V.
"Judging by the Truth"

A.
Introductory

From the cases on self-foreclosure and self- prohibition above, a predominant theory of the Prohibition emerges: Prohibitions are granted in the public interest upon information to the Court. It does not matter whom the information comes from, whether the informer's hands are clean *qua* private party, whether his motion is timely. On the other hand, it was difficult entirely to exclude considerations of private justice in Prohibition cases. "If Prohibition should lie in principle to protect the public interest it should lie here" was too stringent a rule to apply with complete consistency. We turn now to several classes of cases which further test the "public stake" theory of Prohibitions against the claims of private justice. Cases of these several kinds in one way or another raise a common question: "To what extent should parties in Prohibition cases be allowed to take advantage of technicalities or points of strict legal logic?

That question of course arises in every branch of law administration. In innumerable contexts, courts have a choice between strictness and leniency, between doing substantial justice and insisting on procedural standards. The law erects procedures, "right ways of doing things." There is a social interest in insuring that litigants observe those standards -- because they are perceptibly or presumptively reasonable, or, failing that, because regular forms of some sort are necessary and those that exist, exist. In addition, forms of procedure inevitably beget expectations in private litigants -- reasonable and unreasonable expectations, just ones and cunning ones. Parties will inevitably say, and within bounds of reason must be allowed to, "Whatever the substantive rights, I should win because the other party has violated the procedural rules of the game. He could have done things the right way, and if he had perhaps he would have a case against me. But he has done them the wrong way. It is unfair to me (as well as publicly undesirable) to help him out -- to dismiss his errors as if procedure were unimportant, or to let him go back and correct his mistakes, and to decide the substantive matter on the basis of facts that have accidentally emerged despite my adversary's failure to make his

case in due form." Litigation is warfare. Given the adversary system, that is a salutary fact. At the same time -- if the agonistic character of life is tragic, the bellicose or sporting character of litigation is at least a nuisance. To allow parties the advantage of procedural points when that is avoidable is both socially desirable within limits and a necessary concession to expectations naturally and properly formed in an adversarial world. But it is also, in one degree or another, to indulge sharpness and to waste time in the long run, to punish the laity for bad counsel and reward the rich and the smart. It is to cheat that rather amorphous genius loci, Substantial Justice, of his worthy and hungry demands. With these tensions, courts struggle in countless situations. It would be mistaken to assume that unreformed, traditionalistic common law courts did not often struggle with them -- that they were mere sticklers for form, connoisseurs of litigative jousting, aficionados of logic abstracted from life.

I recite those truisms in order to put the Prohibitions cases below in focus. If we find the courts lenient toward procedural errors and disinclined to allow parties the advantage of them, we may legitimately see the "public stake" theory of Prohibitions in operation. We may take the judges as saying, "It is of no concern whether the plaintiff has 'done the right thing' procedurally." If it appears that Prohibition ought to lie, it will be granted -- never mind how it became apparent, never mind whether this careless plaintiff ought to lose in an ordinary contest between party and parry, never mind that it is unsporting or even more seriously unfair to deprive the defendant of his well-taken procedural point." Procedural indulgence of defendants. it should be noted, could similarly imply the "public stake" theory, for the defendant, too, can be conceived as the court's informer -- its source of facts and reasons for seeing no infringement of the "roya1 dignity," or for upholding the putatively desirable jurisdiction of "foreign" courts in their sphere. A difference in procedural tenderness toward plaintiffs and toward defendants would signify something else -- a "when in doubt prohibit" policy, or bias in favor of typical interests of plaintiffs (or vice versa).

However, a *caveat* must be put in the way of inferring the "public stake" theory from procedural leniency: It cannot be glibly assumed that the courts would behave differently on the "public stake" theory from the way they would behave if they saw Prohibition cases primarily through the categories of private justice. I.e.: It is not necessarily true that 16th

and 17th century courts would tend to prefer procedural nicety over substantial justice in mere contests between party and party. I would expect them -- as I would expect most courts at most times -- to do so in somewhat greater degree than when they recognized an important public interest in the substantive outcome. But one should be careful of naked inference, looking for positive signs of the courts' attitude before concluding too much. The self-foreclosure and self-prohibition cases above furnish a clearer test than the cases below.

B.
Variant Verdicts

Summary: If a verdict, or conceded evidence, literally falsifies a claim but substantially supports it, should the claim be upheld? Did the "public stake" in Prohibitions lead the courts to follow the truth as established by verdict even though the claim to which the verdict responded was misstated? Some of the evidence supports an affirmative answer to those questions, but it must be considerably qualified.

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One sub-group of cases involves discrepancies between special verdicts or conceded evidence and plaintiff-in-Prohibition's claim. It may be advantageous to look at simple example before taking up the cases: Suppose A claims a *modus* to pay 6d for tithes and the jury finds a modus to pay 10d (I.e.: The jury so finds by special verdict. Juries were in many situations permitted or encouraged to return the facts as they knew them, as opposed to finding generally that the claim to be established -- e.g., a modus for 6d -- was true or false. When a special verdict was returned, its application -- whether or not the facts as found sustained the claim to be established -- was a question of law for the Court.) Should the jury's negative finding -- that tithes in kind have never been paid -- be used to sustain the Prohibition? Or should A's failure to prove his claim as alleged be taken against him and Consultation granted? (Cf. the similar problem in connection with preliminary proof of surmises under 2/3 Edw.6.)

From a public point of view, the Prohibition should clearly be upheld. If private considerations are relevant, how strong is the case against A? The following points seem to me to be the main ones bearing on that question:(a) Though A obviously ought to have alleged his *modus* correctly, confusion about tithing customs is understandable. (Imagine a

newcomer to community, or a purchaser of land misinformed by the previous owner.) (b) On the other hand, indulgence toward careless pleading of *modi* might encourage a species of fraud: A jury of friendly and self-interested neighbors knows the custom is really 10d, but is tempted simply to find the plaintiff's allegation of 6d true, for then he will certainly not have to pay tithes in kind, as he ought not, and a verdict for 6d will not make it any easier for the parson to collect 10d in the future. A dishonest verdict might be hard to get away with if strong evidence of the truth were presented at the trial, in the judge's hearing. But the plaintiff would only have a motive to present evidence of a 6d *modus,* and the defendant should not have to bear the burden of proving something he does not believe (for his ecclesiastical suit is predicated on the claim that there is no *modus* at all.) Moreover, under the still-prevailing ancient theory, jurors were supposed to draw on their own knowledge, though judges could, to a limited degree, control verdicts flagrantly against the evidence as presented. The defendant in our case would be entitled to assume, especially when communal custom was in question, that the jurors knew the truth and would declare it. Even apart from the absurdity of expecting a man to present evidence against his interest and belief, one should not have to hustle up evidence to make sure that jurors could not commit fraud. Insisting on strict conformity between claim and verdict when jurors were honest would of course not prevent dishonesty, but it would tend to condition litigants and their lawyers to be careful, and it would catch deliberately fraudulent plaintiffs whose hopes backfired. (I.e.: one intentionally alleges a too-low *modus,* gambling on the jury's collaboration, but the jurors tell the truth. Making that man pay tithes in kind for one year is modest punishment.)

(c) The preliminary-proof requirement affects the equities: If A. alleges 6d by an honest mistake, the necessity of finding two witnesses to back him up gives him an occasion to discover the truth. So in principle the proof requirement should reduce the excusability of coming to the jury with an inaccurate claim. But complexities arise: A man says 6d, then in looking for preliminary proof discovers that the truth is 10d. Will he be allowed to amend his surmise? Hopefully. But suppose he cannot or does not. His preliminary proof for 10d will probably be accepted even though the surmise says 6d (see above). Now what is he supposed to do when he sees a 10d verdict looming? Drop his surmise and start over correctly? If a Consultation for non-prosecution is obtained by the other

party, will a new Prohibition be barred by 50 Edw. 3? Perhaps when he pleads formally he should change from 6d to 10d. But will a discrepancy between the surmise and the declaration be held against him (see below)? In sum: The problems of escaping from an initially inaccurate surmise are perhaps a reason for "judging by the truth" instead of holding parties to prove exactly what they allege.

(d) The defendant is perhaps entitled to assume, (seriously as opposed to sportingly), that the verdict must support the plaintiff's claim exactly. That is to say, his so assuming might affect his conduct: Suppose a parson says to himself, "I think I can make my claim to the tithes in kind stick, at least against A. For he says he only owes me 6d That can't be true. It's just possible that the jurors will find a 10d *modus,* properly enough. I doubt it, but they might, for I know that 10d has occasionally been taken for tithes in this parish. Maybe the jurors will infer a custom from that. Maybe they ought to. But 6d -- that's unheard-of. A. is seriously misinformed, if not just ornery. I *know* that he will fail with the jury. So I can safely count on tithes in kind from him this year." (The superior economic value of tithes in kind of course explains why there was so much litigation over *modi.)* These thoughts are not unrespectable. Both the parson's economic planning and his litigative conduct (not making an all-out effort to show that there is no *modus,* on the assumption that the worst the jurors can find is a 10d *modus)* could be influenced by what is probably the layman's natural guess about the law -- viz. "My adversary will surely be made to prove exactly what he is foolish enough to believe or wicked enough to assert." Whether the law should try to conform to "the layman's natural guess about the law" is a large and persistent question. Moreover, opinions can differ over the respectability and typicality of the thoughts I have put in a parson's head. Imagine a malevolent parson: Knowing full well that a 10d *modus* is the custom, he picks out a parishioner whom he knows to be misinformed about the amount of the *modus.* This parson's motive from the start is to catch a parishioner in a legal squeeze-play and extract unowned tithes. Perhaps the second parson is more typical than the first, and the thoughts of the first may need very little modification to pick up the flavor of sharp practice.

