch puts this line of argument first in his discussion of the substance. It has the advantage of avoiding any real construction of the statute’s intent. The words of the section saving ecclesiastical jurisdiction say that spiritual courts may use any “censure of the Church” against any offender, with no distinction between first and subsequent. By the letter, that may seem to include deprivation. But one qualification must be understood—not because something intended was not said, but because no one using language normally would consider it necessary to put in an express qualification. Obviously “any censure of the Church” means “any lawful one”, “any censure that ecclesiastical law allows to be imposed in a given situation.” Deprivation is simply not a lawful censure for a *malum prohibitum*—just as, say, hanging is not for the *in se* crime of fornication. A statute could no doubt make deprivation imposable by ecclesiastical courts for a *malum prohibitum*, and possibly the Uniformity Act has that effect with respect to second offenders, but it certainly does nothing of the kind with respect to a first offender. On the other hand, the disadvantage of this argument is that it calls on a common law court to look into the ecclesiastical law and invites the response that they are not competent to judge ecclesiastical law (cf. *Cheinye* above.) For that reason, Finch necessarily addressed himself to wider questions about the statute’s intent and how to make applied sense of its puzzling features.

With these considerations in mind, we may look at Finch’s several points. Be it noted that he says nothing specific to the High Commission. The contention is that no ecclesiastical court, High Commission or other, was entitled to deprive Caudrey for his first offense. So far as appears, Finch saw nothing to be gained by arguing that the Commission lacked jurisdiction to proceed against a clerical defamer of the Prayer Book, except in so far as all ecclesiastical courts lacked it with respect to the first offense. At most, a brief and somewhat cryptic remark at the end of his speech touches the High Commission in particular. The following are Finch’s specific arguments:

(a) Towards establishing that by ecclesiastical law a clergyman may never be deprived for a *malum prohibitum*: There is authority to show that a clerk may be refused (i.e., the patron’s nominee may be turned down by the Bishop) because he has committed a *malum in se*—perjury is the example in the case cited. Finch takes it for granted that a clerk may not be refused because he has committed a *malum prohibitum*. He assumes further, as is clearly reasonable, that a clergyman already installed in a living may not be deprived for a cause that would not justify excluding an uninstalled candidate.

(b) Towards establishing that speaking against the Prayer Book by a clergyman is unmistakably a *malum prohibitum*: Finch recognizes that the offense can be assimilated to schism. I.e., it could be argued that although the specific act of speaking against the Prayer Book is “created” by the Uniformity Act, it is not really “created *ex nihilo*.” Rather, the statute operates to specify what shall count in the future as a species of schism, a pre-existing *malum in se*. Finch does not give a fully articulated counter-argument, but he suggests an approach. Schism, he says, means separation from the unity of the Church; it is analogous to sedition, or separation from the body of the *respublica*. With schism so defined and analogized, Finch asserts, rather than argues, that speaking against the Prayer Book is not an instance of it. The thought, I suppose, is that merely saying one disapproves of a prescribed liturgy (or even, perhaps, the “civil disobedience” of refusing to follow it exactly, if Caudrey was convicted of that too) does not bespeak the anti-social spirit required for schism and its secular cousin, sedition. It is like
expressing disapproval of a particular secular law (or perhaps even disobeying it with willingness to take the consequences), rather than like the acts and utterances that would constitute sedition—expressions of contempt for the law or the government generally, active steps short of treason to subvert the government.

(c) Towards clearing away a possible objection to classifying the offense as a malum prohibitum. Finch says that not coming to church, another offense subjected to secular sanctions by the Uniformity Act, is a malum in se. He proves this by citing Fitzherbert (i.e., an authority antedating the Elizabethan Settlement) for the point that Prohibition does not lie to stop an ecclesiastical prosecution for failure to attend church. The utility of this citation is not brought out in the report, but I suspect it is twofold. First, it might be possible for someone to suppose that the offenses collected in the Uniformity Act are all of the same sort—all mala in se or all mala prohibit. To leave such an impression uncorrected would invite an opponent to discover that not coming to church is a malum in se and then to argue that speaking against the Prayer book must also be, or at least that the intent of the statute must be to permit all the offenses it covers to be punished as if they were in the higher class to which some belonged. So arguing is the more plausible because not coming to church (which by the statute includes skipping a single Sunday without a valid excuse) seems the more minor offense and was in fact subject to a lesser statutory punishment. Therefore Finch anticipates: The two offenses are not of the same nature; what makes one a malum in se and the other a malum prohibitum is not that one was morally worse, but that one was prosecutable in ecclesiastical courts without any legislated basis, whereas the other could not be prosecuted there before the Uniformity Act.

Secondly and more significantly, Finch takes up the fact that the text of the statute is different with respect to the two offenses. He introduces his point by saying that the offense of failing to attend divine service is “at the censures of the Church.” The phrase is directly out of the statute; the idea is that ecclesiastical sanctions apply to the two offenses in rather different ways. The Uniformity Act expressly makes non-attenders liable to the censures of the Church and to a forfeiture of 12d. per offense, the forfeiture to be levied by the churchwardens by distraint. Speakers against the Prayer Book are not made liable to the censures of the Church in comparable express terms. In so far as they are liable to them at all, it is by virtue of the statute’s separate, general saving clause for ecclesiastical jurisdiction. But in view of the difference between the section on failure to attend church and that on speaking against the Prayer Book, is the best conclusion not that the latter are not subject to ecclesiastical sanctions at all, at any rate on the first offense? An intelligible pattern can be seen: Not attending church, a malum in se, was prosecutable in ecclesiastical courts and solely punishable by spiritual sanctions before the statute. The statute affirms the status quo by subjecting the offense to ecclesiastical censures in terms and then superadds a secular penalty. It is significant that no secular jurisdiction to impose the pecuniary penalty is conferred, but only a power to distraint. (A basis for involvement of the secular courts is created, for the churchwardens’ distraints could of course be challenged, like any other distraint, by ordinary common law process, but that is different from creating secular authority to punish.) Speaking against the Prayer Book, a malum prohibitum, is not expressly subjected to the censures of the Church, but solely to forfeiture and imprisonment imposable as a punishment after conviction exclusively by secular tribunals (I presume without discretion to mitigate.)
The best conclusion seems to be that the crime, at least on the first offense, is simply not liable to ecclesiastical censures, as it was not before the statute. We have, in short, an argument for position (a) above—ecclesiastical courts may not touch a first offender against the Prayer Book in any way. As I have shown, however, it is possible to retreat from that position and still maintain that such offenders are not liable to deprivation.

(d) Argument (b) above acknowledges the difficulty raised by schism and dispossession of it, leaving the implied conclusion that if speaking against the Prayer Book is not schism it must be a malum prohibitum. Later, Finch acknowledges that the either-or choice may not be compelling. His argument shifts to an amended proposition: Not only is deprivation unlawful for any malum prohibitum; it is unlawful also for some mala in se—“unlawful” meaning still by the standards of ecclesiastical law, without reference to the positive effect of the Uniformity Act.

Towards establishing the general point that deprivation not always be imposed when a clergyman commits a malum in se: There is authority that clergymen may not be deprived for riot or drunkenness, yet those are mala in se.

Towards showing that even if speaking against the Prayer Book is a malum in se (short of schism), it is still not punishable by deprivation on the first offense: On the distinctly intra-ecclesiastical authority of Linwood, the offense of “speaking against religion” is punishable only by excommunication the first time; on a second offense a clergyman may be deprived. Linwood, that is to say, gives a kind of countenance to the view that the Uniformity Act “declares” an existing malum in se—“declare” meaning here not simply “restate” but “redefine”, “specify for altered circumstances that x shall be taken as an instance of the existing genus y.” One should, I think, say only “a kind of countenance.” The position is not compelling, not preferable to the view that speaking against the Prayer Book is a malum prohibitum. Indeed, it is probably dubious to admit “redenomination” as a form of “declaration”, at least in the absence of statutory language professing to impart the flavor of an old bottle to new wine. More concretely, it is puzzling to see how denouncing a Prayer Book that made no pretense to exist before 1559 (and made no pretense to be the only order of worship acceptable to God) could be other than a crime that came into existence with the Prayer Book. If ecclesiastical courts could proceed for “speaking against religion” before and after 1559, it would seem that after that date they must mean something like what they meant before—something more basic than expressing disapproval of some features of a new document. Perhaps wholesale denunciation of the Establishment would count; perhaps ecclesiastical courts would be entitled to take note of new documents and new legislation towards making out a speaker’s generally defamatory intent “against religion”, but surely bare speaking against the Prayer Book derives its criminality solely from the statute that makes it criminal and need not have done so. (Suppose the Uniformity Act had not created the offense, but had merely required the use of the Prayer Book in churches. It might still be legitimate to take note of the statute in the larger context of making out that a man had spoken “against religion”, but it would be hard to find criminality in an isolated critical utterance. By the statute as it is, but only by it, it is probably not too strong too say that the least of such utterances is criminal in a clergyman, at any rate if they occur in a sermon. With possible ambiguity as to whether public utterances outside church services count, the act makes it criminal for a clergyman to “preach, declare, or speak anything in the derogation or depraving of the said book, of anything therein contained, or of any part
thereof.” Non-clerics are forbidden under criminal penalties to speak publicly to the “derogation, deparing, or despising” of the Prayer Book of any part of it. *Quaere* whether “despising” together with the statute’s mention of ballad-makers and stage-players as prospective defamers especially in need of warning—points to a slight difference of standard, a sense in which tone, intent, and effect were meant to be a little more relevant in the lay case than the clerical. “Deprave” in 16th century usage is probably no stronger than “derogate”—“cause something to be less well thought of”—without necessarily making it an object of ridicule or contempt. ) If these arguments are not accepted, however,—if one insists that speaking against the Prayer Book is continuous with the prior crime of speaking “against religion”—nevertheless, Linwood shows that deprivation may not be imposed until the second offense.

(e) Now Finch turns away from making out that speaking against the Prayer Book is not a deprivable offense by ecclesiastical law and toward straight construction and application of the statute. He starts by maintaining that the statute’s “affirmative” language imposing a penalty for the first offense implies the “negative” addition “and not otherwise.” This argument runs into the canon of statutory interpretation that attributed greater force to “negative” than to “affirmative” imperatives—in other words, that opposed reading restrictive implications into positive statements. Nevertheless, it is perfectly sensible to suppose that statutes setting penalties for *mala prohibita* do carry the implication “and not otherwise”, not because of their grammatical form, but because of their legal character. More seriously, the argument runs into the clause of the statute reserving to ecclesiastical courts power to punish all the offenses mentioned in the act. It is a little strange to read “and not otherwise” into the provision for forfeiture and imprisonment when this act goes on to provide for what looks like an “otherwise.” If, however, Finch’s point were conceded, position (a) in the analysis of the issues above would be established and the case clinched: If the statute excludes all punishment for a first offense except forfeiture and imprisonment, then it excludes all ecclesiastical censures, including deprivation.

(f) Finch next argues for preferring the secular law when it collides or overlaps with ecclesiastical law. This argument is quite clearly an attempt to overcome the weakness in (e). As I suggest, it is not very convincing to say that the surface meaning of the statute excludes ecclesiastical courts from meddling with first offenders against the Prayer Book, when a prominent clause of the act seems to go out of its way to not to exclude them from anything covered by the act. Therefore Finch moves from the “surface meaning” to a general policy of the law and of statutory construction.

In one form, his argument comes to the unreasonableness of “double vexation.” Exposing people to both spiritual and temporal punishment for the same act is suspect. So is any form of “double exposure.” The common law tries to avoid it and does so by taking jurisdiction itself when a competing tribunal has a plausible but ambiguous claim to a share of jurisdiction. (To show that his point transcends temporal-spiritual relations, Finch cites a dictum by Babington in Y.B. 8 Hen. VI, f.31. All Babington says is that a franchise may not have cognizance of a battery that starts outside the franchise and continues within it. The act of beating a man from one place to another is a single trespass, liable to only one suit, and the suit must be at common law despite the franchise’s “plausible but ambiguous” claim to jurisdiction when the tort was committed inside its boundaries.) No doubt a statute could impose two punishments administered by
separate tribunals for one offense, but the assumption should be that statutes do not intend such unfair and inconvenient arrangements. If the “surface meaning” of the Uniformity Act rather suggests that Parliament did intend to impose two-way liability, the statute should nevertheless receive “reasonable construction. It should be construed to save the policy of the law. The best interpretation is therefore that the act imposes only one punishment, and when the choice is between a temporal and a spiritual one the former should be preferred.

(About double vexation in a stricter sense Finch does not speak, but he may have had it in mind. If a man can be prosecuted in a spiritual court and punished by ecclesiastical censures, and subsequently be prosecuted in a temporal court and punished by forfeiture and imprisonment, or vice versa, he is literally twice vexed for the same act. That is considerably worse than merely being in a position, prior to prosecution, to be “hit from either side”, even though the lesser evil is an evil. It is a source of uncertainty as to the cost of misbehavior, which may mean less effective deterrence despite the appearance of menace to the right and to the left. The fairness of indistinguishable culprits’ being exposed to very different fates as luck has it is in any event highly questionable. Double vexation proper would be preventable only by a rule that previous prosecution in the other jurisdiction is a good plea to stop a second prosecution for the same crime. There is nothing in the Uniformity Act to require such a rule, which is an additional reason to suppose that it does not confer double jurisdiction.)

In its second formulation, Finch’s point does not so much stress the moral doubtfulness and legal inconvenience of exposing people to two punishments as the mere policy of the law whereby temporal jurisdiction was preferred over spiritual when there was in some sense a choice. The argument shows that there are common law contexts where secular law is held to preempt a field in which ecclesiastical law seems to have a legitimate interest. It concludes that a statute which is ambiguous as to the apportionment of jurisdiction between secular and spiritual tribunals should be construed as giving secular courts exclusive authority, even though the statute deals with matters of interest to the Church. The step from premise to conclusion can be disputed. Insisting on the temporal law’s general title to be preferred over the spiritual is still worthwhile for the more modest purpose of reinforcing the point just above: If double punishment is intolerable, there cannot be much doubt but that the secular should win—the punishment with “teeth”, obviously put in the statute for that reason. It does not hurt to add that letting it win out is consonant with a more general policy.

Finch defends the principle that “when the spiritual law meets with our law [the latter] will hold plea” by several citations:

(i) The best is Brooke, Prohibition 14, 22 Edw. IV. The case there is an ecclesiastical suit for defamation prohibited, not necessarily because the suit was as such inappropriate to the ecclesiastical court, but because a common law suit was subsequently brought turning on the same questions of fact. In other words, the ecclesiastical court was not out of bounds, or involved in something in which it had no legitimate interest; the common law was simply preferred in a situation in which it would be inconvenient for the same matter to be tried twice. An abbot allegedly detained a married lady against her will “to make her a meretrix.” Her husband talked about the episode, whereupon the abbot sued him in an ecclesiastical court for defamation. Then the husband, on the wife’s behalf, brought an action of False Imprisonment. The ecclesiastical suit was prohibited, and
Brian, the only judge who appears in the Abridgment, held that Consultation should not be granted. The report does not tell what the defamatory words were. By later standards, if the husband said “The abbot falsely imprisoned my wife”, the words would probably be actionable at common law and therefore not permissible as the subject of an ecclesiastical suit—contra if he had said “The abbot seduced, or tried to seduce, my wife”. By the standards of 22 Edw. IV, before the development of common law defamation in the 16th century, it is probably all one—a perfectly appropriate ecclesiastical suit, prohibited only because the common law acquired a preemptive interest in ascertaining the facts via the action of False Imprisonment.

Brian goes on in the Abridgment to cite other cases showing, as he puts it, that “where the common law may meddle, the spiritual court shall not meddle.” The generality in a sense serves Finch’s purpose, but the other cases are less useful than the principal one. They come to saying that the ecclesiastical courts may not entertain suits for breach of oaths to pay debts, make feoffments, and the like. The prohibitability of such suits can be conceived in different ways. They simply to not occur in the period of this study—the breach of faith jurisdiction of the Church had dried up, and any attempt to revive it would probably have been seen as invasion of the secularized field of contract. I admit that my language is anachronistic—conceptualization of contract as a “field” came very slowly. I still suspect that the unarticulated response had become natural—ecclesiastical courts are out of bounds if they touch promissory behavior in any way under the pretext of an oath. In Brian’s time, Church courts’ proceeding for breach of faith may have looked perfectly appropriate as such—e.g., when the effect was to enforce a “contract” unenforceable at common law. It seemed objectionable only when it so to speak “crowded” the common law by taking up a case which might literally come up at common law—e.g., ordering payment of a debt today when tomorrow the creditor might bring an action of Debt. (A “contract” to make a feoffment is trickier. In Brian’s day, the court really “crowded” would have been the Chancery—the enforcer of contracts to convey land via the doctrine of uses. The common law was pre-eminently protective of real-estate interests, however, and perhaps the Chancery’s role was tolerated only because it was both familiar and restrained. I.e., it enforced only considerate promises—mainly if not exclusively sales—, whereas ecclesiastical courts, turned loose, might have caused the transference of real property in a wider range of circumstances provided there was an oath. In short, Brian’s supporting cases may have been closer to his principal case than they would have looked later.

I belabor these refinements somewhat because the generality stated by Brian will cover what I call the “paradigmatic” Prohibition—stopping an ecclesiastical suit when the plaintiff could just as well have sued at common law (cf. Vol. III above.) That is all very well, and possibly it is in effect what Brian meant to cover. The trouble is that the principle so understood may hurt Finch’s case more than it helps it. It seems to me shaky to draw an interpretation of the Uniformity Act from the mere fact that Prohibitions were used to insure the common law’s monopoly over some kinds of litigation. It is too easy to reply that the purpose of these Prohibitions is to keep ecclesiastical courts out of territory where they have no business being, whereas the Uniformity Act on its very face acknowledges their interest in the offenses it deals with and assigns them some sort of role. If, on the other hand, Brian’s point in historical perspective is different, it lends better support to Finch. The Uniformity Act might intend to exclude ecclesiastical courts
altogether from a limited part of the enforcement role, when their participation would especially threaten awkwardness or injustice. So, per Brian in one understanding, Prohibitions may sometimes be used to prevent inconvenience, even when there is no pretense that ecclesiastical courts are drastically out of bounds, or could not in slightly altered circumstances do what they are in these circumstances stopped from doing. (The differences are, of course, refinements. Part of the justification for “paradigmatic” Prohibitions is that an ecclesiastical suit could be started today and have one outcome, when a common law suit for the same object could be started tomorrow and have a different outcome. I doubt that that would in later perspective have seemed the central justification—as it was for what I call Prohibitions to prevent collateral infringement of common law interests, where the ecclesiastical suit is not “for the same object” or in any way inappropriate in itself, but involves issues closely enough related to the possible subject of common law litigation to pose a danger of prejudice. The two categories may not have been so distinguishable in Brian’s perspective. For that matter, since Caudrey antedates most of the rich development of Prohibition law in this study, the distinctions I make here may not have been so evident to the lawyers involved as I am inclined to think they would have been later.)

(ii) Another of Finch’s citations—Y.B. 2 Rich. III, 22—is also useful for his purpose, although the judges in the Year Book are divided on the relevant point. Each of the parties in the case claimed to be the executor of S. One of the contenders pleaded that he had challenged the will under which the other claimed to be executor and finally overturned it on appeal to Rome, wherefore his adversary was no executor. The issue debated on this pleading was whether ecclesiastical invalidation of a will automatically means that the person named executor therein is not the deceased’s executor from the point of view of English law. We may omit the reasoning on both sides and note only that two judges thought that the invalidation does not necessarily have that effect. Part of their point—what is valuable to Finch—is that English law should take precedence over ecclesiastical in an ambiguous situation. They thought there was an ambiguity because by English law a person could for some purposes act as executor before probate; the pleading conclusion that a man named executor in an invalid will could not be executor was therefore not airtight. (Only rigor in pleading was in question, I think, nothing in the real world. I take it that the executor in the invalid will would not be rightful executor, but what the pleading said was that he was not executor at all, in any sense. That was presumably true by ecclesiastical standards, but not quite by English.)

(iii) Finally, Finch cites a “Davy’s Case at St. Albans” for what became a familiar proposition if it was not already one at the time of Caudrey: A common law action will lie for the aspersion “whore” if the woman slandered avers that she lost a prospective marriage as a result. The point for Finch is that although calling someone “whore” is normally ecclesiastical defamation, the common law acquires an interest when temporal loss is claimed and by virtue of that interest has exclusive jurisdiction.

As I suggest above, the utility of establishing what Finch’s citations go to establish is not overwhelming, but his idea is interesting, and his introducing it is a nice illustration of the way his argument covers every angle. If one concedes that the Uniformity Act does not clearly oust ecclesiastical courts from dealing with first offenders against the Prayer Book, it is still reasonable to say that the statute is ambiguous in the mere sense of confusing about exactly how it means some kind of concurrent spiritual-temporal
jurisdiction is to work. It sets up “a kind of concurrency” in general terms, but for some specific situations it deals with, such as first offenders against the Prayer Book, it is hard to believe, though not impossible, that full concurrency could be intended. To resolve the doubt in favor of full concurrency, per Finch, would be to violate in the realm of statutory interpretation a policy of preferring secular courts that is usually observed in other circumstances. It would be like letting the abbot’s defamation suit go forward because in one sense it was not objectionable, or like tolerating an ecclesiastical suit for “whore”, even though there was temporal damage, merely because in general ecclesiastical suits for that slander were lawful.

(g) Finch also urges the royal interest in favor of his construction of the statute: If only the secular punishment can be imposed on the first offender, the Queen will profit from the forfeiture of a year’s income. If the first offender may be deprived, she will lose this profit. The statute-makers seem to have intended that she should have it and therefore should not be read as undermining their own intention by a subsequent general provision. Moreover, when there is doubt about a statute’s meaning, it is legitimate to count the royal interest—part of what moderns would ball the “public interest”, be it remembered—towards tipping the balance.

This point only argues against allowing deprivation of first offenders, not against other spiritual sanctions. One might suggest, however, that the simplest way to insure the Queen’s interest is to exclude ecclesiastical courts from touching first offenders at all. If an ecclesiastical court “got there first” and imposed a sentence short of deprivation, there would at least be a problem about vexing the party again in the temporal courts, and another one as to whether the forfeiture could be imposed on the strength of an ecclesiastical conviction without retrying the party in a secular court. It would also be a problem whether secular proceedings for a repetition of the offense after ecclesiastical conviction must result in deprivation, with loss of the forfeiture. Short of the legal and moral problems, if we assume that retrial would be allowable but necessary to gain the forfeiture, conviction of a man already punished would probably be hard to obtain. The Queen’s interest would only be completely safe if the ecclesiastical court “got there second” and afflicted a man already in jail, without income and with additional spiritual censures—perhaps not a bad thing to a rigorist.

(h) Near the end of his argument, just before making point (g), Finch adds a double edged concessionary twist. His purport throughout is that ecclesiastical courts had no power to deprive before the statute and gained none by the statute. He now adds “but admitting that this offense would have been punishable by deprivation by the common law, yet that is now altered by this statute, but inasmuch as it [the statute] gives authority to the Bishop to deprive for this offense it is good proof that he had no authority before.” In other words, I take it, “you can’t have it both ways.” If you say the offense was subject to deprivation before, then the best reading of the statute, on the grounds above, is that the statute changes the previous law. It is better taken as cutting off a pre-existing ecclesiastical power than as confirming one. If, on the other hand, you construe the statute as conferring power to deprive—well, you are wrong, but in any event you have excluded yourself from arguing that the power existed before. The statute is better mistaken as a grant of new jurisdiction than as a confirmation of old—now let us see if you can make a serious case for the former. (One side of this point may be useful for the purpose that Finch shows no sign of pursuing, viz. arguing against High Commission
jurisdiction specifically. If the statute gives new jurisdiction, it would appear to give it to the regular ecclesiastical courts only, for the language of the clause that might have that effect speaks of “Archbishops, Bishops, and…their officers. “ Arguably, for the High Commission to have jurisdiction it would be necessary to show that the relevant powers were vested in the ecclesiastical system before the statute. If that is not showable, or if the other side were willing to stake its case on showing that the statute gave the jurisdiction to deprive, then nothing was given to the Commission. A de novo donation ought to go only to the designated recipients.

Finch, for Caudrey, is succeeded in the MS. report by two lawyers on the other side, Hutton and on a later day Attorney General Coke. Hutton’s points were as follows:

(1) He takes issue with Finch’s argument that the special verdict failed to find that Caudrey’s deprivation was a formally sufficient judicial act because it attributed the sentence to one Commissioner with the assent of others. Hutton maintains that the language of the patent permitted such procedure. He also claims common law analogues for treating certain acts “with A’s assent” as A’s acts.

(2) He excepts to Finch’s proposition that clergymen are never deprivable for mala prohibita, claiming authority to show that they are deprivable for the malum prohibitum of letting a house attached to the living decay.

(3) He does not challenge Finch on the actual meaning of the Uniformity Act, but falls back on the proposition that if Caudrey was wrongfully deprived the remedy is by appeal within the ecclesiastical system. Since this proposition recurs in both Coke’s speech and what was said from the Bench, let us note here the difficulty it seems to present—a much worse one than the same point in Cheinye. If the Uniformity Act confers no jurisdiction on ecclesiastical courts, either de novo or by confirmation, or if it removes jurisdiction from them, how can it be mere ecclesiastical error to take jurisdiction contrary to the statute? Is that plausible except on the radical premise that any statute regulating ecclesiastical courts is only enforceable on ecclesiastical courts by themselves? In Cheinye, by contrast, the High Commission hardly violated the Supremacy Act, save for the sense in which the statute can be said to command the Commission to apply the real or correct ecclesiastical law to cases in its jurisdiction. It is plausible to say that that statutory imperative can only be enforced within the ecclesiastical system, where the expertise lies.

One reading of the Uniformity Act does, however, tend to support Hutton’s argument. It should be articulated in making the argument, as it is not in the report, but perhaps it is understood. Suppose one says that deprivation of a first offender is unlawful by non-statutory ecclesiastical standards, but that the statute itself in no way, by words or intent, actually bans the application of that sanction to a first offender by ecclesiastical courts. Then clearly enough depriving such an offender is ecclesiastical error. The only sense in which it might be considered a violation of the statute within common law control is the sense in which the same can be said of the High Commission’s sentence in Cheinye—the statute implicitly commands correct application of ecclesiastical law, and common law courts responsible for the statutory rights of the subject may enforce even that requirement, at least against flagrantly unwarranted decisions or against a court from which there is no guaranteed appeal. The best riposte to this is intelligently anticipated by Finch: The reason deprivation of a first offender is bad ecclesiastical law—because the offense is a malum prohibitum—is itself derivable, in part though not exclusively, by
interpretation of the statute; the interpretation is common law business; ecclesiastical courts are not entitled to hold implicitly that the statute does not create the offense or deem it a *malum prohibitum*, whether or not a reasonable case for regarding it as a *malum in se* could be made by ecclesiastical lawyers independently of the statute. Needless to say, the underlying thesis—that the statute does not have the positive effect of ruling out deprivation of a first offender—is vulnerable, for reasons shown by Finch.

For the rest, it seems to me that these problems can only be avoided by focusing on policy for handling special verdicts. I.e., one can argue that special verdicts finding formally sufficient judicial acts by ecclesiastical courts should be uniformly taken as finding acts which are either valid or voidable within the ecclesiastical system; the common law courts may sometimes be entitled to scrutinize the validity of such acts, but they should do so by way of Prohibition.

(4) Finally, Hutton makes an argument tending to uphold the High Commission’s jurisdiction, as opposed to that of ecclesiastical tribunals generally, the point omitted by Finch. Hutton claims authority in the form of a holding from 23 Eliz. that the Commission may take cases normally within episcopal jurisdiction without the Bishop’s consent. The immediate relevance of this would be to argue that although the Uniformity Act in terms reserves jurisdiction to Archbishops and Bishops, the High Commission may meddle with the offenses covered by the statute if the monarch gives it authority to. The premise would seem to be that the Commission may be authorized to take any ecclesiastical case, since many of the Uniformity Act offenses are hard to construe as “enormities.” It is implied that the statute of 23 Hen. VIII (Chap. 2 above) is no more a bar to the Commission than the language of the Uniformity Act. With its implications, Hutton’s claim is much too broad in the light of virtually all decisions on the High Commission’s jurisdiction. A more modest proposition is perhaps tenable: The Uniformity Act does not intend to exclude the Commission from prosecution of crimes covered by the act if they are in themselves serious enough. Obviously, I should think, only *mala in se* would qualify, and only some of those, but perhaps clerical subversiveness, if it can be made out to be a *malum in se*, would be sufficiently grave.

We come now to Coke’s argument in the MS. It is not easy to come to terms with. The first part is a learned and high-flying discourse much to the same effect as the “Treatise” in 5 Coke’s Reports—an assertion of the monarch’s ecclesiastical supremacy at common law. I suspect Coke must be understood as speaking in part in favor of the monarch’s prerogative for its own sake, in his capacity as Attorney General, as well as for the party, Acton, who was trying to have Caudrey’s deprivation upheld. The important question is what he hoped to accomplish for his client in the case at hand by insisting elaborately on the Supreme Headship at common law.

To start with, the argument is presumably meant to cover the first technical quibble raised by Finch. If the monarch by virtue of the common law prerogative could create the equivalent of the High Commission without statutory warrant, he could arguably not be bound by the statutory requirement that the Commissioners be natural-born subjects. This seems to involve a large and dubious assumption, however—that the Supremacy Act does not or could not limit the pre-existing prerogative. Coke seeks to avoid being challenged for assuming too much by noting a feature of the special verdict: The jury found in terms that the Commission was appointed “*authoritate suprema*” and not “*virtute actus tantum*.” (One would suspect that it was told by the trial judge so to find.)
Coke therefore seems to be urging the theory that the monarch has two powers—an unlimited common law one and a (possibly) limited statutory one. In any given instance, it may be questionable which one he drew on in constituting a High Commission, but here there is no question because the jury found as a fact that the Queen drew on her common law supremacy. 1 Eliz. does not recognize and narrow a pre-existing prerogative; it leaves that prerogative intact and confers a new and separate power more limited or not as the case may be.

Secondly, asserting the common law prerogative goes to say that the High Commission may be given any part of ecclesiastical jurisdiction if the monarch chooses to draw on the prerogative. It cuts off such arguments as “The statutory power to create a High Commission is only power to create a special tribunal for enormous crimes; whatever else is true, speaking against the Prayer Book is not an enormous offense.” A more important argument, in the present context, is not so clearly cut off—viz. that the Uniformity Act created the offense of speaking against the Prayer Book, and all the common law prerogative in the world would not give the monarch power to confer jurisdiction over an offense that did not exist at common law. If, however, one can rebut Finch’s arguments and make out that the offense in some way antedates the Uniformity Act, it is helpful to assert the common law prerogative. If the prerogative is separate from the powers conferred by the Supremacy Act, the prerogative should be exercisable without reference to limitations imposed on ecclesiastical jurisdiction by the Uniformity Act. If speaking against the Prayer Book is a “common law” ecclesiastical offense, the monarch, so long as he draws on the prerogative, may assign it to any ecclesiastical court, even though qua offense created by the Uniformity Act it is prosecutable only in regular ecclesiastical courts.

As we have seen, however, these arguments do not answer anything that Finch certainly said, apart from the “technical quibble”, though they respond to possible arguments on his side. Finch’s claim was not centrally that the High Commission had no business dealing with Caudrey, but that ecclesiastical courts generally had no business proceeding against him, or at least no authority to deprive him. The most interesting question about Coke’s lead-off argument is whether he conceived it as an answer to Finch’s central contention.

I think it is possible that Coke conceived his argument as having that potential. He is at pains not only to prove the monarch’s supremacy at common law, but to show its strength. I shall not go into his illustrations and authorities one by one, because they essentially cover part of the same ground as the printed “Treatise.” The effect is to show how very much the monarch as Supreme Head can do, as well as showing that his headship had been continuously recognized in spite of Popery—how very much he could have done without statutory acknowledgment of his supremacy and can now do notwithstanding it. For example, according to Coke, the monarch could, as easily without Parliament as with it have accomplished what the Fourth Lateran Council actually accomplished: alteration of ecclesiastical law so that tithes must henceforth be applied to support of parish priests. Most tellingly of all, for this point speaks to a living issue rather than a historical fantasy, Coke asserts strongly that the monarch may “suprema authoritate” grant commissions to review sentences by the Delegates. (I.e., the statute of 25 Hen. VIII, c. 19—does not hedge the common law prerogative so as to make decisions by the Delegates unreviewable in any way. That is an entirely respectable position, but it
was not a unanimous position, and judicial decisions later than *Caudrey* are ambiguous. Coke says that he could show “seven precedents” of commissions to review decisions by the Delegates. He undoubtedly could—there were several practice precedents for such commissions, but their legality had not been upheld judicially, and when the effect of the statute finally came to be scrutinized by the courts strong arguments were advanced on both sides. Coke was not strictly entitled to treat the legality of review commissions as a fact, though so regarding it was reasonable on the best evidence available when he spoke.)

Coke’s emphasis on the strength of the common law prerogative is encouraging to the following construction of his intent with respect to the case at hand: The ecclesiastical prerogative will by itself justify spiritual punishment of a clerical defamer of the Prayer Book, including deprivation. If there were no Uniformity Act requiring exclusive use of the Prayer Book, the monarch could make a prerogative order to the same effect and could direct ecclesiastical courts to punish at least clergymen for disobeying the order or expressing disapproval of it. Laymen would no doubt pose a problem—to the degree that the monarch used the prerogative to make new rules, laymen would have a strong claim that they could not be subjected to liability without Parliament, even as lay members of the Church. But the prerogative amounts to very broad power to manage the Church internally, which includes making rules for the clergy and punishing them for violations. It makes no difference whether the rules are strictly new (let us avoid ultimate questions by assuming, realistically in our context, that the rules are about “order and discipline”, not fundamental religious matters.) Perhaps *mala prohibita* as a general class cannot be punished by deprivation—new rules made by Parliament on subjects within ecclesiastical jurisdiction without express authorization of deprivation as a remedy against clerics—but rules made by virtue of the prerogative properly used are outside that limitation.

Now, one can obviously say that this hypothetical is all very well, perhaps, but in fact requiring the use of the Prayer Book and imposing penalties for offenses against it were not effected by prerogative but by statute. Even if the Uniformity Act, like perhaps the Supremacy Act, did not limit the prerogative, the prerogative was not employed, so the question remains pure and simple what the statute provides, including whether in the relevant aspect it creates a *malum prohibitum* or declares an already existent *malum in se*. The only reply I can think of to this is to fall back on the “*suprema authoritate*” in the special verdict: It is a conclusive fact in this case that the action taken against Caudrey was by virtue of the monarch’s prerogative authorization. It takes some doing to stretch that phrase from a basis for saying the High Commission acted legally because it was authorized by the Queen to entertain this kind of case to saying that the very crime and its punishment, at least before the High Commission, were creations of the prerogative, but perhaps Coke was ready to suggest the stretch.

The argument is certainly extreme. I do not think Coke *in propria persona* can have been comfortable with its implications. I shall show below that Coke’s own report of *Caudrey* reflects no such argument. There, assertion of the monarch’s prerogative in the reported “resolutions” of the court figures as a gigantic tail wagging a miniature dog. That in itself is a reason for doubting that Coke actually did mean to use the ecclesiastical prerogative to evade all problems about the construction of the Uniformity Act. But if he meant so to use it, he must be given credit for characteristic cleverness in the *persona* of advocate. For if the argument would sell, it amounts to a splendid gambit, an end-run
around all the complexities raised by Finch, a way not to face the meaning of a none-too-intelligible statute. Perhaps the relative pettiness of the immediate objective and its salutariness from an Establishment point of view would tend to make the argument vendible. For the end of all was to be rid of a non-conformist minister. Convince a court that is unlikely to be sympathetic with Puritans that the Royal Supremacy in all its historic color is probably sufficient justification for dealing harshly with Caudrey, and perhaps the court will look past the tangles of Finch’s all-too impressive defense of a wretched displaced non-conformist. After all, the court is only asked to construe a special verdict in favor of the Crown and the ecclesiastical authorities—and in favor of an innocent successor to Caudrey, who stands to lose his living. (A Prohibition case, where the court is nominally asked to protect the “royal dignity” against encroachment, is perhaps a less eligible occasion for going a bit light on the hard problems of the law.)

Coke puts his assertion of the common law prerogative first and devotes a disproportionate part of his time to it, if the MS. reflects reality. This is a ground for surmising that it might carry conclusive weight. His argument in the MS. goes on to further points, however.

(1) With specific citations, Coke restates the argument already made by Hutton that if deprivation of Caudrey was erroneous the error was one of ecclesiastical law, not subject to the scrutiny of this court. His first citation is Cheinye. I have already discussed how that case is both relevant for this one and convincingly distinguishable. Coke emphasizes the most hardboiled side of Cheinye, stressing how hardboiled it was: In that case, the High Commission did not simply err in a matter of pure ecclesiastical law (by taking over a case pending elsewhere); it violated the terms of its patent by sentencing Cheinye on a presumptive confession, without factual investigation of his guilt. In his own report of Caudrey (there is no intimation of this in the MS.), Coke says that Caudrey was deprived on non-appearance—i.e., like Cheinye, without direct proof of his guilt—and that exception was taken thereto. The exception was based on the Uniformity Act, not the Commission’s patent, as in Cheinye, for the statute speaks of offenders convicted “by verdict of twelve men, or by his own confession, or by the notorious evidence of the fact.” I.e., the statute seems to exclude a default judgment. The difference between violating a statute and violating a patent may make the cases distinguishable on this point, but if Caudrey was in fact condemned by default Cheinye’s relevance as a precedent is enhanced.

Coke’s other citation, Bunting v. Leppingwell, held that common law courts may not force their standards on ecclesiastical courts in some circumstances even though interests in the common law sphere are affected. A woman was sued for wrongfully marrying B when she was pre-contacted to marry A. Her husband, B, was not named as co-defendant, as he would have to be in a common law suit against a married woman. The court held that the ecclesiastical decree dissolving the woman’s marriage with B could not be interfered with, even though the effect was to bastardize B’s children without his having had a hearing. Thus, even quite objectionable ecclesiastical results must be accepted, including those that produce temporal loss—e.g., Caudrey’s loss of his freehold living, if indeed he was wrongfully deprived. The precedent is well-chosen.

(2) At last Coke reaches the Uniformity Act. Rather than painfully expound it, Coke advances a clever argument anticipated by Finch. If, Coke says, a clerical defamer of the Prayer Book cannot be deprived for his first offense, he cannot be deprived for his second
offense either, except after secular conviction of the second (when his judicial deprivation would be nugatory, since he is already deprived *ipso facto*.) That is absurd; ergo the first offender may be deprived. Although not all the steps are articulated in the report, I think there is no doubt but that Coke hit on a substantial difficulty in the statute. One does not have to accept his reasoning, but it demands attention.

I can best explain Coke’s argument by first expressing what the common sense interpretation of the statute seems to me: A first offender may, pace Finch, be punished by minor ecclesiastical censures before the secular courts touch him. He may not be deprived, however, until he has once been convicted and punished by secular courts and has committed the offense again at a time subsequent to said conviction. But then ecclesiastical courts may prosecute him and deprive him upon finding him guilty of such second offense. They need not wait on the secular tribunals to prosecute and convict a second time. For if they did have to wait, the statute’s saving of ecclesiastical jurisdiction would be nearly empty as far as clerical offenders are concerned. They would be debarred from using their serious sanction for clerical discipline, deprivation. They would be limited to the vain motion of pronouncing sentence of deprivation on someone already deprived. To all intents they would be confined to punishing clergymen by minor sanctions. For second offenders, that would not be to much purpose. Why impose admonition or penance on someone who is liable to *ipso facto* deprivation? Better to promote his prosecution in a secular court and see that he receives the condign punishment. There is still less point in visiting minor sanctions on someone who has already suffered a second secular conviction and the greater penalty of deprivation plus a year in jail.

I see nothing in the language of the statute sufficient to defeat this interpretation. Coke’s strategy, however, is to knock it out by concentrating on the second offender: Either no meaningful power to deprive is reserved to ecclesiastical courts, or they have such power against first offenders as well as later ones. It is not true that the statute poses no obstacle to allowing second offenders to be deprived by ecclesiastical process without waiting on a second secular conviction. For this contention, Coke has sound, if tricky, verbal grounds—hardly good enough, it seems to me, to overcome a “common sense” guess at what the ill-drafted statute intends, but still persuasive.

The statute says that a first offender “lawfully convicted, according to the laws of this realm, by verdict of twelve men, or by his own confession, or by the notorious evidence of the fact” shall forfeit a year’s income and be imprisoned for six months. This language plainly refers to secular courts, for the act subsequently makes it clear that ecclesiastical courts may only apply ecclesiastical censures, which do not include forfeiture or jail. Speaking of second offenders, the statute says that one who “shall after his first conviction eftsoons offend, and be thereof in form aforesaid lawfully convicted” shall be imprisoned for a year and deprived *ipso facto*. “In form aforesaid” obviously refers to the first-offenders clause—i.e., repeats the requirement that conviction be by the laws of the realm, by verdict, confession, etc. The first-offenders clause refers only to secular tribunals. Therefore the second-offenders clause refers only to those. Therefore deprivation can only follow on conviction, in the manner specified, by a secular tribunal. Therefore ecclesiastical courts may never deprive, unless in the empty sense of depriving someone already deprived. That is absurd for the reason the “common sense” interpretation above gives. If the ecclesiastical courts’ reserved powers mean anything,
those courts must have power to deprive at some point. But the sections of the statute we have looked at do not countenance ecclesiastical deprivation after one secular conviction any more than they countenance it before. Therefore the only part of the statute that authorized ecclesiastical deprivation at any point is the general clause permitting punishment of all offenders against the act by the censures of the Church. Those censures are in no way defined to exclude deprivation, and no distinction is made between first and second offenders in the clause permitting their use. Therefore first offenders may be proceeded against in ecclesiastical courts and deprived if the court does not see fit to give the culprit a second chance (whereas automatic deprivation requires two secular convictions. Note that this is both a corollary and an advantage of Coke’s theory. The statute could be read as providing that a second conviction in an ecclesiastical court as well as in a secular one would result in ipso facto deprivation, though of course the other sanction, imprisonment, could not be imposed. But that is incompatible with Coke’s reading. It is also improbable. The statute-makers are likely to have wanted to insure that a man would incur certain deprivation only after enjoying secular process of law. Ecclesiastical could after all not be obliged to deprive a second, or a thirteenth, offender. By Coke’s theory, the price of this benign and probable result is that a first offender is in danger of deprivation if the ecclesiastical court gets its hands on him before a secular one. Freer and easier interpretation, merely by likely intent, would avoid the price.) So, with some spelling out, I take Coke’s point to be. It has considerable force and is squarely on the statute. If accepted, it removes all need to rely on the Royal Supremacy at common law, all need to persuade the court that it may not scrutinize ecclesiastical error, and, failing the second, any need to make out that there was no ecclesiastical error (either because deprivation for a malum prohibitum is not always unlawful or because speaking against the Prayer Book is not a malum prohibitum.) The argument’s only fault, if it is one, is that it takes the words of the statute very seriously. A cynic might say that gives the statute-makers too much credit—that rougher guesswork about their intentions is a better bet.

(3) Coke’s last point, like his others, has the “something extra” that distinguished his advocacy. He starts by saying that the Uniformity Act, being in the affirmative, does not abolish any pre-existing authority. As I observe in discussing Finch’s argument, this position as such is sound and standard. Express “negative” or disauthorizing language was usually necessary to do away with an existing jurisdiction, remedy, or procedure when a new one in the same area was enacted.

This point is obviously only of use if ecclesiastical courts could in fact proceed against the equivalent of defamers of the Prayer Book before the Uniformity Act and punish first offenders by deprivation. Coke does not rebut Finch’s cogent arguments that no such power existed. It is possible that the high-sounding argument about the Royal Supremacy is meant in part to cover this weakness. I.e., it may be necessary to admit that ecclesiastical courts could not deprive for mala prohibita, nor for the malum in se of “speaking against religion” on the first offense. The only resource may be to argue that the monarch could at any time alter the ecclesiastical law, at least quoad clerical discipline, and by virtue of the special verdict had presumptively done so.

Coke does not, however, rest content with assuming the problematic premise—prior ecclesiastical power—and asserting that the conclusion is obvious by accepted canons of statutory interpretation. His final effort, as I understand it, implicitly admits that the
conclusion may not be so obvious and finds a reason for it beyond the “accepted canons.” I have already suggested, in connection with Finch, why the Uniformity Act’s “affirmative” appointment of secular procedures and sanctions may not obviously leave intact other procedures and sanctions admitted to exist—why, as Finch puts it, a “negative” (“and not otherwise”) may be implied in this affirmative: There is no particular reason why a statute creating a new civil remedy should be construed to take away an old one without express evidence of such intent, but a criminal statute is not in the same boat. The precept that “affirmatives” do not imply “negatives” has no higher status than the rule that penal acts should be construed strictly. The latter maxim is applicable to the instant case. There is plenty of reason why an act appointing a stiff penalty for a first offense, but explicitly sparing first offenders the further grave penalty of automatic deprivation, should be construed as limiting what can be done to first offenders by any tribunal, if necessary even at the expense of prior powers.

Coke’s final strategy is to shift from the Uniformity Act to the Supremacy Act. He claims to have a “clincher” for the purposes of the case at hand, for he introduces his last remark with the phrase “but to oust [or overcome—d’outster] all argument in this case.” Coke’s point is that the Supremacy Act expressly authorizes the High Commission “to proceed as has been used before this statute.” To spell out: Let us grant that the Uniformity Act, albeit without express negative language, destroys any pre-existing power in regular ecclesiastical courts—the Archbishops and Bishops specified in the “censures of the Church” clause—to deprive for a first offense. That might be equivalent to destroying all ecclesiastical power to deprive for a first offense if the Uniformity Act stood alone. To preserve the power would at any rate require falling back on the reserve of royal prerogative and the special verdict. But for present purposes it is not necessary to fall back on those. The letter of the Supremacy Act is sufficient. For that statute in terms permits the High Commission to do anything that could previously be done by ecclesiastical courts, whether or not it still lay in the power of regular ecclesiastical courts. Therefore, granting that before the Elizabethan Settlement any ecclesiastical court could have punished by deprivation, the High Commission may do so now. It makes no difference whether the Uniformity Act destroys other ecclesiastical courts’ power to deprive.

This argument of course involves interpretation of the Supremacy Act. It requires giving literal force to the words “…such jurisdictions [etc.]…as by any ecclesiastical power or authority have heretofore been…exercised or used…” But Coke’s interpretation was to enjoy considerable favor. Its usual application was to prove that the High Commission could imprison for heresy because episcopal courts once had power to do so, though by repeal of the relevant statutes they no longer had it. It is if anything more convincing to argue that the High Commission may deprive for defaming the Prayer Book because regular courts could once do so. That is true because power once exercised solely by virtue of now-repealed statutes may be trickier to bring under “heretofore…exercised” than prior de jure power. The argument of course still needs the shaky premise that power to deprive defamers of the Prayer Book did in a meaningful sense exist before the Elizabethan settlement.

With this Coke rested. The court’s immediate response, according to the MS., was to delay responding. Chief Justice Popham, noting that the case was of great consequence, said that the judges wanted to advise with their brethren of the other common law courts
as well as among themselves. On a later day, Coke moved for judgment, and it was entered for his client.

The report gives the judges’ position in the form of a per Curiam opinion:

(a) The first proposition endorsed is that Caudrey’s deprivation was good because the statute in the affirmative does not take away the authority which spiritual courts had at common law. Nothing is said as to why one should assume that spiritual courts did have relevant authority at common law.

(b) The court held that deprivation by one High Commissioner with the consent of others was good enough. No large theses about the common law prerogative or the meaning of the Supremacy Act are put forward. Rather, the opinion distinguishes between a judicial act and a property transaction; A Dean cannot make a lease of land belonging to the Dean and Chapter “with the assent of the Chapter”; the lessor must appear (in pleading or a special verdict) to be the Dean and Chapter as a body. The standard for a judicial act is less exacting; “this is the act of one judge with the consent of two others” is equivalent to “this is the act of three judges as a body.” The point is pure common law. Nothing is said about the other technicality raised—whether the special verdict was defective because it did not say the High Commissioners were all native Englishmen.

(c) Finally the court held that whether or not Caudrey was duly deprived his deprivation was at worst only voidable within the ecclesiastical system. (“Also, admitting that the deprivation is not duly done, yet without question it is not void, but voidable only by suit in the spiritual court, and so inasmuch as it is not void at this point [adluc], the parson [Caudrey] is out of possession of the parsonage, for he is not parson, and so cannot enter there and make a lease at this time [wherefore the fictitious lessee must lose in an action of Ejectment.]” I have already said what I think is wrong with this argument, but it does follow Cheinye at least superficially, and it does take advantage of Finch’s weakest sector. (His attempt to show that Church courts had no prior authority to deprive someone in Caudrey’s position led him into propositions about ecclesiastical law, which invite the response that ecclesiastical courts are the only competent judge of their truth.) The proposition that ecclesiastical courts may have had prior authority, and that whether they did is an ecclesiastical question, combined with the court’s perfectly traditional view that the affirmative statute did not take away any prior authority that existed, in a sense justifies the decision. It seems to me, however, that the court as reported by the MS. was all-too willing not to tangle with the meaning of the Uniformity Act—too willing to treat as a reality the rather phony issue whether a crime which common sense would say was unheard of before the statute was already within ecclesiastical cognizance and to evade deciding how the statute-makers actually meant to have offenders dealt with. To do him justice, Coke showed the court rather more elegant ways to get where it wanted to go than the court shows any sign of taking up. Resorting to a per Curiam opinion in a case as carefully argued as this one probably signifies, let us say, a preference for letting Coke’s theories about the prerogative stand non-contradicted and uninvestigated and for not sinking into difficult questions that might have to be resolved in favor of a non-conformist.

The task remains of comparing the MS. with the printed reports. Popham’s report overlaps both Coke and the MS. and differs from both in its presentation of the court’s holdings. Like the MS., it does not have the court embracing any far-reaching doctrines
about the monarch’s prerogative. For the arguments of counsel, the report is negligible. It notes briefly the technical points made by Finch (without naming him or the opposing counsel) and his thesis that the Uniformity Act banned deprivation until the second offense (without any of the subtleties of his argument.) As to the court’s opinion, Popham distinguishes the following holdings:

(a) Deprivation by one Commissioner with the assent of others is unobjectionable because it is good ecclesiastical form; that is the proper standard, rather than rules applicable to the judicial acts of a secular commission.

(b) It is not a fault that the verdict failed to find the Commissioners native subjects, for two reasons: (1) Common intendment—i.e., if the verdict said nothing even by implication on the subject, it would be presumed that the Commissioners were natives unless the contrary were asserted as a fact. (2) Actually, the verdict did say something by implication, viz. that the Commission was appointed “secundum tenorem & effectum actus.” That is a sufficient finding that the Commissioners met the native-birth standard and any others. (Note that the court read the verdict as referring to a Commission constituted pursuant to the Supremacy Act, not to the Queen’s common law prerogative.

(c) Caudrey’s deprivation was lawful because the Uniformity Act is in the affirmative. I.e., (as the Popham version explains) the language fixing a penalty for a first offense restricts only secular courts to that penalty, leaving ecclesiastical courts unaffected. As in the MS., there is no justification of the proposition that ecclesiastical courts had any prior authority to leave intact.

(d) The Supremacy Act and the High Commissioners’ patent warrants their punishing the offense at discretion. So I take the words: “…by the Act and their commission, they may proceed according to their discretion to punish the offense proved or confessed against them, and so are the words of their commission warranted by the clause of the Act.” I am not sure what this holding adds. There could possibly be, despite (c), some doubt whether the Uniformity Act leaves regular ecclesiastical courts with power to deprive. But since, as (c) says, it does not cut off ecclesiastical jurisdiction over first offenders altogether, the permissiveness of the Supremacy Act supports the conclusion that at least the High Commission may be authorized to use any ecclesiastical sanction.

(e) The Uniformity Act saves ecclesiastical jurisdiction. To add this as a separate holding only underscores the obvious. It does not solve the problem whether ecclesiastical jurisdiction is saved quoad deprivation of a first offender.

(f) The last point in Popham seems only to reinforce (d) –the wide statutory warrant for conferring powers on the High Commission, including powers not enjoyed by regular ecclesiastical courts. It is first said that “all the bishops and popish priests were deprived by virtue of a commission warranted by this clause in the Act.” This does not seem to be more than a historical truism—that early in Elizabeth’s reign the High Commission was used to get rid of Catholic clergy. Secondly, the report cites a recent case in which all the judges allegedly agreed that the Commission, being duly warranted by its patent, was entitled to fine a “vicious liver” 200 marks. Asserting the Commission’s power to impose secular sanctions in the context of the present case—where there was no direct question about that power—seems to say that the Commission’s power to deprive cannot be challenged even if ordinary ecclesiastical courts are not conceded the same power. (Quaere how compelling that is. Because secular sanctions available to no ecclesiastical court without—pace Coke’s high prerogative theories—statutory warrant can be given to
the Commission, that court can also be excepted out of a statute limiting the use of an ordinary ecclesiastical sanction in a particular situation?)

To summarize: Aside from the technical exceptions to the verdict, Popham’s report differs from the MS. mainly in the omission of one important point—the court’s holding that the rightfulness of Caudrey’s deprivation was an ecclesiastical question. Secondly, Popham has the court upholding the High Commission’s specific authority to deprive, which tends to moot the matter omitted.

Turning now to Coke’s report: After stating the case, Coke summarizes the arguments of Caudrey’s counsel (not identifying them by name.) The summary contains some points and emphases that do not appear in Finch’s argument in the MS. On the other hand, it does not reflect the complexity which that argument seems to me to have. This is not to say that Coke is unfair to the losing side or represents its case so as to make weaknesses prominent. On the contrary, he gives a clear and solid argument, which certainly conveys the essence of what can be, and was, said on Caudrey’s behalf. All I suspect him of is just that—formulating the essence with some loss and possibly some gain. Finch might have thought his various angles and authorities too boiled down to “what it comes to”; he might have had to give Coke credit for a better statement than his own of parts of his contentions and for adding some considerations he failed to develop.

Coke attributes four arguments to Caudrey’s counsel, of which the first comprises the substantive points. The other three are the technical exceptions to the verdict, plus the further argument, absent from the MS., that it was unlawful to deprive Caudrey by a default judgment even if his deprivation was otherwise justifiable. Nothing about Coke’s representation of the technicalities seems to me to vary from the MS. His picture of the substantive contention has two distinguishing features. First, it speaks more clearly than Finch in the MS., if more exclusively, to the policy of the Uniformity Act. It addresses what common sense cannot miss after all is said that can be about mala prohibita and mala in se, affirmative and negative statutes, and the like: Viz. the Uniformity Act appears to be “moderatum & aequum “in that it intends to spare non-conformist clergy until they have been put on warning by the solemnity of conviction and punishment for a first offense. (To embroider in my words, not Coke’s: The act appears to allow for what realistic and even-tempered legislators in 1559 ought to have allowed for—that a new liturgy coming in a succession of new liturgies was not going to please everybody, that the Settlement would not at once be accepted by some of those who would have preferred to settle somewhere else. Wise legislators would be both, insistent and indulgent, insistent that the clergy recognize the Settlement and start cooperating right now, indulgent in the light of recent history and an agitated climate of opinion. The Uniformity Act seems to practice both virtues by making a first offense highly penal, but not running men out of their livelihoods and the Church’s service until it has really been brought home to them that the Settlement is for keeps and demands respect.) In so far as Coke emphasizes, rather than represses, the strong common sense appeal of the losing case, he sets up the winning one as a triumph for the “artificial reason of the law”, the paradoxical deep truth of our societal understandings, embedded in the law that oftentimes belies what seems to make sense. Could he have been conscious of this effect? It is a “paradoxical deep truth” to which his “Treatise” will point: The Royal Supremacy is so embedded in English hearts and institutions that what everyone would have thought—
that the Pope, however wrongfully, had at least successfully enjoyed supremacy over the
English Church through much of its history—comes out a very superficial semblance.

Secondly, Coke introduces a two-pronged argument specific to the High
Commission: The clauses preserving ecclesiastical jurisdiction in the Uniformity Act
speak only of Archbishops, Bishops, and other Ordinaries; therefore the High
Commission is excluded. If, however, this proposition is denied and the High
Commission is conceded as much jurisdiction as other ecclesiastical courts, then it is
limited in the same way as other courts—i.e., may not deprive for a first offense. This
argument, in both branches, is clearly relevant. Save for a hint, it is missing from the
MS., which of course need not mean Finch did not make it. If he left it out, the cause
would not necessarily be negligence. He might have figured that there was little hope of
persuading the court that the Commission’s deprivation of Caudrey was unlawful if the
court could not be convinced he was simply not deprivable. That would probably be a
realistic calculation both practically and legally. (Practically because there is not a lot of
sense in excluding the Commission from doing what other ecclesiastical courts may do
by way of clerical discipline, when there is no lay interest in local justice and the
avoidance of secular sanctions without secular process of law; because offending the
Church dignitaries to no great purpose is foolish; because it is pretty vain motion to undo
one tribunal’s longstanding sentence of deprivation when the same sentence could be
obtained in another—a different matter from prohibiting proceedings in the wrong court
before they have occurred. Legally because it is pretty literal reading of the statute to take
its mention of Archbishops and Bishops as intended to exclude the High Commission.) If
Coke ascribed the argument to Caudrey’s counsel without the warrant of what they
actually said, motives are assignable. It was he who needed an argument specific to the
High Commission in order to refute it, and refutation opens the way to his higher themes.

From his summary of the arguments on Caudrey’s side, Coke proceeds to the
“resolutions” of a unanimous court, cast as responses to the “objections” above.
Arguments on the side he himself represented are not given, and there is no mention of
his own role. These are the “resolutions”:

(a) The substance and the exception to Caudrey’s having been deprived by default are
covered by one resolution going to interpretation of the Uniformity Act. It has several
sub-divisions:

1. The affirmative statute does not take away any existing ecclesiastical power (as
was held according to all accounts.)

2. Secular and spiritual punishments have different ends and means—the one to
punish the outward man, the other to reform the inward.” Only Coke’s report has the
court articulating this truism. What function does it serve? As we have seen, it is dubious
to deny a penal statute restrictive force just because it does not use express negative
language. It is a better argument to say that a statute appointing a secular penalty has no
restrictive reference to spiritual penalties without express language, because by the
principle stated the two kinds of penalty simply “fail to meet.” So to speak, the legislature
may mean to exclude other secular penalties when it appoints one affirmatively, but it
hardly means to abandon souls to the devil. It may of course insist that ecclesiastical
courts follow Parliament’s judgment as to what “treatment” is good for souls in particular
circumstances, instead of using their own discretion, but the odds are against Parliament’s
wanting so to insist. For the most part, legislation reshapes and corrects secular law.
Therefore highly explicit evidence of intent to limit the remedial discretion of spiritual courts must be shown.

Secondly, I would speculate that emphasizing the distinct end of spiritual law is helpful for reaching the conclusion that Caudrey’s deprivation was not ecclesiastical error. I.e., Assume for the sake of argument that whether there was ecclesiastical error is not beyond common law scrutiny. One approach to deciding whether there was error is to take on such specific questions as “May deprivation be used as a sanction for a malum prohibitum?” and “Is the seeming statutory offense of speaking against the Prayer Book actually an instance of a longstanding ecclesiastical crime for which deprivation is an eligible sanction?” Another approach is to say that the very end of improving the “inward man” requires that courts with that function have wide discretion in the choice of sanctions. They are never engaged in applying the penalty to the crime that has been committed, but in deciding what will do the particular criminal the most spiritual good. Perhaps if there were perfectly certain answers to the specific questions above—analogous to an unmistakable Parliamentary intent to curb ecclesiastical discretion—it would be possible for an outsider, such as a common law court, to say “The ecclesiastical court has erred.” Short of that, there must be a strong presumption that application of any sanction on the list of recognized spiritual ones is an exercise of lawful discretion and therefore “correct ecclesiastical law.” To say otherwise belongs only to insiders—superior ecclesiastical courts, part of whose function is to reconsider the discretionary decisions of inferiors. Leaving aside the special case of the High Commission (or dismissing it in the cavalier manner of Cheinye), the generosity of ecclesiastical appeals is reason for supposing that inexpert “spiritual physicianship” will almost always be corrected. Without at least the presumption that any spiritual sanction is lawfully applicable at discretion to any crime within ecclesiastical cognizance, the ecclesiastical system would be turned into something foreign to its purpose—a mere structure of rule-bound courts, indifferent to the inward man so long as the outward gets what by the law he has coming to him. (It is ironic that “mere rule-bound courts” are what Puritan hypersensitivity to inward states saw in the ecclesiastical system.)

(3) The statute in any event expressly saves ecclesiastical power to apply any sanction hitherto used to the offenses in the act. As above, creating a new temporal sanction does not take away the old ecclesiastical ones; in addition, if instead of creating some new sanctions the statute said nothing at all about penalties—but merely commended the use of the Prayer Book in churches—ecclesiastical courts would have authority to apply their traditional censures at discretion to clerics who disobeyed or “depraved” it. (I take it that this means even if the saving had been omitted as well, but a fortiori with it.) The question is still left open whether deprivation of a first-offending clergyman for offenses against the Prayer Book or the equivalent was really “hitherto used” and not against positive rules of ecclesiastical law, except as the point above about the distinct end of spiritual law is a kind of answer.

(b) One High Commissioner acting with the assent of others is unobjectionable because (as in Popham) it is good ecclesiastical form. The court’s opinion in Coke elaborates with the generality that faith and credit should be shown to judicial acts in the ecclesiastical sphere. For this the two cases used by Coke in his MS. argument are cited—Cheinye and Bunting. The cases and the generality they support are brought up solely in connection with the technical objection to the verdict.
(c) The Commissioners will be presumed native subjects. Three reasons are given for this. Two are the same as Popham’s (“common intendment” and the verdict’s having found generally that the Commission was constituted in accord with the Supremacy Act.) The third is that the Supremacy Act is declaratory, so that the High Commission could have been created without statutory warrant. Here and only here, in connection with the technicality about the Commissioners’ nationality, are the grand theories urged by Coke in his MS. argument touched on. As reporter of the court’s “resolutions”, Coke says the statute was held declaratory partly on the basis of its title (“An Act Restoring to the Crown the ancient Jurisdiction over the state ecclesiastical etc.”) and partly on the basis of its “body.” But there is no indication whether the judges actually said anything about the body of the statute, nor of how they proposed to apply the declaratory theory to the case at hand, even to the quibble about the Commissioners’ native status. Coke launches into his “Treatise” without any real transition; what exposition of the “body” of the statute effectively means is the whole elaborate historical case for the common law prerogative. Coke admits frankly that this is his own contribution. There is no similar admission as to other features of the reported “resolutions.”
Notes to Cheinye and Caudrey

1. (*Cheinye*) The reports of this case are as follows. Note that details suggest that the history of the litigation was somewhat more complicated than the accounts in the text. If so, it makes no difference; I have synthesized all reports in recounting the case.


Harl. 6687, f. 730. *Sub. nom.* Cheyny v. Frankwell. Dated T. 29 Eliz. Court not specified, but the source is Coke’s interleaved Littleton, which runs to Queen’s Bench cases in which Coke was involved (as we know he was in this one from Leonard.) Does not state facts but summarizes the issues and rulings. Hard to read, but agrees with Leonard as to what was decided. If dates in the two MSS. are correct, note that the gap between M. 26/27 and T. 29 is rather large.


Leonard describes both the first round and the Writ of Error. The former is plainly in the Queen’s Bench, for Coke and Wray speak individually. (Arguments on the side opposed to Coke are summarized, without naming the lawyers.) The Writ of Error is clearly in the new Exchequer Chamber, for the judges who speak, Anderson and Periam, were Common Pleas judges who would have sat on that court.

These things would scarcely be worth mentioning if a disturbing note were not introduced by Justice Periam, for he refers to a time when the case was in the Common Pleas. (At that time, he says, the civilian Dr. Clark was consulted about whether an appeal would lie from the High Commission.) It seems unlikely that “Common Pleas” is a mere slip for “Queen’s Bench”, because the Common Pleas judge Periam remembered the episode precisely, including the civilian’s name, which would suggest that it took place in his court. One can only speculate as to how the same case, or at least the same in substance, got into both the Common Pleas and the Queen’s Bench. The best guess is that Cheinye and Frankwell sued each other in different courts but eventually agreed to have it out in the Queen’s Bench, whereupon the Common Pleas suit was dropped. Small oddities in the reports—dating and confusion about which party was plaintiff and which defendant—give that hypothesis a little support.

Add. 24,845, f. 129b is a strange report, which probably amounts to notes on *Cheinye*. The case is summarily stated at the end of the document: Incumbent “Cheney”, being deprived by the Bishop of Lincoln appealed to the Archbishop, pending which appeal Cheney was sued before the High Commission and deprived by that court. The points in the document are ones which the straightforward reports show were made in *Cheinye*, or at least points relevant for that case.

The document is dated M. 15/16 Eliz., however, (court not indicated.) It starts with the generality that the High Commission has power to deprive, and someone identified as “Recorder” is reported to have said that there had been several such deprivations. The document states next that “this case” was before a Bishop and that while it was pending the party was sued for the same cause before the High Commission, which latter suit was “not good.” (“This case” sounds like *Cheinye.*) The document
proceeds to report the opinion given by a civilian “being there”: A person sued before an ecclesiastical judge should not be sued for the same cause before any other ecclesiastical judge; further, an erroneous ecclesiastical sentence is “avoidable” by appeal, and appeal suspends execution, but a sentence given by the Pope or the King’s commissioners will be “void” by a supplication to the King to make a new commission or to the Pope to make new delegates; such supplication does not, however, suspend execution of the existing sentence.

The document then jumps to P. 25 Eliz. (close to Cheinye, but still a little earlier than the clear reports of the case.) Remarks by Fenner—whom we know to have been of counsel in Cheinye—are given: It had been adjudged in the King’s Bench that if “Commissioners” give sentence in time of Parliament and then the same Parliament pardons the offense by the general pardon the said sentence is void, and therefore—per Fenner—when “commissioners” give erroneous sentence “it will be void in itself [en lui mesmo].”

Next, “in the same term” (P. 25 presumably) it was disputed between two civilians whether, if a suit is pending before a Bishop or Archbishop and “it” (presumably a suit for the same cause) should be commenced before Commissioners and judgment given the sentence will be void or voidable, and thus (i.e., likewise) if a sentence is given before an Archbishop pending a suit before a Bishop. It was also said “there” (probably on the same occasion) that appeal ought at common law to be taken within 10 days after sentence, though “now” he has 15 days, but “supplication” (for royal intervention) may be brought within 2 years and there will be restitution of the profits, but supplication lies after 2 years (i.e., presumably, if the new royal commission reverses the earlier sentence there is restitution only if “supplication” for such a new commission was timely, but supplication may be made at any time, except that if it is delayed beyond 2 years and reversal results there will be no restitution.

The brief explicit reference to Cheinye follows. My best guess is that the material in the document reports early proceedings in that case and precedential citations therein, unless some of it reflects only the research of a lawyer concerned with the case.

2. (Caudrey) There are some problems about the reports of Caudrey. These bear immediately on no more than factual trivia. Because Coke’s reporting of this case is so singular, however (see text), one should be especially inquisitive about its literal accuracy. Substantial differences among the reports, discussed in the text, are the main evidence on that, but oddities in the trivia may also be suggestive. The picture at the end of this note of what Coke may have been “up to” is meant cum grano salis—as a projection from both the details and the substance that is worth considering, but hardly as solid as the comparison in the text between Coke’s report and a very convincing MS.

Bare references for the case, omitting dates, which are part of the problem, are as follows:

(a) 5 Coke’s Reports, 1. Sub nom. Caudrey’s Case (and the name of the other party is given in the body of the report as Atton.)


(c) Add. 25,201, f. 65b. Cawdry v. Hatton. Very fragmentary notes on Coke’s argument in the case. Adds nothing except one citation contributed by the reporter.

(d) Add. 25,211, f. 87. The important MS. Relied on principally in the text.
(e) Harg. 7, f.34. Sub nom. Cawdry’s Case. Although this MS. presents some problems of legibility, as Add. 25,211 does not, it is all but identical with the latter. One of these two reports is evidently a copy of the other.

As for dating: Coke dates the case, by its original enrollment as H. 33 Eliz., but records that it was not decided until H. 37. (Popham’s dating is the same.) That is slow progress, but not necessarily reason for surprise apart from a discrepancy in the reports as to the cause of action. Coke and Popham both say that the action was Trespass *Quare clausum fregit*, the special verdict being rendered upon a plea of “Not guilty.” Add. 25,211, the strong MS., together with Harg. 7, is dated M. 36/37 and gives the action as Ejectment. The date itself is compatible with Coke. The MS. does not say that the court’s decision was handed down in the next term, H. 37, but it implies as much, while showing that it was argued on two different days in M.36/37. For the MS. tells us that the judges wanted to deliberate and gave their opinion on a motion for judgment “another day.” It is more than likely that this “other day” was in the next term. (The incomplete MS. Report—Add. 25,201—giving only the argument of Coke as counsel in the case, is also dated M. 36/37, confirming the chronology.) Whether the action was Trespass or Ejectment is of no importance for the substantive issues, but I do not think we can let the discrepancy go at that. These small matters bear on the “dramatic” structure of the case and hence on the reliability of the different accounts.

If we had Coke’s report alone, we would have an action of Trespass commenced in 1591 and decided in 1595. The impression would be of a difficult case, as this one certainly was, reargued on several occasions and finally decided in the most thorough fashion. Indeed, Coke says it was: “Et haec causa pro tribunal per advocatos utriusque parties, & de tribunal per Judices saepius tractata est, & post magnum & maturum deliberationem, & cum caeteris Judicibus consultationem...adjudicata...” (Coke wrote his report of Caudrey in Latin, presumably to make it continuous with his “Treatise”—see text—for which he considered the learned language appropriate. He thought, as he says, that contents of the “Treatise” were important for the general public—the “educated public” in modern parlance—to know about; concealing them in the jargon of the legal fraternity would have been a pity. Coke was translated so early and is so familiarly known in English that it is sometimes forgotten he wrote and first published his Reports in Law French.)

If we had Add. 25,211 alone, we would have an action of Ejectment argued late in 1594, perceived as difficult, put off for “deliberation and consultation with other judges”, and probably decided early in 1595. Moreover, we would have a per Curiam opinion, not a decision rendered in the form of separate speeches by all the Justices, as Coke’s words “from the Bench by the judges often argued” imply. (Coke does not actually give arguments by individual judges, but that is in itself unsurprising. He did not characteristically write “narrative” reports, but summed up the holdings of the court. In this case, however, there is good MS. Evidence that there were no individual judicial arguments in open court, whereas Coke creates the impression that he is merely not spelling them out. ) From the fact that the case was argued at the Bar in M. 36/37, it of course does not follow that it was not argued any number of times before. But I wonder. As I show in the text, the debate by counsel in M. 36/37 was thorough. When that debate was concluded, the judges reacted as one would expect after hearing a hard case ably
argued—they took time to advise. One would hardly suppose that they had heard of it off and on for four years.

Finally, Add. 25,211 provides a bit more evidence that the action was Ejectment than merely saying so. For as that report renders the per Curiam opinion, it contains language specifically appropriate to judgment in Ejectment and not appropriate to Trespass.

