

III. Self-foreclosure

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

A. Introductory

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

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

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

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

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

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

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

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

**B.
Admiralty Sentences**

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

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

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enced merchant in Admiralty jurisdiction. Finally, the ecclesiastical courts often sat as judges between laymen and the corporate interests of the Church, for those corporate interests were involved with such private ones as an individual clergyman's claim to tithes. Though the etiquette of a mixed judicial system required presuming that ecclesiastical judges would handle cases within their jurisdiction fairly, a certain tacit suspicion of their objectivity -- an unstated assumption that the common law was charged with protecting the layman *qua* layman, even in the face of his own acquiescence -- may well have been present. Let us look first at the Admiralty cases.

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

1 M. 39/40 Eliz. C.P. Harl. 1631, f.272; Noy 68 (undated). Another MS., Add 25,199, f.7b, dated 40 Eliz. C.P., probably relates to the same case. At any rate, the same rule is stated as a dictum.

2 M. 9 Jac. C.P. 2 Brownlow and Goldesborough, 30.

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Thus, in our case, if the libel had said “At London in Middlesex within the jurisdiction of the Admiral,” the lack of jurisdiction would appear on the face of the libel, because nothing done at London could possibly be within the Admiral’s jurisdiction -- or on the high seas. *Quaere* as to the spectrum, which includes the principal case, where an element of judicial notice of the facts of geography would be required: e.g. -- “At Madrid in Spain within the jurisdiction of the Admiral -- (or ”on the high seas“); “On the river Seine on the high seas (or within the jurisdiction of the Admiral)”; “At Bordeaux (a notorious seaport) on the high seas.” My guess would be that in none of these cases would the lack of jurisdiction be considered evident on the face -- i.e., that if the Admiralty defendant behaved in such a way as to seem to admit that Madrid was some place in the middle of the ocean, the courts would take no account of their knowledge to the contrary.

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

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

³ M. 9 Jac. C.P. 2 *Brownlow and Goldesborough*, 30. This report is stuck into the long account of a completely unrelated case (*Baxter v. Hopes*). It could be a somewhat distorted version of *Jennings v. Audley* and it could be another case.

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

4 M. 12 Jac. K.B. 1 Rolle, 80.

5 12 Coke, 77.

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A later Admiralty case⁶ raised a slightly different problem from that in the foreign contract cases. Here, a group of sailors joined in an Admiralty suit against the master of a ship for wages. After sentence, the master sought a Prohibition on the ground that the wage contract was made on land in England. It does not appear from the report whether the libel contained jurisdiction-giving language, such as “on the high seas,” or whether, if such language was included, there was anything on the face of the libel to show that it was patently fictitious. In denying a Prohibition, the Common Pleas, in any event, gave no sign of concerning itself with those features. Its motive was the nature of the suit. Eventually, the courts were to except mariners’ suits for wages from the general rules limiting Admiralty jurisdiction. I.e.: The Admiralty was allowed to entertain them even though the contract was manifestly made on land, because sailors were poor men, whose efforts to collect their wages should not be delayed by legal wrangling, and whom Admiralty rules permitted to join in a common suit, as they could not do at common law. In our case, the Court relied expressly on the sentence and characterized refusing the Prohibition as an act of discretion. It justified the exercise of discretion, however, by the undesirability of depriving poor mariners of their wages and the economy of a joint suit, not by discussing the degree to which acquiescence in a fictitious or legally doubtful local allegation ought, in general, to bar a Prohibition. A few further scraps of evidence confirm the courts’ inclination to refuse Prohibitions when such acquiescence in the Admiral’s jurisdiction could be made out.⁷

6 P. 19 Jac. C.P. Winch, 8.

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

(b) Don Diego Serviento v. Jolliff *et al.* Undated. Jac. C.P. Hobart, 78. The Court took pains to point out that they were especially glad to grant a Prohibition -- which they strongly thought was deserved on the merits -- because it was sought before any proceedings in the Admiralty and the claim to a Prohibition depended solely on the libel.

The same report notes another case decided on the same day: Watts *et al.* v. Villiers. Prohibition denied because the claim that certain events happened on land was not advanced until after sentence and nothing appeared on the face of the libel to show that it was on land.

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

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

after sentence, but to have been complicated by an appeal. Cases so complicated are discussed below.