(e) Against the plaintiff in our case, it may be urged that he would be in a better position if his mistake were not favorable to himself. Thus, if one pleads a 10d *modus* and proves a 6d one, he should perhaps win on

public grounds. Insisting that the mistake be unfavorable to the party before invoking the "public stake" theory might be a compromise between fairness to the defendant as a private party and the public reasons for "judging by the truth." In sum: There is no manifestly right solution to our exemplary case within the perspectives of private law.

Turning now to the real cases: In the early Pelles v. Saunderson,[1] the ecclesiastical suit was for grain tithes from 60 acres. A Prohibition was obtained on the surmise that the 60 acres were recently reclaimed waste -- i.e., that the land produced no crops and paid no tithes before reclamation and was therefore exempt for seven years after reclamation by 2/3 Edw. 6. The jury found that 30 of the 60 acres were completely barren before reclamation, but that the other 30 acres had paid tithes of lambs and wool (not of grain.) The theoretical alternatives were: (a) Consultation for the whole 60 acres. (The plaintiff did not prove what he said was true -- that the 60 acres by reason of barrenness had never paid any tithes.) (b) Consultation quoad only the 30 acres that paid lamb and wool tithes. This course would involve: (i) Interpreting the statute to mean that land that had paid any sort of tithes before reclamation was not exempt. (ii) Going by the truth as established by verdict, rather than punishing the plaintiff for an inaccurate claim. (c) No Consultation. This would involve: (i) Interpreting the statute to mean that land which by reason of uncultivation had never paid grain tithes (nor, I feel sure, hay tithes) was exempt from "great tithes' -- grain and hay -- for seven years after being reduced to cultivation, even though it had previously paid some "small tithes" in virtue of grazing use. (ii) Going by the truth, but in a different sense. I.e.: The plaintiff did not prove what he said -- no tithes from 60 acres -- but he proved all he need have claimed -- no great tithes from 60 acres.

The judges of both principal courts, plus the Chief Baron of the Exchequer, conferred about this case. There is no sign that the first course -- Consultation for all -- was considered. It may be material that the defendant had not traversed the plaintiff's claim, but pleaded affirmatively that the 60 acres were fruitful. (The reporter tells us, with perhaps a note of surprise, that such pleading was said to be tolerated by Queen's Bench

1 M. 1/2 Eliz. Q.B. 2 Dyer, 1706.

practice. It would be unacceptable by the normal canon: one should not make an affirmative statement which amounts to an implied denial of adversary's statement without at least accompanying it by an express denial.) Thus the verdict failed to conform with the defendant's statement as well as the plaintiff's, which is perhaps a reason for not being too hard on the plaintiff. As between the other two courses, the judges were first inclined to (b), but later decided on (c). So far as the spare report indicates, the change was only a matter of information: When they were disposed to (b), the judges were under the impression that the ecclesiastical suit covered the lamb and wool tithes as well as the grain. When they got the facts straight and saw that the parson could recover his lamb and wool tithes by starting a new suit -- i.e., without a Consultation in this one -- they had no apparent hesitation about taking course (c). In sum, Pelles v. Saunderson comes to authority for "judging by the truth," but owing to its complications it is not clear authority for simple cases such as our example above. It points to one kind of reason for "judging by the truth," a reason that would not hold in simple cases -- viz. legal ambiguity: The plaintiff in Pelles v. Saunderson may have drawn his claim as he did because he thought his only chance of asserting the exemption from grain tithes for all 60 acres was to show that none of the land had ever paid tithes of any sort. That would have been a legal miscalculation, not a matter of factual misinformation. To the degree, at least, that it was a legitimate miscalculation, perhaps it should not be held against him. (The report is too brief to show whether the judges were in serious doubt about the statute's meaning, As far as it goes, they hardly seem to have been.)

In a case of 1609,[2] Chief Justice Coke cited a Queen's Bench judgment from 19 Eliz. (1576) *in favor of "judging* by the truth" in simple *modus* cases: Plaintiff-in-Prohibition said that the commutation he claimed was customarily paid at Michaelmas. The jury found that there was a *modus;* but that the custom was to pay at Pentecost. The Prohibition was upheld in spite of the discrepancy. Coke used "public stake" language in explaining that decision (whether he was interpreting or stating from a re-

2 M. 7 Jac. C.P. Add. 25,211, f. 189; Harg. 52, f.29. The same citation from 19 Eliz. appears as a *noto* in 13 Coke, 58, where Chief Baron Tanfield is said to have a MS. report of the case, and the case is said to have been "well-debated." The 1576 case is also cited in Chambers v. Hanburye below.

port the reasons actually given in 1576): "...because it goes to the jurisdiction of the court; though the prescription is not found in the manner common in law, yet it suffices." In other words: In a purely private matter, if issue were taken on prescriptive title it would have to be more strictly sustained by the verdict, but here there is a public interest. *Quaere* whether a mistake as to the day of payment is more trivial and hence excusable than other mistakes, e.g., as to the amount of a *modus*. Probably there is no difference: the important thing is that the verdict showed no tithes in kind due.

In Folcot v. Ridge,[3] the parties were at issue on a *modus* for hay tithes from certain specified land. The jury found that there was a *modus,* but also that part of the land had never been mowed (in which case, there could not possibly be a *modus* for hay.) The verdict did not, however, specify which of the acres in question had never been mowed. The Court upheld the Prohibition, on the ground that the defendant had not contested whether all the land had been mowed. In one sense, the Court went by the substance, as opposed to punishing the plaintiff for an inaccurate claim: The plaintiff said such and such specified land was subject to a certain *modus*. The jury said in effect, "Money is indeed given in respect of such hay as is grown within the area specified, but is not true that there is a hay *modus* applying to exactly the land to which the plaintiff says it applies, for some of that land has never produced hay." In another sense, the Court cared more about pleading-logic than the truth: If the defendant's traverse of the *modus* implied an admission of the plaintiff's implied claim that all the land mentioned was hay land, then the reality could be ignored. *Quaere* whether it would have made a difference if the jury had said what specific land had never been mowed. (The reporter takes special note of its indefiniteness.)

In Chambers v. Hanburye,[4] plaintiff-in-Prohibition claimed a *modus* to pay a certain sum for all tithes "at every time when he shall be required." His evidence was offered to the Court for evaluation before any verdict. (A common practice. A party could "demur to the evidence" -- i.e., concede the factual truth of the evidence, but contest its legal sufficiency to

3 T. 36 Eliz. Q.B. Croke Eliz., 333.
4 M. 40/41 Eliz. Q.B. Add. 25,203, f.14.

maintain the claim of the party offering it. The Court must then determine the validity of that legal assertion. As this case shows, however, decision on the legal effect of the evidence did not necessarily conclude the matter between parties.) The evidence showed that the money was customarily paid at Lammas, not as the plaintiff said, on demand. Tanfield, at the Bar, argued that only the existence of the *modus,* not the day of payment or whether there was a fixed day, was relevant, citing the case of 19 Elizabeth above. The judges said they would be of Tanfield's opinion if the jury returned a special verdict. (The plaintiff's evidence was held good for his purpose, despite the discrepancy, but the evidence was not treated as equivalent to a verdict. A special verdict finding the *modus* to pay at Lammas would be considered a verdict for the plaintiff, but the jury was left free to bring in some other verdict.)

One late Elizabethan report[5] underscores the limits of "judging by the truth" in *modus* cases. An opinion is reported, without specified context, to the following effect: Plaintiff-in-Prohibition alleges a 20/ *modus.* The truth is that he has always paid money instead of tithes in kind, but sometimes he had paid less or more than 20/. *Held:* The plaintiff's prescription here fails, even though there is only one established instance of a different sum paid. The point here is really substantive, not procedural: A *modus* by nature is a custom of paying so much for tithes. If one alleged a *modus* to pay various sums, or an uncertain sum, the prescription would be bad on its face. Therefore, to prove a practice, even from time immemorial, of paying one sum this year and another sum that year is manifestly not to prove any *modus* at all -- which is not the same as proving a different *modus* from the one alleged. I cite the case here because the existence of the report suggests that an argument from permissive application of verdicts may have been made: Jury A says "Tithes in kind have never been paid, but the commutation that ought to be paid is 10d, not 6d as the plaintiff alleges." Jury B says "Tithes in kind have never been paid, but we cannot say that 20/ should be paid as a commutation, as the plaintiff alleges -- for all we know positively is that various sum of money have been paid." The negative statement common to the two verdicts makes for a superficial similarity. It perhaps encourages arguing that if the negation in the first is more important than the affirmation, so should it be

5 Lansd. 1172, f.53. Dated T. 40/41 Eliz., which cannot be correct. M. 40/41? T.40? T.41?

in the second. But as the report implies, the point is badly taken. (And note: We as yet have no cases directly holding that a 10d verdict will sustain a 6d claim.)