What then is to be made of the discrepancies? It seems out of the question that there were two separate and simultaneous lawsuits between the same parties to try the same matter, both decided in H.37. In general, the clearest ring of authenticity comes from Add. 25,211, simply because it is a narrative report—the arguments of named counsel given in order, their speeches recorded in enough detail for successive lines of reasoning to stand out, citations abundantly noted by the reporter. I therefore conclude that an action of Ejectment was argued for the first time in M. 36/37 and decided in a relatively cursory way in H. 37. Yet Coke and Popham testify to an action of Trespass begun in H. 33. I suggest that there was such an action, but that it was dropped before it was decided—not necessarily without ever having been discussed, but probably without thorough discussion. One explanation might be that Caudrey was advised to try to get his deprivation reversed within the ecclesiastical system before pressing a common law test of its validity. A few years later, that having failed and the parties being still at odds, a new suit' was commenced, Ejectment this time (possibly chosen as the slightly “higher” action when the litigation was clearly to be seen through to a showdown,) Some confusion or conflation took place when Coke prepared his report. The same is true of the author of the report in Popham. (The book called Popham’s Reports was published late in the 17th century and is of uneven quality. Connection with Chief Justice Popham—who presided over the court that decided Caudrey—is dubious, though the publisher claimed that most of the volume was taken from MSS. in Popham’s hand.) Both Coke and Popham cite the roll number for H. 33 where the action of Trespass was entered. Perhaps they found that case in the rolls and confused it with the action of Ejectment they remembered the debate of. Nothing in the substance would arouse suspicion in someone who had forgotten the details.

All this goes to cast doubt on Coke’s memory and his proximity to the case when he composed his report. Doubt based on these trivia goes to reinforce the touch of skepticism that should always greet a well-wrought Cokean report, even when there is no other source to compare with it. Did the judges really “resolve” the points Coke has them “resolving” in quite the terms he gives? The volume of the skepticism should rise a bit with the addition of a piece of information supplied only by the MSS.: Caudrey was won by Coke, won by an argument that does credit to his powers. Ordinarily, Coke was not given to suppressing his victories, but here, perhaps, one can imagine a different temptation, essentially a literary one: A great case, after maturing for four years, yields deeply thought through resolutions, on the basis of which a legal scholar erects a “Treatise” of considerable historical and constitutional interest, and also of patriotic or Papist-confuting appeal. Tempting, is it not, to make it seem so? A better picture emerges than the one that Add. 25,211 seems to put closer to the photographic truth. The latter would run this way: Coke, Attorney General, makes an effective argument in a new case, whose complexity is revealed to the judges by able advocacy on both sides. Coke wins. The judges find enough in his several arguments to be persuaded that his client should win. But they are aware that they have not thought through every angle.
Rather than lay down too much law, rather than embrace every theory that proceeded from the Attorney General, and rather than speak too freely about politically sensitive matters, they grasp at the essential and avoid the histrionics of "great cases." The Chief Justice sketches out the court's opinion on enough points to settle the case, and judgment is entered. The victorious Attorney General is perhaps a bit disappointed to have offered more than was received.

Later, with a "Treatise" to write—for which Coke's argument in Caudrey per the MS. was a kind of first draft—it may have seemed no more than poetic license to make the style of the decision look a little grander than it was. As the text shows, Coke claims that the court accepted the doctrines of his "Treatise" and his argument. At the same time, he subordinates those doctrines to a minor issue in the case easily resolvable without reference to them. If license was taken at all, it was taken modestly, for Coke does not pretend that the broad ideas in the "Treatise" and argument were the real reason the case was decided as it was.
Section 3: The High Commission before Coke’s Chief Justiceships.

Courts headed by Coke (the Common Pleas from 1606-1613, the King’s Bench from 1613-1616) handed down a disproportionate share of rulings on the High Commission’s scope by way of both Prohibition and Habeas corpus. This gives prima facie countenance to Coke’s reputation as the Commission’s arch-foe. It suggests a pattern similar to that formed by cases on 23 Hen. VIII (Ch. 2 above.) It is possible that 23 Hen. VIII would never have come to be enforced by Prohibition, or at least that it would have been interpreted to place fewer restrictions on intra-ecclesiastical operations, without Coke’s influence. It may be useful to ask whether his influence was similar with respect to 1 Eliz. and the High Commission—whether without Coke the Commission would probably have been allowed to take a wider, or even unlimited, range of ecclesiastical cases away from the regular courts and to use secular sanctions freely. One must not, however, jump to conclusions about the answer. The sub-category of High Commission cases already discussed in this study—that on self-incrimination—Vol. II, Ch.5—stand as a warning. Coke’s courts were the favored place to challenge the Commission’s use of inquisitorial procedure, as to challenge its jurisdiction and sanctions. In both cases the figures signify something—that lawyers and litigants had better reason to expect sympathy and judicial willingness to take on the Commission from the Cokean courts than from others. But that expectation could be reasonable as a rough practical legal prediction without entailing that Coke’s courts clearly held positions more adverse to the Commission than others. One can choose a court in the vague hope of favorable treatment without calculating in a stricter sense that one would probably fail in the alternative court. The self-incrimination cases warn against concluding too much from a general bias, for there is reason to doubt that the Cokean courts embraced different standards for the permissible use of inquisition than other prior and contemporary courts. Might it be thus with respect to other questions about the High Commission? The answer can only be reached by looking at what was decided, and at the comparability of cases, in detail. I shall, however, try to keep the focus on Coke’s contribution by taking careful stock of the law on the High Commission in so far as it was settled before he ascended to the Bench, and then of the law as he left it to his successors. To that end, we shall first look at the Elizabethan cases and secondly at the Jacobean ones, mostly from Popham’s King’s Bench, that precede Coke’s Chief Justiceship of the Common Pleas.

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Sub-section (a): Elizabethan Cases

Summary

There are not many Elizabethan cases on the jurisdiction and powers of the High Commission. From these, however, one distinct position emerged in the Court of Common Pleas around 1600. It is not until after James I’s accession that the King’s Bench took significant stands on the principal issues about the Commission. The Common Pleas position was in essence: (a) Any and all parts of ecclesiastical jurisdiction may be conferred on the Commission. (b) No secular sanctions may be given to it. This
contrasts with the predominant Jacobean and later view: (a) Only some parts of ecclesiastical jurisdiction are assignable to the Commission. (b) Within this limited range, or at least part of it, temporal sanctions may be employed. The main architect of the late-Ellizabethan Common Pleas position was the senior puisne Justice, Walmesley. Some resistance to it on the part of the Chief Justice, Sir Edmund Anderson, is detectable, but in the upshot unanimity was achieved. Four cases—Mary Barham’s, Smith’s, Whitewit’s, and Poole v. Gray—furnish solid discussion by counsel and the judges of the Commission’s sanctions and procedural powers, documenting the court’s considered opinion that only spiritual ones are available to the Commission (principally excommunication and its established secular follow-up, De excommunicato capiendo.) It is an evident strength of the Walmesley-Common Pleas position that the “secular follow-up” existed, for it forces the question whether additional powers were really necessary for the ecclesiastical system to be effective; the case for a supplementary tribunal, albeit with the same powers as other ecclesiastical courts, is perhaps more convincing.

The only evidence from reports of judicial attitudes earlier than the last years of Elizabeth I’s reign comes from a Serjeants’ Inn discussion by all the judges (1587). This upholds the use of secular sanctions and militates in favor of unlimited substantive jurisdiction so long as it stays within the bounds of ecclesiastical law. One decision against the Commission was, however, made early and remained the law: In Habeas corpus the High Commission must explain in some detail why it has imprisoned someone; it may not, as the Privy Council could, merely invoke its authority to justify an imprisonment. More generally, there is indication in Elizabethan cases that “transcendent” views of the High Commission, which enjoyed favor in ecclesiastical circles, made no impression on the common law judiciary. That is, the prevailing opinion was that the monarch had no authority by prerogative or by a highly permissive interpretation of 1 Eliz. to confer whatever jurisdiction and powers he liked on the Commission. The Commission’s dependence on the statute and the statute’s capacity and tendency to impose at least some limits on the tribunal it created gives every sign of early acceptance.

With this much said, one should note that it would be misleading to suggest that the proposition “so long as the case is within ecclesiastical jurisdiction the High Commission may handle it” was firmly accepted. There are intimations of the view, which prevailed later, that a High Commission case must have at least some degree of special seriousness above the common run of ecclesiastical litigation. In nearly all the cases however, the Commission’s substantive jurisdiction was upheld if it was controverted—plausibly enough given a fairly broad view of that jurisdiction. Working out what its limits were and narrowing it to a manageable specific group of “enormous” criminal offenses was largely left to the future.
The Cases

My earliest relevant report is of Hinde’s Case, in all probability the case of that name several times referred to as a precedent in discussions of self-incrimination. (Vol. II, Ch. 5.) The present report, however, says nothing about the important rule in that context which Hinde and a few other roughly contemporary cases were cited to support (the rule that ecclesiastical courts, including the High Commission, may not expose people to potentially self-incriminatory questioning when they are concurrently liable to ecclesiastical prosecution and, via statute, to secular prosecution for the same offense.) Nor does the report of Hinde go to the substantive jurisdiction and punitive powers of the High Commission. Rather, the case as reported endorses the fundamental principle on which the many later uses of Habeas corpus to raise questions about the Commission’s jurisdiction and punitive powers all depend. It would appear that the principle was uncertain nearly two decades into Elizabeth I’s reign; having been laid down in Hinde, it was so far as I know subsequently unchallenged. The brief report of the case gives the conclusion and adds an important distinction: When Habeas corpus is brought to demand justification of a High Commission imprisonment, it must be substantially justified—i.e., why the party was imprisoned must be spelled out, so that the common law court can examine whether he was imprisoned for sufficient cause; it is not enough to do what the High Commission tried to do in Hinde—just say that he was imprisoned by the order or the authority of the High Commission. The Common Pleas then added an express contrast with imprisonment by order of the Privy Council. (“But if one be committed to prison by the commandment of the Queen’s Privy Council, there the cause needs not to be shewed in the return, because it may concern the state of the realm, which ought not to be published.”) Behind the scanty report there clearly lies a major issue about the conception of the High Commission, whether or not this was deeply debated in Hinde: Is the Commission the ecclesiastical analogue of the Privy Council—the manifestation of supreme authority on the “spiritual” side that answers to the monarch’s and Privy Council’s on the “temporal”, of which power to imprison without showing cause is a necessary adjunct? Or is the Commission, as it were, “just another court” with powers, real or purported, to imprison? Hinde says “just another court”, and so the law remained at the level of general principle (i.e., the decision need not eliminate all dispute about how detailed a “spelled out” return on a High Commission Habeas corpus has to be.) It is incidentally noteworthy that the court’s position on the Privy Council’s imprisoning power looks taken for granted—unsurprisingly for the mid-Elizabethan period, though it became an agitated question in the 1620s.

The next relevant document reports an opinion rendered by all the judges at Serjeants’ Inn. It relates to a real case, for particularities are given. A.B. promised marriage to E. F. and committed fornication with her “in Greenwich-house, being in service with one of the Queen’s servants.” A. B. then married another woman. For this offense, the High Commission fined him 200 marks and certified the fine to the Exchequer. The question discussed at Serjeants’ Inn was the legality of the fine. There is no telling whence the question was referred—quite possibly from the Exchequer, in

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66 M. 19 Eliz (i8/19 or 19/20?) Eliz. C.P. 4 Leonard, 21.
67 T. 29 Eliz. at Serjeants’ Inn . Savile, 82 and 114.
connection with whether steps for the collection of the money should be taken. Savile reports the discussion at two places, identically except that in one place he says all the judges agreed and in the other that the greater part did. What at least a majority agreed on was sweepingly supportive of the High Commission: Under 1 Eliz. and the current patent, the Commission may both fine and imprison “for all offences and misdemeanors corrigible by Ecclesiastical power and jurisdiction.” Note that the opinion by implication goes beyond asserting the legality of temporal punishments, for it is so stated as to suggest that the Commission may handle any ecclesiastical crime, not only enormous crimes. If one is entitled to doubt whether the judges meant to go that far, one must still take them as recognizing that fornication compounded by breach of promise to marry—and perhaps aggravated in its scandal by proximity to the Queen—was a High Commission matter. The judges then qualified their opinion: Although discretionary, fines imposed by the Commission must be reasonable and imprisonment must not exceed a convenient time. It is implied that common law courts might use the Prohibition to prevent imposition of definite sentences deemed unreasonable and the Habeas corpus to discharge from both an excessive definite commitment and, after a reasonable time, from an open-ended one designed to coerce. Absence of appeal from the Commission is given as a reason for insisting on limitation of its punitive discretion.

Partlet v. Butler (1596) is significant for the jurisdiction of the High Commission on one point. In this case, the Commission was prohibited from proceeding for defamation of a clergyman on the ground that a common law action would lie for the words in question. To this intent, it signifies only the uncontroversial proposition that the Commission is an ecclesiastical court, wherefore any subject matter beyond ecclesiastical jurisdiction generally is also beyond the Commission’s. The defamatory words here, however, were allegedly spoken during divine service, so that the additional and properly ecclesiastical offense of disturbing divine service was also involved, which offense would have been committed whether or not the words were defamatory. The Prohibition was accordingly framed to extend only to the defamation. The decision accordingly implies that disturbing divine service—hardly the most grievous of crimes in all forms—is appropriate to the Commission. No attempt was made to maintain the contrary.

The first sign that some undoubted ecclesiastical crimes are too minor for the High Commission appears in an anonymous Common Pleas case of 1599. The crime in question was laying violent hands on a clergyman. The judges agreed that an ecclesiastical court could proceed for the offense, but doubted whether the High Commission could, “for they understand (intend) that they may not determine such petty things.” Immediately, they wanted to advise and see whether there were any relevant precedents, but a Prohibition would seem eventually to have been granted, because according to the report the final result of the case was a Consultation—i.e., there must at some point have been a Prohibition for the counter-writ to undo. While the Consultation is unexplained in the report and could simply represent a decision on deliberation that a High Commission suit for the offense was unobjectionable, one further circumstance is reported that could account for the Consultation independently: Defendant in the High Commission pleaded self-defense and witnesses had been examined in the Commission

by the time Prohibition was sought. That is to say, plaintiff-in-Prohibition could plausibly be held to have forfeited his right to a writ by waiting too long to seek one. Although delay in pursuing Prohibitions usually did not bar them (cf. Vol. I, Ch. 3), it may be arguable that waiting too long is least excusable when one’s claim is only that one is being sued in the wrong ecclesiastical court.

From the same term and court as the first intimation of an “enormity” test for High Commission jurisdiction came the important Habeas corpus case of Mary Barham. This case shows the Common Pleas perhaps close to agreement that the Commission had no secular punitive or coercive powers whatsoever; in addition, one judge, without reported objection by others, both embraced an “enormity” standard in general terms and applied it to exclude High Commission jurisdiction in the common run of marital suits.

Barham brought Habeas corpus after being committed to the Gatehouse prison. The Keeper’s return said she was committed by the Bishop of London and two fellow High Commissioners (Byng and Stanhopp) for disobeying “divers sentences given before them concerning contract of marriage between her and William Dennys.” The less complete report, Lansd. 1065, is express that Dennys or Dennis was suing Barham; neither report is very specific about the cause of action, but breach of contract to marry, with or without further complications, seems likely. The Keeper also said that when Barham was in his custody De excommunicato capiendo was brought against her. (Clearly the High Commission had excommunicated her—lawfully or not depending on its jurisdiction—as well as sending her to jail without a De excommunicato—lawfully or not depending on its procedural powers. Its—or Dennys’—proceeding to sue out a De excommunicato perhaps suggests that committing her directly was conceived as an interim measure rather than a properly punitive or coercive one—a matter of securing the party until her imprisonment on De excommunicato could be processed. Nothing would exclude the hypothesis that the High Commission itself, at the time of this case, had no aspiration to secular sanctions stronger than a short-term power to keep excommunicated persons from eluding imprisonment by De excommunicato capiendo.)

Barham was represented, Lansd. 1065 tells us, by Serjeant Harris who argued flatly that the High Commission had no power to imprison, such power being ruled out by Magna Carta (Ch.29.) In effect, imprisonment by any ecclesiastical court does not count as imprisonment per legem terrae. Justice Walmesley, speaking first from the Bench, strongly agreed (“What authority have the High Commissioners to imprison the body of any man [?] [I]t is directly against Magna Charta [,] nullus liber homo &c.”) He went on to say that although the Queen was authorized by statute to appoint High Commissioners, and they were required or permitted to proceed according to their commission, the language means “according as their Commission is guided & warranted by law, for the Queen hath only that authority which the Pope had before.” (If you like, obviously commitment by Papal order before the Reformation was not commitment by “due process of law” as understood by Magna Carta. Implicit in Walmesley’s position is the proposition that 1 Eliz. did not “amend Magna Carta” by permitting the monarch to

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70 P. 41 Eliz. C.P. Lansd. 1074, f. 303b (the fuller report, from a series most exceptionally in English) and Lansd. 1065, f.12 (skimpy, but accordant and useful for a couple of details,
authorize ecclesiastical courts under the new regime to exceed the Pope’s powers—a sensible reading of Parliament’s intentions, though it did not hold up in the long run.)

Justice Glanville spoke next, agreeing “with all this…which Walmesley hath said”, subject only to a faint note of hesitancy. (He emphasized that he was speaking “under correction.”) Glanville than added, “the chiefe cause of the foundation of the High Commission was for correction and deprivation of Bishops and heresy, not baptizing of children, & such heinous crimes, & not for matters of matrimony and such inferior causes.” In short, Glanville, unlike Walmesley, moved from sanctions to jurisdiction and articulated a version of the “enormity” test. The two judges then underscored their opinion on sanctions by saying expressly that excommunication was the ecclesiastical courts’ “utmost authority.” As Walmesley vividly put it, “theyr sword can give noe deeper wounds, but they are Faine to crave ayde of the temporall sworde, and sue out a Cap[iendo] excommunicat[o] for theyr bodyes.” And Glanville drove in once more the sense in which Magna Carta was a formidable obstacle to any other construction (“…without doubt the meaning of the statute was in noe case to disannul Magna Charta soe sacredly established.”) (It is, I think, clear from this language that Magna Carta was not regarded as unrepealable—only possessed of a prestige and longstandingness such that without unmistakable evidence of intent to repeal or amend it other statutes should not be interpreted as doing so.)

Chief Justice Anderson, speaking last, was alone uncertain. He says nothing substantive at odds with Walmesley or Glanville, only that it would be advisable to look at the statutes and the commission before resolving the case, “or els we shall do rashly.” It is hard to say what Anderson thought closer study of the authorizing documents might reveal, but it was scarcely unreasonable to want to consider whether anything in the chapter and verse might stand in the way of releasing the prisoner. Walmesley and Glanville had made no pretense of exact exposition, but spoke from a confident general sense of what the current law was against the background of Magna Carta.

In the event, when the court turned to the mere case before it, the discussion of the High Commission’s jurisdiction and sanctions virtually vanished into abstraction. For all the judges agreed that now—De excommunicato capiendo having been brought against Barham—she could not be bailed (or, a fortiori surely, released outright.) In other words, however illegally she was held before the De excommunicato was obtained there was nothing illegal about holding her prisoner now. (Whether there is any technical way of wiggling out of this conclusion I do not know—any conceivable ground for bailing her immediately and forcing whoever was responsible for executing the De excommunicato to catch her anew.) In the end, the only action taken by the Common Pleas was to order Barham transferred from the Gatehouse prison to the Fleet. Her counsel requested that this be done, and perhaps it would have been done without the request. Justice Walmesley noted that the Fleet was the “proper prison of this court.” (Might there be a testy note in Walmesley’s remark, as if to say, “The High Commission’s unlawfully throwing someone into a prison of its choosing is certainly no excuse for keeping her there when valid grounds for her imprisonment subsequently appear; if this court is de facto the agent of her now-lawful detention, let her be put where this court’s ordinary prisoners would.”? Again, I am unable to say whether any finer points of De excommunicato procedure could be relevant.)
The reports of a Queen’s Bench case of 1600, Lovegrove v. Prynne,\textsuperscript{71} yield faint dicta on High Commission jurisdiction, though the case is centrally a holding that the ecclesiastical suit should be prohibited as inappropriate to any Church court. That suit was brought in the High Commission by a clergyman, Prynne. The libel had two elements, (a) defamation and (b) battery or at least assault with intent to beat. I.e., on the second count the libel used the “or at least” expression instead of firmly claiming battery (presumably legitimate ecclesiastical pleading though it would not be acceptable at common law.) The suit was prohibited (a) because the alleged words—“goose”, “woodcock”, and other unspecified “opprobrious words”, but presumably the level of opprobrium was about the same as “goose’s”, were too trivial to support a defamation suit, lay or ecclesiastical; and (b) because taken as a complaint of assault—as the second claim must be taken in the absence of a definite claim that Prynne was beaten—the case belonged to the common law. Prynne’s counsel, Wilbraham, moved for Consultation, arguing that ecclesiastical courts may proceed for a mere assault on a clergyman, but he was unsuccessful. In the process of turning down the Consultation the judges conceded that if battery has been claimed ecclesiastical courts would have jurisdiction, by virtue of the ancient statute Articuli cleri, under the rubric of laying violent hands on a clergyman. The report of the case written by Francis Moore, who was Lovegrove’s counsel, has the court in its closing remarks saying specifically that the High Commission may entertain a suit for “violent hands”, but may not entertain one for slanderous words about a clergyman—any slander, it would seem, not just one consisting in such aspersions as “goose”. (Without doubt regular ecclesiastical courts could hear claims of defamation, whether of clergymen or others, provided the words were not actionable at common law, were not ridiculously trivial, and perhaps, by a further and distinguishable criterion, provided that the words were construable as imputing an ecclesiastical offense to the plaintiff.) To the extent that Moore’s language is deliberate and accurate, the Queen’s Bench may have delivered two dicta about the High Commission specifically.

Smith’s Case (1600)\textsuperscript{72} again raised the question of High Commission sanctions in the Common Pleas. Though there were complicating circumstances in Smith, it basically strengthens the position to which the court was tending in Barham. The case was as follows: Anne Stock was cited before the High Commission for adultery. She was convicted and subsequently excommunicated (presumably for refusal to do assigned penance or to obey an order to refrain from her adulterous behavior.) The High Commission sent a pursuivant, armed with its letters missive, to take Anne prisoner. I.e., it proposed to arrest her on its own authority, by-passing the De excommunica capiendo procedure (That procedure may not have been available to the Commission at the time the pursuivant was sent, since it became so only after forty days from excommunication. An excommunicate could of course make himself or herself hard to find before the

\textsuperscript{71} Moore, 607 (undated); Lansd. 1059, f.346 (nearly identical report from a series designated as Francis Moore’s reports. \textit{sub nom}. Lovegrove v. Preyn. Both this and the printed version say that Moore was Lovegrove’s lawyer.); Croke Eliz., 753, \textit{sub nom}. Love v. Prin, dated P.42 Eliz. K.B.; Add. 25,203, f. 178b, Lovegrove v. Prinne, dated T. 42 Eliz. Q.B. (supplies the additional detail of Prynne’s counsel’s name.)

\textsuperscript{72} H. 42 Eliz. C.P. Lansd. 1065, f. 44b (much the fuller report) and Croke Eliz., 741, \textit{sub nom}. Tho[mas] Smith v. Smith.
regular commitment process could be put into effect.) The pursuivant and five henchmen entered Anne’s husband’s house and broke a cistern (so I read the report) in which they thought the woman was hidden. The local constable and John Smith, presumably a neighbor (who, we are told incidentally, was a Common Pleas attorney) intervened to assist the Stocks against the invaders and prevented the pursuivant from “proceeding in this manner against the peace.” Mr. Stock, Anne’s husband, subsequently brought an action of Trespass for housebreaking against the pursuivant and his associates. Smith was meanwhile cited before the High Commission for the “rescue”—one should probably say in stricter legal terms for contempt of the Commission in obstructing its officers and process. He obtained a Prohibition. The reported debate is on motion for Consultation.

Serjeant Warburton, for Smith, took the fundamental position against use of temporal sanctions by the High Commission: Spiritual courts have three sanctions—suspension, excommunication, and interdiction. The Commission, as a spiritual court, is confined to those. 1 Eliz., on which the Commission is grounded, makes no alteration of the previous law in this respect. Taking and imprisoning a person is a temporal function, to be carried out by De excommunicato capiendo in the case of ecclesiastical offenders. I call this the “fundamental position” in contrast to a narrower one possibly sufficient for this case: To stop the High Commission proceedings against Smith, it might have been enough to claim only that the pursuivant’s manner of going about his business—entering the Stocks’ house by force and abusing Mr. Stock’s property while searching for Anne—was unlawful, wherefore Smith’s effort, in collaboration with a peace officer, to stop these actions was not unlawful. Serjeant Warburton, however, must have thought that his client would be at least as well-served by attacking the fons et origo of the proceedings that Smith eventually got swept into—the High Commission’s project of arresting Anne Stock, illegal even if carried out with scrupulous rectitude. (Given Warburton’s highly probable awareness, from Barham, of the way the wind was blowing in the Common Pleas, the advice was good. Allegations about the pursuivant’s behavior would have raised factual questions that going directly to the Commission’s legal powers would sidestep. I should not think it plausible to maintain that the third party, Smith, could commit an offense against the High Commission by getting in the way of its officers regardless of the legality of what they were doing, unless perhaps he could be charged with excessive or unprovoked violence, and then it would be hard to make out that the remedy would not be at common law and belong to the pursuivant and his men as individuals.)

Serjeant Harris’s position on the other side was equally radical (and incidentally the opposite of the one he had defended in Barham): 1 Eliz. unites all temporal and spiritual jurisdictions in the Queen, which “joint and absolute” authority she has transferred to the Commission. Therefore the only question is what specifically she has authorized the Commission to do. The question is easily answered here because, according to Harris, the current patent expressly authorized the arrest of persons “found in adulterous manner.” (The phrase may have a wider reach than “convicted—or indeed convicted and excommunicated—for adultery”, but it must surely include those cases.) Harris’s language is so broad that besides what it clearly covers—power to confer any part of ecclesiastical jurisdiction on the High Commission and power to give it temporal sanctions—it could conceivably be stretched even to conferral of secular jurisdiction. Such a construction would present grave problems, and though it is more than Harris
needed on the premise “if the attempt to arrest Mrs. Stock was perfectly legal the arresting court may lawfully prosecute someone who tries to thwart the arrest.” Erasing limits on the Commission’s jurisdiction so far as possible does, however, have the advantage of weakening the contrasting proposition “even if arresting and imprisoning Mrs. Stock for adultery was perfectly legal, ecclesiastical proceedings against Smith look dubious—should any tort or crime he may have committed not be a common law matter?” Admittedly, Harris did not so far as the report indicates show chapter-and-verse from the patent to the effect that interfering with a lawful High Commission arrest is a High Commission offense. If, however, the Commission could be given even more than comprehensive ecclesiastical jurisdiction and secular sanctions, there may be some basis for arguing that “incidents” of its jurisdiction and procedural powers are given to it at least by implication. Harris’s final remark in his speech may be meant to push this latter point. What he says is that “the suit in spiritual court is wholly other [tout auter] than the cause of action here.” He possibly means that the ecclesiastical suit against Smith, a legitimate incident of the Commission’s proper proceedings against Mrs. Stock, does not take away Smith’s right to bring a common law action (no more, one might say, than Mr. Stock’s later action of Trespass was barred by anything that might be determined between the Commission and its officers and either Anne Stock or Smith.) Sed quaere. Before making that last point, Harris added to his sweeping defense of the High Commission a rather interesting comparison, though I am not sure it adds any real force to his contentions. “…The commission (i.e., the patent)”, he says, “will be of as great force as a custom is.” A custom, of course, if it is immemorial and to the judges’ eye reasonable, will defeat the common law. Harris must be saying that by 1 Eliz., anything the monarch authorizes the High Commission to do in the patent is as lawful vis-à-vis the common law as if the same practice were warranted by custom. That is at least a strong restatement of the length to which Harris was ready to go, or his clients the Commissioners wanted him to go. It may, on the other hand, sound a slight note of moderation in the sense that owing to the reasonableness requirement a custom cannot trump the common law in just any respect. Harris may have intended to concede that the patent could not confer unlimited common law powers on the ecclesiastical Commission, but could, well short of that, confer secular powers useful for the effective discharge of its proper business. The comparison was not pursued; complex problems could have arisen if it had been.

Chief Justice Anderson, speaking first from the Bench, did not, as he did not in Barham, go at once to the major issues about the High Commission. By the end of his brief speech, however, he appears to concede that the question before the court—whether the Commission may proceed against Smith—depended on whether arresting Mrs. Stock was infra vires, which is to say it depended on the “major issues.” Before reaching that point, Anderson enunciates the general principle that when a suit is “well-commenced” in an ecclesiastical court, and in the course of that suit a “common law thing” comes up, the ecclesiastical court may still proceed. This principle was often stated in civil cases (there are examples passim in Vols. I-III above.) It was often honored rather in the breach than the observance, but it is possible that some judges insisted on it categorically, or at least were reluctant to make exceptions. (Going by the letter of Anderson’s words, he stated the principle in especially strong form, for he says that the ecclesiastical court shall proceed “notwithstanding any Prohibition.” This is stronger than saying “ecclesiastical
courts should not be prohibited when a common law issue arises in an originally legitimate ecclesiastical suit”, for it suggests that even if the ecclesiastical suit is prohibited the ecclesiastical court should still proceed. That would seem to imply that the Church court and parties are not attachable for violating the Prohibition. *Quaere.*

Anderson finishes off this point with “*et issint econtra*” [“and so the other way around”—?]. As ecclesiastical courts should be left alone to decide common law questions “incidental” to deciding ecclesiastical questions in common law suits—? But what would that mean? I should have thought that some ecclesiastical questions that must be decided in order for a common law case to be resolved—such as whether two people are married—were simply by the common law itself triable only by ecclesiastical certification, while others were ultimately resolvable by the common law court, subject to a frequently honored moral obligation to seek civilian advice on doubtful questions. Perhaps Anderson was no more than tempted by *Smith* to give voice to his probably overbroad, but plausible, theory of the relationship between the spiritual and temporal legal systems, one tending to limit Prohibitions more than they were limited in practice.)

In any event, the application of Anderson’s principle to the case at hand must be that if the High Commission was, so to speak, rightfully possessed of “Anne Stock’s Case”, it was free to deal with Smith’s conduct as an “incident” thereof, not worrying about whether what he actually did was a “common law thing” (a thing which would raise no legal question except the thoroughly temporal one “Did he commit unjustifiable assault or battery?”) The alternative would be detaching Stock from Smith and holding that the High Commission had jurisdiction to proceed against interference with its process even though the form of the interference would have come to an ordinary common law tort. Anderson’s approach, to its credit, was more principled than that. As I have already shown, however, Anderson realized at once that his suggested approach was of no use unless the High Commission’s sending its pursuivant with his missives (the equivalent of a warrant for Anne Stock’s arrest) was lawful, and hence that the major issues about the Commission’s powers must be faced. His brethren got to that conclusion more directly.

Justice Walmesley, the senior puisne judge, spoke after Anderson. (The Chief Justice normally gave his opinion last, but there is nothing irregular in variations, especially when a judge had an observation short of his ultimate word on the case, as Anderson’s opening point here was.) Walmesley’s opinion in *Smith* is entirely consistent with his opinion in *Barham*, but somewhat different in tone and emphasis. There is no mention of Magna Carta, invocation of which is a bit melodramatic and even problematic if scrutinized closely. (As I point out above, a subsequent statute could permit something which Magna Carta by itself should be taken to forbid. It may have been the part of good sense not to declaim about what a scandal it would be to “repeal Magna Carta”, but to stick to straightforward argument as to what the statute now in question does mean.)

Arguing in this case, Walmesley as reported does not construe 1 Eliz. elaborately, but takes it as obvious that the statute permits giving only spiritual jurisdiction to the High Commission; if the Commission’s patent purports to give it more it simply fails to, since nothing the statute says about the patent is clear or explicit enough to allow the patent to counteract against the statute’s otherwise plain intent. (The formulation here is mine, but I think it comes to what Walmesley thought.) Nothing said by Walmesley or any judge in this case suggests any limits on the substantive ecclesiastical jurisdiction conferrable
on the Commission, much less any doubt as to whether it could be authorized to deal with adultery. It is perhaps noteworthy that for Walmesley saying that the statute confined the High Commission to spiritual jurisdiction sufficed to say that it was confined to spiritual sanctions and procedures, as well as spiritual substance. In other words, to Walmesley and perhaps most late-Elizabethan judges the distinction I have steadily employed in this study between substance and sanctions might have looked meaningless. I believe it is necessary to expound—in the sub-sections below—what might be called “the 17th century synthesis”, a predominant though not unanimous position: some substantive jurisdiction but not nearly all of it, may be given to the Commission, and some temporal sanctions. But it may have taken time, increased litigation, and fresh political breezes for such a compromise to look so much as intelligible to many lawyers, Walmesley’s main effort in Smith was not to belabor his fundamental beliefs about 1 Eliz., but to develop a strong supplementary argument in support of his position. He observes that the statute of 5 Eliz., (thus another statute quite close in time to 1 Eliz.) confirmed the De excommunicato capiendu procedure and modified some details of it. The basic inference is that Parliament is unlikely to have intended, or to have understood 1 Eliz. as intending, that the refurbished De excommunicato could be evaded by one ecclesiastical court via a power to arrest and commit directly. Moreover, 5 Eliz. appointed a penalty for persons against whom a De excommunicato had been issued if they failed to turn themselves in. The Queen would therefore lose her penalty if the High Commission could effect excommunicates’ imprisonment on its independent authority. Besides, Walmesley goes on to say, the common law provides the writ De cautione admittenda for someone who has been imprisoned on De excommunicato capiendu and has made submission: the writ orders the ecclesiastical court to assoil him. (“Submission” presumably means doing whatever is required to satisfy the spiritual law and entitle the party to have his excommunication lifted.) In short, the ecclesiastical courts do not have an unchecked discretion to keep a person in the state of excommunication and in jail. As the secular arm comes to the aid of the Church by imposing a secular sanction, so it comes to the aid of the subject by seeing that the Church does not abuse the assistance it is given. Thus, Walmesley says, to find in the Supremacy Act an intent to let the High Commission be given imprisoning power would be to do the subject out of a common law right, as it would do the Queen out of a statutory entitlement bestowed on her shortly after the Supremacy Act. It would mean that one ecclesiastical court could imprison people perpetually, contrary to the whole purpose of the De cautione procedure. Walmesley sums up with the maxim ex errore sequitur error, which perhaps in context says, “Err in construing 1 Eliz., maybe not implausibly in view of the vagueness of its language, and you alter or confuse the law on various scores that the makers of the act are most unlikely to have anticipated.”

To close, Walmesley makes one further point: “And for the manner of the action it is out of course also, for by the common law no one may enter a house to arrest anyone’s person unless by open doors except only in cases of felony or treason, and if the Queen makes a commission to the contrary it will be held for nothing.”, citing Year Books. I take this to say that even if 1 Eliz. did permit the High Commission to be given imprisoning power it would not follow that it could be given, or was given by the current patent, an exemption from the general rule on arresting officers’ title to break into houses. Construing that into the statute would be several degrees more farfetched than allowing it
to infringe the *De excommunicato* procedure and its incidents, indeed to the extent of threatening their destruction. It would confer on the monarch in one context a power which he or she simply did not have at common law. (I.e., *per* Walmesley, the monarch had no prerogative to authorize breaking into a house to effect an arrest for less than felony, however special or pressing the occasion or carefully specified the authority. The application of this point to the instant case would seem to be: If the pursuivant and his assistants were manifestly violating the common law, surely Smith’s interference with them could not be an ecclesiastical offense, even if the attempt to arrest Mrs. Stock was in itself perfectly legal, and even if Smith’s interference with an arrest carried out in a proper manner—as if the pursuivant had entered through an open door or was admitted to the house by someone within it—would count as an ecclesiastical offense.

After Walmesley’s speech Anderson intervened again by remarking, “The example that lately was at Northampton greatly moves me, for there on such occasion a man in defense of himself and his house killed another, and often felons enter on pretense of such commissions, & by authority, whereby great mischiefs may ensue.” I take it that this expresses agreement with Walmesley’s last point and suggests a softening of any disinclination to prohibit Anderson may have had. He seems to say that the rule against breaking in to arrest anyone short of a felon is indeed important to preserve, partly because felons could use commissions—forged or crookedly obtained, I suppose—to gain admittance to houses unless such commissions were illegal no matter what. Whatever the circumstances of the case at Northampton Anderson remembered, it impressed on him that illegal entries to make arrests, or with pretense of such a purpose, can lead to dire results—people can get killed and be caused to kill in (presumably justified) self-defense.

Justice Glanville speaks next; like Walmesley, he is consistent with his opinion in Mary Barham’s *Habeas corpus*. He expresses his agreement with Walmesley in terms, stating their common view in language we have encountered before: What 1 Eliz. does is “reduce absolute jurisdiction in causes spiritual (my italics) …to the Crown”, such spiritual jurisdiction having been “by usurped authority…invested in the Pope”; there is simply no reason to suppose the statute “ordain[s] any new spiritual jurisdiction”, as opposed to “reducing” (restoring) that which already existed; the Crown’s temporal jurisdiction was untouched by the statute because it had never been usurped. (So any notion that by 1 Eliz. the monarch gained new temporal authority, which he might transfer if he liked—to an ecclesiastical agency if he chose—is cut off. Glanville does not quite articulate this, but it is intimated in his choice of language.) Glanville then adds a strengthening argument: If the High Commission may imprison an excommunicated person directly, it may by the same line of reasoning execute a heretic (i.e., directly order the execution of someone it has convicted of heresy and excommunicated), which manifestly it may not do, but must deliver the perpetrator to the secular arm for execution. (Glanville does not spell out the rule on heretics, but a long legislative history, rooted in the idea that the Church may not kill or “shed blood” could be invoked.)

Justice Kingsmill speaks next, expressing agreement with Walmesley and Glanville. I think his one-sentence reported opinion might be meant to say a bit more explicitly than the other judges do that “no temporal substantive jurisdiction” implies “no temporal sanctions”, but the words are too slight and general for that to be clear. Justice Glanville then spoke again to add one further argument, another significant strengthening
of the case against the High Commission. 1 Eliz., he says, must surely leave the new ecclesiastical court it authorizes in the same procedural position already occupied by ecclesiastical courts generally (excommunication its highest sanction, beyond which *De excommunicato capiendo* takes over.) For if the statute meant to create any different procedures for the new court it would have “ordained” them expressly. An important reason for so believing—in addition, perhaps one should say, to common sense and the context of 1 Eliz.—is that when other new courts were created by statute a distinctive process to be used by them was laid down in the act. Two Henrician secular examples are cited, the Courts of Augmentations and Wards and Liveries. (In other words, I take it, a new statutory court meant to proceed somewhat differently than in a well-known pre-existing way—common law or ecclesiastical—is customarily given a specified process by the creating legislation; past practice implies the rule that either the new process is specified or no new process is brought into being.) The reporter says that the other judges “well-allowed of this reason.”

Three justices having spoken decisively in favor of the Prohibition, Serjeant Harris made one further attempt. He does not add any new arguments to his earlier speech, but tries again to focus the judges on the patent, insisting that whatever else is true the statute does say clearly enough that the High Commission’s current powers are what the current patent gives it. The judges replied, however, that the patent refers to the statute and according to the intent and purpose thereof shall be expounded. The court’s decision was apparently unanimous; Croke’s concordant synoptic report says it was. If Chief Justice Anderson had any lingering reservations he did not express them, unless perhaps by not speaking for himself on the central issues.

*Barham* and *Smith*, the one on *Habeas corpus* and the other on Prohibition, have together the effect of a “leading case” for the Common Pleas. The most basic limits on the High Commission—its dependence on 1 Eliz. and construction of the statute as putting some limitations on what the Commission could do or could be authorized to—were fixed. Later Common Pleas decisions would tighten restrictions on substantive jurisdiction and somewhat loosen those on procedural powers. With respect to the latter, however, *Barham* and *Smith* can still be said to have established the principle that any pretense on the Commission’s part to go beyond standard ecclesiastical procedure was subject to strict scrutiny.

The remaining Elizabethan cases from the Common Pleas are in line with *Barham* and *Smith*; one adds detail and specificity to the procedural restrictions. The case of South v. Whitewit (or Whetwit) is so close in date and form to Smith that one might suspect it of being a version of the same case. The specific facts, however, are different, so it is probably best taken as separate, though legally identical. (Whitewit’s wife slandered South—nothing said in the reports to explain how her words were so much as colorable ecclesiastical defamation. South sued her in the High Commission, which

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73 Owen, 145; Harg. 12, f. 188. The reports agree, but the MS. has a little more detail. Neither is dated, but Justice Glanville, who speaks individually in the MS. —not in Owen—died in July, 1600. Both reports oddly refer to the statute of 5 Eliz. when the discussion appears to be about the basic 1 Eliz. This is probably confusion with the statute of 5 Eliz. confirming and revising the *De excommunicato*, which is brought up by Justice Walmesley, as in *Smith*.

224
excommunicated her—whether after trial or for failure to respond to the citation the reports do not say. A pursuivant was sent to take Mrs. Whitewit prisoner, which he did after breaking into Whitewit’s house in the middle of the night. Mr. Whitewit “rescued” his wife, for which he was summoned to come before the Commission. He sought and got a Prohibition. Whether the reported discussion is on his original surmise or on motion for Consultation does not appear.) The same judges speak as in Smith, one by one and so far as the report shows they make the same arguments. The MS. report may contribute a significant detail in that it has Chief Justice Anderson by name agreeing with the other judges both on the large questions and in emphasizing that, whatever else, the pursuivant’s breaking in to arrest for an offense below the rank of treason and felony was unlawful.

In my last Elizabethan case, Poole v. Gray, a priest, sued Gray in the High Commission for laying violent hands on him. Generously displaying what it supposed its powers to be, the Commission (1) fined Gray £10 “for the Queen”; (2) excommunicated him; (3) enjoined him to procure absolution and “submissively” acknowledge his offense in “the” (presumably his) parish church; (4) ordered him to pay Poole £20 for costs; (5) committed him to prison at the Commissioners’ pleasure and until he paid the Queen’s fine and the “damages” (presumably Poole’s “costs” above); (6) ordered him to be bound to perform the “submission.”

Gray sought a Prohibition alleging (1) “the custome & lawes of the land quod omnia placita de transgressione &c.” [Abbreviations in the Latin spelled out. I am not sure what legal source is referred to, but the principle is clearly that all pleas of trespass belong at common law. It is implied that Poole’s suit, at least as handled by the High Commission, was nothing else than a plea of trespass, viz. battery.]; (2) nullus liber homo [from Magna Carta, c. 29]; (3) language in the reputed statute Articuli clerii which gave or confirmed ecclesiastical courts’ jurisdiction to entertain suits for laying violent hands on a clergyman, expressly barred spiritual courts from imposing a pecuniary penalty for it.

The Common Pleas issued a special Prohibition (so designated in the Lansd. 1074 report) quoad the fine, “expenses”, and imprisonment. (I.e., the Prohibition did not touch the High Commission’s jurisdiction over violent hands nor—given its jurisdiction—the excommunication and the injunctions to do spiritual acts appropriate to a convicted and excommunicated person. Interestingly, nothing is said about requiring Gray to enter a bond to perform the spiritual part of the sentence against him.) When the special or partial Prohibition was delivered, the Bishop of London and other Commissioners released Gray from prison but “bound him from court to court” (i.e., made him enter another bond to appear before the Commission at regular intervals.)

Later Serjeant Williams, clearly representing Gray, came to the Bar and prayed Attachment “for this contempt.” I.e., Williams’s position was that letting Gray out of jail while doing nothing about the fine or the costs/expenses/damages was not full obedience of the Prohibition. I think Williams’s procedural move here is unusual—i.e., asking the

74 Poole v. Gray. M. 44/45 Eliz. C.P. Lansd. 1074, f. 405; Lansd. 1058, f. 54b. The latter report is not headed by the names of the litigants, but a note at the end says “Grey was one of the parties.” Lansd. 1074 is the fuller report; Lansd. 1058 does not disagree, but see text for significant supplementary information it provides.
prohibiting court, upon an informal showing of what had happened, to approve Attachment instead of simply suing out an Attachment-on-Prohibition (pursuant to which the attachee could plead either that he had done what the Prohibition demanded or that the Prohibition was wholly or partly ill-granted.) Be that as it may, the Common Pleas judges took the occasion to argue the legality of all disputable actions taken by the High Commission before it was prohibited. Williams should probably be credited with a useful short-cut and perhaps even with doing the High Commission a favor. For if the Common Pleas gave the dignitaries on the Commission clear advice about their rights they might be able to correct any inadequacies in their response to the Prohibition without actually being attached or forced to plead formally in what might turn out to be a hopeless cause. They could still accept Attachment and controvert it if they chose to, banking on a Writ of Error if the Common Pleas should order attachment—instead, I suggest, of letting its opinion be known and holding back until the Commission undid anything the Common Pleas said was ultra vires. One should not, I think, say the Commission was merely foolish or stubborn in its response to the Prohibition. Previous cases had only said unmistakably that the Commission may not imprison, and in this case it had backed off from imprisoning. It was entitled to the court’s opinion on fining, taxing costs—or perhaps over-taxing them as a concealed way of imposing damages—, and possibly insuring performance by compulsory bonds, even though the Prohibition here does not seem to have been directed against that practice.

The case was discussed by the puisne judges, Chief Justice Anderson being absent in the Star Chamber. Justice Walmesley was true to form. After reiterating his view that the High Commission had no power to imprison and no sanctions beyond excommunication followed by De excommunicato capiendo, he said expressly that no power to impose a fine existed. He said further that the Commission had no power to assess damages, “for in this case there [is] no differ[ence] between dam[ages] & costs for all runne under ye name of damag[e]s but only p[ro]ceed quoad correctio[n]em tantu[m].” The meaning of the last clause raises a question: Does Walmesley mean that ecclesiastical courts including the High Commission may not tax bona fide litigative costs? Or that they may but “in this case” had obviously awarded damages by charging Gray the large sum of £20? Or that clearly labeled costs within the bounds of possible bona fides may be charged, even if suspiciously large, but “in this case” the High Commission had not successfully camouflaged the damages as costs (perhaps by using the word “damages” in the bond Gray was compelled to enter)? In any event, Walmesley ruled out detectable civil damages as firmly as criminal fines. He did not comment on the use of bonds in itself.

Justice Warburton (Glanville’s replacement on the court) followed up on Walmesley’s last phrase, “quoad correctionem tantum” (i.e., the High Commission like other ecclesiastical courts may proceed only to the end of punishing by spiritual sanctions—“correctio.”) Per Warburton, “That correction must also be moderate for in 2 Hen. IV they imposed soe great a punishment upon an offender that he was faine to agree with his adversary and thereupon had a Prohibition.” The test for excessive spiritual punishment is interesting. Would this be the right formulation: If the punishment is so severe that a “reasonable man” would usually rather pay off his adversary it exceeds ecclesiastical power? There would otherwise be an easy ruse to impose a pecuniary sanction in effect.
Serjeants Daniel and Williams then intervened to cite a case they had “had in experience” (had encountered in their practice—it is not independently reported) to confirm Warburton’s point that moderation should be enforced on the High Commission. In that case, Haurforth v. Cotten, “The hie Com[m]is[sion] assessed a fine of £200 upon C[otten] for incontinency and extreated it into ye excheq[ue]r & upon all ye matter disclosed there we had it discharged there by all ye barones.” This case does not unmistakably support what Warburton was probably saying, for he appears to agree with Walmesley that no pecuniary penalty may be imposed and to add that even spiritual punishments must be moderate. Haurforth does not as described seem to rule out fines altogether, but to hold that if a fine is excessive none of it may be collected. It might also imply that Exchequer process, rather than Prohibition, is the way to challenge an immoderate fine. The decision can, however, be taken to uphold not just “Spiritual punishments must be moderate”, but a broader principle: “All ecclesiastical punishments must be moderate. That is true if they are spiritual and thus intrinsically lawful. It is also true if the punishment in itself is unquestionably lawful, or indeed if it is lawful for the High Commission by virtue of special statutory powers given to that tribunal; if immoderation is present, the legality of the type of punishment need not be reached.” So Daniel and Williams would seem to take their case. There is nothing to bar saying that pecuniary penalties should be cut off altogether if excessive whatever common law forum gets the chance to stop them, the Exchequer by discharging an apparent debt referred to it for collection or other courts by Prohibition.

After the interruption, Justice Warburton resumed to make a closing point. I think his intent was probably to defend attaching the Commission as Williams proposed (equivalently, to hold the Prohibition violated despite Gray’s release from prison, or notwithstanding any possible argument that the Prohibition had been obeyed with respect to the central and clearest illegality committed.) For a paraphrase, perhaps: “This case is important for all interests concerned; it is just as well to settle the questions it raises comprehensively and by a strong measure, rather than get involved in niceties as whether the Prohibition was ‘essentially’ obeyed or not.” Warburton’s words in Lansd. 1074 are: “This suit is double for it concernes the credit of ye Church wherein they may deal quoad Correc[t]io[n]em and it concernes the amends of the wrong to the p[ar]ty wherein they may not decide quoad damn[u]m. They might as well to surcease in all dependencyes as in the principall matter.” The report ends with “Kingsmill ad idem”—i.e., the judge not yet heard from agreed with Walmesley and Warburton, probably by saying no more than that he agreed.

The briefer Lansd. 1058 report of Poole v. Gray accords with Lansd. 1074 but adds some significant details. (1) Gray’s fine was estreated into the Exchequer. This means that imprisoning Gray in part to coerce him to pay the fine—as Lansd. 1074 has it—was not instead of subjecting him to normal process for collecting a debt to the Crown, but in addition.

(2) The judges are said to have agreed that “if [ecclesiastical defendant] alleges that the tort which the [ecclesiastical] plaintiff had was de son tort demesne & they of the Court Christian will not allow this plea Prohibition lies.” I take this, applied to the case at hand, to mean that if someone in Poole’s position complains of “violent hands” and someone in Gray’s, admitting that he did lay hands on the plaintiff, claims self-defense in effect—i.e., that he was only responding to plaintiff’s “own tort” by attacking him—the
plea must be allowed and tried as to fact, or else the ecclesiastical court will be prohibited from handling the case. (For Prohibitions sought on the ground that an ecclesiastical court has improperly disallowed a defensive plea, see Vol. II, Ch.2.) Lansd. 1074 gives no indication that this matter was discussed over and above the powers of the High Commission specifically. Its being discussed strongly suggests that Gray urged the improper disallowance of his defense as a ground for Prohibition in addition to his multiple complaint of *ultra vires* behavior on the Commission’s part.

(3) *Per* Lansd. 1058, it was “shown” that the Commissioners after receiving the Prohibition “still bind” Gray by surety to perform their decree. This probably indicates that binding Gray “from day to day” did not merely oblige him—legally or not, a question that cannot be answered without going into whether the use of bonds was in itself a temporal procedure unavailable to any ecclesiastical court—to attend on the Court until he had satisfied the properly spiritual injunctions he had been given. Rather, he was still bound to pay the fine and the costs or damages. Therefore it was clearer that the Commission had disobeyed the Prohibition, and was subject to Attachment, than if it had simply done nothing positive to cancel the fine and the civil award. Justice Warburton in Lansd. 1058 seems to say this in essence when he says that “certes” Attachment lies because “in [illegible word] and the dependencies they proceed against the Prohibition.” It would seem that there was judicial doubt about Williams’ motion for immediate Attachment, I take it because the case in one way raises a problem about what “proceeding against a Prohibition” consists in. (If a court has already imposed a fine and taken the routine first step to get it collected, and then the court is prohibited *quoad finem,* doing nothing to rectify the misstep hardly seems to be proceeding in violation of the Prohibition.) Warburton escaped this problem by finding the perpetuation of the bond after the Prohibition a sufficient “positive step” incompatible with the Prohibition.

(4) A further remark by Justice Walmesley reported in Lansd. 1058 indicates, I think, that he was basically aligned with Warburton on the Commission’s immediate attachability, but concerned about the procedure. For he says, “It seems to me that a special writ should be formed for this purpose.” My spelling out of Walmesley’s thinking would go as follows: Yes, the Prohibition *has been* disobeyed. The High Commission should be held in contempt and attached now; it is not necessary to sue out a regular writ *claiming* a contempt for which Attachment is the legal remedy, to which writ the Commission must plead. But what is the procedural form for such an immediate Attachment? Do we not need a new writ to effect that (whatever would be involved in framing one—perhaps instructing the clerks of the court to draw up a new judicial writ for the judges’ approval)?

(5) In the event, Lansd. 1058 tells us, the court did not order attachment here and now, but assigned a day to show cause that “attachment should not issue.” This information comes right after Walmesley’s remark—(4) above. Although the delay is unsurprising, it could represent a compromise response to Walmesley’s procedural quailm. The court would seem to have asserted its power to attach without a “special writ”, not to mention a writ of Attachment and the formal pleading it would entail, while avoiding the appearance of heavy-handed action and giving the Commission the floor to object. As I suggest above, the Commission may not have been unhappy with this solution: better to be merely prohibited and (probably) no more than compelled in the instant case to rescind everything the Common Pleas took exception to than to lose in
full-scale Attachment-sur-Prohibition proceedings, which would constitute a legal record. I do not think Serjeant Williams’ innovation affected the future; there is probably little point in departing from the standard rule “obey the Prohibition or face formal Attachment” outside a case like Gray, where there are tricky questions as to whether a multiplex Prohibition has clearly been disobeyed. In such a case, an informal mode of procedure may have advantages somewhat analogous to granting Consultation on motion even though not all the information needed to justify the writ is strictly before the court. In Gray, the information “not strictly before the court” was what the High Commission had done after receiving the Prohibition.

(6) Finally, Lansd, 1058 contains a sharper phrase (though hardly a clarifying one) than anything in Lansd. 1074 on the relationship of “costs” and “damages”. The words are, “…where by their law they may not proceed except ad correctionem, yet they do otherwise by a color, and where they allow plaintiff costs of suit they include damages also under name of costs.” This shows clearly enough that the Common Pleas thought the High Commission guilty of fraud in calling damages “costs.” It gives no clue, however, to how one tells in a given case whether the fraud has been committed or what the best response to the danger of fraud would be. Allow no costs awards because they can too easily conceal damages? Go by common probability and assume that a suspiciously high charge labeled “costs” must be at least largely damages in reality? A tendency to leave this problem hanging may be an inconvenience of the unusual procedure attempted in Gray. On a straight writ of Attachment plaintiff could allege fraudulent “color”, defendant could deny it, and a jury would decide.

In sum, on the major High Commission issues—leaving aside the procedural twist—Poole v. Gray rounds out the accomplishment of the Elizabethan Common Pleas by pretty well ruling out, as improper secular sanctions, not only the imprisonment well-covered by previous cases, but also fines, damages recognizable as such, and excessive spiritual penalties likely to force a pecuniary penalty on the party in practice. It also rules out underhanded enforcement of secular sanctions by bonds, while leaving the use of bonds to enforce spiritual ones undetermined. Substantive jurisdiction is left untouched and by implication upheld for “violent hands”, as earlier cases do not question it for the particular offenses involved in those cases, or attack the general proposition that all forms of substantive ecclesiastical jurisdiction may be conferred on the Commission.

Sub-section (b): Jacobean Courts before Coke’s Chief Justiceships
(Common Pleas, 1603-1606; King’s Bench, 1603-1613)

Summary

The only case in the Common Pleas between James I’s accession and Coke’s appointment to head the court was decided on recognized narrow grounds of Habeas corpus procedure: the necessity of a full and specific return. Judicial dicta on the substance re-emphasize denying the High Commission all temporal sanctions without limiting its ecclesiastical jurisdiction to any particular class or classes of suit.

The two earliest Jacobean cases in the King’s Bench were also decided on Habeas corpus procedure. Judicial commentary in these cases, however, went beyond that subject. Especially important is a speech in one of the cases (Needham’s) by Coke when
he was still at the Bar and Attorney General. Whether he spoke as counsel for the prisoner or for himself as adviser to the court, he defended the view that the High Commission had some imprisoning power, but only within a narrow range of serious religious offenses. Moreover, he connected this point with an earlier King’s Bench precedent (not independently reported) from the time of Chief Justice Wray (1574-1592.) Though the wider implications of this position are problematic, and though the case at hand was decidable without it, Coke at least dissociated himself—and King’s Bench tradition—from the Common Pleas’ rejection of all secular sanctions.

A few reports from the King’s Bench under Chief Justice Popham (who died in June, 1607) are tangled and complex. They are indeed primarily interesting for their complexity; the discussions suggest a court feeling its way into the High Commission issues it had not, in contrast with the Common Pleas, been much compelled to face in Queen Elizabeth’s reign. Differences in the thinking of individual judges appear, but they do not resolve either into sharp and durable differences or into clear consensus following debate. Two propositions, however, can probably be considered firm King’s Bench law:

(1) The High Commission may imprison to coerce performance of spiritual sentences, but not otherwise. This appears to have been Popham’s main conviction on High Commission matters. It has the virtue of seeing in 1 Eliz. intent to give the Commission an instrument for making enforcement of ecclesiastical law more effective. That is to say, it responds to the argument that there would not have been sufficient point in merely erecting an additional ecclesiastical court with the same powers as the old ones had. One Justice (Tanfield) favored taking the principle—that the new court was meant to have “teeth” ordinary Church courts lacked—a step farther and permitting punitive imprisonment as well as coercive. Other judges, such as Fenner, were skeptical of conceding a general power to imprison coercively, but did not clearly dissent from an actual decision on that basis. The reach of the imprisoning power depends on the Commission’s substantive jurisdiction, which the King’s Bench did not debate comprehensively. (Coercive enforcement of sentences in a few grave criminal cases is after all different from freedom to use imprisonment in petty cases as well.)

(2) It follows from (1) that imprisonment to enforce payment of a fine would be unlawful. Fining in itself, however,—in lieu of a spiritual punishment or in addition—need not be ruled out. In an oblique way, the early Jacobean King’s Bench still came close to ruling it out in practice. There are signs of reluctance to hold formally that the High Commission simply lacked power to fine. The reason was perhaps that it seemed anomalous to confer imprisoning power in any form or degree and at the same time to deny utterly that the conventionally lesser secular sanction of fining could be used. Since, however, imprisoning to coerce payment of a fine was ruled out, there was only one way to achieve payment—estreating the fine into the Exchequer. (That means referring the fine to the Exchequer for collection as a debt to the Crown. Actually, there is one alternative besides imprisonment—making the party enter a bond conditioned on payment of the fine. It is unsurprising that the High Commission thought of this trick and unsurprising that the judges found it unlawful.) The upshot of this line of thought is that whether a High Commission fine was a collectable royal debt belonged to the Exchequer to decide. Some of the King’s Bench judges claimed to know that the Exchequer had in the relatively recent past decided with full deliberation that the fines were not lawful debts, which must mean that in the Exchequer court’s opinion 1 Eliz. did not permit the
High Commission to fine (as the contemporary Common Pleas held.) There is an Exchequer story here which I am not in a position to tell, but there is no reason to doubt at least the short-run truth of what the judges reported. (i.e., there was such a decision in the Exchequer, whether or not it was followed later; purported fines imposed by the High Commission were not currently being collected.) Some of the King’s Bench judges seem to have thought that since such fines were realistically nugatory one might as well say that fines could not legally be imposed; others seem reluctant to say that quite flatly, on the strength of another court’s reading of the statute. The difference, however, comes in practice to very little. (One school could say that the King’s Bench might as well prohibit the High Commission from imposing fines and save the Exchequer the trouble of rejecting it as a debt; the other school, perhaps a bit more punctiliously, might decline to prohibit. “So what?” is a good question. No actual cases hang on the difference.)

The most famous Jacobean King’s Bench case touching the High Commission, decided after Popham’s death, when Sir Thomas Richardson had assumed the Chief Justiceship, was Fuller’s Case. Though elaborately argued in at least its final stage, in consultation with the Common Pleas and Exchequer judges, and though decisive on a peripheral point of “constitutional” significance in historical perspective, Fuller is of slight importance for the basic High Commission issues. The following are the points decided that bear on High Commission jurisdiction and powers. (There are some further points of general significance for Prohibition law.)

(1) As for the long-run “constitutional” matter: The judges held, without any sign of disagreement among themselves, that a lawyer arguing for his client in a common law court has no immunity from ecclesiastical prosecution for remarks constituting ecclesiastical crime. The ecclesiastical court in the case at hand was the High Commission, and it was the Commission’s jurisdiction that was upheld, viz. its jurisdiction to prosecute for schism, here allegedly committed in the form of a lawyer’s statements in common law argument (specifically, Nicholas Fuller’s argument in Maunsell and Ladd, for a full account of which see Vol. II, pp. 339 ff.) Schism was uncontroversially a High Commission matter, so there was no jurisdictional issue apart from Fuller’s contention that a lawyer speaking in the line of duty was exempt from liability.

(2) Use of imprisonment in a clear *infra vires* case such as schism was upheld, but within the bounds of the established King’s Bench principle that such imprisonment is permissible only to coerce conformity with a spiritual sentence.

(3) The judges enunciated a limit on the High Commission which they probably would have considered settled and uncontroversial law, but which had not previously been so clearly stated: The High Commission has no jurisdiction over slander of itself. That, together with other slanders of the “government”, lay or ecclesiastical, was a common law offense. The High Commission was free to proceed against Fuller for schism, which the judges thought he was sufficiently charged with, but it must not count as schism what only came to slander of its authority. (In some places, the Commission’s original charge against Fuller seems to confound the two categories, but the reports do not give a detailed account of what the judges considered schism and what slander; the Commission was warned off from the latter in general terms.)
(4) The proposition—uncontroversial by 1608 when Fuller was decided—that the High Commission has no authority to expound 1 Eliz. or its own patent was strongly re-emphasized.

Thus, for all its celebrity as a case on “advocate’s privilege”, Fuller was not a weighty or innovative one on the High Commission’s jurisdiction and powers. It does, however, present major problems of construction in itself; these are dealt with in detail in the text.

I have found no cases in the King’s Bench between Fuller and Coke’s transference to the Chief Justiceship of that court in 1613. This Sub-section concludes with two extrajudicial opinions from 1604 and 1606. Although the earlier is of considerable interest in itself, neither contributes importantly to the development of doctrine concerning the High Commission. The 1604-5 opinion upholds the Commission’s power to exercise ecclesiastical jurisdiction in a new context with special problems, but does not touch its authority to go beyond ecclesiastical sanctions. The less formal opinion from 1606 (given in discussion at Serjeants’ Inn) denies the Commission’s power to use imprisonment. It goes to show Coke still in line with previous Common Pleas opinion at the very beginning of his service on that court (see the next Section for his and his court’s subsequent change of position on imprisonment.) If King’s Bench judges participated in the opinion, they would not have been quite in accord with their earlier decisions. Coke himself was the reporter, however: he may have characteristically attributed more unanimous agreement with his own views to other judges than would have held up in adversarial debate.

The Cases

I have only one Common Pleas case earlier than Coke’s assumption of the Chief Justiceship of that court in June, 1606. Chambers’s Case (1605) 75 was a Habeas corpus. Chambers having been committed by the High Commission and having brought a writ, the sheriff responsible for his custody returned only that he was imprisoned for diverse contempts against the King. The vagueness of this return afforded sufficient grounds for disposing of the case, and it was ultimately decided on that basis. When the case first came up, however, two judges, Walmesley and Daniel, went straight to the broader issues about the High Commission’s powers. (The other puisne justices, Warburton and Kingsmill, may have been present, for the report says no one contradicted Walmesley and Daniel. It says expressly that Sir Francis Gawdy, who in August, 1605, succeeded Anderson as Chief Justice of the Common Pleas after sixteen years as a King’s Bench judge, was absent.) In keeping with the court’s Elizabethan position, Walmesley and Daniel said flatly that the Commission had no authority to imprison and that 1 Eliz. confined it to ecclesiastical law even if the patent could be read as purporting to give it powers not warranted by that law. By way of dictum so far as the present case goes, they also said, somewhat more qualifiedly, that the Commission may not fine and estreat fines into the Exchequer. On this point, they conceded that “there has been opinion delivered to the contrary”, but added that “since that time they have changed their opinion.” It is not

75 M. 2 Jac. C.P. Harg. 19, f. 169 b.
explicit whom “they” refers to, but I think it must mean the Barons of the Exchequer. If that is correct, Walmesley and Daniel would seem to be granting that it was the Exchequer’s role to decide whether High Commission fines were legally collectable. But if Exchequer opinion was now clearly against the lawfulness of such fines, perhaps any obstacle to other common law courts’ prohibiting them would be cleared away.

Walmesley and Daniel then added a further argument, the full implications of which seem to me somewhat elusive. Their words are: “And great mischief arises thereon [reference of ‘thereon’ unclear], for if a man is cited before them for only a petty thing, yet he will have a pursuivant sent for him who is 40 miles from him. And it has been seen recently that a man & his wife and 1 of his children were cited before them, &the child paid for his miles as well as the man or his wife.” Off-hand the picture projected from the recent episode would seem to be of a pursuivant sent to arrest defendants, at least for the purpose of bringing them before the Commission. Naming several co-defendants from the same family and charging a man by the mile for conducting three people a considerable distance back to the Commission’s seat would result in a large bill of costs if the party summoned lost the suit against him. The costs would arguably amount to a pecuniary penalty even without a fine (cf. Poole v. Gray above.) Banning all forms of taking people into custody, of course including punitive or coercive imprisonment, would cut that off (not to mention the flagrant behavior of pursuivants sent to make arrests in two of the Elizabethan cases above.) The judges’ essential thought may therefore be: High Commission power to take parties into custody can ramify into more mischief than jailing convicted persons to punish or to coerce performance of spiritual sentences. Even if the latter could be justified by 1 Eliz.’s presumed purpose of more effective ecclesiastical justice, the abusive by-products cannot be. Therefore a flat ban is the only solution.

A further thought is also possible, however: Even if pursuivants were and were allowed to be nothing more than process-servers, costs could still be inflated to a degree, by charging by the mile for the pursuivant’s own round trip. If (as the judges had just said) punitive fines are ruled out, must one not consider what to do about costs as well—if not barring them altogether, at any rate scrutinizing the size of the bill and whether the Commission has contributed to inflating it?

Tantalizingly, Walmesley and Daniel emphasize that the abuses they outline could be practiced on someone accused of a very minor offense or civil wrong. The obvious way to deal with that would be to have some criterion of seriousness for permissible High Commission cases. But if that solution crossed the judges’ minds they do not say so. Reluctance to consider it, but instead to believe that stringent elimination of secular sanctions was the only justifiable way to restrain the Commission, characterized the Elizabethan Common Pleas and may well have been as far as the early Jacobean court would have gone. (In practice, it should be said, that approach would probably have prevented most High Commission interference with petty offenders. Why, after all, should a Commission forbidden to touch people in their personal liberty and pocketbooks go to the trouble of pursing the spiritual correction of small fry? Serious offenders are another matter—people who ought to feel the hand of ecclesiastical justice and be made examples of, but might not if lack of zeal or favoritism affected regular diocesan courts. Indeed, private complainants might as a rule need to feel strong outrage
at a serious grievance to prosecute in an august court away from home, if embarrassing the adverse party were the only advantage over local prosecution.)

Chambers was adjourned after the first discussion. When it was taken up again on a later day in the same term, the full court, including Chief Justice Gawdy, was present. The case was now unanimously resolved in the prisoner’s favor without mention of the High Commission’s sanctions. The basis for the resolution—quite sufficient and precedent (see Hinde above)—was that the return on the Habeas corpus was inadequate: saying only that Chambers was imprisoned for “divers contempts”, it did not give the Common Pleas enough information to judge whether he was committed for a valid cause. As the court pointed out, for all that appeared Chambers could have been imprisoned for a “temporal thing”, or for a contempt for which he should instead have been bailed. (There is no indication of criteria for distinguishing a bailable contempt of an ecclesiastical court that has not strayed out of the spiritual sphere from one not bailable. Talking about bailability necessarily assumes imprisoning power as well as limits thereon, but the court now chose to by-pass whether the power existed. In summing up its ground for discharging Chambers, after saying merely that the return was bad for “uncertainty” the court added, “and [for] not showing the degree of the offense.” The latter phrase could be significant. Does “degree” mean only “what, or of what kind, the offense was”, or does it mean “degree of seriousness among ecclesiastical offenses”? Could the implication of the word be that some offenses, though spiritual, are too minor for High Commission jurisdiction? Or that all ecclesiastical offenses are within the jurisdiction but some not grave enough to punish by imprisonment? Or not serious enough to hold a man for if he can and will put up bail? Quaere.)

The unexceptionable decision in Chambers was buttressed by a little obliquely related authority. A case from Dyer—254—was cited for showing that conclusory language (criminosus and inhabilis, criminal and unqualified), even though supported by specific allegation of peccadilloes (haunting taverns and [participating in] unlawful games) was insufficient to permit judging of some point about a presentee to an ecclesiastical living or his presentor—perhaps whether the former was clearly rejectable by the Bishop or whether the latter had forfeited his right to present for the immediate vacancy. Also cited was a rule that a valid Chancery bill may not be brought for “divers lands and tenements” but must say which ones.

Resolving Chambers on general Habeas corpus law rather than on the High Commission’s powers may have been in deference to the Chief Justice, who as a veteran King’s Bench judge may have been unready to agree with the strong restrictions on secular sanctions pioneered by the Common Pleas. (Since Gawdy died in 1606, making way for Coke’s appointment, he left no record of his opinion about the predominant Common Pleas view.) It is of course impossible to tell whether the puisne judges would have preferred to press the issues specific to the High Commission if that could have been done without dividing the court. They may all on consideration have approved the idea that if a “narrow grounds”, procedural route to decision is easily reachable it should usually be taken.

Once the court had shown where it stood, a motion was made that the sheriff holding Chambers be allowed to amend his return. The motion was denied because “the mittimus by which he was committed to prison & the return agree in words, so that the sheriff has done all that is in him to discharge himself, so that he may not amend it or
make it better.” (I.e., the High Commission ordered the sheriff to commit Chambers for “divers contempts.” When the sheriff was asked by Habeas corpus to justify holding the prisoner, he did all he could by passing on the reason for the detention exactly as it had been given to him. He is not in the position of a jailer who may be allowed to amend because he has over-abbreviated or summed up too vaguely the grounds communicated to him. Realistically—since the sheriff was in all probability a neutral participant interested only in doing his job according to law—the court’s decision means that the High Commission was denied the opportunity to commit people with a sketchy statement of the reason, then re-write the order for commitment [Mittimus] in the event a common law court on Habeas corpus thinks the return unsatisfactory. Such shoddiness—if intentional, presumably meant to keep the prisoner himself ignorant of just what he had allegedly done wrong—should surely be disciplined.) Chambers was accordingly discharged outright.

We may now turn to King’s Bench cases from the period between James I’s accession in 1603 and Coke’s translation to the Chief Justiceship of the King’s Bench in October, 1613. Several antedate the span during which Coke presided over the Common Pleas, 1606-1613. Those from Coke’s Common Pleas years raise the question whether the large number of decisions about the High Commission during that time affected King’s Bench law on the subject. The question cannot easily be discussed, however, until the Common Pleas cases have been inspected in detail. I shall immediately describe the King’s Bench cases straightforwardly.

My first two King’s Bench cases conform to the type of Chambers: decisions based on Habeas corpus law, rather than the court’s view of the High Commission’s powers. Both, however, present significant variations.

In Bery’s (or Birry’s) Case (1605)76, the original return on Habeas corpus said only that Bery was committed for “certain ecclesiastical causes” (Add. 25,205 says that he was committed “by means of Dr. Newman.” This may have been specified in the return, but I do not think it affects the legal questions. The role of this civilian in the case is unclear.) The court rejected the return as too general. In this case, however, the (unspecified) returning officer was allowed to amend. The new return said that the prisoner was committed “for unreverend speeches to Dr. Newman & saucy carriage toward him.”