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

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C.
Bare Sentence in an Ecclesiastical Court

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

The evidence from reports not complicated in either of those two ways suggests that the courts never committed themselves firmly to lean against Prohibitions after ecclesiastical sentence (unless they did so extrajudicially in Charles I's reign). They were committed to lean that way in Admiralty cases, while insisting that they were not bound to; in ecclesiastical cases, they probably would have insisted on their discretion to weigh plaintiff-in-Prohibition's delaying until after sentence against him, but without any commitment as to what weight they would normally give it. One cursory report, without context,⁸ shows a division over the effect of sentence in the early-17th-century Common Pleas. Justice Walmesley said flatly that Prohibition will not lie after judgment in the ecclesiastical court. He was sharply contradicted on that proposition by Chief Justice

8 P. 8 Jac. C.P. Harg. 52, f.43.

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Coke and Justice Daniel, who said they had a great deal of recent authority on their side. Another report from the same term⁹ has Coke laying down a rule, with the concurrence of the rest of the Court: "...that after sentence given in the Spiritual Court, he would not grant a prohibition, if there were not matter apparent within the proceedings; for I shall not allow, that the party shall (to have a prohibition) shew any thing not grounded on the sentence to have a prohibition, because he hath admitted of the jurisdiction; and there is no reason for him to try if the Spiritual Court will help him, and afterwards at the common law to sue forth a prohibition." The context of this statement is not reported. (Coke's remark is appended to the full report of a case in which the Court *did* grant a Prohibition after sentence. In the principal case, however, a Prohibition would not have been appropriate until after sentence. The reporter introduces Coke's speech with a "but" -- as if he were surprised at the result in the principal case: "But Cook said, the same day in another case") Coke's rule leaves a certain ambiguity. He clearly meant to exclude the surmising of matter of fact outside the record by parties seeking Prohibitions after sentence. However, he expressly includes the sentence in the record. That is obviously necessary for one type of situation (such as that of the case to which the rule is appended): where there is no basis for a Prohibition except an erroneous sentence. The ambiguity arises in another situation: Suppose a Prohibition could be obtained without going outside the record before sentence, but the party waits until after sentence to seek his Prohibition. Should he be barred for "admitting the jurisdiction," or allowed his Prohibition on the total record (i.e., because it appears on the face of the libel that the ecclesiastical court lacked jurisdiction -- which could have been shown earlier -- and because the sentence shows that the ecclesiastical court did not refuse jurisdiction -- whether or not asked to by the party)? Possibly Justice Walmesley's concurrence with Coke on this rule argues for taking it in the stronger sense: i.e., as erecting a bar to Prohibition *whenever* the party has failed to act as soon as he might. In any event, Coke's rule is stronger than a mere claim of discretion to deny Prohibitions when there has been undue delay. There are other cases which seem to go no further than such a claim of discretion.

9 P. 8 Jac. C.P. Godbolt, 163 (Within the report of *Candict v. Plomer*)

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

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

10 Baron v. Goose. P. 17 Jac. C.P. Harl. 5149, f.291b.

11 H. 2 Car. C.P. Littleton, 21.

12 M. 15 Car. K.B. March. 73.

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thing more than “after sentence.”) Rolle, arguing for the Prohibition at the Bar, tried unsuccessfully to make a distinction on the basis of the Court’s past practice. He conceded that a Prohibition should be denied if a parishioner, being sued for tithes, fails to plead his *modus* in the ecclesiastical court *and* waits until sentence goes against him before seeking the Prohibition; *contra* if he pleads his *modus* and then waits for sentence, as in this case. In other words, double negligence should count against plaintiff-in-Prohibition, but not the sentence by itself. (Subject to a little dispute, a Prohibition could be obtained on a *modus* -- at least before sentence -- without pleading it in the ecclesiastical court and surmising that the plea had been rejected.) The second report¹³ is just a note: Prohibitions should not be granted after sentence without “special cause” (no explanation of “special cause”).

In a third Caroline case, *Dudley v. Crompton*,¹⁴ the Common Pleas denied a Prohibition sought *four years* after sentence in a defamation suit. The three puisne justices thought that Prohibition would lie if it had been sought in time, Chief Justice Bankes disagreeing on the substance. The exact meaning of “too late” is not expounded, but it is clear from the puisne Justices’ words and tone that the four years moved them, rather than the sentence as such. They were little short of scandalized to learn that the ecclesiastical court had regarded the vague abuse in question as legally defamatory; two of the three Justices thought in addition that the sentence was cast in dangerously loose terms, so that a Prohibition specifically requiring retraction or non-execution of the sentence would be justified. Waiting four years to protest being punished for one particular scurrilous speech (probably by an order to apologize for the words or to do some sort of penance, plus costs to the prosecuting party) is unconscionable. Refusal of the Prohibition was surely justified if the Court is assumed to have any discretion at all. If the judges promised categorically to deny Prohibitions after sentence at the high moment of Laudian power, this case shows that in 1642 they no longer felt obliged.