Nowell v. Hicks[6] presents the converse of the last case: a bad substantive point *against* plaintiff-in-Prohibition which may have got its color from procedural problems. Here, the jury found that the communal *modus* alleged by the plaintiff had obtained up to 20 years ago, but added that within the last 20 years some parishioners had paid in kind. Justices Clench and Fenner, alone in Court, thought this was a plain finding for the plaintiff. Surely it was, for as a matter of substance a *modus* was not destroyed by an interruption -- i.e., by the mere fact that the *de jure* thing was done instead of the customary thing in specific instances. (Though of course instances of payment in kind could count as evidence against a *modus* -- perhaps as a evidence to conclude a jury in the absence of any positive evidence of the alleged custom.) No arguments contra are reported, only that the plantiff's counsel moved for judgement and argued that he should have it because the verdict was in his favor. From the fact that he had to argue, I would infer that the other party was making trouble, or at least that the Court was expected to have some hesitation. I can see a possible basis for momentary hesitation in a superficial resemblance to discrepant-verdict cases: If a man who pleads a 6d *modus* and proves a 10d one should lose *(quaere* whether he should), then what about a man whose plea says that tithes in kind have never been paid in the parish, and whom a special verdict likewise in one sense supports and in one sense contradicts? But surely a plaintiff-in-Prohibition who alleges a perfectly true and legally valid *modus* in the parish is not by implication saying that the custom has always been observed *de facto* by every parishioner. Surely he is not bound to anticipate and explain away in his plea such facts as might count against him in evidence.

Hall v. Spencer[7] contains the same point as Nowell v. Hicks, plus others which make it a much more material discrepant-verdict case. Here, a modus (16d for hay tithes) was laid in a manor. I.e.: The tithing custom was alleged to be the custom *of the manor,* applicable to its customary

6 M. 43/44 Eliz. Q.B. Add. 25,203, f.384b.
7 P. 1 Jac. K.B. Add. 25,203, f.684.

tenants (copyholders). Manors were local units -- comparable to parishes, towns, etc. -- capable of having their own tithing customs. as well as other customs of their own at odds with general law. The jury found a special verdict, as follows: (a) The land whereof tithes in kind were demanded is customary land of the manor, as alleged. (b) The customary tenants of the manor have used to pay the 16d commutation up to 23 years ago. (c) For the last 23 years, they have paid sometimes more than 16d, sometimes less.

The three puisne justices of the King's Bench (Chief Justice Popham being absent in the Star Chamber) made the following determinations: (a) Cessation of observation of the *modus* for 23 years does not destroy it. The verdict is not against the plaintiff because it shows such a cessation. (b) The verdict is, however, against the plaintiff for another reason: The jury did not find a custom *of the manor,* as alleged -- i.e., a *modus* within and throughout that *local unit, applying to* its customary tenants. Rather, it found the customary practice of a *group of people,* holders of a *particular group of tenements,* the customary tenements of that manor. It is as if A. alleged a parochial *modus* and the jury found a *modus* applying only to a particular piece of land. A -- and so the plaintiff in this case -- has a perfectly good claim to the commutation, but he must allege it correctly. There are two kinds of *modi* -- those pervading a local unit capable of its own custom (parish, town, manor, etc.) and those peculiar to particular pieces of land, singular or plural ("the close called Greencroft," or "all the customary tenements in the Manor of Dale"). A man must correctly allege which kind of *modus* he has, as between those two kinds. A jury must answer the question "Is such-and-such the local *modus?"* if that is the question it is asked. It may not say "No -- but the plaintiff has always paid a certain commutation in respect of his particular tenement," or "We do not know -- but the plaintiff has always paid a certain commutation in respect of his particular temenent." (c) Since, however, it appears from the verdict that the parson has no right to tithes in kind, a Consultation should not be granted.

Rather, a new *Venire facias* (i.e., another jury to retry the issue) should be awarded. I.e.: Instead of punishing the plaintiff for what was not his fault, the Court "punished" the jury (and tacitly, perhaps, the trial judge) for rendering an unnecessary special verdict. If the jurors believed that the customary tenants of the manor had always paid the commutation,

save for the recent cessation, they were in a position to find that the custom of the manor was as the plaintiff said it was. The possibility that the jurors could in good conscience find only a *modus* applying to particular tenements was merely theoretical. In reality, no doubt, the jurors and trial judge were confused by the 23-year cessation. Being unsure that they could affirm the plaintiff's claim as stated when the custom had not been observed in recent years, they chose and were permitted (for trial judges undoubtedly exercised a good deal of control over whether juries returned general or special verdicts) simply to return the facts as they knew them. In doing so, they inadvertently stated the facts in such a way, that strictly construed, they failed to support the plaintiff's claim. A new jury could be expected more or less automatically to return a proper general verdict for the plaintiff, the law having been clarified. The solution arrived at was liberal and fair. The more liberal and more economical alternative would have been to refuse a Consultation *simpliciter,* without a new *Venire facias* to establish a logically elegant record. In rejecting that alternative, the Court implied a rule for the simpler parallel case: A man alleges a parochial custom and the jury finds a *modus* applying only to the plaintiff and his predecessors in estate with respect to a particular tenement. There, Consultation should be granted, for the plaintiff has without excuse misstated his modus, even though it is evident that he does not owe tithes in kind. Simply denying Consultation in the principal case, where the plaintiff was not at fault, would tend to encourage similar permissiveness in the parallel case where he is at fault. (That is to say, where he can be considered to be too much at fault to win. It is of course not inevitable that he be so regarded.)

In Berrie's Case (1617),[8] a parochial *modus* for hay tithes was claimed. The jury returned a special verdict: There was such a *modus* ap-

8 T. 15 Jac. C.P. Harl. 5149, f.98; Hobart, 192. I follow the MS. except at the point noted, for Hobart's report is plainly of his own opinion only, giving no suggestion of the division in the Court. Hobart's thoughts (perhaps rather that than what he actually said in Court) as reported by himself took account of the "public stake" theory of Prohibitions: "...we shall never give them a Consultation to proceed in all, no nor in part, where the suit appears to us originally ill-founded, and a Prohibition leaves more power in this Court, than the other actions, in as much as it locks up that Court [the ecclesiastical] which cannot require it to be opened but with a key of right and justice..." This is strong language, hard to reconcile with Hobart's agreement (in the MS.) with Warburton's case of a 6/ *modus* alleged and a 12/ *modus* established.

plying to most of the parish, but one particular tract of meadowland customarily paid tithes in kind. Plaintiff-in-Prohibition had five acres in that tract. Upon this verdict, the Court was presented with two choices: (a) A general Consultation, for the issue was manifestly not found for the plaintiff according to his claim. (b) A Consultation *quoad* only the five acres which clearly owed tithes in kind. The judges were divided as to which course to take. Chief Justice Hobart and Justice Winch favored the partial consultation. They embraced the general policy of "judging according to the truth," relied on Pelles v. Saunderson as supporting that policy, and maintained that it was consistent with practice in ordinary private suits. (As to the last point: Hobart put the case of an action of Debt on a tenant's obligation not to commit waste. Suppose the lessor alleges that the lessee did waste by cutting 20 trees and the jury returns that he cut ten trees. Although, Hobart said, this verdict is strictly speaking against the lessor, it will be taken in his favor -- i.e., the lessee will be held to have committed waste and hence to have forfeited his obligation. So in the principal case, though the verdict is strictly speaking against the plaintiff -- and the jury might, if it had chosen, have given a general verdict against him -- the special verdict will be taken in his favor so far as possible -- i.e., with respect to all but the five acres. To emphasize the private law parallel is to de-emphasize the "public stake" in Prohibitions. In the MS. version, nothing is said of the special character of Prohibitions, but Hobart's report of his own opinion shows that he had it in mind. See note 8.) Justice Hutton took the opposite view: The verdict was simply against the plaintiff, so that a general Consultation should be granted. Hutton for his part claimed good common law to support him (citing a prescription where one claimed to have been seised of a vill from the time of Henry VIII and the jury found that he was seised from Henry VII -- *held,* the prescription fails *in toto* even though the truth was more on the party's side than he imagined.) Though he speaks less directly, Justice Warburton plainly agreed with Hutton. He says simply that the verdict is "void," then lays down an important parallel rule: If one claims a 6/ *modus* and the jury finds a 12/ *modus,* the issue is found against the plaintiff (implying that Consultation should be granted even though tithes in kind are manifestly not due.) *This rule the rest of the Court conceded,* notwithstanding the judges' disagreement in the principal case. The first and only judicial statement -- a dictum -- on the problem in our "exemplary

case" above goes plainly against "judging by the truth." The ultimate disposition of Berrie's Case is not reported. We are left with a picture of the Court evenly divided on the important question at issue.

