# II.
# STATUTORY RULES GOVERNING PROHIBITION PROCEDURE

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

### 1. Extent of proof requirement

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

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

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

Edw. 6 applied, a further procedural requirement was imposed on plaintiff-in-Prohibition.

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

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

1 The one qualification on this point is that § X of the act speaks of offerings, or "obventions." I have found no cases on the application of the proof requirement to suits for offerings. In Stoneaceran v. Tee (M. 15 Jac. K.B Cited in Stroud v. Hoskins, below, but not separately reported), it was held that a customary discharge of anothcr type of ecclesiastical due -- a mortuary fee -- does not have to be proved.

quirement to other kinds of ecclesiastical suits, or to other non-common law suits on which Prohibitions might be sought, would be dubious. (Admittedly, the reasons for the rule could hold in other cases. The judicial practice of extending a statute to like cases "by the equity" -- i.e., not by liberal interpretation of the language, but because of the mere fairness of having like situations governed by the same rule -- was still acceptable in the 16th and early-17th centuries. However, it was usually confined to "positive" or enabling legislation. Extension to administrators of the power to bring a certain action which a statute gave to executors is a clear example. A statute imposing a new duty on executors to prove something by two witnesses would probably not have been extended to administrators. So here.)

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

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

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

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

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

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3 A couple of reports merely state the uncontested rule that *modi* must be proved: Sharpe v Sharpe, Noy, 148 (undated); Gippe's Case, H. 11 Jac. C.P., Godbolt, 246.

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

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

4 T. 30 Eliz. Q.B. 2 Leonard, 212.
5 T. 30 Eliz. Q.B. 2 Leonard, 29.

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

In Goodiar (or Goodyear) v. Master and Fellows of the College of Manchester (1601),[7] the surmise said that the Master and Fellows had leased the tithes they were suing for and that the period of the lease was unexpired. Like bargains other than compositions-real, leases of tithes are not specifically mentioned in 2/3 Edw. 6. The two judges present (Gawdy and Fenner) nevertheless thought the language of the statute general enough to include leases. But when they asked the clerks about the Court's usage they were told that proof had been required only in *modus* cases. The Justices decided to follow that usage.[8] The general rule of confining the act to *modi* seems doubtful, since it refers to compositions real and, at least arguably, to several other non-*modus* situations which

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

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

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

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

In Tanner v. Small (1608),[9] the King's Bench held that a suggested bargain for discharge of tithes need not be proved. The "experience" of the Court was again invoked. That is all the brief report reveals. The rule excluding bargains was also indirectly upheld in Cobb v. Hunt (below), and another unreported case was later cited to the same effect. [10]

The Common Pleas meanwhile showed signs of taking 2/3 Edw. 6 less narrowly. (Divergence between the two principle courts was not uncommon.) In a Common Pleas case of 1601,[11] a Prohibition was sought on the ground that the parties in a tithe suit had agreed to go to arbitration. The arbitrators had allegedly made an award, but the plaintiff in the ecclesiastical suit was nevertheless prosecuting. The Court held that these allegations must be proved in six months, as provided by the statute. Justice Warburton said explicitly that all matters of tithes, and only matters of tithes, are within the act. The holding is strong, because the statute says nothing specific about arbitration. It would seem strange to require proof of an agreement to arbitrate and the award thereon, while not requiring proof of a bargain concerning the tithes themselves.

In a second Common Pleas case,[12] the ecclesiastical suit was for tithes of wood. Wood was generally subject to tithes -- i.e., 1/10th of what a man cut should be set aside for the clergyman. But by virtue of the statute of 45 Edw. 3, c. 3, timber trees over twenty years old (i.e., "quality" lumber) were exempt from tithes. In our case, the defendant to the tithe suit sought a Prohibition on the ground that the wood in question was timber of the exempt sort. The Court held that he was required to prove the factual. truth of this claim and repeated the rule that all tithe cases come under the statute. The Court's approach here was sensibly general. Nicer construction of the statute might have generated a special problem about wood tithes. As we have seen, sect. xiv speaks of matters "before rehearsed." *Before* sect. xiv, nothing specific is said about timber trees,

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9 M. 5 Jac. K.B. Yelverton, 102; Add. 25,205, f.57.
10 Sivall's Case. 5 Jac. Cited by counsel in Stroud v. Hoskins, below.
11 P. 43 Eliz. C.P. Lansd. 1058, f.10.
12 P. 44 Eliz. C.P. Lansd. 1058. f.41.

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

A brief later note, labelled King's Bench[13] (the litigative circumstances are not reported), gives the opposite rule on timber trees -- i.e., that suggestions invoking 45 Edw. 3 do not have to be proved -- plus a similarly restrictive rule for another type of case on wood tithes. Wood cut only for use as fuel in a parishioner's house was not tithable. The report says that suggestions that the wood sued for was used only for that purpose need not be proved. Whereas 2/3 Edw. 6 does in a manner mention 45 Edw. 3, it says nothing about wood used for fuel. Whether the divergence between King's Bench and Common Pleas carried over to surmised bargains is uncertain for want of significant cases from the Common Pleas. There is a hint that it may have been in one Elizabethan report.[14] In general, it seems clear that the two courts understood the statute somewhat differently.

In Reynolls v. Hayes (1615),[15] however, the King's Bench moved away from its declared habit of requiring proof only in *modus* cases. A Prohibition was sought on the surmise that the tithe dispute had been put to arbitration. Chief Justice Coke, with Justices Croke and Dodderidge concurring, held that this suggestion had to be proved within six months, like a suggested *modus.* By dictum, Coke also extended the proof requirement to suggestions of exemption from tithes by virtue of the Statute of Monasteries.[16] It may be significant that Coke had previously headed

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13 M. 17 Jac. K.B. Harg. 30, f.56b.

14 M. 44/45 C.P. Lansd. 1058, f.50b: A briefly reported *per Curiam* opinion that a surmise of discharge by reason of a composition must be proved. If "composition" means "composition-real," the likelihood of conflict with the King's Bench is less, at any rate, than if the word is used loosely from some other sort of agreement. A much later note (Johnson's Case. H. 4 Car. C.P. Hetley, 146; anonymously reported by Littleton, 297, under T. 5 Car.) says that a surmise of a "personal agreement" between parson and parishioner does *not* have to be proved. *Quaere* whether "personal agreement" takes in everything short of a composition real or lease.

15 T. 12 Jac. K.B. 1 Rolle, 55.

16 The best evidence supports the treatment of Reynolls v. Hayes in the text, but there is a complication. In Stroud v. Hoskins (below), a Heydon v. Kenold is cited, from M. 12 Jac., wherein the decision was allegedly that a surmise of arbitrament does *not* have to be proved. The names and dates are close enough to suggest that the citation goes to the same case. Rolle's clear report is more likely to be right than the partisan citation. Further circumstances, reported by Rolle, may explain the confusion: In addition to the question about the proof requirement, there was debate on whether Prohibition would lie at all. Initially, the Justices disagreed about

the Common Pleas, where 2/3 Edw. 6 had been taken in a more reasonable, and more pro-ecclesiastical, sense. We shall see that there are cases besides this one in which Coke by no means appears as the friend of easy Prohibitions.