13 H. 16 Car. C.P. March, 92.

14 H. 17 Car. C.P. March, 153.

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**D.
Appeals**

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

The earliest report involving an appeal¹⁵ is very brief -- a bare statement that it was adjudged that after sentence and appeal no Prohibition will be awarded. *Ayliffe v. Brown* (1614)¹⁶ casts doubt on that generality. Here, a Prohibition was in fact denied on the ground that the plaintiff had not only waited until after sentence and appeal, but until after the appeal was decided against him. The Court seems to stress the double sentence, as opposed to the first sentence and the mere taking of the appeal. In addition, the Court went out of its way to show that it did not think plaintiff-in-Prohibition had altogether clean hands, even though he would probably have been entitled to a Prohibition at an earlier stage. (The plaintiff was an executor seeking to stop a legacy suit on the ground that there were possible debts outstanding against the estate. An executor was not obliged to pay legacies until he was free from accountability for common law debts. The Court was cool toward the executor in this case because he had refused to give security for payment of the legacy if the estate was sufficient, as the ecclesiastical court had apparently given him the option of doing. The judges seem to have thought that that was a reasonable demand, possibly that it would have been reasonable at any stage. The Court's position may have been "We might not have granted a Prohi-

15 Sir George Carie's Case. 40 Eliz. C.P. Add. 25,199, f.16b.

16 H. 11 Jac. C.P. Godbolt, 243.

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

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

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

17 T. 16 Jac. K.B. 2 Rolle, 24.

18 Churchwardens de ---. H. 20 Jac. K.B. 2 Rolle, 270.

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

In *Fartham v. Rudd*,¹⁹ the late-Jacobean Common Pleas embraced the same open-discretion attitude as the King's Bench took in the preceding cases. The Court was disinclined to grant a Prohibition after affirmation of sentence on appeal in a defamation suit, but the judges limited their position carefully. They said they would have granted a Prohibition in the instant case before sentence, or even after one sentence, as they had done in a similar defamation case (*Calthorp's Case*, not cited by date), but if application for a Prohibition is delayed until after appellate sentence, "then we are more wary, for it is a matter that rests in the discretion of the Court, and so the Court will advise." Note "will advise": The judges were only ready to *think about* denying the Prohibition. I imagine they would consider just how intolerable the ecclesiastical decision seemed to them. (It was one of those trivial-in-consequence but foolish holdings that vague abuse was defamatory, a species of ecclesiastical decision which the common law judges found hard to take.)

In the *Caroline Dickes et uxor v. Brown*,²⁰ waiting for sentence and taking an appeal was held against plaintiff-in-Prohibition, at least by Justice Dodderidge. Dodderidge's remark to that effect is only incidentally noteworthy, however, because the whole Court clearly agreed that the claim to a Prohibition was bad on the merits. In *Ward v. Cory*,²¹ the de-

19 T. 22 Jac. C.P. Harl. 5148, f.44.

20 M. 1 Car. K.B. 3 Bulstrode, 314; Benloe, 139 (dated H. 1 Car.) and 170 (dated P. 2): Noy 77 (undated, *sub. nom.* Dixye v. Brown). Bulstrode is the good report.

21 P. 6 Car. K.B. Harg. 39, f.106.

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fendant in an ecclesiastical suit for defamation suffered sentence to go against him, appealed, and then sought a Prohibition. The Court was in doubt about the merits and adjourned the case. But the judges expressly agreed that the sentence and appeal would not bar the Prohibition. In *Reynolds v. Dr. Lockett*²² on the other hand, the Common Pleas rested denial of a Prohibition solely on the fact that the plaintiff had appealed twice -- i.e., had a first-instance sentence plus one appellate sentence against him and an appeal to the Delegates pending. The surmise was that the parson suing for tithes was not truly incumbent, being automatically deprived for failure to read the articles as required by 13 Eliz., c. 12, and that the ecclesiastical court had refused to admit a plea to that effect. The Court clearly and unanimously held that Prohibition lay on the merits, but nevertheless denied the writ. In *Pew et uxor v. Jeffryes*,²³ from the same year as the last case, the King's Bench also showed respect for ecclesiastical sentence and appeal, though only with supporting effect. The case was tangled in ways we need not go into here. Once the tangles were straightened out, the Court was more than inclined to deny a Prohibition on the merits. It actually did so with the observation that a Prohibition was *especially* inadvisable here, where the ecclesiastical sentence had been affirmed once on appeal and appealed again. The plaintiff-in-Prohibition's delay was only used to overcome a shadow of doubt (as to whether allegedly defamatory slang could be understood in such a way as to put the language clearly within ecclesiastical jurisdiction -- a problem both tricky and trivial).