The only case[8a] in the present line later than Berrie's, is a relatively weak instance of liberalism: A *modus* of 40/ for all tithes was claimed as applying to the scite and demesnes of a manor owed by Crane, Plaintiff-in-Prohibition. The evidence showed that part of manor had been severed before Crane purchased it. (Assume A. owned the unit prescriptively identified as the Manor of Dale. A. conveys some of the demesnes to B. and the rest to Crane, in the name of the Manor of Dale. Crane has the manor -- i.e., is lord with the jurisdictional rights of a lord that comes to him -- while B.'s land is severed from it -- i.e., no longer part of that manor or any other.) The effect of the severance was that the 40/ *modus* applied to more land than the scite and demesnes of the manor, to which Crane's plea applied it. The Court held upon this evidence (not upon a verdict incorporating it) that Crane's prescription was good despite the discrepancy between the exact truth and his claim. Having applied the *modus* to the unit to which it applied prescriptively (the manor), Crane was not obliged to spell out the further circumstance that he was not the owner of all the ancient manor, or that what the *modus* now applied to was the manor-plus. (Note that Crane's "mistake" of a sort was against himself He did not, so far as the present record showed, dispute his duty to pay 40/, even thought he did not possess all the land covered by that *modus.)*

From the cases above, we must conclude that the courts never reached a firm policy of "judging by the truth" when verdicts failed to fit plaintiffs' claims. Sometimes they so judged. They tended to be liberal towards plaintiffs who were not at fault, or scarcely at fault, in stating claims that turned out not to be provable exactly as stated. But they cannot be said to have embraced the "public stake" theory so boldly as to overlook the party's fault and the imperatives of procedural correctness. They did not say "The conclusive truth of the verdict is the decisive information to the Court. If on the basis of that information Prohibition should lie, it will lie, however things stand between plaintiff and defendant." The divided Court in the late-Jacobean Berrie's Case -- and the dictum in that case -- do not recommend "judging by the truth" very strongly. The doubts in that case do not really go against the weight of earlier holdings.

8a Crane v. ---. M. 13 Car. C.P. Harg. 23, f.15.

Coke came closer than any other judge to endorsing "judging by the truth" on public grounds as a general policy.

C.
Misconceived Surmises

Summary: A plaintiff who claimed a Prohibition on the basis of a misconceived legal theory, but was plainly entitled to one on a different theory, had a good chance of being helped out by the Court, according to the "legal truth," *provided* the claim he originally relied on had not been falsified by verdict. This conclusion, however, depends on slight and ambiguous evidence.

* * *

The cases in the last group ask whether the truth as established by verdict or conceded evidence should be decisive, notwithstanding discrepancies between that truth and the party's claim. Whether or not to "judge by the truth" (or give primacy to the public interest in Prohibitions, or do substantial justice in spite of the party's error) could arise in other ways as well. Suppose a plaintiff-in-Prohibition misconceives the law and draws his surmise in accord with his misconception, so that the defendant would have grounds for demurring. But suppose it is clear on the face of things that the plaintiff would be entitled to a Prohibition on a different legal theory than the one he has adopted. Should the Court help him out, or should it leave him to consequences of his folly -- and leave an improper suit in the hands of a "foreign" court? A few cases raised that question.

In Brewer *et al.* v. Dawson (1597),[9] a parson sued for tithes computed as one-tenth of the rent the parishioners paid for their houses. At common law, as the judges clearly agreed, the parson had no claim to such tithes -- i.e., men had no duty to pay what amounted to a real-estate tax to the Church. Actually, the parson's claim was not all that absurd, for he based it on prescription. Generally speaking, non-tithable products, such as minerals or ocean fish, could be subject to tithes by special custom. In this case, however, the judges also clearly agreed that the parson's prescriptive title was bad (because he claimed the "real-estate tax" as the cus-

9 M. 39/40 Eliz. C.P. Harl. 1631, f.272b.

tomary commutation for other things which in their turn were legally non-tithable.) Therefore, the parishioners had an open-and-shut claim to Prohibition on the ground that they were being sued for tithes which were simply not due by the law. However, they did not make that claim. Instead, they surmised that they paid certain other tithes in lieu of any charge on their houses. As a defense to a tithe suit, that was bad by well-established principles, as the judges again clearly agreed: A man sued for hay tithes could not escape them by alleging a *modus* to pay corn tithes instead. Payment of one species of tithes was never good consideration for exemption from another species.

Because the surmise in Brewer *et al.* v. Dawson was founded on a manifestly untenable legal theory, the defendant moved for Consultation. After discussing the case on two occasions, the Court decided unanimously to deny the Consultation. For it was clear from the parson's libel (attached to the surmise as required by statute) that he had no claim and should have been prohibited on a correctly drawn surmise. It should be noted that the case arose on *motion for Consultation,* before formal pleading. If the plaintiffs had declared on their misconceived surmise and the defendant had demurred, could judgment for the defendant have been avoided? (The propriety of Consultation on motion is discussed as a distinct topic below. There was no mention of that problem in this case.)

In Baxter v. Hope (1611),[10] a parishioner did essentially what the plaintiffs in Brewer *et al.* v. Dawson did -- alleged a *modus* when the proper claim would have been *de jure* exemption from the tithes sued for. The tithe suit was in part for "after-crop and stubble." (After corn was harvested, another crop of some sort was grown in the cornfield during the same year and/ or the stubble was grazed. The parson was suing for tithes of such by-products.) The parishioner said in his surmise and his declaration thereon that the custom was for householders to pay corn tithes and in consideration thereof to be discharged of tithes of after-crops. That is to say, the plaintiff pleaded what looked like a *modus.* But taken as a *modus,* the claim here was presumably bad: paying corn tithes could not be good consideration for exemption from tithes of after-crops,

10 M. 9 Jac. C.P. Harg. 15, f.260.

assuming the latter owed tithes *de jure.* When the defendant demurred to the declaration in this case, the Court faced two question: (a) Should the plaintiff's claim be construed as a *modus?* (b) Assuming that the claim, despite its appearance, is not to be taken a *modus,* are after-crops tithable *de jure?* A majority of the Court said "no" to the first question, Justice Foster dissenting. The Court then proceeded to decide that no tithes were due from after-crops by the law. (A conclusion which accords with most opinion on that often-discussed question).

Baxter v. Hope is an instance of "judging by the truth" or "helping the party out of his legal mistakes," but in a more complex sense than Brewer v. Dawson. Strictly speaking, the majority of the Court *understood* the plaintiff as claiming a *de jure* exemption. The judges (save for Foster) did not say. "The plaintiff has made the mistake of claiming an invalid *modus,* but we will find for him anyhow since he never ought to have been sued for such tithes." They said instead, "The appearance of the claim is deceptive -- it really amounts to claiming a *de jure* exemption, or at least admits of such interpretation." Color of a sort can be given to that reading of the plaintiff's claim. There is a sense in which the theory behind legal exemptions from tithes of after- crops "sounded in exchange," or involved the notion of "consideration": A given field produces its main annual crop, on which tithes are paid. *Therefore* (in consideration thereof, considering that fact) subsidiary crops are tithe-free -- for post-harvest use of a field, while it may be incidentally profitable to the user, contributes to the upkeep of the field, or at least to the general maintenance of the farmer's husbandry, and hence to the ultimate value of the parson's tithes on the main crop.

Therefore, a plea which cites payment of tithes for the principal crop as "consideration" for exemption *quoad* after-crops *can* be taken as merely invoking the theory on which the *de jure* exception of the latter is based -- i.e., as innocuous "surplusage." However, as Justice Foster presumably thought, such construction strains against the apparent tendency of the claim's language and ignores the probable motive behind it. As to the latter: A man hopes to claim *de jure* exemption, but he is not sure that the Court will hold that after-crops are intrinsically tithe-free. So he draws his claim to keep all options open. "Maybe the Court will think the after-crops are intrinsically exempt and will find a way of deciding in my favor whatever I say. But if the judges think the after-crops are legally subject

to tithes, maybe I can make out a *modus,* notwithstanding the general rule that one tithe cannot be consideration for another. For perhaps it can be plausibly argued that non-payment on after-crops from time immemorial was presumptively in consideration of the increased value of the main crop by virtue of post-harvest use -- in other words, that this is not a true case of claiming to pay one tithe in consideration of another." I strongly suspect that such calculations -- the strategy of a lawyer, not the simplicity of a layman -- were behind the plaintiff's position in Baxter v. Hope, for the case falls in an intricate and problematic area of tithe law. The question then arises whether such strategy should be indulged. The usual motive for a professionally drawn ambiguous claim -- i.e. for avoiding a clear stand on one legal theory or another -- is hoping for the best of both worlds. Does the value of substantial justice, in general or in Prohibition cases particularly, outweigh the value of discouraging what might be called "cheating on the common law" (i.e., inventing ways of fishing for substantial justice in defiance of the common law's pervasive "take your choice" philosophy -- the philosophy that said "Traverse *or* demur," "Make your declaration accord with the writ you have brought or find another writ that suits you better")?

Thus, when the majority in Baxter v. Hope understood the plaintiff as claiming a *de jure* exemption it committed a colorable, but strained and lenient, act of construction. Strictly speaking, the Court did not endorse "judging by the truth" *regardless* of the plaintiff's handling of his claim. If a man came forward with what could *only* be regarded as a bad *modus* (a prescription to pay hay tithes in consideration of after-crops from cornfields would be an example), the decision in Baxter v. Hope would perhaps leave room for holding against him despite the Court's conviction that after- crops were exempt *de jure.* Strictly speaking, the decision endorses "judging by the truth" only in the form of the rule: "When possible, construe claims in such a way that the legally correct result can be produced." The Court's language (probably *per* Chief Justice Coke) was certainly broad enough to embrace such a rule, if not a still more general policy in favor of substantial justice and the public interest in Prohibitions (for the Court did not make the pretense of merely construing, of giving mildly ambiguous language a sense it could easily be made to bear): "...Foster... said that it is not good law that the payment of tithes in one kind should be satisfaction for tithes in another kind or in the same kind for part in the same kind, but the other judges said, as to that, that it is

only surplusage here to show a prescription, *but we as judges will adjudge according to the law,* which is that he will be discharged..." (My italics).