The second return was also disallowed, and Bery was discharged. For all that appears from Add. 25,205 the discharge might have been outright, but Godbolt has it that the prisoner was put in bail to appear de die in diem before being released. Add. 25,205 says that the amended return was rejected “for generality too.” The implication in the circumstances of this case would be that a specific enough return would need to give the content of the “unreverend speeches” and an indication of what acts were deemed “saucy carriage.” The court in fact gave an explanation of its thinking on the score of “saucy carriage” (identical in both reports) and in so doing contributed the case’s most important point. The reported words: “And it was held that if he had not put off his cap or not given the wall to him, although those are misdemeanors, yet they may not imprison him for them.” This would seem to mean: (a) Though minor forms of disrespect toward clerics

76 M. 3 Jac, K.B. Add. 25,205, f.22 (Bery); Godbolt, 147 (Birry). The reports are very close, but a few details are furnished by one and not the other.
and Church dignitaries are ecclesiastical offenses (analogous to common law misdemeanors, I should think—not, from the examples given, actual ones) and though as such they are not outside the reach of High Commission jurisdiction, they may not be punished by imprisonment. (b) The High Commission has power to imprison for serious offenses, wherever the line between petty and serious falls—serious in any event does not include disrespect in forms hardly worse than bad manners.

For its final point, touching self-incrimination, Bery is treated in Vol. II above (p. 339.) By whatever way the issue arose in this case, the court’s opinion was that binding someone to answer interrogatories before he has been furnished with the charges against him is invalid. For present purposes, note that the High Commission was not altogether forbidden to use bonds, say to enforce cooperation with its processes or performance of its sentences, only bonds meant to obligate a person to answer questions no ecclesiastical court was entitled to ask.

In Needham’s Case, from the same term as Bery (there is no way of telling which case was taken up first),77 the return on Habeas corpus said that the prisoner was censured for speaking opprobrious words of Price, a minister, for which he was fined £20 and committed (to the Gatehouse prison) until he paid the fine. The court agreed that the stated cause of imprisonment was insufficient; the words called “opprobrious” should be given expressly “so the Court can judge.” This is all the report says strictly about the disposition of the Habeas corpus. There is no information as to whether Needham was discharged outright or bailed, or as to whether amendment of the return was sought or allowed. Nor are there any observations from the court as a whole on power to fine or to imprison in order to coerce payment of a fine. There is no reason there should be, for on the bare Habeas corpus question the decision seems open-and-shut: Unspecified “opprobrious words” might constitute common law defamation; they might be so vague or such commonplace vilification as not to be pursuable in any court, ecclesiastical or lay; they might (if the court was ready to think along these lines, as Bery suggests it was, not be utterly beyond the High Commission’s reach, but too trivial a manifestation of disrespect for the kind and degree of punishment imposed to be allowable.

The report contains further important material, however. (a) It is noted at the end of the report that “Needham sued Prohibition and had habeas corpus”. Furthermore, the “opprobrious words” for which Price sued Needham are given—“a knave priest & fitter to weare a white cloke than a blacke.” The Prohibition is the likely source of the actual words, since as plaintiff seeking that writ Needham would have had to recite them. I am not sure what the insulting edge of the utterance is. Could “priest” and “white cloke” be meant to say by innuendo that Price had Popish tendencies, suggesting in turn that Needham had Puritanical ones? Possibly, but even so the opprobrium would be very indefinite, admitting of the mitior sensus of “nearly meaningless aspersion—conveyed mostly by ‘knave’—whatever intention one might suspect to be behind it.” However one takes them, the words seem well-qualified as the sort of “letting off steam” outburst, virtually without factual content capable of being assessed as true or false, that would be hard to make out as routine ecclesiastical defamation. The report does not say whether Needham got his Prohibition, but he probably had a good chance for one without regard to the High Commission’s powers.

77 M. 3 Jac. K.B. Lansd. 1111, f. 141b.
(b) Speeches by Justice Fenner and Attorney General Coke are reported, both going beyond “the bare Habeas corpus question.” Coke may speak as Needham’s counsel, but he says so much more than was necessary to get Needham released that one wonders whether he was not speaking for himself as amicus curiae. (He makes some in-court appearances as Attorney General in which it seems likely that he was representing the government rather than a private client. That cannot be true in this case, for the views he expresses can hardly be what the government wanted to hear. My guess would be that his high office and prestige would permit his being allowed to address the King’s Bench in propria persona: analogously, Serjeants sometimes spoke in the Common Pleas without being of counsel for one of the parties, as in effect ex officio advisers to the court.)

Justice Fenner’s first speech makes one point without elaborating what conclusion it leads to: “…if one speaks opprobrious words of a minister & is [proceeded against] for them in Court Christian & wants to justify them he will not be suffered, for as they say, Est contra caritatem.” I.e.: Construing the remark strictly, ecclesiastical courts take the position that truth is not a defense in one special category of defamation, when the words are spoken of a minister. In that case, the ecclesiastical view is that uncharitable (contra caritatem) speech is punishable even if true—to which should perhaps be added “and even if expressive of an unfavorable value judgment or hostile attitude, though not assessable for truth or falsity.” Questions can be asked as to whether the “truth defense” was clearly acknowledged in ecclesiastical law across the board, and also whether it was enforced by lay courts as a required conformity with common law standards. (See Ambler v. Metcalfe, Vol. II above, p. 46, where the question is touched but not addressed head-on, and passim in Vol. II for the general legitimacy of insisting that ecclesiastical courts imitate the common law as closely as possible in such matters as available defenses and standards of proof.) Fenner would seem to imply that the defense was usually good in ecclesiastical law, or at least insisted on by common law courts wielding the Prohibition, except that the Church courts claimed an exception for opprobrious words spoken of a minister, which common law courts had at any rate not yet overruled.

Granting Fenner his premise, what does he want to make of it? One or both of the following, I should think: (1) Over and above the obvious vagueness of the return, it is especially important that this court know the exact words judged opprobrious, lest language constituting common law slander, or language that does not meet the most minimal standard for “defamatory” or “disrespectful”, not only be punished by an ecclesiastical court, but also be sheltered from the truth defense. (2) Assuming, on the other hand, that disclosure of just what Needham said revealed that it had enough factual content to call true or false, and assuming that the words were appropriate to ecclesiastical jurisdiction, the truth defense must be made available to the defendant in the Church court. Whatever else ecclesiastical courts should or should not be allowed to do in the area of speech-offenses, they may not so far depart from the common law model as to punish someone who has only spoken what he can show to be true. Whether Needham had so spoken could obviously not be ascertained without a fuller return. (Again, Vol. II, passim. The position that “the common law model” often has a strong claim to be followed by ecclesiastical courts and that the truth defense in defamation is an instance, was plausible but problematic.) It is worth noting that in various contexts
Justice Fenner was not very indulgent toward ecclesiastical courts, including the High Commission.

Coke’s speech, following Fenner’s observation, starts by saying that the return on Needham’s *Habeas corpus* was “without doubt bad”, but he does not say so for, as it were, the general reason that the return was too general. Rather, at the outset he locates the return’s inadequacy in its failure to say that “the party is a schismatic, heretic, or the like.” The return must be “special” (specific), he says, so that “this court can judge of the heresy.” I.e., Coke implies, as he later makes explicit, that the High Commission’s authority extends only to the gravest ecclesiastical crimes. To support his point broadly, without immediately referring to the High Commission, he cites a case from 4 Edw. IV: An excommunicated man said “his corn grew no worse [for his having been excommunicated];” he was cited by his Ordinary “and committed as a heretic by the statute of 2 Hen. IV” (i.e, by the statute *De heretico comburendo*, which permitted ecclesiastical courts to imprison heretics—they could then be turned over to the secular authorities for burning.) The alleged heretic brought *Habeas corpus* in the King’s Bench. The Ordinary returned that the prisoner was a heretic, and the return was adjudged bad. The Ordinary, clearly being allowed to amend, then revealed what the heresy consisted in. The prisoner was delivered: In the court’s view his irreverent utterance about excommunication’s apparent lack of temporal consequences did not constitute heresy “because it did not concern any fundamental part of religion.” (Though I cannot say how precisely known the case of Edw. IV was, its hero’s skepticism about what one need fear from God in this world merely by being excommunicated was a familiar anecdote.) The moral for the present case would be that a return on a High Commission *Habeas corpus* must first say “heresy” or the like to establish the imprisoning court’s jurisdiction and then explain what that court counts as heresy.

Coke then turns to the High Commission in particular, with the observation that “their authority is to be well considered.” He points out that at common law Ordinaries had no power to fine or imprison before 2 Hen. IV authorized them to commit for heresy. The report is not clear as to the step he took from there, but I suppose it is the argument that the existence of statutory imprisoning power before 1 Eliz. justifies, as is necessary to justify, reading the Supremacy Act as conferring on the High Commission alone imprisoning power covering only heresy and its near relatives. Coke in any event says that the High Commission is an ecclesiastical court founded “merely” by 1 Eliz. (This tends to cut off the argument that powers beyond those conferred by the statute could be given to the Commission by patent on the strength of the monarch’s common law prerogative.) 1 Eliz., Coke continues, was made when the (still Catholic) Ordinaries were suspected of being remiss in punishing “heresy, error, and schism” (a little more than just heresy), and was made in order to punish “enormous schisms and heresies, & not to deal with every petty offence against ecclesiastical law or private controversies, for “that would toll Ordinaries’ jurisdiction.” Note from the last phrase that for Coke it was central that the statute’s intent was to keep infringement on the regular ecclesiastical courts’ jurisdiction to a minimum. Although this is not mentioned in the *Needham* speech, saving the policy of 23 Hen. VIII (Ch. 2 above) could be, as it came to be, an important further argument for the construction.

Here, so far as I know for the first documentable time, Coke stated the view of the High Commission which in its basic features characterized him on the Bench. (1) The
Commission’s jurisdiction—not only its imprisoning or secular-sanctioning power—is limited to “enormities.” (2) Given jurisdiction, imprisoning is not ruled out (and perhaps not fines and bonds, sed quaere). The present case adds that commitments, if challenged, must be justified by showing what specific words or acts were taken by the Commission to be “enormous.” Both of these features depart from the Elizabethan Common Pleas position, of which Justice Walmesley may perhaps be considered the father.

Coke concludes his speech by citing an important precedent. The case is not named, precisely dated, or described in detail. But, per Coke, it was ruled “in the time of Sir Christopher Wray” (Chief Justice of the Queen’s Bench 1574-1592) that the High Commission may “commit solely in great & enormous offences in which they proceed ex officio for the peace of the church & in cases of heresy & not in any/every (ch[esc]un) case between p[ar]ty & p[ar]ty.” Note the precedent supports Coke on power to commit, but not in terms on substantive jurisdiction, Note also that it says explicitly, as other sources we have examined so far do not, that High Commission imprisoning power applies only to criminal cases in a stricter sense than “criminal” by itself necessarily signifies—the Commission must be proceeding ex officio. Though not quite as broad as Coke’s opinion, the ruling from Wray’s time shows more sharply than other hints we have noted that the Elizabethan Queen’s Bench was not in line with the Elizabethan Common Pleas.

After Coke’s speech, Justice Fenner made a further remark: The High Commission has “come to” proceed according to their instructions, “but what those instructions are no one can know, and also no one can see what their commission is, for it is not enrolled, which seems to me a great abuse.” The application of this is not evident. The observation shows, as his first speech does more subtly, that Fenner was no friend of the High Commission. It suggests that any attempt on the Commission’s part to claim that its actions were authorized by its instructions or commission should be rebuffed, the more so because these documents were not in the public domain. The argument (which we have seen made) that the statute permitted the Commission to do whatever the monarch permitted or told it to in the patent would have received short shrift from Fenner.

My next piece of evidence is only a nota without context: Justices Williams and Tanfield, “on Serjeant Nicholl’s motion”, said that the High Commission had no authority to impose a fine on anyone or imprison him for non-payment thereof. They go on, “if they may impose a fine, it must be estreated into the Exchequer.” At first sight there appears to be an ambiguity as between “fining is flatly unlawful” and “fining at least may be lawful, but imprisonment to coerce payment is not—estreatment into the Exchequer is the only allowable procedure to realize the fine.” I think the ambiguity is dispelled, however, by a further remark from Williams. He says the matter was debated “at large” in the Exchequer in a case in which he was of counsel, and it was “finally adjudged” that the High Commission may not impose a fine. (The case is very likely the same one Williams cited as counsel in Chambers above.) With this addition, the two judges’ thinking can be spelled out as follows: We can now say safely enough that High Commission fines are “flatly unlawful”, but it is not strictly ours to say. So long as the Exchequer would or might regard High Commission fines as lawful and handle them like

78 H. 3 Jac. K.B. Add.25,205, f.25
other estreated debts to the Crown, we would have no clear power to interfere. The Exchequer having with full deliberation ruled out such fines, however, there is no obstacle to our saying they are simply ruled out, as in our opinion they should be. If the Exchequer had not disallowed estreating High Commission fines, it would be our option to decide whether imprisonment to coerce payment should be permitted as a supplementary means of enforcement. To permit it as the sole means—assuming contrary to fact that we were inclined to think that fines are authorized by 1 Eliz. —would be a breach of inter-court comity. Besides strong convictions on the statute’s meaning, such a step would involve either saying (outside regular appellate channels) that the Exchequer was wrong or disputing (whether or not it is in the abstract disputable) the Exchequer’s primary responsibility for deciding whether an alleged debt to the Crown is really due.

In the *Habeas corpus* case of Williams (1606)\(^79\), the return said: (a) The complaint for which Williams was committed to the Gatehouse was incontinency, irreverent words “given” to the Bishop of Llandaff when he was sitting in his Consistory, and slanderous speaking of the Bishop’s wife. (b) On conviction, Williams was enjoined to make purgation and do penance, fined, and ordered to pay costs. He paid the fine, but was imprisoned for nonfeasance of the rest of the sentence.

With respect to (a) – the original cause of prosecution, incontinency, *may* be vulnerable. Is incontinence serious enough for the High Commission? If not, however, speech-offenses against a high ecclesiastical dignitary and his family, especially when aggravated by disturbance of order and expression of contempt for the judge in a Church court, might well be *infra vires*. Even so, in the light of *Bery* and *Needham*, it would not be out of the question to ask for specification of the words spoken to the Bishop and about his wife, for the words ought perhaps to appear to be ecclesiastical defamation (even with the “contempt of court” element added.)

The King’s Bench as reported did not, however, say anything about the return *quo ad* the substantive case against Williams. That is unsurprising, partly because of the problems about attacking the original prosecution I have suggested, and the more so because the return as a whole posed two perfectly clear legal questions: (1) Even if the High Commission may not imprison for any other purpose, may it do so to coerce performance of a purely spiritual sentence? (2) Should a costs award be considered a legitimate part of a spiritual sentence (and if so, should the return give the amount of the costs or itemize them lest costs include covert damages?)

While the King’s Bench judges confined themselves in *Williams* to the Commission’s punitive and coercive powers, they did not *just* address the legality of imprisonment to enforce spiritual penalties, and they said nothing about the costs. (It should be noted that abuse of costs had been made an issue of in the Common Pleas, but not in the King’s Bench.) The judges’ discussion of *Williams* therefore raises questions of interpretation going to its premises.

The first time the case came up, Chief Justice Popham said the High Commissioners may not imprison for a fine imposed by them, nor take an obligation for it to the King’s use, but must estreat the fine into the Exchequer. But if the Commissioners impose penance “or other lawful ecclesiastical censure”, they may

\(^79\) P. 4 Jac. K.B. Lansd.1111, f. 210. The prisoner Williams here should of course not be confused with *Justice* Williams, who participated judicially in the case.
imprison the party quousque he conforms. Justices Fenner, Tanfield and Yelverton agreed with Popham (leaving only Justice Williams unheard from—he may of course have been absent.) In short, the whole court or most of it was at one on the nature and extent of the imprisoning power (leaving aside the costs, in which none of the judges took an interest.) Popham’s remark on fines can be taken as a dictum, save for one twist: Suppose Williams had been imprisoned to coerce payment of his fine and performance of his penance—i.e., for one lawful and one unlawful purpose. Should he not, perhaps, be released in consideration of the wrongful aspect of his commitment, though he might reasonably be bailed to constrain him more mildly to perform the rightful part? (Release on bail would probably obligate him to report to the High Commission from time to time so that it could be ascertained whether he had conformed to the spiritual sentence. He would probably be subject to recommitment at the Commission’s discretion for obdurate resistance, and at any rate he would be in danger of excommunication and its consequences.) In the actual case, by contrast, Williams had paid the fine voluntarily. It seems disproportionate to be harder on a man who has acknowledged his wrongdoing to the extent of making monetary amends for it without being coerced than on one who refuses all cooperation with the High Commission. Therefore Williams should be discharged on at least as favorable terms as someone released from partially illegal imprisonment.

If this is the conclusion to which Popham’s thinking tends, his insistence that the High Commission may not commit to force payment of a fine does not reduce to a dictum added to his on-the-issue holding that imprisonment to compel performance of spiritual sentences is lawful. He needs to say that “imposing a fine” is in a sense as improper as imprisoning to coerce payment of a fine, for “imposing” one at all can have the effect of inducing a person to pay up at once if he is able; the only way for the Commission, in a manner of speaking, to “fine” is to estreat immediately into the Exchequer, which agency may eventually collect the money, provided its judicial branch considers a payment to the monarch assessed by the High Commission a lawful debt to the Crown. (Popham probably knew as well as Justices Williams and Tanfield in the *nota* just above that the contemporary Exchequer was unfavorable to High Commission fines. It remains correct toward Exchequer jurisdiction to say that sums the High Commission thinks should be paid to the Crown should be referred to the Exchequer for evaluation. They should not, however, be coerced by imprisonment, guaranteed by bonds, or—by the reasoning I have been exploring—“imposed” in the sense “ordered”, so that the party is given the impression that the sooner he pays the better he may fare with the authorities.

The analysis I have pursued has the virtue that it predicts what eventually happened to Williams—he was released on bail. But his release did not occur until after two more discussions of his case among the judges. A few loose ends in the analysis of Popham’s and three puisne judges’ first pronouncement need commentary before moving on to later judicial remarks:

(a) The picture of Williams paying the fine but resisting the spiritual penalties is puzzling. Why might someone do that? There are several possibilities. (1) The belief that paying the fine might save one from imprisonment, even if one knew or surmised that this was not legally guaranteed. Behind this belief might lie the further one, which could be cynical and could be Puritan, that the Commission cared more about the money than about whether penance and the like were actually performed. “Caring more about the
money” need not proceed from a low desire to enrich the Crown. It could reflect the perfectly rational view that fines deter, whereas performance of spiritual penalties, especially nominal performance by people who do not repent of anything they sincerely regard as wrong and do not respect the court bearing down on them, is unlikely to affect the future very much. (2) A purer religious attitude: As it were, “Let my persecutors have the lucre they seek to extort from me illegally, but let them not have the satisfaction of seeing me hypocritically perform their ceremonies—they may accommodate me in their jail for a while if they must.” (3) We of course do not know that Williams really had paid his fine, only that the High Commission said so. The Commission might well waive the fine by returning that it was paid, correctly predicting that the chances of being allowed to hold Williams for the spiritual penalties only was better than the chance of realizing the fine, either through an Exchequer unlikely to be cooperative or by its own coercion. Even apart from the risk of losing all by trying for too much, a less cynical view of the Commission than that suggested above might credit it with thinking spiritual discipline of misbehaving Christians more important and more clearly its role than exacting a pecuniary penalty—and after all, the bite of jail is for most people a more memorable punishment than a fine even when the keys to the jail are in the prisoner’s hand.

(b) It is worth noting that the High Commission did not say that Williams was imprisoned as a punishment. In Bery and Needham a punishment may have been intended, but instead of saying so the Commission tried to conceal what it was behind vague language. The High Commission’s course in Williams reflects the failure of that expedient. Yet from earlier than these three cases we have not seen the King’s Bench decisively ruling out punitive imprisonment. The case from Wray’s time cited by Coke in Needham is the closest thing. Williams’ offenses hardly meet the standard of gravity Wray thought required to justify any imprisonment, coercive or punitive. The Popham opinion in Williams lowers that standard for the coercive variety quoad spiritual penalties. The much sharper Common Pleas opinion against secular sanctions may have deterred the High Commissioners or their advisers from supposing they could persuade the King’s Bench to take a radically different stance, extending to the punitive imprisonment of an offender of Williams’ grade.

(c) It bears re-emphasizing that Popham and his colleagues ruled out not only imprisonment to enforce payment of a fine, but also taking a bond conditioned on payment. While it may be tenable to hold that requiring a performance bond of an ecclesiastical defendant is intrinsically secular and therefore ultra vires by the same token as fining and imprisoning, Williams shows why such bonds for fines must be excluded without reaching so broad a rule. The judges stress that the only way the High Commission could fine was to estreat the fine into the Exchequer as a debt to the Crown, whether or not they thought the Exchequer likely to allow it as a debt. Obviously, if the Commission could demand a bond payable to the King on forfeiture it could secure payment without the Exchequer’s cooperation. It could in effect insure itself against an unfavorable Exchequer view of High Commission fines (A further and more abusive step would be to put a penalty in the bond so that the party would be under pressure to pay the principal sum of the fine without disputing its legality in the Exchequer. I do not know whether Exchequer procedure would admit of such a ruse and assume that equitable protection against the penalty would be available, perhaps in the Exchequer itself. But a naïve
person might still be frightened into paying the principal to avoid trouble, if not serious
risk of incurring the penalty.)

Williams’ Case was taken up for the second time on another day in the same term
(P.4 Jac.) On this occasion, Justices Fenner and Williams said flatly that the High
Commission may not “assess fines” or imprison. Fenner must have thought better of his
concurrence with Popham on the earlier day, if he and Justice Williams meant their point
to be as absolute as it sounds in the report. (Note the phrase “assess fines.” Could the
“assess” make the meaning “do anything that resembles fining, even if the Commission
simply estreats the sum due and resorts to no form of enforcement on its own”? ) Justice
Tanfield disagreed. He too had changed his mind since the earlier discussion. As starkly
as Fenner and Williams say the Commission may not “assess fines” or imprison, Tanfield
says “they may well do both.” He gives two reasons: (1) He reads the statute as allowing
the High Commission to proceed according to its discretion (“**iuxta sanam discretionem
suam**”—the report uses the Latin.) I take this to mean that the Commission may go
beyond regular ecclesiastical sanctions at discretion, as deemed necessary, though it may
not imply that no limits on the abuse of discretion may be enforced by common law
procedures. (2) If the High Commission may not fine and imprison it has no more power
than an Ordinary, “which were in a manner to make the statute idle.” In making this
point, Tanfield is the first judge we have encountered to suggest a reason for the High
Commission’s existence to compete with the one that has several times come to our
attention. One might formulate the two reasons this way:

**Reason I**—Historically, the Commission was created because the Ordinaries left
over from Queen Mary’s reign were unreliable. It was for suppressing religious offenses
at the level of heresy that they were really unreliable, which favors the inference that the
Commission was intended to have jurisdiction only over such grave matters. But even if
one is unwilling to draw that inference, it was and still is true that the value of having a
High Commission reduces to the value of having a supplementary ecclesiastical court. It
**does** make sense to have one, even when there is no longer a general cause to distrust the
regular courts on the score of heresy and the like. For it may always be the case that
Ordinaries here and Ordinaries there will be deficient in zeal to enforce all parts of
ecclesiastical criminal law or in competence or freedom from bias to apply the civil
branch correctly. From this—the conception of the High Commission as a concurrent
supplement—the appropriate inference is that the Commission, as “just another
ecclesiastical court” with the same jurisdiction as any other, cannot go beyond regular
ecclesiastical sanctions. Parliament can hardly have intended to give one ecclesiastical
court extensive temporal sanctions to be used against anyone who happens to be caught
in its grasp, down to the petitioned malfeasor. (Does this not probably represent the
reasoning of Justice Walmesley?)

**Reason II**—Tanfield’s reason: A mere overlapping supplementary court does not
make much sense. It may have for a brief time around the enactment of 1 Eliz., but one
should assume that a statute not expressly made temporary, and which has stayed on the
books for many years and been frequently put into execution, has a serious long-run
purpose. Having one high-ranking ecclesiastical court with discretion to use secular
sanctions when that seems necessary is a more cogent purpose than having an extra court
with no more effective means for exacting obedience of the ecclesiastical law than the
regular tribunals have. Such a court could at best (i) cause some offenders to be
prosecuted and, if convicted, punished spiritually who might otherwise, on account of this or that contingency, escape those fates; and (ii) permit private complainants to choose their court. Intent to create such a court is a weak explanation compared to creating a new tribunal with “teeth” the regular courts lacked.

Beyond the unresolved difference between Fenner-Williams and Tanfield, the report gives no further information on events in P. 4 Jac. Two notations at the end carry the case into the next term (Trinity.) (1) In that term the whole court is said to have agreed that the High Commission may not commit “for their fines assessed”, but “make estreats into the Exchequer.” It would appear that both sides of the debate in Easter were persuaded, perhaps by the Chief Justice, to retreat on fining (which was not directly in issue in Williams, since the prisoner had already paid the fine.) The retreat on neither side need have been a drastic reversal. Justices Fenner and Williams would not have had to concede more than that it was too extreme to say the Commission may not “assess” a fine; they may not have granted more than that it was the Exchequer’s business to pass on the validity of estreated fines (and they may well have thought that the Exchequer would not uphold them.) Tanfield would only have had to concede that bonds or imprisonment should not be used to enforce fines: estreating was the “due process”; if the realization of fines was being frustrated by the Exchequer, perhaps that should be changed by legislation or judicial negotiation, perhaps it must be suffered, but it does not affect the Commission’s legal power under the statute to fine. The point is not empty formalism, for a party who paid the fine, as the prisoner Williams had, would have satisfied a substantial part of his ecclesiastical duty and have at least a moral claim to lenient treatment in other respects—he would not have paid “of his own folly.” Someone who failed to pay could not only be imprisoned to coerce performance of spiritual sentences, but also as a punishment for his original offense, by what I take to be Tanfield’s position.

(2) As I have already noted, the report says at the very end that the prisoner Williams was delivered with bail. No summarizing tally of the judges’ positions is given. The best projection from the information we have would be that three justices (Popham, Tanfield, and Yelverton) thought the imprisonment was perfectly lawful, Fenner and Justice Williams probably dissenting, though upon the first discussion Fenner went along with imprisonment to back up ecclesiastical sanctions. Popham and probably Yelverton might have limited imprisonment to coercion of spiritual performance, with Tanfield alone ready to support punitive imprisonment.

Though justly imprisoned per the majority, the prisoner was nevertheless released. Only one of the majority would have needed to favor release, but there is nothing to suggest that the decision was not unanimous. Decisions in Habeas corpus cases to release with bail are often hard to interpret. (This is illustrated in some of the cases involving self-incrimination—Vol. II, Ch. 5) One always-present consideration is that whatever imprisoning power, punitive or coercive, the High Commission had, it could not plausibly be entitled to hold people perpetually. Release by the common law court’s discretion after the prisoner had served a reasonable time in relation to the gravity of his offense—with bail if the commitment was initially lawful and the Church’s interest in the party’s conformity remained unsatisfied—is the best general formula. The prisoner Williams would have spent only a matter of weeks in jail—part of Easter term, the interval between terms, and part of Trinity—but his original misbehavior was not very grievous. As I have suggested, his payment of the fine, leaving (aside from the
undiscussed costs) only the spiritual penalties, which could have been addressed by excommunication, would quite reasonably be counted in his favor. (It would be a nice, though entirely speculative, irony if Justice Tanfield, the strongest supporter of secular sanctions, was firmly for letting the prisoner go: A perfectly legal secular punishment had been accomplished, just what the statute, in Tanfield’s opinion, meant to allow.)

Another case from the same term as Williams requires mention here only for a remark by Chief Justice Popham at the end of the report. Popham’s words are puzzling; the reporter may have caught only a fragment of what he said. The comment does however, tend to confirm Popham’s view in Williams of the High Commission’s imprisoning power. The case itself was about the writ called Vi laica removenda, whereby the sheriff’s assistance could be called in to remove a clergyman from physical property attached to a living if he was not entitled, or was no longer entitled, to occupy it but would not vacate voluntarily. Whether this procedure could be used in the circumstances of this case and, if so, whether the procedure was followed properly gave the King’s Bench judges trouble and evoked divided opinions; no resolution is reported.

The High Commission was involved with the case in that it deprived a beneficed clergyman called Smith “upon the new canons” (i.e., for some unspecified infraction of the 1604 canons) and also committed him to prison. The Vi laica was brought by the person entitled to present the next incumbent; the issues on the Vi laica were the more complicated because, Smith being absent in jail, the eviction proceedings were a matter of ousting his wife and servants, who remained in possession of the minister’s residence. Except for Popham’s final remark, nothing in the discussion of the case touched High Commission questions. If the Commission’s jurisdiction, act of deprivation, and act of imprisoning could have been challenged by Prohibition or Habeas corpus, they were not.

Popham’s reported words are: “if the High Commission may commit one quousque he submits to the censure of the Church not in other manner [no punctuation].” If the “if” is a slip, Popham would be reiterating his opinion in Williams, with the “not in other manner” making it clearer than before that only coercive commitment to enforce spiritual sentences was lawful. But what does this have to do with the Vi laica case? One conjecture occurs to me. Popham’s thought spelled out as follows might fit the context: “If [as I believe is true, but in any event assuming it is] the Commission may commit someone until he submits to the censure of the Church and not otherwise [i.e., not as a punishment for his original offense or to compel payment of a fine], is there not reason to doubt whether Smith was lawfully imprisoned? If a clergyman is deprived of his living are there likely to be other censures of the Church to which he ought to submit? There possibly could be, but one must wonder whether imprisonment on top of deprivation is not a dose of temporal punishment in addition to an already severe ecclesiastical sanction. If we assume the imprisonment was unlawful, could the Vi laica be affected? Could it matter that the sheriff took action against Smith’s wife and maid-servant when Smith’s absence was in a sense explicable by his unlawful detention, though obviously as a free man he could have been absent on a given occasion?”

I cannot answer the concluding question for want of sufficient understanding of the Vi laica law. The judges’ discussion of the case, however, though too brief to clarify much, makes me wonder whether concern about the legality of Smith’s imprisonment

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80 P. 4 Jac. K.B. Harl. 1631, f.327.
could not have come up in further debate. (Justices Yelverton and Fenner appear to think that neither a deprived clergyman nor his servants or family may be removed by *Vi laica*. Justice Williams thought that if the minister is merely absent his servants—nothing said about the family—may be removed. Popham thought that if the servants or wife keep possession by force they may be removed and committed. In the instant case, however, Mrs. Smith and the servant girl do not seem to have used force, The sheriff used a little, first by breaking in when the servant refused to admit him and then preventing the wife, who was out when he arrived, from entering, though she expressed her desire to and signified that she was not surrendering possession. Justice Tanfield essentially agreed with Popham and emphasized that even though Smith was in prison he remained in possession through his servants, and that merely by preventing Mrs. Smith from re-entering he “removed” her as a matter of law. Amid this confusion and disagreement—I can against only ask—could the possibility that the case might not have arisen if Smith had not be wrongfully imprisoned have been focused on as a way out?)

The important *Habeas corpus* case of Maunsell and Ladd (1607) has been exhaustively discussed in Vol. II above, because it is about the High Commission’s power to require accusees to answer self-incriminating questions and imprison them in order to coerce them to answer. The argument of this exceptionally well-reported case was far-ranging. It inevitably touched questions about the High Commission broader than the immediate issue—about its power to imprison at all and the general nature and scope of the tribunal. I shall not try to abstract everything the prisoners’ lawyers and the judges said that transcends the self-incrimination question in which such remarks are enmeshed, but refer the reader to the detailed presentation of the case in Vol. II. Two points, however, may be usefully picked out as contributions to the on-going debates about the Commission’s jurisdiction and procedural powers, other than its interrogating power.

1. Maunsell and Ladd were imprisoned, *per* the return on *Habeas corpus*, because they were unwilling to answer a question about a conventicle. Exactly what they were asked is unclear; it was probably whether they had participated in such an unlawful religious assembly. No issue was made in the case as to whether proceedings against conventicles or alleged conventiclers fell within the Commission’s substantive jurisdiction. This is evidence that the activity was a grave enough religious offense for the High Commission. It may have been thought to amount to schism, or at least to be close enough, but there was no discussion of the matter. Counsel vehemently attacking the Commission on its interrogating power and more did not suggest that if conventicling was illegal at all by ecclesiastical law it was a relatively minor offense within diocesan jurisdiction.

2. The prisoners had been held for nine months at the time they brought their *Habeas corpus*. It was cogently argued by Ladd’s counsel (Fuller, for whom see the next case below—Vol. II, pp. 344 and 350-51 for Fuller’s argument) that even granting that their imprisonment was initially lawful they could not be held longer than three months. The argument depends on the contention that any imprisoning power the Commission

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possibly had was owing to the statute *De heretico comburendo* (2 Hen. IV, c. 15), which expressly provided that heretics imprisoned by ecclesiastical courts must be tried within three months of their commitment. Chief Justice Popham rebutted Fuller vigorously. Which side of the debate is the stronger seems to me uncertain—see Vol. II for analysis. Nowhere else in reported cases is the permissible duration of High Commission imprisonment so expressly raised. All that can be said about the exchange in *Maunsell and Ladd* is that Fuller did not persuade Popham of his three-month rule—none of the other judges comments.

(3) Noy’s brief report is of a single remark by Popham. It basically says that the High Commission may imprison if it is proceeding within its jurisdiction. The passage is of interest because of the Chief Justice’s way of making that point, for he founds the power to imprison on the power to fine. “[I]t hath been adjudged”, he says, “that a fine imposed by the High Commissioners was estreated into the Exchequer. And that was levied by process out of the Exchequer, and well. And if they may impose a fine, they may imprison, and it hath been so used these 50 years, without any repugnancy, if the offence be ecclesiastical and belong to them.” The language here is puzzling. What court “adjudged”? That a fine was estreated and was subsequently levied seems rather a fact than something adjudged. Perhaps the “and well” is the clue to the idea: For the fifty years the High Commission has existed, fines have been imposed and collected through the Exchequer. The practice has at least gone unchallenged and may have been judicially endorsed, perhaps by the Exchequer or perhaps by other courts, either directly by refusal to prohibit fining or at least collaterally—e.g., by holding that the Commission may not imprison to enforce fines because estreating is the correct procedure (even if by current Exchequer law actual collection could be blocked—which Popham may not have believed.) In any event, it is notable that in this speech Popham takes the power to fine as the entering wedge for use of temporal sanctions by the High Commission. His thought seems to be “If a court can fine, surely it can imprison.” On the surface that jars with the assumption that jail is a heavier sanction than a fine, but remember that Popham held High Commission imprisonment lawful only to coerce performance of spiritual penalties. A fine is hard not to see as a punishment, unless perhaps by seeing it as a forced commutation of spiritual sanctions: coercive imprisonment, savoring of civil commitment by courts of equity, can be reasonably regarded as lighter.

*Maunsell and Ladd* brought in its train Fuller’s Case.82 Although celebrated, *Fuller* is not well-reported. Almost all solid information about the case comes from 12 Coke, one of the two posthumous volumes of the *Reports*, for the accounts in Add. 25,213 and Noy are cursory. Coke reports the case in the form of “resolutions”, which he says were agreed on by the Common Pleas and Exchequer judges as well as those of the King’s Bench, where the case arose. (Whether *Fuller* was formally adjourned into the Exchequer Chamber for decision by all the judges or only discussed informally by the whole Bench, perhaps at Serjeants’ Inn, does not appear. I think the latter is more likely,

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82 M. 5 Jac. K.B. Add. 25,213, f.81; Noy, 127 (undated); 12 Coke, 41; Harg. 33, f. 119 (“An Exact Copie of the Record of Nicholas Fuller’s case of Grayes’ Esqr Termino Trin Anno 5 Jac Regis”—in Latin except for the Commission’s charges against Fuller in English.)
since the procedural setting at the crucial point to which the resolutions relate was a mere motion for Consultation to reverse a King’s Bench Prohibition. By participation in the deliberations of all the judges, as Chief Justice of the Common Pleas, Coke would have had direct knowledge of the resolutions and no doubt a role in working them out.) The resolutions certainly give a clear rendering of judicial opinion on the issues of the case; they suffer from the fault of all reporting of ultimate conclusions alone, to which Coke was partial, in that they do not tell us about debate on the way to that end, though inferences about the intermediate steps are sometimes possible. In addition to the three reports, a copy of the official record of Fuller is preserved among the manuscripts consisting largely of reports. This document is useful for some narrative details and occasional hints of how legal issues may have been seen, but like all official records it supplies no direct evidence of the thinking of counsel and judges.

The bare narrative of Fuller—synthesized from the documents, none of which gives the whole story—is as follows: In the vacation between Trinity 5 Jac., when Maunsell and Ladd was argued for the second time, and Michaelmas, Fuller was summoned before the High Commission and accused of culpable utterances in the course of his argument as Ladd’s counsel in that case. He obtained a Prohibition from two King’s Bench judges, Fenner and Croke. In Michaelmas, the Prohibition was partially undone by Consultation. It is out of the discussion of the motion for Consultation that Coke’s resolutions came. The High Commission then proceeded against Fuller and convicted him of schism and erroneous opinions. He was fined £200 and committed to the Fleet prison. Thereupon he brought a Habeas corpus in the King’s Bench. Counsel—“Serjeant Harris Minor” and Serjeant Hutton—were assigned to Fuller. They took two unspecified exceptions to the return, but the court, with all judges participating, held it satisfactory and remanded the prisoner.

The official record of the case gives us the whole of Fuller’s surmise to have a Prohibition, in repetitious legalese. We do not, however, have any information about argument from the surmise—i.e., argument as to why, assuming factual statements in the surmise to be true, a Prohibition should or should not be granted. There almost certainly was no such argument: The Prohibition was granted by two judges in vacation; Fuller’s exhaustive complaint could hardly fail, and did not as the case was later decided, to state some ways in which the High Commission had exceeded its jurisdiction; granting Prohibition fairly casually, especially outside court, if there was prima facie justification and leaving serious debate until Consultation was moved for was common enough. Coke’s resolutions, on the other hand, give a good picture of what the judges held on the fundamental High Commission issues by way of deciding on what scores the Commission might proceed against Fuller and on which ones they might not—i.e., how much of the Prohibition stopping all proceedings should be upheld and how much should be reversed by Consultation. We lack only give-and-take debate of these matters.

The most striking absence in the materials is any extended discussion of the question that to modern eyes is likely to seem the most interesting: Is a lawyer arguing in court for his client liable to be prosecuted for words which, if spoken in other circumstances, would or might be a speech-offense? Less generally, is a common lawyer arguing for his client in common law proceedings answerable to ecclesiastical courts for utterances which, outside that context, would or might be ecclesiastical offenses? It is, I think, clear from Fuller’s surmise that he claimed a broad “advocate’s privilege”, though
exactly what he claimed presents some problems. (For a detailed analysis of his claim, addressed to those problems, see the End Note at the conclusion of this Section.) From Coke, it is entirely clear that the judges rejected any comprehensive privilege. Resolution #4 contains the holding that rules out such privilege, because it is specifically about a counselor arguing in court. It starts with the general point that if a counselor “scandals” (slanders) the King or the government, *temporal or ecclesiastical*, he has committed a misdemeanor and contempt of court; he is subject to indictment and, if convicted, to fine and imprisonment. I.e., slandering the authorities in common law courtroom argument is a common law offense; it is such even if the slander is of ecclesiastical authorities; no “advocate’s privilege” protects the slanderer. Resolution #4 then emphasizes expressly that ecclesiastical courts do not have jurisdiction (even if the slander is of ecclesiastical authorities.) Resolution #3 spells out the application of this principle to Fuller’s Case: Charges made by the High Commission against Fuller claiming that he had slandered the Commission were outside its power; it had improperly charged him with offenses determinable at common law. Therefore, *per* Resolution #3, the Consultation was qualified by a clause forbidding it from pursuing slander of itself (or—the clause adds for good measure—anything else “punienda et determinanda” at common law or by statute.) Resolution #4, however, goes on from the general point to add that if “he” (i.e., a counselor) “publishes” heresy, schism, or error he may be corrected by ecclesiastical law. Therefore, *per* the Resolution expressly, Consultation was granted. (I.e., the only reason for not letting the whole Prohibition stand was that *inter alia* the High Commission charged Fuller—or plausibly charged him—with some or all of the three serious religious offenses herewith affirmed to be within its jurisdiction.

I shall return to the other Resolutions and to detailed implications of #s 3 and 4. The present point—that #4 rules out Fuller’s claim to an “advocate’s privilege”—is clear in itself. The steps to this conclusion are unknowable from the documents we have, but some speculation may be warranted. Normal procedure would be for the motion for Consultation to be argued for and against in the King’s Bench (the alternative dispositions being to uphold the Prohibition *in toto*, reverse it *in toto*, or to take the course actually taken in the end—Consultation for part of the High Commission suit, Prohibition stands for the rest.) Following debate by counsel, if the King’s Bench judges did not feel ready to give their opinions, they could have adjourned the case for further discussion. Not routinely, but naturally enough in so far as the case can be seen as difficult or important, they might have conferred privately with the judges of the other major courts, announcing their decision only after such conference. This is one route to Coke’s pan-judicial Resolutions. The other would be to hear no argument when the motion was first made, but to adjourn the case for argument before the judges of all three courts. Either way, there would have been public debate between Fuller’s counsel, or Fuller representing himself, and counsel for the High Commission. The judges—whether the whole Bench or the King’s Bench judges only—might interrupt or participate in such debate, but they were of course not obliged to. At the end of debate, the judges might have given their individual opinions *seriatim*, but they were perfectly free to hold off until they had had time to confer among themselves. Ultimately, they might have made an order without publicly stating their reasons, announced a unanimous *per Curiam* opinion with a statement of reasons, or delivered individual opinions with dissents and concurrences on distinctive grounds articulated.
It is surprising not to have reports of adversarial debate on the motion for Consultation in Fuller, since the case must have attracted interest, partly because of its politically lively subject matter concerning the High Commission and Puritanism and the more so because it concerned the rights of lawyers in the line of duty. (Cf. the excellent reporting of Fuller’s antecedent, Maunsell and Ladd.) Of course reports of adversarial debate may be found, or at any rate may once have existed. Nevertheless, it seems to me that the absence of any is suspicious enough to suggest the possibility that there was no open-court debate on the motion and that Coke’s Resolutions are the product of irregular procedure on the part of the King’s Bench. Although I am on conjectural ground, I think a plausible story can be told.

Let us try to imagine the perspective of the King’s Bench when the High Commission moved for Consultation instead of accepting the Prohibition and leaving Fuller alone. With his Puritan sympathies and his Puritan client Ladd, Fuller may not have been a favorite of most judges, but I can still imagine their rather wishing that he had been left alone. Determination on the High Commission’s part to punish him for whatever it could salvage as within its jurisdiction must have looked like a vendetta even to eyes not particularly hostile toward the Commission. A gratuitous vendetta against a barrister arising from his in-court words cannot have been a happy prospect even to judges inclined to think—as in the event they all agreed—that nothing could be done to shield a common law advocate from prosecution for proper High Commission offenses. Gratuitousness is not hard to see. Maunsell and Ladd was still not finally decided when the Consultation in Fuller was sought. I do not think, however, that the Commission could have had much to fear about the probable outcome of that case—nothing like a desperate need to silence Fuller lest upon re-argument he and his co-counsel should be successful in liberating their clients though they had failed heretofore.

It is true that the King’s Bench in Michaelmas was altered in composition from the court that in the preceding Easter term and (minus the dying Chief Justice Popham) in Trinity had listened to Fuller et al. and sent their clients back to jail, where they remained pending final decision. A major shake-up of the King’s Bench occurred late in Trinity: On June 25, 1607, Sir Thomas Fleming was moved from Chief Baron of the Exchequer to be Chief Justice of the King’s Bench in succession to as Chief Justice Popham, who died on June 10; Justice Tanfield was promoted to Chief Baron of the Exchequer; and Sir John Croke was appointed as his successor on the King’s Bench. Therefore, if Maunsell and Ladd were moved again—as no evidence I know about suggests it was—the parties would have faced a court with two judges who had not previously sat on the case and without the two (Popham and Tanfield) who when they were members of the court had been strongest against the prisoners on their duty to answer and the legality of imprisoning them for refusal. Despite this circumstance, however, I doubt that there would have been a significant chance of reversal in midstream upon another hearing of Maunsell and Ladd. That is partly because it would have required the novice judges to overrule the two former ones who, besides having heard argument from the beginning of the case, probably enjoyed the highest intellectual prestige on the court, one of them the late venerable and formidable Chief Justice. If another round would have offered any prospect of the prisoners’ being liberated, almost certainly with bail, it would probably have been on the still-open ground that High Commission imprisonment must eventually end. (By the time of the motion for Consultation in Fuller the prisoners would have
served a good year.) I conclude that the motion, rather than being seen as a strategic move, must have worn the aspect of a vendetta—or, more mildly, a manifestation of mere zeal to make an example of Fuller and strike a blow against Puritanism. As such, the King’s Bench judges cannot have been eager to act on the motion, though of course they must.

In this situation, I can imagine the judges’ preferring to avoid a regular hearing. Having one would involve giving the floor to Fuller’s counsel, if not to Fuller himself, to attack the High Commission with renewed vigor and especially to enlarge on the scandal and attack the legality of prosecuting an advocate for doing his best on a client’s behalf. It would likewise give the High Commission the floor to elaborate the justification for doing what it probably could not be denied the right to do—punish schism committed even in the course of advocacy—, but which a court with a regard for comity should be reluctant to do. For a member of the family of courts under the King to put another in the position of having to stand by while occurrences inside its courtroom are scrutinized from without—while words listened to and argued with inside are identified from the outside as “enormous” crime—is not a graceful way to foster correct relations between courts. Having been put in that embarrassing position, a sensible thing for the King’s Bench to do—instead of staging a vendetta and counter-vendetta—would be to confer informally with their brother judges in the hope of responding to the motion without adversarial debate and with the authority of pan-judicial consensus. Coke’s Resolutions fulfill that hope, though one can only conjecture about the motives and steps that led to them.

For a more complete picture of the state of Maunsell and Ladd when Fuller arose, see the account of the former in Vol. II. The reflections in the paragraphs just above can be enriched by noting two specific features of Fuller’s claim to a Prohibition in the official record. Towards strengthening his case for “advocate’s privilege”, Fuller states that he was assigned to be Ladd’s counsel and that Maunsell and Ladd was still pending when he was summoned by the High Commission. I doubt that either allegation adds to the substance of his claim that he could not be prosecuted for what he said as an advocate. (See End Note.) Both, however, add sharpness to the moral conundrum I have suggested the motion for Consultation posed for the King’s Bench. The first emphasizes that Fuller was serving as an “officer of the court” in a strong sense—not a highly partisan lawyer brought in by Puritan interests to vilify the High Commission as much as possible in the process of speaking for his Puritan client. (In its charges against Fuller, the High Commission represented him very much in the latter light.)

I do not know what the court’s rules and practice were with respect to the assignment of counsel. Apart from Fuller’s Case, I have seen nothing to suggest that parties bringing Habeas corpus could not, or normally did not, have counsel engaged by themselves on hand when they were brought into court in obedience to the writ. Assignment occurs twice in the present case, however—Fuller’s appointment to represent Ladd and the appointment of two Serjeants to represent Fuller in his own Habeas corpus. Ladd could well have been a poor man, who got his writ with no more than the help of an attorney, appeared without a barrister, requested that one be assigned him, and was routinely given one. Fuller himself, as a prominent barrister, could presumably have arranged for his representation, even from jail. He might certainly have preferred not to speak for himself, if that would have been allowable, having already tangled unsuccessfully with the King’s Bench over Maunsell and Ladd. He might also have
thought it in his interest to be represented by court-chosen lawyers presumptively free from any motive except to expound the law in his favor as well as they could. If that was his desire, even if alternatives were legally open to him, the court would seem to have been bound to make an assignment despite his presumable ability to find and pay counsel. With respect to the assignment of Fuller to represent Ladd, it is of course possible that Fuller was in a sense disingenuous in formulating his claim to a Prohibition. He could have been technically court-appointed although behind the scenes it was made known that he wanted to be assigned and that Ladd wanted him. The court may have customarily gratified such off-the-record preferences. At one point in the official record Fuller says that he was not only assigned as Ladd’s counsel, but “retained.” The additional word suggests, as one would expect, that court-appointed counsel must be accepted by those they were chosen to represent. About all this, however, I am obliged to conclude with a *quaere*.

Calling attention to the undetermined state of *Maunsell and Ladd*, like calling attention to Fuller’s assignment as counsel, probably does not affect the claim to Prohibition. I.e., if one can commit—let us say heresy—by what one says in common law advocacy, there is no plausible ground for making it a matter of law that the advocate should be left at large, perhaps to commit a deadly offense again, until the case he is arguing is finished. On the other hand, if the ecclesiastical authorities are so impatient to pursue their heretic that they interrupt common law proceedings, they can hardly expect indulgence from the common law court. In *Fuller*, they were not indulged in three ways: (1) A comprehensive Prohibition was issued, as opposed to a tailored one inhibiting the High Commission from proceeding in inappropriate ways but permitting it to proceed *quoad* the serious ecclesiastical offenses Fuller was charged with. In a sense, the King’s Bench interrupted the High Commission’s business in response to the Commission’s interruption of its business, though of course it could have done that without Fuller’s calling attention to the “interruption.” (2) The King’s Bench may have denied the High Commission the opportunity it might have preferred to debate the motion for Consultation openly. (3) The Consultation issued with the concurrence of the court’s Common Pleas and Exchequer colleagues was carefully drawn to emphasize limits on the High Commission, as we shall see in detail. Although the Commission was permitted to carry on its prosecution of Fuller *quoad* religious offenses, it was expressly told what it could not take note of. These spelled-out restrictions are not likely to have been welcome to the Commission.

I shall shortly return to the Consultation phase of Fuller’s Case and the rest of Coke’s Resolutions. Let us first, however, for the sake of narrative continuity, look at the case’s final phase.

Having been permitted by the Consultation to proceed against Fuller for his alleged religious offenses, the High Commission did so. He was convicted, fined, and imprisoned, whereupon he brought *Habeas corpus*. The reports tell us that Serjeants Hutton and Harris were assigned to speak for Fuller and that they urged two exceptions to the return. Then we are told that Fuller was remanded—by unanimous decision *per Add.* 25,213. There are no straightforward reports of what was argued for and against holding him. A few hints in and inferences from the sources can, however, add something to the bare account.
The most significant clue is Coke’s Resolution #6: “Resolved, that the special Consultation being only for heresy, schism, and erroneous opinion, if they convict Fuller of those things & he recant, that he shall never be punished by ecclesiastical law.” Thus, in issuing the qualified Consultation that allowed the Commission to proceed against Fuller at all, the judges in effect laid it down that he could be imprisoned to coerce recantation, but not otherwise. This applies what by 1608 was well-established King’s Bench law—High Commission imprisonment is lawful only to enforce spiritual sanctions, not to punish and not to enforce fines. The return on Fuller’s Habeas corpus must have said that he had not recanted and was therefore being held.

What, then, could Fuller have hoped to gain from his Habeas corpus, beyond putting his enemy—the High Commission—to trouble? What arguments could there be for his liberation, given that he had not recanted and was detained only to make him do so? It may be that the very sparsity of the reports is a kind of clue toward answering this question. Add. 25,213 says only that the Serjeants took the two unspecified exceptions and that the judges all agreed that the return was sufficient: Coke says only that the jailer returned the cause of detention. Do these matter-of-fact sounding statements perhaps suggest that one of the Serjeants’ exceptions was formal in the way we have seen in some previous cases? I.e., without positively arguing that Fuller could not plausibly have been convicted of schism and error, counsel may have maintained simply that the return did not show enough of what he said in Maunsell and Ladd for the court to make any judgment on whether his conviction could have been justified. For all we know, lacking the text of the return, the justification was stated minimally, perhaps so minimally that the return was reasonably challengeable. I take it as clear law from earlier speech-offense cases that although deference was due to the ecclesiastical court as competent judge of what schism and error consist in, the High Commission could not in Habeas corpus get away with saying no more than “the prisoner was convicted of speaking words adjudged to constitute schism”; it must give enough of the language so adjudged to let the common law court see that the conclusion “schism” was at least prima facie convincing enough. From Fuller’s verbatim recital of the charges against him in his application for Prohibition (official record) we know that the High Commission used the terms “schism” and “error” generously and did in a manner say what remarks by Fuller in Maunsell and Ladd were considered to amount to those offenses or to evidence of them. I think questions can probably be raised as to whether all the utterances recited were schismatical, or at any rate lucidly shown to be. (See End Note for detailed analysis of the charges.) For the present, it is enough to note that the King’s Bench judges knew the charges too and so knowing had granted Consultation quoad prosecution of grave religious offenses. For this reason, they may in the Habeas corpus have been undemanding of great specificity (and the High Commission may not have felt pressed to give a very detailed justification.) That is to say that the Serjeants may have had a quite good argument from formal insufficiency, but also that the judges’ overruling it is unsurprising. I.e., the judges already knew that the schism-and-error charge was not ridiculously fabricated; the alternative to remanding Fuller would probably have only been to permit amendment of the return, which would probably only have led to more detail sustaining at least the plausibility of his conviction; if Fuller really was a victim of abuse of ecclesiastical law, perhaps he had better try False Imprisonment.
A second clue to Fuller’s possible grounds for release from prison is provided by Noy’s report. One can, I think, wonder whether Fuller’s claim to some sort of “advocate’s privilege” had been as thoroughly or as subtly explored in adjudicating the motion for Consultation as it might have been. The judges as reported by Coke seem to move a little hastily from “there is no such privilege to protect a lawyer who commits the secular offense of slandering lay or ecclesiastical authorities” to “a lawyer in the lay system cannot in any way be protected from ecclesiastical prosecution for ecclesiastical offenses, at any rate major ones.” Noy indicates that the matter was broached again in Fuller’s *Habeas corpus*, though in the form of a more modest claim to privilege than Fuller probably advanced in his surmise for Prohibition. All Noy says is that “Lee’s Case” was vouched, as well as “Mitton’s Case in the time of Lord Dyer.” These cases are almost certainly the *Leigh* and *Mitton* that figured prominently in *Maunsell and Ladd* (see Vol. II.) Their importance there was for the principle that the High Commission had no authority to compel defendants to answer questions under oath when a true answer would amount to confession of a common law offense. Noy, however, cites *Leigh/Lee* for another point: “that Lee being an attorney of the court was bailed because of his necessary attendance in court.” It is then said that “so it was ruled in Mitton’s Case.” (To this Noy then adds, “And in that case it was agreed that the High Commissioners may commit to prison.” The reference is probably to *Mitton* alone, but whether it is also or instead to *Leigh/Lee* makes no difference. One or both of those cases decided originally that the High Commission has some imprisoning power, a point little contested by the King’s Bench though for a time discountenanced by the Common Pleas.) Here it is the party’s position as an attorney that matters. It seems likely that in Fuller’s *Habeas corpus* the Serjeants brought up these early cases to show that “officers” of common law courts were privileged against High Commission imprisonment to the extent that they should, though lawfully committed (and *a fortiori* answerable in ecclesiastical courts and subject to other sanctions), be released on bail in order to fulfill their office for the court’s convenience. It is of course not necessary that a barrister should enjoy the same privilege as an attorney, much less a clearer one. That he does not is implied in the unexplained decision to remand Fuller. Fuller’s emphasizing that he was counsel in a still-pending case might seem to strengthen his claim to temporary protection, but it does not appear to have moved the judges.

To conclude the discussion of *Fuller*, let us note the further features of the Consultation. Two of Coke’s Resolutions, #1 and #5, are about procedural law. They were prompted by *Fuller* and amount to endorsement of the procedures followed in the case, but they say nothing about the jurisdiction and powers of the High Commission. (#1 holds that Consultations—in contrast to Prohibitions—may not be granted in vacation; #5 upholds granting Prohibition to stop ecclesiastical suits altogether when they are partly *infra vires* and partly *ultra* and later returning the *infra vires* parts to the ecclesiastical court by Consultation on motion. This is said to be common practice, whereas partial Prohibitions stopping only the *ultra vires* parts, though permissible, are rare. For these points in Fuller, see Vol. I, pp. 306-308, 319.) To Resolution #5 six “general rules about prohibitions” are appended, with the notation that Prohibitions (or rules about them) are rarely encountered in “our books.” None of these has any particular relevance for *Fuller*. They have every appearance of a personal touch of Coke’s—bits from his collection of lore suggested by the general discussion of Prohibitions and Consultations. The source...
may be Bracton or other ancient treatises, since the rules are in Latin; it is true enough
that there is not a lot of Prohibition law in “our books” in the sense of the Year Books.

Resolution # 2 lays down the general principle that construction of 1 Eliz. and
letters patent pursuant thereto belongs exclusively to the common law courts. The
principle is applied to justify one of the qualifications in the Consultation in Fuller: The
Commission is permitted to proceed so long as it stays away from exposition of its own
patent and interpretation of 1 Eliz. I do not think that as of 1608 the generality was in
serious doubt in either principal common law court. Its unequivocal statement by all the
judges, however, together with its practical embodiment in Prohibition law—for the
Resolution says in effect that the High Commission (and presumably by extension any
ecclesiastical court) may be explicitly prohibited from infringing the “common law
monopoly”—contribute at least to clarification of the law.

With respect to the exposition of patents, a significant supporting analogue is
cited: If the King has a benefice donative by letters patent, the holder of such a benefice
is not visitable or deprivable by ecclesiastical authority, but only by the Chancellor or
commissioners under the Great Seal. (I.e., besides an ordinary advowson—a
“presentative” benefice—it was possible to own a “donative” one. The owner could
grant the living to a clergyman directly instead of nominating one to the Bishop. A
donative benefice belonging to the King might have the further characteristic that it could
only be granted by letters patent. The rule cited means that the holder of such a benefice
is not subject to ordinary ecclesiastical discipline; his behavior as a beneficed clergyman
can only be investigated and punished by the Chancellor—the issuer of letters patent
responsible for seeing that their beneficiaries do not obtain them corruptly or abuse their
intent—or by a special royal commission in effect constituted by letters patent—i.e., by a
document bearing the Great Seal.) This rather arcane rule relevantly supports a common
type of Prohibition—to prevent ecclesiastical courts from construing letters patent,
usualy ones pardoning various offenses including ecclesiastical crime. Fitting it exactly
to the High Commission seems to me a bit tricky, since 1 Eliz. could have given the
Commission authority to construe its own patent. Towards arguing that it does no such
thing it may be useful to be able to say, “Any such empowerment of the Commission
would involve making an exception from the principle, operative in other contexts, that
ecclesiastical courts may not scrutinize letters patent even when they relate to Church
interests or proceedings affecting the Church.” Cf. “1 Eliz. could amend Magna Carta,
but overwhelmingly explicit textual evidence would be required to make out that it does.”

Resolution # 3, already discussed for its applied point, starts with the
generalization that any question about what power belongs to ecclesiastical courts
belongs to the common law, for which the venerable authority of Bracton is cited. (Bk. 5,
De exceptionibus, f. 412.) The passage in Bracton is scarcely more than a statement of the
generalization in the form of saying that if ecclesiastical judges were entitled to decide on
their own jurisdiction they could proceed as they liked, ignoring the King’s Prohibition
(the surrounding passage is about 13th century Prohibition law.) Neither the general
principle nor its implied ground—that in a system comprising temporal and spiritual
courts ultimate authority to determine how jurisdiction is to be divided, must rest
somewhere and it does rest with the King’s courts—cannot be called controversial in the
17th century. I suppose the ancient authority is cited with the thought that being clear
about the King’s “sovereignty” over inter-jurisdictional questions should help dispel any
doubt about the matter actually in question—common law authority over slanders of the ecclesiastical “government.” Perhaps: If ecclesiastical courts had the last word about whether derogation of their authority is criminal, they might as well have it with respect to the substance of their jurisdiction.

With one exception (an anomalous case dealt with at the end of this sub-section), Fuller concludes the cases decided in both courts before Coke presided over them successively. To complete the mainline account of both principal courts before Coke’s Chief Justiceships, we need to note two early-Jacobean extra-judicial events. (As at other points in this study, I deal occasionally with extra-judicial proceedings when accounts of them occur among law reports. Here as elsewhere, at least with reference to the first event, it is possible that there are fuller and better records of such proceedings among classes of documents I have not investigated. Cf. explanation of the boundaries of the study in Vol. I, “General Introduction.”) Both of the extra-judicial opinions in question here are affirmative of some of the High Commission’s claims. Neither, however, is inconsistent with the case law as of the time the opinions were rendered.

The first episode, in 1604 or early 1605, was a solemn government-initiated conference attended by all the judges and the principal state dignitaries. The object was to get a public declaration by the judges in support of several anti-Puritan positions of importance to the government, and that object was attained. There is no reason to see in this conference an adversarial encounter between the government and the judges. In this respect, the 1604-5 conference contrasts with a similarly full-dress conciliar meeting in 1611 discussed in the Section following. The latter was an attempt, probably prompted by a particular case, to put pressure on the Common Pleas to alter that court’s handling of the High Commission—significantly in areas other than Puritanism. The former may of course have been less than welcome to some judges, as an effort to secure pre-commitment on issues that might arise judicially, but it was basically addressed to the judges in their recognized capacity of legal advisers to the Crown. In affirming the legality of the government’s views on several points, it is unlikely that the judges said anything they did not fully believe. It is perhaps worth noting that neither the Attorney General, Sir Edward Coke, nor the Solicitor General attended the Conference (the roster is listed by two reports, Croke and the MS.) That probably only signifies that having lawyers present to argue for the government’s preferences would have been out of keeping with the spirit of an encounter between the King seeking advice and his Justices.

The conference was prompted by two recent events, the propagation of a series of canons for the Church of England in 1604 and the Puritan Millenary Petition presented to James I at the beginning of his reign. (New petitions modeled on that one were probably expected in response to the canons, or some may already have been in circulation.) The

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83 Croke Jac, 37 (dated M.2 Jac.); Noy, 100 (dated H. 2 Jac, 13 February); Harl.3209, f. 58b (dated 13 February 2 Jac. –report series labeled “Reports of Mr. Andrew of Lincoln’s Inn.”) Croke is the fullest report, but the three are entirely consistent. The discrepancy in dating is unimportant; both dates are plausible, but the one specified by two reporters is slightly more probable. “13 Feb., H.2 Jac.” puts the conference at the beginning of 1605. It must in any event follow by a certain interval the issuance of the canons early in 1604 and fall close to the end of November, 1604, when a period of grace for conforming with the canons given by royal proclamation ran out.
Chancellor opened the meeting with a “long speech” (Croke) deploring both Puritans and Papists as “disturbers of the State” and then asked the judges their opinions on three matters. The judges responded unanimously to all three. *Per* Croke, they said in reply to the first inquiry, before going to the substance, that they had already conferred about the question. This shows that they were not taken by surprise and suggests that the conference was rather a ceremony to publicize the judges’ foreknown agreement with the government than an expected occasion for debate. Presumably the same opportunity to prepare responses to the second and third questions was afforded.

(1) The first question was whether the High Commission could deprive Puritan ministers for refusal to conform to ceremonies prescribed by the new canons. (The designation “ceremonies” covers some 18 canons concerning the conduct of divine worship—out of a total of 141, which as a whole takes in many aspects of Church administration. The extent to which the clearly “ceremonial” canons were innovative is open to question, but at least they insisted on practices which *de facto* had not been regularly observed by some clergymen and were objected to by Puritan consciences, touching such matters as the use of the sign of the cross, kneeling, and following the Book of Common Prayer exactly.) It is the limitation of the first question to the High Commission that makes the conference of interest for the present discussion of the Commission’s jurisdiction and powers. Why was the pressing question not simply the validity of the canons and the appropriateness of deprivation as a sanction for flouting them applicable by *any* ecclesiastical court? It looks as if the government foresaw that regular Church courts were not likely to prosecute non-conformity with the canons very vigorously, nor to deprive local clergy of their livings even if they were prosecuted and convicted. The expectation seems realistic. Whatever the distribution throughout the ordinary Church hierarchy of a certain sympathy for Puritanism, one or another degree of disapproval, and distaste for newfangled regulations, one could predict reluctance on the Bishops’ part to adopt a policy of strong enforcement. A mere fatherly preference for dealing gently with erring members of the clerical community must have combined with fear of upsetting local relationships by offending the patrons whose friends, relatives, and protégés would be the victims of deprivation. In sum, the appearances suggest that the government and the central hierarchy intended a campaign to get rid of Puritan incumbents, knew that the High Commission would have to do the job, and wanted the Commission’s legal authority made clear before it was challenged in particular cases.

Why, however, was it challengeable? Let us assume that ecclesiastical courts generally were free to enforce the canons, by deprivation if they saw fit, and that the High Commission could entertain or initiate any kind of ecclesiastical suit (as most case law as of 1604-5 suggests most judges thought it could.) Is there an argument that the Commission should be debarred from enforcing the canons by deprivation even though regular ecclesiastical courts were not debarred?

Such an argument can, I think, be made out from the reports. The judges said unequivocally that the argument is invalid, but it must have been taken seriously enough by the government and hierarchy to recommend cutting it off by judicial pronouncement before it was urged in perhaps numerous attempts to prohibit the Commission. I would propose constructing the argument against the High Commission’s power to enforce the 1604 canons by deprivation as follows: The Commission was simply created by 1 Eliz. The monarch may have been authorized to give the new court jurisdiction to enforce any
or all ecclesiastical law existing at the time 1 Eliz. was enacted. Obviously, however, new requirements of ecclesiastical law that came into being in 1604 were not covered. Even if the line between innovation and codification in the canons is sometimes disputable, they cannot be used as a source of law by a tribunal that had no such source when it acquired its powers; the burden of showing that any rule contained in them antedated 1 Eliz. would rest on the Commission (and be very hard to sustain.) So, granting the validity of the canons and in consequence their enforceability by regular ecclesiastical courts, violation of these new or newly propounded rules would not be within the High Commission’s cognizance. New Parliamentary legislation would be necessary to extend the Commission’s jurisdiction to ecclesiastical law added or altered after 1 Eliz.

I so reconstruct the argument against the High Commission because that is what the clearly reported opinion of the judges seems to answer. The burden of their opinion is that 1 Eliz. did not create the High Commission as a new court. Rather, the statute is strictly declaratory. What it clarifies or pins down in certain terms, for present purposes, is that restoration of the monarch’s erstwhile usurped ecclesiastical prerogative included his power, not only to alter or reformulate the canon law without Parliamentary assent, but to establish new tribunals to exercise any or all parts of substantive ecclesiastical jurisdiction, using any or all recognized ecclesiastical sanctions. The substantive jurisdiction contemplated by 1 Eliz. included lawful future additions to the body of ecclesiastical rights and duties. (Membership in that body would presumably be determined by subject matter. There might be ambiguous cases, but rules prescribing what clergy must do in the conduct of religious services would seem to be a clear one.)

The ecclesiastical sanctions already existed—there is no implication in this opinion that new sanctions could be added; the existing ones were freely available to new tribunals, including deprivation. (It should perhaps be observed that although the opinion goes only to the monarch’s prerogative, and indeed implies that a document such as the 1604 canons could have been issued solely on his authority, the Church had internal consultative procedures which propriety, at least, required to be used. The 1604 canons were in fact prepared by the Convocation of the Clergy for Canterbury Archdiocese, with the King’s leave and approval. He followed up on their enactment by a proclamation giving notice of them, commanding obedience, prescribing deprivation of non-conforming clergy, and allowing a few months’ grace for ministers to come into conformity before the sanction would be applied. The judges in their opinion commended him for these measures.)

(2) The second question put to the judges went to a possible hitch in the reply to the first. In response to the opening general question about the High Commission’s power to proceed against violators of the canons and punish them by deprivation, the judges already said that the Commission was free to prosecute ex officio—i.e., without a libel. The second question was expressly whether Prohibitions founded on the statute of 2 Hen. V, c.3, could be employed to stop High Commission prosecution and deprivation of offenders against the canons. The 15th century statute provided that ecclesiastical defendants must be furnished with a copy of the libel by which the plaintiff commenced his suit. It seems at first sight that if, as declared by the judges in reply to Question #1, ex officio prosecution was permissible 2 Hen. V could have no relevance: the statute in its terms is about the normal run of civil cases started by libel, not about ex
—roughly “criminal”—suits. So the judges held in response to Question #2. Is that clearly the right answer?

The problem raised by the second inquiry is what kind of case clergy who ran afoul of the new canons might have made for invoking 2 Hen. V or what the government was afraid of when it sought a separate, explicit declaration of the irrelevance of that statute. It seems implausible to claim that a clergyman’s failure to follow ceremonial requirements imposed by the new canons could not be prosecuted ex officio—by regular courts even if the High Commission were to be excluded from jurisdiction. General regulations for the performance of the Church’s religious functions would seem unlikely to give many individual complainants a motive to sue misdoers by libel, especially a respectable motive (a less than respectable one would be, say, a patron’s desire to get rid of his incumbent in order to gain a new presentation, perhaps to be used for the benefit of someone personally preferred by the patron.) The “party in interest” with respect to the Church’s general ceremonial rules is surely, primarily, the Church at large; the purpose of ex officio proceedings was surely to allow for representation of that interest. (Analogy with moral offences pursued ex officio is close enough. Rarely will live-and-let-live attitudes be overcome to produce private prosecution, save from dubious motives of vengeance or enmity. If Christian morality is to be significantly enforced at all, it must be on the initiative of the ecclesiastical courts themselves, given the absence of an adequate separate system for “public prosecution.” (True, the Church had such a system of sorts in the institution of Episcopal visitation. It is probably fair to say, however, that ex officio prosecution found a place in the sun because presentment at visitation was too subject to local prejudices and tolerances to turn up a large share of offenders, especially among the relatively well-connected.)

In the light of these considerations and some indirect evidence, I think the Puritans’ hope in 2 Hen. V, and the political authorities’ fear, was more solidly based than in objection to ex officio proceedings as such. The purpose of requiring that defendants be given a copy of the libel is plainly to insure that they have a full and precise statement of the complaint so that they can prepare their defense. Although the language of 2 Hen. V only covers suits started by libel, it remains a good question why the equivalent of a copy of the libel should not be furnished to ex officio defendants, at least in some sorts of cases. Let there be no libel; recognize the power of ecclesiastical courts, in appropriate cases, simply to summon subjects before them, without—so far—any notice of what they are summoned for. Would it not be reasonable now—before proceeding to trial—for the ecclesiastical court serving as accuser to be required to furnish the defendant with a written statement of the accusation and allow him some time to prepare his response to a fixed claim? One can of course reply that it might be reasonable, but 2 Hen. V does not require it: the statute is about what by the letter it speaks of, cases in which there is a libel. So the judges declared in 1604-5. Naturally enough, in the face of a Privy Council looking for crisp results, they made no excursions into the legal anomaly, the gap between the law’s solicitude for fairness to libel-defendants and its at least formal indifference toward ex officio defendants.

There is, however, potential mileage in the anomaly; the government knew what it was doing in seeking to have an inch disallowed lest it turn into miles. In general jurisprudential terms, “The statute just does not apply” was not quite a final blow in litigation when the doctrine of “the equity of a statute” was still good law, as it was in the
early 17th century. That doctrine means that no claim of legislative intent is necessary to extend a statute beyond what it says, only a showing that there is no significant distinction between the situation the statutory language covers and some other situation it does not. (The most familiar example is a statute giving a right of action to executors but saying nothing about administrators. The latter were held to have the same right “by the equity.”) Even without the doctrine of statutory equity, however, interpretation and application of statutes was less rule-bound and more flexible in the early 17th century than it later became. It would not be terribly surprising to find Puritan ministers threatened with deprivation seeking Prohibitions with the argument that the intent of 2 Hen. V, or the mere policy of the law implied when the statute was made with reference to libel-based suits, forbade exposing any accusee to serious loss without first giving him a written statement of the particulars of the accusation; it would not be a miracle to find some judge agreeing. Even if such a decision did not catch on as law, there would be a precedent and there would be disputes in future cases. The best way to strike a “final blow” to the use of 2 Hen. V would be by means of a unanimous judicial opinion in advance of actual attempts to use it.