A couple of cases from Charles I's reign raise the question of the effect of sentence and appeal in special ways. In *Smith v. Executors of Poyndreill*²⁴ the Common Pleas refused a Prohibition sought too late, but in a manner that strongly confirms the cases pointing to a "rule of discretion." Despite the result, this case is in a sense especially favorable to Prohibitions, for the only reason to prohibit at all was a statutory rule regulating traffic within the ecclesiastical system. 23 Hen. 8, c.9, protected people against being sued in ecclesiastical courts other than those of the diocese they lived in. The act was frequently enforced by Prohibitions. The ec-

22 H. 12 Car. C.P. Harg. 23, f.4.

23 P. 12 Car. K.B. Croke Car., 456.

24 M. 3 Car. C.P. Croke Car., 97.

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

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

25 H. 15 Jac. C.P. Harl. 5 149, f.93b. The report reads “32” Hen.8, but I think that must be a mistake for 23.

26 Noy, 137.

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

E.

De Excommunicato Capiendo

A group of four reports, all from the same term, introduces the further complication of a *De excommunicato capiendo*. The abstract question is whether issuance of that “temporal” writ against the loser in an ecclesiastical court will invariably bar him from a Prohibition, whether or not any “spiritual” event (sentence, appeal, decided appeal, excommunication itself) would have that effect. The reports, however, present problems of reconstruction and reconciliation. Although three of them may relate to the same case, I shall consider them one by one. (a) One report, labeled

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Cope's Case²⁷ does not recite the facts, but gives the opinions of three judges, as follows: Chief Justice Coke with the concurrence of Justice Warbarton, said that a Prohibition should never be awarded, whatever the merits, after an ecclesiastical loser is "taken" by *De excommunicato capi-endo*. Coke thought it illogical that a Prohibition -- whose nature is to stop the ecclesiastical courts from proceeding -- should be issued after the ecclesiastical courts had "proceeded as far forth as they can" and the party had been handed over by matter of record to the temporal courts. Justice Foster disagreed. He admitted that there was authority (from the Register of Writs) against Prohibition after *De excommunicato capi-endo*. He apparently thought, however, that the rule was not invariable and that the example in the Register was somehow different from the present case. (Without more information, I cannot reconstruct his point in substance.)

(b) The second report²⁸ gives every sign of relating to the same judicial discussion. This one gives the case: A man was sued in the wrong diocese and therefore could have had a Prohibition by force of 23 Hen.8. But he neglected to seek one until after sentence had gone against him and a *De excommunicato capi-endo* had been issued. Coke and Warbarton said that they could simply find no authority in favor of Prohibitions after *De excommunicato capi-endo*. At the same time, they emphasized that ecclesiastical sentence as such is no bar, despite some ancient authority to the contrary. Coke went on to qualify the latter point by a distinction seemingly different from the one he made elsewhere: viz. that Prohibitions should not be granted after sentence when the ecclesiastical court's lack of jurisdiction appears on the face of the libel, *contra* when it does not. (The distinction makes sense and is not really inconsistent with Coke's view above -- that Prohibitions should not be granted after sentence on *matter of fact* outside the record. There were three basic types of claim to a Prohibition. (i) Where all the plaintiff need do is show the libel. (ii) Where the libel shows that the suit originally belonged in the ecclesiastical court, but subsequent pleading or the ecclesiastical judge's interlocutory handling of the case raises the right to a Prohibition. (iii) Where out-of-court facts are surmised. Coke may well have thought that

27 M. 8 Jac. C.P. Harg. 15, f.230.

28 M. 8 Jac. C.P. Add. 25,209, f.210.

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

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From this report and the last one, it may be safely concluded that the majority of the divided Common Pleas opposed Prohibition after *De excommunicato capiendo*. Justice Walmesley would surely have agreed with Coke and Warburton, for he was more inclined than any other member of the Court to consider sentence by itself a bar.