In the King's Bench case of Jouce v. Parker,[11] plaintiff-in-Prohibition tried unsuccessfully to take advantage of the same legal "truth" -- *de jure* tithe-exemption -- that prevailed over bad pleading in the preceding cases. The form of the case was different, however. Here, a parishioner pleaded exemption by way of *modus* from tithes on two classes of "dry cattle." ("Dry" means "not in milk-production. The two classes were draught-oxen and heifers. Their tithes, if they owed any, would be equal to one-tenth of the herbage they consumed.) The parson traversed the alleged *modus,* rather than taking exception to it on legal grounds. The jury found for the parson -- i.e., that tithes in kind had always been paid for the dry cattle. The parishioner then moved in arrest of judgment on the ground that dry cattle were exempt from tithes from tithes *de jure.* The Court turned down the motion.

How much does this holding imply? Hardly that a party who unwisely stands on prescription will *always* be struck with his folly. Here the parishioner said that tithes in kind had never been paid, whereas the truth established by verdict was that they had regularly been paid and no commutation paid in their stead. It does not follow from that verdict-truth that they *ought* to have been paid, or that the parson was entitled to maintain a suit for them *qua* tithes in kind. The verdict does, however, suggest that the parson might be entitled to the tithes by way of prescription (assuming, realistically, that dry cattle were exempt *de jure* -- though the Court did not need to decide that question in this case.) If he were so entitled, he of course ought to sue by way of prescription. Nevertheless, it would be hard to deprive the parson of his tithes when both the factual truth and the parishioner's fault in misconceiving his claim weighed on the parson's side. In the preceding two cases, the parson moved for Consultation and demurred, respectively. There is perhaps a sense in which a party who takes his stand on the law expresses faith in the general legal justice of his claim, not simply his belief that he can "take apart" the other party's claim as stated. (Cf. my argument above on every plaintiff's

11 T. 18 Jac. K.B. Croke Jac., 575.

implied faith in his suit's "natural justice.") In this case, on the other hand, the parson made no statement construable as such an "expression of faith." He simply said, "The plaintiff is not telling the truth," and the jury backed him up. It seems more unfair to turn back and help out a party who has demonstrably "not told the truth" -- who has thus vexed someone else with a "false" suit -- than to come to the assistance of someone who has only mistaken the law. (This point would apply to our "6d. *modus,* 10d verdict" case above, except insofar as some untruths -- untruths in details, as to dates of payment, amounts, etc. -- may be regarded as more excusable than others.)

In sum, there are reasons for distinguishing misconceived claims challenged by legal exception from those falsified in their terms by jury trial. To judge by the brief report, the Court in Jouce v. Parker probably did not worry about that distinction as such -- as opposed to seeing intuitively that the legally foolhardy and factually falsified parishioner was in a weak position. In addition to that general perception, the Court relied on another point against the parishioner: To one intent, his motion in arrest of judgement was based on a legal error. In stating his ill-fated *modus,* the parishioner applied it to other people's draught-oxen grazed for hire on his land, as well as his own draught-oxen. The Court thought that the other people's oxen were clearly tithable (in accord with the better option.) I.e.: *De jure,* a man who took money for use of his grazing-land ("agistment") owed tithes on the herbage consumed by the guest-cattle. Therefore the "agisted" beasts could *only* be exempt by way of *modus,* and the verdict showed they were not.

This consideration would not necessarily stand in the way of arresting judgment *quoad* the parishioner's own oxen and heifers and granting Consultation *quoad* the guest-oxen only. But perhaps it adds to the equities against the parishioner (and proportionately reduces the general meaning of the decision): After starting off on the wrong track and failing to establish facts favorable to himself, the parishioner was trying to escape by arresting judgment -- and even then he was being legally careless and/or greedy. For instead of trying to escape only insofar as he had a fairly good case in substance (with respect to his own oxen and heifers), he also, on the face of his motion, hoped to escape *quoad* the agisted cattle, where the Court thought he plainly had no case.

Norton v. Fermer[12] raised the same point as Jouce v. Parker and came out the same way, but the shape of the case and reasons for the decision were slightly different. Here, the ecclesiastical suit was for tithes of wood. Unlike (in all probability) most dry cattle, wood was perfectly tithable *de jure.* There was, however, a vein of opinion (probably the stronger vein) that wood used for fuel in a man's house was exempt by law. In this case, the parishioner got a Prohibition on surmise that the wood in question was used as fuel and that *by custom* wood so used was tithe-free. (The report does not tell what consideration was alleged. As with after-crops, it was easy to say that exemptions of firewood were in consideration of something -- and similarly easy to defend common law exemption as based on a universal or presumptive "consideration." A man must be able to heat his house in order to maintain an agricultural establishment. Therefore, the parson can be said to exchange tithes of fuel-wood for the greater value of other tithes that will come from a decently maintained "family," or agricultural establishment. So to speak, keeping the family from freezing to death was deductible as a legitimate business expense, by common law or customary law as the case might be.) The parson in Norton v. Fermer traversed the custom, and the jury found in his favor. The parishioner then moved in arrest of judgment: that even though there was no such custom, fuel-wood was exempt *de jure.* The Court denied the motion. In explaining the decision, it gave two reasons: (a) The judges

12 T. 4 Car. C.P. Croke Car., 113; Littleton, 152. I follow Croke in the text because it purports to give the final *per curiam* judgment. Littleton gives an earlier discussion (same term) ending with an adjournment. Littleton reveals disagreement among the judges, which I take to have been composed later. Justice Hutton argued for the view finally adopted, at least as the better opinion -- that fuel-wood is only exemptible by custom -- while Justice Croke argued that it is exempt *de jure.* Croke also expressly endorsed "judging by the truth" in the case of a misconceived surmise, because in his opinion that was what should be done in case of a variant verdict. (He puts the case of an alleged 4d. *modus* and a verdict for 3d. and says no Consultation should be granted.)

Hutton cited two cases, not independently reported, in his favor: (a) A Dr. Graunt's Case, which sounds exactly like Brewer *et al.* v. Dawson, except that the plaintiff who misconceived his claim tried to escape only after verdict, by motion in arrest of judgement. According to Hutton, consultation was granted. (b) Another case, cited in Dr. Graunt's, where one entitled to the statutory exemption for timber-trees mistakenly relied on a custom. There too a motion in arrest of judgment was denied and Consultation granted in keeping with a verdict against the custom.

did not think -- or did not think it *clear* -- that fuel-wood was exempt *de jure.* ("Or did not think it clear": I question whether it is correct to say that fuel-wood was not exempt *de jure.* "Correct" or not, this Court said so in terms and may well have thought so. However, the report suggests to me that the judges' stance was less-than-dogmatic. They said -- correctly -- that it was "usual" for customs to be alleged in fuel- wood cases, and that "hearth-penny" -- a small monetary payment--was often alleged as consideration for discharge from fuel-tithes. The judges may have meant to say, "Whether or not fuel is exempt *de jure* -- however we would decide that question if it were raised straightforwardly -- the frequency of custom- based claims to this exemption is *prima facie* reason for doubting that the motion in arrest of judgment is well-founded in the abstract.") (b) In any event, the parishioner took his stand on the custom and lost -- he cannot escape by the back door now.

If the Court in Norton v. Fermer believed flatly (subject only to possible correction after full-scale adversary debate on a demurrer) that there was no *de jure* exemption, the decision has little meaning for our present purposes. If the Court was only *inclined* so to believed, the decision need only mean, "Parties should not be helped out unless it is quite clear offhand that they could have won if they had not misconceived their claims. The Court should not spend its time giving all due consideration to a weak contention, or debating a dubious or difficult one, in order to come to the aid of someone who could have helped himself." In this case, in addition to the doubtfulness of the parishioners' legal contention, a material fact was in a sense outstanding: Was the wood in question actually used for fuel? Legally, the parson's traverse of the custom no doubt implied admission that it was , but the real truth had never been tried. Would it be fair to trap the parson in his legal admission while relieving the delinquent parishioner?

For a final hypothesis as to the Court's view of the substantive question: The large number of "precedents" of custom-based claims to fuel-tithe exemption relied on by the judges suggests the possibility of treating law-based and custom- based claims to the exemption as true options. It is logically puzzling to say "This product is tithe-free *de jure,* but a man may prescribe to pay a commutation for tithes of this product." Logically, either custom-based claims should be good if factually true and law-based claims should be bad, or vice versa. The Court in this case was

inclined to be logical: i.e., to conclude that law-based claims were bad from the *presumption* that the many custom-based claims that had been made were not all ill-conceived (a perfectly acceptable presumption in 17th-century jurisprudence, where practice-precedents or "repeated *de facto* happenings" were allowed considerable force.) But perhaps this logic is not entirely compelling. Non-tithable products were tithable by prescription. In order to "save" the precedents, one might conceivably interpret custom-based claims in the case of a particular product, such as fuel-wood, as founded on an admission, not of the parson's *de jure* title, but of his prescriptive title, against which a counter-prescription could be invoked.