The specific situation we are concerned with favors the temptation to rely on 2 Hen. V one way or another. Offenses pursued ex officio that could only be penalized by routine spiritual sanctions arguably do not demand the formality of written, spelled out charges. Should the Church not be trusted to deal with her suspected erring children though she does so without much legalism? But if the sanction of deprivation is contemplated, the equities are radically altered. A man sued for tithes, let us say, deserves, and by 2 Hen. V enjoys, a right to know just what his parson claims, for he has a plain material interest, both in his pocketbook immediately and in the long-run value of his land, in paying no more than is justly demanded. Is the material stake of a clergyman in peril of deprivation not at least as weighty? He stands to lose not only his position in the Church, but a common law interest, his freehold in the living, his life-estate in the incomes and property attached thereto. Whether by in some extended sense “applying” 2 Hen. V or by merely pointing to the principle of justice animating it, excluding the statute from any sort of relevance seems as harsh as overlooking the comparability of the prospective deprivee’s plight with that of the tithe payer, the executor sued for a legacy, or other like defendant. It is perhaps further arguable that at any rate the High Commission should be bound by “something like 2 Hen. V.” A clergyman prosecuted ex officio in a regular ecclesiastical court to the potential end of deprivation, even if given no firm advance notice of the charges, had two ecclesiastical appeals ahead of him in the event of conviction. The appellate process, in which all factual and legal findings were revievable, would perhaps be very likely to rectify any mistakes or injustices traceable to hasty trial at the first-instance level or confusion and poor defense on the part of an inadequately informed defendant. The protection of appeal was not available against the High Commission.

Indirect evidence that 2 Hen. V was given relevance for more than the libel-commenced suits it applies to literally comes from the law of self-incrimination. For detailed discussion of this matter, see Vol. II, pp. 404-405 and 410-416. In summary: Throughout early discussion of inquisitorial procedure in ecclesiastical courts, there runs a somewhat scrappy vein of consensus that when ecclesiastical defendants were lawfully compellable to answer interrogatories under oath, whereby they might be required to
incriminate themselves, they were entitled to be apprised in writing of the questions, or at least the topics of the questions, in advance of testifying. (See Vol. II, Ch. 5, *passim*.) I have not, however, found this opinion tied to 2 Hen. V until Chief Justice Coke made the connection firmly in the major *Habeas corpus* case of Burrowes et al. of 1616. There was some hesitation between saying that the equity of 2 Hen. V ensured this right and saying that the statute was strictly declaratory of the general principle of entitlement to notice (i.e., 2 Hen V did not enact *de novo* that civil defendants must be given a copy of the libel, but declared or explained that the general, common law principle so demanded.) Either way, toward the end of his judicial career Coke had made up his mind that the statute was the solidest prop to rest the right of notice of incriminating interrogatories on. In *Burrowes* his King’s Bench colleagues give no sign of disagreeing with him, though that case hardly settled the point. There were grounds indisputably rooted in the precedents for deciding the case against the High Commission without taking up failure to provide adequate notice of the articles of examination to the—Puritan—defendants. The idea of relying on 2 Hen. V may have been Coke’s inspiration, which the other judges may have thought hardly worth considering deeply when the case was easily decidable without a theory of 2 Hen. V and when the need for notice of potentially incriminating questions was already pretty well recognized. All that can really be said is that upwards of a decade after the 1604-5 conference Coke did flatly reject the general position on 2 Hen. V taken by all the judges at that conference, i.e., the position that limits the statute to its literal meaning and disallows any penumbras. I have no evidence as to whether Coke remembered the 1604-5 conference and was aware that he was proposing a turnabout from the judges' opinion there. It of course does not automatically follow that if 2 Hen. V should be used to check incriminatory questioning it should also be used to insure that clergy merely accused of disobeying the canons were entitled to a bill of particulars; their conviction for that offense would seem unlikely as a rule to depend on confessional evidence, as opposed to evidence of their conduct supplied by witnesses. I should note that among the miscellaneous Prohibition cases not yet analyzed in this study there are quite a few on the construction of 2 Hen. V in its straightforward application to libel-based cases.

(3) The third question addressed to the judges was occasioned by the Millenary Petition and perhaps the fear of similar petitions reacting to the new canons. It has no direct bearing on jurisdictional law except for showing further that the judiciary shared the rest of officialdom’s hostility toward Puritans and willingness to use sharp measures against them. The question was essentially whether it was a punishable offense to petition the King with an “intimation” that his turning down the petition would cause thousands of subjects to be discontented. The judges’ reply was emphatically “yes”: with slight variation in the language of the reports, such petitioning is “an offense finable at discretion, and is near to treason by raising sedition by discontent, &c.” (Noy); “finable at discretion, and very near to treason & felony in the punishment, for they tended to the raising of sedition, rebellion, and discontent among the people” (Croke); “near to treason and greatly finable” (Harl.3209.) One can only wonder whether the Privy Councilors could have hoped for more, say a declaration that unlawful petitioning was treason or felony, as opposed to dangerously close, or that discretionary imprisonment was available as a punishment in addition to discretionary fining. Apparently after the judges had given their basic answer to the third inquiry, *per* Croke, “many” of the Councilors said that
“some” Puritans had spread a false rumor that King James intended to grant toleration to Papists. This information prompted the judges to declare that disseminating such a rumor would also be “heinously finable by the rules of the common law, either in the King’s Bench, or by the King and his Council, or now since the statute of 3 Hen, 7, c. 1, in the Star Chamber.” (Harl. 3209 tells the same story in slightly abbreviated form. 3 Hen VII is the so-called Star Chamber Act, believed to have created that court though, it is now thought, erroneously.) Some of the Councilors reported further that the King had recently been informed of the rumor and disavowed in the strongest terms having the tolerationist intentions attributed to him. It is worth observing, for the purposes of our concern with the High Commission, that there is not the least suggestion that ecclesiastical courts, including the Commission, would have the least color of jurisdiction to proceed against improper petitioning or rumor-spreading touching the state’s religious policy. That was purely common law business.

The later of the two extra-judicial reports bearing on the High Commission presents no problems of meaning. It is valuable for recording an out-of-court opinion from the winter of 1606 affirming the position on the High Commission that had pretty clearly been reached by the end of Elizabeth I’s reign. Viz. the Commission may be authorized to exercise all parts of ecclesiastical jurisdiction, but is strictly confined to spiritual sanctions; the patent may not give it power to fine or imprison. The occasion for this opinion was a post-prandial discussion at Serjeants’ Inn. We are told that the question raised was whether the Commission may imprison and that “all” agreed on the resolution, which spoke to substantive jurisdiction and fining as well as to imprisoning. It is not certain that all the judges were present, but likely that the company included more judges than the members of the Common Pleas and the Serjeants who practiced in that court. Coke, who reports the question and resolution, was presumably present. As of a time only shortly after his appointment as Chief Justice of the Common Pleas, he would not appear to have departed from his court’s consensus, though he was later to do so. There is nothing surprising in the sparsely reported reasoning behind the Serjeant’s Inn opinion. The premise that the monarch could have created a High Commission over and above the ordinary ecclesiastical courts by prerogative is endorsed. The deduction from that premise is that such a creation would be “just another ecclesiastical court”, with the permissive implication that it may, if so authorized by the monarch, enforce all parts of ecclesiastical law and the restrictive one that it may enforce them solely by spiritual sanctions. A statute of course could add to or subtract from such jurisdiction and powers, but there is no reason to say 1 Eliz. does so. That statute’s reference to the patent constituting the Commission does not mean that the monarch may give it jurisdiction or powers it would not have if it came into existence without a Parliamentary mandate.

One final case from the King’s Bench involving the High Commission, Pit v. Webly, came just before Coke’s transfer to that court as Chief Justice. This case was settled by the parties before Prohibition was definitely granted or denied. The judges’ inclination on an unusual issue is, however, reported. Because the case touches on the statute of 23 Hen. VIII, c. 9, it is discussed for that aspect in the End Note to Ch. 2 above. In the event, after proposing to seek Prohibition on the basis of 23 Hen. VIII, counsel

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84 12 Coke, 19. Dated H. 4 Jac.
85 P. 11 Jac. K.B. 2 Bulstrode, 72.
dropped the attempt with the court’s encouragement. Plaintiff-in-Prohibition’s surmise was changed so that 23 Hen. VIII was not mentioned and Prohibition was sought on another ground, which alone concerns us here.

Pit is identified as “the serjeant of the mace.” He arrested Webly when the latter was coming from church after a sermon. The report does not say who Webly was. He could have been the clergyman of the church, but he might have had plausible legal grounds for complaining about the arrest if he was only a member of the congregation that heard the sermon. The report also informs us that the arrest did not take place on Sunday, but of course there could be religious services including a sermon on other days. One remark by counsel suggests that the arrest was after evening prayer. It is reported further that Pit arrested Webly by warrant of a Justice of the Peace. Thus, as counsel says, the arrest was “for the King”, rather than “between party and party”—i.e., it was not pursuant to a civil dispute, as a creditor’s arrest of a delinquent debtor would be. Finally, the arrest was affected “without tumult.”

Webly sued Pit for the arrest in the High Commission by libel. It will hardly seem evident that Pit committed an ecclesiastical offense, much less a High Commission one, in performing his function as a royal officer. Were it not for two medieval statutes, one would suppose either that merely arresting a minister or worshipper in, so to speak, close proximity to a religious service was a recognized ecclesiastical offense, or else that Webly’s version of the facts, presented in his libel, was more damning than that presented in Pit’s surmise, which is all that was before the court and what my statement of the case above must mainly depend on. (The Webly version could have complained that Pit invaded the church, interrupted divine service, created a “tumult”, or—if Webly was a cleric—laid violent hands on him; the last of these was certainly an ecclesiastical crime, and the others probably offenses which the Church would not have considered excusable by claiming that they were committed in the performance of official duties.) In reality, however, there were two crucially relevant statutes—50 Edw. III, c. 5, and 1 Rich. II, c. 15. It may seem pedantic to look in detail at these two extremely vague old statutes, but I think it is worthwhile because they are a good example of what 17th century courts faced when obliged to make sense of legislation over 200 years old, of whose form and historical circumstances they could have had little idea. The judges hardly had a choice but to imagine what the law based on these sources came to; there is no sign of their analyzing the texts closely, if indeed they had the texts.

The later statute, 1 Rich. II, is the important one to focus on, as the 17th century lawyers did, for it is at least less vague than its predecessor. The statute starts by reciting the complaint of the prelates from which it arose: Viz., “beneficed people of Holy Church” and “others” are arrested in cathedrals and other churches and conducted (“drawn”) out of those edifices; they are also arrested and removed from the churchyards attached to such churches (“their” churchyards); sometimes these arrests and removals occur when the arrestee is “intending” on divine service; arrests are also made in “other places” “although” “they” are bearing Christ’s body to sick persons, such arrestees being “bound and brought to prison against the Liberty of Holy Church.” The ambiguities so far are: (1) Are all arrests in churches and churchyards complained about, or only arrests of beneficed clergy and other clerical personnel? (2) Is anyone included among those “intending” on divine service beyond the clergy performing it? Note that while arresting people directly involved in services is singled out, it is not expressly differentiated as a
more serious cause of complaint than simply arresting in a church or churchyard. (3) Do improperly arrested bearers of the Host to the sick extend beyond the priest on his way to perform the sacrament—i.e., to servants or assistants, clerical or lay, accompanying him?

The enacting clause following the recital of the complaint is clear enough as far as it goes: It is ordained “That if any Minister of the King or other, do arrest any Person of Holy Church by such Manner, & thereof be duly convict, he shall have Imprisonment, and then be ransomed at the King’s Will, and make Gree to the Parties so arrested…” It modernizes the language only mildly to say that the statute makes the arrests complained of a secular criminal offense and a secular tort for which the victim is entitled to be compensated. (Ancient legal concepts are employed, such as taking pecuniary punishment as “ransom” paid to the King. The only obscure word is “Gree”, but that is only a truncated form of “agree”—“make Gree” probably means something like “come to terms with”, which I suppose amounts to “settle with the victim for damage he claims, or, failing settlement, be subject to suit by him.”) The statute says nothing specific about procedure on either the criminal side or the civil. What it most conspicuously does not make clear is where it leaves the ecclesiastical courts. If before the legislation those courts could proceed against any or all of the arresters complained of and punish them by spiritual censures, could they still do so, over and above the temporal sanctions now imposed? Or was any prior ecclesiastical power taken away when the offenses were “secularized”?

The antecedent act, 50 Edw. III, is not of much help for construing 1 Rich. II At two places it uses language that seems more restrictive: Complaining of arrests—by royal authority or “Commandement of other Temporal Lords”—of those taking the Sacrament to the sick, it refers to “priests” and “their clerks with them”; it also refers to “Persons of Holy Church” arrested when they are “attending ["entendant" in the extant French version of this statute—equivalent to “intending” in 1 Rich. 2, which only survives in English] to Divine Services in Churches, Churchyards, & other Places dedicated to God.” Nothing is said to suggest that arrests of laymen, even if they are immediately participating in services, are within the complaint behind the statute. It is, however, said expressly in 50 Edw. III that besides offending God and the liberties of the church, the arrests previously mentioned are disturbances of divine services (a likely candidate for an already existing ecclesiastical crime, though officers executing their duty could possibly be exempt.) The enacting part of this statute does not sharply create new offenses or new remedies as 1 Rich. II does, but after saying that the King will be displeased if anyone makes the arrests complained of, it says that he “will & granteth and defendeth [forbids] upon his grievous forfeiture, That none do the same from henceforth.” The phrase I italicize does have the effect of creating a highly indefinite secular offense—the King, so to speak, undertakes to use his punitive arsenal against offenders somehow.

Both statutes end with provisos forbidding collusion on the part of churchmen: 1 Rich. II, “Provided always, That the said People of Holy Church shall not hold them within the Churches of Sanctuaries by Fraud or Collusion in any Manner”; 50 Edw. III, “So that Collusion or feigned causes be not found in any of the said Persons of Holy Church in that Behalf.” The fear behind these clauses must be that clerics in charge of the ecclesiastical places and occasions mentioned would collude with persons liable to arrest in order to bring them under the protection of the statutes. There may be a faint suggestion here that lay people merely present in those places or on those occasions are
within the act’s contemplation, rendering it necessary to provide that they be bona fide participants in services rather than beneficiaries of favoritism or a “deal”. This is not, however, a certain implication, for clerics could collude with other clerics too.

With the refractory but unavoidable statutes in mind, we may now return to the course of Pit. Webly having put in his libel, the High Commission tried the case and awarded Webly £6. The report says that the Commission allowed the cause of the arrest, but gave Webly £6 as costs for the “contempt.” This is puzzling language. My suggestion for making sense of it would be that it shows the High Commission leaning over backwards to avoid any appearance of exceeding ordinary ecclesiastical powers. As it were: “We have not used any secular punitive powers we may have against a man who could be prosecuted at common law by virtue of 1 Rich. II and punished by secular means if convicted there. We have pursued that man to the sole end of correcting him spiritually. Upon finding him guilty of a contempt toward the Church and religion—by making an arrest at a time and place that the secular law itself recognizes as out of bounds—we awarded his prosecutor his costs for bringing the infraction to the ecclesiastical court’s attention. That is not punishing the offender nor compensating the person wronged, but a normal exercise of ecclesiastical courts’ power to tax litigative costs against violators of ecclesiastical law in favor of a plaintiff or informer who has incurred expenses in bringing the wrongdoing to justice. The action we have taken involves no judgment that the arrest was unlawful in the sense that, if committed, it would merit punishment or damages under 1 Rich. II, for that is a common law question. All we have adjudged is that from the Church’s point of view a contempt of a sacred place and occasion occurred, to which we might if we saw fit respond with admonition or an assignment of penance, or perhaps no more than seeing that the worthy act of complaining about the contempt did not leave the complainant out of pocket.”

Whatever the High Commission had in mind, Serjeant Henry Yelverton (son of the judge Sir Christopher Yelverton and later a judge himself) sought a Prohibition as to the costs. He did not object to Pit’s citation into an ecclesiastical court notwithstanding his liability to secular sanctions, only to the monetary charge. The implied position on the 14th century statutes is that they bar ecclesiastical courts from imposing any material loss on an offending officer—call it a fine, call it costs, or be it imprisonment—but not from correcting him spiritually. Although it is not articulated in the report, the rationale of this position must be that the statutes cannot intend an offender (in the special class of officers carrying out their functions) to be out, let us say, £6, or £6 more if he should be imprisoned or fined at common law, or should be prosecuted and acquitted there, or indeed convicted and spared criminal punishment by judicial discretion, or found by jury to have inflicted no damage on the arrested party.

The first judicial remark comes from Justice Croke, who alone speaks as an individual in Bulstrode’s account. All he says is that 1 Rich. II certainly forbids arrests during divine service, to which he added enough to give the reporter the impression that he thought arrests of persons going to or coming from a service were also banned. Then Henry Yelverton makes a remark which departs somewhat from the position stated above in defense of Prohibition for the costs alone. Now he says that it is “hard” for one in Pit’s circumstances—a royal officer “duly” arresting a man “for the King”, after evening service (i.e., not during the service and not following a full Sunday Eucharistic service, suggesting perhaps an arrest “at the end of the day”, when there might be no further
opportunity to arrest the man that day) – should be sued in an ecclesiastical court and excommunicated. That is to say, even if there had been no costs award, there might be sufficient cause for Prohibition – this arrest is not forbidden by the statutes and therefore not even purely spiritual measures may be taken against the arrester. The statutes may not preempt jurisdiction for the common law absolutely, so that arrests they clearly forbid could not be punished spiritually over and above the common law sanctions they were subject to, but if an arrest simply does not violate the statutes ecclesiastical courts are not free to treat it as nonetheless a spiritual offense. (Serjeant Yelverton’s language suggests that Pit had actually been excommunicated, and a later comment of his does the same. I.e., ecclesiastical process had run its course to excommunication, to which the award of costs was then added. It does not seem to me to matter for the argument whether that was the case, or whether Pit was only put in danger of excommunication by subjecting him to ecclesiastical jurisdiction.)

Serjeant Yelverton next turned to the fact that the surmise before the court relied on 23 Hen. VIII, the claim that neither he nor the judges thought advisable and that was soon dropped. (See End Note, Ch.2.) After the exchange on that matter, with 23 Hen. VIII out of the way, Justice Croke spoke again, reiterating his former opinion a bit more decisively. (1 Rich. II forbids arrests during divine service and arrests of people going to and coming from such services on Sunday, but not on other days.) Serjeant Yelverton then makes an important argument for his side, not previously broached: 1 Rich. II does not forbid arrests in a matter between the King and a subject, but only in those arising out of civil lawsuits. I cannot see any textual warrant for this distinction, but it has considerable common-sense probability. Is it likely that the King would have undertaken to punish his own servants doing his own business, presumptively at his immediate command, in order to secure ideal respect for the Church? Would he not have been much more believably willing to discipline established officers less directly tied to his personal service (principally sheriffs and their deputies) when they were routinely executing the law for the benefit of a private litigant (typically a creditor)?

If Serjeant Yelverton’s construction is right, it would rule out secular proceedings against officers strictly acting for the King, but would not by logical necessity forbid their spiritual correction. If, however, we imagine the King balking at dissuading some of his officers by means at his own disposal from making arrests the Church objected to, it is reasonable to imagine him also declining to concede the Church’s power to dissuade from such conduct by its means. If this argument is accepted, it gives Serjeant Yelverton his simplest and strongest claim to a Prohibition. It comes to saying that by the statute book it is merely not an ecclesiastical wrong for an officer acting directly for the King to make arrests which if made by an officer acting on behalf of a private party would certainly be a secular wrong and at least perhaps an ecclesiastical one as well. (One might urge at the “constitutional” level that the statutes are irrelevant for ecclesiastical power to proceed against such an officer, the ecclesiastical law being independently determinative. I would not expect such an argument to prosper. To act on it might be to flirt with Praemunire.)

So far as one can tell from a spare report, Serjeant Yelverton seems to have come around to the “simplest and strongest” claim to Prohibition, abandoning not only the initial invocation of 23 Hen. VIII, but also the idea that the High Commission’s mistake
lay only in taxing costs, rather than in assuming jurisdiction at all. The King’s Bench, moreover, seems to have concurred.

At the end of the report, the new surmise is described. As we have already noted, it is in one way fully consonant with the stark “no jurisdiction” basis for Prohibition, since it specifies the nature of the arrest—on a Justice of the Peace’s warrant—with the evident purpose of showing that Pit was not acting in a matter between private parties. The surmise is not, however, confined to that, for it adds that the arrest was after evening service and without “tumult”. These alleged facts would seem to be irrelevant on the “no jurisdiction” theory. Introducing them may be explicable as “insurance” in case the justices should be reluctant to protect royal officers who gratuitously disturbed an ongoing service or otherwise violated decorum extremely.

The statement of the surmise is followed by a detached remark that does no more than repeat the doctrine that the medieval statutes apply only in private suits. Whether this came from one of the judges or from Serjeant Yelverton again is unclear. In any event, the court is reported as seeming to be of clear opinion that Prohibition lay.

Although one cannot be sure, it seems probable from the course of the discussion that the judges’ reason was the position developed by Serjeant Yelverton: there is no basis for ecclesiastical, including High Commission, proceedings unless the 14th century statutes authorize them, and they do not for the circumstances of this case. The judges were not however, ready to grant Prohibition at once; in adjourning the case with permission to move it again, they perhaps acknowledged its puzzling character. The parties’ settling, on terms that are not reported, meant that it was never reopened. Although Pit v. Webly is of negligible importance for issues specific to the High Commission, it is significant for this study in part because of a later case.

End Note; The Official Record in Fuller’s Case

Some aspects of Fuller’s Case appear from the official record only. For want of full or fully reported, argument, one cannot say exactly how these aspects were dealt with by counsel and the judges. The purpose of this note is to look at these for their intrinsic interest.

The official record consists of Fuller’s spelled out claim to have a Prohibition, plus the brief text of the Consultation by which part of the Prohibition was reversed. It raises two basic questions: (1) Just what did Fuller claim by way of privilege as a barrister to say in the King’s Bench whatever he thought would avail his client, and what were the grounds of his claim? (2) Just what did the High Commission accuse Fuller of, and how plausibly can it be argued that it accused him partly of offenses within the Commission’s jurisdiction and partly not? The second question can be asked because in his complaint Fuller recites completely the charges, or “articles”, the Commission brought against him.

The main point to note about the “advocate’s privilege” claim is that it is cast in insistently prescriptive form. After reciting that he has been a member of Gray’s Inn for 43 years, Fuller says that “from the time of memory” Gray’s has been an Inn of “men of the common law courts” and of “conciliar men of the common law” [men who act as common law counsel].” He then says that for 32 years he has been “a conciliar man and apprentice (in English an utter barrister”) of the Inn, and has been erudite in the common law.” (In effect, he was certified as learned by his promotion from student to barrister.)
Fuller continues by saying that from the time of memory the following “ancient and laudable custom has existed [habetur] and has been used and approved [viz.] that all free men of the realm who prosecute or defend any action real or personal between party and party or any other thing or cause whatsoever (pleas of high treason or felony alone excepted”) in the King’s Bench from the time of memory have retained and been accustomed to retain conciliar men learned in the law and Serjeants at law for stating, pleading, and explicating their causes to the Justices.” (Note that Fuller is careful to say that the prescriptive right to counsel extends beyond civil suits, although it stops short of prosecutions for treason or felony. The application here must be, although it is not spelled out, that someone bringing a Habeas corpus to challenge a commitment for an ecclesiastical offense is just as entitled to counsel as a civil plaintiff or defendant. The exception, of course, states the familiar common law principle that persons indicted for the gravest secular crimes may not be represented by counsel, so that the question of “advocate’s privilege” could not arise.)

Next, crucially for “advocate’s privilege”, Fuller says that it is lawful, and from time of memory has been, for counselors and Serjeants in arguing and pleading for a client “modestly and decently” to object what they can against letters patent, commissions, and grants of the King to whomever it [such patent or grant] has been made, as much as against all liberties, jurisdictions, and privileges of private and particular people if the cause of their client requires, leaving judgment and determination to the Court aforesaid, which custom exists, has existed from time of memory “of necessity”, and “contains in itself equum et bonum.” (The striking point about this passage is its specification of the custom beyond a general right to say what one’s client’s cause requires. The general right as stated includes specifically a right to challenge the validity, or propose a construction, of royal patents, commissions, and grants. The judges may reject any such challenge or construction, but a lawyer does no wrong in making one—within the bounds of “modesty and decency”, which seems to go rather to the manner than the matter. There is nothing untouchable about royal grants in discussion of people’s rights and liabilities, whatever the law as determined by the judges may be—even if it should turn out to be that the court addressed lacks jurisdiction to authenticate or construe the grant.)

Apart from “advocate’s privilege,” the official record is mainly valuable for showing the terms in which the High Commission charged Fuller. Lacking any reports of pro and con argument by counsel and the judges, first on whether the High Commission’s prosecution of Fuller should be prohibited and then of whether his Prohibition should be reversed by Consultation, we have no way of knowing what the judges thought about the charges one by one. We do know from the reports that in the upshot a qualified Consultation was issued. The official record confirms that. The record concludes with the full text of the Consultation. Although the reports are clear and accurate about what it provided, the picture is perhaps sharpened by looking at the exact form of the Consultation at the crucial point. First come words of permission: “We signify to you [the Commissioners] that quoad schism, heresy, or erroneous . . . opinion . . . you may proceed [against Fuller] . . . notwithstanding [the Prohibition] . . .” Then come two inhibitions: (1) Quatenus non agatur de [so long as there be no dealing with or treating of] the authority or validity of our [the monarch’s] letters patent for ecclesiastical causes directed to you or any . . . or concerning the exposition or interpretation of the statute [of
(2) And quatenus non agatur de any slanders, contempts, or other things which by the common law or a statute of the realm should be punished or determined.”

There are no indications in the Consultation whether any of the charges we shall now review might be in danger of violating the inhibitions or be considered not to make an adequate accusation of “schism, heresy, or error” on Fuller’s part. The charges are, however, of historical interest. Looked at in one way, the High Commission’s winning a qualified Consultation can be seen as a Pyrrhic victory. The Commission would have been liable to Attachment for disobeying the Prohibition if it proceeded against Fuller for, say, “slander and contempt” of the Commission because a given charge was reducible to that offense, even if the charge was written to give it the color of “schism, heresy, or error.” In the opposite perspective, the Consultation can be seen as a clear vindication of the High Commission’s power to proceed against Fuller on any or all of the charges, with only an easily obeyed warning not to challenge the common law’s monopoly to construe statutes and patents and not to punish “slanders and contempts” amenable to common law prosecution. This comes to saying that the charges are carefully drawn to allege a spiritual or religious component in Fuller’s misbehavior, over and above anything he may have said, correctly or incorrectly, touching secular matters.

In discussing the charges, besides simply summarizing them, I shall comment on whether they probably do accuse Fuller of schism in a meaningful way, as opposed to merely calling words or acts “schismatical” when they come down at most to secular contempts or to claims about what 1 Eliz. and the patents implementing it provided. I focus on schism because of the other two subjects the Commission was allowed to take up: heresy is referred to only once, and “error,” though affirmed in the Consultation (and in other legal sources) is never in the charges against Fuller spoken of as an offense that can clearly be committed without also committing schism or heresy.

There are eleven specific charges, all relating to utterances by Fuller in arguing *Maunsell and Ladd*. They are assigned to particular times (nine of them to the 6th of May or thereabouts, two to the 13th of June or thereabouts.) The charges are stated in English, the language in which the Commission would have addressed them to Fuller, as opposed to the Latin of the official record as a whole. Each is introduced by the same formula with no more than trivial variations from item to item (“. . . wee object and articulate to you that . . . you did factiously and falsly affirme publiquely and in the hearing of many either in expressed words or in effect that . . .”) Note that this form alone implies that Fuller’s schismatical behavior as alleged consisted in, or at any rate was solely evidenced by, his speech-acts—speech-acts in a straightforward sense public, being committed in the courtroom. He was not charged for his beliefs, nor confessions thereof exacted by constraint, including any oath to answer questions about his beliefs; nor for overt acts such as the participation in conventicles charged against Fuller’s client Ladd; nor for communications to a few people, or intended to be heard or read only by selected addressees.

The charges were as follows: (1) Fuller said that the High Commission’s “manner of proceeding” was “Popish in that sometymes they did comitt men to Prison.” The Commission alleged that his words to such effect “did tend to ye great offence of manie and to the slander of the Church, to the hardening of Papists against the said Commissioners, and to the malicious impeachment of his Ma[jes]t[ie]s Authoritie in Causes Ecc[les]i[a]st[ical].”
Why Fuller should call the High Commission’s proceedings “Popish” for the specific reason that the court sometimes imprisoned in not obvious. For some reflections on that, see Charge #11. #1 does not say in terms that casting the aspersion “Popish” on the Commissioners was schism (or a form of error more suitable to top-level ecclesiastical correction than other opinions that can be reasonably, but were not unanimously, regarded as erroneous—e.g., that 1 Eliz. did not as a mere matter of law permit giving the Commission imprisoning power.) My guess would be that the High Commission in #1 was hoping to make out that any use of the epithet “Popish”, which Puritans were notoriously given to applying to Church practices they thought should be reformed, put the speaker in the class of schismatics, or nearly so, as other ways of expressing the same criticisms might not—e.g., asserting that the criticized practices lacked Scriptural warrant, or that they were illegal by secular law. As it were, “Papist” and “Popish” express hatred, as opposed to disagreement or disapproval. How Fuller’s words would “harden” Roman Catholics is less than evident. Catholics would not be less subject to discipline for their outright opposition to the Royal Supremacy and all its fruits because dissident Protestants “maliciously impeached” that institution, would they? Could the point be that unless calling aspects of the English Church “Popish” was branded as radically false, some average Protestants might lose zeal for prosecuting genuine Papists?

(2) This article does not make a definite accusation, but concludes by ordering Fuller to explain what he meant by certain language. The article recites that Fuller appeared to cast “a malicious aspersion and false interpretation” on the High Commissioners but was too vague to be quite so characterized. Therefore Fuller is “commanded” to “set downe” his meaning.

Fuller had said he “feared” lest the authority to imprison “in some cases” which the monarch had given the Commission “would be used to suppressed the faith of the Sacrament.” He spoke, the charge continues, “as if you knew them to be Enemies to the true doctrine of the Sacrament in that you feared least they would cast men into prison for their maintenance of it, and suspecting that in your words touching the faith of the Sacrament you purposed to broach some Error wee command you to set down what you meane by the faith of the Sacrament.”

There is not much point in speculating about Fuller’s meaning when the High Commission was not sure of it. He was presumably suspected of unacceptable beliefs about Eucharistic doctrine. It would be helpful for showing that Fuller was a schismatic to exact a religious error from him, as opposed to utterances construable as slander of Church government.

(3) Fuller said: “Ordinaries (meaning B[i]sho[pps] and the officers under them) did proceed in these dayes by taking an el when they had but an ynch granted them, and in examining men upon their Oathes at their discre[c]i[on and indiscrece[i]on and such their dealings were now lamentable . . .” By so saying Fuller “used these and the like scandalous words of purpose to bring in Contempt the calling of B[i]sho[pps] and their Eccl[esiasti]call Courts as being suspected, to be yourself a schismatick and a mainteyner of sundrie false and erroneous opinions both against their calling and Authoritie.”

This article looks designed to avoid being a claim that Fuller had slandered the High Commission itself or the “ecclesiastical government in general”—i.e., to head off the argument that his offenses added up to no more than contempt subject to secular
prosecution. There may be validity in maintaining that to slander the bishops was to commit schism, even if slandering a latter-day department of ecclesiastical government and the legal structure that made it possible was only contempt. The bishops were after all deemed to hold ancient canonical power in succession to Christ’s apostles. Anglican Protestants could well maintain that Henry VIII and his non-Romanist successors did not choose episcopacy for the governance of their Church; they were vested by God with Supreme Headship of a Church that was ab origine Episcopal. Thus to slander the bishops come to attacking the Holy Catholic and Apostolic Church per se, surely schism if not heresy too. By contrast, having a High Commission was a choice (by monarch and Parliament), a contingent feature of the ecclesiastical government, and perhaps even the power of monarch and Parliament to regulate the ecclesiastical judicial system can be seen as a political choice.

Some Puritans, of the so-called “Presbyterian” branch, of course believed that episcopacy was unscriptural (and its imposition in England an unjustifiable choice.) Whether what Fuller said about the bishops—in effect that some of their proceedings were beyond their legal power and that they were greedy for powers never given them—were slanderous enough to count as schism raises a question. Saying in the charge that Fuller was himself suspected of the thoroughgoing anti-episcopal school adds nothing; if the suspicion was correct, it might be arguable that slander from an “unclean heart” could be schism, although the same words would not be if said by a lawyer personally free of unorthodox ecclesiastical views.

The only suggestion in Fuller’s alleged words of a specific basis for his vague aspersion is his mention of wrongful examination under oath by the bishops. Whether they were guilty of that is a question of fact on which I have no evidence. Legally, they had well-warranted power to conduct sworn examination, subject to limits (see Vol. II.) Since the issue in Maunsell and Ladd was the High Commission’s examining power, which need not be identical with that of diocesan courts, it was in a strict sense irrelevant for Fuller to take up the latter. In a looser sense, however, a neutral lawyer’s taking it up might not be irrelevant if his point was that abuse of interrogating power was so widespread in the ecclesiastical courts at large that one would surely expect it in the High Commission. If it could somehow be made to stick that Fuller was infected with anti-episcopal principles, his taking an irrelevant swipe at the bishops might reinforce the gravity of his offenses.

(4) Fuller said that the High Commissioners imprisoned men without showing them cause why they were imprisoned and that they detained them in prison as long as they liked and did not permit them to be bailed. He “uttered these untruths to make both themselves [the Commissioners] and their proceedings odious, thereby rather satisfying y[o]ur scismaticall and factious humor then having any regard of truth, or as if you might slander y[o]ur sup[er]ior as you list without controllment insinuating directly, that they kept men in Prison rather to suffer their owne wills than for anie just cause.”

This article seems to me a straightforward accusation of slander, with very little said to stretch the alleged offense to schism or error close to schism. Fuller is alleged to have actually said only that the Commission had abused its power to imprison. There is not in his words so much as a claim that the Commission lacked imprisoning power altogether, however untrue as to fact the imputation of abuse may have been or however incorrect as to law Fuller’s assumptions about the extent of the imprisoning power may
have been. To the degree that the charge goes beyond stating what Fuller said, it gets no farther than a cloudy suggestion that “gross” or “malicious” slander exceeds the category of slander.

(5) Fuller allegedly said falsely that “administering the oath ex officio doth tend to the damning of their soules that take it thereby insinuating that it is an oath not lawfull to bee ministered, but likewise in effect publishing such a gross and intolerable Error as tendeth to the great ov[er]throw in manie Cases of Justice as well in the temporall Courts of this Realme as in Eccl[esiast]icall.”

The idea behind Fuller’s words is that requiring people to testify under oath when to answer the questions truthfully might be deleterious to themselves was a temptation to perjury, a soul-damning sin. This idea was a motif throughout the history of controversy over self-incrimination. What asserting it is alleged to “insinuate” was not, however, legally true, viz. that the oath ex officio was flatly unlawful. The ex officio oath means the oath by which ecclesiastical courts forced criminal defendants to testify against themselves. English law held that examination under such oath was sometimes illegal, but not always—not when the party was accused of a purely ecclesiastical offense and some fairness rules were observed, such as that the examinee be informed of the questions he would be asked before testifying. (For all this, see Vol. II, Ch. V.)

Fuller certainly believed that all sworn testimony with incriminating potential ought to be against the law—essentially on moral grounds, though in Maunsell and Ladd he proposed some good legal ones as well. It seems very hard to make a major ecclesiastical offense out of misrepresenting the law or criticizing it. If egregious enough that conduct might at most qualify as contempt, none too plausibly. The High Commission’s effort to strengthen its charge by saying that Fuller’s language would be subversive of secular justice is surely self-defeating. It is true that some anomalous secular procedures used possibly soul-endangering oaths (e.g., compurgation in some civil cases at common law), but by and large the common law’s reliance on juries rendered such oaths unnecessary (and I believe tribunals such as the equity courts and the Star Chamber avoided them.) To call attention to any threat Fuller’s opinions might pose to secular law tends, however, to admit that if those opinions were criminal they should be corrected by secular law.

(6) This article says in so many words that Fuller “presumed to slander his Ma[jes]tie as well to bring his action into Contempt, as to pynch at his lawfull Authoritie in Causes Eccl[esiast]icall” (by saying that the King’s patent authorizing the High Commission was “contrarie to the Lawe”—how is not specified in the text of the article.)

This seems a manifest charge of contempt and slander of the government, no doubt the graver for being directed at the King himself. The charge is given the color of schism only by adding that “factious persons and disobedient scismatics cannot endure” the King’s lawful authority in ecclesiastical causes.

(7) Fuller said that “his Ma[jes]ty’s Commissioner for causes eccl[esiast]icall (notwithstanding you knew the tenor of his Ma[jes][i]e’s Commission granted unto them) had no more Authoritie by the Act of Parliament primo Eliz: whereupon the said Commission is founded, then they had before the making of that Act, whereby you utterly deny in effect the Kings L[ette]res Patents granted to his said Com[missione]rs to bee of any validitie for it is apparent, that before the said Act, there was nev[r] anie such Commission nor Com[missione]rs and that then if such his Ma[jes][y’s]
Com[mission]rs have now no more Authoritie by such his highnes[’] Commission then they had before the making of the said Act, that they have now none at all, which is to take from his Ma[jes]tie all lawfull meanes to execute his power and Authoritie in causes Eccl[esiaticall] and consequently together [probably ‘altogether’] to deprive him if it, a thing as well by the factious p[er]sons and scismaticks in these dayes as by the Papists o(u)r Mortall Enemies much affected and desired.”

It is hard to say what Fuller was getting at in the words attributed to him. The striking feature of this article is that the Commission appends a string of deductions to show that those words have extreme implications. Because the letter of Fuller’s words implies that the High Commission at present has no authority at all, it is further implied that the King has “no lawful means to execute his power and authority in causes ecclesiastical.” That is equivalent to claiming that he has no such authority. That, per the Commission, is indistinguishable from what Roman Catholics hold. It comes, one can say, to flatly denying the Royal Supremacy in a major aspect. If the deduction is conceded, it seems difficult not to consider Fuller a schismatic, for separating himself from the Church in England as now constituted, no less radically than Romanists do. It may be no worse than contempt to criticize how the King’s ecclesiastical justice is organized and applied, but can it not be schism to deny, with the Catholics, that there is any such thing?

(8) Some of this article I can make no sense of, but it essentially objects that Fuller’s “scornfull speeches” were grounded on his ignorance. (Of what I cannot make out, but Fuller has already been accused, not without some justification, of not knowing the law and the High Commission’s actual practices. Of course ignorance and open-eyed misrepresentation are hard to distinguish.) Most significantly, it is alleged that Fuller’s “sawcie ignorance did proceed from your malicious desire to discredit as much as in you lay both his Ma[jes]ti[y’s] Commission and Com[missione]rs as foreseeing that if that Authoritie might be ov[er]throwne once, your scismaticall Masters might doe what they list.”

Again, we have a plea for the relevance of motive: Fuller is represented as errand-boy for a conspiracy of people with notoriously schismatical intentions, though they may have lacked or avoided his opportunities to commit prosecutable schism (and lacked the cover, though it failed him, of his advocate’s role.) Could speaking falsely and ignorantly about the High Commission to the end of liberating his co-conspirators from need to fear ecclesiastical prosecution for schism, however boldly they pressed their program, not be schism? Is it not weak consolation to the Church for the removal of this danger merely to concede that the faction Fuller was spokesman for could not be saved from the peril of secular prosecution—prosecution that might be effective, if lay jurors willing to indict or convict could be found?

(9) Fuller said that the High Commissioners “by reason of their absolute Authoritie, did thereby oftentimes commit sundrie absolute Wrongs.” This article, like #2, concludes with a “command”, except here it is in the alternative: “. . . wee command you to name the Com[mission]ers that have done such absolute wrongs, that they may be dealt with according to their desert, or if you are able to name none, you may receive such due punishment as your slanderous words deserve.”

Again, I think the point of this charge must be that loose defamatory language about individual Commissioners comes to schism, not merely contempt for the
ecclesiastical government. There is perhaps some plausibility in contending that even if irresponsible aspersions on the Commission as an institution must come to the secular offense, unwarranted attacks on the reputations of particular Commissioners need not. The claim would be that the pitch of sinfulness reached by expressions of hatred or malice against flesh and blood—against fellow Christians, especially ones clothed in ecclesiastical dignity—is inherently spiritual and divisive within the Church to the point of schism; this hardly can be turned into a secular crime (at any rate not without very explicit Parliamentary legislation.) By contrast, attacks on institutions of Church government need not be beyond the reach of secularization. (On the other hand, the attacks on individuals attributed to Fuller might be reducible to common law defamation, depending on how the vague “absolute wrongs” is taken or whether Fuller could be compelled to spell it out.)

(10) This article contains vague and puzzling language, but on one point it is specific enough. The charge starts by accusing Fuller of saying that the High Commission’s proceedings were contrary to law, which of course he believed and could hardly avoid asserting in some respects merely to argue that his client was improperly held. Then he is said “in pride of yo[u]r hart” to have made “manie scornfull glosses and observations” upon the Commission. In the first example of these, I can see no explicable meaning. (Fuller allegedly said that the Commissioners “had power to devise wayes for searching out of matters to proceed either by Eccl[esiast]icall lawed or otherwise at their discrecion to command all Justic[e]s all subjects [sic] wh[i]ch you disdainfully pretended you knew not how farr it extended . . .”)

Of the next point, however—or the continuation of the last after “extended”—the legal gist is visible. Fuller allegedly went on with “. . . and to appoint Receivers of ffynes . . .” It seems clear that Fuller was accusing the Commission of collecting its own fines (fines he probably considered illegal, but he is not charged with error as to the fining power itself.)

Granting that the Commission was not completely debarred from imposing fines, there is ample authority that it must certify its fines to the Exchequer for collection as debts to the Crown, rather than collect them itself. The procedure put the Exchequer in a position to scrutinize the legality of fines. In the present article, the High Commissioners were presumably saying they observed the procedure and had not appointed their own collectors, or at any rate that they were not currently doing so. (The numerous common law judicial pronouncements that estreatment into the Exchequer was always required suggest that at some point the Commission had tried to do its own collecting.) Assuming the Commission had acquiesced in the common law’s insistence on using the Exchequer, it was gratuitous for Fuller to harp on a past error that may have been innocent before the common law courts settled the point, and that in any event had nothing to do with the issues in Maunsell and Ladd. To make things worse, Fuller allegedly could not resist adding a sarcasm to his observations on fine-collection: “. . . if they had auditors too what an Exchesq[uer] this would be.” I.e., so far as Fuller pretended to know, the Commission might be planning to set up a full replica of the Exchequer. (A few more words in the charge, following these about fine-collection I find simply unintelligible; perhaps they were mistranscribed in copying the official record.)

For the purpose of making out schism or serious religious error, charge #10—like #9—seems to me to rely on the tenuous but not entirely empty ground that gratuitousness
and a “saucy” tone might lift Fuller’s utterances above secular contempt. As it were, a broadside of assorted untruths about an ecclesiastical court bespeaks a schismatical spirit as relevant argument in a case concerning an ecclesiastical court would not, even if it were mistaken, known to the speaker to be, and in danger of constituting secular slander/contempt.

(11) The final charge against Fuller may come to the clearest accusation of schism, the hardest to reduce to contempt and slander of the ecclesiastical government, Fuller is alleged to have said that the ecclesiastical jurisdiction granted to the High Commissioners by 1Eliz. and the monarch’s patents “giving them Authoritie to inflict some corporall punishment upon Delinquents is Antichristian, and that such Ecclesiastical Jurisdiction is not of Christ, but of Antichrist and that thereby you showed your sely to have embraced some notable scisme and heresie fitt to bee corrected and amended in you . . .” The article continues, “besides that you have made manifest your rebellious and lewd heart towards his Majestie in ascribing unto him that the maintenance of that Ecclesiastical Jurisdiction which is not of Christ and making Him to bee the Author and Grantor of that Authoritie unto his Com[missioners] which is Antichristian.”

It is the first part of the article that concerns us. The second part paints Fuller’s offense as the worse for manifesting disloyalty toward the King, but does not represent that as constituting schism or heresy. The Commission was well-advised not to appear to be proceeding for a secular crime. Whether saying the monarch granted and maintained an “Antichristian” jurisdiction and authority was treason or less, its prosecution must surely be secular.

With respect to the first and essential section of the article, it should be noted that calling a practice anti-Christian in the 17th century rings deep. As our document itself explains, it means “not of Christ, but of Anti-Christ.” At the least, that says the practice was shaped by Christ’s worst enemies, who to 17th century Protestants would include both the devil and the Pope. That is stronger than some such definition as “inconsistent with Christian ethical ideas as those are best understood.”

Observe secondly that Fuller’s extreme animadversion was on one particular power—to inflict corporal punishment. That can only mean power to imprison—not the Commission’s substantive jurisdiction, nor its authority to use temporal sanctions, notably fining, but authority to imprison. I do not think that even Fuller could have pretended that the Commission ever punished or thought it could punish in any further “corporal” way—from death through the various “cruel and unusual” punishments for which the Star Chamber eventually became notorious to minor inflictions of discomfort and shaming in English secular law, such as setting people in the stocks. (I would suggest reading the odd-sounding phrase “some corporall” punishment as “any punishment that can be considered corporal, including arresting men’s bodies, even briefly, as well as detaining them in jail.”)

Notice thirdly that here alone in the catalogue of charges against Fuller heresy is alleged. While schism was usually spoken of as the second-ranking offense within High Commission jurisdiction, after heresy—and some Puritan acts and utterances that could not reasonably be taken as heresy were prosecuted as schism—the present article shows that the most serious forms of schism could not be sharply differentiated from heresy and that a heretic within the Church of England was ipso facto a schismatic.
I can only speculate on why Fuller should have singled out “corporal punishment”, among the disputed areas of jurisdiction and disputed sanctions belonging to the High Commission as “of Antichrist.” Perhaps the ancient and undisputed rule that the Christian Church may not shed blood was extended in some precisionist minds to rule out any use of physical coercion by agents of the Church. This can be further extended to the Church’s evading the rule by farming out physical coercion to the secular authorities, as the statute *De heretico comburendo* provided for, or as the English writ *De excommunicato capiendo* permitted. One can probably find enough examples of physical coercion directly applied in the medieval and Counter-Reformation Roman church to make out “corporal punishment” as “Popish” and so *per* Fuller “Antichristian”—hard physical penances, “imprisoning” misbehaving clerics in monasteries, Church courts’ handling of the many varieties of wrongdoers subject to their jurisdiction via benefit of clergy. More generally, it was a Puritan motif that the “discipline” of the Church should be distinctively spiritual, rather than a sister-ship of worldly government, using the latter’s rough if necessary sanctions and failing comparably short of reforming misbehavers’ souls. (See my observations in Vol. I, p. 20 ff., on the sense in which Puritans were at least latently hostile to the whole structure of ecclesiastical law. Fuller may have thought there was much more “Antichristian” about the High Commission and even the ordinary courts it partly displaced and exceeded in efficiency, than “corporal punishment”, though he reserved his strongest rhetoric for the last straw.)

There seems to me no compelling basis for determining when criticism of ecclesiastical courts’ procedures grows from a degree of reckless falsity and gratuitous vituperation that *only* makes it slander and contempt to religious misconduct so grave that its correction cannot be taken away from ecclesiastical justice (or from the High Commission.) Whether any of the other charges against Fuller sufficed to cross that line, one must probably say that as a matter of law Article 11 does so: The High Commission imprisoned Fuller, he was remanded to prison on *Habeas corpus*, and the brief report of his *Habeas corpus* suggests that the return focused on the charges in Article 11 (“. . . he was accused of saying that their proceedings were Popish and that it proceeds from Antichrist and not Christ & c.”)
Section 4: The High Commission during Coke’s Chief Justiceships

Sub-section (a): Common Pleas Cases (1606-1613)

Summary

Cases on the High Commission from the Common Pleas when it was presided over by Coke are difficult to summarize. Common Pleas law on the Commission was certainly altered over the seven-year span 1606-1613. It is possible to depict the change in bright colors, but the more closely one looks at the reported cases the more muted the colors become. The most important thing to note about this passage of legal history is how the Common Pleas law became more complex and uncertain compared to what it was in the Elizabethan and very early Jacobean period. A sense of that can only come from immersion in the details.

The highlighted picture of the change would be as follows: Before Coke assumed the Chief Justiceship, the court was permissive with respect to substantive jurisdiction and restrictive with respect to sanctions. The High Commission was allowed to entertain any recognized class of ecclesiastical claim or complaint. On the other hand, the Commission was not permitted to go beyond recognized ecclesiastical sanctions. It could neither impose a fine nor commit a party to prison. The Cokean period saw change on both scores. The Commission was restricted to criminal cases and, within that class, to serious offenses called “enormities”; a definite list of these was proposed by Coke. Secular sanctions were permitted in cases on that list. A substantial majority of the court was in favor of these rules, but one Justice, Walmesley, was characteristically at odds with his brethren. As against these changes, restraints on the Commission that were already in place when Coke took over the court persisted. (Procedural rules in Habeas corpus, which demanded that commitments to prison be justified in particular even when they were generically legal; the rule that parties could not be arrested first and informed of what they were charged with later, but must be cited to appear and be coerced by excommunication if they failed to; a ban on exacting performance bonds from defendants.)

A more shadowed and more accurate picture has a few specifiable general features, though it is only through looking at the details of particular cases that one can see how the simplified summary above falters. The doctrine that High Commission jurisdiction is at least limited to ecclesiastical criminal law was not easy to apply in all contexts. Civil and criminal matters could be commingled in a single case. A couple of sophisticated arguments appear in the cases to the effect that a kind of “public interest” could sometimes give jurisdiction to the High Commission even when the charge could hardly be made out as “criminal.” The simplified picture is certainly correct in asserting that the “enormity test” won out in the Common Pleas as it had not done earlier. (Even Justice Walmesley seems to have acquiesced in it up to a point.) The content of that doctrine, however, was not clearly or stably agreed on. Coke’s stab at a very limited but sharp list of enormities was in the event only a stab; additions were made or contended for, and the very basis for the restriction to enormities was not always seen in the same way. Cases within High Commission jurisdiction and cases in which secular sanctions were allowed did not work out as fully coterminous categories. It is unclear that the
conceded power to imprison was ever agreed to permit more than “equity-style”
imprisonment—i.e., power to coerce fulfillment of an already-imposed spiritual sanction.
Imprisonment to coerce replying to lawful interrogatories despite self-incriminating
effect was accepted. That is both an example of “equity-style” commitment and the best
proof that it was employed in practice. Though such imprisonment was endorsed
judicially for other contexts, there are not many instances of its actually being used. (See
Vol. II, Ch. 5, for self-incrimination cases.)

The effects of change in the Common Pleas law can mainly be seen in marital
litigation. Puritans were no more protected from the High Commission than they were
before. Serious Puritan activity was safely in the category of enormities; at most a few
minor misdemeanors inspired by Puritan sentiments may have escaped under the
enormity line. Puritans were worse off by being more subject to imprisonment. To the
degree that they were better off for common law protection it was largely because of
limits on the Commission worked out before Coke’s Chief Justiceship—restraints on
self-incriminatory questioning and on the power to imprison when it was as such lawfully
employed. (Insistence on formally adequate justification of commitments in Habeas
corpus; checks on perpetual or unreasonably long detention, these never reduced to clear
doctrine, but visible in practice.) What as a practical matter the High Commission wanted
and was prevented from having by the Common Pleas in several cases was a free hand or
wide discretion to handle marital disputes. It was largely in such disputes that criminal
elements—whose classification as enormities was typically problematic—were
intermixed with parties’ attempts to secure civil remedies, such as divorces and alimony
awards. While at a theoretical level spokesmen for the High Commission persisted in
their belief that the monarch had virtually unlimited prerogative to confer such
ecclesiastical jurisdiction and secular powers as he chose on the Commission, there was
no serious chance in the 17th century of that position’s being accepted by the common
law courts. In practice, it was not necessary to go so high to make a reasonable case for at
least broader powers in marital affairs than strict limitation to criminal enormities would
permit.

The best evidence that marital law was the real bone of contention between the
Common Pleas and the High Commission comes from extra-judicial events in 1611. In
response to the Common Pleas’ prohibiting alimony awards by the High Commission, the
government required all the judges to meet with the principal state officials, took the
Common Pleas to task for the court’s disposal of marital cases, and made a blatant
attempt to use the King’s Bench and Exchequer judges against those of the Common
Pleas. Although one should be cautious about attributing the “constitutional ethics” of the
future to the early 17th century, the flavor of inappropriate political interference with the
courts hangs heavy over this episode. Coke and his colleagues perceived that flavor and
objected; Coke’s courage and leadership on behalf of judicial independence are apparent.
The dust of the 1611 controversy, however, settled into a compromise. The consequence
is that as of the end of Coke’s Chief Justiceship of the Common Pleas in 1613 rules on
the High Commission’s marital role, and the wider implications of that for the
Commission’s scope, were in nubibus. Perhaps the closest thing to a safe generalization
would be that although the enormous crimes limit still held in the abstract, the
Commission gained some ground towards acknowledgment that it had a role in especially
aggravated marital cases. Wider marital jurisdiction for the High Commission would
have favored more humane treatment of married women than lay law combined with ecclesiastical law solely enforced by the regular Church courts would have made for.

Although the changes in Common Pleas law during Coke’s Chief Justiceship were more muted and confused than they appear at first sight, changes did occur. In the aetiology of these changes political pressure to accommodate the High Commission may have figured. There was not, however, nearly enough change to satisfy the government and the central officers of the Church. In the event, those patrons of the Commission probably lost more than they gained. Though limited imprisoning power, mainly valuable for more effective disciplining of Puritans, was conceded, narrowing the ecclesiastical jurisdiction available to the Commission made its increasingly prominent aspiration to a role in marital affairs harder to attain. Deference to political authority mainly took the form of deciding cases against it on narrow grounds when possible.

It is likely that the explanation of the legal changes lies largely in Coke’s history and then in the influence of his intellect and personality on his fellow judges. Before becoming Chief Justice of the Common Pleas, Coke was a King’s Bench lawyer and a government lawyer. The late Chief Justice Popham of the King’s Bench was probably his most honored teacher and model. Although the King’s Bench did not have as many opportunities as the Elizabethan Common Pleas to develop a comprehensive position on the High Commission, it was tending, under Popham, in the direction the Common Pleas took under Coke. Coke’s associations would probably have put him in basic sympathy with the King’s Bench tendency to embrace a limited imprisoning power and to adumbrate the enormity test. As Attorney General, he would probably have supported the government he was part of in its hope for strengthening the Commission’s sanctions and thereby its effectiveness. In any event, whether or not Coke would have said that the King’s Bench point of view taking shape simply made better sense than the older-fashioned Common Pleas law, he must as the new “outsider” Chief Justice of the Common Pleas have been concerned about the mere fact of a degree of divergence between the principal courts. Sooner or later they would have to get together. Better take the lead and achieve harmony sooner, Coke can be imagined thinking, than wait for a Writ of Error in the King’s Bench or an Exchequer Chamber decision to override the Common Pleas. Coke took pride in being an engineer of judicial unanimity. In carefully reporting Fuller’s Case, whatever his own role in the achievement of unanimity there, he provided an example of harmony on High Commission matters, even though Fuller did not address the most basic issues about the Commission. The next step, he might well have thought, was to achieve unanimity on those basic issues by a moderate change of course in the Common Pleas.

Having firmly embraced the enormity test and linked imprisoning power to it, Coke’s Common Pleas was not entirely successful in clarifying and sticking with what was now its fundamental High Commission policy. Its commitment to the values behind that policy, on the other hand, probably deepened, with catalytic help from the court’s leading role in construing and giving effect to 23 Hen. VIII, c. 9 (Ch. 2 above.) By giving that statute the serious attention it had not previously had, Coke’s court was forced to think about the danger of centralized subversion of local ecclesiastical justice and the subject’s interest in localism, not only his convenience but his traditional entitlement to two appeals from an adverse sentence. This concern suggests curtailing the High
Commission severely, since with broad jurisdiction it could both preempt local business and, in contrast with other preemptors, cut off appeals completely.

The Cases

We turn now to Coke’s Common Pleas, 1606-1616, the richest source of law on the High Commission. The earliest case decided by that court, Roper v. Bulbrooke,\(^8\) was

\(^8\) M. 3 Jac. C.P. Noy, 149, *sub nom.* Rooper v. Bulbroke; Harl. 4817, f. 191b; Add. 25,205, f. 35b; 12 Coke, 45-47 and (second entry) 47-48, *sub nom.* Sir Anthony Roper’s Case.

The date M.3 Jac. is from Add. 25,205. Harl. 4817 is undated, while Noy says that the case was disputed from M.3 until “now”, but “now” is not identified; Coke’s first entry is undated, but his second dates the case M.5, with a citation to the Plea Roll for that term. The complexity of the case makes it likely that it ran over several terms.

Harl. 4817, a MS. labeled as Justice Warburton’s reports, is the only version that gives the full narrative. The text follows that report. Noy is brief but agrees in its statement of the principles behind the result. It is possible to read Noy as saying that according to the holding in this case the High Commission may not deal with any dispute about “*meum* and *tuum*”—i.e., any purely civil matter—but the meaning is probably only that it is excluded from disputes over the interests that were preserved by statute when monastic property was secularized. Add. 25,205 presents some problems of reconciliation. It gives the basic decision as stated in the text (ordinary ecclesiastical remedy before the Dissolution, no remedy at all after 31 Hen. VIII, statutory remedy provided by 34/35 Hen. VIII.) This appears, however, to figure as the argument *against* Prohibition (*per* Justice Foster), and as a successful argument, for the report says that a Consultation was granted. The argument can be imagined as cutting that way, perhaps in the form “If the pension were recoverable *de jure* in an ordinary ecclesiastical court the High Commission should probably not handle it, but it is appropriate for a statutory court, which exercises the Supreme Head’s powers by delegation, to entertain a dispute over a special quasi-ecclesiastical interest whose very existence depends on the statutory reorganization of the Church.” On the other hand, Add. 25,205 accords with Harl. 4817 in having the court agree that 2 Hen. V requires the libel to be shown to the defendant in civil litigation. It was reportedly agreed that Prohibition will lie *until* a copy of the libel is furnished, which is surely the only meaningful use of a Prohibition claimed solely on 2 Hen. V. Justice Warburton is reported as distinguishing proceedings in ecclesiastical courts, where by definition there is no libel and—*per* Warburton—no requirement that the defendant be apprised of the charges in a manner *equivalent* to showing him the libel in a civil suit (but cf. the last Sub-section above for contrary opinions on this point.) If a general Consultation was really granted, the instant case must be classified as *ex officio*—plausibly, but so classifying it would contradict Harl. 4817. That report is so clear and detailed a narrative account that I think it must be preferred. If Add. 25,205 is not merely inaccurate, it can be reconciled only by supposing that there was still more to the narrative than Harl 4817 tells. Taking the hint from Noy (confirmed by Coke) that debate
begun in 1605, before Coke’s accession to the Bench, and unanimously resolved in 1607. It presents an instance of resistance by the High Commission to regulation by the Common Pleas, countered by that court’s insistence on its right to regulate. The problem in the case was special, however, with the result that the decision has only limited implications for the general scope of the Commission’s authority. Three of the four reports stick to the immediate problem. The fourth, Coke’s (from the posthumous 12 Reports), adds a few broader “resolutions”. On the immediate problem, there are no conflicts among the reports. We have had occasion before to observe that Coke was capable of attributing more to courts than they may have known they were deciding. Whether or not he did so in this case, I shall discuss Roper v. Bulbrooke as all the reports agree it was and at the end note the further—not strictly necessary but not irrelevant—holdings reported by Coke.

Bulbrooke was incumbent of a vicarage dependent on an impropriate rectory held by Sir Anthony Roper. Bulbrooke claimed that a pension issuing out of the rectory was due to him and unpaid by Roper—a pension, that is to say, which had been settled on the vicar in the days of the monastery and for which Roper was liable as successor. To recover his pension, Bulbrooke petitioned the King, presumably supposing that he had no other remedy. The King referred the petition to the High Commission, which called the parties before it summarily and decreed that Roper should pay the pension. (“Summarily” means that the Commission proceeded without a libel—i.e., without Bulbrooke’s having put in a written statement of claim such as civil litigation in ecclesiastical courts normally started from. The Commission acted directly on the petition to the King to make the defendant appear.) Roper refused to obey the decree, whereupon the Commission imprisoned him in the Fleet.

Roper brought both a Prohibition and a Habeas corpus in the Common Pleas. Upon the latter, he was discharged from prison. The reason for this decision is not reported, but no further reason is required than the fairly well-settled view of at least a majority of the court that the Commission simply lacked power to imprison. The Prohibition was sought and granted on the basis of 2 Hen. V, c. 3, which provided that ecclesiastical defendants must be given a copy of the plaintiff’s libel. In the present case, relying on 2 Hen. V amounts to contending that Roper was not answerable in any ecclesiastical court for a private adversary’s claim to a pension except on being sued by libel. When they released Roper and granted the Prohibition, the judges told Bulbrooke to start a suit by libel. Nothing in the reports at this point suggests that such a suit could not be in the High Commission.

To the actions of the Common Pleas, the High Commission responded: “But the High Commissioners say that they will not obey such direction, but that they have made a decree in the case, and Sir Antony shall perform it or otherwise will be committed again

of the case extended over several terms starting in M.3 (the date given by Add. 25,205): perhaps the first discussion did result in an inclination to grant Consultation, after which the case was re-opened and the court persuaded to go the other way. Roper’s imprisonment and the Habeas corpus (not mentioned in Add. 25,205) may have been persuasive in the sense that it exposed the Commission’s readiness to act in a manner which the Common Pleas regarded as illegal and therefore prompted the judges to look more closely at its substantive claim to jurisdiction.
toties poties, and accordingly they committed him to the Fleet again.” Thereupon Roper prayed a new Habeas corpus and prayed further that Bulbrooke be attached for disobeying the Prohibition. Both prayers were granted at once. A little later, the court disposed of the case on both scores by deciding that the Prohibition should stand and that Roper should again be discharged. At this stage, the judges resolved unanimously that the High Commission had no jurisdiction to make a decree for a pension of the sort claimed here.

The legal position behind this holding was as follows: The pension would have been recoverable in a regular ecclesiastical court before the dissolution of the monasteries. The statute of dissolution (31 Hen. VIII, c. 13) preserved such pensions, but did not make it clear that they were to continue recoverable in ecclesiastical courts against impro priators or other grantees from the Crown of monastic property. At that point, Bulbrooke’s course—petitioning the King for want of an ordinary remedy—may have been correct. The statute of 34/35 Hen. VIII, c. 19, soon altered matters, however. This act recited 31 Hen. VIII’s saving for pensions and took note of the fact that persons entitled to them were not being paid for want of a “direct mean” to recover them. The act therefore provided that such pensions were to be recoverable by ecclesiastical process, as before the dissolution. 34/35 Hen. VIII is not restrictive in terms as to which ecclesiastical courts were to have jurisdiction over suits for pensions. I.e., it does not say that such suits must be in regular episcopal or archiepiscopal courts. The statutory language is general; pensioners are only given “such process” as they formerly had, and they are empowered to recover the sum due, plus costs and damages, when the adverse party is convicted “according to the ecclesiastical laws.” The court in Bulbrooke, however, interpreted 34/35 Hen. VIII to mean that jurisdiction was restricted to the regular courts—sensibly enough, inasmuch as the statute refers to pre-dissolution practice, before the High Commission (conceived as the creation of 1 Eliz.) existed. Even if the High Commission is considered entitled to entertain all de jure ecclesiastical causes, the particular type of suit in question—claims to pensions against successors to the monasteries—is best thought of as authorized “positively” or de novo by 34/35 Hen. VIII, and therefore as entertainable only by such ecclesiastical courts as the statute assigns—as held, the regular ones.

Besides the principal holding, the Common Pleas may have taken note of information before it going to show that the High Commission had mishandled Bulbrooke’s suit. For one thing, 34/35 Hen. VIII makes pensions recoverable by ecclesiastical process only if they had been in the pensioners’ possession (presumably meaning that he had been paid) within ten years before the dissolution. I.e., the successors to the monasteries were protected against liability for old claims to pensions newly dug up. The High Commission had omitted to require proof of payment or “possession” within ten years before the dissolution. Therefore it had erred, in the sense of failing to pursue 34/35 Hen. VIII, even assuming, contrary to the court’s opinion, that it had jurisdiction under the statute. Secondly, it was also shown by Roper, apparently to the court’s satisfaction, that the pension in question was actually tied to the former possessions of the monastery generally, of which the rectory was only part. Presumably Roper was not the present owner of all the former possessions and therefore, as owner of the rectory, not liable for the whole of the pension. In charging him with all of it, the Commission had allegedly erred in a determination of fact. Whereas that sort of error by
an ecclesiastical court was as a rule not grounds for Prohibition, it might arguably be
where an ecclesiastical court is exercising a mere statutory power. 34/35 Hen. VIII is
careful to provide that contentions arising out of ex-monastic pensions should be
determined at common law if they presented issues appropriately determinable there.
Arguably, perhaps, the question of exactly what is charged with a pension is a common
law issue, wherefore ecclesiastical courts should be prohibited upon surmise that such an
issue has been raised or has been mistakenly disposed of. I am not sure whether the court
was made aware of the Commission’s alleged mistakes on or off the record. Awareness
of them may in any event have made prohibiting easier. Be that as it may, however, the
Commission’s lack of jurisdiction under 34/35 Hen. VIII as construed was sufficient
reason for Prohibition.

The court did not need to hold more than that to hold for Roper. It did not need to
examine the nature of the High Commission in any deeper sense than considering
whether 34/35 Hen. VIII gave jurisdiction to that tribunal by implication, or only to the
regular Church courts. Coke’s report, however, says that the Commission’s scope was
considered in wider terms. It is perfectly plausible that it should have been: in effect, the
further “resolutions” reported by Coke provide reinforcing reasons for the result, beyond
mere construction of 34/35 Hen. VIII. It is possible that Coke reports his own opinion,
rather than what the whole court expressly agreed on, though he professes that the
resolutions were unanimously embraced. The only ground for suspecting any such thing
is that the other reports have the court going only to the narrower, but sufficient, point
(plus perhaps giving some weight to he Commission’s errors, which Coke does not
mention.)

In any event, Coke gives six resolutions over and above the decision on the
narrower point: (1) 1 Eliz. does not “take away” (repeal or amend) any previous statute
which it does not expressly name. In application to the case at hand: 34/35 Hen. VIII
gives jurisdiction over ex-monastic pensions to the regular ecclesiastical courts; 1 Eliz.
does not in effect amend the earlier statute by extending the statutory jurisdiction to the
Commission, assuming the monarch authorizes it to exercise such jurisdiction. Similarly,
Coke notes, 2/3 Edw. VI, c. 13, gives the then-existing regular ecclesiastical courts
authority to award the double value of substracted tithes; 1 Eliz. does not operate to give
the High Commission authority to award such statutory punitive damages. Coke observes
that substracting tithes is not “injury or crime”, but a matter of “interest and property.”
The implication is perhaps that 1 Eliz. might “take away” a prior criminal statute, but
does not give the Commission any statutory civil jurisdiction formerly confined to regular
tribunals (despite the punitive element of double damages.)
(2) 1 Eliz. extends only to crime. Here we have a more fundamental statement about the
Commission: It may be erected as a criminal court only; no part of ecclesiastical
jurisdiction properly classifiable as civil may be given to it. Thus, for the case at hand,
whatever 34/35 Hen. VIII says or means, the High Commission cannot be given
jurisdiction over claims to pensions which are clearly civil. (Obviously 34/35 Hen. VIII
does not make a prophetic exception. A statute after 1 Eliz. could no doubt give the
Commission civil jurisdiction by express provision, but hardly an earlier statute.) (3) The
authority conferred on ecclesiastical courts by 34/35 Hen. VIII is essentially temporal,
whereas 1 Eliz. refers to spiritual jurisdiction. I.e., I take it: Waiving the points above—
granting that 34/35 Hen. VIII is rather general in its reference to ecclesiastical process,
that 1 Eliz. might be taken to alter previous statutes in favor of the High Commission, and
that the Commission may be given civil as well as criminal jurisdiction—the most 1 Eliz.
gives the Commission is all spiritual jurisdiction properly so-called. But power to
entertain suits for pensions of a new sort (pensions charged on successor-grantees of
former Church property), such power and the preservation of the pensions themselves
being entirely owing to statute, is not true spiritual jurisdiction. It is no different from a
totally temporal matter, something in no way even associated with the past and present
affairs of the Church, assigned to ecclesiastical courts by statutory fiat. Therefore such
jurisdiction is outside the reference of 1 Eliz. (4) 1 Eliz. revives rather than repeals 23
Hen. VIII, c.9, with the implication that the High Commission may not entertain “private
causes.” (5) If 1 Eliz. intended to give the High Commission civil jurisdiction, it would
have provided for appeal from the Commission’s sentences. (6) The Commission’s
patent, in any event, does not give it civil jurisdiction, because it speaks of “offenders”
and confers power to imprison them; “offender” is to be understood as a term of art
meaning “one who commits a crime.”

If Coke’s report reflects what the whole court discussed and decided, Bulbrooke v.
Roper represents a significant step toward defining the High Commission’s scope: It can
only be given criminal jurisdiction, which a suit for a pension is not an example of. How
to draw the civil-criminal line in less clear-cut situations remains a problem, but the case
at any rate insists that the first question to ask is whether a suit falls on one side of the
other of that line. The thesis that universal ecclesiastical jurisdiction was grantable to the
Commission, which had had its advocates, is ruled out. The resolutions do not say that
only some grave ecclesiastical crimes may be assigned to the Commission, but reliance
on 23 Hen. VIII and the absence of appeals to exclude the Commission from civil suits
perhaps points forward to that. Resolution #6 countenances strict construction of patents
even when it is conceded that jurisdiction of a particular type could be assigned to the
Commission if the monarch chose. One should, however, be careful about using
Bulbrooke as clear authority for the Commission’s scope in general, since the broader
points in Coke’s resolutions, though rather reinforcing points or alternative reasons than
mere dicta, transcend the special problem in the case, about which there was no judicial
disagreement.

In Lane’s Case (1607)87, the High Commission was prohibited from prosecuting a
man for defaming his parish minister in church on Sunday before all the parishioners.
The words themselves (“a wicked man and an arrant knave”) are probably of
questionable defamatoriness, but their utterance in the circumstances was no doubt at
least a prima facie offense. It was not, however, severe enough for the High Commission,
the court held—the first ad hoc application of the enormity test by Coke’s Common Pleas.