(c) The third report²⁹ is distinctly different. Without stating the case, it gives the following rule as a *per totam Curiam* holding: If a man is sentenced in the ecclesiastical court, then *De excommunicato capiendo* issues, then he appeals, he may have a Prohibition *because the appeal suspends the sentence*. In none of the cases involving appeals above is there any sign of the “suspension” doctrine. This report alone lends it countenance in the context of the barring effect of sentence. The rule here is especially strong, because of the *De excommunicato capiendo*. For it might be argued that, although the appeal suspends the sentence, the *De excommunicato capiendo* still bars Prohibition by “taking the matter out of ecclesiastical hands,” or erecting a common law record to which a Prohibition would be repugnant. In addition, the party seems relatively at fault when, besides waiting on sentence, he delays his appeal (i.e., assuming the “suspension” doctrine, fails to take prompt advantage of the means to have a Prohibition despite the sentence) until the further inconvenience of a *De excommunicato capiendo* has descended on him.

(d) The final report³⁰ is labelled “King’s Bench,” so despite the coincidence of date it must relate to a different case from those above. It is very brief -- a mere noted rule in general terms that Prohibition may not be granted after *De excommunicato capiendo*.

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

29 M. 8 Jac. C.P. Add. 25,209, f.212b.

30 M. 8 Jac. K.B. Harg. 32, f.41.

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

F.

Miscellaneous Forms of Self-foreclosure

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

In a case of 1605,³¹ the plaintiff was entitled to a Prohibition because the land with respect to which tithes were sued for was exempt as recently reclaimed waste. An unsuccessful attempt was made to block him on the ground that he had confessed the libel before seeking the Prohibition. The brief report does not explain exactly what "confessing the libel" involved. The man had probably not paid his tithes, then, sued for them, had in ignorance admitted they were due as alleged. Subsequently, he probably discovered the statutory exemption for reclaimed land. To deny the Prohibition in such circumstances would be a pretty harsh application of the presumption that every man knows the law. One who contested an ecclesiastical suit might do so because *de facto* he did not know his right to a Prohibition, but the very fact that he made a legal fight suggests that he was advised by at least an ecclesiastical lawyer -- that he felt the claim against him was invalid and bestirred himself to oppose it, in which case it was his responsibility to discover all his rights, to look into the common law as well as the ecclesiastical law. A poor man, guilty as sin of neglecting the parson, might well come and "confess the libel" without the slightest idea that he had a defense. Insofar as pleading to the ecclesiasti-

31 P. 3 Jac. K.B. Add. 25.209. f.47b.

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

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

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

32 T. 15 Jac. K.B. Croke Jac., 429.

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

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

33 H. 15 Jac. C.P. Harl. 5149, f.95.

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Standard cases on sentence, etc., ask whether a plaintiff entitled to a Prohibition may foreclose himself. In *Gilby v. William*,³⁴ the King's Bench did not think the plaintiff was entitled to a Prohibition on the merits. His delay in seeking one was used against him in another way, however. The plaintiff had waited on ecclesiastical sentence, appealed, and lost again at the appellate level. Then he sought a Prohibition on grounds the judges thought insufficient. They might, however, have granted the Prohibition in order to permit adversary debate on the merits, for the other party was not represented at the hearing on the surmise. That was probably urged as the proper course, and it probably would have been in normal circumstances. In this case, the Court thought the plaintiff's delay destroyed any right he might otherwise have to a provisional Prohibition, pending formal pleading or motion for Consultation by the other party. The Prohibition was simply denied after the plaintiff had had his chance to argue for it *ex parte*.

Standard cases ask whether the ecclesiastical loser may have a Prohibition when he has unnecessarily waited to lose before seeking one. In *Barkham v. Woode*,³⁵ the shoe was on the other foot. A parson sued a parishioner for tithes. The parishioner pleaded in the ecclesiastical court that the land was recently reclaimed waste and therefore exempt by the statute. The ecclesiastical court gave judgment for the parishioner -- i.e., that the land was exempt for the reason alleged. The parson appealed. Then, to halt the appeal, the parishioner sought the Prohibition he could have had as soon as the ecclesiastical suit was started. The Prohibition was denied, "since he has sentence for him and the other appeals only to reverse it, which is just. For the appeal is on the old libel and therefore if erroneous sentence is given it is fit to be reformed." To put it another way: If I have acquiesced in the ecclesiastical court's jurisdiction to the extent of contesting the suit, when I win my mouth is surely stopped to dispute the jurisdiction for the purpose of cutting off the other party's appeal -- an appeal that may perfectly well be justified. (Here, it is perfectly possible that the first ecclesiastical court misdetermined the factual question whether or not the land was recently reclaimed -- the same question