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

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that, whilc agreeing that the proof requirement applied. At a later discussion concerning costs, *dated M. 12 Jac. by Rolle,* it was apparently agreed that the Consultation had finally been granted on the merits. not for failure of proof, so that double costs under 2/3 Edw. 6 should not be awarded. The lawycr who cited the case in Stroud v. Hoskins may have been misled by the fact that the Consultation was held not to depend on 2/3 Edw. 6 into believing that the statute was held inapplicable.

17 M 17 Jac. K.B. 2 Rolle, 125; also anonymously by Harg. 30, f.56b.

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

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

18 P. 33 Eliz. Q.B. Croke Eliz., 228.
19 P. 33 Eliz. Q.B. Lansd. 1073, f.129b.

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

### 2. Meaning of "six months"

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

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

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

(3) Copley v. Collins. M. 14 Jac., probably C.P. Hobart, 179: "Six months" means "six months by the ordinary calendar," not "six twenty-eight-day months."

(4) Skinner's Case. T. 16 Jac. C.P. Noy, 30; Harl. 5149, f. 178b: Proof actually given within six months is good although not entered of record until later.

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

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

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

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

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Several cases arose on the standard of proof required by 2/3 Edw. 6 and on the effect of discrepancies between what plaintiff-in-Prohibition surmised and what his witnesses testified to. These cases are of some interest and variety. The degree of precision to require in proofs, as to which the words of the statute provided no guidance, gave the courts trouble. I shall take the Common Pleas cases first.

In Woode v. Savile (1587);[20] a *modus* was surmised: to pay 10/in lieu of all tithes to the parish clerk, who then pays the money over to the parson. The witnesses testified that the 10/ was customarily paid to the clerk, but they did not say that he paid it over to the parson. Serjeant Walmesley argued that the proof was insufficient, and the Court agreed with him. In this case, as was argued, there was more than a nominal discrepancy between surmise and proof. On several occasions, the courts were liberal toward nominal discrepancies. Here, the trouble was fundamental. For a surmise to pay 10/ to the parish clerk in lieu of tithes would not by itself state a valid *modus.* The reason is that every good *modus* must be a considerate exchange between parson and parishioner. It must appear that the parson has relinquished his tithes in exchange for something he could presumably have considered a material benefit to himself. To pay money to the clerk *simpliciter* would not (as was argued) benefit the parson, since the parson had no legal duty to maintain that official out of his pocket, and there was no pretense here that he had such a duty by custom. For all that appeared from the proof, the money was paid to the clerk *simpliciter.*

The reports of Baker v. Hulett (1595)[21] vary slightly from each other, so that precise reconstruction of the case presents difficulties. The following statement of the case, based on a combination of the two reports, seems probable (for present purposes it does not really matter whether it is exact): A parishioner who was sued for wood tithes *by the parson* surmised a *modus,* viz., to pay 2d. per acre of woods *to the vicar* in lieu of tithes. ("Impropriate" parishes had both a parson, or rector, and a vicar, tithes being divided between them according to one arrangement or another.) In other words, the surmise sought a Prohibition on two redun-

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20 P. 29 Eliz. C.P. Lansd. 1073, f.53.

21 M. 37/38 Eliz. C.P. Harg. 7, f. 147; Harl. 1631, f.205 and (second entry) 205b, *sub nom.* Baker's Case. I think there can be no doubt but that the two reports are of the same case, since in addition to the date and the matter, the names of counsel, given in both reports, are the same. The conflict is that Harg. 7 only says negatively that the witnesses failed to prove a sum-certain for the *modus*, whereas Harl. 1631 says positively that the agreement was proved. In both reports, counsel argue appropriately to the facts as stated by the reporter. I would conjecture that the case was argued several times, counsel first concentrating on the mere failure to prove the *modus* with certainty and later taking up the further question whether proof of the agreement should count as indirect proof of the *modus*, if not as providing sufficient basis for the Prohibition even though it was not surmised.

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

In another early case,[22] the Common Pleas made a liberal exception from the words of the statute. Plaintiff-in-Prohibition in this case did not prove his suggestion by witnesses at all, though the statute in terms requires that mode of proof. Instead, he produced two verdicts from previous cases by which the matter of his surmise was shown to be true. The Court held that the substitute proof was sufficient.

Liberality appears again in a case of 1618.[23] It was surmised that the inhabitants of a village had customarily paid money in satisfaction of tithes. The witnesses proved the *modus* only for plaintiff-in-Prohibition himself. I.e.: The *modus* was proved to be incorrectly described as running throughout the entire village, but it was proved true that occupiers of the particular land held by plaintiff-in-Prohibition had always paid money instead of tithes. The Court ruled that the surmise was adequately proved despite the discrepancy. It was also held that 2/3 Edw. 6 is satisfied if the

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

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

Somewhat greater strictness was shown in two other cases. In Hobdale's Case (1619),[24] a *modus* was surmised to be customary in the parish of D. in the County of Warwick. The witnesses proved the *modus,* but it transpired from their testimony that D. was in the County of Worcester. Plaintiff-in-Prohibition asked leave to amend his surmise, but he was turned down and the other party told to proceed in the ecclesiastical court. This looks like a rather hard ruling, since the plaintiff was punished for what was probably an attorney's or clerk's error. It may be significant, however, that the brief report does not say that a Consultation was granted -- only that the defendant was told to proceed in the Church court. In the absence of a Consultation (which would bar another Prohibition in the same suit), the plaintiff could probably simply start over with a new, correct surmise. The judges may have had that in mind. But they in any event refused to consider the *modus* sufficiently established in the face of the difference between the surmise and the proof.

Goddard (Toddard or Stiddar) v. Tiler (or Tilet),[25] 1628, is more material. A parishioner was sued for tithes of milk and calves. He surmised a *modus,* viz. that all inhabitants of the parish paid 4d. per cow and 2d. per calf in lieu of those tithes. His witnesses affirmed that the tithes had never been paid in kind, but said that some inhabitants paid 6d., some 7d., etc. The Court granted a Consultation on the ground that nothing like a *modus* running throughout the parish, as alleged, emerged from this proof. The judges took care, however, to prevent their decision from being overinterpreted. If a 20/ *modus* is alleged, they said, and a 40/ *modus* proved, that is good enough. The trouble in this case was the "mere uncertainty" of the proof. Later in the term, an attempt was made to reopen the case by showing that plaintiff- in-Prohibition had later produced some witnesses who affirmed his surmise in its terms. However, this second round of proof had not come within the six-month limit. The Court ruled that one who produces insufficient proof may still prevail by furnishing new evidence (even, presumably, though it is contradictory) within the

24 M.16 Jac. C.P. Harl. 5149, f.141.
25 T. 4 Car. C.P. Littleton, 151 and 155; Hetley, 100.

six months, but not after that period has expired. Again the judges offset their award of a Consultation in this case with permissive language, saying that "slight" proof, "as he thinketh or believeth," is good enough.