In Wither’s Case (1608)88, the Commission proceeded against a “singing man” of
Exeter cathedral to the end of depriving him for incompetence as a singer and
misbehavior (not observing regulations made for the “government” of the cathedral
personnel and behaving himself “indecently.”) The suit was prohibited because it was not
for an “exorbitant” offense and because the party would lose his appeal. The latter point
has particular force in this case because the High Commission had actually interfered

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87 M. 5 Jac. C.P.—included in Coke’s report of Bulbrooke. 12 Coke, 47.
88 P. 6 Jac. C.P. Add. 25,215, f.63b.
with the appellate process: The Bishop of Exeter had already deprived Wither for the same offenses, and Wither had appealed to the Arches. The suit in the High Commission was commenced pending this appeal. The Common Pleas held, as a separate reason for Prohibition, that the appeal suspended the Bishop’s sentence, wherefore Wither was not deprived at present. The point of insisting on that may be that if Wither were in contemplation of law deprived the Commission would not be proceeding to the end of depriving him, but for the possibly more excusable end of punishing him otherwise for his misdeeds and not so flagrantly for the purpose of undermining his appellate rights in the deprivation suit. Insofar, however, as the court was determined to exclude the Commission from petty suits, even against clerics, the further consideration would not seem to matter.

Allan Ball’s Case (1608)\(^9\) confirms earlier decisions holding that the High Commission may not arrest persons subject to its jurisdiction to secure their attendance and answer. The context of Ball is not reported, only the court’s unanimous resolution: A pursuivant may not be sent to arrest an accusee; the party must be cited, and if he defaults proper procedure is to excommunicate him, going on if necessary to De excommunicato capiendo. In support of this holding, the judges went high, to Magna Carta and other ancient statutes whence it appears that a freeman may not be arrested upon a bare surmise or accusation. 1 Eliz. had no intent to repeal those profitable laws. The judges also went to a recent case (which is alluded to above): The late Chief Justice Anderson and Justice Glanville had resolved at Northamptonshire Assizes that a man who killed a High Commission pursuivant in resisting arrest did not commit murder, the arrest being tortious. The report ends with a note observing that neither the Star Chamber nor the Chancery would warrant arrests merely to procure a party’s first appearance; they send a Subpoena to the party and arrest him only when he commits the contempt of disobeying. (An exact parallel with the Star Chamber and Chancery is obviously not intended, for whereas those courts may proceed for contempt if the Subpoena is disobeyed, the High Commission must excommunicate. The comparison does, however, suggest the question whether the Commission may arrest for contempt after sentence—when a spiritual sentence in the nature of an injunction is disobeyed. The present holding at least does not imply that it may not. In contrast to earlier similar decisions, this one does not cut so close to the general power of the Commission to imprison or otherwise transcend regular ecclesiastical procedure. Its weight is more specifically on the illegality of arrest as the first step in proceedings against a man—illegality which the High Commission did not want to recognize, but which the Star Chamber and Chancery acknowledged in their practice.)

Langdale’s Case (1608)\(^9\) is a landmark as the first Cokean case testing the High Commission’s authority to entertain marital suits. I think it likely that that authority

\(^9\) T. 6 Jac. C.P. 12 Coke, 49.

\(^9\) The account in the text is constructed from the following sources: (a) Harl. 4817, f. 187b. Undated. (Fullest account of the facts—the wife’s allegations about the husband’s wealth, the amount of the High Commission’s award, subsequent suit in the Arches.) (b) 12 Coke, 50, sub. nom. Marmaduke Langdale’s Case. Undated. (Agrees with Harl. 4817 on the result of the original motion for Prohibition. Suggests that a demurrer was contemplated and gives the ruling that the count should run against the High
became the main practical bone of contention between the common law judges and the High Commission. Over serious Puritan cases they differed less than is perhaps commonly believed; it is hard to criticize the judges for preventing the Commission from infringing local autonomy for petty quarrels and misdemeanors; in marital matters, the Commission may have believed it had a manifestly desirable role to play because diocesan courts could not be trusted to enforce the morality embodied in ecclesiastical law, or to insure fair treatment of women, against rich and influential people. The belief was probably justified. In so far, however, as one is resolved that the High Commission is limited to crime, and to grievous crime at that—primarily, if not exclusively, religious unorthodoxy—, one will have trouble bringing marital litigation inside the Commission’s jurisdiction. Adultery can be seen as a serious crime, even if it comes before the law only as grounds in a divorce suit. But to hold it “enormous” without bringing the whole gamut of commonplace sexual misconduct into the High Commission’s scope may be difficult. Other marital matters are harder to give a criminal color or to elevate to enormity.

Langdale’s Case presents a pretty clear example of the civil end of the spectrum. Langdale had “put away” his wife—why, whether with a legally valid or at least understandable reason, and in what form, do not appear. The wife sued in the High Commission for a separate-maintenance stipend, claiming that she was not allowed enough support (not that she was provided with nothing at all) and showing her husband’s financial circumstances, including her own contribution to his wealth. (He had land to the value of over £1000 per year, plus land in his wife’s right worth £160 per year—*quod nota*: we are dealing with a property arrangement for wealthy people.) The Commission awarded that Langdale pay his wife £140 in separate maintenance. He sought and obtained a Prohibition on the ground that no crime or enormous offense was involved. Allowing maintenance belongs to the Bishop, the court said, and Langdale ought not to be deprived of his appeal.

There are further wrinkles to the case, however. Justice Walmesley was at least doubtful about the decision. Walmesley was by no means a friend of the Commission in all respects, but he was to show in later cases a disinclination to exclude it from the marital sector of ecclesiastical jurisdiction. I therefore take him as tending to dissent on the substance in this case, as well as on a further point—whether the Common Pleas may...
prohibit when there is no pending suit, overlapping with the ecclesiastical one, in the Common Pleas itself. The latter point was eventually debated at length and resolved by the usual split: all the judges except Walmesley held that the Common Pleas may prohibit any prohibitable suit, just as the King’s Bench may. (There are several cases on this point not yet analyzed as a group in this study.)

The question about the Common Pleas’ standing to prohibit without a pending case was resolved on demurrer in Langdale. A nice point of procedure was settled to clear the way for a demurrer: The court ruled that plaintiff-in-Prohibition should count against the High Commissioners—i.e., designate them as defendants-in-Prohibition—for the purpose of formal pleading. This was necessary because a husband could not count against his own wife. I.e., the real adverse party, the ecclesiastical plaintiff normally treated as defendant-in-Prohibition, could not be the object of the declaration; a wife could not be sued by her husband in Attachment-on-Prohibition, though there was no objection to one spouse’s merely informing the court of an improper ecclesiastical suit brought by the other; therefore, in order for a demurrer to be possible, the ecclesiastical court must be treated, anomalously, as defendant-in-Prohibition.

The tone of Coke’s report suggests to me that the judges found this way to have a demurrer because they were determined to find one. I imagine Langdale’s counsel making trouble in the face of Mrs. Langdale’s (or perhaps more likely the High Commission’s) desire to demur. As it were: “But how can there be a demurrer, when by normal procedure Langdale would have to declare against his wife?” The report suggests that the judges’ response may have been something like this: “Well, Prohibition cases will always be settled on demurrer if defendant-in-Prohibition wants it that way. This is categorical. We are not going to prevent Mrs. Langdale from prosecuting her ecclesiastical suit on the basis of a mere surmise, nor confine her to objecting by a mere informal motion. She has a right to her suit until a formal judgment on pleadings is given against her, and when and if such judgment is given she is entitled to her Writ of Error. Here’s how we’ll do it in his anomalous case—let the declaration run against the High Commission.” (The possibility of a Writ of Error upon a formal judgment is expressly mentioned. A parallel is irresistible in the context of this case: The court did not approve of cheating people of their ecclesiastical appeals by taking suits needlessly to the High Commission; it had no intention to let anyone be deprived of appellate recourse in Prohibition proceedings at common law.)

A demurrer, especially one insisted on in the face of a certain difficulty, implies seriousness and hope. Mrs. Langdale, or the High Commission behind her, was unwilling to see a precedent set for prohibiting marital suits without maximum effort to prevent it. She, or the Commission, must have hoped the judges would see the light on full-scale argument. If that hope was faint, the prospect of overturning a Common Pleas judgment by Error in the King’s Bench may have looked better. Having demurred, defendant-in-Prohibition would appear to have chosen the Common Pleas’ standing to prohibit without a plea pending as the better ground to fight on, for it is the debate on that that is reported, though the jurisdiction question may have had more attention than we know.

Emphasizing the standing of the Common Pleas perhaps drew Walmesley’s clear dissent, which may have been as much as defendant hoped for. In Wither above, where High Commission involvement was especially inexcusable, the court is reported as unanimously holding that the Common Pleas may prohibit without an overlapping plea
pending before it. Although Walmesley was to display his contrary opinion in several cases, he would seem to have overcome it in Wither. In Langdale, he probably did not approve of the Prohibition on the merits, and that disapproval may have moved him to make up his mind to dissent on the issue of the Common Pleas’ standing—the stronger ground, since it is hard to give the Commission jurisdiction in a separate maintenance suit and deny it jurisdiction over any other ecclesiastical cause.

Langdale’s Case on demurrer had a sequel (briefly reported in Harl. 4817.) Mrs. Langdale, having been prohibited from suing in the High Commission, sued in the Arches. Her husband now sought a Prohibition from the Common Pleas to stop the new suit. The writ was denied. This comes to holding that although an expelled wife’s suit for maintenance does not belong in the High Commission it is perfectly appropriate to a regular ecclesiastical court. The decision of the prior case on demurrer had cleared away any objection to pursuing Prohibition in the Common Pleas, so the only question arising is how the husband could have had any chance to stop the Arches suit. One possibility is that exception was taken on 23 Hen. VIII to going to the Arches instead of a diocesan court. There is no indication of that in the report, however, and the large sums of money and complicated circumstances in Langdale make it quite likely that the case was removed to the archdiocesan level at the Bishop’s request. The other possibility is that the husband thought it arguable that the wife’s independent wealth debarred her from recovering. The Common Pleas seems not to have debated that point, for the report has the court saying only that the case was now in the proper court. That comes in effect to saying that entitlement to separate maintenance is purely an ecclesiastical question.

The most significant point about Edwards’s Case (1608) is another dissent by Walmesley, it would appear. (The decision to prohibit is given as that of Coke, Warburton, Daniel and Foster. If Walmesley participated he dissented. He could have done so because of his opinion about the Common Pleas’ prohibiting power in general. The plausibility of a dissent on the merits is discussed below. The case for prohibiting seems very strong. The High Commission proceeded against Edwards for several things. Part of the charge was that he had defamed a physician, Dr. Walton, by casting aspersions on his professional competence. As to this, the court held that any wrong done to Walton was temporal wrong, for which the remedy was at common law. The judges were vehement: the Commission ran the risk of Praemunire for proceeding in such a matter. The point, which is not specific to the High Commission, seems all but unanswerable. The only possible basis for dissenting I can see so far is that defamation of Oxford University was mixed in with defamation of Walton. (Edwards “taxed the University with rashness” in making Walton an M.D.) The majority went on to say that even if there were a cause for ecclesiastical defamation it should be complained of in the episcopal court, not the High Commission. (Edwards had allegedly said that Walton and another physician, Dr. Maders, were cuckolds and that Walton had inherited syphilis and leprosy from his father. Such aspersions were less apt than professional incompetence to support a common law action, for which reason there is perhaps a difficulty about contesting their prima facie power to support an ecclesiastical suit, though I doubt that they would be

91 M. 6 Jac. C.P. 13 Coke, 9; Lansd. 601, f.2ll. No important differences. Lansd. 601 consists of cases published in 12 and 13 Coke, usually little different from the printed versions.
held capable of doing so. The judges were content to say that there was no High Commission matter here.) One can dissent from the proposition that the High Commission is excluded from ecclesiastical defamation at all; Justice Walmesley may have done so.

Most of the color of enormity in the charges against Edwards comes from the rest: Walton’s late father had been Bishop of Exeter, so that attributing French pox and leprosy to him worked “to the dislike of the dignity and calling of Bishops.” Edwards had obtained a Star Chamber sentence against Dr. Walton and boasted about it; as it happened, Dr. Walton was a member of the Ecclesiastical Commission for Exeter (local equivalent of the national—properly Canterbury Archdiocese—High Commission); by bragging that he “had gotten on the hip of a Commissioner for causes ecclesiastical”, Edwards not only vilified Walton but “in him the whole commission ecclesiastical in those parts.”. Finally, when summoned before the High Commission, Edwards had “arrogantly” said that “he cared not for anything this Court can do” to him, and that he could remove the case at his pleasure. In short, the charges in part accused Edwards of “contempt” or collective slander of the Church, smacking of Puritanism if not plain irreverence. The majority of the Common Pleas held that slander of the High Commission itself—referring to his behavior upon receiving his summons—was punishable at common law. This accords with the King’s Bench in Fuller. The majority did not single out what I call the further element of collective slander or disrespect, but lumped it together with any possible ingredient of individual ecclesiastical defamation as clearly less than enormous. Justice Walmesley could have dissented from the proposition that the Commission may not proceed against contempt or slander of itself, and he could have seen sufficient admixture of “collective slander” and irreligion to make a High Commission case here without abandoning the enormity criterion and admitting the Commission to any and all ecclesiastical causes. The majority decision adds no limitations on the Commission that were not well-anticipated. (A further point on self-incrimination in Edwards is discussed in Vol. II above, p. 194.)

Perepoynt’s Case (1609)92 is considered in Chapter 2 above for its bearing on 23 Hen. VIII. On the High Commission’s substantive jurisdiction, the report gives a per Curiam holding without sign of dissent that tithe, marriage, and testamentary matters are not examinable by the Commission. The charge in the instant case was procuring a priest to marry a gentleman’s daughter to a ploughman in the night and attending the clandestine wedding. The case was complicated by an element of double vexation: The defendant had been excommunicated by his bishop for the same offense and subsequently absolved, after which the Commission undertook to prosecute him. We are told also that he was imprisoned by the Commission, and that the court resolved that it would set him at liberty if the Commission did not do so upon his making submission. That seems a bit reticent if the court thought the Commission utterly ultra vires. The report, however, does not so much as inform us whether the case arose on Prohibition or Habeas corpus. If the former, advising the party to submit may come only to saving trouble and conflict—as it were, “Go be polite and say you’re sorry and see whether the Commission, taking note of the Prohibition, won’t release you, but if you fail bring a Habeas corpus.” There is no sign of a Habeas corpus before the court and no discussion of the imprisoning power.

92 H. 6 Jac. C.P. Godbolt, 158.
Veniar v. Pellin (1609)\(^{93}\) is of interest mainly for its unusual structure and the arguments of counsel. (A few judicial remarks are reported, but the case was adjourned without decision.) Pellin, a parson, was prosecuted in the High Commission by the “procurement” of Sir Henry Veniar. I.e., he was prosecuted \textit{ex officio}, but Veniar informed the Commission of his alleged offense and promoted the prosecution. Pellin was charged with failure to provide services in a chapel of ease in his parish, as the parson was allegedly bound to do by custom. Veniar failed to furnish sufficient proof (presumably of the custom). Thereupon Pellin was acquitted of liability and Veniar was sentenced to pay Pellin costs to the sum of 10 marks. Veniar sought a Prohibition to block execution of the award of costs.

Serjeant Harris, for Veniar, argued simply that the High Commission had no business proceeding for such a matter as failing to provide and finance religious services in a chapel. This is surely a valid application of the enormity criterion, which Harris expressly asserted. (1 Eliz. was directed against Popery and heresy and confines the Commission to exorbitant offenses of that order.) As far as the report indicates, Harris did not elaborate the tricky aspect of this case. The only question, as he represented the case, was whether the Commission had jurisdiction over the matter. If it did not, then all acts of the Commission in consequence of the proceeding were \textit{ultra vires} and ought to be nullified by Prohibition, as much the award of costs against Veniar upon Pellin’s acquittal as any sentence that might have been given against Pellin if he had been found at fault.

That Veniar was responsible for Pellin’s being brought before the Commission for an inappropriate matter and put to expense made no difference by Harris’s theory. (Let it be said, before Pellin is pitied, that on Harris’s view of the law he could have nipped the High Commission suit in the bud by Prohibition; contesting it can certainly be called his folly.)

Serjeant Shurley, for Pellin, argued at greater length, both attacking Harris’s position on the Commission’s jurisdiction and contending that the award of costs against Veniar was lawful even if the prosecution of Pellin was not. On the jurisdiction question, Shurley advanced a theory midway between that which would confine the Commission to enormous crimes and that which would permit it to entertain any ecclesiastical causes the King chose to assign it. His underlying premise is the same as will support unlimited ecclesiastical jurisdiction for the High Commission: Supreme ecclesiastical authority is in the monarch \textit{de jure}, and 1 Eliz. only confirms his title and removes the Pope from \textit{de facto} possession. By virtue of his supremacy, the monarch may delegate ecclesiastical jurisdiction without specific authorization from the statute. He may so delegate it as to give special commissioners jurisdiction which would ordinarily belong to regular Church courts. This is evident from the fact that the monarch, by virtue of the same supremacy, may grant individuals exemption from ordinary episcopal jurisdiction by charter, as several Year Books are cited to show. I.e., if the King may derogate from the regular courts by way of charter of exemption, so may he by setting up an extraordinary court by patent.

Shurley did not, however, push these premises to their implicit conclusion. Rather, he conceded that the Commission was limited to “public offenses” and excluded from “private or meum et tuum.” This contention he appears to rest on the statute, not on

\(^{93}\) P. 7 Jac. C.P. Harg. 52, f. 7b.
the contingent fact that the monarch had granted only “public” jurisdiction to the Commission in his patent. The theory would seem to be: 1 Eliz. does limit the monarch’s 
de jure power to assign any class of ecclesiastical litigation to special tribunals in derogation of the ordinary ones. It confines such assignment to “public offenses” (whatever the exact boundary between public and private, and however precisely that distinction corresponds to criminal/civil and to the procedural antithesis ex officio/libel-commenced.) Public offense means any public offense; there is no restriction to enormities. The offense charged against Pellin in the instant case, according to Shurley, was clearly public.

What does the application in this case say about the meaning of “public”? It seems questionable that Pellin’s alleged default can be made out as criminal, let alone enormous. “Public” = “criminal” may = “lawfully liable to ex officio prosecution”, but it can hardly be equivalent to “merely in fact prosecuted ex officio”, because any alleged wrong could be prosecuted—improperly—in that form. Shurley is careful to point out in his argument that no common law action would lie for neglect of Pellin’s duty—in contrast to the situation where someone is obliged to maintain a chapel for the use of a particular individual and his family. But that only goes to say that the High Commission had not invaded the temporal sphere in this case. It need not imply that no one would have “civil standing” to enforce the duty in the ecclesiastical sphere, though it is possible that Shurley intended so to claim—i.e., to argue that since the chapel was for the benefit of all the inhabitants of the hamlet it served, the duty to maintain it was not civilly enforceable, whence breach of the duty, if legally controllable at all, must be controllable as a “crime” of sorts. Shurley points to the rule that the King may pardon ecclesiastical suits pro salute animae, but not ecclesiastical suits in which a private party has an interest and says that in the instant case no particular party had one. Whether that implies only that the present High Commission suit could be pardoned or that any conceivable suit by inhabitants would be pardonable makes a question. Shurley probably intended to suggest the latter—that an inhabitants’ suit, if possible, would still be pardonable and therefore is inherently “public.” If we assume, however, that a civil suit by inhabitants would be perfectly appropriate, or even unpardonable, does it follow that Pellin’s neglect of his duty is not a “public” offense? Not necessarily. Arguably, the duty is “public” because it runs to all inhabitants and concerns their spiritual welfare, as opposed to mere material interest—notwithstanding that a suit by particular inhabitants, or a “class action” for all of them, would lie. The only help Shurley supplies is that he says the offense here was not “not only public 
facto but exemplo.” “Facto” must refer to the considerations I have advanced. “Exemplo” may add a bit. I suggest: To make out that an ecclesiastical offense is public, it is relevant to consider whether deterring it is plausibly important for setting a good example in the Church, with a view to the Church’s morale and “image.” If that is the point, the application makes sense. Clergymen responsible for maintaining ancillary chapels in their parishes—for seeing that religious services are as conveniently available to the people as they have been in the past—should be encouraged to take their responsibility seriously. If known instances of neglect are overlooked, or left to the chances of private litigation, other clergymen will be tempted to similar neglect. And the quality of religious life will suffer. By contrast, one might suggest, whether Jane secures the right to live apart from her abusive husband and receive alimony is a comparatively private question, though the husband’s conduct is morally much worse than that of a
clergyman trying to save himself the trouble of keeping up a separate chapel in an obscure hamlet. Of course the husband is a bad example too, but so are those who infringe the ecclesiastical duties that must surely be reserved for the private side, such as the duty to pay tithes. Hence my suggestion that “exemplo” be taken to refer to the Church’s internal standards and discipline.

How Shurley arrived at his theory about the High Commission’s scope is not evident. He does not linger over exposition of 1 Eliz. A case for “crimes and public offenses only, but not only enormous ones” based on the statute’s words does not seem to me easy to make. Going by probable intent, however, that formula is plausible: Why should Parliament have wanted to override the ordinary civil jurisdiction of established ecclesiastical courts, with such effects as defeating the policy of 23 Hen. VIII? Why should it not have foreseen the utility of an extraordinary, centralized tribunal for enforcing the “public law” of the Church, especially the part of it that regulates clerical behavior and demands respectful treatment by the laity? Is that not just the area where local courts, if not lax or intimidated, are at least likely not to have uniform standards? Are variable standards and the lure of paths of least resistance not likely to be a more serious problem in small matters than in great—more likely to lead in some localities to the decay of chapels of ease, say, than to the propagation of heresy? Rather than argue directly about the statute, Shurley cites two important clerical-behavior cases, Cheinye (in which he was counsel) and Caudry—both discussed above. In those cases, the Commission’s authority to meddle beyond the narrow range of enormities can be said to have been upheld. Though to rely on those cases alone is to ignore many decisions made in the meantime, Shurley’s theory is a reasonable projection from King’s Bench cases, which include those two.

Shurley then proceeded to argue that whether or not the Commission’s prosecution of Pellin was lawful, Prohibition should not be granted to frustrate the award of costs. Most basically, he sought in effect to distinguish that award from any sentence that might have been given against Pellin. Conceding that the latter would have been an improper arrogation of the diocesan court’s role, the same cannot be said of the former. The award of costs to Pellin finally implies only that he was wrongfully vexed by the suit in the High Commission and should therefore be compensated. To make that judgment is not to pretend to do something that a Bishop’s court ought to be doing, or could do in the circumstances (albeit that the circumstances may include a wrongful assumption of jurisdiction by the Commission.) Surely the High Commission is prohibitable on jurisdictional—as opposed to sanction—grounds only if it is in fact taking something away from regular ecclesiastical courts. (I elaborate the argument here from the bare sentence, “Auxi les costes asesse devant les Hault Commissioner est solement pur le vexacon et ne tolle le Jurisdiccon del Ordinary.”)

Shurley’s next argument is that a sentence given in an ecclesiastical court may not be examined by a common law court. That is as much as he says. What does he mean? The remark could be a flat objection to Prohibition after sentence. That, however, is not a very promising line (see Vol. I, pp. 115 ff.), and Shurley’s own further argument (just below) shows that he knew a categorical rule against intervention after judgment was untenable. I suggest as an alternative that Shurley’s point here is that the Common Pleas ought not to take note of why Pellin was awarded costs. I.e., saying in the present context that the sentence is not examinable is an instance of the respectable position that common
law courts ought not to go behind ecclesiastical sentences to ask whether they were just or correct by ecclesiastical law—a position perfectly compatible with holding that an originally *ultra vires* suit may be prohibited whether or not it has proceeded to sentence. Here, there is great virtue, from Shurley’s point of view, in not looking behind the sentence awarding costs to Pellin. In fact, that sentence was given because the prosecutor, Veniar, failed to prove the charge against Pellin, the Commission having assumed jurisdiction. If we note only *that* sentence of costs was awarded to defendant for wrongful vexation and ignore the reason, it need not appear to the court judicially that the Commission assumed jurisdiction improperly, if that was the case. Costs for wrongful vexation might have been awarded to defendant for what Shurley’s opponents must regard as the best of reasons: because Pellin was wrongfully sued in the High Commission instead of a diocesan court. Only by prying into how the Commission actually justified the sentence to itself and claiming that a mistake about its jurisdiction was involved as a cause of the Commission’s act can those opponents object to the sentence. On their own premises, they ought to welcome it as such—as due compensation of a man who was wrongfully vexed. (Between the words quoted at the end of the last paragraph above and those on which this paragraph is based—“Auxi sentence done in *Spiritual* Court ne serra examine hic”—comes a sentence of which I can make no direct sense: “Auxi le jurisdiction fuit que suer devant l’ordinary.” I wonder whether that could be a garbled link between the two intelligible points. As it were, “The most that can be said is that by proper jurisdictional rules Pellin ought to have been sued before the Ordinary; if we do not examine the reason for the sentence, we cannot say but what the sentence takes note of that very point and compensates Pellin accordingly.”)

Shurley’s final point may seem the most obvious: that Veniar was trying to prohibit, not his own private suit, but as good as that—a criminal suit prosecuted by him. Shurley realized, however, that exploiting this situation was *not* obvious, however weak Veniar’s moral position. (See Vol. I, pp. 161 ff. for the general point that prohibiting one’s own suit was by no means ruled out in principle.) Shurley’s words here are, “‘Sir H. V. himself preferred the suit to the High Commissioners, and therefore he will not have Prohibition, and yet 22 Edw. IV although the party admits the jurisdiction yet the Court will award Prohibition…’” The italics, which are mine, indicate the words by which Shurley concedes, with the help of his Year Book source, that prohibiting what is in some sense “one’s own suit” is not absolutely barred. (It is these words which lead me to say above that Shurley probably did not claim that there can be no Prohibition after sentence. As it were, waiting until after sentence is one form of—arguably—“admitting the jurisdiction of the court”; starting a suit in a given court oneself is another.) To get around this difficulty, Shurley proposed what can be seen as a modified version of Justice Walmesley’s view of the Common Pleas’ general standing to prohibit: It is true that admitting the jurisdiction of an ecclesiastical court is no bar to Prohibition if the purpose of the Prohibition is to protect a plea pending in the Common Pleas. Otherwise, it is a bar (*mes ceo* [the point based on 22 Edw. IV above] *est intend ou est plea pendant in cest court et issint nest nostre case*) Walmesley’s full view was that there must always be a “plea pending in this court” to justify Common Pleas Prohibitions. Shurley would seem to have realized that that would not go down with any of the judges except Walmesley, but to have thought a piece of it salvageable. His position restated comes to: The policy of the law, or at least this court, *is* against self-prohibition, but an exception is made in
In justice to Shurley’s subtle argument, it is worth noting a road he does not take. I think it is plausible to argue that people whose ecclesiastical suits are misplaced to begin with may not later prohibit them. I.e., self-prohibition is clearly unobjectionable only when the suit is well-commenced originally, but an issue appropriate to common law determination arises in the course of it. If one concedes that Veniar ought never to have promoted the High Commission suit, then one can argue that he ought not to have a Prohibition. But that would be to concede what Shurley’s opponents claimed—the High Commission lacked jurisdiction—, though they of course did not draw the conclusion therefrom that Veniar lacked standing to have a Prohibition. Not wanting to concede that, Shurley took another tack: asserting a general policy against self-prohibition, subject only to exceptions not relevant here—wherefore Veniar should not have a Prohibition regardless of whether the High Commission had jurisdiction. Note that Shurley’s two points before the present one are in the same form. They do not involve conceding for the sake of argument that the High Commission lacked jurisdiction, but by-pass that question: whether it had jurisdiction or not, it did not encroach on the diocesan courts by the specific act of awarding costs to Pellin and, in compensating him for wrongful vexation, may for all we need know have denied its own jurisdiction. A judge who thought the High Commission lacked jurisdiction might, however, take the alternative route to denying Veniar a Prohibition. On Veniar’s, or Harris’s, own premise it may follow that Veniar should not have a Prohibition, though Shurley’s claim that the general policy is against self-prohibition be rejected. On the same premise, it may follow that Prohibition lies because who informs the court of the ultra vires suit is immaterial. The choice, which trenches to the theory of Prohibitions, must be made once the premise is accepted. Shurley’s argument, on the other hand, permits holding that the Commission had jurisdiction and therefore Prohibition does not lie. It also permits making no decision about the Commission’s jurisdiction and still concluding that Prohibition does not lie. (Again, cf. Vol. I on self-prohibition generally.)

The judicial response to Shurley’s careful argument was for the moment cursory. Coke jumped immediately on the last point: “But as to that, Lord Coke said the Prohibition is the King’s suit, as appears by 28 Edw. III. And the writ is contra coronam et dignitatem, and therefore although the party himself may not sue, yet the Court must award Prohibition.” I.e., Coke predictably embraced the “public stake” theory of Prohibitions, whereby all that matters is whether a foreign suit should be prohibited on the merits and the standing of the private party seeking Prohibition is never objectionable. However, though Coke opposed his last argument, Shurley had several more. The rest that Coke says, reportedly with Justice Foster’s concurrence, avoids taking up Shurley’s further points but sounds encouraging for his cause. For after objecting to Shurley’s position on self-prohibition, Coke turns around with a “but” and says Consultation will lie in this case. The reasons he gives have nothing to do with the substance: “For although the statute of 1 Eliz. is shown, which gives authority to the King to appoint Commissioners etc., yet it is not shown what authority is given to him [sic—“luy”—but probably “them”], and so it does not appear to the court that they have authority of the
matter in question. Also, it is not shown that there are any commissioners, etc.” It looks as if Coke turned his attention to picking purely formal holes in Veniar’s surmise—failure to recite the statute and patent, the names of the Commissioners, and the like in such form as was required if one wanted to prohibit the Commission. If that is right, the course is understandable. The majority of the court is unlikely to have been persuadable by Shurley’s theory of the Commission’s jurisdiction. On the other hand, Veniar’s moral position was weak. If narrow reasons for holding in Pellin’s favor could be found, so much the better. Raking over the Commission’s jurisdiction again—in the face of an able argument against the court’s preferred enormity theory—could be avoided. If technicalities would do the job of justice, it would be unnecessary to grapple with Shurley’s position on the jurisdiction question. Even if nothing he said was actually accepted by the court, Shurley’s argument may have had its effect in heading off Harris’s glib appeal to the enormity theory and forcing a search for narrow grounds. The case was adjourned after Coke spoke, and I have no report of its resumption.

Darrington’s Case (1609-10) 94 is discussed at length in Vol. II because of its incidental bearing on self-incrimination. It will suffice here to restate summarily its significance for the High Commission’s jurisdiction and sanctions. The significance is considerable. For present purposes we need concern ourselves only with Darrington’s Habeas corpus, not with the Prohibition he obtained at a later stage in his struggle with the Commission. The case is the first on Habeas corpus wholly from the period of Coke’s Chief Justiceship. It resulted in remand of the prisoner originally and later, on a second writ, in his admission to bail at most—i.e., he was not discharged outright. In justification of this result, the court per Coke adopted and supported by an express theory the position that the Commission may imprison for some offenses. This position must be regarded as a reversal of the opinion, which was quite well-entrenched in the Common Pleas before Coke’s accession, that the Commission may simply not use secular sanctions. In addition, going beyond the immediate needs of this case, Coke laid down with purported comprehensiveness what offenses fall within the Commission’s jurisdiction. The enormity test was endorsed, and its content was specified as in no previous case. Finally, the court confirmed two propositions that were hardly still within the range of realistic controversy. (a) Exposition of 1 Eliz., and hence the last word on what the High Commission’s powers are, belongs to the common law judges and not to the Commission itself. (b) The statute itself delimits the Commission’s powers—i.e., does not enable the monarch to confer such power as he chooses on it.

With respect to jurisdiction, Darrington itself was not difficult. The return on the Habeas corpus may not have been beyond criticism with regard to every element in a complex charge against the prisoner, but it was reasonably full and it made clear that one of his offenses, at any rate, was Brownism. In his speech, Coke called Brownism heresy. Be that as it may, it was certainly serious religious error by the standards of the Established Church, with which the judges were never disposed to quarrel. The enormity test was easily satisfied in this case. It is therefore by way of dictum that Coke in the

94 Harg. 52, f. 20b; 2 Brownlow and Goldesborough, 3. Harg. 52 dates the case T. 7 Jac.; Brownlow is undated. T. 7 appears to be the date of the second Habeas corpus. The account in the text here depends almost entirely on Brownlow. For the MS. report and other evidence on the case, see the account in Vol. II.
course of his opinion ventured to say what offenses belonged to the Commission—viz.
heresy, schism, polygamy, incest and recusancy. He represents this list as exhaustive and
as having been agreed on in Queen Elizabeth’s time (by whom or in what context he does
not say.) For the inclusion of one item, polygamy, he offers an argument: that offense
was made felony by the statute of 3 Jac., wherefore it must have been an enormous
spiritual offense before. I.e., Parliament would surely not have felonized an ecclesiastical
crime unless it adjudged it to be of the most heinous intrinsic character. Towards defining
the Commission’s jurisdiction negatively, Coke offered one example of a non-enormous
crime: It was held in a Reimore’s Case (undated by Coke and not independently reported)
that the High Commission may not punish a man for working on holidays.

The problematic issue in Darrington was the power to imprison. It appeared on
Darrington’s first Habeas corpus that he was imprisoned until such time as he should
“make submission” to the Commission and give security not to repeat his offenses. I.e.,
he was committed to coerce performance of a spiritual sentence, not as a punishment.
(The order to make submission was a plainly legitimate ecclesiastical sentence. The
legitimacy of forcing him to enter a good behavior bond could probably be challenged,
but the reports give no sign of its having been.) The court’s decision upholding the
imprisonment, therefore, goes in strictness only to coercive or equity-style commitment.
Nothing in the Chief Justice’s language, however, indicates an intent to limit the
Commission to coercing and restrain it from punishing. Coke says incidentally that the
Commission may fine where it may imprison, and fining is hard not to regard as punitive.
(From other evidence—see the discussion of this case in Vol. II—it appears that
Darrington was in fact modestly fined. This fact does not come out in the reports of the
Habeas corpus, however, and was presumably not before the court.) After having been
remanded, Darrington brought a second Habeas corpus, claiming he had made
submission as required and was still not discharged. The second writ raised problems of
its own, concerning how closely the common law court should look into whether
Darrington had in fact made submission, or done so in an adequate form (see Vol. II.)
But no new questions about the imprisoning power as such arose on the second Habeas
corpus.

Coke’s theory in justification of the Commission’s power to imprison goes as
follows: Ecclesiastical courts have no inherent power to imprison, even for the most
serious crimes. Three statutes prior to 1 Eliz., however, gave them limited imprisoning
power. Two of these—5 Rich. II, Stat. 2, c. 5, and 2 Hen. IV, c.15—applied to heresy and
closely related matters. Both were repealed by 1 Eliz. The intention of 1 Eliz. was not,
however, to do away with such imprisoning power; it was rather to transfer it from the
ordinary ecclesiastical courts to the High Commission. With respect to heresy, removal of
secular sanctions from the hands of the then-untrustworthy Bishops, rather than the
reduction of all ecclesiastical courts to their de jure spiritual sanctions, was the policy of
the Elizabethan settlement. It obviously does not follow that imprisonment is lawful for
the other crimes on Coke’s list above, especially polygamy and incest (for serious
religious error short of heresy at least partakes of the nature of heresy, and it may fall
within the letter of the medieval statutes.) Indeed, it is the opposite that follows from the
present theory, on which Coke seems to insist quite clearly: nothing is punishable by
imprisonment in the High Commission that was not so punishable in other ecclesiastical
courts before the High Commission existed, even though 1 Eliz. permits the
Commission’s jurisdiction to extend to a few major crimes which could not previously be punished by imprisonment. Whether Coke intended so strict an inference to be drawn from the theory I am not sure. The alternative would be that 1 Eliz. meant to give the Commission imprisoning power for all offenses within its jurisdiction, in which case it would not properly speaking have transferred the power from the Bishops to the Commission. It would have made such a transfer for the most important offenses, while conferring the power to imprison on the Commission de novo for a couple of further crimes of comparable gravity. The only clue to Coke’s choice between the two possibilities is indecisive: his citation of Fuller’s Case for the proposition that the Commission may imprison for heresy or schism. If schism (which, rather than heresy, was Fuller’s offense) is within the words or equity of the medieval statutes, then perhaps imprisonment is lawful only for heresy, schism, et similia; otherwise, schism is within the same case as incest for present purposes, and the Commission may imprison so long as it has jurisdiction.

Coke’s third example of ecclesiastical power to imprison before 1 Eliz. introduces its own complications. 1 Hen. VII, c. 4, gave ecclesiastical courts power to imprison clergymen for various forms of incontinence. Coke mentions this statute only to complete his catalogue of exceptions to the general rule that spiritual courts may not use temporal sanctions. He does not say that 1 Eliz. intended to allow the monarch to confer power on the High Commission to proceed against clerical incontinence. There were strong reasons to suppose that the statute meant to permit the Commission to be given jurisdiction, together with power of imprisonment, over serious religious offenses once subject to ecclesiastical imprisonment, but why over the more commonplace clerical incontinence, which regular ecclesiastical courts were already equipped to deal with by imprisonment? I have found no spelled-out answers to this question. Cases below suggest that the High Commission was unlikely to be prohibited from dealing with incontinent clergy. This may reflect a never fully justified broadening of the “enormous” category beyond Coke’s short list in Darrington, together with a loose readiness to assume that in creating an ecclesiastical court with power to imprison Parliament intended that anyone in danger of ecclesiastical imprisonment was subject to that court’s jurisdiction.

In sum, Darrington is a clear vindication of the High Commission’s imprisoning power in grave religious error cases. Coke was ready to stretch “enormity” a bit farther, but only to a few specified crimes. It is worth noting that he took the occasion of this case to affirm a broad limit on the imprisoning power: Coke cites, as Symson’s Case, a “resolution” of the Elizabethan Judges Anderson and Gianville at assizes, which we have seen referred to before. In this case, a pursuivant was sent to arrest a man (for adultery, probably not an infra vires High Commission offense) “in a layman’s house.” The pursuivant was slain—by whom does not appear (the householder? the intended arrestee?) It was decided “on great deliberation and conference with the other Justices” that the slayer had committed manslaughter rather than murder, because the High Commission may not arrest a man’s body, but should proceed by citation and excommunication. This decision was the ancestor of others to the effect that the Commission could not “imprison” suspects by arresting them, whatever its power to detain the convicted.
In Parson Wransfield’s Case, from the same term as Darrington’s second *Habeas corpus*, the Common Pleas had no objection to the High Commission’s prosecuting Wransfield for inveighing against the Book of Common Prayer. The court called the offense enormous, without labeling it heresy or, more plausibly, schism and without speaking to whether a layman’s liability would be the same as that of the clergyman who was defendant here. Imprisoning Wransfield for the purpose of compelling him to testify was upheld, and he was accordingly sent back to prison. The serious issues in the case were on authority to exact self-incriminating testimony, for which see the discussion of the case in Vol. II (pp. 370-372, 376.)

A small point on the High Commission’s jurisdiction was decided the same term at Serjeants’ Inn (probably by reference from the Common Pleas to all the judges.) It was agreed that perjury committed in ecclesiastical courts is to be punished by those courts, rather than by temporal proceedings pursuant to the statute of 5 Eliz., c.9. This holding simply states what the Perjury Act of 5 Eliz. all but unmistakably provides. The significant point in this case is a further gloss: “this is not to be understood [as meaning] that one may be punished before the High Commissioners, but in the Ordinary’s court.” I.e., if a man commits perjury in a regular ecclesiastical court he is to be punished for it there; he is not to be cited before the High Commission. If you like, perjury in ecclesiastical proceedings is not an enormous offense, nor does the High Commission have a kind of supervisory authority over the whole ecclesiastical judicial system, by virtue of which it may punish such abuses of the system as perjury wherever within it they occur. The report leaves hanging, however, the question whether perjury committed in the High Commission itself, in the course of proceedings within its jurisdiction, may be punished by the Commission. To deny that it may seems an extreme conclusion, but it is not an impossible one. If one insists that the Commission has jurisdiction over only a few specified enormities, and perjury is not among them, it may well follow that perjury even in a legitimate High Commission case must be prosecuted in a regular ecclesiastical court. To the principal holding, Coke is reported to have added a further point: In practice, he said in effect, perjury committed in ecclesiastical courts was not always left to the ecclesiastical system. Rather, it was commonly punished in the Star Chamber. (That practice in no way conflicts with 5 Eliz. The statute exempts perjury in ecclesiastical courts from new penalty actions created by it, but it expressly saves means of prosecuting perjury which already existed when the statute was made. The major effect of that proviso was to preserve Star Chamber jurisdiction over perjury in the temporal sphere as an alternative to the newly created procedures, but there could be no reason why it should not save such jurisdiction in the spiritual sphere as well. ) Calling attention to the Star Chamber’s role in punishing ecclesiastical perjury reflects in two ways on the judges’ holding concerning the High Commission. First, it points up the contrast between the Star Chamber and the High Commission, the sense in which the Commission should not be conceived as a kind of “ecclesiastical Star Chamber.” It was a function of the Star Chamber, as an extraordinary court with a special responsibility for punishing abuses of legal process, to deal with perjury committed anywhere in the judicial system, whether in

95 T. 7 Jac. C.P. Harg. 52, f. 15.
96 T. 7 Jac. Identified in the margin as C.P., but called in the text a Serjeants’ Inn case. Identified as the case of “Walgrave in Bucks.”

298
the lay or the ecclesiastical branch. According to our principal holding, the High Commission was not to function as an equivalent tribunal for the ecclesiastical system alone. Secondly, the Star Chamber was simply available as a supplement to ecclesiastical courts for ecclesiastical perjury. There was no need for the High Commission to serve as a duplicate supplement to ordinary ecclesiastical courts. The availability of the Star Chamber may, indeed, argue that the Commission ought not even to punish perjury committed in its own cases. It is perhaps disturbing to imagine perjury in the superior High Commission being tried in an inferior Bishop’s court, but there is no oddity in holding that such perjury belongs to the still-superior, more comprehensive Star Chamber.

A dictum by Coke from early 1610 takes a surprisingly broad view of the Commission’s jurisdiction. In the principal case reported, the Common Pleas refused to prohibit a regular ecclesiastical court from prosecuting a man who said he would not listen to sermons by ministers who came to their positions via Bishops—i.e., presumably, by episcopal institution. That is a highly predictable decision, the sort of Puritan case in which the courts were not inclined to interfere with ecclesiastical discipline, including that wielded by the High Commission. By the way, Coke noted another case, in which a parson sued someone in the High Commission for calling him “knave.” According to Coke, this suit was regarded as good in itself, but it was prohibited because the Commission imprisoned the defendant. Coke seems to cite this decision with approval, presumably thinking it supportive in the principal case. (If ecclesiastical courts, even the High Commission, may proceed for defaming a clergyman by words so trivial that they would probably not be defamatory of anyone else, surely they may proceed for a much more serious expression of disrespect toward the constituted ecclesiastical order.) Coke’s citation seems to deviate from Darrington in two ways: (1) It extends High Commission jurisdiction, not to all ecclesiastical causes, presumably, but to small-potatoes disrespect for the cloth. (2) Contrary to Darrington, it does not treat jurisdiction and the power to impose secular sanctions as coterminous. I can only explain the report by supposing that Coke casually used a pre-Darrington holding for his immediate purpose without considering its correctness by present standards, if indeed he thought the standards had been decisively changed.

With three reports from 1610, we return to marital disputes. One, George Melton’s Case, tells us that Melton was imprisoned by the High Commission in his wife’s suit for separate maintenance, a separation having been made between them. No further particulars are given—at what stage of the wife’s suit and to what end the husband was committed, whether the separation was de facto, as that in Langdale probably was, or by order of the Commission or another ecclesiastical court. We are told in addition that Melton was compelled to enter a bond to abide by the Commission’s award (but not whether he had actually entered it, as opposed to holding out and suffering imprisonment wholly or partly for his refusal.) Whether the case reached the Common Pleas by Habeas corpus or Prohibition is not reported. In any event, three judges—Coke, Walmesley, and Daniel—held that the imprisonment was unlawful. So far as the report indicates, that is all they held. I.e., there is no affirmative sign, at any rate, that the judges objected to the

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97 H., 7 Jac. C.P. Add. 25,209, f. 180b.
98 P. 8 Jac. C.P. Add. 25,209. f. 197.
Commission’s taking jurisdiction of the separate maintenance suit, if only it had not resorted to a temporal sanction. Justice Walmsley, at least, should be expected so to distinguish the scope of the Commission’s jurisdiction from the more limited range of its secular sanctions; that position would be more surprising in Coke and Daniel (cf. Langdale.) In support of their holding, the three judges cited the statute of 1 Hen. VII, c. 4, permitting the imprisonment of incontinent priests. The relevance is presumably to say that ecclesiastical courts have no inherent power to imprison, for to the extent that they have the power it has been by statute, and to the extent that the High Commission has it the warrant of statute before 1 Eliz. is required (as held in Darrington.) After this principal point, the report has Daniel and Walmsley saying that it was unlawful to take a bond of the sort demanded of Melton. Is it possible that Coke’s not being mentioned in connection with this holding means he doubted or dissented? It of course need not mean that. (There is no sign of dissent by the other members of the court, Foster and Warburton; they were probably simply absent.)

A second report from the same term 99 in the form of an opinion not tied to a particular case, is probably only another version of Melton. It in any event, it appears to confirm that in an alimony suit, if not across the board of ecclesiastical causes, the High Commission may not fine or imprison, but may handle the suit by means of excommunication and De excommunicato capiendo, again in apparent disregard of the enormity test. Bonds to abide the award of the court are also said to be “void.”

Lady Throgmorton’s Case, from the next term,100 in a sense clears up points left hanging by Darrington and subsequent cases and in a sense introduces further confusion into the picture of just what the Common Pleas held. The double effect is owing to two reports which are not irreconcilable but do differ in emphasis. It will be best to look at them separately.

(a) The report from posthumous Coke (12 Reports) gives the facts and the outcome straightforwardly. It appeared by return on Habeas corpus that Lady Throgmorton was imprisoned for (1) “many evil offices” between Sir James Scudamore and her daughter, Lady Scudamore, to the end of causing the Scudamores to be separated and for “detaining” Lady Scudamore from her husband and (2) speaking contemptuous words of the Commission after sentence (“she had neither law nor justice there.”) I.e., it would appear that the interfering mother-in-law was prosecuted for breaking up a marriage, convicted, and sentenced. Whether she was sentenced to imprisonment for the primary offense, or in order to enforce some other sentence, or only for the contemptuous words, is not clear, but the record on Habeas corpus, at any rate, related the imprisonment to the offense, not merely to the contempt. The court reportedly resolved, first, that the offense was not enormous and hence not within the Commission’s jurisdiction. I.e., taking the case was held objectionable, not simply imprisoning in connection with such a case—a predictable application of the enormity test, were it not for the disturbing note in Melton. (A suit for separate maintenance hardly seems more appropriate to the Commission than a prosecution for sowing domestic discord.) The court also said that a common law remedy would lie for detaining Lady Scudamore from her husband, which is of course a reason why no ecclesiastical court should proceed for

99 P.8 Jac, C.P. Harg. 15, f. 208b.
100 T. 8 Jac. C.P, 12 Coke, 69; Harl. 4817, f.218.
that. It said further that the wife could not be imprisoned for such an offense. Since there is no sign that Lady Scudamore was prosecuted along with her mother, though she may have been, I take this remark as reinforcing: A wife may not be imprisoned for doing of her own accord what Lady Scudamore stirred up her daughter to do—running away from her husband and avoiding his efforts to get her back. If that is so, surely a third-party promoter of such conduct may not be imprisoned. Note, however, that by the letter the report does not say that the High Commission could not proceed against the wife, only that it must not imprison her.

Secondly, as to Lady Throgmorton’s contemptuous words, the judges held that it did not appear that the words were spoken in court, and that even if they were imprisoning the party was unlawful because the Commission was not a court of record. The implied position would seem to be: (1) the Commission may not punish for expressions of disrespect spoken out of court, but may punish, as for contempt of court, if the words are spoken in the face of the sitting Commission; (2) in the latter case, however, it must confine itself to spiritual sanctions, for only contempt of a court of record is a misdemeanor summarily punishable by imprisonment by the court offended. (I put it this way because other cases suggest that contempt of the Commission may be prosecuted by information or indictment at common law and punished by imprisonment. The present holding could quarrel with that rule, but it need not.)

Having held against the Commission on both scores, the court proceeded to bail Lady Throgmorton, rather than release her outright. I find this result hard to interpret except as an example of discretion employed in Habeas corpus cases to avoid challenging the High Commission too abruptly, even when it was found to lack jurisdiction and to have used inappropriate sanctions. Other cases display the same tendency. One must ask whether, in marital matters involving the highly placed, the common law courts did not recognize a certain virtue in the High Commission’s taking a hand, even though properly such cases belonged to regular ecclesiastical courts and processes.

Coke’s report concludes by adding another case from the same term: a Habeas corpus in which Randal and Hickins were remanded to prison because they were shown to have been committed on vehement suspicion of Brownism. Coke explains this decision by saying, consistently with his opinion in Darrington, that Brownism is heresy. Imprisoning power in enormous cases is here extended to the suspected, as opposed to the convicted or those who refuse to cooperate with the Commission. Coke introduces the case to point to its contrast with Lady Throgmorton—the enormity case as against the case of misconduct in marital affairs.

(b) The MS. report comes from a series headed “hors del liver de Justice Warburton”, Warburton being a member of Coke’s Common Pleas. It is identifiable as the same case as that reported in 12 Coke only by being labeled “Lady Throckmorton’s Case”, for it bears no date and gives neither the facts nor the judgment in the case at hand. Rather, it reports in general terms certain holdings about the High Commission. I see no reason to doubt, however, that the report relates to the same Lady Throgmorton’s Case we have just discussed. The points it makes are appropriate to the context of that case, even though they do not go to its immediate issues. I surmise that the case gave the court occasion to speak more at large than Coke’s report suggests.
In any event, the MS. has the court holding that the High Commission may imprison in some cases and in others not, and may sometimes fine and sometimes not. This states as a clear generalization what other cases leave in doubt: The Commission’s jurisdiction and its power to employ secular sanctions are not coterminous. The report then proceeds to put flesh on the generalization. It reiterates the basic holding in *Darrington*: the Commission may imprison in those cases in which ecclesiastical courts could imprison by the authority of statutes in force before 1 Eliz. That means heresy, as is clear in *Darrington* and explicit in the present report. Whether it means schism and serious religious error short of heresy is left open, as before. The present report’s advantage over those of *Darrington* is that it draws an explicit conclusion from 1 Hen. VII (incontinent clerics.) That statute is plainly given the same status as the medieval heresy acts: Anyone may be imprisoned for heresy; a clergyman, but not a layman, may be imprisoned for incontinence. The language of the report is such, however, as to suggest that the judges may have meant to give 1 Hen. VII a wider significance—as permitting the Commission to imprison clerics for any offense appropriate to its jurisdiction, not just the acts of incontinence covered by 1 Hen. VII. One cannot be sure that that was intended, and the convincingness of so projecting from 1 Hen. VII is not evident, but the language of the relevant passage is notably general. (“Auxi per le statute de 1 Hen. VII, c.4, le Ordinary poyt imprison un ecclesiastical person pur incontinency, et pur ceo les Hault Commissioners poyt imprison ascum ecclesiastical person mes nemy un temporall person nient plus que le Ordinary poyt.”) The ambiguity hangs on “ascun.” It could mean some ecclesiastical persons—viz. ones guilty of incontinency—or it could mean any ecclesiastical person, which is linguistically more compatible with the singular number. The sentence just quoted is followed by “et quant al imposer des fynes ils ne poyent ceo faire.” This I take to mean that the Commission may not fine an incontinent, or perhaps otherwise offending, cleric, because the warrant for that case, 1 Hen. VII, speaks only of imprisonment, not of fines. It cannot mean the Commission may never fine, because the report has already said that it sometimes may. I do not see how one can deduce a power to fine from the medieval heresy statutes, except by the theory that power to impose a lesser secular punishment is comprehended in the power to impose the greater one of imprisonment, and that reasoning seems as applicable to the incontinent clerics act as to the heresy acts. The puzzling upshot seems still to be that an incontinent cleric may not be fined, but a heretic may. (The final, incomplete, sentence of the report, following the words just quoted, is “Et nota que le dame Throckmorton fuit imprison pur ceo que…” It seems as if the reporter were at last ready to say something about the case at hand, but was interrupted before writing down the cause of Lady Throgmorton’s commitment. The context, however—discussion of the power to fine—suggests a speculative possibility about the facts: that Lady Throgmorton may have been fined and then imprisoned to enforce payment. The nature of her offense—non-religious and hardly of the gravest criminality—would make a fine the predictable secular punishment in the first instance.)

For the rest, the MS. restates the enormity test and the general principle that 1 Eliz. has a restrictive force. (On the latter point, the judges imagined alternative words which would have allowed the Commission to use secular sanctions to any extent the monarch chose—“according to such censure and manner as shall be appointed in and by the said letters patent.” But given the actual words of the statute the Commission was
confined to sanctions already employable by ecclesiastical courts, either de jure or by statutory authority.) No content is given to the enormity standard except for the negative statement that matters between party and party, such as proving of wills, and “common inferior causes” are beyond the Commission’s jurisdiction. The rest of the report insists that clerical incontinence must be added to Coke’s list of High Commission causes in Darrington and perhaps suggests that other clerical misbehavior of comparable gravity should be added. It may also suggest that punishment of clerics by imprisonment in cases unaffected by the medieval heresy statutes—say bigamy or polygamy—might be justified where such punishment of laymen would not.

The report of Eager’s Case, from the next term,101 consists entirely of generalities and is rather unclear. Standing alone, it might be read as denying the Commission’s power to fine and imprison altogether, but I doubt that it does any more than repeat the general holdings in Lady Throgmorton. A second report from Michaelmas, 1610,102 has Coke saying by the way, in a tithe case with no apparent connection to the High Commission, that Fuller upheld the Commission’s power to imprison for heresy and schism. His explanation is the now well-entrenched theory that 1 Eliz. transferred to the High Commission such imprisoning power as medieval statutes gave to regular ecclesiastical courts, even while repealing those statutes. Coke seems to have had no doubt that schism, as well as heresy, was within the medieval statutes.

Three specific holdings from the same term are reported. One 103 confirms by an actual decision Coke’s previously expressed opinion that polygamy is a High Commission crime. It also shows notable reluctance to interfere with the Commission’s handling of substantively appropriate suits. In this case, a man cited before the Commission for polygamy was acquitted of the offense, but nevertheless censured to pay costs. He sought a Prohibition to block the sentence for costs. The Common Pleas denied Prohibition, relying on the principal-incident doctrine. I.e., the Commission was entitled to proceed for the crime of polygamy; therefore Prohibition will not lie on account of such an “accessory” decision as a costs award. One can of course object that it is scandalous to charge costs against an acquitted party, and also that the courts did not consistently refuse to prohibit the “incident” when the “principal” was within a tribunal’s jurisdiction. Coke tried to soften the decision by saying, “peradventure it was very suspicious that he was guilty.” I do not find the scandal much mitigated by the suggestion that an innocent party is not really treated unjustly if made to pay for litigation caused by conduct he was reasonably suspected of. One is inclined to posit considerable “political will” not to make an issue of the High Commission’s doings so long as it stays within its jurisdiction.

The same policy of perhaps overdone restraint can be seen in Parker’s Case.104 The High Commission deprived Parson Parker of his living for drunkenness, and Parker sought a Prohibition. We are not told his grounds, but they must have been that drunkenness, even in a clergyman, is not a High Commission offense, and that deprivation on relatively trivial grounds by the Commission is especially objectionable.

101 M. 8 Jac. C.P. Harg. 15, f. 225.
102 M. 8 Jac. C.P. Add. 25,209, f.205b.
103 M. 8 Jac. C.P. 2 Brownlow and Goldesborough, 7.
104 M. 8 Jac, C.P. 2 Brownlow and Goldesborough, 37.
because it imposes a serious loss without possibility of appeal, The Common Pleas in this case simply side-stepped deciding whether the Commission had exceeded its authority. It denied the Prohibition, and instructed Parker to bring an action for the tithes attached to his living, whereby the validity of his deprivation could be drawn in question. Why were the judges unwilling to act straightforwardly on the application for Prohibition before them? Two slightly different answers are possible: (a) Judicial restraint is simply the right policy toward an extraordinary ecclesiastical court of high rank, backed by the government and putatively performing what it conceives as important functions for the well-being of the Church. Therefore, even when the Commission appears to be exceeding its authority, one ought to avoid checking it directly when other means are available to insure that the law is correctly applied in the long run, and one should be reluctant to draw sharp lines around the Commission’s authority when it is not necessary to do so. Here the suggested action for tithes is a feasible alternative to the direct check of a Prohibition. If gone through with, the tithes action might eventually require a decision on the Commission’s powers, but later rather than sooner. If a decision against the Commission should turn out to be necessary, it would not take the form of a direct restriction on the Commission, but of a judgment against a private party—successor-parson or parishioner—claiming that Parker was duly deprived. Litigation about the tithes might manage to stay within the ecclesiastical system, questions about the validity of the deprivation being raised and decided there, possibly against the Commission. Finally, litigation about the tithes might not force a decision on the Commission’s legal power. It might, for example, be resolvable in Parker’s favor on the facts (if he could manage in pleading to get behind the sentence of deprivation and reopen the question whether he was guilty of drunkenness) or on the incidents of procedure (as if he could show that sentence was given against him without proper evidence or the like.) (b) Other cases indicate that the Common Pleas was not quite firm, or unanimous, in the conviction that the Commission was excluded from dealing with a fairly wide range of clerical misconduct. The position that it could not only proceed, but imprison, for clerical incontinence may have been at least a source of awkwardness—a reason for wondering whether other behavior seriously unworthy of a clergyman might not be enormous enough, even though the same behavior in a layman would clearly fall short of enormity. The decision in Parker might reflect an inclination to hold that clerical drunkenness is appropriate to the Commission, or at least enough doubt on the question to recommend avoiding a contrary holding, especially when Parker could have another hearing by way of tithes litigation if he wanted to insist on one.

The last decision from Michaelmas, 1610, in Dr. Conway’s Case, confirms that sexual offenses committed by a layman, save for incest and polygamy, are outside the High Commission’s authority. Conway and his wife were prosecuted together, the wife for adultery with one Sir Michael Blunt and the husband for conniving at the affair as a “wittal” or pimp. The proceedings were prohibited, partly on the express ground that no enormous offense was charged. The element of distastefulness beyond simple adultery, pandering for one’s wife, was insufficient to promote the crime to a higher rank. There was, however, a separate ground for Prohibition: a general pardon covered the offense, in spite of which costs had been taxed against Conway. (Conway’s doctorate need not

105 M. 8 Jac. C.P. 2 Brownlow and Goldesborough, 37.
identify him as a cleric. One may wonder whether the Commission would have been held unauthorized to proceed against a clergyman for the gross indecency he was charged with. He was probably a physician or civilian.)

Two decisions from the next term—Hilary, 1611—add no new limits on the High Commission, but implement well-established principles. The more important of these, Huntley v. Clifford, \(^{106}\) has been discussed in Vol. II (pp.373-375) because of its bearing on incriminatory inquisition. For the rest, that case of blatant impropriety and abuse on the Commission’s part makes the following points: The High Commission has no jurisdiction over a complaint sounding in breach of promise to marry. Mary Clifford’s promisee, Huntley, claimed that she intended to marry one Cage instead of himself and sued in the Commission to restrain her both from doing that and from cohabiting with Cage. The Common Pleas prohibited and clearly would have done so even if there had been no procedural irregularities to add justification for the Prohibition. The ideas behind the decision are not rendered in exactly the same way in the reports. The small differences project to significantly different pictures of the court’s thinking. (1) Harl.4817, which may have been written by Justice Warburton, a member of the court, says that the Commissioners “must deal in high matters, and therefore it is called the High Commission, but they may not meddle in inferior matters, which are called civil causes or ordinary causes, such as contracts of matrimony, legacies, pensions, portions, tithes, or such like, for those are not any offenses or contempts, but civil or ordinary causes, and cognizance of such matters belongs to the Ordinaries, and not to the High Commission.” This language, represented as what the whole court agreed on, is not extremely restrictive. It is interesting for its hesitancy about taking a civil-criminal distinction as quite adequate for demarcating the Commission’s authority. The examples, however, are all of matters where it is next to inconceivable that litigation could be commenced except on the initiative of a party harmed in a material interest. At the same time, this report avoids drawing any lines within the area of “offenses and contempts” (an expression approximating “crimes” but still different), or within the area of matters at least amenable to ex officio prosecution (though not solely prosecutable in that form or incapable of being intermixed with interested private claims.)

(2) If there is one member of the court whom I would suspect of a propensity to exclude the Commission only from strictly civil cases, it is Justice Walmesley. In Brownlow’s report, Walmesley speaks first to the question of jurisdiction, agreeing with the result and saying, “… these High Commissioners ought to meddle only with things of the most high nature, and not of [sic] things which concern matrimony, and the ordinary jurisdiction.” These words do not suggest a strict civil-criminal distinction so much as the antithesis between routine cases, including merely civil ones, and a few enormous offenses. One may still wonder whether Walmesley’s participation in the decision might not have been based on a narrower understanding of it than his words suggest. It is questionable, in view of other cases, whether he was ready to exclude the Commission from everything concerning matrimony short of situations involving the gravest sexual crimes (Cf. Langdale.) Coke, following Walmesley in Brownlow, says only that the Commission may not meddle with civil causes, instancing tithes and legacies and

\(^{106}\) H. 8 Jac. C.P. Harl. 4817, f. 219; 2 Brownlow and Goldesborough, 14; Harg. 15, f. 239.
pointing to the usual reasons (the policy of the law can hardly be to “dissolve” the
Ordinaries’ jurisdiction and deprive parties of appeals.) I.e., Coke, speaking for himself
in this version, refrains from going beyond the immediate case and from distinguishing
enormous from non-enormous crimes.

(3) It is not quite clear whether the third report, Harg. 15, is a synopsis of what all
the judges agreed on or Coke’s speech, taken by the reporter as expressing the opinion of
the whole court. In any event, its language on the question of jurisdiction is somewhat
different from that of the other reports: “The ecclesiastical law has two terms or names
for all causes before them, causes civil or criminal, as with us common pleas and pleas of
the crown. Pleas civil comprise common matters, which are testamentary or matrimonial
or for tithes. Criminal [consist] in this—adultery and the like. For the first, the High
Commission by the said statute of 1 Eliz. may not deal [with it.] For the latter, solely in
certain [ascun] of them which are exorbitant and enormous [may the Commission]
intermeddle by this law, and not with legacies, obventions, tithes, pensions, nor
matrimony. For then they could well bastardize anyone’s issue, and no appeal, for it is the
highest court, from which there is no appeal. And this was confessed by the Archbishop
who lately was, that their jurisdiction does not extend to those things.” This version is of
interest because, while insisting that not all criminal causes are proper to the Commission
and in general terms laying down the enormity test, it still represents the civil-criminal
distinction as the main clue to the jurisdiction question and as grounded in ecclesiastical
law itself. It produces the distinctly interesting counter-example of adultery to the most
obviously civil examples also given in the other reports. The emphasized reason for
keeping matrimonial matters out of the Commission’s hands is neither their basically
civil nature nor the non-enormity of most marital misconduct, but the danger of having
marriages invalidated without appeal. That rationale is open to the objection that not
every cause classifiable as matrimonial could lead to invalidation of a marriage, while the
favored enormities, polygamy and incest could.

In sum, the reports of Huntley yield a somewhat confused account of the ratio
decidendi in the case. The absence of a clear embrace of “criminal jurisdiction only and
within that over only a specific list of enormities” may indicate that the court did not get
together on an unambiguous solution or intentionally avoided a decisive generalization. It
was not necessary to reach one in order to hold that a suit for breach of promise to marry,
at the behest of the offended party, is not a High Commission matter. Judicial restraint
may be visible in the very unreadiness to be decisive at a higher level.

(b) Clifford and Cage were arrested by a pursuivant at the outset of proceedings
against them—i.e., were not cited to appear, subject to spiritual sanctions, but attached
bodily as the first step. In clear accord with several earlier decisions, and with specific
reliance on the holding of Glanville and Anderson in Simpson’s (=Symson’s) Case, here
dated 42 Eliz., the arrest was held illegal—“utterly tortious”, per Harg. 15, and false
imprisonment.

(c) Having been arrested, Clifford was compelled to enter a £2000 bond to
answer Huntley’s complaint in the Arches and meanwhile not to marry, make a
conflicting contract to marry, or commit fornication. The bond was held invalid (1)
because it was exacted by duress—i.e., by holding Clifford pursuant to an arrest that was
both illegal in form and motivated by a complaint over which the Commission had no
jurisdiction—and (2) because the Commission was held to have no power to exact a bond
requiring a party to appear in another ecclesiastical court—i.e., the Arches (in the same way, it was said, as the Common Pleas could not make someone enter an obligation to appear before the Council of Wales—the specificity of the example may suggest a specific case.) In Brownlow’s report, Coke generalizes about the Commission’s authority to demand bonds. It may not do so in civil cases, such cases being beyond its jurisdiction. The point of this may be a bit more than truistic, since it is conceivable that if the power existed in could be used to gain a hold on a party to an *ultra vires* suit. Suppose there is no element of duress, as there was in the present case, the effect of which is presumably to make the bond like a secular one exacted by threat of mere force—uncollectable by action of Debt if the duress is proved. Suppose, however, a gullible party is induced to enter a bond to abide the award of the Commission and an attempt is then made to collect on the bond if he changes his mind and seeks to prohibit the suit. I should not think this apparently voluntary bond would be intrinsically “invalid” without a simple rule “no jurisdiction, no bond of any sort connected with the case—an attempt to proceed on such a bond should be prohibited.” On the other hand, Coke said, with conspicuous tentativeness, that it *seemed* the Commission could take a bond in criminal cases, if the case required, but that he did not want to dispute about that or affirm the point for sure. One can only ask what the tentativeness signifies. Doubt and an uneasy inclination toward a complementary “simple rule”—“granting the Commission’s jurisdiction, its choice of means to make its decisions effectual, including perhaps the use of fines and imprisonment, is its own business”? Dislike of bonds, perhaps because other secular sanctions were available, combined with a preference not to lay down broader rules than deciding Huntley required, with which other members of the court might not agree?

(d) Huntley was a terribly weak case from the High Commission’s point of view. All that can be said practically in its behalf is that perhaps the amorous and concomitant material squabbles of a certain class of people (rich enough to impose a £2000 bond on) were too much for the regular ecclesiastical courts and the parties’ misconduct unlikely to be responsive to spiritual sanctions. Despite poor prospects, however, one La Herbe, a B.C.L and a King’s Proctor, was received to argue against the Prohibition. He did so in a high theoretical vein, very likely representing the Commission more than the party Huntley. We need not delay over this phase of the case, which appears from Harg. 15 alone, for the civilian only took the predictable and hopeless line of his party: “…Prohibition ought not to be granted, first, because the King has both ecclesiastical and temporal jurisdiction in his person, and the one shall not control the other so long as they execute what is their proper jurisdiction. And if the King grants to either part more than naturally belongs to it, the other part is not to examine that, because he has two rights and powers in him and may abridge the one and enlarge the other as pertains to him. And inasmuch as they have observed and held themselves within that which is given to them, they may not be restrained from that, for that is to erect altar against altar…” The reporter lacked patience with this (for he adds only that the Proctor “said many things to this effect for the maintenance of their jurisdiction”), and the court was irritated. The Proctor was mistaken, the judges said, in suggesting that they proposed to dispute the King’s ecclesiastical authority; rather, “we are not here to do anything except expound an act of Parliament, that is, the statute of 1 Eliz., which properly belongs to us to expound, and to no others than the judges of the common law, and that is not altar against altar, as was said, but it is to construe that which properly pertains to none other.” By now, years of
practice were founded on the general position thus expressed, by no means all if it illiberal towards the High Commission. Between the lines of the present scandalous case (again, see the discussion in Vol. II for the full flavor) reluctance to hedge the Commission more than was necessary can be discerned. As we shall see from other phenomena than the Proctor’s performance in Huntley, a counter-offensive was working up.

The second case from Hilary, 1611, Symonds v. Green,\(^{107}\) has also been dealt with in Vol. II (pp.382-384, 390.) The decision appears from both reports to have been based on the rule that the High Commission may not arrest accused persons by pursuivant, the least controversial of the holdings in Huntley, well-confirmed by other cases. The MS. report, however, has the judges reaffirming their decision in Huntley generally, which probably implies the tentative view that the Commission was on no stronger jurisdictional ground in this case than in the other, and so prohibitive even if there had not been procedural abuses. Given fully adequate narrow grounds, the court probably preferred to rest on them, rather than take up the Commission’s jurisdiction once more and struggle with whether anything could be said in its favor in Symonds by distinguishing Huntley. Coke says in so many words that he did not want to argue recently debated matters again. In substance, Symonds is close to Huntley: the charge was promoting a clandestine marriage, the making of which was a violation of a previous contract to marry. The offense seems about as doubtful a High Commission matter as the intended breach of contract in Huntley, but circumstances made suing in the Commission perhaps more colorable: The participants in the offense were scattered over several dioceses, and the Bishop with most probable jurisdiction had allegedly requested the Commission to take the case. It seems the part of wisdom not to have gone into the possibility of an anomalous extension of the Commission’s power (which would raise 23 Hen. VIII problems) when a simple resolution was at hand. The arrest was especially egregious, since the pursuivant had demanded fees of the arrestees and received £4 from one of them. Coke called the proceedings tort and oppression and reminded the parties that False Imprisonment would lie against the pursuivant. The Prohibition was upheld “with wonder” on the judges’ part that such troubles and oppressions should be done to the subject.

A third decision from Hilary, 1611,\(^{108}\) concerned a celebrated personage but legally went only to a technicity. Legate, soon to be distinguished as one of the two last heretics executed in England, was committed to Newgate prison by the High Commission for Arianism. He sought a Habeas corpus, and a writ was granted. The whole issue, however, seems to have been whether Newgate was a lawful place for his imprisonment. The basis for saying that the Commission is legally bound to use certain prisons is not clear from this case, nor from a few others in which the matter occurs. Here Coke cites the statute of 5 Hen. IV, c. 10, for the proposition that a Justice of the Peace may not commit a man to a “private prison”, and that it is false imprisonment to do so in violation of the statute. He adds that to commit someone to the Counters in London (the sheriffs’ private prison for debtors) for anything but debt is false imprisonment. The application of these points to the present case is not explained. It would seem that there was some

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\(^{107}\) H. 8 Jac. C.P. 2 Brownlow and Goldesborough, 16; Add. 25,215, f. 78b.

\(^{108}\) H. 8 Jac. C.P. 2 Brownlow and Goldesborough, 41.
objection to the High Commission’s using Newgate; Coke’s brandishing the danger of false imprisonment may come to saying that the Commission, like the officials mentioned, should take its choice of prisons seriously. No outcome is reported. It is surely unlikely that a suspect of unambiguous heresy went free; if Newgate was indeed held to be an improper jail, the threat of liberating him, implicit in Habeas corpus, was probably only used to make sure that Legate was transferred to a proper one.

In the following term, Easter 1611, came Sir William Chancey’s Case.109 This case was something of a landmark for the use of 23 Hen. VIII to expound 1 Eliz. There are two other senses as well in which it stands out. First, it raises squarely issues about the High Commission’s authority over sexual offenses and marital affairs, which earlier cases touch on obliquely and leave unsettled. Secondly, Chancey was the specific occasion for political counterattack by the Commission against the Common Pleas.

