

THE WRIT OF PROHIBITION:
Jurisdiction in Early Modern English Law

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Volume I:
General Introduction to the Study
and
Procedure

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*The Writ of Prohibition:
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By

Charles M. Gray

Foreword to Second Edition

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

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

Charles Gray

These volumes are dedicated

to

Hanna Holborn Gray

Acknowledgments

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

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

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

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

General

Introduction

General Introduction

This volume is part of a larger study.¹ The present volume and its projected companions are about the control of jurisdiction in the English legal system from the later 16th century to the middle of the 17th. It is almost, though not quite, equivalent to say that the study is about one legal procedure -- the writ of Prohibition. That writ was the main means by which the managng courts -- the King's Bench and Common Pleas -- kept other courts within their jurisdictional bounds. In the period I am concerned with, though not at earlier stages of its history, the Prohibition was a judicial writ. That means a party applied to the King's Bench or Common Pleas for a writ and obtained it only if he convinced the court that there was cause. Judicial writs contrast with *de cursu* Chancery writs, which could be had for the asking and a fee and were merely the ordinary way of starting a suit at common law. If someone wanted to stop a suit in another court on the ground that it was beyond that court's jurisdiction, he went to the King's Bench or Common Pleas with his statement of cause; if he was successful, a Prohibition was granted forbidding the subject court and the plaintiff there from proceeding; the suit could be resumed only if the Prohibition was reversed. I shall explain this more fully and technically below, but the simple formulation is sufficient for a basic understanding of the writ.

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

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

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

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

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

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

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

- I. Procedural issues in Prohibition law (the present volume.)
- II. Control of judicial conduct by Prohibition. (“Conduct” means how the non-common law court handled cases properly before it. That contrasts with “jurisdiction” in the sense “whether a case or issue of a certain sort belongs before the non-common law court.”)
- III. The range of jurisdiction-control (in the above sense, opposed to conduct-control.)
- IV. Enforcement of statutes by Prohibition.
- V. Prohibitions to the Admiralty.
- VI. Prohibitions to courts of equity.
- VII. Prohibitions and ecclesiastical defamation.
- VIII. Common law issues and collateral infringement of common law interests.
- IX. Prohibitions and tithe law.
- X. Miscellaneous ecclesiastical Prohibitions.
- XI. Historical cross-survey and post-Civil War Prohibitions.

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

1. Conception, sources, and limitations of the study.

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2. Basic procedure in Prohibition cases--beyond the brief indication above, but short of the problematic cases under Title I.

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

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

4. Prohibitions in politics and constitutional law.

Conception, sources, and limitations of the study

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

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

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

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

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

The study is based on the reports in print and on those in manuscript in the British Library. I cannot guarantee that I have overlooked no printed cases, and still less that I have missed none in the manuscript collections, but I have tried not to. I have gone through the printed reports page by page (reliance on primitive indices and on leads and references would not turn up a significant fraction of the relevant cases). Similarly, I have gone through all the British Library manuscripts that appear from the cata-

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logues to consist of law reports from the period of the study, transcribing all Prohibition and jurisdictional cases. There are law reports in manuscript elsewhere; searching those would no doubt produce more cases. I have stopped where I have because my collection of cases is already large, and because I think that making sense of the corpus I have is a better investment of energy than further searching. I am quite sure that looking for more unprinted cases would produce mainly duplicate reports. When more are found, they are likely to affect only details on the map I present; having a map to locate new material on seems to me more important than having all possible data in hand before mapping it.

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

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it is because other reports disagree. The only ones I suspect at large are the most famous, Sir Edward Coke's, for conflicting reports in several instances suggest what common sense might surmise -- that the deliberately edited and published product of a strong personality bears the stamp of his predilections.

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

Perhaps the largest limitation of this study lies in the fact that it explores a by-way in considerable technical detail. It is appropriate to ask: Why would one want to know about this? Is the subject's long-run importance for legal history or general history sufficient to justify the trouble?

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I shall not make an elaborate apologia. In summary, I think there are three main reasons for pursuing the slice of legal history I have chosen in the rather relentless manner I have adopted:

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

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

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

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

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

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

This situation came about mainly because the Reformation incorporated the ecclesiastical component into a national galaxy of courts and laws. A case in a Church court was no longer made over to a literally foreign authority, which required, even on the most loyally Catholic assumptions as to its legitimacy, to be watched and contained. At the same time, the other non-common law components gained prominence in re-

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sponse to practical needs. Hostility ran between different members of a legal system more unified than before and less homogeneous than later, and interested motives entered into their attitudes and conduct toward each other -- as is well known, perhaps too well known; over against that hostility was a set of assumptions shared by people with different views on particular jurisdictional questions and on the approach to such questions in general -- simply that the system *was* a complex mixture, whose correct proportions were discoverable in the law by the lawyer's art.