My first Queen's Bench case in point is from 1593[26] A *modus* was claimed to pay 10/ for wood tithes from a certain park. The witnesses proved that the party paid that sum for the wood tithes of the park *and two other places as well.* The case was adjourned, but the Court is reported to have thought the proof too different from the surmise to be good, as Coke urged from the Bar. There was another strong point againstplaintiff-in-Prohibition,however.

In Austen v. Pigot (1600),[27] Coke was unsuccessful in persuading the Court to insist on strict proof. Tithes from the demesnes of a manor were sued for in the ecclesiastical court. The surmise claimed that in lieu of tithes the parson customarily had a 100-acre close in the manor, consisting of 20 acres of pasture and 80 acres of woods. The witnesses proved that the parson had customarily had the profits of the pasture, but the surmise was not proved as to the woods. The Court thought this proof sufficient. Chief Justice Popham laid down a generally liberal policy: "...we ought not to be too precise in accepting proof, but if it is such that it may reasonably appear that the Court Christian has no cause to hold plea of tithes, it is sufficient." Lest liberality be over-interpreted, however, Popham warned that it will not do for witnesses to prove that a parson is "commonly esteemed" to hold land in lieu of tithes, unless they also prove that tithes have never been paid. Popham relied strongly on a Cotton's Case (not independently reported) as exactly in point: Cotton sued for tithes. The parishioner surmised that the parson had always enjoyed a

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26 Sherburne's Case. M.35/36 Eliz. Q.B. Croke Eliz., 306.

27 H. 42 Eliz. Q.B. Croke Eliz., 736; Moore, 911; Add. 25,203, f. 159b. There is one conflict of possible importance among the reports. Croke says 20 acres of pasture and 20 of woods, and Moore says 20 of pasture and 10 of woods. I follow the MS, (20 pasture/80 woods) because Coke in his argument for the defendant from the Bar attaches some importance to the fact that the surmise was unproved *for the greater part,* viz. the woods. Croke and Moore give the opinion as the Court's, while the MS. represents it as Popham's without mention of the other judges. Croke and the MS. agree that the case ended by the parties' agreeing to go on to formal pleading and trial. I.e., the defendant waived his objections to the preliminary proof, probably because he saw that the Court was against him. Quotation in the text and Cotton's Case are from the MS.

certain close in the parish in satisfaction of tithes. The witnesses proved that "it was commonly taken in the reputation of the country" that the parson had the land in place of tithes *and* that no tithes had ever been paid. The proof was held good.

In Nowell's Case (1600),[28] plaintiff-in-Prohibition apparently suggested a *modus* of 60 years' standing. His witnesses said that 60 years ago and for 30 years thereafter the suggested *modus* was in operation, but that for the last 30 years it had been discontinued, the parishioner instead compounding with the parson for the tithes. At least Justice Fenner thought this proof sufficient. In view of the theory of prescription, that is a reasonable conclusion. Usage of 60 years or any other determinate period did not make a good *modus,* for immemorialness was required. On the other hand, a valid *modus* was not destroyed because it had not been taken advantage of for 30 years or any other certain period. Here, the plaintiff need not have said anything about 60 years. If he had simply said that there was an immemorial *modus,* the proof would presumably have been clearly satisfactory. He was, however, indulged, in that he was not held to prove what he could be taken to have offered to prove.

In Beale v. Webb (1601)[29] a *modus* to pay 4/ was surmised. The witnesses proved a *modus* to pay 4/6d. The Court held this sufficient proof, because it showed that tithes in kind were not due. Counsel cited an earlier case *contra* (Bird v. Collingworth, M. 34/35 Eliz.). That case apparently came from the Common Pleas, for Chief Justice Popham dismissed it with the remark that the Common Pleas judges were now of a different opinion.

In Dett v. Webb (1602),[30] the majority of the King's Bench continued to make light of minor discrepancies between surmise and proof, but Popham, who was cautiously liberal in Austen v. Pigot, dissented, emphasizing the limits of liberalism. The ecclesiastical suit in this case was for

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28 M. 42/43 Eliz. Q.B. Add. 25,203, f.276b (the better report, giving only Fenner's opinion); Add. 25,202, f. 19 (states facts less completely, but appears to give the Court's decision).

29 P. 43 Eliz. Q.B. Croke Eliz., 819; Add. 25,203, f.317b; 2 Dyer, 170B (incorporated in report of Pelles v. Saunderson and dated M. 42/43).

30 T. 44 Eliz. Q.B. Add. 25,203, f.549 (excellent report); Add. 25,213, f.35 (unclear report *sub nom.* Pett v. Webb).

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

Chief Justice Popham, on the other hand, expressed his dissent as follows: "...there is a difference between a proof that concurs with the suggestion but is not precise and direct, for then it will be well-allowed on this statute, and a proof that is variant from the suggestion, for such proof is no proof, but rather disproves the suggestion, and so will not be allowed. And therefore if the witnesses do not depose directly according to the surmise, but say that the common voice or opinion of the country has been such, or if they prove it by any probable circumstances, the Court should allow it for sufficient proof, for it would be impossible when a *modus decimandi* or discharge of tithes is alleged in an abbot before the dissolution to produce witnesses who could depose of it of their knowledge, and so it is necessary to admit proof by circumstances. But in our case, the proof varies from the surmise. And if it had been given in evidence on an issue taken on such prescriptions, it would be necessary to find against him who pleaded them." One may doubt whether Popham's distinction between an "imprecise" proof and a "variant" one is fruitful. His scruples about slackening the standards of art and relaxing the demands of a statute one may admire.

The Chief Justice's reluctance to take the statute too freely was again displayed in Webb v. Petts.[31] A *modus* of 2/6d. was surmised. The witnesses, speaking from hearsay, said that the sum paid was 3/. The Court agreed that the witnesses' reliance on hearsay was no ground for rejecting the proof. But Popham considered that the difference between 2/6d. and 3/ made the proof insufficient. Justices Fenner and Yelverton held the contrary, for the usual reason: it was sufficiently clear that tithes in kind were not due.

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

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

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

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

33 P. 12 Jac. K.B. 1 Rolle, 2.

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

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

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

35 On this point, an undated note -- Noy, 28 -- confirms the other evidence above that proof by hearsay was in itself regarded as sufficient.

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

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

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36 Brown v. Crashaw. M. 11 Jac. K.B. 2 Bulstrode, 154.