Chancey brought Habeas corpus and Prohibition at the same time. This appears from the best report, Brownlow’s, as does the fullest statement of the case; the other reports are consistent but abbreviated. Chancey’s offenses were flagrant adultery, expelling his wife, and allowing her either no or inadequate maintenance. The history of his misbehavior and legal troubles was somewhat complex, and not every detail is as exactly specified in the reports as could be wished. Some considerable time before the present proceedings, he was cited before his Bishop and sentenced to penance for adultery. Whether that suit was ex officio or on the complaint of Lady Chancey does not appear, but there is nothing to suggest that a legal separation was granted or alimony allowed at that time, only the criminal-style spiritual punishment. Chancey then commuted the penance—i.e., made a charitable contribution or the like, with the ecclesiastical court’s assent, in satisfaction of that duty. He then proceeded for several years to live adulterously in his house with two successive women and begot two bastards. At just what point Lady Chancey was turned out does not appear, but she clearly was expelled in favor of the in-residence paramours, if she did not depart on her own motion. At length, Chancey was cited before the High Commission for (a) adultery and (b) not allowing his wife competent maintenance. It is not reported whether the proceedings were ex officio—though presumably on the wife’s information—or in the form of a suit by the wife for alimony, alleging the adultery. According to Brownlow, Chancey was imprisoned because he refused to enter a bond to perform the Commission’s order. Coke has him sentenced to pay alimony and to make submission for the adultery, then imprisoned for failure to carry out the sentence. Either way, he sought to challenge his imprisonment by Habeas corpus and, following Brownlow, also to challenge the Commission’s jurisdiction by Prohibition.

Aside from arguing that 23 Hen. VIII was grounds for excluding the High Commission from this case, Chancey’s counsel, Nichols, made the following arguments:

(a) Adultery is not enormous. The conclusion from that is surely that the Commission had no authority to deal with Chancey criminally for that offense. But the proposition also raises some collateral questions: May the Commission notice adultery as part of a pattern of marital misconduct that would justify an award of separation and alimony?—a question that obviously involves the further one whether it may make such

109 P. 9 Jac. C.P. 12 Coke, 82; 2 Brownlow and Goldesborough, 18; Harg. 15, f. 54b, sub. nom. Chauncye.
civil awards in any circumstances. It would be possible to argue that the Commission may award a wife maintenance after convicting her husband of incest or polygamy, those offenses being within its criminal jurisdiction, but not upon convicting him of adultery. On the other hand, one could argue that settlement of disastrous marital situations is simply, as a civil matter, beyond the Commission, so that the incestuous polygamist can only be punished criminally; if his wife is entitled to a divorce, she must seek it in the Bishop’s court. Theoretically, though this would be hard to justify, one could argue that the High Commission has civil jurisdiction in separation and alimony cases, even though no crime within its authority, or no crime punishable by spiritual sanctions at all, is charged against the husband.

(b) No ecclesiastical court may in any event imprison a layman for adultery—or, as one must say to meet the facts of this case, in connection with adultery, even to enforce a spiritual sentence; nor may any ecclesiastical court put a party under the pressure of a bond to fulfill such a sentence. This is apparent from the fact that it is only by force of the statute of 1 Hen. VII that clergymen may be imprisoned for adultery by ecclesiastical courts.

(c) No ecclesiastical court may grant alimony unless the husband is unwilling to live with his wife. Per Nichols, Chancey was desirous of cohabiting with Lady Chancey (now at any rate—nothing in the report reveals whether he took the position that her removal was all along her own choice.) But even if alimony were awardable by a regular ecclesiastical court, it is not a High Commission matter and should not be granted by a court from which there is no appeal. (These propositions are stated categorically, so as presumably to imply that the High Commission may not award alimony even if it has criminal jurisdiction over matters connected with the breakdown of a marriage.)

Dodderidge, arguing contra, took a precise, narrow position. The report identifies him as the King’s Serjeant. By virtue of his position, he probably appeared at the behest of the Commission and the government. (One should note the contrast between this common lawyer and the civilians received in various cases to defend ecclesiastical interests. Dodderidge concedes what was likely to be lost and looks for winning ground; civilians, as in Huntley above, tended to open wide, foredoomed theoretical questions.) He admitted the general proposition that the Commission is confined to enormities and that the matters in question, adultery and alimony, are not “originally” enormous. He went on, however, to argue that Chancey’s behavior in the circumstances of this case did amount to an enormous offense—his persistence in adultery of a flagrant character after being disciplined by a regular ecclesiastical court, whereby he established himself as an incorrigible offender.

Dodderidge’s theory is not without problems, but it makes a good deal of common and historical sense. Is Parliament likely to have created an extraordinary court with an absolutely definite list of offenses it was entitled to handle in mind? Is it not more likely that the legislature was looking to need and contemplating that although only a few offenses are by nature so grave that ordinary courts may not be adequate to them, others can become so aggravated by circumstances that it may be necessary for the extraordinary tribunal to step in? It is a problem for this approach whether all lesser crimes, if appropriately aggravated by such factors as defiance of ordinary courts and the evident failure of such courts to meet it, should be allowed to go to the Commission. Perhaps a “moral gravity” test for the original offense would be required and hence
explicit argument in such a case as this that adultery qualifies as close enough to the
recognized enormities while other specifiable ecclesiastical crimes do not. More
generally, the approach requires conceding to common law courts considerable
discretion, in Prohibition or Habeas corpus proceedings, to assess whether substantial
signs of aggravation, incorrigibility, or the helplessness of regular ecclesiastical courts
really exist. Nevertheless, the Dodderidge theory perhaps offers the best answer to “Why
should there be a High Commission?” unless one accepts the historically plausible view
that the tribunal was intended only to handle heresy and its near relatives, a view which
Coke’s willingness to stretch the list of enormities at least to polygamy and incest tends
to subvert.

Dodderidge’s position makes the better sense if the High Commission is entitled
to use secular sanctions whenever it has jurisdiction. I.e., if the Commission was
essentially meant to do what the regular courts, either presumptively for some offenses or
in actual aggravating circumstances, cannot effectively do, must the Commission not
have been given teeth that the regular courts lacked? The advantage of turning someone
like Chancey over to the Commission must surely consist mainly in exposing him to the
choice of reforming his ways or going to jail. It is rather idle to say merely that he is
worse than a simple adulterer—enough worse to pass the border between enormous and
non-enormous offenders—and therefore within the Commission’s jurisdiction, and then
to add that the Commission may do no more than try its luck with the spiritual sanctions
that had already failed. If Dodderidge is taken as speaking to the Habeas corpus, he must
be understood as making that extension of his point—i.e., as arguing that the Commission
has jurisdiction over aggravated adultery and by the same token may use imprisonment,
at least as a means to make its award effectual if not as a punishment proper. Coke’s
report, however, says that Dodderidge did not try to maintain that the imprisonment was
lawful. If that is correct, he conceded not only that adultery must be aggravated to give
jurisdiction, but that, having jurisdiction, the Commission is still confined to spiritual
sanctions. The concession tends to undercut the jurisdictional argument in the way I
suggest, but that does not prevent it from being a prudent anticipation of the court’s
opinion.

Dodderidge’s position leaves its civil implications hanging. Once an aggravated
form of criminal misconduct gives the Commission jurisdiction, may it award civil
remedies appropriate to the situation, such as granting alimony to Lady Chancey? For
that matter, could aggravated resistance to performing a merely civil duty, such as paying
tithes, justify the High Commission’s assuming jurisdiction? In sum, would Dodderidge
have presupposed the rule that the Commission is exclusively a criminal court, and did
the Commission do more than extend the enormity test to aggravated forms of non-
enormous crime?

The judges did not respond at once to counsel’s arguments. On a later day,
Justices Foster, Warburton, and Walmesley spoke generally to the High Commission’s
powers in the area of this case, dividing Foster and Warburton versus Walmesley. They
did not speak directly to Dodderidge’s aggravation theory. (So Brownlow reports. In his
own report, Coke associates himself with the position of Foster and Warburton. He was
probably absent from the first discussion. Coke acknowledges Walmesley’s dissent.) The
Foster-Warburton opinion amounts to cursory acceptance of all Nichols said: adultery is
not enormous; use of secular sanctions is in any event unlawful in such a case as the
present one; alimony is beyond the Commission’s jurisdiction. The MS. report, which gives the court’s opinion without stating the case and without mentioning the dissent, adds a little emphasis on the last point. This version makes it clear that the court accepted Nichols’s contention that an award of alimony was inappropriate in this case apart from the Commission’s jurisdiction to award it. Whereas Nichols says generally that alimony may not be granted if the husband is willing to cohabit with his wife, the judges say it may be granted by Ordinaries on “divorce”, but not on separation. I.e., alimony is grantable on a court-ordered legal separation (“divorce”), not when a wife is driven out de facto, or when she goes away with justification, but does not bother to sue for a “divorce.” (The husband’s willingness to cohabit would ordinarily bar a legal divorce, I assume, but perhaps not in every situation. Whether there might be exceptions makes a question, not only about the ecclesiastical law, but about the common law courts’ tolerance for ecclesiastical decisions in marital cases. Would the grant of a divorce withstand Prohibition in the face of evidence of the husband’s present willingness to live with his wife?) The MS. report also confirms that the appealability of alimony awards seemed important to the judges; they emphasize that such an award may be appealed on the ground that it is excessive in amount.

Walmesley’s dissent, delivered at greater length than the Foster-Warburton view, goes unmistakably only to one point—criminal jurisdiction over adultery. He says nothing about the alimony as a separate question and may have agreed with his brethren on that. On the lawfulness of imprisoning Chancey, his position was complicated, as will appear. On the criminal jurisdiction, Walmesley held that adultery is an enormous offense. He says that in so many words. His reasoning, however, is far from certain. He starts out by endorsing the enormity test and proceeds to apply it so that adultery comes out an enormity. His reason is explicit: adultery is forbidden in the Decalogue. At first sight, it may seem that there could hardly be a better criterion. On reflection, however, questions quickly arise. Is it convincing that every article of ecclesiastical criminal law with a basis in the Decalogue is an enormity by the intent of 1 Eliz. (one might instance cursing and Sabbath-breaking as problem cases)? My inclination in the end, even so, is to think that Walmesley did embrace the strong position that would confer jurisdiction over some seemingly minor offenses on the High Commission. If so, however, he did little more than propose a refined version of what he had long been disposed to think: viz. if an action is a crime (not the basis for a civil claim assigned to the ecclesiastical system, such as the paradigm cases of tithes and legacies), and if it falls under ecclesiastical jurisdiction (of course some offenses in the Decalogue were preempted by secular law), then it is up to the ecclesiastical system to decide whether resort to the extraordinary High Commission is justified. The refinement in Walmesley’s Chancey opinion is to concede that High Commission offenses other than heresy must by the language of the statute be enormities and to imply that by and large ecclesiastical crimes are enormities. This need not mean, I suggest, that they are all evidenced by the Decalogue, only that they can be shown to be clear divine mandates not incorporated into “human” or secular law. Of course an express commandment of God in the Decalogue is the most, perhaps the only, indisputable example, and sufficient to the needs of Chancey, but there would seem to be no reason to exclude more constructive ones from consideration.

I think that this interpretation of Walmesley is borne out by his further remarks. From declaring that its place in the Decalogue makes adultery an enormity, he goes on to
dispute the other judges’ view that “enormity” and “exorbitant crime” are synonyms. Resorting to etymology, he insists on the root sense of “enormous”, whereby its meaning is closer to “illegal” (a broad enough term to include disobedience of clear divine law) than to “extremely grave” or “outrageous.” (“…enormous is where a thing is made without rule, or against law.” So the translated report; read “done” for “made.”) He then reinforces his linguistic point by looking at English legal usage: Writs of Trespass use the phrase “et alia enormia ei intulit,” where the reference is not to extreme crimes, but only to the trespasses specifically recited in the writ before that phrase (“…and yet these are not intended exorbitant offences, but other trespasses of the nature of them, which are first expressed particularly.”) So interpreted, Walmesley’s position seems to me coherent, though it leaves many problems about how to isolate true ecclesiastical crimes from the whole class of misdemeanors dealt with by Church courts, many of which are harder to classify than the clearest analogues of secular civil claims. It may still be constructive to hold that the problem is not one of weighing “gravity”, which is not easily ponderable, but of placing an offense, as it were, in the theory and history of Christian moral doctrine; adultery, at any rate, is an easy case on that premise.

Walmesley concludes the first part of his speech by saying that 1 Eliz. had been expounded as he expounded it for many years. It is unclear whether he means only that adultery has been recognized as a High Commission offense, or that his exposition of the general sense of “enormity” had been accepted. Either way, his statement may at first sight seem factually dubious. I am not sure, however, that the evidence above in this chapter decisively rebuts it.

When he turns to the Commission’s power to imprison, Walmesley comes down much closer to the other judges. Coke reports expressly that he concurred with the rest of the court in holding Chancery’s imprisonment unlawful. That report has him saying that it would be unlawful even if the Commission had been imprisoning in such cases for twenty years. That position would come to saying that jurisdiction over adultery does not entail authority to imprison in connection with adultery proceedings. Along with the rest of the court, to go by earlier cases, Walmesley would have held that the Commission may imprison only in those cases in which ecclesiastical courts had imprisoning power by statute before 1 Eliz.

Brownlow’s report, however, shows that Walmesley reached his final position only with some difficulty. In that account, he starts out by saying that the High Commission had been imprisoning for twenty years. That could mean in adultery cases or across the board in cases that came before it and were not halted by Prohibition. He then admits that there was no warrant for the practice in 1 Eliz., but observes that it was authorized in the King’s patent. Whether the authorization by patent was lawful without the backing of the statute Walmesley does not say one way or the other, as if he might consider that question still open. He expresses reluctance to interfere “suddenly” with longstanding practice and concludes by giving a day at the beginning of the next term for argument on the imprisoning power.

Walmesley’s assigning the day for reopening the case, as senior puisne Justice, shows that Coke was not present at the first discussion. Probably only the judges who spoke on that occasion—Warburton and Foster in addition to Walmesley—were in court. Another round of debate was clearly necessary, as a courtesy to the absent judges and
also because the *Habeas corpus* was a separate procedure not yet addressed. Even *quoad* the Prohibition there was not yet a certain majority of the whole court in favor of a writ.

Going by the two printed reports, the court’s final stance was agreement on the illegality of the imprisonment offset by a 3-1 split on the Commission’s jurisdiction over adultery. Neither report gives a judicial reaction to Dodderidge’s argument that adultery aggravated in the way it was in the circumstances of this case was proper to the Commission. The MS. report corrects the impression that that argument was ignored. This non-narrative report only summarizes the court’s final opinion. While otherwise consonant with the printed versions, it records further that the judges were moved by Dodderidge’s contention, though undecided as to its ultimate correctness. (“But the Justices said that because the party was sentenced in the Ordinary’s Court to do penance and reform himself, which he has done, and yet is newly relapsed in the same sin and perseveres in it more grievously, whether this circumstance will not alter the nature of the act and make that determinable before the High Commission which was not originally, and they doubted thereof.”) Their doubt on this score, I think, was an important consideration behind their final action.

To that final action we come at last. Pursuant to the *Habeas corpus*, after asserting their right to deliver someone unlawfully imprisoned, the judges exercised their discretion and bailed Chancey. He was instructed, while free on bail, to attend on the Archbishop and do what right and reason required (Coke’s report). He did so attend, the Archbishop assumed a mediator’s role, Chancey was reconciled with his wife, “and that was the end of this business” (Brownlow). It is clear, I think, that the court simply took no action on the Prohibition. To have prohibited the Commission, the judges would have had to make up their minds on the effect of aggravating circumstances, the matter they were in doubt about, and if the majority resolved that against the Commission they would have had to act as a divided court. As it was, they asserted a principle they agreed on and took advantage of their rather principle-free discretion, which is attested by several cases, to bail the unlawfully imprisoned whom they might have liberated. Going by results, the discretion could be useful, as *Chancey* shows, and as the judges probably realized, though they were also probably aware that it was the better part of valor not to display implacable hostility toward the High Commission. In an oblique way, Dodderidge won his case on pretty much the ground he chose. Although he did not get a decision against Prohibition, his shaking the court by his emphasis on aggravated circumstances is likely to have been part of the reason for the compromise handling of the *Habeas corpus*. Claiming High Commission jurisdiction over adultery as such, though congenial to Justice Walmesley, might have prompted the other judges to favor outright discharge of the prisoner as well as denial of the Prohibition. As a final note, Coke’s report adds that the return on the *Habeas corpus* was found insufficient for uncertainty. There is no explanation; it is hard to see in what the uncertainty could have consisted, since Coke, who represents his report as relating only to the *Habeas corpus*, states the essential facts of the case, presumably from the return. Reliance on a technicality as at least an additional reason for finding the imprisonment unlawful is consistent, however, with the court’s preference for narrow grounds.

In the upshot, Chancey’s Case was not a great blow to the High Commission. On the other hand, a majority of the Common Pleas enunciated a strong anti-Commission stance in principle on the sensitive matter of sexual and marital cases involving
substantial people. It is therefore both appropriate and inappropriate that Chancey should have prompted an extrajudicial offensive against the Common Pleas in the term after it was resolved. It is likely that the case pushed a growing resentment on the High Commission’s part, based on more cases than this single one, beyond the boiling point. I shall only summarize the out-of-court proceedings here; for the details and the sources, see the long note at the end of this Sub-section.

The Privy Council first held a series of meetings to consider complaints against the Common Pleas’ handling of the Commission. As usual in such cases of political intervention, the Council was hardly neutral. The hope, at least on the part of the Archbishop of Canterbury and the dominant officers of state, Lord Treasurer Salisbury and Lord Chancellor Ellesmere, was to talk the Common Pleas judges out of their opinion or, failing that, to use their colleagues from the other common law courts against them. Coke was forced to produce a written “brief” in defense of his court, and then the Common Pleas judges were called before the Council and required to defend themselves orally. When they proved unbudgeable, the Council sought to extract pro-Commission opinions from the King’s Bench and Exchequer judges by summoning and interrogating them in the absence of their Common Pleas brethren. This operation had only qualified success. As one would expect from decided cases, King’s Bench opinion was less set against the High Commission. Some encouraging things, from the government’s point of view, were said by some of the judges and Barons. The main result, however, was that the friends of the Commission were persuaded that its patent ought to be narrowed. I.e., even the judges who would not embrace the Common Pleas position thought that the way to avoid future trouble between the Commission and the courts was for the King to give the Commission less sweeping jurisdiction than he had in the past. The politicians and ecclesiastical authorities were either convinced of the merits of that proposal or persuaded that the best they could do without offending a united judiciary was to concede something in the hope that the Commission would be upheld in the more strictly defined powers to be assigned to it. Issuance of a new patent subsequently led to a fresh contretemps with Coke, for it was cleverly—or all-too cleverly—proposed to make him and several other judges members of the Commission. (Laymen and non-civilians were perfectly eligible; Commissions ordinarily included more members than were expected to participate in practice in the tribunal’s business.) Coke thought of reasons—perfectly good ones—to resist this scheme for creating a conflict of interest in certain judges. Whether this further episode undermined such good as the earlier compromise might have done I cannot say. In the last glimpse the documents give of the Archbishop, he seems to be trying to soothe a newly ruffled Coke, rather than defy him further. Whether, in more general terms, the extra-judicial offensive of the summer of 1611 had the effect of making the courts more cautious in their regulation of the Commission, or by virtue of the compromise of mitigating conflict, can only be determined from future cases. “A little, perhaps, but hardly dramatically” is probably the right answer.

For the rest of Coke’s tenure on the Common Pleas, I have only two more cases. Chetwirke’s Case, from the same term as Chancey’s,110 does not go far beyond Habeas corpus policy. Chetwirke having been imprisoned by the High Commission, the return on his Habeas corpus said that he was committed because he was the means of distributing

110 P. 9 Jac. C.P. Harg. 125, f. 246b.
libels “scandalous to the state and government of the Church.” The Common Pleas held the return insufficient “because he could disperse and be the means of dispersing without having notice”—i.e., without knowing the subversive character of the literature. This holding was justified by saying that distributors of libels and forged writings without knowledge of the character of what they distributed were not punishable in the Star Chamber. The court’s action in the light of this holding was stronger than it might have been: the judges bailed Chetwirke instead of giving an opportunity for amendment of the return and leaving him in jail meanwhile. The decision limits the Commission only in the sense of forbidding it to impose criminal liability on, and use imprisonment against, a bookseller or the like for mere unwitting distribution of objectionable literature, or for taking insufficient care to know the content of what he disperses. The court had no occasion to decide whether the Commission had jurisdiction to prosecute and power to imprison an intentional distributor of such material. Earlier decisions suggest that its authority would be upheld in such a case, subject to whatever requirements the court would enforce as to an adequate showing that the literature was really subversive of the Church. The argument from the Star Chamber would seem to imply that where that tribunal could punish for distributing a secular libel the High Commission could proceed for dispersing an ecclesiastical one—and probably imprison for it, on the strength of such cases as Fuller’s, upholding the imprisoning power for schism. As an implementation of Habeas corpus policy, Chetwirke militates against giving the Commission the benefit of the doubt—i.e., presuming that it held Chetwirke liable by appropriate standards, as a knowledgeable distributor, and leaving him to his action of False Imprisonment should the presumption be false. The decision to bail, rather than release outright, indicates respect for the Commission’s presumptive interest in the matter, though it also presumes in the prisoner’s favor compared to merely waiting on a better return.

The last case, and the only one after the flurry of extrajudicial debate prompted by Chancey, is another marital dispute. All the cursory report of this case, Agar’s,111 tells is that a man was sued or prosecuted for beating his wife and calling her whore; that he was sentenced to pay her 3/ per week alimony; that he was subsequently fined for not performing the sentence and required to enter a bond to perform it; and that he had both a Prohibition and a Habeas corpus to deliver him. Obviously he was imprisoned on top of the other sanctions, or because he resisted them. Legally, nothing can be said for the Commission as this case appears. The adultery and aggravated adultery of Chancey are lacking; there is no sign of a divorce, nor of clear entitlement to one; even the clear-cut expulsion of a wife, as in Langdale, is absent. This of course does not mean that the High Commission was not readier to enforce humane behavior on husbands than regular ecclesiastical courts, or than common law courts thought appropriate for ecclesiastical tribunals.

111 T. 11 Jac. 2 Brownlow and Goldesborough, 36. Not identified as a C.P. case, but almost certainly one coming from that series of reports. The report does not even say that the case concerned the High Commission, but it obviously did, at least at the stage where secular sanctions were employed. It is perfectly conceivable that the case originated in a lower ecclesiastical court, the High Commission taking over when the party proved obdurate.
End-note: Sources and details of the 1611 extrajudicial debate.

I have four documents bearing on the extrajudicial debate summarized in the text: (a) Lansd. 161, f.250. This document is headed “The Copy of th’ Information, delivered to his Ma[jes]ty by Mr. Serse his Proctor, touch[ing] the many Prohibitions sent to the High Com[m]issioners Ecclesiasticall fro[m] the Court of Com[m]on Pleas. 1611”

The Privy Council discussions about the Common Pleas’ regulation of the High Commission took place in the summer of 1611 (T. 9 Jac.) The present document, appropriately dated as to year, looks like a, or the, position paper from the ecclesiastical side registering the complaints that led the Council to take action. It is a general statement of objections and a petition to the King to come to the Commission’s help, rather than a precedent-citing argument.

The High Commission’s point of view is clearly stated: The monarch may give the Commission any or all parts of ecclesiastical jurisdiction, civil as well as criminal. Pursuant to this power, Queen Elizabeth gave it, and King James has given it, such unlimited jurisdiction. Their intention was not that the Commission should handle petty matters to the derogation of regular ecclesiastical courts. Rather, the policy has been to trust the Commissioners’ discretion to accept only “exorbitant” cases. By the same token, however, the policy is not to pre-define “exorbitant.” Correct use of discretion would consist in taking major criminal cases plus lesser criminal and civil cases when “the qualities of the persons in question enforced them.” (That, I believe, is close in practical meaning to “divorce and morals cases involving substantial people”, as in Chancery.) The Commission has always in fact used its discretion in this restrained way, and inferior ecclesiastical courts have never complained. The Common Pleas specifically, not the common law courts in general, is criticized for issuing unwarranted Prohibitions. The Common Pleas is correctly enough credited with the position that the Commission may use temporal sanctions in the few “enormous” criminal cases over which it has jurisdiction. I.e., it is not said, falsely, that the court took the more extreme position that temporal penalties are unlawful as such. From the author’s point of view, of course, temporal penalties are lawful whenever the Commission in its discretion decides that a case is major or exceptional enough for it to take.

The paper takes express exception to the Common Pleas position that 23 Hen. VIII was in a sense applicable to the High Commission (one of the points embraced in Chancery), on the ground that that pre-Elizabethan statute in its terms covered only regular ecclesiastical courts. Exception is also taken to the doctrine that the common law judges have exclusive responsibility to interpret statutes. Excessive Prohibitions to regular Church courts, as well as the High Commission, are protested incidentally. It is objected that old, and irrelevant, statutes (Magna Carta and Articuli cleri) were relied on as reasons why the Commission should not use temporal sanctions: the Common Pleas’ straightforward reliance on its reading of 1 Eliz. is perhaps underemphasized, and the job of refuting that reading by close construction avoided.

The “information” ends by asking the King to “give order to take away these Prohibitions” or else to authorize the Commission to disregard them. “Give order to take away” may, I suppose, mean (vaguely) “do something to remove the abuse” or (specifically) “order the Common Pleas to stop issuing them.” The King in the event “did something” he hoped would be constructive—Privy Council meetings with the judges,
persuasion, pressure, and compromise. The Proctor may have believed that he could or would give direct orders to the common law courts.

(b) 12 Coke, 84.

This is a report of four successive Privy Council meetings concerned with the Common Pleas and the High Commission, the first a few days before T. 9 Jac. and the rest in that term.

(1) Owing to complaints specifically about Chancey, all the judges (i.e., it appears, King’s Bench and Exchequer as well as Common Pleas) were summoned before the Council, where the Archbishop of Canterbury and other churchmen and civilians were also in attendance. Coke had already delivered to the Commission what he describes as “the treatise which I made of it”—meaning presumably a brief or apologia he had prepared defending his court’s actions in Chancey, if not its decisions generally. It would appear that an out-of-court battle was going on before the Council intervened. Oral argument on the points of Coke’s “treatise” took place before the Council, Coke and Archbishop Abbot holding the floor. The Archbishop finally came up with a couple of arguments which he thought the “treatise” did not anticipate; in his report, Coke treats them with contempt, and so perhaps he did in oral argument. (The Archbishop claimed in effect that 1 Eliz. authorized the monarch to give the Commission any powers he had previously given de facto to commissioners appointed to hear ecclesiastical causes, whether he had done so lawfully or not; he claimed that Henry VIII and Edward VI had given temporal sanctions to such commissioners; Coke did not dispute the fact, only the absurd theory that 1 Eliz. meant to legalize previously illegal acts so long as they were precedent. Abbot also advanced the theory that because pre-Elizabethan statutes had given ecclesiastical courts temporal sanctions in some cases, 1 Eliz. should be taken as authorizing the monarch to give the Commission such sanctions, not only in those cases, but in all others. One senses that Coke could do little more than sputter at so total a non sequitur.) The meeting apparently ended inconclusively.

(2) The Common Pleas judges alone were summoned before the Council for further argument. This time the Lord Chancellor did the talking against the resolutions in Chancey. The judges stuck by their guns.

(3) The King’s Bench judges, except for Fenner and Yelverton, plus the Barons of the Exchequer, were summoned before the Council. Document (c) below confirms what reported cases would suggest: Fenner and Yelverton were probably left out because they were the members of the King’s Bench least favorable to the Commission. Coke says that the King’s Bench and Exchequer judges did not know why they were summoned, and that they were unacquainted with the reasons behind the holdings in Chancey. (But since they were present at Meeting #1 above, it is unlikely that they were completely in the dark about the case.) Coke obviously and properly disapproved of the government’s attempt to trick the King’s Bench and Exchequer judges into statements of disagreement with the Common Pleas; he is visibly proud that it did not work. For the King’s Bench and Exchequer judges, off the cuff and without talking among themselves, came down in agreement with the Common Pleas. (At least as against broad claims for the Commission put forward by the Lord Chancellor. One cannot tell from the report exactly how the question was framed for the judges, Ellesmere is reported as saying that the Commission had always fined and imprisoned for exorbitant crimes under
the authority of 1 Eliz. This is what the King’s Bench judges are said to have reacted against. How untrue or objectionable Ellesmere’s statement is depends on what it is taken to mean. Possibly he suggested in an overstated way that there was simply no question about the legality of temporal sanctions, that to deny their legality was to say that a great deal of practice had been illegal and the assumptions underlying it false. Perhaps in the context he was using “exorbitant” as the Proctor in the first document above uses it. To such a tone and such a usage of “exorbitant” the judges ought to have reacted with at least skepticism.

(4) This time the judges of all three principal courts were summoned, Fenner and Yelverton included. The Common Pleas judges, however, were at once sent from the room, to wait until the Council had parleyed with the members of the other courts. Lord Treasurer Salisbury cast aspersions on the Common Pleas judges in the process of stating a pretext for requesting their withdrawal. (They had “contested with the King.”) According to Coke, the King and the Prince now entered and listened to the ensuing discussion, but Document (c) below is better evidence that their entrance actually took place after the interrogation of the judges. Coke again complains that questions were in effect sprung on the King’s Bench and Exchequer judges. In contrast with the last occasion, their replies were not unanimous this time. (The report gives no details as to how they differed. There is of course nothing particularly surprising in the discrepancy between their testimony on this occasion and on the previous one. Their responses would depend on exactly what questions were put and in what manner. There is every reason to think that judicial opinion outside the Common Pleas was at least relatively uninformed, and probably more favorable to the Commission.)

After two and a half hours, the Common Pleas judges were called back in. Instead of upbraiding them for misapplying the law, the King announced his intention to reform the Commission’s patent and define more narrowly or precisely what causes it should have jurisdiction in. Only the general intent was announced, it would seem, not the detailed features of the proposed new patent. The government’s exact game is therefore hard to make out. It was clearly persuaded to concede something; interrogating the King’s Bench and Exchequer judges did not leave the King and Council in a position to say that the Common Pleas was flatly wrong. But it remains uncertain whether the government was ready to retreat in substance from an overextended position, or only to make minimal concessions and insist in the new patent on all the points it was really interested in, such as adultery and alimony. Perhaps it had little more in mind at this moment than a general strategy and a peace-making gesture; there had after all been no time to deliberate.

After the King, the Lord Treasurer made a speech. Its tone is elusive, and it contributes little clarification on the real point of the announced solution. Salisbury starts on a sad or angry note (“…the principal feather was plucked from the High Commissioners, and nothing but stumps remaining, and that they should not intermeddle with matter of importance, but of petit crimes…””) If this is meant as criticism of the judges, it is odd. Perhaps the “principal feather” is wide discretion in the Commission to decide what “matter of importance” suitable to its jurisdiction is, without regard to legalisms such as the civil-criminal distinction. The tendency of an enormity test in some form, after all, is hardly to leave the Commission only “petit crimes”, unless Salisbury wanted to suggest that leaving it mostly, in practice, with disciplining obscure Puritans
and misbehaving clergymen amounted to as much, compared to dealing with important people unwilling to respect ecclesiastical justice. He goes on, however, to give a little indication of what may have been thought wrong with the present patent and how it would be reformed. This suggests that the “sad or angry note” may have applied to the proposed reform, Salisbury saying that in his own view too much was being conceded, or else dramatizing the generosity of the concession. On the deficiencies of the present patent, he notes that it used the loose word “errors”, which would be defined more precisely for the future. He also says that the Commission’s taking bonds from parties, “as before absurdly and unjustly had been taken,” would be stopped. That practice, at least, he considered a genuine abuse, not a “principal feather.” He adds, finally, that there would be still other reforms, but does not specify them. One senses that Coke, writing the report, suspected that the reform would fall far short of bringing the patent clearly into line with the law.

At last Coke got the floor and used it, with characteristic courage and relentlessness, to complain to the King’s face about the Council’s examining judges of other courts separately concerning a case argued and decided in the Common Pleas (clearly Chancery.) In closing, he was only so far conciliatory as to say that when he and his colleagues saw the new patent they would “as to that which is of right, seek to satisfy the King’s expectation.” Again, it sounds as if he was hardly sanguine about the reform. The meeting broke up with nothing more said.

(c) Harg. 17, f. 1, among a number of pages inserted upside down at the end of a volume of reports.

This document is a personal minute by Justice Sir Christopher Yelverton of the last of the meetings reported by Coke. It is written in the first person and refers to Yelverton’s own feelings and problems. Its authenticity as Yelverton’s product, or a copy thereof, is confirmed by the fact that the next document among the papers appended at the end of Harg. 17 is labeled as Yelverton’s argument in Calvin’s Case (to which he makes incidental reference in his minute of the Council meeting.) The document dates the meeting—10 June, 9 Jac.

After giving the names of the fourteen Privy Councilors present and saying generally that the question was about 1 Eliz. and the High Commission, Yelverton recounts his own remarks to the Council. He begins by observing that he had not previously heard the matter in question debated because of his omission from the earlier meeting of the King’s Bench judges. He takes the occasion to complain about the omission and clearly intimates that the reason for it was that he was suspected of being unfriendly to the Commission. This he denies, citing his concurrence in Fuller’s Case, where the Commission’s power to fine and imprison was upheld. He then generalizes: “and so in other cases I think they may likewise do secundum quantitatem delicti.” The language here is probably hedging. Fuller was visited with secular sanctions for schism. “Secundum quantitatem delicti” probably means that those sanctions may be used in some cases besides schism, provided the crime is serious enough—a true enough proposition from the Common Pleas point of view. Alternatively, the phrase could mean that secular sanctions are lawful in all cases within the Commission’s jurisdiction, but in quantity they must be reasonably proportioned to the gravity of the offense. That too need not on its face quarrel with the Common Pleas; it all depends on what the Commission’s
jurisdiction comprises, and for the moment Yelverton says nothing about that. He continues in what seems to me still a hedging vein. Wandering from what I should call tightly relevant considerations, he notes that secular judges have a good deal of discretion to fine and imprison when there is no “positive law” appointing those punishments in specific amount. Even lowly constables may imprison under some conditions, and that by common law (i.e., non-statutory) authority. Considering these truths, Yelverton wonders how the High Commission can lack power to fine and imprison. (“And why may not ecclesiastical Commissioners doe the same though they be not bounded within any compasse for the Bishoppes which be the Cheife Comissioners be most reverent learned grave and considerable men.”) Then Yelverton observes that royal commissioners in various secular contexts purporting to give power to imprison or seize goods would be unlawful. But why? Because such commissions lack the statutory warrant that the High Commission has—implying that the statute behind the High Commission’s patents makes it at least probable that its use of secular sanctions is lawful.

At last, after what I should call a good deal of warm-up, Yelverton gets explicit and says in effect that the best construction of 1 Eliz. is that it warrants secular sanctions if the monarch chooses to authorize them. (“…the statute is the ground of the commission and the commission the warrant of there authoritie, and the statute and the commission together doe give them power to sett faines and to imprison men. And if the statute had expressly given them power to sett faines and imprisonment noe man will denye but they might have done it and so if the statute had expressly sett downe that the commission should be so and this amounts to as much for the statute is that they shall execute all the premises according to the effect of the commission and it is but a degree further that that is contayned in the commission which is warranted by the statute and not contayned in the statute it self.”)

So in the end Yelverton said what the Privy Council wanted to hear. He took the respectable position that the “tenor and effect” clause in the puzzling 1 Eliz. is best read as intended to give the monarch wide discretion as to the powers (and similarly the jurisdiction) to be conferred on the Commission. His awkward way of saying that, however, adds to the impression one gets from his roundabout way of working up to it—of a thinking-out-loud quality that is natural enough if Yelverton was really surprised to be asked his opinion, but that could also be assumed to avoid contradicting the Common Pleas too flatly. His tone seems close to, “Well, now that you ask, it would seem odd if the High Commission could not fine and imprison when so many other courts and officers can do so without obviously overwhelming justification, and if we start with that presumption—well, it is a little funny that 1 Eliz. does not give clear directions, but then some of its language is hard to give effect except as conferring broad authority on the monarch.”

The sequel seems to confirm that Yelverton was not enthusiastic about coming out for the Commission. For after doing so, his face brightens, as it were, and he goes on to suggest that the King take the initiative to clear up the present unpleasantness: “But in this great commission I could wish that it would please his ma[jes]tie to bound it within a more narrow compasse and not extend it to so many nor so slight causes.” Yelverton then suggests three reforms: (1) Avoiding a multiplicity of Commissions—i.e., having just one High Commission (per Archdiocese, presumably) and not supplementing the major tribunal with other local ones of the same legal nature. (2) Some way of obviating the
repeated objection that to confer jurisdiction on the Commission was to deprive men of their appeals in ecclesiastical causes. As Yelverton puts it, “That there might be a petition to his Majesty for the review of their sentence, and not to have it so final or so peremptory as it may not be contradicted.” He proceeds to remind the Council that no other high court in the realm is free from appellate review and that judges are always better off when the possibility of reversal hangs over them. His proposal is not specific, but it presumably calls for routinization of what was already technically available—the right to petition the monarch for a review commission. Presumably, in Yelverton’s view, some sort of standing body to hear appeals should be constituted, and the subject would be assured that petitions would lead automatically to a hearing before such a body, without an ad hoc exercise of royal discretion. Yelverton’s emphasis on this point reveals, as his other reforms do not, his sympathy with a deep-seated judicial motive for holding back the Commission’s jurisdiction. Assuring routine appeal might well be an indirect cure for diseases beyond the immediate one, for the impulse of civil complainants and private prosecutors to go to the Commission must have been strengthened by knowledge that resorting there was a way to avoid the tedious process of ecclesiastical appeals. (3) The personnel of the Commission should be improved by appointment of “men of worth and of some eminence in the world and not the servants of Bishopps nor any of there family.” Whatever the exact reality that suggested this proposal, there is plenty in the reports of cases to make one think the Commission had more trouble with the courts than a wiser use of its purported discretion would have brought upon it. It would of course be optimistic to suppose that improving the caliber of the Commission would cause the legal problems surrounding it to vanish.

Yelverton credits his scheme with smashing success. The Treasurer “amongst many words in comendacon of it, said, he had not seene in so weake a body so strong a minde.” The Lord Chancellor was no less impressed, saying “that I had satisfied him in the matter more than all the rest of the Judges, and that it was a speech the best framed and the most judicious that ever he heard.” With a pinch of salt for vanity—and perhaps for condescension, irony, and appeasement of an offended Justice on the part of the great officers—it is still possible that the idea of conceding some abuses and compromising around a new patent originated with Yelverton, so that the Privy Councilors were indebted to him for a constructive suggestion as well as a comforting doctrine. Yelverton says that the other eight judges and Barons interrogated were “of the same opinion.” There are too many variables to permit telling exactly what the terms of agreement were. It can hardly be out of the question that the judges pre-concerted a united front. To the degree that they were spontaneous, “of roughly the same opinion” would seem a likely emendation—not so firmly against the Commission as the Common Pleas was supposed to be, inclined to the compromise-reform option once it was broached.

At this point, after the interrogation of the judges, the King came in. Thus Yelverton’s version, in contrast to Coke’s, as to when exactly the royal presence graced the occasion. All one can say is that Yelverton was there while Coke fretted in the antechamber. Salisbury and Ellesmere proceeded to recount the conference to the King. There are no further details, except that Salisbury “tooke occason to speake in comendacon of me, upon which I kneeled down”(perhaps a confirming hint that there really was something special about Yelverton’s contribution.)
The rest of Yelverton’s account is given over to a bit of by-play concerning himself. Having an opportunity to speak to the King, and enjoying a modest limelight, Yelverton thanked him for diverting “the disgrace that was intended to be imposed upon me by removing me from my Circuite.” Yelverton explains in his minute that “the Lord Chancellor before had purposed upon some private concept against me to have displaced me of my Circuite.” He is presumably thanking the King for some previous decision to veto the Chancellor’s recommendation, not for an action taken here and now in the glow of Yelverton’s good performance in the matter of the High Commission. The King replied that he never meant to remove Yelverton, had always thought well of him, and was especially in his debt for his speech in the Case of the Post Nati or Calvin’s Case (when Yelverton was among the large judicial majority, led by Coke, that decided the case as the King wanted it decided.) The information supplied by this closing note reflects back on the history of the meetings on the High Commission in several ways. Yelverton’s initial exclusion might be explained by the Chancellor’s hostility, whatever motivated that, as well as by the suspicion that Yelverton held unsound views on the High Commission. That suspicion might of course have entered into the hostility. Ellesmere may have gone out of his way to commend Yelverton on the present occasion because he had a personal offense to make up for. Yelverton’s being out of favor for collateral reasons may have moved him to say as much for the government’s point of view on the High Commission as he conscientiously could.

(d) 12 Coke, 88. M. 9 Jac. (i.e., the term following the Privy Council meetings discussed above.)

This document is Coke’s account of his resistance to the plan to include him, together with six other judges, on the new High Commission. The others were Chief Justice Fleming of the King’s Bench, Chief Baron Tanfield, Justices Williams and Croke from the King’s Bench, and Barons Altham and Bromley from the Exchequer. The puisne Justices of the Common Pleas were unrepresented.

Coke’s position had three elements: (1) He claimed the right to be fully informed of the content of the new patent before consenting, or being obliged, to serve. His insistence was in the face of what would seem to have been a deliberate attempt to prevent him from knowing what jurisdiction and powers were purportedly conferred on the tribunal he was appointed to. (Coke says that the King’s Bench and Exchequer judges knew the content of the patent, whereas he and the other Common Pleas judges did not. This suggests that confabulation between the government and the favored King’s Bench-Exchequer group went on beyond the meetings above, as the new patent was being drawn up.)

(2) Underlying Coke’s demand for disclosure was his view that a judge ought not to sit on the Commission unless he was convinced of its legality. That is surely a respectable position, if not axiomatic. It is perhaps arguable that a subject is bound to accept appointment regardless of whether he considers the powers of the body to which he is appointed legally unexceptionable. Could he not resist from within the exercise of powers he thought unlawful? Was the point of introducing a common law component into the Commission not to internalize possible disagreements over what powers could be bestowed on the Commission and so to reduce the probability of inter-court warfare? Those cavils seem pretty casuistical, however. It is likely that Coke was right in the view that must presumably be imputed to him: the scheme was basically to embarrass him and
other judges by setting up a conflict of roles and making the judges complicit in decisions they thought the Commission had no title to render.

As things turned out, Coke got some support from the other judges and got his way, or at least part of it. The patent was read aloud at the meeting to which Coke’s report refers. This was an assembly at the Archbishop’s palace in Lambeth, where the new commission was officially “published”—albeit without a reading, by the original plan—and the new members of the court were to be sworn in by taking the Oaths of Supremacy and Allegiance. Coke raised his objections towards the outset of the meeting and thereby kept the ceremonies from moving smoothly on to the swearing-in. He may have thought that written copies of the patent should have been furnished to the appointees, but in any event he insisted successfully on a reading. Having heard it read, he still refused to accept appointment, now on the ground that he needed more time to consider. In his report, he tells us that in fact he thought the patent illegal in several ways, but unfortunately he does not say what they were. Perhaps he was rather estopped by the situation from saying more then and there but that he needed time. Having made his protest, he then proceeded, “as the subject of the King”, to take the oaths. His posture must have been something like, “I will not refuse to take the oaths here offered as the requisite step to effect my induction into the office of High Commissioner, because as a loyal subject I would be glad so to swear daily before breakfast, but I do not regard my swearing as inducting me into the office and regard it as my right, which I continue to reserve, to refuse appointment.” Questions can be raised at this point about the law and about Coke’s intent. Having protested first and then sworn, is it clear that he did not “accept” the appointment? In the end was there any way of “refusing” except by not taking the oaths? Did he mean the observers to see that at least his intention was to decline the office, and that he swore only because it would be graceless not to when the opportunity was offered? Or did he mean to allow them to suppose that he relented despite his misgivings? In writing his report he could have touched up the face of his behavior.

Coke’s taking the oaths at last cleared the way for the public relations stunt that Archbishop Abbot had planned. Abbot delivered an oration on the urgent need for a High Commission in these sinful days, “and then he caused to be called a most blasphemous heretic, and after him another, who was brought hither by his appointment, to shew to the Lords and the auditory the necessity of that commission.” One may suspect that the flat tone of this reportorial language is charged with contempt for the sideshow on Coke’s part. For the benefit of his judicial auditory, the Archbishop should perhaps have substituted a delinquent alimony-payer for one of the heretics.

Coke then tells us that the Archbishop “afterwards” spoke privately with himself and Chief Justice Fleming of the King’s Bench, promising them a copy of the new patent and assuring Coke that when he had an opportunity to study it properly he would find it very different from its predecessor. Whether “afterwards” means before the meeting broke up or on a subsequent day is uncertain. In any case, the final note is conciliatory. As at the last Privy Council conference in Trinity, there was at the end a certain yielding to the judges’ sensitivities, a certain shrinking from political bravado. That Archbishop Abbot was a reasonable man may have something to do with it.

Near the close of his report, Coke notes again something he mentions in passing earlier: that the judges, on Coke’s insistence, remained standing throughout the meeting.
although they were asked to sit down. It looks as if what was normally a gesture of respect was meant as a gesture of stand-offishness, a symbol of resistance to instant co-optation. The report ends with the Archbishop announcing the time and place at which he would hold sessions of the new High Commission. This was pursuant to the King’s order that the court sit in an “open place” at stated times—presumably a facet of the new leaf, a response to the objection that the Commission was irregular in its habits and sometimes avoided the publicity appropriate to judicial tribunals. Abbot also announced that there would be a sermon in the morning of the days on which the Commission sat, for the purpose of keeping the Commissioners better informed of their duty. Here too the odor is of reform. Was the homilist to warn the Commissioners against foolish over-extension of their jurisdiction and heavy-handed use of secular sanctions, as well as remind them of the blasphemous heretics who needed putting down? “Bad public relations” seems to have been part of the diagnosis of the High Commission’s troubles with the courts in recent years. In several ways, Archbishop Abbot was trying to do better.
Sub-section (b): The King’s Bench during Coke’s Chief Justiceship (1613-1616)

Summary

The King’s Bench during Coke’s Chief Justiceship did not define the High Commission’s authority in significantly new ways. The court may have been brought into clearer line with the Common Pleas position that the Commission lacked power to award alimony, and probably by extension jurisdiction on the civil side of matrimonial law generally. Although Coke’s King’s Bench held clearly enough that the Commission may not touch alimony, and a fortiori may not use secular sanctions and bonds in connection with alimony disputes, the court was tacitly disinclined to interfere heavy-handedly with the Commission’s assumption of matrimonial jurisdiction. Persons imprisoned in consequence of such proceedings were only bailed on Habeas corpus or were induced to mediate their marital troubles. Recognition that the Commission’s role was more useful than lawful seems implied, as well as a degree of deference to the sensitivities of the government and the ecclesiastical hierarchy.

Otherwise, decisions from Coke’s King’s Bench largely confirm the High Commission’s jurisdiction in areas where earlier holdings tend to support it: Clerical incontinence, simony, Puritan activity in the nature of schism. On the other side, there is a trace of confirmation that contempt or slander of the High Commission is not punishable by it.

The Cases

We turn now to the cases from the King’s Bench during Coke’s Chief Justiceship there, from October, 1613, until his dismissal in November, 1616. For all the qualifications that must be put on his ferocity as a foe of the High Commission, litigants seeking to limit that court certainly followed Coke. I have no cases from the Common Pleas for the period he headed the King’s Bench, and there was little King’s Bench business touching the Commission when he presided over the Common Pleas. The two principal courts, though somewhat different, were not far enough apart on High Commission questions to make seeking relief against the Commission hopeless except where Coke sat. Nevertheless, he seems to have been the beacon for those who wanted to complain.

Two cases from Coke’s first term on the King’s Bench rather vindicate than limit the High Commission’s jurisdiction. The structure of Watts’ Case is unclear from the reports, but the essential point of the holding comes through. The Commission was prohibited from awarding costs against Watts because he had a pardon covering the offense for which he had been sued, clerical incontinence. The problem for the court seems to have been whether the King’s pardon could toll the interest of the private plaintiff in the High Commission suit. (Who the private plaintiff was, or what kind of interest he could have claimed, is one of the obscurities in the reports, but there plainly was such a plaintiff.) The court held that the offense was indeed pardonable, and the award of costs accordingly improper, because all suits in the High Commission, like

112 H. 11 Jac. K.B. 2 Bulstrode, 182; Croke, Jac. 335.
those in the Star Chamber, are the King’s, whether or not there is a private plaintiff. That
in effect says that the High Commission is an exclusively criminal court, even when its
proceedings are civil in form. So to hold is obviously to say that the Commission does
not have universal ecclesiastical jurisdiction, but that was by 1613 hardly controversial.
On the way to this determination, Coke spoke about the offense of clerical incontinence
in such a way as to show that he regarded it as manifestly a High Commission
matter. (This comes out from Bulstrode’s report alone.) He called it “heinous”, which
from the tone and context would seem to be indistinguishable from “enormous” and
“exorbitant.” He said that pre-Reformation statutes (not specifically cited) had made it
felony. (I do not think that is correct, but as we have seen above it was subject to
imprisonment by ecclesiastical courts by statute. Coke added that since clerical marriage
had come in the offense was so much the worse, because what was once mere fornication
was now in danger of being adultery. While earlier cases leave little doubt that clerical
incontinence, unlike most sexual offenses, was prosecutable in the Commission, the
proposition had never been embraced quite so firmly. Although its costs award was
nullified, the Commission gained in Watts a strong affirmation of authority in an
important area from its point of view. Centralized control over the moral standards of the
clergy, as over its religious conformity, was surely at the heart of what the government
and the hierarchy were seeking, control that would be effective in the face of local laxity
and the private interest of patrons.

The second case, Sir William Boyer’s, has been discussed in Vol. II (pp. 399-
401) since its problematic aspect concerns the power to exact incriminating testimony.
Here we need only recall that along the way Coke declared simony an enormous offense,
“worse than felony.” His intent was clearly to leave no doubt that the crime was entirely
appropriate to the High Commission, whether proceedings were directed against a
clergyman who gained his benefice by simony or against laymen who made simoniacal
bargains in dealing with the advowson. Problems arose in the case only when it came to
whether interrogation tending to temporal detriment should be prohibited. It is not
surprising to find simony classified as an enormity, but no previous case affirms it to be.

Bradshawe’s (or Bradstone’s) Case (1614) has also been discussed in Vol. II
(pp. 401-404) for the element of self-incrimination. As to the powers of the High
Commission generally, the King’s Bench held that fining and imprisoning to enforce
payment of alimony are unlawful. It made no difference at the level of principle that
adultery and aggravated marital misconduct were involved in the instant case. The court
also held that it was improper for the Commission to take a bond from the delinquent
husband; Coke said he would grant a Prohibition quoad the bond if one were sought. The
case, however, arose on Habeas corpus, and, as in several other such cases, the result was
not severely discouraging to the Commission’s meddling in marital disputes. The
prisoner was bailed, rather than discharged outright, and told to go to the Bishop of
London, submit himself, and use his wife better. The Bishop of London may have been
his diocesan, who ought to have handled the case in the first place, as well as a leading
member of the High Commission. But even if the party is considered referred to his

113 H. 11 Jac. K.B.  2 Bulstrode, 182.
114  M. 12 Jac. K.B. 1 Rolle, 110 (sub nom. Bradston); 2 Bulstrode. 300 (Bradstone); Add.
25,213, f. 163 (Bradshawe).
Ordinary, his imprisonment commuted into bail was the means to make him heed the ecclesiastical authorities.

Whereas the reports of Bradshawe go only to the use of secular sanctions, an anonymous Prohibition case from the same term speaks to jurisdiction over alimony by way of dictum. So far as appears the principal case did not involve the High Commission, a wife complained of cruelty to the Ordinary, who awarded her weekly alimony. The husband sought a Prohibition, on what ground is not reported, the theory that alimony is only grantable as an adjunct of a formal divorce may have been the ground, for the judges, besides saying generally that the matter was proper to the Ordinary, said that he was entitled to take order for the wife’s safety and award alimony. The judges added that a misused wife also has a temporal remedy, because she may have her husband bound to good behavior (but it is not implied that this is any bar to her ecclesiastical remedy.) They added further, incidentally it seems, that the High Commission may not meddle with alimony. (There may be an implication, in the context, that there is no need for the Commission to meddle with it, considering that Ordinaries have a fairly wide discretion to deal with marital discord, and secular good behavior bonds may if necessary be used to reinforce the regular ecclesiastical courts.)

The final cases in this Sub-section essentially adopt the Common Pleas position on marital disputes into King’s Bench practice. In Broke’s Case, it was returned on Habeas corpus that the prisoner was committed for refusal to allow alimony to his wife. The court held that the High Commission may not meddle in such a private case. This time the judges did not use the bail technique to keep the misbehaving husband responsive to ecclesiastical authority. Instead, they undertook mediation themselves and persuaded the couple to agree that the wife should receive £20 per year in separate maintenance.

A further group of eight reports, all possibly relating to the same case and probably to the same marital disturbance, also concerns whether alimony is beyond the High Commission’s authority. The reportorial picture is so tangled that it will be best simply to look at the accounts one by one:

1. Harl. 4817, f. 234 b., dated H. 12 Jac. K.B.
   Codd was sentenced to pay his wife alimony, entered an obligation to perform the award, and was subsequently committed for failure to perform it. These facts being returned on Habeas corpus, the court discharged Codd, outright it seems. The judges held that the Bishops, not the High Commission, may hold plea of alimony. They also said that the bond was unlawful.

2. A Codd’s Case is mentioned in Rolle’s report of Bradshawe/Bradstone above. It is dated H. 12 Jac.—oddly, since that term follows the M. 12 of Bradshawe/Bradstone. Perhaps it is the reporter’s interpolation. No outcome is given, only that the return on Habeas corpus said Codd was committed for contempt of the High Commission’s order to receive his wife and use her as his wife—that rather than failure to pay alimony. They also said that the bond was unlawful.


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116 P. 13 Jac. K.B. Moore, 840.
117 See text for references to these.
The return on *Habeas corpus* said that Codd was committed for refusing his wife alimony and for “diversa opprobriosa verba.” In this report, the court says nothing about the alimony. It held vehemently, *per* Coke, that the return was insufficient for failure to specify what the opprobrious words were and when they were spoken. The prisoner was bailed.

(4) 1 Rolle, 245, *sub nom.* Codde’s Case; 3 Bulstrode, 146, *sub nom.* Hodd v. High Commission; Harg. 47, f. 79b.

These three reports are all dated M. 13 Jac. K.B. They all have the return on *Habeas corpus* saying that the prisoner was committed for reproachful words touching the Commission and refusing to respond to articles concerning the same. I.e., there is no mention of an underlying marital case. According to all the reports, the court held that neither the reproachful words nor the articles of inquiry were sufficiently specified. It also held that even if the return had been more detailed it would still almost certainly fail to make out that the Commission had jurisdiction. The reason for this was that slander of the High Commission going to the legality of its proceedings is not punishable by the Commission itself, but at common law. This holding accords with earlier decisions. Coke cited in support a Hales’s Case, where a man said that a sentence of divorce given by the Commissioners was against their consciences, as well as against the law. He was indicted for the slander at common law and fined upon his confession. (Note that *Hales* furnishes a precedent of a High Commission divorce. Presumably the party did not try to prohibit the divorce suit, just denounced the decision therein. The common law’s treating the denunciation as a criminal contempt without regard for the suit’s lawfulness bespeaks respect for the Commission’s dignity. Attacking its integrity as well as the legal correctness of what it had done of course adds to the weight of the slander; it could possibly be essential to its criminality.) Bulstrode has the prisoner in the principal case discharged; Rolle has him bailed until the next term and then discharged; the MS. has him simply bailed. (This version of Codd’s Case is discussed in Vol. II (pp. 427-428) as it touches self-incrimination.)

(5) 1 Rolle, 432, and Harl. 4561, f. 272b.

These virtually identical reports are dated M. 14 Jac. K.B. That is Coke’s last term on the court. He was already in disgrace, and one cannot be sure of his participation. The decision given in these reports suggests either Coke’s absence or a change of tune when he was in his straits.

Again, one Codd was imprisoned by the High Commission and brought a *Habeas corpus*. The return explained that he had been ordered to cohabit with his wife or else show cause why he should not, and that he refused to do either. It explained further that he was ordered “*superinde*” (probably, “thereupon” rather than “moreover”—see below for the difference) to enter an obligation to attend from day to day until the Commission should determine what alimony he ought to allow his wife, which he also refused, and was committed for refusing. The King’s Bench, “upon the sudden reading of this,” thought that two reasons were alleged for the imprisonment—(a) refusal to cohabit or show cause and (b) refusal to enter the obligation. The reporter thought, however, that the return clearly claimed only the second reason, the first serving as “background.” Anyhow, the judges said that the Commission could imprison for the first reason; they were in doubt about the second and therefore remanded the prisoner for the present.
Leaving aside the judges’ confusion about what they were called on to decide, their opinion seems surprising. If they adhered to their earlier position that marital matters were almost entirely beyond the Commission’s jurisdiction, and certainly not subject to secular sanctions, it is hard to see how they could justify the imprisonment on one score and be in doubt on the other. The only possibility of distinguishing I can see is to take the Commission’s acts as merely interlocutory. I.e.: Codd was not ordered to cohabit with his wife, but given a chance to show why he should not cohabit with her. Perhaps he could prohibit the Commission from entertaining the case that led to that order, and perhaps he should be released on *Habeas corpus* if he were ordered to cohabit and refused to; but the Commission may imprison to make a party who has not protested its jurisdiction cooperate in the sense of not “standing mute.” Similarly, Codd was not ordered to pay alimony, but to cooperate with the process of assessing alimony. If we straighten out the reading of the return, as the reporter suggests, this sort of argument gains in persuasiveness: The Commission did not imprison Codd to make him cooperate with proceedings designed to determine whether he ought to live with his wife. It did not treat him as one subject to a *nisi* order is ordinarily treated if he fails to appear and show cause—i.e., did not order him to live with Mrs. Codd. Such a disposition would be poor handling of a marital situation even if Mrs. Codd was trying to get her husband to take her back, and worse if separate maintenance was equally or more eligible from her point of view. Rather, the Commission accepted the husband’s unresponsiveness to its first order as an expression of unwillingness to live with his wife, in effect dropping the demand that he justify his unwillingness. It held his unresponsiveness against him only in the sense of concluding that he had nothing to say that would justify his refusal to cohabit and therefore mitigate, if not remove, his responsibility to maintain his wife separately—such as showing that the wife was adulterous or otherwise to blame for the breakdown of the marriage. That is to say, the Commission concluded that an arrangement for separate maintenance must be made. Even then, it did no more than seek to enforce the husband’s cooperation in proceedings to assess the alimony—in which, incidentally, he might still have an opportunity to cast blame on the wife by way of reducing the sum to be paid her. It sought only to keep Codd from frustrating its efforts to ascertain such things as his ability to pay, without which a settlement could hardly be worked out. To that end, it tried to restrict itself to a bond and used imprisonment only to make Codd enter the obligation after he refused to do so without coercion. All the while he made no effort to prohibit the Commission and thereby liberate his wife to pursue her remedy in a regular ecclesiastical court.

These considerations seem to me to lend a good deal of common-sense justification to the King’s Bench’s decision to remand the prisoner, and even so he was remanded only for the time being, until the judges resolved their doubts. They showed a degree of sympathy for the Commission’s seemingly restrained effort to deal with a refractory situation, even if on consideration they would have felt compelled to hold the bond unlawful, in accord with most authority, and their decision need not quarrel flatly with the well-established rule that alimony and related matters are simply beyond the High Commission’s jurisdiction. One may still find it on balance surprising, given the prior common law insistence that alimony is simply *ultra vires* for the Commission.

Exactly what human and legal story these clearly related reports add up to is not worth speculating about. Suffice it to say in summary that among the reports one can find
(a) straight confirmation of the position that the High Commission may not meddle with alimony and *a fortiori* may not use secular sanctions in connection with it and may not demand bonds; (b) a propensity to evade the question of the High Commission’s marital jurisdiction by settling *Habeas corpus* cases on the formal sufficiency of returns and by limiting the Commission’s authority to punish slander of itself; and (c) a qualified retreat from (a), to the extent of saying that in some circumstances use of imprisonment in marital proceedings may be justifiable. *Codd* may illustrate the truth that drawn-out, oddly managed, intractable situations can distort the law.

Coke’s last major case involving the High Commission was the *Habeas corpus* of Burrowes, Cox et al., which has been discussed at length in Vol. II (pp. 338, 404-427, 430) because it turns essentially on the power to exact self-incriminating testimony. We may recall here that that case confirms the well-established principle that heresy and schism are within the Commission’s jurisdiction and imprisoning power. It shows that schism was interpreted broadly enough to take in most Puritan activity. It also illustrates, along with several other cases, including marital ones, discretionary, indeed self-restrained, administration of the *Habeas corpus*, whereby people whom the High Commission ought never to have imprisoned were in practice allowed to spend considerable time in jail or liberated only on bail.
Section 5: Cases after Coke’s Chief Justiceships

Summary Covering Both Subsections

The Common Pleas after Coke’s departure cannot be said to have reversed any positions taken in his time, but wavering and inclination toward a more pro-Commission attitude are visible at a few points. The two decisions made by the Court under Sir Henry Hobart (1613-1625) affirm the High Commission’s jurisdiction—over simony, unsurprisingly, in one case, but in the other over clerical misconduct short of serious religious error or gross immorality. The latter case is not a head-on holding, but it is somewhat encouraging to the Commission in the still largely unsettled area of its authority in intra-Church affairs, especially discipline of the clergy.

It is in that area that the Common Pleas under Sir Thomas Richardson (1625-1631) made its clearest holdings restricting the Commission. Two cases, one of them decisive, exclude the Commission from punishing clergymen for variously compounded forms of unedifying behavior—not all of it sub-criminal, though hardly “enormous”, and in its pattern distinctly deleterious to the Church. Such decisions are pretty strong reaffirmation of the value of localism, even in criminal and intra-Church matters, and of the “enormity” test for the High Commission’s jurisdiction. On the other hand, an opinion in a further case by two judges (Hutton and Richardson), while upholding the “enormity” standard expressly, brings one rather surprising form of misconduct within the standard and hence within the Commission’s jurisdiction—viz., converting a church to profane uses. (The suit was brought by a patron against parson and parishioners. Nothing like blatant sacrilege was charged—only failure to keep up the building as a church, whereas the defendants claimed that alternative facilities were available and customarily used.) Another decision supports the Commission’s authority to exercise essentially administrative supervision over the ecclesiastical system (specifically, to investigate, and possibly to deprive, a judicial officer—Bishop’s Chancellor—for alleged professional incompetence, where there was no pretense that he had committed a crime.) The “intra-Church affairs” cases from the Richardson Court, taken together, suggest an inclination to stretch a point in the Commission’s favor for the sake of good order in the Church, provided it did not get involved in listening to bills of complaint against parochial clergy of the sort all-too likely to arise from parochial quarrels.

Otherwise, the High Commission was upheld by Richardson’s Common Pleas only in a Puritan-activities case (notable for the comparative triviality of the activities, as against anything that could seriously be considered schism) and in the case of a layman prosecuted for adultery, blasphemy and drunkenness (where, however, the Court’s refusal to prohibit was probably owing to an added element of subversive utterance—in itself quite obviously inappropriate to the Commission, but probably the reason why the Court did not look very deeply into the propriety of prosecuting the other offences there.)

The several cases outside the “intra-Church” area in which the Richardson Court restricted the Commission basically perpetuate previously established lines, but they show some signs of strain. Richardson himself was well-connected with the government and in most departments of Prohibition law a conservative judge (i.e., disposed to limit common law interference with extra-common law courts.) It was characteristically Richardson who leaned toward favoring the High Commission. He was not able to carry
the other judges with him, but his influence and the Court’s presumable preference for avoiding head-on splits may account in part for the occasionally blunted edges of anti-
Commission decisions.

Two cases on sexual offences eventuated in restrictive decisions. One (aggravated pandering to adultery) brings out the division between Richardson and the puisne judges quite clearly. The majority thought the basic offence \textit{ultra vires} for the Commission (without, perhaps, wholly excluding the possibility that aggravation—here prolonged promotion of an adulterous affair—could give jurisdiction); Richardson plainly disagreed. It is less certain that he dissented from the majority view that in any event secular sanctions and bonds could not be used in connection with such an offence. The case, however, was disposable on separate grounds—a pardon covering the offence. Although there were some problems about the applicability of the pardon, the judges agreed that it did apply and were therefore able to stop the High Commission proceedings without dissent. Consequently, the decision is not a strict precedent on the jurisdiction and sanctions question. The second case was incest, which was as such indisputably appropriate to the Commission. The issue was whether the Commission could be controlled (via \textit{Habeas corpus}) when it appeared on the record that statutory standards as to what constitutes incest had been violated. The Court was inclined to think that the Commission was controllable for mishandling a matter within its jurisdiction in that way (misconstruing or ignoring a statute.) Interstitially, however, the discussion of this case brings out positions favorable to the Commission, as to which the judges do not seem to have disagreed: (a) Use of secular sanctions in an incest case (including punitive imprisonment, or at least imprisonment to enforce a fine) is unobjectionable. (This point represents no break with Coke’s courts, but is confirmation, for incest, of the rule that secular sanctions may be used in connection with the small number of “enormities” clearly within the Commission’s jurisdiction—a rule that in Coke’s day was never quite sorted out from the rival rule that secular sanctions may be used only for heresy—plus clerical incontinence if that is \textit{infra vires}—, where there was a statutory basis.) (b) The Commission may probably justify imprisoning for incest in \textit{Habeas corpus} without showing wherein the incest consisted. (It had simply made the mistake of telling too much and revealing its error in this case). If so for incest, why not for heresy, etc.? (c) No more than bail was so much as sought for the prisoner, much less considered by the Court, though to constrain him by bail was to constrain one who by the Court’s holding had done nothing wrong.

The Richardson Court held pretty well to the position that the High Commission may not touch alimony. It was strongly asserted by some judges, especially Hutton. Richardson resisted to a degree, but not decisively. At least one (and possibly another) decision to prohibit an alimony suit was deliberately, at Richardson’s request, put on grounds that would be good against any ecclesiastical court, thus avoiding questions specifically about the High Commission’s jurisdiction. A little countenance was given to the proposition that a temporary award of alimony, pending marital litigation, may be made by the Commission.

Two other restrictive decisions had special features. The Commission was denied jurisdiction over assaults on clerics because ecclesiastical jurisdiction was entirely statutory and the ancient statute (\textit{Articuli cleri}) conferring it specified the episcopal courts. Save for Richardson, however, the judges would perhaps have been equally ready
to prohibit on the ground that the offence was too minor for the Commission. In this case they expressly confirmed that patents to the Commission may not exceed the bounds set by 1 Eliz. The second case holds that the Commission may not fine when the party could be fined by temporal courts for the same offence. (The report does not tell what particular offence was in question in the instant case.) However, the implications of the discussion are not entirely unfavorable to the Commission. It was held that imprisoning a man subject to a temporal fine for the same offence is at least not controllable by Prohibition. The Commission was prohibited from fining the party in those circumstances, but he was told to bring a *Habeas corpus* if he wanted to challenge his imprisonment. Richardson probably had some doubt about the principal decision (no fine under the circumstances), but he went along with it. The other judges did not deny that the Commission may sometimes fine and imprison, but they did not on this occasion go beyond affirming that it may do so in the clearest cases—heresy and clerical incontinence, owing to the regular ecclesiastical courts’ one-time statutory power. Richardson probably favored more permissive standards, at least power to imprison in all cases for the purpose of enforcing a spiritual sentence.

The King’s Bench had less of a tradition of restricting the High Commission than the Common Pleas. Nevertheless, the clearest restrictive decisions after Coke’s departure come from the King’s Bench. All of the significant ones are from the late 1620’s, when the Court was presided over by Sir Ranulphe Crewe and Sir Nicholas Hyde.

Alimony was straightforwardly held *ultra vires*. The King’s Bench saw itself as adopting Common Pleas precedents at the very moment when the contemporary Common Pleas was wavering somewhat on alimony. In its alimony cases, the King’s Bench expressly held that the monarch required, and for this matter lacked, statutory authority to confer jurisdiction on the Commission. The Court also emphasized the importance of preserving appeals. In reaching these oft-repeated general points, the judges implied a little more than they were called on to decide, for it would be hard to deny jurisdiction over alimony with those points in mind and not also to deny it for other civil causes, and perhaps the pettier criminal ones as well.

The strongest reaffirmation of restrictive guidelines came in an “intra-Church” case of sorts (where the High Commission suit was to compel a rector to perform his *de jure* duty to repair the chancel of the church.) In the process of holding this suit inappropriate to the Commission, the Court insisted that the commission is limited, not only to crime, but to “enormous” crime. Strict construction of “enormous” (i.e., that it means “extremely grave”, not “unlawful”) was insisted on. So was the importance of preserving appeals and the theory that the historic reason for authorizing a High Commission was hardly more than an immediate need to purge the Church of Catholic clergy. Defamation, including defamation of clerics, was incidentally said to be too civil a matter for the Commission. Finally, the actual circumstances of the case were such that Prohibition would probably have been justified if the suit had been in a regular ecclesiastical court. The judges preferred to hold it *ultra vires* for the Commission, rather than avoid passing on the Commission’s powers and seek other grounds for Prohibition. Another case in the same Court confirms the principal decision (no suits before the Commission to compel repair of a chancel.)

On the other hand, the Caroline King’s Bench showed some signs of permissiveness toward the Commission in the “intra-Church” area. One clerical
discipline case was rather ambiguously handled: A minister who refused to obey his superior’s order to preach a visitation sermon was imprisoned by the Commission. The King’s Bench relieved his immediate plight by bailing him on *Habeas corpus*. The Court was probably inclined to doubt that imprisonment was lawful for so comparatively petty a misdemeanor (and there was a question as to whether it was a misdemeanor at all), even if the Commission had jurisdiction over the matter. However, the bail decision was represented as tentative, pending a final resolution (of which there is no report.) The indications are that the Court was reluctant to intervene in the process of clerical discipline, although it was very ably urged to by counsel in this case. An opinion in another case by two judges (Jones and Croke, neither particularly royalist or pro-ecclesiastical) confirms such reluctance: they opposed interfering with the Commission’s proceedings against a clergyman for drunkenness and “lewd behavior.” The King’s Bench also had occasion to pass on the Commission’s power to proceed against a Bishop’s Chancellor for professional incompetence. (The same case as the Common Pleas decided on that point. The party appears to have tried his luck in the two courts successively.) If anything more decisively than the Common Pleas, the King’s Bench held that the Commission was within its rights.