Counter-prescriptions raise logical problems of their own, but those problems perhaps admit solution. On this theory, one could say that as a matter of law fuel-wood was exempt *de jure,* but also hold a party, such as the parishioner in this case, absolutely to his custom-based claim once he made it -- for there would be no sense in which it was ill-conceived. Despite the rather elaborate hypotheticalness of this line of argument, I doubt that it can be overlooked as a possible construction of the Court's thinking in Norton v. Fermer. The point is that the Court could have held several positions on the legal issue -- whether fuel-wood was exempt *de jure* or not -- and still reach the same conclusion. I think it is quite likely that the Court *did* hold several positions, in the sense that it saw vaguely, and saw that it did not need to sharpen its vision, that the plaintiff had no case, "whichever way you slice it."

In summary: On the basis of the four cases above, one would be entitled to conclude that the courts would help out plaintiffs-in-Prohibition who founded their claims on a misconceived legal theory when and if the plaintiff's claim was challenged legally. On the other hand, the courts frowned on attempts to escape ill-conceived claims by motion in arrest of judgment after verdict. I am not sure, however, that I would invariably advise my client against making such a motion in arrest of judgment, for sharper cases can be imagined than either of the two on that point above. For example, suppose A. is sued for tithes of a flagrantly non-tithable product, such as coal. Suppose A. claims a flagrantly unlawful prescriptive exemption -- alleges no consideration whatever. Instead of demurring, the parson traverses. The jury finds for the parson (that there is no such custom of non-payment.) Will a motion in arrest of judgment fail in

this case? (This case differs from Jouce v. Parker (a). in that no consideration is alleged for the exemption, making it "flagrantly unlawful," (b) in the implications of the verdict, owing to the character of the product. In Jouce v. Parker, the verdict implied that the parson had received tithes for dry cattle from time immemorial -- not necessarily rightfully, but *de facto.* Minerals, on the other hand tended by nature -- and I am far from certain that judges would close their eyes to such reality -- to be "one-shot," limited, or recently exploited products. When the jury says there is no custom of non-payment, it hardly can be assumed to mean that the parson has been collecting tithes on this parishioner's coal from time immemorial. If that were true, there would not be any coal left to litigate about. The jury must only mean that a few instances of tithe payment, or the very fact that coal has only been mined within recent memory, force it to conclude that here is no such custom as alleged. Admittedly the imaginary case would be unlikely to occur, but it is perhaps worth considering by way of emphasizing that the strongest case on motions in arrest of judgment, Jouce v. Parker, has it limitations.

D.
"Legal Truth," Miscellaneous

Alongside the cases above on discrepant verdicts and misconceived claims, we may consider two cases where, in different circumstances, the courts were asked to "judge by the truth," or bail out a legally entitled party who had mishandled his cause. In Pringe v. Child (1603),[13] a vicar sued the parson of the same parish for small tithes. (Such a suit is in no way surprising. The vicar claimed to be endowed with the small tithes -- i.e., tithes other than corn and hay. The commonest arrangement between vicar and parson was for the small tithes to go to the former, the great to the latter. The parson here had carried off the parishioners' small tithes, refused to pay them in respect of his own land, or both.) The parson got a Prohibition on surmise of a prescriptive right to the small tithes as against the vicar. In pleading to the Prohibition, the vicar relied on his endowment of 1310. The parson demurred to that plea, whereupon the Court gave judgment for the vicar and granted Consultation. (A plainly correct

13 P. 3 Jac. K.B. Lansd. 1111, f.60; Add. 25,209, f.36; Noy, 3 (dated T. 2 Jac.). Lansd. 1111 is the good report. The others are too brief to bring out the point with which we are concerned here.

decision: even if the parson had been collecting and not paying small tithes continually since 1310, the usage would not be immemorial, and the parson could not be admitted to prescribe against his own endowment -- "his own" in the sense of "the parson's *qua* corporate person.") The suit having been returned to the ecclesiastical court, sentence was given for the vicar. The parson appealed. When the appellate court was on the point of reversing the sentence below, the vicar got a Prohibition on *surmise of his endowment, hut without mentioning the former judgment in his favor.* The parson demurred.

It is at this point that our problem arises. In the Court's opinion, the vicar's claim to a Prohibition on the basis of his endowment was bad. (Clearly correct: Contentions between vicar and parson as to who was entitled to which tithes, and hence over the terms of endowments, were often affirmed to belong to ecclesiastical jurisdiction.) On the other hand, in the Court's opinion, the vicar could have validly claimed a Prohibition by reciting the earlier judgment. (The Court may have meant, "The invalidation of the parson's title to the tithes, insofar as it depended on the prescription as against the endowment, in the prior common law suit concluded the ecclesiastical courts. The case was sent back by Consultation in order to allow the ecclesiastical courts to do what the lower ecclesiastical court did -- give sentence for the vicar -- not to abjudicate the matter by its own standards, as the appellate court proposed to do." This proposition can be questioned. When the common law decides, for whatever reason, that Prohibition does not lie and sends a suit back by general Consultation, can it not be argued that the ecclesiastical courts ought to be free to handle the case by their own lights?

But even if this point is conceded -- and even if the Court in our case did not necessarily deny it -- the vicar ought still to have pleaded the prior judgment. Thereby he would at least state a *prima facie* cause for Prohibition, or at the very least a *possible* cause. He would open the question, if it can be regarded as an open question, whether the prior common law judgment restricted what the ecclesiastical courts could do. As it was, the vicar had foolishly failed to state any cause for Prohibition whatever.) In these circumstances, should the Court help the vicar out? Should it visit him with his folly by granting Consultation, or take notice of the matter of record he could have used? The Court faced this question directly and resolved it leniently: No Consultation was granted for the

time being. The vicar was told to start over with a new Prohibition and amend his surmise. (By this solution -- as opposed to refusing Consultation definitively -- commitment was properly avoided as to the vicar's ultimate title to a Prohibition. Properly, because even if the ecclesiastical courts were concluded by the prior judgment the parson should have an opportunity to show anything he could in his favor -- e.g., that the ecclesiastical suit could be decided for him on another point, without contravening the common law judgment.)

Chief Justice Popham proceeded to take both parties to task: "This matter was badly handled on both parts. For at first if the parson had not brought Prohibition those of the ecclesiastical law would have adjudged for him on his prescription, being almost for 300 years, against the vicar's endowment, and the vicar could not have a remedy at common law, for he could not have a Prohibition to prohibit himself. And now the vicar has negligently omitted the judgment in his Prohibition, and so there is folly on both parts." Popham's first point is clear: The parson ought never to have brought a Prohibition, for he has the kind of prescriptive claim against the vicar that would probably have succeeded at ecclesiastical law, where immemorialness was not insisted on, but which was bound to fail at common law in the face of the endowment. His second point may seen surprising in the light of the court's general tolerance for self-prohibition. However, Popham was clearly right in result: If the vicar had sought a Prohibition when the parson set up his prescription in the ecclesiastical court, he would surely have been turned down -- not because he was trying to prohibit his own suit but because he had no grounds for a Prohibition. For the parson's prescription should surely be interpreted, however he stated it, as an *ecclesiastical* prescription -- i.e., a claim that as a matter of ecclesiastical law the 300 years' usage should prevail against the endowment. Men were generally allowed to prohibit their own suits when issues within common law competence arose, but there would have been no common law issue in this case. Prescriptions were usually common law issues, but not as between vicar and parson. (In the actual case, the ecclesiastical defendant -- parson -- of course got his Prohibition by alleging a prescription. On the face, he could not have been turned down: one sued for tithes comes and says he has a prescriptive exemption in the common law sense -- Prohibition lies. *Quaere* whether there would have

been any way for the vicar to defeat the parson on the law, without pleading his endowment -- merely by bringing out that the contest was between vicar and parson and so within ecclesiastical jurisdiction, whatever the nature of the claims and counterclaims.) Popham's apparent language against self-prohibition may be taken as shorthand. As for Popham's dwelling on the mistakes on both sides: Perhaps the pervasiveness of folly in Pringe v. Child was an added reason for disregarding legal nicety on the side of the tarnished parson and trying to straighten the matter out as justice required.

The reporter adds one further note: "But the opinion of Coke at Lincoln was with the ecclesiastics, because it seems there was a later composition." Whatever the context of Coke's involvement, the hint is significant: It looks as if there was a further issue in the ecclesiastical suit, beyond the prescription, the endowment. and the bearing of the common law judgment -- viz., a claim that the vicar and parson had an agreement of relatively recent vintage governing the distribution of tithes. If so, the vicar probably had no ultimate right to a Prohibition -- as Coke presumably thought. The ecclesiastical court of appeal may have been perfectly entitled to find for the parson on the basis of the agreement, regardless of the other events -- and right or wrong (for although compositions between parishioner and clergyman were within common law jurisdiction, all matters concerning the apportionment of tithes between vicar and parson belonged to the Church.) In that event, all the Court did for the negligent vicar in Pringe v. Child was give him a chance to make the best case he could for himself. The decision basically reinforces Brewer v. Dawson and Baxter v. Hopes above, except that in Pringe v. Child the Court resorted to its knowledge of the record to aid a delinquent party, rather than simply to its knowledge of the law.