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

3. I have done the study as I have partly for its by-products. The subject permits one to observe the late-Tudor and early Stuart judiciary dealing with many related yet different questions (different in both formal structure and practical stakes, but all involving in some way debate about the same set of legal values.) A basis is perhaps provided for some tentative generalization about judicial behavior in the period -- broader generalization than simply concerns the constants, diversities, and tendencies of judicial opinion on jurisdiction and Prohibitions. The fact that the subject is "public law" of a sort, and that it was tinged with politics, is in some ways an advantage, though I intend the category "judicial behavior" to be comprehensive. Such differences as those between cautious, self-restraining judges and more adventurous ones -- more moved by principle or more willing to act from a general sense of value and likely practical result -- as well as such phenomena as alignments and leadership on the Bench, are perhaps easier to see when the issues have a public or political cast than when private law alone is involved. Yet, subject to the dangers

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of projection, there may be possibilities for seeing beyond or abstracting from the particular subject and its peculiar flavor. Judges are never simply the victims of their predilections for particular outcomes in particular areas; they are also “victims” of their approach to legal problems and their conception of good judging, whatever the context.

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

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

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

Another kind of by-product concerns the interests at stake in jurisdictional cases -- the “realist” underside of a study focused on legal issues

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

Procedure

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

The Prohibition was a judicial writ issuable by the King's Bench, or Common Pleas on a showing of cause. (There was controversy as to whether the Common Pleas had the same comprehensive power to grant the writ as the King's Bench, but in the upshot it did.) The written statement of cause submitted to the court was called a "suggestion" or "surmise." It was in English and not subject to any requirements of mere form, though there were some in the nature of "supporting documents," and some substantive rules as to what surmises must contain or show (these are discussed in Vol. I.) I refer to the party who submits a surmise and thus commences a Prohibition suit as "plaintiff-in-Prohibition." Plaintiff-in-Prohibition was almost always defendant in an ecclesiastical suit (I often, when there is no reason to do otherwise, use "ecclesiastical" *per synecdochen* for "non-common law" generally -- Prohibition cases involving ecclesiastical courts greatly outnumbered all others.) In uncontroverted principle, any person generally eligible to bring a lawsuit could be plaintiff-in-Prohibition; one did not have to be defendant to the ecclesiastical suit one sought to arrest, or to have any sort of interest. The idea

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behind this principle was that there was a public interest in stopping suits brought in the wrong jurisdiction. In practice, however, as one would expect, plaintiff-in-Prohibition was almost always someone hoping to stop a suit against himself. (The nice question whether, in certain circumstances where a motive for doing so existed, *plaintiff* in an ecclesiastical suit could seek to prohibit his *own* suit is treated in Vol. I.)

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

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

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

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

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

To understand this option fully, one has to go a bit further into procedure pursuant to Prohibitions (below), but the idea can be grasped through a common example: A. sues B. for tithes; B. claims that tithes

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

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

After plaintiff-in-Prohibition had put in his surmise, various sequences were possible. Frequently there was open-court debate as to whether a Prohibition should be granted (whether the surmise stated good cause on

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

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

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

2. The case in which one or more judges thought they saw sufficient reason to grant a writ and went ahead and did so with little or no discussion. When this happened, defendant-in-Prohibition was ordinarily permitted to make what amounted to a motion for reconsideration, pursuant to which the merits of the surmise would be debated, usually by counsel on both sides. The technical term was "motion for Consultation." A writ of Consultation was the inverse of a writ of Prohibition: the Prohibition ordered the ecclesiastical court and the party (defendant-in-Prohibition) to stop proceedings; the Consultation authorized them to resume a once-prohibited suit. As will appear in Vol. I, there was a scintilla of doubt about the general legitimacy of motions for Consultation, but in practice they were usually permitted.

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Let us now assume Prohibition granted and motion for Consultation not made, not permitted, or denied. Many cases stopped here, but no case had to. Some common cases routinely went on to further stages. The next step, if defendant-in-Prohibition wanted to go on litigating, was for him to disobey the Prohibition, or pretend to. There is no sign in the reports that prohibited parties ever really disobeyed and persisted with their ecclesiastical suits, nor that ecclesiastical courts, whose cooperation would have been necessary for continuation of prohibited suits, ever joined in disobedience. What happened in reality was that defendant-in-Prohibition signified his intention to contest the Prohibition in the formal or full-dress way that the law allowed him as of right (as opposed to contesting it informally by arguing against the initial grant or moving for Consultation, technically by the court's grace and favor.) Plaintiff-in-Prohibition had no choice but to cooperate; were he not to, defendant-in-Prohibition and the ecclesiastical court *could* ignore the Prohibition with impunity.

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

It will be evident that the formalistic idea behind all this was that a Prohibition did not have to be obeyed, as a matter of law, unless it was

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justifiably granted in the first place. Whether it was could only be ascertained by verdict or legal judgment pursuant to proper pleading. The name for these steps beyond the initial grant of Prohibition was "Attachment on Prohibition," a form of contempt proceeding. (If after judgment in Attachment, defendant-in-Prohibition and the ecclesiastical judge should actually disobey the Prohibition, they would be punishable for contempt.) The procedure descended from the middle ages, when the Prohibition was a Chancery writ rather than a judicial one. By the period of this study it was a rigmorole; I shall ordinarily finesse the machinery and refer simply to cases that "proceeded to formal pleading."