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

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

### 4. Double costs and damages

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

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

37 It may be noted in connection with this case that witnesses under 2/3 Edw. 6 were not subject to criminal punishment for perjury in the same way as most other sorts of witnesses. That is to say, they were not within the statute of 5 Eliz., c.9, which in effect created the regular criminal law of perjury for witnesses (as distinct from the ancient procedure of attaint for jurors and Conciliar power to punish perjury). Add. 25,202, f.36b (P. 44 Eliz. Q.B.), reports precisely such a holding: that witnesses for purposes of 2/3 Edw. 6 are outside 5 Eliz. (as witnesses in the ecclesiastical courts were by express provision of 5 Eliz.). An early report (2 Dyer, 242b) raises the question whether perjurers under 2/3 Edw. 6 could be punished in the Star Chamber. The judges appear to have thought not. Absence of liability for perjury would seem to be a reason for insisting on reputable witnesses and perhaps for scrutinizing what they said carefully.

when a court held the contrary. Or he might proceed in good faith and make an effort to produce proof, yet find his evidence rejected and himself exposed to the penalty because of some defect in the witnesses' knowledge or carelessness in their way of speaking. It would not be surprising, therefore, if the courts were to prefer not to award penal damages in ambiguous circumstances. A few cases suggest such a preference.

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

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

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

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38 Cockram v. Davy (or Davies). H. 22 Jac. K.B. Benloe, 143; Lansd. 1063, f.62 (the better report). The parties' names and the date suggest the major case in the following sub-section (Note 4), but the reports do not overlap in content.

39 Noy, 81; Latch, 140. Neither report dates the case, but since it occurs in Latch it must be early Caroline. What Noy gives as a *per Curiam* decision, Latch gives as the opinion of Justices Crew, Jones, and Whitelocke.

40 H. 5 Jac. K.B. Yelverton, 119; Add. 25,205, f.54.

plus 50/ damages. The judgment to recover these sums was not properly given, however, owing to failure to enter judgment in the technically correct form. The parson then sued an action of Debt in the Common Pleas for the money and recovered. Our case is on a writ of error in the King's Bench (the normal appellate procedure from a Common Pleas judgment). Two errors were alleged: (a) The technical fault in the original judgment. (b) The substance of that judgment. With respect to the second, Yelverton argued for reversal from the Bar, as follows: A surmise of both a *modus* and a bargain must be proved for the *modus* but not for the bargain. (Correct by the King's Bench rule at the time of this case.) When it was not proved for either, the Court ought to have dismissed the Prohibition *quoad* the *modus,* but kept it in force *quoad* the bargain. Erroneously, it dismissed the Prohibition *in toto.* On this error was erected the further one of awarding costs and damages relating to the whole.

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

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

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

## B.
## 50 Edw. 3, c. 4

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

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

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

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

ies and enacted long after 50 Edw. 3. In the long run, that argument was successful.

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

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

41 Harl. 48 17, f.165b. K.B. Not dated, but from its place in the reports, probably from the 1590s.
42 M. 5 Jac. K. B. Yelverton, 102; Add. 25,205, f.57.

ations, "which was not the case above, but only for negligence in not having his proofs ready." This language leaves the implication that even if the year had not been different the four unproved surmises would not stand in the plaintiff's way.

In Kirby v. Pigge (1617),[43] a surmised *modus* was not proved. When the case was returned to the ecclesiastical court, sentence was given against the parishioner. He appealed the sentence within the ecclesiastical system (which had a several-layered appellate structure and permitted appeals automatically). Then he sought a new Prohibition. The Prohibition was denied by reason of 50 Edw. 3, the Court holding that a case on appeal is still the same case within the statute. In the light of other holdings (see below), this decision was correct. That is to say, if the Consultation had been granted on the merits, another Prohibition could not have been obtained after appeal. The fact that the Consultation here was only granted because of the proof requirement was not allowed to alter the general rule. The appeal, not the basis for the Consultation, seems to have been the point urged in Kirby v. Pigge. The brief reports give no sign that the intimation in Cop v. Semer -- that failure of proof is simply not within 50 Edw. 3 -- was revived. The decision rejects it by implication.

In Cockeram v. Davies (1625),[44] the case was exactly the same: failure of proof, Consultation accordingly, ecclesiastical sentence against the parishioner, ecclesiastical appeal, application for a new Prohibition. This time, the Court went the other way, upholding the second Prohibition. A good MS. report enables us to follow the thinking of two judges, Dodderidge and Jones. Justice Dodderidge was vehement on the danger of letting appeals be an excuse for more Prohibitions than one in the same case. The plaintiff's counsel relied heavily on the language of 50 Edw. 3 that forbids a second Prohibition to *to the same judge.* An appellate judge, it was argued, is not the "same judge" as the recipient of the first Prohibition. In reply to this argument, Justice Dodderidge not only deplored excessive literalism *("Qui haeret in littera haeret in cortice,"* he said), but also gave a reason why a different judge is miraculously the same judge

43 P. 14 Jac. K.B. Add. 25,211, f. 157b: Moore, 917, *sub. nom* Big's Case.
44 H. 22 Jac. K. B. Lansd. 1063, f.86.

in ecclesiastical law. (An appeal in ecclesiastical law, unlike a writ of error at common law, suspended the prior sentence. I.e.: Until the appeal was decided, the parties remained in the same plight as if no sentence had yet been given. Therefore, the appeal was in no sense a different suit, but *quasi* another hearing of the suit at the original level. Therefore, though the appellate judge is a different *man* from the original judge, he is not a different *judge,*

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

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

According to the MS., the Court ended by granting the second Prohibition "at this time," "since many Prohibitions were granted in similar

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

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

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

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

in routine cases. In complex ones, where, as here, decision was delayed over several terms and counsel were permitted to develop lengthy arguments of notable importance, one expects judicial discussion. (The custom was for the puisne Justices to give their reasoned opinions in ascending order of seniority, followed by the Chief Justice.) Decision without judicial argument in a major case suggests political embarrassment or, at least, disinclination to commit the Bench too firmly to a decision the judges did not like but could not avoid. Both explanations are plausible in the case of Stroud v. Hoskins.

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

47 "In 4 and P.5 Jac., when there was the great debate about Prohibitions, this very matter was complained of, and the answer given hereto was that the complainants should have shown in particular where the fault was and then it would be redressed." By "this very matter,'' Noy presumably meant the general question of how strictly 50 Edw. 3 should be enforced. He can only point to a vague response to what must have been the complaint that it was not being enforced strictly enough. His intention must be to say that although the judges did not admit laxity, they were prepared to tighten up enforcement of the statute if specific instances of loose interpretation could be cited. Noy's remark only functions as a general admonition and reminder to the Court.

Apart from politics, the judges in Stroud v. Hoskins may not have liked the result that reason and precedent drove them to. Plaintiffs-in-Prohibition who neglected or lacked proof should presumably not be overencouraged to seek new Prohibitions. To the end of minimizing litigation and enforcing 2/3 Edw. 6, "one chance in one tithe-year" might have been a good rule, even though 50 Edw. 3 could not be held to have enacted it. A lengthy and deliberate statement of the judges' belief that no such rule existed would allow tithe-payers and their lawyers to be confident that one did not. We should remember that judicial precedents were neither so easily discoverable nor so authoritative in principle in the early 17th century as they later became. Judicial argument could both publicize a decision in the legal profession and add to its weight. (In the light of these observations, it is ironic that the judges in Stroud v. Hoskins may have felt very nearly "bound" by Cockeram v. Davies.)