Hill v. Thorton (1629)[14] presents another kind of tension between the party's delinquency and the legal rights. In this case a landowner's son and heir got a Prohibition to stop the executor from probating his father's will. The surmise (a) claimed that the father did not make the will which the executor was seeking to probate; (b) recited that the purported will comprised both land and goods. (Prohibitions were often sought and

14 M. 5 Car. K.B. Croke Car., 165; Harg. 39, f.67b.

often obtained to stop probate of wills including both real estate and personalty. The theory behind such Prohibitions was that authentication of the will as a whole by an ecclesiastical judge would tend to prejudice anyone who wanted to challenge the will at common law *quoad* the reality. The basic fact behind that theory was that the probate authority of ecclesiastical courts extended only to personal estate. If land was claimed in common law litigation by virtue of a devise made pursuant to the Statutes of Wills, it made no legal difference whether or not the will comprising that devise had been admitted to probate. It was argued, however, that if a mixed will had been proved in ecclesiastical court a common law jury would be prejudiced in favor of its authenticity. Though sometimes successful, that argument did not always prevail. Mixed wills gave the courts trouble and led to mixed results. In the instant case, however, the heir-plaintiff almost certainly had good grounds for Prohibition, for he challenged the authenticity of the will *eo instante.* I.e.: He did not propose to stop probate of the mixed will because its authenticity *might* be contested in common law litigation; he contested it here and now.) The executor took issue on whether the father in fact made the will in question. After presentation of evidence at the trial, the heir-plaintiff was nonsuited -- probably involuntarily or semi-voluntarily, because the evidence manifestly supported the will.

Our case arises at this point. For the heir-plaintiff then tried to persuade the Court to withhold Consultation notwithstanding the nonsuit (and what I would assume to be virtual, though not literal, establishment of the will's authenticity.) In other words, he tried to invoke a flat rule that probate of mixed wills should be prohibited. His initial claim involved the theory that would lie behind such a rule, but did not rest flatly on that rule and did not require it as a flat rule, to be good claim. Now he was asking the Court to treat him as if from the start he had relied solely and simply on the theory that no mixed will should be probated. His counsel proposed parallel cases in support of "going by the truth" despite the nonsuit: e.g., suppose a clergyman sues for tithes of timber trees and pursuant to a Prohibition to the parties take issue on a collateral point (i.e., a point other than whether the trees were really timber). If the plaintiff is nonsuited, Consultation will still not be granted, because it is legally manifest that the ecclesiastical court has no jurisdiction to entertain a suit for timber.

The judges conceded the parallel cases. I find it difficult to visualize them concretely, but they come to saying that a nonsuited party will not necessarily lose, if according to the "legal truth" he ought to have won. There is a sense in which being nonsuited, even in some degree involuntarily, can be considered worse than losing the case one has stated on demurrer or by verdict. A non-prosecutor is negligent of his interest, as opposed to ill-advised or misinformed; or he has lost faith in his suit before any test of it is made; or he has convicted himself of frivolity by failure to produce any evidence in his favor, as opposed to showing something and being overruled by the jury. To the degree that he is worse, perhaps he has less right to be helped out of his legal mistakes by the court. Nevertheless, the Court agreed, he will not always lose. In the principal case, however, the judges would not listen to the heir-plaintiff's contention. Instead, they took one of the most standard and most sensible courses in mixed-will cases: Consultation *quoad* the goods only. The effect of that was to let the ecclesiastical court go ahead and probate the will as a document, so that the executor could assume his functions, legacies be collected, etc., while making as sure as possible that the ecclesiastical court's proof of the will would not be used against a common law challenger *quoad* the land. The judges said expressly in this case, as in others, that the fact of probate could not be given in evidence in a common law suit about the land. By formally limiting the Consultation to the goods, probate was rendered strictly irrelevant in any future land suit: an attempt to introduce it as evidence, however inconclusive, of the will's authenticity could be countered by saying (warrantably if a bit fictitiously) "No document mentioning land was ever proved in the ecclesiastical court -- fur the ecclesiastical court was expressly forbidden to touch this document insofar as it has to do with land."

Going by his nominal pretensions, this solution should have satisfied the heir (obviously his ulterior purpose was to block the will altogether because of interest in the personal estate.) The Court's decision amounts to simple rejection of the rule on which the heir was relying. In other words, the judges did not think that probate of mixed wills should be prohibited generally, only *quoad* land. Therefore the decision (as distinct from the dictum on parallel cases) says nothing as to whether a nonsuited party should be helped out by the Court. If the Court's view of the law

had been otherwise, or had been in doubt, it seems to me that the equities were still strongly against the heir-plaintiff, since he had -- and had failed to take advantage of -- an opportunity to disauthenticate the whole will at common law, thus avoiding the prejudice that he pretended to be concerned about.

With respect to the underlying rule, Justices Jones and Whitelocke (in the slightly fuller MS. report of the judges' words) conceded that in the leading Marquis of Winchester's Case probate of a mixed will had been prohibited *in toto,* but they thought that case distinguishable. It surely was, for in Winchester's Case the surmise said that the testator who made the mixed will was a lunatic, and the decision was against a Consultation *quoad* the goods where the effect of such a Consultation would have been to open the possibility of contradictory rulings on the testator's sanity (if indeed anyone had the interest or standing to challenge his sanity in the ecclesiastical court, whereas his disinherited heirs obviously had an interest in challenging it at common law.)

If Winchester's Case had parallelled Hill v. Thorton in form -- i.e., if issue had been taken on the testator's sanity and plaintiff-in-Prohibition had been nonsuited -- there might still have been good reason for withholding Consultation *quoad* the goods. For notwithstanding the plaintiff's negligence or inability to produce evidence, and even assuming that mere prejudice in the event of further common law litigation could be guarded against, it is hardly fitting to have a man's legacies paid on the assumption that he was sane when there is a strong probability that a jury will soon be asked to pass on his mental condition and may well find him mad. In Hill v. Thorton, *per contra,* the heir-plaintiff's whole case depended on the claim that probate might prejudice him, and he was in a weak position to urge that claim when he had created an opportunity to avoid prejudice, then neglected or tried-and-failed to exploit it. Such, perhaps would be the spelled-out meaning of Jones's and Whitelocke's discrimination between Winchester's Case and this case. (Their words: "...the Prohibition [in Winchester] was granted, *scil.* for the goods and for the land, since the cause on which the Prohibition was grounded, *scil.* the testator's lunacy, was entire and one and the same thing. But *contra* where the suggestion consists on several grounds, as here.")

E.
Variance between Surmise and Libel

Summary: Surmises were generally expected to conform with the libel by which the ecclesiastical suit was commenced--i.e., not to misrepresent, even in small ways, the suit one was seeking to prohibit. The libel (which in many cases was required by statute to be affixed to the surmise) showed the truth conclusively, but the courts would not on that account overlook inaccuracies in the surmise and prohibit any suit which on public grounds ought to be prohibited. They were disinclined, however, to grant Consultations (as opposed to merely declaring the Prohibition void) once a Prohibition was granted on an inaccurate surmise, and in one important case a principled exception was made to the requirement of conformity. There was therefore a reasonable chance that a mistaken surmise would not do the plaintiff-in-Prohibition much harm.

* * *

A further kind of discrepancy between "truth" and the party's statement of this case occurred when a plaintiff-in-Prohibition was inaccurate in reciting the nature of the ecclesiastical suit against him. As a rule, the truth was right in front of the Court, for in all Prohibition cases within 2/3 Edw.6,c. 13, Sect. xiv, a copy of the ecclesiastical libel had to be attached to the plaintiff's surmise. In any event, producing the libel would show conclusively and exactly what the ecclesiastical suit was about. Imagine; then, some difference between what the surmise says about the ecclesiastical suit and what the libel *shows.* Is there any point in penalizing the plaintiff for his inaccuracy? One would hardly think so, for it is difficult to imagine inaccuracy of this sort as amounting to more than clerical error. The plaintiff presumably has the libel right in front of *him.* What can go wrong except misreading, or a slip in writing, or some carelessness in communication when a plaintiff orally informs the attorney or clerk who draws the surmise -- hardly worthy grounds for letting justice fail?

Yet there is something puzzling about prohibiting an ecclesiastical court from entertaining a suit described as *x, because* someone has come and so described it, when it is manifestly entertaining no such suit. Cf.: John says to Father "Tell William to stop teasing the dog." Father sees with his own eyes that William is in fact teasing the cat. He would gladly intervene to stop that activity, but he obviously cannot do so by literally carrying our John's request -- by using the words "Stop teasing the dog."

It may seem unnecessary to reduce Prohibitions to "literally fulfilling the plaintiff's request" (i.e., to "Stop entertaining the suit commenced by this libel"). But will justice and orderly law-administration sometimes require such reduction"?

Our example may be altered to expose the problem: (a) Imagine extreme disjunction between what John complains of and what William is doing -- either there is no resemblance between the activity described and the activity observed, or there is resemblance in form but great difference in moral seriousness. Father may feel a certain unfairness about using his authority to prohibit William's activity -- even though abstractly he considers the interference justified -- when he would never have observed it had he not been deceived, or credulous, or unnecessarily shocked, by the request made to him. "I searched out William in an anxious and angry mood, intending to do as John urged me. But William is doing something quite different, and it's only mildly naughty. Though I could and maybe should tell him to stop, it seems a little unfair in the circumstances. If I spoke at all, would I speak too loudly because of the state I was in, or too softly because of the relief I now feel?"