The important thing to understand is the motives of defendants-in-Prohibition for carrying litigation on to the formal pleading stage. Again, it was defendant-in-Prohibition's right to do so. He was not obliged to acquiesce in the Prohibition even if he had been allowed to argue elaborately against the initial grant and to try again by moving for Consultation. But few litigants, except for those who might feel their initial effort was inadequate in relation to the merits of their case and perhaps those who merely hoped to wear down their opponents, would want to reopen a sufficiently argued legal issue. To do so would incur the expense of formal proceedings with little hope of success and the judges' irritation as well. Defendant-in-Prohibition might, however, want to challenge his opponent to a jury trial on the facts, even after losing a vigorous attempt to make out the legal insufficiency of the surmise. (In effect, the Prohibition procedure as a whole allowed defendant-in-Prohibition to fight on both fronts, fact and law, an opportunity common law defendants, including defendant-in-Prohibition at the formal pleading stage, were denied.) In many cases, on the other hand,--the open-and-shut kind as to initial prohibitability--there was no point in opposing the grant of Prohibition; defendant-in-Prohibition's defense would be entirely factual; he would not resist the Prohibition, but make plaintiff-in-Prohibition plead formally and reply by taking issue on the facts. Verdicts ordinarily concluded cases taken to an issue of fact, but sometimes the courts would entertain motions in arrest of judgment raising questions of law after the facts were settled by verdict, and special verdicts (the jury, on its own initiative or at the trial judge's behest, finds the facts conclusively, but refers their legal meaning to the court) were common in Prohibition cases as in other kinds of lawsuit.

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In contrast to the cases in which the formal pleading stage was only a step to a jury trial were those in which the parties or the court preferred to resolve a legal issue in the “full-dress” way. If defendant-in-Prohibition thought he had a strong legal case against the grant of a writ, it would be cheaper and more convenient to argue against the initial grant, but those advantages might be outweighed. Defendant-in-Prohibition might want time to prepare a careful case; he might have an interest in a once-and-for-all settlement -- a formal judgment in his favor on the record, with *res judicata* effect, and a judicial precedent strictly so-called. The two parties could share such an interest in a firm settlement and go to formal pleading by agreement. The judges, for their part, sometimes thought desirable the more deliberate argument entailed by formal pleading and preferred to reach a formal resolution of record--an appropriate attitude when a case presented an especially important or novel problem. The judges might then grant a Prohibition in the face of admitted uncertainty as to whether they ultimately ought to, in order to draw formal pleading and reargument. They might also so proceed as a way of dealing with sharply divided opinion among themselves. On occasion their motives were less clean, though perhaps statesmanlike--to put off a hard or divisive question by saying to defendant-in-Prohibition in effect, “If it is really worth your while to dispute this Prohibition, you are free to-- you may have a good case, but we doubt it and do not owe you the time and trouble to unravel it now.” Conversely, irritated judges can occasionally be heard saying to defendants-in-Prohibition whose cases at initial hearings they thought hopelessly weak, “Go ahead and force formal pleading if you feel so strongly about it, but for the moment stop trying to persuade us that black is white.”

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

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Note on non-Prohibition cases and procedures encountered in the study

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

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

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

In the case of High Commission prisoners, if the return said no more than that the prisoner was held by High Commission warrant it raised the question whether the Commission had power to imprison at all. Such a return, however, would almost certainly be held insufficiently detailed merely as to form. If the return said with reasonable particularity what the prisoner was held for, it raised the question whether the alleged mis-

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conduct was within ecclesiastical jurisdiction of any sort and, if so, whether it was within the Commission's arguably narrower jurisdiction. Apart from the issue of subject-matter jurisdiction, such a return always raised the question whether the Commission had power to imprison, either for all or for some of the things within its jurisdiction; questions about other powers could also arise. E.g., does the Commission have power to fine -- another claimed power not shared by other ecclesiastical courts -- and then to imprison to enforce payment, even if it may not imprison as a punishment?

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

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

Praemunire also appears in the study in connection with Prohibitions to courts of equity. This is owing to a famous and anomalous episode -- a none-too-plausible attempt by Coke to make out that one form of "especially inexcusable" resort to equity was within the *Praemunire* statutes, despite their original anti-ecclesiastical purpose.

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Procedurally, *Praemunire* needs no particular explanation. It was simply an indictable crime like others, though *sui generis* in the sense that it rested entirely on statute, occupied a middle rank between felony and misdemeanor, and was very uncertainly defined. It was of no real practical importance for jurisdictional law. Jurisdictional boundaries, one might say, were enforced by Prohibition, with *Praemunire* a vague threat in the background, rarely invoked even when it may have been invocable in theory.

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

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

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

4. Incidental presentation of jurisdictional questions. I shall discuss a few cases in which the scope of non-common law jurisdiction arose in litigation not as such concerned with that. The following example is an important case in schematic form: An action of Trespass was brought for wrongful entry on the property attached to an ecclesiastical living. The case turned out, by way of a special verdict, to depend on whether the

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High Commission was within its jurisdiction when it deprived a one-time holder of the living of his benefice, thereby enabling the appointment of a new clergyman, who took possession of the property.