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

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

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

As we saw above, it was unsuccessfully urged that the reclaimed-waste surmise did not have to be proved. If that argument had prevailed there would *perhaps* have been no problem about 50 Edw. 3. I.e.: If the Consultation had been improperly granted (granted on the mistaken impression that the surmise needed to be proved), then a new Prohibition might seem appropriate. 50 Edw. 3 speaks of Consultations "duly" granted. If the Consultation had been erroneously granted, would it have been "duly" granted? *Maybe* not, but a strong argument *contra* was made by Noy. He argued in effect for taking "duly" in the narrowest sense -- as equivalent to "granted by a competent court in proper form," *not* as equivalent to "correctly granted as a matter of law."[49] As things turned out, Noy would not have needed to press for so confined a sense of "duly," for he and his colleague persuaded the Court that the Consultation had been correctly granted as a matter of law. How the case would have been decided if the issue on the proof requirement had been resolved the other way becomes an academic question. (Though not without interest. Having decided that a surmise of a given type *did* have to be proved, should the Court be free to reconsider the correctness of that decision on a new application for Prohibition after Consultation? The question would be most troubling if both principal courts were involved. Suppose the Common Pleas held that a surmise required proof and granted a Consultation for failure thereof.

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

49 Noy took pains to defend his interpretation of "duly" as accepted legal usage. E.g.: A man erroneously convicted is still spoken of as "duly" convicted. So with the related word "lawfully." As Noy said, "There is a civil lawfulness and there is a natural lawfulncss." E.g., a child may be spoken of as "lawfully begotten" for the purposes of an entail even though he is a product of adultery. In short, ordinary language can be a very misleading basis for construing legal meanings. Cf. "due process of law."

Then suppose a new Prohibition were sought in the King's Bench. It is realistic to imagine the King's Bench taking a different view of the proof requirement's scope. Should it be free, in effect, to review and reverse the Common Pleas decision? Noy's interpretation of "duly" would prevent such a problem from arising. Some related problems on the interaction of the two courts are discussed below).

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

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

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

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

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

Two further lines of argument were also pursued. (a) Cockeram v. Davies was cited. No attempt was made to distinguish it, for that is impossible to do. In a sense, the appeal in Cockeram v. Davies made it the stronger case. It was represented, without contradiction, as a general holding -- that new Prohibitions may be issued after Consultation when the Consultation is not on the merits. That is broader than upholding new Prohibitions *solely* when the Consultation is based on 2/3 Edw. 6. There is no telling how reluctant the judges may have been, aside from other considerations, to reverse a recent decision. An earlier case, not independently reported,[50] was cited as flatly contradictory to Cockeram v. Davies, which might have mitigated the pain of reversal. As we have seen, there were still other earlier cases, not used in Stroud v. Hoskins,

50 Pilton's Case, H. 11 Jac. K.B., where it was purportedly resolved that a new Prohibition will not lie after Consultation based on 2/3 Edw. 6.

which could be employed to argue against the result, though not very decisively.

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

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

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

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The line of cases just considered, in which both 50 Edw. 3 and 2/3 Edw. 6 were involved, must be seen in the light of another line involving only the former statute. In a few cases, the Consultation issued, not be-

cause the first Prohibition had been dismissed on its merits, but for some incidental reason other than failure of proof under 2/3 Edw. 6 -- e.g., failure of the plaintiff to prosecute. In an important sense, the failure-of-proof cases are similar to the other cases of "non-substantive" Consultations. The major difference between the two classes is that the requirement of preliminary proof did not exist when 50 Edw. 3 was made, whereas such defaults on the plaintiff's part as non-prosecution could have been within the statute-makers' contemplation. It would have been symmetrical to treat the two classes alike, but there was a convincing reason to treat them differently.

Perhaps the obvious discrimination is to say that failure of proof is not fatal to a second Prohibition, because the proof requirement did not exist in 50 Edw. 3, whereas non-prosecution or the like is fatal. But the opposite discrimination can be defended. One might argue that failure of proof touches the substance more closely: Having had a chance to produce evidence of the sort that would be relevant for a final determination, the plaintiff has failed, whence it may be inferred that he would be unlikely to succeed on formal trial. The reasons for non- prosecution, *per contra,* might be various and accidental. For a realistic example: Suppose a parishioner surmises a *modus* running through the entire parish. Suppose he finds two witnesses who "prove" his surmise. Then suppose he discovers on further investigation that he has mistaken his *modus* because it applies only to certain land, not the whole parish, whereupon he drops his case and Consultation issues. Does 50 Edw. 3 really intend to foreclose this parishioner from another Prohibition? This example leads to another problem: Suppose that the above parishioner goes to trial. Because the evidence shows that the *modus* only applies to particular tenements, he loses. Then he seeks another Prohibition on a corrected surmise. Does the change in the surmise, while the ecclesiastical libel remains unchanged, justify a new Prohibition? The answer to the last question should probably be "no," for the parishioner was surely at fault in standing on a claim he could not support. But is the nonsuit case so clear? A mistake in the confusing realm of tithing customs is understandable, and in dropping a misconceived suit the parishioner has done the sensible, time-saving thing (barring the possibility of amending his original surmise).

The earliest case in the present category,[51] unlike all those in the preceding one, comes from the Common Pleas. The parishioner in a tithe suit surmised a *modus,* which the parson traversed (i.e., denied factually). A Consultation issued when the plaintiff was nonsuited. He then sought a new Prohibition, changing his surmise slightly. (Formerly, he alleged a custom that *"singuli proprietarii firmarii seu occupatores"* of a certain grange had paid 13/4d. in lieu of certain tithes. The second time, he alleged that the occupiers of the grange "among them" paid that sum.) Neither the alteration in the surmise nor the fact that the Consultation was the result of a nonsuit persuaded the Court to grant another Prohibition when the ecclesiastical libel remained the same. By way of clarification, Justice Glanville pointed out that the holding did not imply that the plaintiff would be estopped in another year if he was sued for the same tithes on a different libel. Shortly later, the Common Pleas affirmed this dictum.[52] Another dictum from a decade later,[53] agrees: The Court granted a Consultation because the plaintiff-in-Prohibition failed to appear at Assizes for trial, having been duly notified. The Court said he could not have a new Prohibition for the same year, but might for another year.

In Foster v. Berkenshare in the King's Bench (1609),[54] the plaintiff-in-Prohibition was nonsuited, then after losing in the ecclesiastical court appealed and sought a new Prohibition. The Court refused another Prohibition because the libel was unchanged. Several lawyers at the Bar were surprised by this holding, saying "that the usage had lately been otherwise, because when the plea is removed by appeal it is not within the words of the statute, viz., 'the said judge,' etc." Nothing seems to have been made of the fact that the first Prohibition was lost by nonsuit. If Consultations based on nonsuits should be treated the same way as Consultations for failure of proof under 2/3 Edw. 6, this case is good authority against the decision in Cockeram v. Davies. Foster's Case was relevantly cited (under the date H. 7 Jac.) in Stroud v. Hoskins, by Calthrop, who was trying to overturn Cockeram v. Davies. An anonymous report from

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51 Watson v. Langdall. T. 41 Eliz. C.P. Harl. 48 17, f174.