34 P. 21 Jac. I.B. Croke Jac.. 666.

35 P. 22 Jac. C.P. Harl. 5148, f.16.

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

Our last case comes from the Civil War period.³⁶ Here, a Prohibition was sought to a borough court (the Corporation of Lincoln), rather than a "foreign court", such as the ecclesiastical courts or Admiralty. (Prohibitions from superior courts of common law to inferior ones -- such as the borough court with franchisal jurisdiction here--were perfectly appropriate, though few cases of that sort or problems of consequence arising from them are reported.) The surmise was local -- that the cause of action "if any were" arose outside the circumscribed jurisdiction of Lincoln. It was urged against the Prohibition that the party seeking it had admitted Lincoln's jurisdiction by pleading there (only pleading, not waiting for judgment). In a case of this sort, where there was no problem of "crossing legal systems," inferring acquiescence in the jurisdiction from the minimum basis -- pleading to the merits -- seems justified. However, the judges were hesitant to do so, and their remarks by the way are of some interest. On one hearing of the case, only Justice Rolle spoke. Off-hand,

36 T. 23 Car. K.B. Style, 45. Two entries relating to the same case on the same page.

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he thought that Lincoln should be prohibited if it was outside its jurisdiction, pleading or no pleading. On the other hearing, Justice Bacon spoke and Rolle spoke again. Bacon made a surprising distinction between “foreign” courts and the inferior common law court here. Without explaining his thoughts, he favored the Prohibition in this case despite the party’s pleading but said that “had it been the Spiritual Court or the Admiralty, it had been otherwise.” Rolle replied that there was no difference between such non-common law courts and the borough court here. In either case, he thought, courts exceeding their jurisdiction should be prohibited. At the same time, he thought it “mischievous to grant a prohibition in this case, for thereby many judgments will be stopped.” The Justices accordingly adjourned the case for advisement. Nothing more is heard of it. It is noteworthy that one Parliamentary judge, Bacon, was readier to infer acquiescence in “foreign” jurisdiction than most earlier judges would have been. The secularization of what remained of ecclesiastical jurisdiction may be reflected in that instinct. On the other hand, in somewhat different ways the two judges adhered to the tradition of seeing a public interest in jurisdictional lines -- an interest the neglectfulness or acquiescence of private parties could not compromise.

G.

Prohibition Inappropriate until after Sentence.

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

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In Lady Lodge's case,³⁷ an executor waited a long time before trying to stop a legacy suit, for he made his move only after the sentence against him had been affirmed by the Delegates on appeal. His delay was not held against him, if indeed that was urged. From the reporter's careful specification of the facts, I am inclined to think that relevance was attached to the delay, though in counsel's arguments as cursorily reported it is not relied on. The substantive complexities of this case are too great to work through fully at this point. Basically: A. made a will with B. as executor and died. B. made C. his executor and died. C. was sued by A.'s legatee, not straightforwardly, but by way of executing a sentence for the legacy already given against B. C.'s real point was that he never had any property from A.'s estate (because B. had conveyed it away), hence that he could not be held to pay A.'s legacies. The mere lack of funds from the appropriate estate was perfectly assertable in the ecclesiastical court -- i.e., no basis for a Prohibition. C.'s right to a Prohibition depended entirely on his claim that the ecclesiastical court had passed on the validity of B.'s conveyance, a question that the common law was solely competent to decide. In short, the case comes down to a common type: A suit unquestionably within the ecclesiastical court's jurisdiction is brought there, but it turns out that the suit cannot be settled except by determining an "incidental" question solely within common law jurisdiction. As we shall see in Vol. II, that situation presented a substantive problem, since it was arguable that jurisdiction over the "principal" engendered jurisdiction over the "incident." However, that argument was unsuccessful as a generality, for Prohibitions were often used to make sure that the common law courts settled common law issues incidental to ecclesiastical suits. With respect to delays through sentence, or through sentence and appeal, such cases raise a special problem. In the present case as I have schematized it, there was presumably a point short of sentence at which C. knew that the inappropriate question of B.'s conveyance was before the ecclesiastical court. That is to say, he *could* have sought his Prohibition earlier. But *should* he have? Could he be reasonably expected to? Would it have been the most useful thing to do? Speaking generally: In "principal-incident" cases it was likely to be unclear before sentence whether the ecclesiastical court would consider the inappropriate "incidental" question