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

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

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

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

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

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

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

There were three types of ecclesiastical courts:

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

b. Primarily appellate courts. Generous appeals (applicable to factual findings as well as legal holdings) were a feature of the ecclesiastical system, often a significant one for the law of Prohibitions. A losing party at the diocesan or equivalent peculiar level could appeal to the archbishop's

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court; one losing there could appeal to the court of Delegates, which was constituted by statute at the Reformation to replace Rome. Besides their appellate jurisdiction the archbishops had first-instance jurisdiction in some special circumstances and some pretense, which was controverted, to preempt cases from lower courts.

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

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

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

In addition to the ecclesiastical courts, the regular arenas of civilian practice were the Admiralty and the Court of Requests (one of the equity courts.) Practitioners moved freely among these arenas, and judicial careers sometimes included judgeships in more than one. The nominal

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holders of ecclesiastical jurisdiction, the bishops and archbishops (and by the same token the Lord Admiral), were not active judges, as the King was not; they acted through professional civilian judges, as the King did through the common law judges, the Lord Chancellor, and other judicial officers.

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

The regular ecclesiastical courts had both civil and criminal jurisdiction, taking those terms to signify procedures undertaken to make someone do a legal duty owed to, or directly benefiting, another specific person, ordinarily at that person's suit (civil) *versus* procedures undertaken to procure someone's punishment, or at least his "admonition and correction" (criminal). The High Commission, by contrast, was essentially a criminal court, but that is a rough truth reflective of what the common law courts in the upshot allowed it to be. There was controversy both as to whether it was authorized to invade the civil field and whether it lawfully could be by royal commission.

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

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

The pure criminal jurisdiction of the Church boiled down to:

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

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

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

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

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

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

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

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

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Vicars suing for such tithes as were payable to them could be plaintiffs in tithe suits.

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

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

Practically all crops in the straightforward acceptation, including hay, were subject to tithes. So were the offspring of animals and their recurrent products, such as milk, eggs, and wool. So was grass pastured by meat-producing animals. So was the lighter sort of wood harvested for

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fuel and other uses. Depletable assets -- timber trees that take many years to replace and minerals -- were not, though there was some legal controversy, reflected in Prohibition cases, about these exceptions, as about various crops and products off the main track of English agriculture. For the agricultural producers really taxed as they were meant to be, tithes were a tax on gross income, in the sense that the occupier paid 10% of his crop whether he was a subsistence farmer who would eat and use as seed all he grew or a commercial one who would sell his whole crop. The system of tithe law did, however, make some kinds of allowance for the maintenance of working capital and the avoidance of double taxation.

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

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

On the other hand, land owned by ecclesiastical institutions could be flatly exempt from tithes by custom, though it was not exempt *de jure*

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(i.e., land belonging to the Bishopric of X located in the Parish of Y owed tithes to the holder of the parish living, barring a custom; customary exemptions could be invoked by tenants of the ecclesiastical owner). In the middle ages, land owned by monasteries commonly enjoyed tithe exemptions by custom or Papal grant; at the dissolution these exemptions were preserved by statute to subsequent owners, so that in practice lay occupiers, whether owners or tenants, were sometimes exempt.

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

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

The rules stated here were generally agreed on and not in conflict as between secular and ecclesiastical law. Which legal system was to decide

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the cases and interpret the rules, on what rationale in this and that situation, was the question and the source of conflict.

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

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

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

As surmising a customary commutation in valid form would lead to a Prohibition, so would surmising a perpetual commutation by formal agreement concurred in by the bishop and the patron of the living. These commutations were known as compositions-real; the common law was the judge of their existence, validity, and meaning; this was owing to the patron's interest. Tithe suits were usually held *not* prohibitable if the payer claimed that the recipient had merely agreed -- by himself and so as to bind only himself -- to accept a money payment or other substitute per-

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formance in place of his tithes. Such agreements were naturally commonplace, and they were perfectly valid ordinary contracts. The argument against Prohibition on surmise of such an agreement was that prohibiting amounted to enforcing the contract specifically: Assuming the ecclesiastical court refused to recognize the agreement, the tithe-payer compelled to pay in kind, or to pay full assessed value, should sue the recipient for damages if he had suffered any, like other victims of breach of contract. Nevertheless, many attempts were made to stop tithe suits by claiming such agreements; there are debates in the cases about the propriety of prohibiting, and outcomes are not entirely consistent.

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

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

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

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

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

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

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

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

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

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

c. Legacies. These were exclusively recoverable in ecclesiastical courts. Legacy suits often led to Prohibitions, by various routes. The underlying reality was that two sorts of claims on estates, enforced by different legal systems, stood in an inherently tense relationship. An estate's creditors had to sue the executor at common law if he did not satisfy them voluntarily; legatees must sue in an ecclesiastical court. The two systems had no disagreement on legal principle: debts prevail over legacies; a legatee is only entitled to be paid when all legally recoverable debts have been paid or clearly can be; if an executor is too lavish about paying legacies and runs out of assets to satisfy debts, he is liable out of his own pocket. Creditors, however, have a motive to delay payment of legacies until they themselves have been paid, or until their claims have been rebuffed at the last litigative ditch; executors have every motive to put off legatees until they are sure the estate is sufficient to satisfy all debt claims that may turn up; meanwhile legatees will be clamoring for payment and starting ecclesiastical suits. One can begin to imagine the complications that could arise from this situation. Numerous cases will illustrate the point.