52 Cropley v. Whiteacres. M. 44/45 Eliz. C.P. Plaintiff surmised a *modus* and was nonsuited. The briefly reported holding is only that these facts are no bar to a Prohibition to stop a tithe suit for another year.

53 Wakeman v. ---.M. 10 Jac. C.P. Add. 25,210, f.9.

54 P. 7 Jac. K.B. Add. 25,208, f.43.

the same term,[55] possibly relating to the same case, has the Court laying down a general rule that new Prohibitions after Consultation can be justified only when the consultation depended on a clerk's fault or some such technical error as the mispleading of a statute -- i.e., presumably, where plaintiff-in-Prohibition is not at fault to the extent that he would be in a nonsuit or failure-of-proof case.

Biggs v. J. S. Parson de D. (1616)[56] combines several themes. A Prohibition was granted on surmise of a *modus.* The defendant pleaded to issue on the truth of the *modus.* At the trial stage, the plaintiff was nonsuited because he could not prove his case. Then, after losing in the ecclesiastical court, he appealed and sought a new Prohibition by an altered surmise. (He had originally surmised a 2/ *modus* for all tithes, the inclusiveness of which was probably what he could not prove, for he changed his claim to 2/ for corn and hay tithes only.) The plaintiff's counsel relied first on the change in the surmise, but was put down by the Court because the libel was still the same. Counsel then switched to the appeal, citing a case[57] to prove that an ecclesiastical suit on appeal is not the same case within 50 Edw. 3. The three judges whose opinion is reported (Coke, Dodderidge, and Houghton) rejected that argument as well. Coke and Houghton rested on the straightforward point that the intent of 50 Edw. 3. was to "oust multiplication of appeals." Dodderidge added the argument he was later to repeat in Cockeram v. Davies: because ecclesiastical appeals suspend the sentence, an appellate judge is strictly the "same judge" as the original one. On the effect of the appeal, the holding was in line with other cases we have seen. It also accords with Hele v. Chaine *et al.*[58] (discussed below for another point) of 1609, though there may have been one dissent in that case. As far as appears, counsel in Biggs v. J. S. did not think it worth arguing that there should be a new Prohibition because the first one was lost by nonsuit. It may be relevant that the nonsuit came at a late stage. It may have been ordered by the trial judge for patent failure of evidence, as opposed to being taken voluntarily by the plaintiff.

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55 2 Brownlow and Goldesborough, 247.
56 P. 14 Jac. K.B. t Rolle, 378; 3 Bulstrode, 182; Harl. 4561, f.221b.
57 Bacon v. Baker, not independently reported, P. 1 Jac. Also cited, as Sir Nicholas Bacon's Case, in Hele v. Chaine *et al.*
58 M. 6 Jac. K.B. Add. 25,215, f.47.

None of the cases just above lend countenance to the theory, advanced in Cockeram v. Davies and Stroud v. Hoskins, that new Prohibitions are always permissible unless the Consultation is based on a substantive determination, A little authority can be mustered in support of that theory, but it is thin and largely distinguishable from the nonsuit and failure-of-proof cases. Arguing against the theory in Stroud v. Hoskins, Noy conceded that a second Prohibition could be granted if the first one failed by an "act of God," such as the death of a party. In Stroud v. Hoskins, Justice Whitelocke told of one curious case (without specific citation) which, though it involved 2/3 Edw. 6, is best considered here: A man by mistake went to a Common Pleas judge at Assizes to prove his surmise, when he should have gone to a King's Bench judge, his Prohibition having been granted by that court. That is all Whitelocke said. His purpose was presumably to show that there are slips so minor or understandable that *always* denying a second Prohibition after Consultation would be unfair. That a layman got mixed up as to the sort of judge he should go before is understandable, but it seems doubtful whether the nonsuit and standard failure-of-proof cases were equally deserving of pity.

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

59 H. 42 Eliz. Q.B. Croke Eliz.. 736; Add. 25,203, f.171 : Add. 25,202, f.12.

explaining the decision as follows: "The statute is to be understood when Consultation is once awarded on examination *of the matter* and not when it is awarded for insufficiency *in the form of the proceeding."* (Italics mine.) The other Justices are said to have conceded this distinction. Popham's statement directly warrants precisely what Calthrop was combatting in Stroud v. Hoskins -- a distinction between substantive and non-substantive Consultations, as opposed to a distinction between trivial or faultless Consultations and all others. There is, however, a basis for doubting Popham's generalization in Syblie v. Crawlie -- viz. at least one other case of a Chancery Consultation overridden by a common law court which points to an exception only for inadvertent or meaningless Consultations not for all Consultations dependent on "the form of the proceeding."[60] The best conclusion is that Calthrop and Noy were right in Stroud

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60 At most there were two such cases, and there may have been only one. I have three reports, all dated P. 34 Eliz. C.P., as follows:

(a) Lyss v. Watts, Croke Eliz., 277: A Prohibition being granted in the Common Pleas, the defendant showed that the Chancery had already granted a Consultation in the same case. At the hearing of Lyss v. Watts to which Croke's report relates, the reason for the Chancery Consultation seems not to have been brought out. Apparently assuming that the Consultation was substantive, the Court said that the defendant ought to have another Consultation -- i.e., that the Chancery's act should be respected. This was a strong opinion, for, as further reported discussion shows, the Common Pleas did not approve of the Consultation on the merits. The ecclesiastical suit was for tithes of slate-stones. The Common Pleas thought, in accord with all common law opinion on this subject, that no tithes were due for such stones (being, like minerals, "part of the freehold," or depletable assets).

(b) Lansd. 1073, f.I27b, is clearly the same case, because discussion of the tithability of slate-stones is also reported there. Otherwise, this report says that the Prohibition in Chancery "abated," whereupon Consultation was granted, because it was sought by English Bill. The Common Pleas is reported to have upheld the new Prohibition because the first one failed by the clerk's fault rather than the party's. The MS. is reconcilable with Croke on the assumption that a second hearing brought out the fact that the Chancery Consultation was extremely non-substantive.