37 H. 26 Eliz. Q.B. 1 Leonard, 277.

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

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

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

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

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

38 H. 30 Eliz. Q.B. Croke Eliz., 89; Moore, 907.

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

In a late-Jacobean legacy case,³⁹ the K.B. positively insisted on having a sentence before granting a Prohibition. An executor sought a Prohibition on two grounds: (a) Because the ecclesiastical court refused to let him rely on a sealed acquittance for the legacy. (The refusal was allegedly because the witnesses to the acquittance were dead -- an especially indefensible evidentiary ruling, as the King's Bench judges clearly thought.) (b) Because, apart from the acquittance, the ecclesiastical court made what the executor claimed was an egregious legal error in holding him liable at all. (We may defer the substance of this complex problem until Vol. II.) The executor surmised that the ecclesiastical court had given sentence against him, the sentence being founded on those two errors. The King's Bench, however, declined to grant a Prohibition until

39 M. 21 Jac. K.B. Harg. 30, f.169; 2 Rolle, 414. MS. followed as much the fuller report.

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

This case is at the opposite extreme from those in which sentence was discussed as a possible bar to Prohibition. It presents the kind of situation in which insistence on seeking a Prohibition before sentence would have been least feasible. The executor here *could* have turned to the common law as soon as his acquittance was unreasonably excluded -- but then he had another wholly independent defense fully assertable in the ecclesiastical court (i.e., without inviting the ecclesiastical court to pass on an issue solely within common law competence). He *could* have sought a Prohibition on his second ground the moment he was sued, for that claim amounted to total non-liability to one in the position of the party suing him -- but then if that party had acquitted him voluntarily and the ecclesiastical court allowed him to use his acquittance, the difficult legal point raised by the second ground need never come up. If he had sought a Prohibition the moment he was sued, relying solely on the second ground -- i.e., simply suppressing the acquittance -- he probably should have been turned down, for there would at that point have been every reason to predict that he would win in the ecclesiastical court. In other words, although the ecclesiastical court may in the event have committed so egregious an error on a question within its competence that it deserved to be prohibited, one does not assume in advance that a court will take leave of its senses.

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Partlet v. Butler⁴⁰ illustrates a way in which the shape of a case in the ecclesiastical court could make it hard to require seeking a Prohibition before sentence. Parson Butler libelled against Partlet for two offenses consisting in the same act: (a) for defaming him; (b) for disturbing divine service by the act of speaking the defamatory words. As to the slander, Partlet was (as the King's Bench thought in the event) entitled to a Prohibition because Butler could have maintained an action for the words at common law. (The most indisputable ground for prohibiting ecclesiastical defamation suits was that the words were defamatory at common law, so that resorting to the ecclesiastical court was a simple infringement of lay jurisdiction.)

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

40 M. 38/39 Eliz. Q.B. Harl. 1631, f.148b; Add. 25,198,f.170.

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

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

⁴¹ P. 8 Jac. C.P. Godbolt, 163; Harg. 15, f.208b. I follow Godbolt as to the exact facts, because the MS. does not make it clear that one Prohibition had been issued prior to the case reported. There is no conflict otherwise. "Gaudye's Case with Dr. Newman" (2 Brownlow and Goldesborough, 38. Same date.) is clearly the same case, concordantly though less fully reported. Dr. Newman was the name of the ecclesiastical judge. Gaudye must be either a mistake for one of the other names or the name of the parson's clerk.

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Prohibition (requiring reversal of the worthless sentence and presumably preventing the ecclesiastical plaintiff from recovering costs). To expect the clerk to seek his Prohibition before sentence would have been absurd, since the second suit did not and legally could not aim expressly at his deprivation. The only procedural question worth asking would seem to be whether he *could* have had a Prohibition before the unanticipated sentence, on the ground that he was being sued at least in part for acts that would only be wrongful if he were not parish clerk. I would hardly bring up the case in the present context had not the clerk's lawyer, Serjeant Houghton, expressed some doubt as to whether the Prohibition was grantable after sentence. ("But what shall we do? for we are deprived by sentence given there.") It may be significant that he was addressing Coke's Common Pleas, for Coke was warier than other judges of Prohibitions after sentence. Also, Coke's earlier remarks in the discussion of this case may have suggested that he considered the second suit prohibitable before sentence because it was visibly predicated on the assumption that the parishioners' electee was improperly exercising the office of clerk. But Coke was prompt to assure Houghton that the sentence was no obstacle (and to express his outrage at the ecclesiastics' conduct).