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3. Marital Law. The marital jurisdiction of ecclesiastical courts produced fewer Prohibitions than the classes above, but it was important in itself. Ecclesiastical courts had exclusive authority to determine whether a man and woman were legally husband and wife (essentially by the standards of ecclesiastical law, though there was some statutory encroachment on its free hand). They also had authority to award civil relief from an abusive marriage. Apart from criminal complaints of marital or sexual misconduct, the standard marital suit in an ecclesiastical court was a “divorce” suit in one of two senses in which the word was once used:

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

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

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

4. Defamation. Defamation constitutes a separate topic in the organization of this study (Title VII in the table on p. ix.) The reason for this is that the field of defamation was shared between the common law and ecclesiastical systems in a sense that holds for no other area of law. By and large, the tracts of human relationships governed by law were assigned to

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one system or the other -- to begin with, so to speak; innumerable problems of course arose from the difficulty of making such an assignment work smoothly. By contrast, some acts of defamation were remediable in one system, some in the other; acts very similar in character and suits motivated by much the same impulse for vindication and satisfaction might fall on one side or the other of a finer line. (The Star Chamber was a third sharer in this field, by way of its civil and criminal jurisdiction over written libels, but its role does not figure in any direct way in Prohibition law.)

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

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

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

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

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

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pects of parish management, mainly election of churchwardens. The policy of the national Church ran afoul of what local people regarded as customary and due, and what wider legal and ecclesiastical opinion regarded as due if customary.

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

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

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

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

A word on the civil sanctions of ecclesiastical courts: In effect, those courts gave injunctive relief backed by excommunication. Often they ordered the payment of money (e.g., rates owed, so much alimony to a "divorced" wife, the sum left as a legacy). Tithes are a peculiar case in this respect, because the basic duty was to render produce in kind. But when tithes had to be sued for, they were of course not usually renderable in kind by the time it had been determined that they were due. It was accordingly necessary for the court to assess the money value of the unpaid tithes and order payment of the assessed sum. (There is, I believe, no evidence of common law interference with that process of assessment, perhaps surprisingly.) This was probably the only context in which ecclesiastical courts did something like "assessing damages," or compensating in money a wrong that does not itself consist in breach of a duty to pay a definite sum of money. Otherwise, they by and large ordered spe-

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cific performance of a non-pecuniary duty and enforced the order by excommunication; they did not award damages for breach of the order. (E.g., a husband might be ordered to stay away from his divorced wife, or to abstain from abusive behavior toward his wife. The same principle holds for the “penances” appropriate on criminal conviction. Apology and retraction, in the quasi-criminal field of defamation, is one kind of example. Orders to abstain in the future from a type of criminal activity one had been convicted of were also common -- e.g., from cohabitation with an illicit partner or from incontinent behavior generally). Orders to losing parties to pay money in the name of litigative costs were routine and intrinsically lawful. Prohibitions often came out of costs awards for collateral reasons, however. (E.g., pardons, both royal and statutory, tended to complicate the law of costs, because costs might be incurred in privately prosecuting an offense before the offense was pardoned. It was the common law courts’ responsibility to construe pardons and work out their precise application in complicated circumstances.) I am not convinced that compensatory damages were not sometimes awarded under cover of costs, but that is uncertain. There is a further small penumbra where I am not sure of the law and the practice with respect to “damages,” for Prohibition cases are not informative. (E.g., would an executor by whose fault a physical object bequeathed as a legacy was lost or destroyed be forced to pay the legatee an assessed equivalent in money?) On the whole, however, “specific injunctive relief enforced by excommunication” is a safe-enough formula. (Private settlement of ecclesiastical disputes for money of course occurred. This was usually not a factor in Prohibition law, because the settlement would be an ordinary temporal contract. There is no sign that parties tried to enforce such contracts in ecclesiastical courts, or that ecclesiastical courts would generally have disputed the bindingness of one side’s promise to refrain from suing or to drop a commenced suit. Problems and Prohibitions did sometimes arise from the shadowiness of the border between civil and criminal. E.g., private parties to a defamation suit purport to settle for money: it was problematic whether this was binding on either the ecclesiastical plaintiff or the ecclesiastical court, because the matter was in principle criminal. By recommending a settlement, or perhaps very nearly coercing one, the ecclesiastical court had a certain scope to award damages in effect, and this opportunity may sometimes have been used.)