(c) Lansd. 1073, f.130b looks like a different case from a bare report, though from the date one suspects that it is another, perhaps confused, version of the same one. According to this report, the Chancellor reversed one of his own Prohibitions by Consultation because it had been granted without order of the Court or English Bill. Syblie v. Crawlie and the report just above show that it was objectionable to grant a Prohibition on an English Bill, whereas this report suggests that the absence of an English Bill was a fault. Perhaps the meaning is that there was *nothing* of record in the Chancery to warrant a Prohibition, not even an English Bill seeking one. In any event, the Common Pleas allowed a new Prohibition on the ground that the Consultation in this seemingly mixed-up Chancery case could hardly be considered "duly" granted, and because the judges thought that a Prohibition was clearly appropriate on the merits ("for although [sic] there was no English Bill, still the Prohibition was well-granted").

v. Hoskins on the basis of prior cases, though as they themselves admitted, the question was confused. One later case[61] illustrates the possibility of "trivial or faultless" Consultations which it would be harsh to include within 50 Edw. 3. Here the plaintiff-in-Prohibition proved his suggestion as required by 2/3 Edw. 6 before a Justice at Assizes. But because the proof was not entered of record, a Consultation was granted for failure of proof. A new Prohibition was allowed, since the Consultation was a mere accident. As we have seen, proof provided within six months was good even though it was not entered until later.

To resume another theme: The well-argued case of Bowrie (or Dowry) v. Wallington (or Willington) (1625)[62] may be taken as settling the question whether 50 Edw. 3 could be circumvented by bringing an ecclesiastical appeal. The Court said, "No," in accord with earlier authority. In other words, if A. gets a Prohibition, then the Prohibition is undone by a Consultation, then A. loses in the original ecclesiastical court and appeals to a higher one, A. may not have a new Prohibition. Although there is some confusion in the reports on this point, it seems clear that the Consultation in Bowrie v. Wallington was substantive -- i.e., granted after verdict and judgment against plaintiff-in-Prohibition. If the Consultation

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61 Mayle v. Murlyn. T. 16 Car. C.P. Harg. 23, f.62b.

62 P. and M. 1 Car. K.B. Popham, 159; Benloe, 148 and 150; Latch, 6 and 76; Harg. 38, f.17b; Lansd. 1063, f.116b. The reports present some problems of reconstruction. There is conflict on one point of significance. Benloe, 150 (unlike Benloe, 148) says the Consultation was granted because the plaintiff-in-Prohibition was nonsuited "upon a mistake of alleging a *modus decimandi* for all the vill, where some part pays tithes in kind." Harg. 38 says the Consultation was granted either because the plaintiff was nonsuited or because a verdict went against him -- the reporter does not know which. All the other reports say that verdict and judgment were given against the plaintiff. I conclude that there was probably a verdict. If there was a nonsuit, it may have been ordered by the trial judge upon the plaintiff's manifest failure to give evidence of a *modus* throughout the village -- which might in itself make the determination "substantive" enough. Benloe, 150, is dated later than the other reports (M. 1 Car., as opposed to P. 1 Car.), but all the other reports make it clear that the case was not decided in Easter. Noy's argument came in Easter, but on a second hearing, after which (according to Lansd. 1063) decision was still deferred, probably to be given the following Michaelmas. Popham suggests that on the first hearing -- before Noy's argument -- the judges were less than convinced that the appeal could not justify a new Prohibition. They said it would not if the appellor and the plaintiff-in-Prohibition were the same person, and if the Consultation were substantive -- good enough for this case but still a little qualified. Benloe, 150, is the only decisive report of the result, from which it appears that Noy's argument was largely accepted by the Court. In Stroud v. Hoskins, Noy cited Bowrie v. Wallington as a general holding (perhaps more general than it was) against new Prohibitions after Consultation.

had been non-substantive, Cockeram v. Davies might have justified a new Prohibition, but the appeal would have had nothing to do with justifying it (as at least Justices Dodderidge and Jones had held in Cockeram v. Davies the year before, and as the whole Court held by implication in this case).

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

(b) Noy reinforced the argument made by Justice Dodderidge in Cockeram v. Davies that 50 Edw. 3 does not mean "the same judge" literally, but rather that an appellate judge in the ecclesiastical system must be taken as "the same judge" as the original one. By ecclesiastical procedure, Noy pointed out, an appellate judge who affirms the sentence below remands the case to the inferior judge for execution. Thus, if the lower ecclesiastical judge is told to go ahead by Consultation, and then another Prohibition is issued to the appellate judge, the effect of the new Prohibition will be to prevent the lower judge *(literally "the same judge" who was permitted to carry on before)* from executing his sentence, in the event that the sentence is affirmed. In addition, Noy cited an analogy to justify taking persons mentioned in statutes as "persons in interest," rather

than natural persons: 27 Eliz., c. 8, gave a writ of error in certain circumstances to "parties plaintiffs or defendants." The courts had interpreted that expression to include the executors of such parties. So here, Noy argued: Different ecclesiastical judges in the sense of different men with different positions in the ecclesiastical hierarchy are the "same judge" in the sense that they represent the same "interest," as an executor and his testator are in that sense the "same person."

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

A report from a few years later[63] confirms Bowrie v. Wallington: Justices Jones and Berkeley restated the rule that an appeal will not justify a new Prohibition. They or the reporter added that this was "subscribed" by all the judges of England. (There are various signs of extra-judicial discussion concerning Prohibitions, like that in James I's reign, in the 1630s, ending with the judges' signing an agreement as to how they would handle certain types of cases. Though the point was well-settled before, it would seem that new Prohibitions after appeal were included in that discussion. Cf. the possible political overtones of Stroud v. Hoskins above.) Jones and Berkeley confused the reporter by saying that although the statute of 50 Edw. 3 spoke of "the same judge," there was another statute of 51 Edw. 3 speaking only of the "same cause." The reporter was puzzled because he could find no such second statute. The judges must have been thinking, perhaps inaccurately, about the historical evidence offered by Noy on two occasions: the *petition,* not statute, of 51 Edw. 3

63 T. 9 Car. K.B. Harl. 1631, f.412.

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

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

I have found only one case on this point,[64] where it arose in a rather interesting form. A parishioner was sued for tithes from former monastic land. He got a Prohibition on the claim that the land was discharged from tithes at the time of the dissolution (and consequently discharged now). The parties went to trial on the truth of this claim. Plaintiff-in-Prohibition lost because he pleaded one kind of discharge and proved another kind. I.e.: He had a good basis for discharge, but lost because he surmised the wrong species. The case was accordingly returned to the ecclesiastical court by Consultation. The parson (plaintiff there) then added to his libel an article saying that whether or not the land was discharged at the dissolution tithes had been paid for some sixty years last past. Relying on the fact that the libel had been added to, the parishioner then sought a new Prohibition.

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

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64 Lady Denton v. Earl (or Countess) of Clanrickard. M. 18 Jac. K.B. 2 Rolle, 207; Harg. 30, f.100.

though in this case, where tithes were manifestly not due, that path might have been tempting. Instead, the Court discussed whether the literal addition was a real or significant one.

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

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

it) for the ecclesiastical judge to hold that the tithes were due now by prescription, whether or not they were due at the dissolution. Therefore the change in the libel could affect what happened in the ecclesiastical court, whatever the civil law expert said. Therefore a Prohibition should be granted.