No cases from either principal court have been found for the years 1631-1640. What this means, insofar as it is more than an accident of reporting, is not obvious. It may be tempting to suppose that no one dared challenge the High commission in the time of Thorough, or that the courts were unwilling to interfere with it. Yet neither proposition in really convincing. There was good precedential basis for challenging the Commission’s activities in several areas, if such activities were taking place. In proportion as the Commission was increasingly unpopular for political reasons, people would perhaps have had all the more animus to resist it if it ventured into civil and petty matters. On the other hand, there was virtually no precedential basis for challenging High Commission proceedings against Puritan activity. Puritans in trouble with the Commission may have thought it futile to seek the help of the common law courts, but that could be for commonplace reasons—because the courts were all but foreclosed by past practice from giving any help to such complainants. Adulterers, delinquent alimony-payers, and the like were not in the same boat. It is possible, indeed probable, that the courts’ net sympathy with all anti-Commission positions would have declined in the ‘30s, owing to changes in the complexion of the Bench and to the political atmosphere. Belief that the courts were prostituted to the government was probably stronger than any reality justifying the belief. Yet the belief is not finally a sound basis for predicting a low incidence of resort to the courts. The impulse to bring test cases in politically supercharged times is not necessarily dampened by pessimism about their success, nor are litigants with any kind of chance likely to be so overcome by pessimism or cynicism that they refrain from testing whether they are really as badly off as they fear. Anyhow, as the Ship Money case classically demonstrated, the judiciary was not a prostituted monolith. A lawyer hoping to save his client from an alimony suit in the High Commission would have had every reason to predict from past performance that at least some judges would argue on his side. Whether Hampden’s lawyers, in a far higher matter and with much stronger reason to be gloomy, calculated that they would win Justice Croke’s vote is probably unascertainable; in the alimony case, it would be easier to say “Croke at least will be with us, and maybe he will be persuasive.”
The safest course, therefore, is to reserve judgment as to what the apparent absence of High Commission cases from the '30s means. The hypothesis that the commission became more prudent and better ordered under Archbishop Laud is at least as convincing as the theory that litigating against the Commission came to seem hopeless (and perhaps was proved to be in cases of which we have no report.) Is it possible that the Commission concentrated on Puritans (and perhaps on the always ambiguous “intra-Church” area), that it learned to stay away from civil and petty matters, especially those involving laymen, and thereby to avoid gratuitous litigation and unedifying squabbles with the secular courts? Could the Laudian vision of the Church not have had some common ground with standard anti-Commission positions—respect for localism and “due process of law” in the ecclesiastical system; a desire to see the regular ecclesiastical courts in competent hands and playing their due role, not in danger of preemption by a central tribunal; a hope of restoring the authority of spiritual sanctions in the common run of spiritual causes, reserving temporal ones for the religious offences and other “enormities” where a serious case for exceptional powers could be made (and whence the secular courts in the 17th century had no inclination to exclude temporal sanctions)?

By concentrating on Puritans, as this hypothesis supposes, the Commission may have been working its destruction in the long run—when Puritan political influence emerged in new-found strength, and an explosive mixture of temporal and ecclesiastical politics had been brewed up—, but in the short run it would have been the way to peace with the secular judiciary. The value of religious conformity and the necessity of extraordinary measures to enforce it were too deeply engraved in the law to be repudiated even by judges who (as some, along with other moderate-conservative Anglicans, must have) had no taste for Laud. (As for a possible “intra-Church” penumbra, where the High Commission’s right to a free hand was less clear than in Puritan cases: Positing greater self-restraint and appreciation for localism on the Commission’s part may suggest that it would have been less inclined than earlier to take commonplace clerical discipline cases and the like. If, on the other hand, we assume a continuing or increasing volume of High Commission activity in that area, a low incidence of complaint about it might reflect something other than a shift, or expected shift, of judicial opinion in the Commission’s favor. It could conceivably reflect a certain success for the Laudian ideals and program, clergy and other officers of the Church finding it less acceptable to quarrel with the hierarchy, resist its supervision, and oppose it in the secular courts.)

Three decisions from 1640-1642 give no sign of discontinuity with practice before 1631. The Common Pleas held very clearly in one case that alimony is ultra vires for the Commission. Neither of two King’s Bench cases counts for much on major issues. One Habeas corpus suggests disinclination to let the Commission issue “intra-Church” administrative orders and punish disobedience as contempt, but the reported decision to bail in that case was only a tentative resolution. The other King’s Bench case suggests not more than a disinclination to discuss the Commission’s power to fine where there were special technical reasons for allowing a fine to be enforced without reaching its original legality. This fragmentary evidence from the eve of the Civil War is probably most consonant with the supposition that judicial opinion in the ’30s stayed about where it was before and would, given occasion, have manifested as much. The alternative hypothesis would be that the courts were, or were assumed to be, exceptionally reticent.
towards the Commission in the ‘30s and then, in response to a changed political climate, reverted to normal and attracted complainants.

(In connection with the above speculations on the 1630’s, cf. the similar points concerning self-incriminatory questioning by the High Commission in Vol. II.)
Sub-section (a): Cases from the Common Pleas after Coke left the Chief Justiceship (1613 to the Civil War Period)

We move now to post-Cokean cases concerning the High Commission. For whatever reason, there are more from the Common Pleas than from the King’s Bench. I shall deal with the former consecutively down to the eve of the Civil War and take up the few King’s Bench cases at the end (except for one case that is replicated in both courts.)

The earliest Common Pleas case, Bishop v. Caleb Mortry,118 though obscurely reported, furnishes a clear holding that simony is within the High Commission’s jurisdiction. The form of the simony alleged to the Commission in this case was that after being presented to a benefice the presentee entered an obligation to pay the patron £100. I suppose there was a question as to whether this constituted simony, in contrast to a gift—whether in cash or a bond—made to the patron before presentment. In any event, the King took the transaction as simoniaal, and hence as ipso facto forfeiture of the immediate presentation to the Crown (by virtue of the statute of 31 Eliz., c.6), for the King presented Mortry to the benefice. Mortry then complained against the erstwhile patron in the High Commission for simony. If his motive was interested, as opposed to a mere desire to see simoniacs punished, I presume it would be the belief that an ecclesiastical judgment that simony was indeed committed would secure his incumbency. A Prohibition was sought to stop the High Commission suit. Serjeant Ashley, arguing in favor of the Prohibition, did not contend that simony was intrinsically inappropriate to the Commission, but that simony was examinable at common law and in the instant case should be examined there rather than in an ecclesiastical court. The report is too sparse to bring out his reasoning, but his effort failed. The Common Pleas decided unanimously that Prohibition would not lie. Two judicial observations shed some light on why Ashley’s theory may have been colorable. Chief Justice Hobart, after saying that the High Commission could without question deal with simony, adds that the obligation would only be evidence of the offense. I take this to mean, though the reportorial language is confusing, that the Commission could take note of the bare fact that an obligation was given so long as it stayed away from any questions about the validity or construction of the bond. Justice Winch probably made the same point with the remark, “If they do anything that crossed the bond the prohibition will be granted.” Ashley’s argument perhaps came to claiming that the potential presence of collateral common law issues owing to the bond gave the common law exclusive jurisdiction. As far as the major High Commission issues are concerned, this case confirms earlier indications that simony as such qualified as an enormous ecclesiastical offense.

Searle’s Case119, also from Hobart’s court, does not raise direct questions about the High Commission’s powers, but has some oblique bearing on them. Searle was brought to the Bar on Habeas corpus. Thereupon he sought a Prohibition to block execution of a sentence depriving him of his Church living that the Commission had imposed on him. His ground was that the offenses for which he was deprived were within a general Parliamentary pardon. The question before the court was in part whether two episodes of misbehavior were included in the pardon; if there were other charges against

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118 P. 16 Jac. C.P. Harl. 1549, f.159b.
119 M. 22 Jac. C.P. Harl. 5148, f. 63.
Searle, the pardon was presumably applicable without dispute. (1) Searle said "publicly and maliciously in the church", that a Mr. Michell was excommunicated. When he ordered Michell to leave the church and Michell refused, Searle commanded the churchwardens to drag him out. In fact, Michell was not excommunicated. The Common Pleas held that the misconduct was not pardoned because the pardon contained an exception for misdemeanors committed in church. Per the court, the exception applied not only to misbehavior by parishioners toward the minister but a fortiori to misdemeanors by the minister himself. Searle’s claim was obviously that ministers were outside the exception (i.e., covered by the pardon.) I cannot say whether anything in the text of the pardon would render the claim plausible. (2) Searle was also deprived in part for saying to a sick parishioner “that he would commend his body to the earth and his soul to the Devil.” The question about those words, which were presumably not spoken in church, was whether they came to heresy or schism, which were excepted from the pardon. The court held that although the words were atheistical and profane they did not amount to heresy or schism and were therefore pardoned. Clearly Searle would have had his Prohibition based on the pardon if he had only been charged with “atheistical and profane” utterance. There is no suggestion in the case, however, that either such language or abusive behavior by a minister in church would as such have been considered insufficiently enormous for the High Commission to proceed against and punish by the ecclesiastical sanction of deprivation. This accords with previous indications that the Commission was given a pretty free hand in disciplining clerics. The effect of the pardon in Searle raised complex problems beyond the comparatively simple one whether some of the party’s offenses were covered by it, but only the latter has any bearing on the jurisdiction of the High Commission. The case in full will be discussed later in this study, when construction of pardons is taken up as a separate aspect of Prohibition law.

In Dr. Sutton’s Case, an unusual suit was brought in the High Commission, and a persistent effort to prohibit it was unsuccessful. The case is not, however, essentially on the Commission’s jurisdiction and powers. There is only one hint in the reports that counsel seeking Prohibition thought of arguing that even if the case was generically within ecclesiastical jurisdiction it was not appropriate to the High Commission specifically. There was no judicial response to the one suggestion of such an argument. The case is an important and difficult one on whether any ecclesiastical court could proceed against Sutton in the form in which he was proceeded against. The judges, in deciding against Prohibition, seem to have taken it for granted that the proceedings, since they were within ecclesiastical jurisdiction, could take place in the High Commission. Counsel favoring Prohibition—with the faint exception referred to—seems to assume that to prohibit the suit it must be shown that any ecclesiastical court would be out of bounds in entertaining it. In this chapter, therefore, we do not need to go deeply into Sutton as it

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120 H. 2 Car. C.P. Littleton, 2 and 22; Harl. 5148 f. 106 and 114 b (virtually identical reports): Croke. Car., 65. The Croke version has already been discussed (Vol. II, p.191) because it touches a point of general Prohibition law missing from Littleton and Harl. 5148—probably just omitted in the reporting because it makes no difference for the substance. Date, content, and result leave no doubt that the Croke report is of the same case.
was actually argued, but only to note what it obliquely has to say about the High Commission.

It is an oddity of Sutton that it occurs in both the Common Pleas and the King’s Bench 121 without significant substantive differences. Both principal courts reached the same result—denial of Prohibition—on the same grounds. It seems clear that after Prohibition in one court Sutton and his counsel simply tried their luck in the other. Because Latch’s King’s Bench report is undated, one cannot say for sure which court discussed the case first. I think, however, that the Common Pleas probably preceded the King’s Bench. Sutton’s King’s Bench surmise has some additions and alterations of what, so far as one can tell, he surmised in the Common Pleas—signs suggesting an effort to strengthen his case in detail for a second try. If so, however, the effort had no effect.

The substance of the case in summary was as follows: Sutton, the Bishop of Gloucester’s Chancellor, was “articled against” in the High Commission because he allegedly lacked the educational qualifications required by his office—mainly a doctorate in civil law, and it may have been claimed in addition no experience in the practice of Church law that might compensate for that deficiency. (If he was a Doctor at all, his degree may have been in divinity.) The attempt to prohibit the High Commission proceedings was based on the fact that Sutton had a freehold interest in his office and the theory that an ecclesiastical inquiry into his qualifications was unlawful because a finding of unfitness might lead to deprivation of his freehold by an ecclesiastical court. I defer the ins and outs of this issue and the question of exactly what the Common Pleas and King’s Bench decided until later in this study. Minimally, the courts held that Sutton must try to justify his qualifications; the High Commission should not be prohibited here and now on the ground that an ecclesiastical court had no jurisdiction to ask him to.

The following seem to me to be the case’s implications for the High Commission specifically:

(1) Mere failure to distinguish High Commission jurisdiction from ecclesiastical jurisdiction in general implies a theory that is not without credentials: viz. The High Commission is “just another ecclesiastical court” with intrinsic or de jure authority to entertain any ecclesiastical cause. That jurisdiction may have been limited by 23 Hen. VIII, c.9, as it was for regular ecclesiastical courts (but, as we have seen, that statute was not clearly held to apply to the High Commission.) The Commission may have no power to use secular sanctions, or statutory power to use them only in some of the cases in which its jurisdiction (with power to employ spiritual sanctions) was unexceptionable. (Regular courts of course had no power to use secular sanctions, except for a few ancient statutory exceptions, which since the Elizabethan settlement probably survived only as powers conferrable on the High Commission if the monarch chose to confer them.) These restrictions do not, however, mean that any type of legitimate ecclesiastical complaint was barred from the Commission.

Despite its history and merits, however, it would be surprising to find this theory embraced in Charles I’s reign, or—if it were expressly proposed—accepted without controversy. That is because the Cokean period left a considerable deposit of authority for the proposition that 1 Eliz., in giving the monarch authority to constitute a High Commission, did not permit conferral of all kinds of ecclesiastical jurisdiction on it.

121 Latch, 228. Undated, but early Car. K.B.
Rather, only criminal jurisdiction could be given to the new institution, and within criminal jurisdiction, only power to proceed against “enormous” criminal offenses. The “enormity” test may never have been universally and wholeheartedly accepted by common lawyers and all judges, but it was well-entrenched. It continued to be invoked and applied in some cases between Coke’s departure from the Bench and the Civil War. Virtually by-passing it in so weighty a case as *Sutton*, and thereby implying the older theory—High Commission jurisdiction basically = ecclesiastical jurisdiction—may, however, signify a weakening of its influence.

(2) In my opinion, reasonable cases can be made for and against Prohibition in *Sutton* without leaving the High Commission’s specific jurisdiction out of account. The case for Prohibition is probably the easier. On that side, one can invoke the idea that the High Commission was exclusively a criminal court and argue that Sutton was not charged with a crime. The High Commission’s inquiry was predicated on the suspicion that he was exercising an office without proper qualifications; he was asked in effect to rebut the suspicion, but that is not the same as accusing a man of a crime. It is in fact not clear from the reports of the case that Sutton was thought to have done anything with the flavor of personal wrongdoing. For example, he may not have deceived the Bishop who appointed him and the Dean and Chapter who confirmed his appointment. They may have been satisfied that he was capable of performing the job despite his lack of a civil law degree. He and they may have believed, even if incorrectly, that they were not subject to rigid qualification-requirements. It may have been arguable as a matter of law that the decision of the Bishop and Dean and Chapter was final—or perhaps not examinable except by the diocesan authorities themselves—even if it was mistaken. Should Sutton fail to justify his fitness to continue performing the office, it is not inevitable that he would be subject to anything that can be strictly called a punishment, as a convicted criminal should be. For example, he might be in effect suspended from active exercise of the office without losing the title and emoluments. All these possibilities are at least intimated in the thorny actual discussion of the case, a discussion based on the assumption that the issue was the title of any ecclesiastical court to conduct a retrospective inquiry into Sutton’s qualifications. Why could one not evade the question of ecclesiastical jurisdiction in general and merely argue that this case was not a criminal one appropriate to the High Commission? Or—if all “flavor of wrong” cannot be expunged from merely “doing something against the rules”—is it not at any rate arguable that nothing like an “enormous” crime, nothing with the mens rea quality a crime against God and the Church surely ought to have, was even indirectly “charged”? Should this argument be accepted and the High Commission prohibited, the open question would be whether regular archdiocesan courts could conduct the same inquiry into Sutton’s qualifications as the High Commission undertook to, but that, by this argument, is not our case.

On the other side, a sensible case can be made against prohibiting the High Commission on grounds specific to it. “Criminal” should perhaps not be taken narrowly. Conceding that private litigation—where a plaintiff with an interest sues a defendant with an adverse interest—may not take place in the High Commission, the contrasting category perhaps need not be confined to manifest criminal prosecutions. There may be circumstances in which court-initiated or *ex officio* prosecutions are desirable for purposes other than their usual one of supplementing private prosecution for a clear...
Although there is no 17th century vocabulary for this, what would now be called an “administrative” purpose may sometimes justify such proceedings. Seeing that, or investigating whether, the Church’s judicial system is in competent hands, or functioning in accord with qualification-rules for its personnel, is a good illustration. It is hard to argue that the makers of 1 Eliz. actually contemplated this role for the High Commission, but it may not be unduly loose construction to see it as a legitimately modest extension of what they did contemplate.

The central reason for the Commission, after all, was to have an ecclesiastical court that could reach offenders who were not legally unreachable by regular courts, but were likely de facto not to be so reached. Besides the case of powerful or refractory people who had misbehaved in serious or complicated ways, it may be reasonable to count situations which, if remediable, called for measures beyond the regular courts’ routine. The situation in Sutton may be of that sort. It has some affinity with cases in which inability to act owing to vested interests or legal confusion can be predicted for regular courts. (If the Bishop of Gloucester would not, or could not, or believed he could not, review his appointment of a Chancellor and possibly reverse it—and note that to do so he would have to get around his chief legal officer, Chancellor Sutton—a regular archdiocesan court would be the only body to take action if the High Commission is ruled out. It might be diplomatically difficult for the Archbishop, or the civilian judges who did his judicial work, to interfere with a Bishop, and they might have been unsure of their power to interfere, especially in view of Sutton’s freehold. The High Commission has the advantage of being, formally anyway, an agent of the King and the whole Church rather than the Archbishop—in a sense a neutral supervisory body to deal with a tricky intra-Church problem.)

Although Sutton is a nearly unique example of the High Commission’s playing the role of an “administrative” tribunal, there is some support in the case law for its doing so. Some decisions stretch the Commission’s jurisdiction from “enormous crimes” properly so-called to aggravated cases of lesser offenses and to compounded misbehavior no single component of which would by itself rise to the level of a High Commission offense. Is that less of a stretch than allowing the Commission to take on disorders in the Church that hardly involve plain criminality, but which it might be practically the best agency to deal with? Whatever else—whether the argument for or against High Commission jurisdiction is the better—the case stands as a practice precedent for the Commission’s undertaking to entertain a kind of “administrative” complaint and being allowed to without challenge to its specific jurisdiction.

This hypothetical debate can be given another dimension by taking the High Commission’s sanctions into account. Roughly, without further elaborating the complexities of a figment: If one assumes the less-than-certain rule that the High Commission may use secular sanctions in any case within its jurisdiction, then more arguments for and against allowing the High Commission to touch such a case as Sutton can be imagined. In favor of prohibiting the Commission on grounds specific to it, one could urge the unfairness of exposing the party not only to deprivation of his office, but to fine or imprisonment as additional punishment, or as means of coercing him to cooperate with the inquiry into his qualifications which he claimed was beyond ecclesiastical authority altogether. Against Prohibition, it could be argued that a larger repertory of sanctions than regular courts possessed, if used to coerce the party’s
cooperation rather than to punish, might help to bring about the sort of compromise that would perhaps be the best solution of the case. That would probably take the form of inducing Sutton to accept turning over the exercise of the office to a qualified deputy in exchange for retaining the office itself.

(3) As I mention above, there is in one report a glimmer of an argument specifically against High Commission jurisdiction. This occurs in Latch’s report of the King’s Bench case. Glanville, speaking from the Bar in favor of Prohibition, starts off with the main argument on that side in all reports: ecclesiastical jurisdiction is barred generally by Sutton’s freehold. He then adds, however, the puzzling sentence “and the Court of High Commission is not confirmed by Act of Parliament.” In the abstract, this statement seems nonsense. If anything was true of the Commission, it was that the tribunal had a statutory basis, even if the monarch could have created it without one. I can only take Glanville as saying that 1 Eliz. gave no express authorization for conferring on the Commission power to deal with unqualified Chancellors and the like. By contrast, the statute did authorize jurisdiction over heresy and its kin and added the vaguer category of “enormous” ecclesiastical crimes. Glanville’s assumption must be that investigating whether such officers as Chancellors were qualified does not fall under the authorized categories of jurisdiction. The point is well-taken and clearly directed at High Commission jurisdiction specifically. It seems, however, to have got no attention or, if attended to at all, to have been rejected. The report only tells us that the King’s Bench refused Prohibition without giving any reasons, and two judges, Dodderidge and Jones, who speak as individuals in the report confine themselves to some detailed reasons for holding that ecclesiastical deprivation of the office is lawful notwithstanding the freehold.

A scrap of further information from Latch may, however, suggest part of the reason why the High Commission’s specific jurisdiction was not objected to very strongly, or at least not successfully. Latch gives a little more detail of the Commission’s articles against Sutton than the Common Pleas reports. They recited inter alia that King James had ordered the Archbishop of Canterbury to grant commissions to examine defects of Chancellors and remove insufficient ones, and King Charles had renewed the order. There could perhaps be a “constitutional” dispute over the King’s power to do this, but if one wants to avoid the political stratosphere, it makes a certain sense to say that if the King had lawfully authorized special commissions to look into unqualified Chancellors, the Archbishop was entitled to use the extraordinary agency that already existed. Doing so would be most tolerable if the High Commission qua—let us say again, “administrative” tribunal—must stick to ordinary ecclesiastical sanctions, which include deprivation.

In Smith v. Clay, 122 a clerical discipline case, the Common Pleas was inclined to prohibit the High Commission (in this case, exceptionally, the High Commission for the Province of York) but deferred final action in the Chief Justice’s absence. A private complainant, from public spirit for all that appears, “articled” against Dr. Clay, the Vicar of Halifax. The charges can hardly be called non-criminal, but it may be difficult to promote any of Clay’s alleged misdoings to enormity. Whether the suit aimed at

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122 P. 3 Car. C.P. Hetley, 3; Harl. 5148, f. 120. Nearly identical reports. Date specified in MS. only.
depriving Clay does not appear from the reports; it may have had no specific object, but merely invited the Commission to take such measures against him as it saw fit.

Clay was charged with an impressive catalogue of unseemly deeds, as follows: Reading the Bible in church in an irreverent manner, thus scandalizing the congregation; failing to preach himself on Sunday mornings, “against his oath” and contrary to #45 of the 1604 canons; taking communion cups and other holy vessels home, using them for profane purposes, and putting barn in them, “so that the communicants were loath to drink”; observing a recent fast proclaimed for a Wednesday on Thursday instead, “because it was a holy day” (I suppose because Wednesday was and Clay did not want to spoil the fun—?); keeping an adulterous drunkard as a curate or chaplain for a chapel of ease in the parish; failure to catechize in accord with Canon # 59 (mistakenly cited as #39 by the MS., referred to as “the parish canon” in Hetley)—instead Clay allegedly made do with buying a supply of one Dr. Wilkinson’s catechism at 2d. apiece and selling copies to the parishioners for 3d.; letting parishioners on whom he was ordered by “commissions” to impose penances get off with a money payment; menacing parishioners, or allowing his servants to; “abusing himself” and “disgracing his function” by engaging in “base labors”, specifically making mortar in a leather apron and, having himself taken a tithe pig from the sty, gelding it with his own hands; selling gifts of meat, fish, and ale instead of employing them in hospitality or giving them to the poor; ordering his curate to perform an unlicensed marriage in a private house; letting persons who were “peradventure” unlicensed as preachers and who were “suspected persons and of evil life” preach in the parish.

Serjeant Henden, Clay’s counsel, sought a Prohibition on the ground that the High Commission could not by 1 Eliz. meddle with “such matters”, “but only examine heresies and not things of this nature” (MS.—the printed version lacks the probably too restrictive “only heresies.”) Such a casual invocation of the enormity test might not have satisfied some earlier courts, especially since Clay was so versatile a rascal as to suggest that he could have been too much for the diocesan courts to handle or too much on the good side of episcopal officials to expect discipline. Henden had one further arrow, however, which may have relieved him of need to make a careful case for the pettiness of Clay’s offenses: Somehow the Lambeth (Canterbury) High Commission had been consulted about, or in any event found out about, the case and had certified to the York Commission that it would not itself, or York should not, proceed in such a matter; the senior Commission, so to speak, advised the junior to desist, which it would not do. One archdiocesan High Commission probably had no power to command the other, but this case shows that a consistent national policy was regarded as desirable, not least by the Common Pleas, which prohibited unless cause were shown to the contrary. The Prohibition nisi was probably a courtesy to the absent Chief Justice rather than a sign of doubt.

In another case from the same term as Smith v. Clay123, a clergyman, Giles, sued Balam in the High Commission for assaulting him. Serjeant Athowe, arguing for Prohibition, admitted that the current patent purported in express language to give the Commission jurisdiction over assaults on clerics, but maintained that 1 Eliz. did not permit the patent to confer that power. The words of the statute, he said, allowed

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123 Giles v. Balam (or Baulam). P.3 Car. C.P. Hetley, 19; Harl.5148, f. 143b (specific date from MS. only.)
jurisdiction to be given only over “men who stir up dissension in the Church, as schismatics or new-fangled men who offend in this kind” (not a very precise definition of what the Commission’s scope was, but Athowe’s implication was clearly that violence toward clergymen could not possibly be in the same category as the offenses rather generally indicated.) Serjeant Henden, arguing against Prohibition, emphasized to start with that the ecclesiastical assault suit was for reformation of manners—in other words, essentially criminal. He conceded that Prohibitions had in the past been granted to stop suits of that character, instancing adultery and defamation. Those Prohibitions were proper, because when they were issued the patent did not include those offenses, but the present patent did. Henden did not say that any Prohibitions had been denied in adultery or defamation cases since the current patent was issued, but relied on the familiar general argument that 1 Eliz. annexed all ecclesiastical jurisdiction to the Crown and posed no obstacle to its being granted to the Commission, so long as the patent was express about the sorts of cases granted and so long as they fell in the pro reformatione morum class. The qualifications—“so long as”—are not as reported stated with great clarity or insistence, but it would appear that Henden was being careful not to make too extreme a claim. He cited the now-published 5 Coke—Caudry and Coke’s commentary thereon presumably—in support of his argument.

Prohibition was granted unanimously. Only Chief Justice Richardson’s individual opinion is reported. Richardson relied primarily on the old quasi-statute Articuli cleri: since that act expressly gave jurisdiction over laying violent hands on a clergyman to the Ordinaries, allowing it to be given to the High Commission would unlawfully derogate from the Bishops’ powers. The court as a whole broadened the basis for granting Prohibition by citing two express grants in the current patent which it regarded as invalid—“a stroke in the churchyard” (presumably meaning a violent act in that location) and substraction of tithes. “Strokes” in a churchyard seem to qualify well enough as criminal or partly criminal offenses; I am not sure how substraction of tithes differs from mere non-payment, a leading example of civil jurisdiction not grantable to the High Commission except on the most permissive theory, but perhaps it is narrower, with a colorable criminal element—retaking of tithes after they have been exposed and so “paid”, which amounts to taking the parson’s vested property. In any event, the court’s ground was that if such cases were allowed to the Commission—and presumably assaults on clergy even without reference to Articuli cleri—all the Ordinaries of England will be to no purpose.” Giles v. Balam, in short, deals a pretty strong blow to the extendability of High Commission jurisdiction much beyond the generally conceded core of serious religious offenses.

Isabel Peel’s Case and the Countess of Purbeck’s Case (1628-29), though separate, relate to the same situation. I shall discuss them together. Purbeck raises straightforward questions about the High Commission’s powers; Peel is about whether a party proceeded against in the High Commission was pardoned by a general pardon—i.e., whether the party’s offense was within the terms of the general pardon. The much more

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124 For Peel: P. 4-T.4 Car. C.P. Littleton, 150, sub nom. Mrs. Peele’s Case—dated P. 4 and confined to the first hearing of the case; Croke Car., 113-114; Hetley, 107-109—Mrs. Peele’s Case, not specifically dated. For Purbeck: H. 4 Car. C.P. Hetley. 131; Littleton, 242, sub nom. Viscountess of Purbeck’s Case.
thoroughly reported *Peel* does, however, contain comments bearing incidentally on the major issues concerning the High Commission. The reports of *Purbeck* fall in the term after the last of several in which *Peel* was debated, but remarks in *Peel* show that *Purbeck* was already launched and known to the lawyers and judges dealing with *Peel*. The connection between the two cases is that the Countess of Purbeck was accused in the High Commission of adultery with Sir Robert Howard, while Mrs. Peel was accused of pandering to the Purbeck-Howard affair, a celebrated high-society scandal. Because *Purbeck* is simpler and more important for the main High Commission issues, I shall discuss it first and then return to *Peel*, despite the slightly later litigative disposition of *Purbeck*.

The reports of *Purbeck* are close to identical, but with a couple of significant small variations. Neither (unlike the reports of *Peel*) gives any factual details about the Howard romance, only the legal skeleton of the case. The Countess was proceeded against in the High Commission for adultery, convicted, and sentenced. Only then did she seek a Prohibition, on the ground that the sentence was unlawful. I.e., there is no sign of an earlier attempt to prohibit on the theory that adultery was simply beyond High Commission jurisdiction. Such an attempt would have been unpromising, especially in view of the party’s high rank and (as we shall see from *Peel*) the aggravated character of the offense in this case, although it is less than clear that jurisdiction over adultery was settled in the Commission’s favor. (There is no evidence that Howard, a son of the Earl of Suffolk, was prosecuted.)

The sentence imposed on the Countess was that she be imprisoned without bail until she found sureties to perform the sentence and that she be fined 400 marks. We are told (Littleton) that she was “censured” in the High Commission, but no specific penitential acts enjoined on her are reported. Thus it is not clear whether “performing the sentence” would have required anything more than paying the fine. The most notable feature of the sentence is its specification that the imprisonment be without bail until the sureties were produced. I should very much doubt—as Justice Yelverton did in this case (below)—that the Commission had any authority to make such a provision, even if imprisoning the party were held unobjectionable *per se*. I.e., should she have brought *Habeas corpus*, I think the common law court in which the writ was returnable would surely have had its usual choice to release outright, remand, or bail, and that the anti-bail provision in the sentence would have been nugatory. Nothing, however, is said explicitly about the bail provision by Purbeck’s counsel seeking Prohibition. One wonders whether it might not have reinforced his conviction, *arguendo*, that the sentence was utterly out of bounds, but he perhaps thought he had enough reason for that conclusion without belaboring this further point.

Serjeant Henden, representing the Countess, claimed Prohibition basically on the ground that the High Commission may not impose secular punishment, imprisonment or fine, in spiritual causes; excommunication is the only punitive measure, properly speaking, that it may take. (Penances and the like, though it is often convenient to refer to them as spiritual sanctions, were of course—to borrow a modern idiom—rather “treatment” than punishment.) Without some qualification or explanation, that is a strong proposition for 1629, but despite skimpy reports it is clear that Henden in fact admitted a degree of modification. For he says that 1 Eliz. did not alter the rule (only spiritual sanctions backed by excommunication for ecclesiastical offenses, whether they were
pursued in the High Commission or a regular ecclesiastical court) except for the “things
there named.” He does not specify what those things are, but he must mean heresy (plus
perhaps a few other forms of comparably grave religious error and perhaps the special
case of clerical incontinence.) The striking feature of Henden’s argument is that the
“enormity” test is by implication rejected, both as a test for High Commission jurisdiction
and a test for power to use secular sanctions. With respect to the former, Henden shows
no disposition to be concerned with whether Purbeck’s adultery was grave enough for the
High Commission; he appears to concede that as an accepted ecclesiastical offense it was
as pursuable in the Commission as elsewhere in the ecclesiastical system. With respect to
sanctions, he flatly rejects the notion that an ecclesiastical offense must meet a certain
standard of gravity to be subject to them: the term “enormity” in 1 Eliz. is in effect
reduced to a synonym for the exceptions “named” in the statute. This is “strong for
1629”, but a leading lawyer did not think the argument futile; I do not think this study
shows unambiguously that he should have, that unsettlement of the most fundamental
issues about the Commission was firmly overcome so long as the tribunal lasted (i.e.,
until it was abolished by the Long Parliament.) Henden goes high in his argument,
insisting that the “precious” liberty of the subject demanded his comprehensive rule
against secular punishment and citing Magna Carta. By way of precedent he cites
Smith’s Case from 42 Eliz., and he makes the argument from 23 Hen. VIII against High
Commission jurisdiction.

Following Henden’s argument, observations by Chief Justice Richardson,
Serjeant Brampton, and Justice Yelverton are reported. Richardson says that the first
part of the High Commission’s sentence is not part of the punishment. In other words, the
Countess was not imprisoned punitively, but only to coerce performance of the rest of
the sentence. To imprisonment for that purpose, Richardson had no objection; by
implication, he would have considered punishing by imprisonment in the case at hand
unlawful. We have seen that distinguishing between impermissible punitive punishment
and permissible coercive had a pedigree, though to what extent it was accepted is unclear.
Serjeant Henden does not touch on the distinction, but would presumably have said that
the liberty of the subject demands no imprisonment by any court in ecclesiastical causes,
apart from a handful in which the High Commission had express statutory authority to
use the sanction. Besides embracing the difference, Richardson provides a little reasoning
in its support. He points out that if instead of jailing Purbeck directly the Commission had
excommunicated her, and then she had been committed to prison by De excommunicato
capiendo, she would be in virtually the same position she was in now: to be released she
would have to satisfy whatever ecclesiastical requirements she was excommunicated for
not having satisfied, or else agree to a substitute satisfaction acceptable to the
ecclesiastical courts, of which finding surety for performance, as prescribed in this case,
would be an instance. In Richardson’s view, the direct coercive imprisonment used in
Purbeck was “not but agreeable to the ecclesiastical course.” I.e., though technically
different from the course used by regular ecclesiastical courts, it came to the same thing.
(Needless to say, this equivalentizing can be criticized. Arguably, the “ecclesiastical
course” is the course that must be followed; there is no basis for saying that 1 Eliz.
permits a kind of short-cut around the letter of the due legal procedure, even if it would
be a practical convenience without substantive side-effects. Actually, the practical
equivalence is not perfect. De excommunicato capiendo was a distinct procedure, which
at least required that for an excommunicated person to be jailed he must be able to be
apprehended, and there were checks on the writ such that the bare fact that X had been
excommunicated by some ecclesiastical court was not an automatic guarantee that he
would go to jail even if apprehended. Richardson’s theory needs a premise to the effect
that part of the purpose of the High Commission was to improve the efficiency of
ecclesiastical procedure, as by imprisoning an excommunicated “bird in the hand” subject
to being imprisoned by regular process eventually. Richardson may well have believed
this, but he could properly be pressed to argue it.)

As to what he calls the second part of the sentence—i.e., the fine—Richardson
had no doubt of its legality. (As I note generally above, if the sentence required any
strictly spiritual act nothing is said of it. Richardson’s position is clearly that the
imprisonment was lawful as the means to insure payment of a lawful fine.) On this point,
there is a significant difference between the reports. Littleton has Richardson saying that
fining the party “is expressly within their commission”, while Hetley has him saying it is
“express within their power.” The Littleton version involves the highly debatable
premise that if the current royal patent authorized punishing by fine, doing so was beyond
legal reproach. The Hetley version tends to make Richardson’s meaning, “1 Eliz.
authorized conferring power to fine on the Commission and the current patent confers it.”
Either way, the claim provides plenty to argue about. As Purbeck turned out, however,
there was no opportunity to contest Richardson’s claim or to review the cases in which it
had already been contested.

Serjeant Brampston spoke next. I think it probable that he was speaking for
himself, or using his Serjeant’s privilege to advise the court without being retained as
counsel for either side. Such interventions are not common in the 16th-17th century
reports, but in several of them comments by Brampston are interspersed with the judges’,
rather than clearly placed among the arguments of counsel. Both his readiness to speak
and the characteristic intelligence of what he has to say perhaps reflect an intellectual
authority later honored by his appointment as Chief Justice of the King’s Bench. In
Purbeck, he points out a disarming feature of the case, which poses a grave problem for
Richardson’s approach: The Countess was a married woman; therefore the part of the
sentence consisting in a fine was impossible to be performed (because money and
chattels brought to a marriage by the wife were disposable by the husband); therefore, if
subject to imprisonment to coerce performance of the sentence, the Countess could be
perpetually imprisoned. Brampston states no further conclusion, but surely he thought it
unacceptable to imprison coercively when the prisoner is releasable only on a condition
which nothing in his or her power to do would satisfy.

Possible generalized conclusions from Brampston’s point would include: (1)
Whether or not the High Commission may impose a determinate jail sentence as a
punishment, it may not imprison in the “equity style”—until the prisoner does something
prescribed—owing to the risk that in some circumstances the required performance could
be impossible. (2) The High Commission may imprison coercively (whatever its punitive
resources) in the sense that Prohibition will not lie to block execution of a sentence
ordering such imprisonment; the prisoner may, however, bring Habeas corpus, and if he
does so he should be released if it appears that the imprisonment could continue
indefinitely, or that release could not be achieved by the prisoner’s doing an immediately
doable act. (3) Imprisonment to coerce performance of a strictly spiritual injunction is
unobjectionable, because by definition what is prescribed must be doable; it is fining that introduces the possibility of perpetual imprisonment—certainly for a married woman for as long as she remains one, but also for insolvents and parties simply too poor to pay the amount of the fine. One response to this inconvenience is to rule out punishment by fine altogether; the less radical response is to rule it out at least in the paradigm case of the married woman, (Leaving open the question of how to deal with other forms of inability to pay has the disadvantage, however, that observing the basic principle—no coercive imprisonment unless the sentence is performable here and now—would in those other cases require fact-finding in a nebulous area to enforce the law by Prohibition. I.e.: That a party is a married woman is a simple and often notorious fact. Plaintiff-in-Prohibition could easily allege it if that were considered a desirable formality; it would rarely be controvertible. Other claims of inability to pay would tend to be resolvable only on Attachment, and a jury would have to make a difficult determination; meanwhile—unless bailed on Habeas corpus—the party would stay in prison, in effect suffering a covert and indefinite form of punitive imprisonment.) Serjeant Brampton’s remark hardly commits him among these projected possibilities—and there may be further permutations—but it surely implies that Prohibition should be granted in the instant case.

Justice Yelverton, the last speaker, says that the High Commission could not imprison with a “no bail” stipulation because its patent gave it no power to do so. The minimum meaning of this I have already indicated: Prohibition need not, perhaps should not, be granted, but the High Commission may of course not extinguish the common law’s power to bail on Habeas corpus. A stronger meaning would be that execution of the sentence should be prohibited for no further reason than the Commission’s purporting to do something utterly ultra vires. Even if the impropriety could be undone on Habeas corpus, why should the party have an extra procedural step forced on her? Why should the legally transgressing court be able to detain its prisoner until she actually achieved release, with or without bail—an outcome which, if perhaps likely, would not be inevitable? Yelverton does not spell out the conclusion he wants to be drawn. He states his point conservatively in emphasizing the patent’s failure to authorize “without bail” addenda to imprisonment sentences. That does not imply, however, that if the patent had authorized the addition “without bail” it would be within 1 Eliz. Yelverton had no reason to go into that. His opinion does imply that if the patent authorized imprisonment in general terms (as it probably did) adding “without bail”—a plain encroachment on common law territory—would be acceptable. (Ecclesiastical courts had enjoyed, and the High Commission probably did enjoy, on the basis of statute, at least within narrow bounds, some power to imprison. Giving it that power does not per se limit the common law in its administration of Habeas corpus. To do that, the High Commission would need both a sufficient grounding in 1 Eliz. and an express direction by the monarch pursuant thereto.)

On a day in the same term later than that of Henden’s argument for Prohibition from the Bar and the three comments following it, Chief Justice Richardson is reported—with a slight variation between the two reports—as saying in effect that whatever else was true Prohibition could not be granted because the fine had already been estreated into the Exchequer. There is no sign of disagreement on the part of any other judge. The point is well-taken, for we have seen earlier indications that once a fine was estreated it became the Exchequer’s business whether it was a legally collectable debt to the King. (How the
Exchequer would regard the fine in this case, or any High Commission fine, is uncertain for 1629, though there are earlier instances in which it appears to have disallowed fines imposed by the Commission.

As to the slight variance between the reports: Hetley has Richardson saying merely that no Prohibition may be granted when a fine has been estreated, while in Littleton he says that the Commission “has such power” and that Prohibition may not be granted after estreatment. The difference is unimportant except for reconstructing the narrative of Purbeck in detail. We obviously have thin evidence for such a reconstruction. The following seems to me a reasonable speculation: When the case was first argued, the court was not full, for we hear from only two judges. Richardson and Yelverton could have granted a Prohibition, subject to motion for Consultation, if they agreed, but they did not agree in favoring one. Richardson was opposed and Yelverton more likely than not inclined the other way. They had heard from Brampston a strong objection to Richardson’s view. The Chief Justice may not have been shaken in a perhaps stubborn unwillingness to prohibit the High Commission in this case—a visible one, in which the Commission had demonstrated its readiness to use its purported powers to bear down on a prominent and egregious offender, arguably just what the Commission was for. On the other hand, Brampston could hardly have avoided reinforcing Yelverton’s doubts. Then, after the inevitable adjournment, the case was reopened. Not much time could have passed, for Hilary was a short term, but enough had passed either for the fine to be estreated or for the Common Pleas to learn that it had been. Although in the final entry of both reports only Richardson speaks, it is probable that he was speaking for the court, not for himself alone. That is to say, however strongly other judges may have opposed him on the merits, they had no choice but to acknowledge that estreatment mooted the merits that the case now belonged to the Exchequer. In Hetley’s version, Richardson took the “cool” course and said only what the court held. In Littleton’s, he could not resist adding that the narrow ground for decision led to victory for the side he still favored on the wider questions, so far as the court he presided over was concerned.

Peel involved the High Commission, but was not centrally a case on the Commission’s powers. Rather, it was about whether a general pardon released Mrs. Peel from a sentence the Commission had imposed on her. In the course of discussion, however, some judicial commentary on the basic High Commission issues occurs. The reporting is confusing, especially Hetley’s, though that report significantly supplements Croke, the best account of the case as a whole. Littleton is clear on its limited subject, the first hearing of the case.

Mrs. Peel was prosecuted and convicted in the High Commission for abetting adultery. (She had a house close by [“prochein annex” to] Somerset House, and there was a private passage through her residence into Somerset House. She permitted Sir Robert Howard to go to the Viscountess Purbeck by this passage for the purpose of committing adultery with that lady. Peel was accused moreover of being an active promoter of the illicit affair. *Per* Littleton, she “abetted, caused, and procured adultery between them”; *per* Croke, she was “chief agent for their meetings at unseasonable times, by and through her private lodgings and passages, by means whereof they took their opportunities to commit adultery.” In Croke’s language, her sentence was for bawdry and “lenocynie” (anglicized form of the Latin *lenocinium*: the practice of being a go-between or procurer.) The carryings-on around Somerset House took place over a span of
about three years. Croke tells us that one Elizabeth Ash was joined with Peel in the sentence and had a Prohibition on the same surmise—she was probably a friend or servant of Peel’s who collaborated in the mischief.

Upon conviction, Mrs. Peel was sentenced to a £200 fine and enjoined to make such penitential satisfaction in the Savoy Church as the Commissioners should appoint; she was imprisoned until she found sureties for performance of the sentence (or, alternatively, sentenced to imprisonment in addition to the other penalties—which construction one adopts makes a difference. See below for this aspect of the case.) At this point, she sought a Prohibition and, by Habeas corpus, release from imprisonment. Her ground was that the offense behind the sentence was pardoned by the general pardon of 21 Jac. Littleton’s report notes that adultery itself was excepted from the pardon but abetment thereof was not, which suggests that it may have been urged against Prohibition that the exception for the principal offense carried incidentals such as abetment with it, but if so the argument got nowhere: On the first hearing of the case, the court simply assigned a day for the Commission to show why Prohibition should not be granted. Certainly later on and probably from the start, Mrs. Peel was represented by the ubiquitous Serjeant Henden.

There was ample debate when the case was reopened—lasting several days, Croke says, “chiefly upon the pardon.” In the end Prohibition was granted, meaning “chiefly” that the pardon was held to apply to Mrs. Peel’s sentence. The point was problematic, even given that abetment of adultery was covered, because the sentence expressly referred to acts committed after the pardon. I.e., the Commission claimed, and Peel conceded, that the offense had gone on for some time before the pardon, but it was claimed against Peel that it had also gone on for a while after; she, on the other hand, had averred in her surmise seeking Prohibition that she had not continued to offend beyond the date of the pardon. So was she released from her penalties in virtue of the pre-pardon offenses, which may have been the only ones committed, or still subject to them so long as her averment was not found true by verdict or by admission in common law pleading? There are numerous remarks in the reports on this quite technical issue. I do not think they add up to a completely clear presentation of both sides, but they do not as such matter for our present purposes. Prohibition cases dealing with the law on pardons, of which there are enough to constitute a separate topic in this study, have not yet been discussed. What do matter here are the implications of judges’ and lawyers’ remarks for the basic questions about the Commission’s powers.

As reported by Croke, Justice Hutton made two general observations on the Commission’s authority after giving his opinion that the pardon applied and therefore that Prohibition should be granted. (1) Peel’s imprisonment until she found sureties for performance of the spiritual sentence and payment of the fine was unwarrantable. The reason for this, per Hutton, is that 1 Eliz. gave the High Commission power to fine or imprison “for the offense”, but not “for the fine or until sureties found.” Rather, the fine “ought to be certified into the Exchequer.” Construing this remark and relating it to earlier law present some problems. The conclusion was probably established law: Granting the legality of imposing a fine, collection must be left to the Exchequer; the Commission may not imprison in order to put pressure on the party to pay or to guarantee payment by a bond. Punitive imprisonment is upheld, perhaps more explicitly than in any previous case. I doubt that Hutton meant to exclude coercive imprisonment purely to
coerce performance of a spiritual sentence, which would contradict most precedents, *sed quaere*. Whether, on the punitive side, he meant that the Commission must choose between a fine and imprisonment and may not use both instruments (in an alternative statement, that using both in the same case should automatically be interpreted as imprisoning to enforce the fine, whatever language the sentence uses) is uncertain. In any event, Hutton’s opinion must, so far as the principal case is concerned, demand Peel’s release on her *Habeas corpus*, though it does not say so in so many words. (Nor is there any other separate mention of the *Habeas corpus* in the reported discussion. It may not have been necessary for the Common Pleas to discharge her formally, given the decision that she was fully pardoned.)

(2) Hutton next commented, a little indecisively, on the High Commission’s jurisdiction over Peel in the first place. He noted that the Common Pleas had ruled that adultery suits should go to the Ordinary, not the Commission, unless “exorbitant and notorious.” I take his drift to be, though he does not spell this out, that even apart from the pardon there might well be grounds for Prohibition: If adultery is *ultra vires*, abetting it must surely be. Admittedly, the jurisdictional rule on adultery may be open to an exception for aggravated cases—here Hutton makes the only express acknowledgment from the Bench that I have seen of Dodderidge’s argument from the Bar in Chancery’s Case. If aggravated abetment is in the same class as aggravated adultery, the duration of Peel’s misbehavior and the high-ranking principal offenders might suffice to promote her offenses to the “exorbitant and notorious.” At the least, however, if she had sought Prohibition on substantive jurisdiction rather than the pardon, she would have had a serious case, which might tend to encourage, though it would not legally justify, taking the pardon in her favor. To reinforce his point about simple adultery, and by implication simple abetment, Hutton states the familiar rule that High Commission patents are bounded by 1 Eliz. and may not confer any jurisdiction beyond what the statute allows to be conferred. He observes that alimony suits have no place before the Commission and cites several cases upholding the general principle that the statute controls the patent. One, Dr. Conward’s (probably = Conway’s below) cuts close to the present case and could plausibly be said to involve aggravation: the suit was prohibited even though the defendant was accused of pandering to his own wife. The other two citations are outside the marital/sexual category—Giles v. Balam (just above) about assaults on clerics and a Condie’s Case on the election of a parish clerk.

Hetley has Justice Croke (the same person as the reporter) saying more firmly than Hutton-*per*-Croke that there were two separate reasons for Prohibition, the applicability of the pardon and the mere rule that the High Commission may not inquire into adultery. *Croke-per*-Hetley makes no gesture toward a loophole for aggravation. Rather, he simply cites the same case as Hutton-*per*-Croke *sub nom* Convey’s or Conway’s with a bit more detail. Conway and his wife were sued together, she for adultery with Sir Richard Blunt and he for serving as pander; Prohibition was granted. The precedent was clearly being used to show that adultery and pandering to it are both beyond the Commission’s jurisdiction and perhaps to imply that as no aggravation factor was brought up in that case none could plausibly be in this. *Croke-per*-Hetley goes on to say, like Hutton *supra*, that the High Commission could not touch alimony and, having asserted the general principle that the patent without the statute’s support cannot confer jurisdiction, to cite the parish clerk case *sub nom* Condith’s, also brought up by Hutton-
per-Croke, explaining it. (It was properly a case on creating disturbance in a church, behind which lay a dispute over the method for choosing a parish clerk. The 1604 canons prescribed that the minister should select this official, but in many places it was claimed that there was another method based on local custom. Regular ecclesiastical courts were frequently stopped by Prohibition from giving effect to the canons pending common law trial of whether the alleged custom existed. So far as I am aware, the High Commission was never involved in mere electoral disputes. I take it that Condith acquired a criminal flavor, and the Commission some pretense to jurisdiction, because in that case electees by both methods tried to exercise the office at once—each setting his own psalms for the congregation and so disturbing good order. The suit was prohibited because the matter was too petty for the Commission, whatever the patent may have said.) At another point in Hetley, Justice Croke expresses for himself essentially the view he attributes as reporter to Hutton that the sentence to pay a fine and make submission (to spiritual punishment) and be imprisoned until security was found was “void”. Justice Hutton speaks twice as an individual in Hetley. (1) He cites a case from 44 Eliz. as holding that the High Commission may only fine for heresies, schisms, and errors (which may be a more stringent restriction than he would have insisted on himself.) (2) He says in general terms, without reference to marital misconduct cases such as the one at hand, that 1 Eliz. should be expounded according to “the meaning of the first intent”, which was to provide a corrective to the Bishops who remained Catholic at Queen Elizabeth’s accession. The only example he gives of the principle’s effect—excluding petty offenses from the Commission—is an (undated and unnamed) prosecution for working on saints’ days, but in connection with that he provides a valuable datum: The saint’s day violator was fined and the fine estreated, but the Exchequer held upon argument that the High Commission proceedings were void. This remark confirms scanty earlier indications that the Exchequer played a significant part in limiting the Commission.

The small variances between the reports do not matter very much. Justices Hutton and Croke were clearly enough in substantial agreement on all the issues in Peel. Scattered remarks in Hetley (which I shall discuss below) tend to put Justice Yelverton on the same side across the board. Justice Harvey is only reported as agreeing that Peel was fully pardoned; there is no indication of whether he thought that the suit against her should be prohibited even in the absence of the pardon. Chief Justice Richardson may have been the odd man out. Most of his remarks are directed toward trying to make some kind of case for the High Commission, but whether he ultimately dissented is uncertain. By an unusual reportorial move, Hetley cuts us off from knowing all of what the Chief Justice had to say, though he gives some of it. The reporter’s words are: “Richardson objected divers things [to various arguments by counsel and judges] with much earnestness, but so apparently contrary to the law, that I have omitted it.” The following are the comments from Richardson that Hetley does report: (1) In response to Justice Croke’s saying the sentence was void because of its demand for security backed by imprisonment, he objected that the Commission had no other means to make the party pay her fine and added that if she would pay she would be discharged. I suppose that comes to suggesting that although it might have been improper to imprison her on top of the other penalties, using imprisonment just to get the sentence performed was legitimate. The rest of the judges replied, conventionally, that estreatment into the Exchequer was the proper procedure. (2) Against Hutton’s statement that fines were lawful only for
serious religious offenses, he said that I Eliz. provided that the Commission might proceed according to the tenor and effect of the patent. He may have meant that the patent could confer jurisdiction over any ecclesiastical crime, or only that it could confer somewhat wider jurisdiction than the narrowest interpretation of the statute allows, and with jurisdiction, secular sanctions. (3) A little later he perhaps adopts the less extreme meaning of (2) by noting—relevantly enough—that by the words of the statute the Commission was not confined to heresies and schisms, but permitted to proceed against "abuses, contempts, &c." (4) In response to Hutton’s saying in effect, with a citation, that at least some offenses are too petty for the High Commission, Richardson revived Justice Walmesley’s philological argument that “enormity” covers more than major religious crimes because it means “quicquid est contra regulam et normam Juris”. There is no telling whether Richardson would infer from this definition that anything in any sense illegal by ecclesiastical law was conferrable on the High Commission or would see some limiting implication in it—say to the criminal part of that law. Justice Yelverton promptly rebuffed Richardson’s suggestion, saying that an “enormous” offense means only a great one, for “so in common acceptance it imports.” (5) At the end of the discussion reported by Hetley (which preceded the court’s delivering a decision), Richardson makes what looks like an about-face by saying “They should proceed by excommunication and not fine and imprison.” One can only speculate about what was in his mind. Could he have thought, after sparring with his puisne judges, that the best hope for the High Commission lay in the old Common Pleas doctrine that the tribunal’s jurisdiction extended as far as ecclesiastical law but its sanctions no farther than those available to other ecclesiastical courts? Going back to the old ways would have entailed granting Peel’s Prohibition and releasing her from jail—in other words, the Commission’s losing the present case—, but it would in future cases make room for a useful High Commission role in such situations as flagrant abetment of adultery, especially among the sort of people the Ordinaries may have found hard to deal with. As to whether the final decision to grant Prohibition was unanimous, all one can say is that aside from most of Richardson’s comments in Hetley there is no evidence to the contrary. Croke simply gives the result—Prohibition granted—without any indication of ultimate disagreement.

A few features of Peel remain to be noted. As I intimate above, there might be a shadow of doubt whether Justice Yelverton was completely in line with Croke and Hutton, though he certainly agreed that Prohibition should be granted. From a couple of remarks in Hetley, it is clear that he thought the pardon freed Mrs. Peel from any obligation to pay the fine and any liability to imprisonment. He does not say that even in the absence of the pardon the Commission would have lacked jurisdiction over her case or at least power to use secular sanctions in such a case. One remark may suggest that he was not entirely opposed to such sanctions, for he seems to base his objection to the demand for security and the use of imprisonment on the form of the sentence rather than the mere illegality of the sanctions. He says that the sentence was to a fine and penance, and that the security-and-imprisonment clause on top of that was void. Per Serjeant Brampston as well as Henden on Peel’s side and Serjeant Atthowe for the Commission, one Sir Wil. Chamcer is said to have been both fined and imprisoned for adultery and that “all the judges of England” held that the Commission could proceed by fine and imprisonment. This looks like a not quite accurate reference to Chancey drawing on the extrajudicial aftermath of that case. Taken as a comprehensive view of what the
Commission might do, it was not followed in Peel, having probably been cited by the Commission’s counsel.

Howson’s Case, decided in the same term as Mrs. Peel’s, is close in character to Smith v. Clay above. The High Commission for York proceeded on libel against another unedifying vicar. Howson’s sins were the following: non-residency and neglecting his cure (Littleton specifies that Howson was Vicar of Sturton, Nottinghamshire, but lived in Doncaster); wearing his hat during divine service; offensive behavior when the High Commissioners visited his church (he spoke too loudly and “gave a scornful answer” when he was reproved for doing so); spitting “in abundance” on the pew of one Wright when Wright and his wife were occupying it; saying after that, “with a common voice” (I suppose in a vulgar and offensive tone—?), that his own wife was as good as Wright’s (i.e., her social equal); making jests in a sermon, which the next words are presumably meant to illustrate (he said that Christ was laid in a manger because he had no money to pay for a chamber, and attributed his exclusion to the knavery of innkeepers—as it happened Howson was at the time “in contention” with an innkeeper in the parish); (presumably on a different occasion than the spitting episode) during divine service and to the disturbance thereof, thrusting open the door of Wright’s pew and saying that he (Howson) and his wife would sit there.

Without any sign of divided opinion, the High Commission proceedings were prohibited. Two of Howson’s offenses are singled out in the reports as in the court’s view not punishable by the Commission, non-residency and breaking into the Wrights’ seat during service—perhaps as not enormous enough, though perfectly good ecclesiastical complaints in a regular court, but the reason might be legislative secularization of non-residency and common law interests in the use of pews. For the rest of his offenses, the judges said, he could or should be bound to good behavior. I take that to mean that Howson’s critics should go to a Justice of the Peace and seek a plain secular good behavior bond. I am not sure why the offenses should be divided into two classes. In any event, the Common Pleas was unwilling to concede to the Commission any powers of clerical discipline in multiform and perhaps refractory situations where the particular acts of wrongdoing were run-of-the-mill.

Aldam’s Case is also from Trinity, 1628. Here the High Commission suit was for adultery, drunkenness, blasphemy, and speaking against the King. The last of the offenses took a curious form: Aldam had seen a deed dated by the regnal year of Charles I and said “Charles there was one Charles an Egyptian.” I can only suppose that this utterance was taken to say something like, “Who is this fellow Charles? The gypsy of that name I once heard of?” Prohibition was denied. Littleton had it privately from Justice Harvey that the reason for the decision was “such scornful words against the King.” I am inclined to take the court as indulging in a little innocuous politics. The charges of adultery and blasphemy, though hardly of drunkenness, might perhaps with some plausibility, though not a lot, be held grave enough for the Commission; “speaking against the King” in the way Aldam spoke might have been hard to make out as secular sedition. The “right” solution of the case would probably have been quoad the first three

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125 T. 4 Car. C.P. Littleton, 152; Hetley, 104. Reports nearly identical; dating from Littleton.
126 T. 4 Car. C.P. Littleton, 156.
offenses Prohibition for want of enormity and quoad the fourth Prohibition because the matter belonged to the common law. A dose of the High Commission, however, would be sharper medicine for Aldam than he would be likely to receive otherwise, and the judges can hardly be blamed for preferring to avoid the aspersion that they had let a bad apple go, when he might—if not merely inebriated—have been a bad subject too.

In Larkin’s Case, from the next term, the Common Pleas prohibited an alimony suit, but on grounds that avoided denying the High Commission’s jurisdiction over alimony. It appeared from the two parties’ claims in the suit that Larkin himself caught his wife in adultery, whereupon he beat and threatened her; she then left him and sued for separate maintenance. The suit was therefore prohibitable on the theory that an adulterous wife who has suffered lawful chastisement and left the husband’s house on her own motion has no claim to alimony. (This harsh doctrine may not have been categorical in all circumstances, but I take it there was nothing on the record amounting to a sufficient claim of excessive cruelty in the justifiable beating or of threats constituting a “clear and present danger” to the wife’s physical safety.) The judges were unanimous for Prohibition, but Chief Justice Richardson “commanded” that it be express in the court’s order that the action was taken “on view of the articles & hearing the articles of both parties.” In other words, the court prohibited in awareness of the full state of the case as pleaded, not because it knew, or pretended to know, only that the suit was for alimony. Richardson may not have agreed with the rest of the court that alimony as such was ultra vires; it was entirely proper for the others to go along with his insistence, since grounds that would be good against any ecclesiastical court were the best reason for prohibiting the Commission.

Coventry and Stamford’s Case (1628) is reported in its first phase by Littleton. Another report by Hetley sub nom. Coventry’s Case is clearly of the same controversy at a later stage of the litigation. One aspect of the case is discussed in the End Note to Ch. 2 above, because it involved the statute of 23 Hen VIII, c. 9 (specifically, power to remove a suit from a regular ecclesiastical court to the High Commission.) I shall first follow Littleton and then Hetley. Though I shall indicate how the issue involving 23 Hen. VIII fits in, the reader is referred to the End Note for the details of that aspect.

Littleton initially states the case without reference to the fact that it had been removed to the High Commission—as if, in other words, it had been brought there originally. The first round of discussion by counsel and the judges dealt only with whether the suit was intrinsically appropriate to the Commission—as if, again, it had been started there.

Coventry was a deputy of the Undersheriff of Essex. (Stamford, the co-defendant, is not identified. He was probably a sub-deputy of Coventry’s who assisted him in making the arrest whose legality was the substantive issue in the case.) When a minister named Gumell was in his church on Sunday at the time of divine service, Coventry entered the church “with Pistol, Sword, and Baston” and stationed himself under Gumell’s pulpit. The congregation was “amazed” and asked “them” (Coventry and, presumably, his sole assistant, Stamford) what they meant. They replied that they intended to arrest Gumell at the suit of one Larkin. (I.e., their business was to effect an

127 M. 4 Car. C.P. Littleton, 194.
128 M. 4 Car. C.P. Littleton 194; Hetley, 124 (not specifically dated.)
ordinary civil arrest, probably on behalf of an unsatisfied creditor.) Then they said that if he would not come out of his pulpit they would pull him out. Gumell, “being terrified”, came out before dismissing the congregation (thus while divine service was still going on) and was arrested.

How just this account of the events reached the court and the reporter is mysterious, because the case arose from Coventry’s and Stamford’s attempt to get a Prohibition. They are unlikely to have put the colorful side of Gumell’s seizure into their surmise, as opposed to saying only that they were sued for laying violent hands on a clergyman, they being officers performing their lawful duty, for which they were not answerable in an ecclesiastical court, or at least not in the High Commission. (Littleton’s statement of the facts ends by saying “and so” violent hands were laid on Gumell. This indicates that that was the core of the charge against Coventry and Stamford. They would naturally have surmised something of their grounds for claiming that they were improperly pursued for this *prima facie* ecclesiastical offense, but hardly—one would suppose—with embellishments of their violent behavior. As will appear, however, they could well have had reason for admitting in their surmise that their action involved disturbing divine service, for one part of their contention was that that element turned the offense into a secular one.)

In any event, Serjeant Ayliffe, launching the debate by arguing in favor of Prohibition, made two separate points: (1) The offense Coventry and Stamford committed was great, but was not heresy or schism and therefore not within the High Commission’s jurisdiction. This is of course to adopt the narrowest construction of the authority 1 Eliz. allowed to be conferred on the Commission. (2) Coventry and Stamford should not be being sued in any ecclesiastical court because the statute of 1 Rich. II, c. 15, subjected the specific class of act charged against these parties to secular remedies. (The statute provided, roughly, that officers who make an arrest which in other circumstances would be perfectly lawful in or near a church during services, or just before or after services, should be subject to imprisonment and fine, and should be liable to compensate the victim civilly. For a detailed analysis of this statute and its predecessor, 50 Edw. III, c.5, see the case of Pit v. Webly, above in this chapter, where that legislation figures in a central, though different, way.) As Ayliffe says expressly, 1 Eliz. left the 14th century statute intact. Laying violent hands on a clergyman and interrupting divine service remained ecclesiastical offenses, whether or not suitable to the High Commission, but if they were committed by arresting officers they were preempted for the common law by force of 1 Rich. II.

The first speaker after Ayliffe was Serjeant Brampston. I note in *Purbeck*, above, that Brampston sometimes spoke for himself rather than as retained counsel, and so he may have here, especially since on one point he disagrees with Ayliffe, although his remarks put him on the same side with respect to the basic issue. Brampston says first that the parties’ offense was “enormous”, but not punishable in any ecclesiastical court. By using the word “enormous”, he was probably implying that if the parties were pursuable in ecclesiastical courts at all they could be proceeded against in the High Commission. That is to say, Ayliffe’s extremely narrow view of High Commission jurisdiction was mistaken; wherever the line between “enormous” offenses appropriate to the Commission and lesser offenses should be drawn, the parties’ conduct here was within the bounds of “enormity”. This position is more realistic, in the light of numerous
cases, than Ayliffe’s ultra-restrictiveness. Having so said, however, Brampston goes on to make the case against ecclesiastical jurisdiction altogether. He does so with at least a different emphasis than Ayliffe’s. Rather than simply claiming that 1 Rich. II takes away ecclesiastical jurisdiction, he says that if the parties were to be fined or imprisoned by an ecclesiastical court they would be liable to being fined and imprisoned again at common law. The implication is that such double exposure would be unlawful; clearly, in Brampston’s opinion, neither ecclesiastical nor lay courts could be prevented from imposing punishment by a showing that the other system had already done so. Since, however, the High Commission was the only ecclesiastical court that could possibly fine or imprison for the offense in question here, Brampston’s second point is not perfectly compatible with his apparent earlier statement that the offense was simply not punishable in an ecclesiastical court. I.e., why should the parties not be pursued in an ordinary ecclesiastical court and punished spiritually—the only way they could be punished by such a court—over and above secular penalties that might be or had been imposed at common law pursuant to 1 Rich. II? Indeed, why should the High Commission not proceed so long as it did not use its secular sanctions, but only the spiritual ones which it undoubtedly had as well? I suspect that the reporter, in letting this contradiction appear, may have slightly garbled the argument he heard. In any event, “double exposure” became an important motif in the case; Brampston first broached it.

In the first round of judicial discussion, remarks by three judges are reported. (1) Justice Yelverton spoke briefly twice. The first time, in the immediate light of Brampston’s observations, he says that the place makes the offense ecclesiastical. I.e., he expresses skepticism toward Ayliffe’s and Brampston’s suggestions that ecclesiastical jurisdiction is simply ruled out in this case; per Yelverton, it is not ruled out because the offense was at least partly committed in a church; ruling it out in other situations covered by 1 Rich. II need not be debarred. There is no necessary implication that High Commission jurisdiction should be upheld. Yelverton’s second speech, which follows Hutton (just below), is cryptic, perhaps misleadingly reported. Yelverton emphasizes that the offense in question was a “great abuse” then adds—with a “yet” to introduce the point—that 1 Rich. II and 1 Mary c.3 “aid all there is in this case”. What could that mean? It rather sounds as if Yelverton now wanted to retreat from his previous suggestion that secular law had not simply ousted all ecclesiastical jurisdiction—sed quaere.

(2) Justice Hutton observed that such offenses as the one in question here would have been punished in the Star Chamber, and that there were several precedents of this. The rest of the court conceded the point. The Star Chamber practice in itself need have no particular significance. By virtue of the medieval legislation, abusive behavior by officials of the sort displayed by Coventry and Stamford was unquestionably a secular offense, and it is unsurprising that it should commonly, perhaps exclusively, have been prosecuted in the Star Chamber when it was prosecuted (as a major misdemeanor subject to indefinite non-capital punishment and also to private damages, it is a typical Star Chamber offense.) Hutton may have meant to suggest that the practice tended to support the thesis that ecclesiastical jurisdiction of any sort was taken away, but it need not imply that, and Hutton expresses no such conclusion.

(3) Chief Justice Richardson also spoke twice. His first, brief, contribution was only to say that if the offense here was ecclesiastical it was “enormous” and thus fit for
the High Commission (contrary to Ayliffe, but not to Brampston.) His second speech, after Hutton’s reminder of the Star Chamber’s role, is more extensive. He acknowledges that Star Chamber jurisdiction is perfectly appropriate, while noting that ordinary common law procedure by indictment was also available. He goes on to say that if someone exposed to secular process should be fined or imprisoned by the High Commission he would be punished twice for the same offense: the High Commission punishment could not be pleaded in the Star Chamber nor to bar an indictment. The rest of the court agreed with these points as such. Richardson does not say in this speech that double punishment would be intolerable, but there is no doubt that he and his colleagues thought so. Richardson’s distinctive view turned out to be (below) that the High Commission should not be prohibited until it actually did impose secular punishment. That is contrary to a vein of opinion among the judges that immediate Prohibition was the better course, but there was no dispute about the unacceptability of double secular punishment.

With this much discussed on the apparent assumption that Coventry and Stamford were prosecuted in the High Commission originally, Justice Hutton called the court’s attention to the fact that the case had actually been removed to the Commission by request of a diocesan judge in whose cognizance it originally fell. One cannot be sure whether the Common Pleas was unaware of this feature until Hutton noticed it or simply ignored it because the first point to get clear was whether 1 Rich. II ruled out ecclesiastical jurisdiction altogether. Inasmuch, however, as there was not consensus that ecclesiastical jurisdiction over such a case was flatly and long-since abolished, the fact that the court was dealing with a removed case had to be taken into account. Hutton may have so realized when he introduced the fact. The removal raised two questions: (1) whether suits could ever be removed to the High Commission, as opposed to regular ecclesiastical courts other than the one where the suit was commenced; (2) assuming removal to the Commission was not altogether banned, whether, to be removed there, the suit must be one appropriate to the Commission if originally brought there. These questions depended on the meaning of the statute of 23 Hen. VIII, c. 9. That act preserved a longstanding power to remove ecclesiastical suits at the request or with the consent of the initial judge, subject to some restrictions, concerning which there was a good deal of litigation. See the End Note to Ch. 2 for these matters in greater detail. For present purposes, the point to keep in mind is that the remainder of the discussion of Coventry intermixed consideration of the removal power with the issues already broached—whether the offense in question was within ecclesiastical jurisdiction at all, and if so whether it was a High Commission offense.

The rest of Littleton’s report contains several speeches by the three judges already heard from—Richardson, Yelverton, and Hutton:

Richardson adheres, with greater explicitness, to the position he had already adumbrated: no objection to the High Commission’s handling the case, provided it uses only spiritual sanctions; Prohibition should not be granted until secular ones were actually imposed. Removal to the High Commission seems in itself to have posed no problem for Richardson. (It should be noted that the offense in Coventry was first presented at an episcopal visitation and then remitted by the Bishop to the Commission. Although none of the judges comments on this circumstance specifically, it does guarantee that the case removed was criminal. Richardson need not have thought that
civil cases could ever be removed to the Commission, much less that their removability was virtually obvious. He had already said that Coventry’s and Stamford’s offense met the enormity standard for High Commission matters, with which he would appear to have had no quarrel.) As against what seems a flat assertion by Yelverton (below) that 23 Hen. VIII did not permit removal to the High Commission, Richardson made the general point that the statute did not, after all, ban removals-with-consent completely. He gave an example of the sort of case in which the power to remove made especially good sense and would surely be upheld (where the parties are fugitives, all of whom an Ordinary could not reach within his diocese.) Though it is not spelled out, Richardson’s thought may be that a criminal case as grave as Coventry’s and Stamford’s—involving officials subject to secular punishment, whom diocesan judges might not be sure they were entitled to punish spiritually, and who might be resistant with their superiors’ support—would be, like the fugitives case, a fairly obvious candidate for removability. Of course either case could be handled by removal to a regular archdiocesan court, but it makes sense to argue, as it were, that since the High Commission existed it might as well be used for the function it specialized in—seeing that serious ecclesiastical criminals with good prospects for evading local ecclesiastical justice did not get away with it. Finally, Richardson contradicts the position that 1 Rich. II took away ecclesiastical jurisdiction operating with spiritual sanctions over offenses covered by that statute. The statute’s purpose was to increase the punishment, to see that “such offenders could be smitten with two swords.”

This last point of Richardson’s is quite persuasive. While double secular punishment for one offense would clearly be unacceptable, why should Parliament want the offenders it had singled out as deserving secular punishment to escape spiritual correction if the ecclesiastical authorities thought smiting them with the spiritual sword would be to their religious benefit? To get around this argument, Justice Yelverton came up with a plausible, though shaky, counter-position. Yelverton was indecisive in the first round of discussion, but in the second his opinion is strong and clear. He now shows what looks like an inclination to hold that 1 Rich. II simply terminated ecclesiastical jurisdiction over the offenses it covers, for he emphasizes that the statute was made at the prelates’ request, as if they wanted to be relieved of such cases. After Richardson’s “two swords” speech, however, he retreats, conceding that Ordinaries could proceed spiritually against statutory offenders. The High Commission, on the other hand, could not so proceed. One reason for that, Yelverton now asserts, is that removal to the Commission is simply not permitted by 23 Hen. VIII. That is a respectable position, backed by some authority (see End Note, Ch. 2.) Yelverton does not, however, go into arguments for the construction. Rather, he relies on the ingenious point at the center of his final stance in Coventry: It should be presumed that if a case is before the Commission, either originally or by removal, secular sanctions will be used. Therefore, the only way to avoid double secular punishment is to prohibit the Commission from entertaining any suit for offenses subject to common law or Star Chamber process. (Unless the secularizing statute preserves ecclesiastical jurisdiction with an express proviso that only spiritual sanctions be used? Possibly, but Yelverton adds no such qualification.)