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Excommunication was not only the ecclesiastical courts' ultimate weapon -- the sanction behind its remedial orders. It was also an interlocutory sanction, the means of coercing attendance and cooperation on parties. There is evidence from Prohibition cases that default judgments were sometimes given against ecclesiastical defendants who simply did not show up when summoned. A correct statement of the law and the practice with respect to default judgments is hard to come by. It was, I believe, at least much more common *not* to give sentence by default, but rather to excommunicate the defaulter for non-appearance and then, when he did turn up, to absolve him *quoad* his failure to appear and proceed to try the merits.

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

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

A court with the Admiralty's function would have been hard to do without for a country situated as England is, so long as the common law

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had no way of trying events that did not occur in one or another of the English counties (or in several, in the case of some complex events). For a long time the common law was prevented from trying disputes about events outside the country by the theory of jury trial and the venue rules that followed from it. Jurors were conceived as people who lived in the vicinity where the disputed event occurred and who would themselves know what had happened -- or at any rate might know, or have ways of finding out on their own accord; therefore, they would not be dependent on evidence presented by the parties at a trial, even if they were assisted by it. Obviously jurors of this description could not be found to try what happened at sea; such events would become triable by jury only when the jury was reconceived as a neutral body assessing evidence -- as the judge was conceived under the civil law method used in the Admiralty and elsewhere. (Whether the trier of facts is or is not thought of as a judge of evidence is probably a more critical difference than whether the trier is a single professional or a committee of laymen, and whether the roles of determining facts and deciding legal questions are united or separated.) Events in foreign countries were equally unreachable: Though French neighbors can observe as well as English ones what goes on in their neighborhoods, they could of course not be compelled to serve on English juries. Within England itself, venue rules were originally strict; the triers of whether something happened in Hampshire must be Hampshire men, and even the narrower neighborhood (the hundred) must be represented on the panel of jurors. I shall explain below how relaxation of the domestic venue law and partial reconception of the jury complicated problems about the Admiralty's role in the period of this study.

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

Admiralty cases led to Prohibitions in three main ways:

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

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

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

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

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

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In other words, this category can cross with (3) below--and for that matter with (1) above, as the second example suggests.

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

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

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

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

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

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

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

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

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

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

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

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

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has presumably unintended results, in a situation the legislature did not think of and make an exception for; “mitigation” there was left to the common law courts by way of construction.

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

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

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

It will be clear from this analysis that Prohibitions to courts of equity cannot be introduced by reviewing the established heads of equitable jurisdiction and indicating the *entrée* for Prohibitions. There are no statements analogous to "claims to tithes belong to ecclesiastical courts, but suits for tithes are prohibitable if....," or "complaints of breach of contract do not belong to ecclesiastical courts." The reasons equitable remedies were sought, and the reasons for which the common law courts allowed and disallowed the pursuit of such remedies, have to be inspected through specific cases. (I should add that the substance, though not all the refinements, of my analysis of the Prohibition cases on courts of equity is available in published form.)²

* * *

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

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

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

This point is borne out by the serious clash with the Chancery that did occur in the early 17th century. It was not over the substance of equitable remedies, but over when they are opportune. The prevailing common law view was that a party substantively entitled to equitable intervention must seek it before a common law judgment (based on the rules that equity was allowed to frustrate) went against him. Among the reasons for this position was its symbolic tendency to uphold the pretense that equity does not contradict the common law -- i.e., it ought not to block execution of a common law judgment, with the implication that the judgment was unjust, but may prevent a party with a valid but unjust claim under common law rules from pursuing a judgment. The view of at least the strong-minded contemporary Chancellors, Lords Ellesmere and Bacon, was that equitable relief may be sought after judgment as well as before, subject only to the Chancellor's discretion as to the excusability for the party's delay, in the light of the seriousness of the injustice he would suffer if left

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remediless. Significantly, the Chancery was never prohibited even from intervening after judgment. (The Requests was several times prohibited from doing just that, when in substance the suit before it was perfectly appropriate to equity.) Instead, Coke embarked on a doubtful, though arguably valid, attempt to stop Chancery intervention after judgment by encouraging a grand jury to indict under the *Praemunire* statutes a lawyer who had pursued an equitable remedy for his client in the face of a common law judgment. The indirection -- going after the erring lawyer, not the Chancellor -- is ironically parallel to the indirection Coke thought it important to insist on: the principle that equity may restrain the unconscionable party who might try to make good on his common law rights, but may not suggest that a common law court has decided a case by unconscionable rules. Perhaps the real point of Coke's attempt was to stir up a "state affair." That was in any event the effect: the rights and wrongs of intervention after judgment, and whether it was within the scope of *Praemunire*, were argued out of court between the judicial officers concerned and before the King. In the end, the King purported, with dubious legality (for the argument that only a statute could settle the question so as to bind the common law courts is very strong), to decide the debate in the Chancery's favor. The common law judges proceeded to ignore his decision in the one judicial context in which it was really possible to: they continued to prohibit the minor equity courts from intervening after judgment. The Chancery won the "state affair," however; it continued to be Prohibition-proof, and the *Praemunire* offensive died. Coke was dismissed from the Bench on account of that offensive as well as for other reasons, but even if he had not been, the project of chastening the Chancery by making criminals of lawyers serving their clients under accepted law would probably not have survived a major demonstration of the Chancery's political weight.