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

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

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

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

In Alderman Skinner's Case (1592),[65] a parishioner surmised a *modus* applying to a certain park. Upon traverse and trial, the verdict went against the parishioner because the *modus* in fact only applied to part of the park. (An ancient park had been recently extended. The plaintiff was able to establish his *modus* for the ancient park, but made the mistake of claiming it for the whole present park.) After Consultation and sentence against him, the parishioner appealed to a higher ecclesiastical court and sought a new Prohibition. This time he of course changed his surmise, claiming the *modus* only for the old park. The novelty of this case is that the new Prohibition was sought in the Common Pleas, whereas the earlier sequence of events had been in the Queen's Bench. On the substance, the Common Pleas thought that no new Prohibition should be granted. This view is consistent with similar cases above. Common sense suggests that a party should not be able to evade 50 Edw. 3 by switching from one common law court to the other. But can it be said that the second Prohibition suit is as good as a repetition of the first, and so clearly within the statute, when it is brought in a different court? The plaintiff here probably tried to exploit this doubt (the arguments of counsel are not reported). In any event, the Court felt it necessary to find a device for making it appear that the Common Pleas suit and the Queen's Bench suit were all one: "To make it appear to be all one suit, the former surmise

65 M. 31/35 Eliz. C.P. Lansd. 1073, f. 126.

made in the King's Bench reciting the former libel should be sent here by *mittimus* and should be pleaded here of record, and then we here send Consultation."

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

66 M. 6 Jac. K.B. Add. 25,215, f.47; Noy, 131 (undated, *sub. nom.* Heale v. Churchwardens of Hoblton -- a less complete report).

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

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

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

68 --- v. Rogers. P. 6 Jac. C.P. Add. 25,215, f.64.

The particular slander in question had been committed before the pardon and was therefore covered by it. (Prohibitions were frequently used to give effect to pardons as interpreted by the common law courts.) For some reason, however, the King's Bench subsequently issued a Consultation. The ecclesiastical defendant then turned to the Common Pleas, where he obtained a new Prohibition.

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

Such language raises a disturbing question. Could a presumption of "inconsiderateness" or "inadvertence" not be made whenever one court disapproved strongly of another's Consultation (or even of its own on reconsideration)? Were Coke and Foster not opening the door to interpreting "duly" as "correctly as a matter of law"? The two judges were aware that these questions would arise and took care to close the door again. The case would have been decided the other way, they said, if either of two circumstances had been different: (a) if the objections to the Consultation had depended on anything outside the libel; (b) if the first Prohibition had been formally pleaded to. (I.e.: If the defendant had demurred to the first Prohibition, a new Prohibition would be denied, however erroneously the King's Bench had decided the legal issue raised by the demurrer.) With the judges' qualifications, the power to reverse prior Consultations implied by this case is extremely limited. "Duly" in the statute ought, after all, to mean something. The case shows the difficulty of taking "unduly granted Consultations" to mean "Consultations that could *only* have been granted on account of clerical errors or the like"--for here the King's Bench *could* have granted the Consultation because it was egregiously mistaken about the law (i.e., the terms and meaning of the pardon). But Coke and Foster were careful to show that they reasonably attributed the King's Bench Consultation to inadvertence (perhaps a mix-up about dates) and overrode it solely on that assumption.

The proper effect of one principal court's Consultation on the other principal court is further tested in two cases in the group just below, on expansions of 50 Edw. 3. Before leaving attempts to circumvent 50 Edw. 3, we should note a unique Elizabethan case bearing witness to one further unsuccessful device. All we are told of Copley v. Whittacres[69] is that a Consultation had been previously granted in the matter to which the report relates. The report says it was erroneously granted, suggesting that the Court was of that opinion. Assuming that 50 Edw. 3 barred another Prohibition, the ecclesiastical defendant's lawyer moved for a *Supersedeas* to the ecclesiastical court. Justice Kingsmill, whose opinion alone is reported, saw clearly that a Prohibition by any other name would still prohibit. He turned down the motion for an alternative writ, conserving the policy of 50 Edw. 3.

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

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

60 H. 45 Eliz. C.P. Lansd. 1058, f.59b.
70 M. 4 Jac. C.P. Add. 25,215, f.36.

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

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

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

The second case on the Admiralty[71] comes from the same term as the one above, but from the King's Bench instead of the Common Pleas. Here, the plaintiff tried to get a new Prohibition because he had appealed the Admiralty suit after losing in the first instance and also because he had now changed his surmise (in what way is not reported). The Court held unanimously that there could be no new Prohibition so long as the Admiralty libel remained unchanged. No discussion on the applicability of the statute to the Admiralty or the relation of the statutory rule to the common law is reported.

On the two matters discussed just above -- the effect of a Common Pleas Consultation on the King's Bench and extension of the rule of 50 Edw. 3 to the Admiralty -- the closest approach to a dissent from the early 17th century consensus came from Justice Rolle during the Civil War (1648)[72] In a case from that time, a party sought a Prohibition in the Common Pleas to stop an Admiralty suit. The Prohibition was pleaded to issue, and the verdict went against the plaintiff, whereupon a Consultation was granted. The plaintiff then came to the King's Bench and sought a new Prohibition on the same surmise as he had made in the Common Pleas. The Court showed disinclination on the substance to grant the Prohibition, and Justice Rolle said in effect that he could see no sense in applying for a Prohibition in the King's Bench after the matter had been tried in the Common Pleas. Rolle went on, however, to agree, as counsel for the plaintiff urged, that the trial in the Common Pleas was "no conclusion to us." It might be a mischief, he said, for new Prohibitions to be granted after Consultation, but if so Parliament would have to make a law

71 Walton v. Beane. M. 4 Jac. K.B. Harl. 1631, f.335b.
72 H. 23 Car. K.B. Style, 87.

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

Extension of the rule of 50 Edw. 3 to the Admiralty bespeaks an attitude favorable to the act's policy, whether or not the statute should be considered technically in affirmance of the common law. That attitude of approval could be used to justify extending the statute to circumstances which in a sense could not possibly have been within the makers' contemplation, such as failure-of-proof cases, though that option was rejected in that instance in leading cases. Could a disposition to use the act liberally also justify refusing a Prohibition in what was not literally the *same* case as that in which a Consultation had previously been granted, but an *exactly parallel* case? One version of that question was raised in Parson Bugge's Case (1610).[73]

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

73 M. 8 Jac. C.P. Add. 25,209, f.209b.

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

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

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74 Harl. 4817, f.223b. Probably C.P. Since 1610 is used as an illustrative date, probably from about that time.

In the principal case to which the dictum was appended, a new Prohibition was issued simply because the Court decided it had considered the libel too carelessly when it granted Consultation. The ecclesiastical suit was for tithes of wood and ought to have been prohibited because the wood in question was non-tithable timber. When the second Prohibition was granted, there was apparently no reinspection of outside facts, only reexamination of the libel, from which it was clear that the clergyman by his own admission was suing for timber of the sort the common law held exempt. The overridden Consultation was therefore "inadvertent" rather than "erroneous." The case is in line with --- v. Rogers above and with the prevailing disposition to "hold the line" on exceptions from 50 Edw. 3.[75]

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

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

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

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