It is certainly a good question, as Richardson insists, why the presumption Yelverton proposes should be made. Yelverton does not say something like, “It almost always happens, everybody knows—persons convicted in the High Commission are in one way or another fined or imprisoned, or at least threatened with those sanctions unless
they perform spiritual acts they are ordered to do for their correction, or unless they put in a bond to guarantee performance.” (What the actual practice was would be hard to ascertain historically, and a 17th century common lawyer would be unlikely to have more than an impression.) Legally, the cases above show that there was less than perfect judicial consensus as to whether, granting the High Commission’s jurisdiction, it could always, sometimes, or—except perhaps in a heresy or schism case—never apply temporal sanctions. Despite these difficulties, however, Yelverton’s “presumption” theory has a certain plausibility, which I would state as follows: After all, starting a case in the Commission or removing one there is usually, though not necessarily, motivated by a desire to see an ecclesiastical offender punished more severely than by spiritual sanctions, or at least coerced more effectively to perform a spiritual injunction than the regular course of excommunication could insure. It makes better sense to assume that the Commission will do what it primarily exists to do, even though what is assumed is not a certainty, than to stand by until the Commission has wasted time and energy working out whether to impose secular sanctions that cannot possibly be enforced (i.e., must be blocked by Prohibition or another process, such as Habeas corpus.) Owing to the threat of double exposure, the present case is paradigmatic for a sentence that “cannot possibly be enforced.” In more routine cases, would it not be in the interest of efficiency for the common law judges to ascertain here and now whether a majority would object to secular sanctions’ being used in a given suit, and if it would to prohibit at once? The alternative is treating jurisdiction as a separate issue, possibly leaving the suit before the Commission, then later—when a secular sanction has been imposed—considering its legality separately, perhaps with the result of having to prohibit a suit in which Prohibition had been once refused, or to liberate a prisoner on Habeas corpus when he could have been spared the trouble and expense of launching a legal proceeding.

Yelverton does not state such a rationale, but he must have had something like it in mind when he proposed a rather strained presumption. All he is reported as saying to justify it is that it resembles the presumption that ecclesiastical courts will not admit any plea against tithes. At the present stage of this study—for tithe law as a whole has not yet been analyzed—I can only suggest wariness of the analogy. It is true that persons sued for tithes in kind could have a Prohibition merely by surmising that the tithes were commuted by modus decimandi or composition real. Claiming such a commutation is nearly all that making a “plea against tithes” could mean, since claims to complete exemption from tithes were by the common law simply not available to laymen. If a layman sued for tithes were to claim a total exemption as his defense in an ecclesiastical court, I do not think there would be any basis for stopping the suit, though the plea would in all probability be overruled. For another angle, by the better opinion attempts to prohibit tithe suits on the ground that the current parson had agreed to take a commutation in lieu of the tithes in kind ought not to succeed; taking that for law, though the matter was controverted, one must say that ecclesiastical courts were left free to recognize such bargains or not to; the parson’s common law protection, if the parson did recover the tithes in kind contrary to his agreement, was an action for breach of contract. The picture is somewhat complicated by the rule that ecclesiastical corporations owning land could enjoy complete freedom from tithes. When such exemptions were claimed, the common law did frequently preempt the case by Prohibition, but hardly because it was presumed that ecclesiastical courts would not entertain pleas “against
tithes.” Rather, the claims of these privileged institutions were usually based on alleged immemorial custom or on statutory guarantees of exemptions originally granted by the Pope. Over disputed customs and statutory titles, the common law simply asserted exclusive jurisdiction. Ordinary modi too were custom-based. The best reason for taking claims to them away from ecclesiastical courts was just that a custom disputed as to fact must be tried by jury at common law. The connected question whether an alleged custom is reasonable or valid on its face, whatever the de facto practice from time immemorial, standardly belonged to the common law—almost always, in tithe law, questions of this type were about whether an alleged modus was a disguised claim to total exemption from some tithe.

In short, no presumption about what ecclesiastical courts would do with tithe litigation is necessary to account for how those courts were restricted. At best there is a superficial parallel between Yelverton’s proposed presumption and—let us say—what could be conceived as a sort of practical presumption that ecclesiastical courts were too apt to favor the tithe-recipient over the tithe-payer to be trusted with pleas that tithes claimed were not owed. Both presume what may tend to happen but need not. The High Commission perhaps as a rule used its secular sanctions when it had possession of a suit, perhaps tended to the view that if it took a case at all, or was allowed to by the common law courts, the matter was severe enough to be morestringently dealt with than by regular ecclesiastical sanctions. Nothing, however, prevented the Commission from making the judgment that spiritual sanctions would be sufficient correction for a convicted defendant, or appropriate on other grounds, such as avoidance of prospective double punishment. Estimation of how, over time, the Commission would choose among its remedies and coercive tools could be no more than guesswork. Similarly, if ecclesiastical courts had been given more scope to handle pleas “against tithes” than they were given, it is by no means certain that they would have overruled such pleas massively. Ecclesiastical lawyers tended to insist that reasonable commutations duly established by their standard of prescription—which was not in principle as strict as the common law’s, though perhaps more likely to be scrupulously applied than the common law’s were by juries of lay tithe-payers—would be respected. (Although in this passage I project beyond the cases I have analyzed systematically, the first three volumes of this study contain a great deal of material on tithe law, some of it touching the issues discussed here. The reader is referred to the index covering those volumes.)

When Justice Hutton reminded the court that it was dealing with a removed suit, he said that removal to the Commission at least of offenses presented at visitations was precedent and in his view unobjectionable. In the judges’ later discussion, however, he says that the question before the court reduced to whether 23 Hen. VIII permitted removal to the High Commission and announced his opinion that the statute does not so permit. Then his thinking underwent another shift—see just below.

Littleton’s report ends by summing up where the judges stood. They were divided 2-2 and therefore unable to grant a Prohibition at present. Justices Yelverton and Harvey (who does not speak individually) favored immediate Prohibition. Chief Justice Richardson of course opposed granting a writ until the Commission gave sentence imposing secular punishment. Hutton now said that he was in doubt. All he says by way of justifying his doubts is that “they”—presumably the Commissioners—were proceeding for reformatio morum, which is too vague to explain much. Perhaps he was
not quite sure of the interpretation of 23 Hen. VIII he had last seemed to embrace. Even if that statute did not authorize removal to the Commission as liberally as it authorized removal to regular ecclesiastical courts, did it make sense to suppose that it barred removal of criminal suits looking to a spiritual remedy, so long as the offense was grave enough to have been pursued in the Commission originally? Not being quite sure about that, he may have been skeptical, with reason, of Yelverton’s “presumption theory”, and yet preferred to hear more before joining Richardson in rejecting it. There was quite a lot more to be heard in the next discussion of the case, reported by Hetley.

Hetley’s report, *sub nom.* Coventries Case, is all but certainly of an immediate sequel. It may be in strictness of a separate case—a new attempt to get a Prohibition in the light of events in the High Commission later than the debate we have just reviewed, or at least unknown to the Common Pleas judges when they had that debate; or it could be a reopening of the existing case left undecided by the divided court, with new information adduced; which of these it is makes no significant difference. Hetley does not tell us what the substance of the case was. Besides the case’s name and date, however, one remark by Justice Yelverton makes it clear enough that Hetley is reporting a further phase of the controversy described by Littleton. Yelverton says that although the High Commission may sometimes fine and imprison, it may not do so in the present case *because the party was liable to be fined at common law.* That is to say, the case was of the type of Littleton’s *Coventry,* and the propinquity of name and date almost guarantees that it was the identical case. Other judicial remarks, though “up in the air” as reported by Hetley, resonate with the judges’ attitudes and concerns in the debate reported by Littleton.

I now follow Hetley’s report as it unfolds: Serjeant Ashley, seeking Prohibition, produced a copy of the libel in the High Commission, whereby the parties (note the plural, another hint that this is the case of Coventry and Stamford) were fined £30 and imprisoned. Chief Justice Richardson said at once that if the Commissioners had only excommunicated the parties they would have “been well.” In effect, Richardson was still insisting that the High Commission could, and in this case should, have confined itself to spiritual sanctions, and that the Commission ought not to be prohibited until it failed to do so; he was now, however, forced to admit that the condition had not been fulfilled and thus that Prohibition was probably inevitable.

Justice Yelverton then makes the observation I note just above. He dissociates himself from the extreme view that the Commission had no or very little power to fine and imprison, without generalizing about the limits of that power beyond making the point that the Commission may not impose secular punishment on a party subject to being penalized at common law. This is consistent with the position he comes to in Littleton. He does not mention his “presumption theory” again. There would of course be no purpose in bringing it up now that it was ascertained that the Commission actually had sentenced to fine and imprisonment. He must, however, have felt entitled to the “last laugh”, since the High Commission had done what he proposed presuming it would do. Its sentence is hard to account for if the Commissioners were aware of the previous discussion in the Common Pleas, or for that matter if they knew of the statutes secularizing the offense Coventry and Stamford were charged with. Granting that the Commissioners were not ignorant of the high probability of their being prohibited if they imposed a temporal punishment, they could conceivably have found the facts different
enough from the narrative of the offense given in Littleton to take the officers’ conduct outside the terms of 1 Rich, II while leaving them still guilty of laying violent hands on a clergyman, although this hardly seems likely. (For example, Coventry and Stamford could have behaved more politely than the Littleton narrative has them doing; Gumell could have compliantly gone with them to his house or a public place, where they told him their business; hot words and a scuffle could have occurred only then, which led to their using inappropriate force in arresting him.) Otherwise, the Commissioners’ position would have had to be that it was their duty to employ their temporal punitive powers against anyone they convicted; if the common law courts had, or claimed to have, authority to stop enforcement of the secular sentence, let them stop it, but until they did let the warrant, or indeed obligatory, sentence be carried out. This comes to a stark statement of the position Yelverton had wanted to presume the Commission would take.

One further twist in Yelverton’s remarks is worth noting. In explanation of his basic view that the Commission was barred from imposing a secular penalty on a party subject to common law punishment, he says that if someone is fined by the High Commission and later indicted at common law he cannot plead the High Commission fine. His legal incapacity to bar the indictment by pleading his High Commission fine of course means that if the Commission may use secular punishments for the offense in question, men can be exposed to double punishment for one offense, the crux of Coventry. I do not think one could possibly argue that prosecution for an indictable offense created by statute can be barred by events in the ecclesiastical sphere without an express proviso in the creating statute. Thus Yelverton’s remarks as they start out come to no more than restatement of the obvious. As they continue, however, they become more interesting and more puzzling, for Yelverton goes on to state the converse: If one is indicted and later sued in the High Commission he may plead the indictment. Is putting it this way saying more than that the secular indictee may have a Prohibition quoad any secular sanctions? May he have one to stop the ecclesiastical prosecution unconditionally (in which event one proceeded against in a regular ecclesiastical court, with no danger of incurring secular sanctions save by De excommunicato capiendo, should also be entitled to a Prohibition?) Does the indictment simply—formalistically—constitute common law preemption? If the indictee is acquitted at common law is he safe from ecclesiastical suit looking only to spiritual sanctions? I can only put a quaere on these matters; it is of some interest whether Yelverton meant to open them.

Richardson speaks again after Yelverton. Although he does not depart from his concession that in the present case Prohibition must be granted to prevent execution of the Commission’s secular punishments (at any rate the fine—an important qualification, as we shall see), he adopts a position on the Commission’s imprisoning power of which he gives no intimation in Littleton, but which he had embraced in Purbeck above. The Chief Justice, it must be said, was persistent in his effort to salvage what could be salvaged for the High Commission without permitting double punishment of a single offense.

Richardson begins by stating what he took the strongest opponents of the Commission’s secular powers to hold: without absolutely denying it power to fine and imprison, they confined such power to heresy and clerical incontinence cases. Noting this view seems at first hardly relevant for present purposes. Richardson did not think the secular powers were that narrow, nor did the judges with whom he had disagreed on
whether Prohibition should be granted to prevent secular punishment before it was actually imposed. Even so, there is perhaps a sense in which having the most restrictive view in mind is useful for the main point to emerge from Richardson’s speech. Before reaching that point, Richardson deplores a bit more what the Commission had pig-headedly done in Coventry. Excommunication, he says—as others had said over the High Commission’s history—is really a “greater” punishment than fines and jail terms, if only it were so regarded. The immediate implication must be that the Commission’s imposing secular punishment in the face of certain Prohibition reflects the general underestimation of excommunication. (The explanation and remedy for that of course make a question. Negligent religious instruction, all-too easily fallen into when ecclesiastical offenders serious enough to bother about could be punished in ways that hurt, whether or not they appreciated the soul’s desolation an excommunicate ought to feel? Failure to punish frequently enough in the always-available “way that hurt”, imprisonment via De excommunicato capiendo, when excommunicates did not do prescribed penances and amend their lives to gain absolution? This failure was surely the more likely to occur when an ecclesiastical tribunal existed with fairly broad powers to fine and imprison directly, without the procedural fuss of putting De excommunicato in motion. Suppose, as one brand of “strict constructionists” believed, the High Commission could only fine and imprison heretics and incontinent clerics. Might forced reliance on excommunication and its follow-up for the great majority of offenses not reduce the very need to excommunicate, because sinners would face a more certain prospect of temporal unpleasantness?)

Having so ruminated, Richardson announces his embrace of the position on the High Commission’s powers that does not appear in Littleton, but which puts his point of view throughout Coventry in a new light. For he now says, “they may enjoyn penance, and put the party in prison until he does it.” The position is one we have encountered aside from Richardson’s own adoption of it in Purbeck; it can be associated with Chief Justice Popham, though it was not predominant since Coke’s time: Whatever the limits of the Commission’s power to imprison punitively, it may always do so coercively to enforce penance. If we assume Richardson held this opinion throughout the first debate in Coventry, his insistence on withholding Prohibition until it was known what the Commission would do takes on a different color. The Common Pleas was obliged to wait, not until it was clear whether only a spiritual penalty had been imposed, and at most followed by excommunication, but until it appeared that the parties had been fined or, if imprisoned, imprisoned as a punishment rather than a coercive measure to effect compliance with a spiritual injunction, Ascertaining that imprisonment was punitive could not be easy. If a definite term was not specified, it requires only giving the Commission the benefit of the doubt to infer a coercive intent—until new information renders the supposition implausible, and that must probably take the form of a showing of excessively long imprisonment, probably on Habeas corpus. The striking legal proposition implied in Richardson’s position as now developed is that imprisoning a High Commission convict coercively would not be ruled out by his liability to common law punishment; double temporal punishment must be avoided, but a person who, though liable to be, has not yet been sentenced to a punishment pursuant to indictment or in the Star Chamber may be imprisoned for a while as an adjunct of his spiritual correction, from which his temporal liabilities do not exempt him, per Richardson. The endorsement
of coercive imprisonment does not sit quite comfortably with Richardson’s paeans to excommunication, but there is no logical inconsistency. One can say, not only logically but sensibly, that the High Commission would have barely been necessary if the Church and its regular courts had done their job better; being necessary, it would we well-advised to strengthen the established ecclesiastical sanctions by preferring them; it was, however, empowered at discretion to use coercive imprisonment as a shorter route than De excommunicato capiendo and a surer threat to offenders who, if they were in the Commission’s hands and convicted, must do their penance promptly or taste jail, rather than go off at worst excommunicated with a chance of evading commitment by De excommunicato. If it makes sense to say that a new special tribunal must have some kind of “teeth” that ordinary tribunals lacked, coercive imprisonment is a modest increment.

Adopting the coercive imprisonment theory made no practical difference for Coventry as it stood, and Richardson says nothing more about it. He acknowledges again that Prohibition must be granted. Yet he makes one more Fabian move, by saying that “before he granted a Prohibition he would have the parties present.” He may have wanted to have his own turn at lecturing the parties and impressing them with the importance of making their peace with the Church. In any event, I suppose the Chief Justice’s preference could not be denied as a matter of courtesy, even if the other judges would sooner have put an end to the case at once by prohibiting execution of the whole punitive sentence. As we shall see, however, by putting off a writ yet again Richardson gained more than an opportunity to confront the culprits (and perhaps also to use the court’s influence to insure that they were actually indicted or prosecuted in the Star Chamber before they escaped custody.)

After Richardson, Justice Harvey made his sole individual comment in Coventry (in Littleton we are only told that he was Yelverton’s ally in favor of immediate Prohibition.) I do not understand his point, which has to do with the process of estreating fines into the Exchequer. His remark may be a scrap of evidence that the High Commission had accepted estreatment as the only permissible way to collect such fines as it could lawfully impose (as contrasted with imprisoning to coerce payment of a fine or exacting a bond conditioned on payment of the fine.) Harvey’s concern seems to be based on the belief that if a fine such as the one in Coventry were estreated (he speaks of “such unreasonable fines’) 1/3 of the sum would go to the prosecutor (but who would count as that in the present case?) This Harvey regarded as impermissible. Whatever the technicalities, my guess would be that he was just adding a reason why execution of the sentence, at least quoad the fine, must be prohibited, without believing that any reason was required beyond the fact that persons liable to a common law fine were fined by the Commission.

The last observation in Hetley’s report is by Serjeant Brampton. He says that in order to strengthen the High Commission’s jurisdiction the law gave power to fine and imprison in cases not previously (before 1 Eliz. presumably) fineable at common law, but the offense in the present case was fineable before, I take this as politely critical of Richardson’s convoluted thoughts: It is better to keep things simple. The Commission may fine and imprison as a punishment in many, perhaps nearly all, cases within its jurisdiction—certainly not only for heresy and clerical incontinence. No doubt it may imprison to coerce performance of a spiritual sentence, but that does not exhaust its power to impose temporal sanctions. The one clear case in which it may not use them at
all is where an offense—which need not be altogether beyond ecclesiastical or High Commission jurisdiction as such—was subject to common law punishment before the Commission came into existence, and this is that case.

On a later occasion, the Common Pleas at last decided Coventry. A Prohibition was granted as to the fine, but not as to the imprisonment because “for that he ought to have his habeas corpus.” The final move introduces a new note into the law, as well as being one more tactical victory for the Chief Justice. I do not think it had been held before that Prohibition would not lie to ban imprisonment from being imposed when it should not be or to stop execution of a sentence of imprisonment already imposed. The suggestion that Habeas corpus is the one way to challenge imprisonment is, I believe, novel. A rule to that effect could be narrowed by holding that Habeas corpus is the only route to release for someone already imprisoned, but that the High Commission may be prohibited from imprisoning by anticipation at the time Prohibition is refused on jurisdictional grounds. (It is implied, in other words, that there can be cases in which High Commission jurisdiction is unobjectionable so long as spiritual sanctions alone are used. This goes against the probably better opinion that if the Commission has jurisdiction it may resort to secular sanctions. Chief Justice Richardson was successful, however, in making out an exception in the unusual circumstances of Coventry.).

In Webb’s Case (1629), the patron of a living sued the parson and parishioners in the High Commission for converting the church to profane use. The defendants alleged in their pleading before the Commission that the parish had existed from before memory and had no church; rather, the parishioners repaired to the nearest church in another parish and paid all Church “duties” (presumably tithes, rates, mortuary fees, and the like) there; in addition the parson of the churchless parish paid the neighboring parson 6/8d a year for the “instruction” the parishioners had there.

Chief Justice Richardson and Justice Hutton, who were alone in court, agreed that Prohibition should be denied. Their basic position, which would have been good against any ecclesiastical court, was that if there is a parish, the parishioners are compellable to edify a church. That comes to saying that there could be no prescription against the; universal duty to maintain an active church in the parish; a parish by prescription could not be churchless by prescription; the fact that not having a church was in this case compensated in a manner—the parishioners gaining no material benefit and the parson paying for his sinecure—made no difference. If the arrangement made practical sense as a sort of “merger” of small parishes, it was nonetheless illegal. Secondly, Hutton and Richardson said without explanation that the “crime” was enormous and fit for the High Commission. Seeing the case as criminal and the crime as enormous seems a little surprising for Hutton, if not for Richardson. “Hands off the High Commission if possible, when it is only trying to keep the ecclesiastical life of the nation running according to the rules” might be the maxim of the decision. The fact that the suit would not have had a chance of being prohibited if it had been brought in the Bishop’s court, and the fact that the Bishop had presumably overlooked an illegal arrangement in his diocese for a long time, tend to justify indulging the Commission.

129 P. 5 Car. C.P. Littleton, 263.
Miller’s Case, from the next term, is discussed in Vol. II (pp.429-430) for a self-incrimination aspect, which in the event had no effect on the resolution. In substance, Miller et al. were prosecuted *ex officio* in the High Commission for minor Puritan offenses. Prohibition was sought *per* Serjeant Hetley on the ground that they were too minor to pursue in the Commission. Three judges, probably the only participants—Richardson, Harvey, and Hutton—denied a writ. No serious discussion is reported of where, if anywhere, a line runs between major religious crime—usually schism when Puritans were concerned—and expressions of opinion with a Puritan tendency that were illegal but non-enormous. Richardson delivered a diatribe against the plaintiffs-in-Prohibition and their activities, with which his colleagues appear to have been satisfied. Harvey contributed the information that when he was at the Bar he once tried unsuccessfully to prohibit a suit (presumably in the High Commission) for an (unspecified) offense against the Book of Common Prayer on the ground that the Uniformity Act subjected it to a secular penalty. (It is no wonder that he lost, because it was generally agreed that the ecclesiastical courts retained concurrent jurisdiction over such secularized offenses. They were only prohibited from interrogating the party so as to force a confession of the secular crime.) For the purposes of the present case, Harvey was probably saying something like. “If the High Commission may proceed against practically any expression of disapproval of the Prayer Book—so long as it relies on evidence rather than coerced confession—surely the misdemeanors charged here are grave enough to fall within its jurisdiction.” In sum, Miller shows once again that Puritans got almost no protection from the enormity standard; they were only shielded from improper interrogation (which in the event Miller was held not to have suffered—see Vol. II.)

The charges in Miller may of course have been better specified officially than as reported by Littleton. In the report, Miller and associates are said to have been “men that slighted the Government of the Church” (if “slight” means “speak disparagingly of”, they should perhaps be prosecuted at common law—cf. Fuller); they “did hinder the jurisdiction of a conformable minister” (What could be meant by his jurisdiction?); they “had procured publique fasts & been present at them”; “had procured publique Collections to be made for Poor Ministers and others of the Palatinate”; “commended Mr. Angel to be a good Minister if he did not conform” (i.e., said it would be to his credit if he would not or had not conformed—no assertion that he had actually not done so); and “Received the Communion Sitting and not Kneeling.” Richardson in his denunciation started off with the conclusion that they were “non-conformists to the government of the Church of England.” He then said that it was not “fit” that they organized fasts and collections because “the King of England should appoint fasts and collections.” (I should like to be told the legal warrant for this royal monopoly. Collecting donations for the Palatinate did, it is true, touch foreign policy.) He announced as a conclusion that these misdoings were not “small things” and added that prosecuting them in the High Commission did not violate 23 Hen. VIII because that statute “goes only to the Ordinary, & only such causes which are ordinary.” In other words, Richardson endorsed the reputable, but not clearly universal, opinion that 23 Hen. VIII simply did not apply to the High Commission.

130 T. 5 Car. C.P. Littleton, 274.
One further feature is noteworthy. The party Miller sought Prohibition after he had been fined £40 and the fine was estreated. (The heavy penalty is in a way explicable because he, but not the other parties, was accused of failing to appear before the Commission when summoned. He claimed to have a valid excuse, but the Commission disallowed it.) The judges held that Prohibition would not lie after estreatment of a fine, confirming the reason for decision in Purbeck above.

In a briefly reported case from the autumn of 1629, the High Commission was prohibited from entertaining a wife’s libel seeking alimony. This is predictable for a majority of the court, and no disagreement is reported. Littleton adds a rule qualifying the general position that alimony is unsuitable for the Commission. There is no indication whether there was any consideration of whether the rule might be applicable in the instant case. If so, it was held inapplicable. The rule is that if a wife libels against her husband causa saevitiae before the Commission, and it is ordered that the husband “allow the wife so much pro expensis & alimony during the suit”—as it is said the Commission customarily did—Prohibition will not be granted. In other words, if the wife has left the husband on account of cruelty and sues him for it, he may be ordered to pay her a temporary allowance to cover her litigative expenses and her living expenses while the suit is going on. Indefinite alimony, normally attached to a divorce, is for the regular courts.

The report of Lady Sherley’s Case, undated but from early in Charles I’s reign, is inconclusive. Lady Sherley sued her husband, Sir Henry, for alimony in the High Commission. Nothing is said about the particular circumstances. Serjeant Hitcham moved for Prohibition simply on the ground that alimony was not within the Commission’s power. Chief Justice Richardson observed that the current patent purported to give jurisdiction over alimony, but admitted that there was nothing in 1 Eliz. to warrant granting such jurisdiction. Therefore, he said, the question was whether the King was entitled by the common law to grant it. He suggests no answer. At most, his words indicate that he thought the question a serious one—unsurprisingly in view of his remarks in other cases. Justices Hutton and Yelverton, who with Richardson were the only members of the court present, did not pay the question the compliment of taking it seriously. Hutton made the familiar point that if alimony was conferrable without a basis in the statute, so was any other form of ecclesiastical jurisdiction. Yelverton said that Coke, at the extrajudicial conference following Chancey’s Case, had persuaded James I to take alimony out of the Commission’s patent. Yelverton “marvailed” that it had found its way back in. (The exact words of the report of Yelverton’s opinion are: “I marvail how that came within their commission: he said, that in tempore Iacobi, upon a debate before him, Sir Edw. Cook so fully satisfied the King. And this matter of alimony was commanded to be put out of their commission.” The speech is of some significance as an additional datum on the post-Chancey conference. Note how ambiguous it is as to what Coke “satisfied” King James of: That the King had no common law power to confer jurisdiction on the Commission without a basis in the statute? That the statute in any event provided no basis? That even if conferring alimony was not clearly illegal it was unwise, wherefore it should be dropped from the patent, and was dropped as part of the
compromise in which the proceedings ended? Yelverton may of course have had no ready answer to these questions, but was merely irritated that Richardson might be ready to jettison a sensible solution, causing such questions to be reopened.) Littleton’s report ends with Richardson adjourning the case, instructing Hitcham to move it again when the court was full, and saying that the judges would advise in the meantime. It is highly likely that Hutton and Yelverton would have favored Prohibition in the end, and so, probably, would Croke and Harvey. Richardson, having used the opportunity he could not be denied to have a debate he thought worth having, may finally have acquiesced in the Prohibition he could not in the advisement process talk his brethren out of.

Williams’ Case (1631)\(^{133}\) raised deep questions that had not been debated before. The judges described it as a “great case.” No final outcome is reported; having said that the case required deliberation, the court adjourned it. The reporter does, however, set down his impression of where the judges’ thinking seemed to be tending on the first discussion.

Williams arose on Habeas corpus. The carefully stated return was as follows: “[The prisoner was held because the High Commissioners] have concluded unanimously that he was guilty of incest because he had married the widow of his brother’s son & had lived with her as his wife, and that such marriage was prohibited by certain canons made to direct marriages by the Archbishop & clergy convocate & ordered to be read every year in every church. And for this incest they sentenced him to be fined £500 & to be imprisoned. And desire [i.e., the Commission requests] the Judge of the Arches to annul the marriage.”

Serjeant Henden, representing Williams, moved that he be bailed. The reason was that the marriage was lawful by the law of the land. That was because the statute of 32 Hen. VIII, c. 38, provided that “no reservation or prohibition except God’s law shall impeach any marriage outside the Levitical degrees.” The statute of 25 Hen. VIII, per Henden, though repealed, explains what 32 Hen. VIII means by “Levitical degrees”, and neither that statute nor the later one mentions the present case of marriage to the widow of a biological nephew. ”And so”, says Henden, the common law judges have taken upon themselves the exposition of the Levitical degrees “by force of the statute of 32 Hen. VIII.”

Note that Henden took no exception to the use of secular sanctions as such, nor to the general proposition that incest is an enormity within the High Commission’s jurisdiction—as Coke said in Darrington. His case rested on two foundations: (1) that Williams did not commit incest by the relevant legal definition of that offense; (2) that it was the common law courts’ business to say what that definition was, because it was laid down by statute. It is interesting, however, that Henden seems not quite to proclaim it as obvious that ecclesiastical courts are bound by the common law courts’ interpretation of the term “incest” by virtue of their general monopoly over statutory construction. For he says that the common law judges have taken on expounding the Levitical degrees and cites precedential evidence, as if practice could have been different. If it had been, could 32 Hen. VIII be taken as intending to enact a standard for ecclesiastical courts alone—at least with respect to criminal prosecution for incest—and to leave the meaning of “Levitical degrees” to them? I say “at least with respect to criminal prosecution” because

\(^{133}\) H.6 Car. C.P. Littleton, 355.
the High Commission seems to have been watching its step in Williams’ Case, carefully avoiding the civil measure of annulling a marriage. Henden’s grounds ought perhaps to justify outright discharge of the prisoner. His requesting only release on bail defers to the common practice of restraint in Habeas corpus—relieving the party of imprisonment but keeping him under the Commission’s thumb if there might be some basis for its still having a legitimate interest in him. Here, Henden’s possible apprehension that serious arguments contra could be made and the consideration that the case was generically well-within the Commission’s jurisdiction would recommend his concession that release on bail would be a sufficient remedy.

Sergeant Brampton argued the other side, probably the harder one, with considerable ingenuity. He took as his premise the indisputable rule that matters of fact stated in returns on Habeas corpus must be taken as true. (I.e., if facts as stated are false but furnish sufficient reason to return the prisoner to jail, he must be returned; his remedy for wrongful detention is False Imprisonment.) Brampton proceeded to argue that the present case was governed by that rule. Without (so far as the report shows) being quite express, he introduced a second, almost equally incontrovertible, rule—just that the High Commission had power to examine incest. (One must, I think, articulate this, because it is surely obvious that it would not be a false statement of fact to say that the Commission had jurisdiction over anything you please—say poaching, or, to stay within the ecclesiastical realm, suits for legacies. It would be a statement of law, which would fail to justify a commitment if a common law court in Habeas corpus regarded it as erroneous.)

The next step is the difficult one for Brampton’s argument. I think it amounts to maintaining that in giving an explanation of the handling of Williams’ prosecution the return did the equivalent of making mere factual statements, the truth of which would be irrelevant for Habeas corpus. In view of earlier cases, it was probably necessary to say more than “He was prosecuted and imprisoned for incest.” The common law courts demanded a reasonable degree of specification when the Commission claimed to be within its jurisdiction in pursuing and punishing someone for, say, erroneous opinions or defamatory words—i.e., it was required to specify what opinions or what words. Surely, then, the return in the present case must say something to show in what the Commission took incest to consist. By Brampton’s theory, however, the return qua explanation need not be on its face legally correct, but only colorable. It must make it appear, say, that drunkenness had not been treated as incest. If, however, the Commission was only mistaken about the legal bounds of incest, while making a bona fide effort to identify the offense plausibly, and doing so in the sense that it followed canonical prescriptions ecclesiastical courts were ordered to follow, its return on the Habeas corpus was not ipso facto inadequate. Why should it be, when a return full of untrue statements of simple fact would be perfectly satisfactory? Why should saying something true as mere fact—Williams was convicted of marrying his niece-in-law and the Commission was applying rules it thought it was or might be bound by—have consequences no different than simply lying to make jurisdiction airtight, say by asserting that he was punished for marrying his sister? The questions seem to me to make some sense, notwithstanding the objection that the Commission had committed legal error, if it had, rather than factual misstatement properly speaking. I do not think that the Commission (or its agent the jailer) would escape liability in False Imprisonment if it was mistaken about the standard of incest it should apply, but at least Williams would not be let out of jail here and now
on the basis of an inadequate return. Some common law court in the future, with a jury, would decide whether he was wronged and how much. (I think the words of the report, though brief, show clearly enough that the “facts” in the return which Brampston took as beyond scrutiny were the specification of what the Commission treated as incest and the basis in the canons for that. The return contained a couple of facts in the simple sense—the Commission’s unanimity and its reference of annulment to the Arches—but whether those were actually or putatively true could have no significant effect on the issue of the return’s adequacy; they at most reinforce the Commission’s claim to have acted circumspectly.)

In the rest of his argument, Brampston moved beyond the formal point that the return was adequate even if it was not “true” to a substantive claim, viz. that the High Commission was free to construe “incest” as it did. Perhaps it ought not, in what one can only call an ideal sense, to have allowed the canons to supplement or override the statute of 32 Hen. VIII, but if that was a mistaken reading of the statute, the mistake was the Commission’s to make. In other words, the High Commission—specifically, not any ecclesiastical court—had authority to interpret the statute. An exception was made from the pervasive general rule that non-common law courts violating statutory requirements as the common law judges understood them should be prohibited (and in the limited range of situations in which non-common law courts could commit to prison—rarely extending beyond High Commission cases—persons imprisoned in consequence of misapplying a statute should be liberated on Habeas corpus.) Brampston reached this surprising result by drawing an analogy between heresy and incest.

The statute of 1 Eliz. c. 10 provided that the High Commission—solely and specifically the High Commission—should not have power to adjudge any thing heresy which had not before been so adjudged by the authority of the canonical scriptures, &c. By Brampston’s argument, although this statute was made to prevent the Commission from over-extending the meaning of heresy, it implied that only the Commission had jurisdiction to determine that meaning. At any rate, common law courts were to have no role in determining it by way of their general responsibility to see that the statutes were correctly observed by ecclesiastical courts—the rationale was that theological expertise was required to tell whether alleged heresy had ever been adjudged heresy on proper scriptural and supplementary theological authority. If regular ecclesiastical courts did not utterly lose power to entertain a heresy case, still the High Commission was primarily if not exclusively created to make sure that they did not decide such cases by wrong, statutorily forbidden criteria. If a surviving Catholic Bishop were to do so, or were to be invited to by a complainant, he should presumably be prohibited.

After listening to Brampston, the Common Pleas judges would not deliver any opinion “fully” (i.e., a final opinion, normally in the form of judge-by-judge argument of the case, though a per curiam statement of the grounds for decision could with the whole court’s assent be substituted.) They were not ready to free the prisoner at present, but ordered that he appear with a keeper on a future day for a ruling of the case. In addition to emphasizing the magnitude and difficulty of the case and the need for deliberation, the judges expressed their desire to hear both civilians and divines.

No final decision after the adjournment is reported. Littleton, the reporter, does however, give his impression of what the judges seemed to think, so they must have discussed the issues in a preliminary way before adjourning. Two tentative views are
attributed to the court: (1) If the prisoner had been committed for heresy, and the return on *Habeas corpus* did not state the cause “clearly” (i.e., show in particular in what the heresy consisted), the prisoner could not be bailed—a common law court simply could not meddle in the matter; (2) incest is not parallel to heresy—32 He n. VIII governs what can be counted as incest, and the interpretation of that statute, as of nearly all others, belongs to the common law. In short, Brampton was right in his analysis of heresy, but wrong in his attempt to bring incest under the same principle.

On the verge of the Civil War, in 1641-42, an important Prohibition case concerning alimony came before the Common Pleas, the personnel of which had changed. This case, Powell’s, was soon followed by another which, though different in form, may involve the same people and the same controversy at a later stage. Lady Powell sued Sir Edward for alimony in the High Commission; the husband sought a Prohibition per Serjeant Clark. Rather than argue that alimony was too minor or too civil for the Commission, Clark took the position that no ecclesiastical court could grant alimony. Those courts could, he conceded without excluding the High Commission, compel husbands to treat their wives properly and grant divorces. Alimony, however, belongs to the common law. Clark’s first reason for this conclusion is a writ to a sheriff from 7 and 8 Hen. III ordering him to set out “reasonable estovers” for a wife’s alimony. In other words, ancient evidence showed that a wife entitled to alimony, presumably in consequence of a divorce or of her justified withdrawal from the husband’s household, could and therefore must pursue a common law procedure to secure payment. (There is a variance between March and Harg. 23 in that the latter has Chief Justice Banks, rather than counsel, bringing up the writ from Hen. III, with a more specific citation—Close Rolls, 5 Hen. III, membrane 3. In the Harg. 23 version, Clark starts off with the more predictable argument that alimony belongs to the Ordinary and so is inappropriate for the High Commission. March shows, however, that Banks agreed with the more drastic position evidenced by the 13th century writ. Discovering it, whoever was the original discoverer, testifies, as do several cases in this study, to a higher standard of antiquarian research in the mid-17th century than had obtained earlier.) According to the March account, Clark went on to cite Chancey (probably MS. garbled) as a post-1 Eliz. precedent for prohibiting an alimony suit in the High Commission. He presumably wanted to show that the statute had not been taken to give the Commission specifically a power in alimony which ecclesiastical courts in general lacked. Although in a narrow way cases such as *Chancey* could be considered precedents for that, it misunderstands them so to use them, since there is no sign that they rested on anything more than the proposition that alimony, together with most of the rest of matrimonial law, was reserved to the Bishops’ courts. Either some lawyers of the 1630s and beyond had lost touch with the Jacobean law, or else they were doubtful that the Commission could be restrained

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134 H. 16 Car. C.P. Harg. 23, f. 73 (plaintiff-in-Prohibition named Sir Edmund Powell) and P. 17 Car. C.P. March, 80 (where he is called Sir Edmund Powell.) The second report is fuller, but the two are consistent. One or the other, more likely Harg. 23, is probably just misdated, since both eventuate in a grant of Prohibition—i.e., they do not look like earlier and later discussions of the case. I shall follow March. The possibly connected further case mentioned in the text is reported in Harg. 23, f. 86, *sub nom. *Sir Edmund Plowden v. Warden of the Fleet and dated T. 18 Car.
from exercising any form of ecclesiastical jurisdiction. Clark next made a textual
argument from 1 Eliz., as opposed to one from Prohibition precedents: the statute gives
the Commission power to “reform” or “redress”, but it is “not apt” to say that alimony
should be “reformed” or “redressed”. This amounts to saying that the Commission’s
powers, however extensive, must be criminal, which awarding alimony cannot be; not
paying alimony might be seen as a “reformable”, or punishable, offense, but it has no
foundation if ecclesiastical courts may not create a duty to pay. With the help of the
precedent from Hen. III, such a duty can come into being only when the common law
responds to a marital situation by conferring entitlement to material support on a divorced
or estranged wife. Finally, Clark says that alimony is a temporal thing and that it charges
a man’s inheritance (i.e., I suppose, it would be collectable from the heirs of the man
charged with alimony, instead of the administrators of his personal estate. How Clark
knows this is unclear, but perhaps it is in his 13th century source.)

Serjeant Rolle (spelled Rolls in March) then agued for the other side, against
Prohibition. His general position is that suits for alimony are perfectly appropriate to
ecclesiastical courts. Those courts, per Rolle with no exception for the High Commission,
may not fine or imprison, but they are not subject to Prohibition until they purport to use
those sanctions. So far as appears, his rule is categorical: ecclesiastical courts, including
the Commission, may order payment of alimony and excommunicate if it is not paid;
imprisonment to coerce payment or enforce a penance imposed for not paying is no more
lawful than punitive imprisonment and fining. Rolle’s reason for his position is that
alimony is merely an “incident” of the “principal” power of separation. I should think this
comes to little more than saying it makes sense, and is traditional, for courts entitled to
grant divorces and order abusive husbands to stay away from wives who have fled them
also to be entitled to insure the wives a livelihood. Rolle does not comment on the
argument, central to the other side, that the common law provided an equivalent of
alimony and preempted the field. Skepticism about the force to be given to a single
document 300 years old can of course be respected. Rolle does answer another argument,
which he says was made on the other side, (It does not occur in Clark’s speech, but from
the judicial remarks below it is clear that it weighed with the Bench.) The argument is the
familiar one, that parties should not be inconvenienced and lose appeals by being cited
out of their home diocese (owing to 23 Hen. VIII, that is to say, though Rolle does not
mention the statute.) His rebuttal, so far as one can tell from his words in March, comes
to no more than an assertion that citation outside the party’s diocese is unobjectionable so
long as it is within the same province. The more serious argument that 23 Hen. VIII does
not apply to the High Commission (see End Note to Ch. 2) is untouched.

Chief Justice Banks speaks first from the Bench in March’s report. His first point
is that precedents for the High Commission’s having held plea of alimony and granted it
do not mean that the practice is or ever was lawful, and that the patent’s purporting to
give the Commission jurisdiction in alimony is without effect unless 1 Eliz. permits. On
the matter of citation outside the diocese, Banks observes that the Commission would be
useless if it could not so cite. This must come to saying that 23 Hen. VIII does not govern
the High Commission, though Banks, like Rolle, does not mention the statute. Clearly,
however, the Commission’s being exempt from 23 Hen. VIII implies nothing about its
jurisdiction over any particular subject, such as alimony. The puisne justices—Crawley,
Reeve, and Foster—agreed that a Prohibition should be granted in the case at hand. They
expressed doubt about Banks’ view that citation out of the diocese into the High Commission must be lawful if the Commission were to be effectual at all; deprivation of appeals still seemed to them a serious cost. Banks speaks once more to correct Rolle’s statement that the Commission had all forms of ecclesiastical jurisdiction; even if it had jurisdiction in alimony, as Banks reemphasizes it does not, the more sweeping point would not follow. Prohibition was granted unanimously, the judges agreeing that if the High Commission could charge a man’s land with alimony it might as well have power to encumber it with a rent charge.

About a year after Powell’s Case was decided, a Sir Edmund Plowden v. Warden of the Fleet is reported. While there is no necessary reason why this could not be unconnected with Powell, it seems unlikely. Powell and Plowden are similar enough names to be confused; one version of Powell gives Edmund as the party’s first name, and in all versions he is a “Sir”; most important, the issue in Plowden is whether the High Commission had cognizance of alimony. Plowden, however, is a common law suit for false imprisonment against the jailer. The defendant pleaded that he was holding the plaintiff by virtue of a High Commission warrant; Plaintiff demurred on the ground that the Commission lacked jurisdiction in alimony, so that he was proceeded against coram non judice and the jailer was liable for false imprisonment. No result is reported except that a day was assigned for plaintiff to maintain his demurrer.

If we assume that we are dealing with one and the same Sir. E.P., and that he was imprisoned by the High Commission in consequence of Lady P.’s suit for alimony, there is a mystery: Since Lady P.’s suit was prohibited, how did the Commission get the occasion to imprison Sir. E.? One can only speculate. Could the Commission have simply disobeyed the Prohibition, whereupon Sir E., being imprisoned, opted neither for suing Attachment on his Prohibition nor for seeking liberation on Habeas corpus, but instead pursued damages and the solemnest possible decision that the Commission had no business touching alimony, viz. a common law judgment on demurrer?
Sub-section (b): King’s Bench Cases after Coke’s Dismissal
(1616 to the Civil War Period)

Our last group of cases comes from the King’s Bench after Coke’s dismissal in 1616. Atwood’s Case of 1617, the only Jacobean one, is neither a Prohibition nor a Habeas corpus, but it contains a significant incidental reference to the High Commission. The case itself was a Writ of Error pursuant to Atwood’s indictment and conviction before Justices of the Peace for scandalous words touching religion; upon conviction the Justices had fined him 100 marks. The words in question, whether High Church or Catholic in inspiration, were distinctly anti-Puritan. Atwood said that “the religion now professed was a new religion within fifty years; preaching was but prating, & hearing of service more edifying that two hours preaching.” The Writ of Error was based on the proposition that speaking such words was not “inquirable by indictment” or before Justices of the Peace, but only before the High Commission.

The King’s Bench did not make a definitive decision so far as the report goes. It first referred the question of the J.P.s’ jurisdiction and the legality of proceeding by indictment to Attorney General Yelverton. (This was Sir Henry Yelverton, who served as a Common Pleas judge between 1625 and 1630 and appears several times in the cases above.) Yelverton certified that the J.P.s had no authority in the matter. The court agreed with him, but put off final decision pending advisement. The merits of the common law question need not concern us. The feature of the report that is arresting for our purposes is the statement in or in support of the Writ of Error that religious speech of the sort complained of here could only be prosecuted in the High Commission. I think a more correct formulation would be that the cause was ecclesiastical; whether it could be pursued in the High Commission—or, doubtfully I should think, could not be pursued in a regular Church court—would be determinable in challenges to some ecclesiastical tribunal by Prohibition or Habeas corpus; those questions would be basically irrelevant for the present case, unless perhaps someone were willing to argue that the absence of an ecclesiastical remedy suggests that a lay one must exist. The remark about the High Commission is therefore probably best seen as evidence of a common assumption: viz. that the Commission is the place where in practice religious speech-offenses are dealt with, rather than Bishops’ courts and rather than lay ones save where they were expressly given jurisdiction by statute. The casual suggestion by the authors of Atwood’s Writ of Error that the Commission positively could proceed for the words he was accused of speaking should perhaps not be taken too seriously. An attempt to prohibit a High Commission suit for those words—where a note of disrespect for the Church exactly as established is offset by defense, perhaps in overzealous terms, of outlooks rather favored by ecclesiastical officialdom—might be problematic. The political reality behind Atwood was probably that Justices of the Peace with at least vague Puritan sympathies proceeded against, and punished severely, a man whom they knew the High Commission might not have prosecuted ex officio and might have treated leniently even if a libel against him would have been hard to throw out flatly, as so non-enormous a complaint might not have been.

135 P. 15 Jac. K.B. Croke Jac., 421.
Stanway’s Case, of 1626\textsuperscript{136}, came to a predictable result in the light of earlier decisions. It is mainly of interest for details of the way the court discussed the limits on the High Commission. Stanway was the farmer of a rectory that came to the Crown when the monasteries were dissolved (i. e., the King retained title to the impropriate rectory, but leased it to Stanway.) He was sued in the High Commission to compel him to repair the chancel of the Church. The suit was prohibited as improper for the Commission. The decision was defended first by saying that that tribunal was for enormous and exorbitant offenses, heresy and schism “and such like.” (One wants to ask how sure the judges were that the Commission was limited to a very few very serious spiritual offenses and how much of an escape-clause “such like” provides.) Then the judges say the Commission is “more” (\textit{plusors}) a criminal court than a civil one. (How much tentativeness is in the “more”, how much realization that defining and defending a strict civil-criminal distinction would cause problems?) The Commission was “principally” founded by Eliz. to deprive Popish priests. (What can be inferred from this main, but not exclusive, original purpose? Anything more restrictive, or less so, than confining the Commission to heresy and a penumbra of unorthodoxy only technically distinct from heresy to which Catholic clergy might be disposed?) Next the judges say that the Commission has nothing to do with “matter of interest”; repairing a church or chancel belongs to ecclesiastical jurisdiction, but not, since it involves “interest”, to the Commission. (Is the line drawn here any different than that between civil and criminal? Is a matter of “interest” any ecclesiastical suit in which a losing party could be ordered to pay or expend money?) Toward explaining and justifying the last point, the judges cite a case from 5 Jac. C.P. in which a tithe suit in the Commission, being a “matter of interest”, was prohibited. (Tithes had been cited before as a paradigm example of an ecclesiastical duty not enforceable by the High Commission, but we have not previously seen a specific precedent invoked. Although both involve a judgment to pay money, can no distinction be claimed between every producer’s obligation to pay tithes and the duty of a particular officer of the Church to defray a particular parish expense—repair of the chancel in this case, for which the holder of the parochial living was normally responsible? We have noted before that neglect of such burdens by clergy might well be looked on indulgently by ordinary ecclesiastical courts, leaving the laity—which was normally responsible for maintaining the body of the church, but not the chancel—with the full burden of keeping the church from decaying. That seems a reason for High Commission authority, if one is willing to extend it beyond the most austere limits.) The judges then cite another precedent on a quite different subject: Prohibition granted in H. 5 Jac. to stop a High Commission suit for calling a parson a “Knave and Brabler.” The court explains this by saying that Prohibition was issued “because the suit was for words.” (There were certainly precedents for using the enormity test to prevent the Commission from entertaining minor defamatory remarks about clergymen, sometimes, as here, aspersions so vague that regarding them as defamatory at all may be doubtful. The question that arises in the present context is whether “suits for words” are not close to the opposite of “matters of interest.” Ecclesiastical defamation was admittedly a semi-criminal offense. Whether it was generically criminal enough for the Commission or whether a particular instance was serious enough are good questions, but the object of suits was certainly not

\textsuperscript{136} H. 1 Car. K.B. Harg. 38, f. 45b; Lansd. 1063, f. 154b (nearly identical reports.)
to compel a monetary payment; at most it could turn into one if the ecclesiastical court, probably illegally, imposed compensation of the defamed person as, or in lieu of, a spiritual punishment.)

I have asked cavilling questions about the first passage of the judges’ opinion to make one point: By 1626 there had been several decades of intense litigation about the High Commission. All the doctrines broached in Stanway had been discussed before. Qualifications and complications run through the reported cases, however. A more nuanced—and from the Commission’s point of view less restrictive—position than the maxims confidently embraced by the early Caroline judges add up to need not be accepted, but I should expect it to be considered and, if rejected, rejected in favor of a more coherent across-the-board theory of what the Commission may and may not do than appears in Stanway. The judges in that case give the impression of grasping at the scraps of familiar doctrine that would help justify the result they wanted, rather than of interest in clarifying a confused area of the law for the future. One almost feels that they had given up on making much sense of High Commission law.

After some judicial observations on medieval secular law touching on “matter of interest” and what contrasts with it, Justice Jones makes an argument for the proposition that ecclesiastical courts (High Commission or otherwise) may be prohibited from entertaining suits for the repair of churches. Nothing earlier in the report suggests that this was questionable as such, but it might plausibly have been. It is a little hard to see—leaving aside “matters of interest”, which were urged only as an objection to High Commission jurisdiction—what secular or “royal” interest would be offended if the duty to repair churches, whether that of clerics or (to include lay impropriators) “officials of the Church” or that of parishioners, were simply left to ecclesiastical justice. Jones’s argument is that a suit for contribution to repairs can certainly be prohibited if the party being sued claims to be an inhabitant of another parish. The reason is that the claim puts the boundaries of parishes in question, and that is—as most authority agrees—a common law issue requiring jury determination. Jones’s implication is presumably that if prohibition is appropriate in one sort of church-repair case it cannot be ruled out in others, or is not an intrinsically improper remedy. This point does not seem to have any necessary consequence for the jurisdiction of the High Commission versus that of regular ecclesiastical courts, except that of course if no Church court could be prohibited in a repair case the Commission could not be. If the remedy in itself was proper enough, it remains an open question whether the Commission with its statutory basis was banned from entertaining some or all repair cases.

The rest of the report of Stanway explains aspects of the case that do not touch the prohibitability of repair suits as such or the High Commission’s jurisdiction. These need not concern us. (Briefly, the King had leased the rectory to Stanway rendering rent and covenanted to discharge his grantee of all pensions and encumbrances. The present suit was originally for the minister’s pension as well as the repairs, but the first part of the claim was mooted by payment of the pension. Justice Whitelocke thought that if it had not been paid the minister could not pursue it in any ecclesiastical court, but only in the Exchequer Chamber—here the branch of the Exchequer with authority over royal grants. On the still-alive issue whether the King or his grantee was responsible for repairing the chancel the reporter only refers his reader to a case in Dyer—36 Hen. VIII, f. 58. No decision on the aspect of the case involving the law of royal grants is reported.)
Johnson’s Case is of interest because it is on the same jurisdictional issue as Stanway. It was decided the same way on the most obvious available grounds, without any elaborate or far-ranging argument. Johnson, being sued in the High Commission for not repairing a chancel, sought a Prohibition per Banks for two reasons: (1) The charge was not for an enormous crime and therefore not within the Commission’s jurisdiction; (2) Because there is no appeal from the Commission, the party would not have the same privilege as parties in other ecclesiastical courts. All the report tells us is that Prohibition was granted for these two reasons.

Brown’s Case is reported twice by Latch, unclearly both times. The High Commission is not said to have been involved, but from the report at Latch, 204, I think it must have been. For there the question seems to be whether Brown should be discharged, and it is clear that he was imprisoned. His lawyer, Finch, argued that he should be discharged because “the statute” (one would suppose 1 Eliz.) did not intend “to aid ecclesiastical judges with temporal power in such small cases as defamations &c.,” but only in “great cases of heresies.” Finch said there were many precedents of prisoners discharged in such cases, and Rolle, also from the Bar, supported him with the remark that there were many precedents in Lord Coke’s time. So far, the case looks like a straightforward assertion of the enormity test, at least quoad power to imprison, in a Habeas corpus to challenge a High Commission commitment. The rest of the report, as well as the one—pretty clearly of the same case—at Latch, 174, confuse this familiar picture, however. As Rolle continues (Latch, 204) he points out that the words of “the statute” say that all pains and forfeitures are to be discharged and says that there is no pain greater than imprisonment. The court is then reported as deciding that “this statute” does not discharge the imprisonment. It is unclear what statute is now referred to.

Maybe Brown was trying to use Prohibition on 23 Hen. VIII instead of Habeas corpus.

Alimony arose in the King’s Bench in Hurbie’s Case. The report tells only that Harbie’s wife sued him in the High Commission for alimony and that Prohibition was sought per Serjeant Lloid, who so far as appears did not say more than that several Prohibitions “in the very point” had recently been granted by the Common Pleas. The King’s Bench was not ready to go along just for the sake of conformity and must have argued the principles, for the case was discussed several times before decision. In the end Prohibition was granted, however. The court emphasized the old rule that the Commission’s patent can only confer what 1 Eliz. allows it to, which suggests that despite the rule’s frequent reaffirmation, some members of the King’s Bench may have had doubts.

I mention an anonymous report from i629 only because it shows that the High Commission’s occasional bad habit of committing people to improper prisons was still alive. The circumstances of the case are not entirely clear, but a person brought into the King’s Bench on Habeas corpus had been committed to what is referred to as “the new prison.” He appears to have been remanded, but not to the “new prison”—rather “here”.

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137 Not specifically dated—early Car. K.B, Latch, 10.
138 Undated, but early Car. K.B. Latch, 174, and H. 2 Car—court not specified but presumably K.B.—Latch 204.
139 H. 4 Car. K.B. Harg. 39, f. 17b.
Whatever that may mean, presumably a regular King’s Bench jail—“for this Court does not take notice of the said prison. It would be otherwise if he were in a known prison.” I suppose it would not have to be one of the King’s Bench’s own.

More materially, Drake’s Case (1631)\(^1\) brings us back to alimony for one last time. The wife suing in the High Commission alleged the “various” cruelties she had suffered; she was forced to leave her husband, and he would not allow her maintenance. The suit was prohibited, on the motion of Sir Laurence Hyde, because it belonged to the Ordinary, from whom the losing party could appeal. The report acknowledges that the Commission’s current patent gave it authority to try alimony suits; 1 Eliz., however, did not in the court’s opinion permit conferral of such jurisdiction.

The rest of our cases shift away from matrimonial law and for the most part concern clerical discipline and intra-Church affairs. George Huntley’s Case of 1629\(^2\) is a well-argued *Habeas corpus*. It contains novel issues, by which the judges were sufficiently baffled to put off final decision. The return on Huntley’s *Habeas corpus* said that he was imprisoned by the High Commission for refusing to preach a visitation sermon, having been commanded to do so by the Archdeacon, and also for “various contempts” against the Archdeacon and against the Archbishop of Canterbury, who was Huntley’s immediate Ordinary. (I.e., he lived in the Diocese of Canterbury, rather than another diocese within the Province of Canterbury. That means the Archbishop in his other *persona* as Bishop was conducting his routine visitation on the occasion of Huntley’s misbehavior; he was insulted in the line of duty, so to speak, rather than as a dignitary who merely happened to be present.)

Huntley was represented by two prominent lawyers, Serjeant Heath and Calthrope. Heath, who spoke first, started off by maintaining emphatically that Huntley had done nothing deserving imprisonment. (In Prohibition, he might have said the party had done nothing of which the High Commission had any business taking notice, but it was at once more modest not to insist that even the mildest spiritual censure would have been unlawful and more effective rhetorically to focus on the scandal of this imprisonment. Liberation from prison was after all the only object of the *Habeas corpus*.)

*Per* Heath, Huntley had no duty entailed by his canonical obedience to preach the sermon; his doing so would have been no more than “matter of courtesy.” Lest, however, discourtesy toward the Ordinary and his entourage should furnish some kind of basis for Huntley’s treatment, Heath goes on to argue that that he *could* not legally conform with the Archdeacon’s request: As a licensed preacher, he was not allowed to preach outside his cure; the Archdeacon had no power to dispense with that rule just by ordering him to preach elsewhere. From highlighting the absurdity of the imprisonment in the particular situation, Heath moves to more general points: The offense is intrinsically petty. (Though he does not spell this out, Heath is obviously drawing on the entrenched idea that there is some degree of seriousness required for High Commission jurisdiction, whether or not a stringent test separates a few “enormities” from the bulk of reasonably consequential offenses. Somewhat disobliging or somewhat legalistic behavior by a clergyman, who for all we know may only have embarrassed by a demand that he preach without sufficient preparation, does perhaps set a standard for pettiness.) The Commission’s patent does

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1. T. 7 Car. K.B. Croke Car., 220.
not include the offense (however it would be described if it were to be put in the patent), but even if it did such an item in the patent would not be warranted by 1 Eliz. As what appears to be conceived as a separate point, Heath proceeds to say flatly that the Commission lacked power to fine and imprison “in this case.” (I would take this to telescope another familiar argument—that the Commission’s power to use secular sanctions is not coterminous with its jurisdiction, so that even if minor misconduct in the special setting in which Huntley offended were within High Commission jurisdiction, it must still be dealt with by spiritual sanctions.) Heath then adds some information by telling us that besides imprisoning Huntley the Commission had fined him £500 (no less!) and estreated the fine into the Exchequer, but that this fact was not contained in the return. (Here a technical issue not anticipated in earlier cases arises. Must a valid return on Habeas corpus involving the High Commission recite the whole punishment imposed, spiritual and temporal elements alike, to justify the use of imprisonment, when that is the only secular sanction that the writ challenges? There would seem to be good reasons for an affirmative answer. It was occasionally suggested in earlier cases that an ecclesiastical court with the privilege of using secular sanctions must keep them within reasonable bounds. In the circumstances of Huntley, a huge fine and punitive imprisonment as well must surely exceed plausible bounds. A further question is whether, regardless of quantities, both punishments could legally be used in the same case. Heath’s thinking is not spelled out on these and related matters, but he does seem to conclude that returns must give a full picture of the sentence.) The penultimate point in this extensive argument is the predictable unavailability of appeal; in the context in which that objection is presented, it must be intended to emphasize that an outrageously disproportionate sentence would be beyond appeal. Heath’s final point is a recurrent one in earlier cases: in speaking of “various contempts” in addition to the more specified offenses, the return is bad because too general.

After what I think one may call Heath’s crushing case for liberation of the prisoner, his colleague Calthrope comes on with still more considerations. I am not sure what his first argument says beyond what Heath had said amply, but there may be a nuance. Calthrope, after asserting that it does not appear (from the return) that the offense is within the Commission’s power, adds “and the Court will not take notice of their particular jurisdiction.” The twist here may be that the return needed to say in some explicit way that the High Commission laid claim to jurisdiction—say because its patent conferred it (lawfully or not) over conduct recognizably, as described, like that attributed to Huntley; common law courts should not decide whether to liberate or not to liberate people committed by a special court—whose jurisdiction was certainly confined to ecclesiastical law and was at least notoriously believed to be further limited—on the basis of whatever they may think its jurisdiction is; an express claim to jurisdiction in the case at hand must be put before the common law court for its evaluation; lacking one, obviously the prisoner should be let go. If this is possibly the tendency of Calthrope’s formulation, quaerere whether the degree of nicety in returns it calls for was in practice insisted on.

From his first argument, Calthrope moves into new territory. Focusing on the part of the accusations against Huntley that had him “affronting” the Archdeacon by charging that official with “injustice and wrongful dealing”, Calthrope maintained with the help of secular analogies that at any rate Huntley could not be imprisoned for that. (It would
seem that the return gave a little more information than the initial account of it in the report specifies—or said at least something about what the “various contempts” consisted in.) Counsel cites two common law cases to support this argument—the famous Dr. Bonham’s Case as reported by Coke and a King’s Bench Case from 41 Eliz., Jarrett v. Denlie. How Bonham applies is not explained, but Jarret is recounted: Someone said to a London Alderman that he was a fool and knave and was for so saying imprisoned by the Mayor; the King’s Bench liberated him. Why, one may ask, should the Mayor of London’s lack of authority to punish criminally (at any rate by imprisonment) the defamer of an Alderman (or at least one who spoke disrespectfully of him) have implications for the High Commission’s powers? The question need not be unanswerable. In any event, with this argument Calthrope seems to intimate a deep theory of the need for some level of ultimate agreement between the law applied in ecclesiastical courts and the secular “law of the land.” Such theories are not implausible—see Vols. II and III sparsim—but novel in discussion of the High Commission.

Calthrope then returns to more familiar themes, apparently declaring that the High Commission simply had no power to fine or imprison because 1 Eliz. was “only a restoration of ecclesiastical jurisdiction.” Though too extreme a doctrine to fit most of the case law later than Queen Elizabeth’s reign, this view has a history, and some lawyers may have thought that the old formula “all ecclesiastical jurisdiction but no secular sanctions” remained the best solution to the puzzles of the Commission’s authority and was still worthy of serious consideration. Calthrope cites “2 Hen. 4” for the general point that ecclesiastical courts may not imprison but must punish by spiritual censures. This is probably a Year Book holding what for its time—before the picture was somewhat complicated by statute—was undoubtedly true.

Two more arguments complete Calthrope’s contribution. He notes that the return said in part that Huntley was imprisoned because he did not pay costs (again adding a bit more to the return than the reporter’s opening statement of it contains.) Per Calthrope, an action of Debt—not imprisonment outside the regular course of Debt proceedings—was the proper remedy to recover costs, so that at least in one respect jailing Huntley was unjustified. Finally, Calthrope came up with a canon requiring the Bishop himself to preach at visitations—a further basis for arguing that Huntley was illegally imprisoned for unwillingness to comply with an illegal command.

Two brief remarks by individual judges are reported after the speeches by counsel. Justice Whitelocke took exception to Calthrope’s raising the general question of the Commission’s power to fine and imprison. In Whitelocke’s view, the sole question in this case was whether, admitting that Huntley’s refusal to preach was a breach of his duty of canonical obedience, a complaint of that offense could under 1 Eliz. be assigned to the High Commission or must be left to the Ordinary. Since the “general question” is not intellectually irrelevant for the case, Whitelocke must have thought it so firmly resolved as to be beyond reopening (i.e., resolved in favor of the Commission’s having some power to use secular sanctions, leaving only the question of its extent.) His formulation of the narrow issue sufficient for the purposes of this case is at odds with Heath’s statement that the refusal was not a breach of canonical obedience, but perhaps Whitelocke meant no more than that it was better for the court to stay away from a canon-law matter which it might arguably be considered incompetent to decide. Assuming that the Commission had grounds for holding that Huntley was guilty of an ecclesiastical offense obviously
left ample room for doubting whether the offense was a High Commission matter. The second judicial remark, by Justice Croke, is too cryptically reported to make sense of, except to say that it had something to do with the role of the fine in the case.

On a later day than the argument of the case from the Bar, the court bailed Huntley until the next term, but it deferred delivering an opinion on the “matter in law.” There is no report of subsequent proceedings. Bailing the prisoner rather than remanding him is a symptom of an inclination on the judges’ part to think the imprisonment unlawful. On the other hand, in the light of the strong advocacy in his favor, it may seem surprising that he was not released outright, that the judges thought there was enough merit on the High Commission’s side to require advisement and perhaps a round of public discussion from the Bench. It is tempting to suspect a political motive not to offend the Archbishop of Canterbury, and there may have been strains of politics that the report does not reveal in Huntley’s trouble-making at the visitation. The hierarchy could have had various motives for giving that clergyman a “hard time”, perhaps not very honorable ones, but sensitivity toward the Archbishop might still be the better part of valor. Puritanism may have figured in the contretemps: We know that Huntley was a “preaching parson”; he was willing to make a great fuss by refusing to preach before and in lieu of an official he may have thoroughly disapproved of, and of course expectation of a fuss by the other side may have been why this improbable preacher was picked out; he was so inordinately punished that it is hard to believe mere orneriness or some personal quarrel was behind the assault on him; trapping a notorious Puritan and making a colossal example of him, hoping to get away with it because common law courts did not go out of their way to help Puritans, could have been an attractive project to the authorities; fighting his imprisonment with impressive legal auxiliaries may have been attractive to Huntley for larger purposes than escaping a personal imbroglio. If, however, we curb the play of imagination over a strange episode and stick to the law, I think the King’s Bench may have been well-advised to move slowly and be sure of its steps. While there was probably enough in Huntley’s whole armory to require his eventual release, I do not think earlier cases clearly rule out High Commission jurisdiction and secular sanctions in a matter of clerical discipline, especially an unprecedented one full of complications and uncertainties which regular episcopal courts could perhaps hardly be expected to unravel.

William Copland’s Case (1629) also concerned clerical discipline, but in a much simpler way than Huntley. Copland, a minister from Cumberland, was sued in the High Commission for drunkenness and lewd behavior and sought a Prohibition per Banks. The report notes that Prohibition was pursued after sentence against Copland. Although sentence was not a bar to Prohibition (see Vol. I pp. 115 ff.), common law courts retained some discretion to withhold a writ when plaintiff-in-Prohibition delayed seeking one until after he had been tried and sentenced. There would be no reason to make such an exception in a case such as Copland; we see in this case, from a turn of Banks’ language, that there are situations in which Prohibition could reasonably be denied unless a sentence had already been given. A minor point about dealing with the High Commission is perhaps documented by this detail. To open his briefly reported argument, Banks relies on one precedent (Turner and Neweport’s Case, 43 Eliz. C.P) where Prohibition was granted to stop a prosecution for drunkenness and “brabbling”

143 T. 5 Car. K.B. Harg. 39, f. 51.
words. In the present case, he says, Prohibition should “the rather” be granted because Copland had no appeal from the sentence against him. The phrase suggests that if common law intervention had been sought before sentence there might be grounds for waiting and seeing what the High Commission would do, whereas the subject’s right to appeal a sentence was rarely defeasible (i.e., only for a few heinous offenses, where Parliament unmistakably meant to cut off appeals.) This reversal of the view that Prohibitions should be sought as soon as possible, even though delay should not normally stand in the way of a writ, makes some sense in High Commission cases as a class. To defend a hands-off policy toward the Commission, one surely must regard it as a self-policing agency, which could be expected to understand the interest of Bishops’ courts, the subject’s interest in conveniently local justice and appellate rights (affirmed by 23 Hen. VIII even if that statute did not bind the Commission), and the sheer undesirability of distracting a solemn tribunal with petty litigation (on the level of drunken clergyman one might well say.) It should therefore be presumed that the Commission will not take a case without strong special reason, so that Prohibition should be withheld until the Commission has acted. One should always remember also that the Commission was an ecclesiastical court, free to confine itself to spiritual sanctions whatever secular ones it might have power to apply at discretion in one or another sort of case. This bears on the value of preserving appellate rights. Someone convicted by the Commission and given, let us say, only admonition and a mild penance ought perhaps in the abstract to enjoy the same right of appeal as any ecclesiastical litigant, but how likely is it that pursuing an appeal would be worth the party’s time and money? Again, it perhaps makes sense to know that the party actually wants to make an issue of his interest in appeals before telling a high-ranking Church court that it is out of bounds. (Of course insisting on Prohibition after sentence would be most probable if secular sanctions had been applied, and the common law court’s duty to be sure that they were properly applied would be clear. Unfortunately the report of Copland says nothing about the content of the sentence.)

The points above are only speculative reflections prompted by Copland, for the case itself, so far as the report goes, went flatly against plaintiff-in-Prohibition. Justices Jones and Croke, who were the only judges present in court, simply declined to grant Prohibition on their own. The best explanation of their decision is probably that the “lewd behavior” alleged against Copland makes his case a cut more serious than Turner and Newport and may, depending on what the vague charge covered, turn the case into one on clerical incontinence, arguably always appropriate for the High Commission. Otherwise, the two judges must be seen as leaning to a very broad tolerance for the Commission’s power to take any case on clerical conduct if in its discretion it saw reason. (It is not clear from Banks’ Elizabethan precedent as stated that the party was a clergyman, and if he was his offense hardly extends beyond drunkenness—“drunk and noisy or quarrelsome”, without so much as a suggestion that anyone was defamed, is a small stretch from mere “drunk.”)

One late anonymous case\textsuperscript{144} brings up a point not anticipated in any previous report. A prisoner brought 	extit{Habeas corpus}, on which the return said he was committed by order of the Exchequer for not paying a £50 fine imposed by the High Commission.

\textsuperscript{144} P. 16 Car. K.B. Croke Car., 597.
(The commitment is said to have taken place in 9 Car., which if correct means the man had been in jail for seven years!) The King’s Bench held that although the return did not show why the fine was imposed it could not bail or discharge the prisoner because he was imprisoned by a “Judicial Court.” I do not know how to formulate or generalize the Habeas corpus law applied in this decision, but it would seem to be that none of the principal common law courts (probably most of the meaning, if not necessarily all of the meaning, of “judicial court”) may release the prisoners of another by means of the writ. Perhaps False Imprisonment against the jailer would lie in another court than the one responsible for the imprisonment. Quaere. Otherwise, the case adds a few strands to the history of the Exchequer’s role in the regulation of the High Commission, of which we have seen other traces but not enough evidence for a satisfactory account. The Exchequer obviously did not in this case rule the High Commission fine unlawful, as it appears sometimes to have done, but it may not have been unlawful by standards of the Commissions’ jurisdiction and secular powers shared by the other principal courts. All the decision really says on High Commission law is that a return which would certainly have been found inadequate if the Commission itself had committed the prisoner was saved by a “judicial court’s” having done the deed, here the Exchequer in the process of trying to collect an estreated fine. If the prisoner had in fact been held for an inordinate time, it is conceivable that in seeking a writ after so many years he was hoping that irregular intervention by the King’s Bench could be sold as the remedy against perpetual imprisonment for a High Commission offense. A few earlier indications suggest it would be remedied, although there are no instances of prisoners clearly released for no other reason than that they had been held as long as any ecclesiastical offender could be.

Torle’s Case (1640), 145 on Habeas corpus, involves a purported High Commission power untested in previous cases. Torle and four others were committed for contempt of the High Commissioners in not performing their order to pay a parish clerk his wages. It is not clear why these four persons were considered liable to pay the wages, but we are told that the Commissioners had assessed the sum due at 4d. a quarter for every house in the parish (the London parish of Great St. Bartholomew’s.) It is unusual to see what amounts to a parish rate pursued in the High Commission, as opposed to a regular ecclesiastical court, where such suits were commonplace. It is not, however, obvious that such a suit on intra-Church affairs must be ultra vires for the Commission. Torle et al. refused to pay because they claimed that by custom they were obliged to pay the clerk what the churchwardens and vestry assessed. Their defense, again, is one that occurs in many cases: parties alleged to be liable for a rate duly assessed by ecclesiastical law (usually according to the 1604 canons) claim that they are entitled to the benefit of an alternative customary method of assessment. The defense was almost always successful, on the theory that immemorial custom in these matters of parish finance should prevail over ecclesiastical law, and when a custom was claimed ecclesiastical suits for the rate should be prohibited until it was ascertained whether a jury would verify the custom. (The practice is closely analogous to the treatment of customary modi decimandi in tithe law.) The involvement of the High Commission in the instant case would seem to be irrelevant, in the sense that the standard doctrine quoad jurisdiction to proceed at all pending common law determination of the existence of the alleged custom would seem to

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145 P. 16 Car. K.B. Croke Car., 582.
apply to the Commission as well as any other ecclesiastical court. If the Commission had no authority to proceed, it would seem to have no authority to imprison, whether or not it might have such authority after the custom was disverified at common law. It looks as if in _Torle_ the Commission had hopes to evade the law applicable to ecclesiastical courts generally, for it brought on two civilians (Dr. Merrick and Ecleston) to argue that the Commission’s patent expressly provided that parish clerks should receive their wages as ordered by the Commission and could be fined or imprisoned for any “contempt.” Even apart from whether such terms in the patent were consistent with 1 Eliz., the argument for making a special case of the Commission for such parochial purposes seems to me feeble. It is not clear that the King’s Bench thought so too, because the action the judges took was to bail the parties until a specified day in the next term. I suspect, however, that granting bail instead of discharging outright was mostly a courtesy to the Commission. The prisoners, relieved of duress, were given some time to seek the Prohibition that would temporarily free them from liability to any sort of ecclesiastical prosecution. Should they neglect to do so, the Commission might have some color to claim acquiescence in its jurisdiction and to use its patent to argue that it had acted within its authority in using secular sanctions.