The regional Councils were only partly courts of equity. They also had common law jurisdiction over relatively small claims and Star Chamber jurisdiction. The Council of Wales had a statutory basis, the Council of the North rested on royal authorization. Both courts were sometimes prohibited from exceeding their other jurisdictions, as well as the equitable. As courts with express and limiting instructions from the King and Privy Council, and one of them ultimately limited by the statute behind it, they were, so to speak, natural objects of Prohibition, even though they were not under the kind of cloud the Requests suffered from. I.e., they were

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bound to provoke some Prohibitions merely to enforce explicit limits on their commissions, and although those did not in terms go to their equitable powers, it must have seemed presumable that they were at any rate limited to the generally legitimate business of courts of equity. Any generalized doubt as to whether controlling courts of equity was a proper use of Prohibitions would probably not have been much felt with respect to special, mixed, limited tribunals such as the Councils. There are some signs of such doubts, though they were discussed and dispelled. The Prohibition was after all historically an anti-ecclesiastical instrument. Its extension to minor common law courts and the Admiralty can be seen as enforcement of the internal rules of the common law, in the one case, and, in the other, protection against direct encroachment on business the common law could handle, together with enforcement of statutes. Equity had a higher rationale than courts merely permitted to perform special jobs under well-known bodies of law distinct from the common law, for it purported to see that natural justice was done, and theory held that that function was a necessary check on any system of positive law. The practical immunity of the Chancery from Prohibition probably reflects this sense of its difference from the ordinarily prohibited courts and respect for the Chancellor as the institutionalized expert on what the demands of natural justice are. The nature and status of the minor equity courts, on the other hand, probably catalyzed the general view that *even* equity is a “jurisdiction” amenable to control by Prohibition, as well as providing a realistic entrée for the exercise of that control.

* * *

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

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

Prohibitions in Politics and Constitutional Law

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

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

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

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

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

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

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

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

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

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

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

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

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

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pation. It attempts to catch something of the mentality in which the rival systems appeared as *merely* tolerated, as subordinate in a much deeper sense than is implied in the plain legal fact that their jurisdiction was subject to common law control -- as if they were truly foreign enclaves, that had somehow, almost unaccountably, been suffered to spring up, but were indeed like tenants at sufferance of *the* law, the "common custom of the realm," which ultimately represented all that could strictly be meant by law. (The non-common law courts, with an exception of sorts for the equity system, were often spoken of as "foreign," without necessarily any further sense than "non-common law," but the very currency of the word was an invitation to hear its wider, more unfriendly connotations. Of course the Papalist history of the ecclesiastical system made the invitation all the harder to resist.) On the other hand, much of the burden of this entire study is to show that in everyday working reality -- the process of deciding cases -- such difference and distance between the common law and the non-common law systems is not so apparent. The rights and roles of the non-common law courts -- what I have called the federalistic character of the legal system as a whole -- were respected; jurisdictional problems as they arose in practical cases were perceived as real problems; it was hardly regarded as inconsequential whether the courts subject to Prohibition were ousted from their jurisdiction or forced to conform to common law preferences, like tenants at sufferance when he who suffers decides, as arbitrarily as he pleases, to suffer only so much. As the study unfolds, especially in Vol. II, it will come out that giving a real sense to the common law's superiority over the rival systems *beyond* the obvious sense in which it was procedurally in the driver's seat and responsible for keeping jurisdictional lines straight was a tortuous and tenuous business.

My immediate point is that the political controversy over Prohibitions brought out the perspective in which radical distance between the common law and its rivals is the most prominent appearance. Wrenched from the context of deciding cases, in which they thought they should be left undisturbed, forced to argue on ground they considered improper, the common law judges tended to fall back on the attitudes that deprived their rivals of respectability and prevented regarding them as peers of a sort. Again, it is very much a question how far Coke, with his peculiar pride and pugnacity and his superior intellectual grasp of the point of view I am talking about, was responsible for that perception. I hope that the Introduction to Vol. I will justify my calling the attitudes that made it hard for

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

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

* * *

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

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

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

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

(a) I have already said that some issues arising in originally proper non-common law suits were grounds for Prohibition, because those issues were considered the common law's to determine. In the end, some "common law issues" were firmly recognized, and whether a Prohibition should be granted when one of them came up was not very doubtful. But a certain puzzlement always surrounded this sort of Prohibition. When it was argued that some issue other than the well-recognized few was exclusively fit for common law determination, the courts tended to be troubled

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and divided. Was the Prohibition really meant for preventing non-common law courts from deciding the questions they needed to in order to dispose of suits properly before them? Was that function essentially the same as, or implicit in, what Prohibitions were manifestly for -- preventing the non-common law courts from taking cases they ought not to *ab initio*?