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

42 T. 16 Jac. K.B. 2 Rolle, 24.

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

Still, the principle seems the same: Brabin took his stand on custom. Having done so, he could have obtained a Prohibition without waiting to see how the ecclesiastical court would jump. Should he have? The question is academic because of the alternative basis for Prohibition, but the report is suggestive on this point. Brabin's surmise stressed the *reasonableness* of the custom, over and above its mere existence. Possibly, then, Trediman had not quarrelled with the fact of the custom, but had instead convinced the ecclesiastical court that it was not reasonable. Then imagine the following case: A. sues B. in an ecclesiastical court. B. relies on a custom. A. admits the custom *de facto* but takes issue on its reasonableness. After the ecclesiastical court decides it is unreasonable and gives sentence for A., B. seeks a Prohibition on the ground that the ecclesiastical court made an erroneous legal judgment as to the custom's reasonableness. Should B. have come sooner, with a bare surmise of the custom, forcing A. to demur at common law to contest its reasonableness? There can be no doubt that the reasonableness of a custom was a "common law issue," just as the fact of a custom was for trial by jury at common law. (It was a standard rule, applied in many contexts, that customs were valid only if they were reasonable in the judges' eyes, as well

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as immemorial in the jury's.) As with other common law legal issues "incidental" to ecclesiastical suits, an argument can be made for waiting until it appears that the ecclesiastical court has actually done something wrong. With respect to reasonableness questions in particular: There is a sense in which they were both easy and hard -- easy in that often no very special skill (such as real-property law), as opposed to common sense and fairness, was required to settle them; hard in that generalized standards for judging customs were difficult to evolve. There might be advantages in letting the ecclesiastical court look a custom over first, then reviewing the ecclesiastical decision if one of the parties thought his chances of persuading the common law court to take a different view were really serious. Ecclesiastical opinion on the reasonableness of a custom affecting church matters might be persuasive as to its reasonableness at common law.

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

43 T. 22 Jac. K.B. Lansd. 1063, f.8.

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

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

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

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

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

44 H. 2 Car. C.P. Littleton, 21.

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

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

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Eaton v. Ayliffe⁴⁵ presents an unusual situation, in which a Prohibition was granted in the face of objection that it was sought too late, but where it is hard to see how the delay could have been considered blameworthy. The report is too poor for much sense to be made of the judges' opinions, but the following reconstruction probably catches the essential point: Ecclesiastical litigation over the right to pews was most frequently prohibited because a prescriptive title to the pew, triable at common law, came in question. Ordinarily, it was the ecclesiastical defendant who got a Prohibition on the surmise that his adversary was suing to establish his right, whereas the defendant's right rested on prescription. In our case, however, Eaton sued in the ecclesiastical court to establish his title to a pew and himself set up a prescriptive claim at the outset. The ecclesiastical court held against him and awarded costs to Ayliffe, the defendant there. Eaton then appealed. When he saw that the appellate court was going to affirm the sentence below, he sought a Prohibition.

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

45 Early Car. C.P. Hetley, 94.

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

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

Our last case in the present line, from 1633,⁴⁶ shows the judges in perplexity over prohibiting after ecclesiastical sentence. At an earlier date, this case would probably not have been difficult. By and large, as we

46 P. 9 Car. K.B. Harl. 1631, f.378b.

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

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

The practical considerations I have dwelt on in the present context might recommend waiting even if that general principle were not embraced: Construction of a routine patent is not a very difficult job. The chance of the ecclesiastical judge's reading it erroneously could be very slight. Plaintiff-in-Prohibition might have an utterly flimsy argument for his interpretation of the patent, so that the Prohibition proceedings would come to a vexatious delay, or he might have so strong a case that it would be mischievous to put the other party to the needless charge of defending a Prohibition if his side was to be heard at all. Conceivably, the suit could be resolvable without construction of the patent: e.g., by the eccle-

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siastical judge's finding that no tithes were ever attached to the deanery. Why not wait until it was clear that a real problem within common law competence existed, until one party or the other thought seriously enough that the ecclesiastical court had misconstrued the patent to venture a new round of proceedings?

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

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

Although Richardson needed a way out himself, he was not impressed by Berkeley's idea. (Partly because he was unsure whether the bounds of a deanery came under the same rule as the bounds of parishes, partly because the terms of the patent as alleged made it doubtful -- though Berkeley would not admit that -- whether there was an implicit issue about the deanery's bounds.) Richardson preferred to play out the conse-

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quences of the extra-judicial promise, whether or not the Prohibition would have been delayable before any such promise was made. Divided and perplexed, the Court adjourned the case. There is no report of further action.