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

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

(c) Suppose a suit brought in a non-common law court does not encroach on the common law's monopoly over some kinds of litigation. Suppose it does not violate any specifiable rule to the effect that such a suit may not be entertained by that court. The suit is novel or unusual, not immediately recognizable as a kind of suit which the court in question customarily handles. Nothing has happened -- no issues have yet arisen

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within the suit, there is nothing the non-common law court can be said to have mishandled; the suit has merely been brought. Could there be any basis for prohibiting it? Why should the non-common law court not be free to decide whether or not the novel claim is from its point of view a good cause of action, as common law-courts would be free to do if an analogously novel claim were advanced before them?³

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

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

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

I stop short of "asking whether the complaint is sound as a matter of natural justice" and "asking whether it is a complaint that should be *made* legally valid by virtue of legislative authority delegated to the court." It is not necessary to go that far, where no judge could be expected to go without either (a) the recognition of judicial legislation that is an incident of legal positivism, a jurisprudence of later vintage than the period we are concerned with or (b) the doctrine that every court is ultimately a court of equity, entitled to enforce the requirements of natural justice as the court construes them. The latter doctrine, to the best of my knowledge, was held by only one person in the 17th century, Thomas Hobbes (in his *Dialogue between a Philosopher and a Student of the Common Law of England* --modern ed. by Joseph Cropsey, Chicago, 1971). Hobbes was a self-conscious *enfant terrible* vis-a-vis the common lawyers, a radical iconoclast with respect to all their jurisprudential beliefs.

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control that “ambit,” but ambiguity and uncertainty abound. Under (b) above, we ask, “Are there some standards binding on all courts which it is the common law courts’ duty to enforce outside the common law system?” We now ask the distinguishable but related question, “Do the common law courts have a kind of supervisory authority over the *whole* English legal system such that they may control what is to be recognized as a valid cause of action outside the common law system proper?”

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

Vol. II is principally about situation (b). Situation (c) and (d) are treated directly in Vol. III. The more routine and straightforward aspects of situation (a) are deferred until later in the study (Part VIII⁴) for reasons of expository convenience, but owing to overlap with the issues under (b) some of the most difficult and important problems under (a) are treated in a section of Vol. II. Vol. III develops the contrast between the least questionable kind of initial-jurisdiction-controlling Prohibition (prevention of direct encroachment on the common law) and the most questionable -- (c) and (d) here. In other words, Vol. III is not exclusively about situations (c) and (d), but they are the heart of it.

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

4 See table on p. ix. 'Part' refers to continuations of the study not yet ready for publication. The present three Vols. correspond to Parts I-III on the table.

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

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

Most of the rest of the topics in the table are self- explanatory. The Prohibition cases bearing on "subject-matter categories" are brought together -- e.g., the jurisdiction of Admiralty and equity courts, the boundaries of ecclesiastical jurisdiction over defamation. To some extent, my ordering is influenced by the analytic categories developed in Vol. III. E.g.: The bulk of Admiralty Prohibitions conform to the simple "paradigm" of Prohibition law, as I shall call it--preventing non-common law courts from doing in effect what common law courts were prepared to do themselves. Cases on ecclesiastical defamation are a good illustration of the range of Prohibitions -- "paradigm" cases on the one hand and, on the other cases in which the common law judges undertook to say to ecclesiastical courts, "You simply may not treat these words as defamatory -- it

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extends 'the ambit of remediable wrong' unduly.' Most Prohibitions to courts of equity by their nature restrict non-common law courts from overextending that ambit -- i.e., from judging for themselves that such-and-such is a valid claim to equitable relief.

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

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

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

It would clutter Vol. II unduly and distract from the major jurisprudential issues central to it to deal there with the rather large and complex "subject-matter category" of mixed wills. In Part VIII, I so to speak re-

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

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

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

The legal material of course points beyond the law in a narrow sense. For example, many areas of jurisdictional law, different from each other in legal structure, have to do with tithes. It is possible to cut through all these and say something beyond the immediate suggestions of common sense about how the payer and the recipient of tithes fared at the hands of the law -- and were likely to fare in practice, since the principal social

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function of litigation and legal pronouncement is to fix the background against which people are well-advised to conduct their affairs, including the decision to litigate. Are tendencies in the treatment of payers and recipients over the period of the study perceptible? Are there nice points -- the grosser ones can hardly fail to be evident--about the lay view of the church and of its interests and agencies to be gathered from a vast number of diverse encounters between lay and ecclesiastical courts? My intention is to cross-analyze my topics and to count outcomes, with questions of this order in mind, in as many ways as seem profitable; I cannot anticipate fully what ways will turn out to be.

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

Finally, it is my expectation that once Prohibition law in the cases is worked out through the body of the study, and cross-analysis of various sorts has put it in perspective, the context will exist in which the story of the political controversy over Prohibitions can be significantly retold. As I have indicated, there is a good deal of manuscript material on the controversy, which I would expect to use for that narrative, but the most important prerequisite for it is a command of the case law. Part XI will include a retelling and analysis of the controversy such as seems necessary and possible after the preliminary operations have been completed.

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

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

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

Note on Technical Procedures

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

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

(b) To rely substantially on paraphrase in stating cases and opinions, quoting the reports directly only when there is a purpose to be served. A purpose is served when, say, the report itself gives a judge's words in di-

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

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

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

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

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

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

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

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