Of course this story has no literal application to Prohibition cases. But it helps make this point: "Extreme disjunction" between surmise and libel is imaginable. E.g., A man sued for hay tithes claims a *modus* covering all tithes but recites that he is being sued for corn tithes. The *feel* of unfairness, or sense of *emotional* disproportion, that is crucial in the story is hardly going to enter directly into such reluctance to prohibit as one may have. But the residue of that feeling, or the unconscious force of such an analogy, may have something to do with it. There is no very good "cold" reason not to prohibit. Hay or corn, the ecclesiastical court is obviously entertaining a suit which it ought not to if the alleged *modus* is true. If one is reluctant to prohibit -- if it seems odd -- the reluctance is "irrational." But in what sense? Because one is all too legal or all too human? Because one has fallen for a "formalistic" or "essentialist" notion -- that a Prohibition "by its nature" refers to the case recited in the surmise, or that the surmise is "grounded" on the libel and must therefore pursue it? No doubt. But such notions may sometimes be projections from such real-life paradigms as the story represents, and perhaps there is value in legal "irrationality "which serves to maintain a kind of contact with those paradigms. "Extreme disjunction" can of course be taken as a limiting case,

short of which variance between libel and surmise could be overlooked, but once a limiting case is admitted the way is open to argue that degrees of variance are too hard to judge, and therefore that the best policy is to insist on strict conformity.

(b) Suppose that Father has a strong policy against acting on the boys' complaints unless he sees for himself that they refer to activity that is really going on. When John says "Tell William to stop teasing the dog," Father will not shout a command to that effect, intending William to hear it wherever in the house he may be. Instead, he will say "Take me to William," and will act only after that order has been fulfilled and he has observed William. Now go back to the original case: Father does *de facto* observe William teasing the cat. Recollecting his policy against acting blindly, he says to himself, "Though abstractly I ought to order William to stop teasing the cat, would doing so undercut my policy of insisting that the boys show me the offenses they complain of? I would not have acted on John's complaint if he had been unable or unwilling to lead me to William. I would in a sense not have believed him -- i.e., a certain presumptive incredulity, or suspicion of irresponsible or malicious complaints, underlies my policy. Is it quite consistent to act pursuant to, or because of, John's complaint here -- where it is vitiated on its face, demonstrated not have been literally credible (as opposed to presumptively suspect)? Is it consistent to demand that the boys be prepared to back up their complaints ostensively, but not to insist that they be accurate in their words? John does not appear to have been actually irresponsible or malicious here -- rather, he was mistaken, accountably or unaccountably, or merely let the wrong word escape by some trick of the psychopathology of everyday life -- and he has in a general way acted virtuously in calling attention to improper activity that manifestly is going on. Nevertheless, the inconsistency troubles me."

This version of the story has a direct application to Prohibitions. By virtue of 2/3 Edw. 6, many Prohibition were not lawfully grantable unless a copy of the libel was affixed to the surmise. "Presumptive incredulity, or suspicion of irresponsible or malicious complaints" was the clear policy of the statute. It would be legitimate to translate those attitudes, being sanctioned by statute, into a policy of the law, relevant even where the statutory requirement *qua* form of procedure did not apply. In the event that a Prohibition within the statute was somehow granted without a copy

of the libel having been affixed, Consultation probably would lie (as distinct from treating the Prohibition as null *ab initio* and therefore not amenable to being undone by Consultation, or not requiring it.)[15] Because of the statutory requirement and its implications, precisely the reflections attributed to Father in the story come to mind. Is there an inconsistency in demanding that plaintiffs-in-Prohibition demonstrate their good faith and the reality of the ecclesiastical suit, but not insisting that what they say conform to what they point to?

The arguments against following the libel and overlooking or mentally amending inaccurate surmises of course fall under the "private" approach to Prohibition cases. A full-blooded "public" approach would go the other way: If, as the libel conclusively shows, an improper ecclesiastical suit is going on, it should be stopped. It should be stopped (to allow for the outside possibility) even though the suit described by the surmise looks like a completely different suit from the one the libel attest to, even though perhaps no party to the unquestionably real suit wants to prohibit it, even though it has perhaps been decided long since. But maybe that is too "full-blooded." In any event, the cases show that variances between libel and surmise could give the courts trouble.

The earliest cases in point involved small misnomers. In Gibbs v. Rowlie (1583),[16] the surmise named the ecclesiastical plaintiffas "Rector of Nether Beddington." In the libel he was referred to as "Rector of Beddington," and there was nothing in the libel to suggest that Beddington and Nether Beddington were the same place. (In substance, the ecclesiastical suit was for tithes, against which a *modus* was claimed.) A Prohibition having been granted, Solicitor General Egerton moved for Consultation. His argument had two prongs: (a) If the Prohibition had been granted without any libel affixed, Consultation would lie. This is in effect the same case -- i.e. failing to show (by attaching the libel) that there is any suit by the Rector of Nether Beddington going on is no worse, or no different, from showing that a suit by the Rector of Bed-

15 One undated note in the reports (Harl. 4817,f.162) says flatly that Consultation will be granted in that case. See below for doubts on this point.

16 M. 25/26 Eliz. Q.B. 1 Leonard, 272; Harg. 11, f.30 (Reports fully accordant, but M.S. gives the argument for Consultation more adequately.)

dington, very possibly a different man, is in progress. (b) As a practical matter, denying Consultation is as good as letting the inaccurate or logically inappropriate surmise do the service of a correct surmise. For without a Consultation the ecclesiastical court will not proceed. In other words, there are only two choices -- to penalize plaintiff-in-Prohibition or not to penalize him. The alternative to Consultation -- treating the Prohibition as void *ab initio,* pretending that since no suit by the Rector of Beddington was ever prohibited the ecclesiastical court is free to proceed--is to leave plaintiff-in-Prohibition in as good plight as if he had surmised correctly. For in fact the ecclesiastical court will not dare to proceed, in the face of the Prohibition, on the basis of a technicality.

The Court in Gibbs v. Rowlie rejected Egerton's argument. The Consultation was denied. The Court said, however, that since the Rector of Beddington had never been prohibited, "let the parson proceed in the Spiritual Court at his peril." Several observations must be made on this decision: (1) It obviously says that Consultation will not be granted when there is a variance between libel and surmise, at least when the variance is minor and unlikely to be more than a slip. (2) From the reports, the reasoning behind the decision remains ambiguous: (a) The Court might have rejected Egerton's premise -- that Consultation lies if a Prohibition is mistakenly granted when a copy of the libel is not attached. (See the note above for authority *contra.* However, the alternative of regarding the Prohibition as merely void and the ecclesiastical court as entitled to proceed is available. The text of 2/3 Edw. 6 is not, in my opinion, decisive. The requirement of affixing the libel is intermixed, in Sect. xiv, with the requirement that preliminary proof of surmises be given within six months. Consultation is plainly required if the preliminary proof is not supplied. Whether it is also required if the other procedural hurdle--affixing the libel -- is sidestepped could be argued both ways on the basis of the text. We have encountered the doctrine, in connection with 50 Edw. 3, that a Prohibition granted for failure of proof within six months is "really" void *ab initio,* the statutory Consultation being mere notice of that fact.)

(b) The Court might have accepted Egerton's premise while distinguishing variance cases. There are three possible bases for distinguishing: (i) Failing to attach the libel is a serious failure to observe a categorical and reasonable statutory requirement. If by any chance a Prohibition slips through despite violation of that requirement, the plaintiff should be penalized, and perhaps the statute itself demands a Consultation.

Variances between surmise and libel, at least ones of the sort this case presents, are likely to result from mere carelessness or understandable mistake. Therefore the plaintiff's offense is less serious and the reason for penalizing him less -- and anyhow there is no statute to worry about. *(Contra:* If a prohibition slips through without a libel attached to the surmise, it is a judge's mistake. Presumably the judges ought also to check whether the surmise and libel correspond, when a libel *is* attached, but perhaps the fault is somewhat more the party's though a lesser fault -- i.e. if the libel is there, the judge has a right to suppose the party has looked at it carefully in drawing his surmise. Further, might a party not fail to attach a libel in the belief that his case was outside 2/3 Edw.6--whereas only carelessness could explain failure to follow the libel? I know of no cases on the scope of 2/3 Edw. 6 *quoad* affixing the libel, but the many cases on its scope *quoad* proof within six months prove that it was often questionable what Prohibitions the statute applied to. Its scope was clearly the same with respect to both of the procedural hurdles.) (ii) The logic making failure to point to any ecclesiastical suit equivalent to mispointing is specious. (iii) Consultation is less necessary in variance cases. If the ecclesiastical judge is prohibited in a correctly described suit, he will obviously not proceed without Consultation. It may be the case that the Prohibition ought not to have been issued because no copy of the libel was attached, but the ecclesiastical judge has no way of knowing that. If it were pointed out to him, he would not be competent to decide whether or not the Prohibition was valid. The ecclesiastical judge who would presume to interpret a statutory requirement and overrule a common law act would be hardy-to-foolhardy. But if an ecclesiastical judge is prohibited, say, from entertaining Smith v. Brown, why should he not proceed in Jones v. Robinson? Even if he has reason to be pretty sure that "Smith v. Brown" is a mistake for Jones v. Robinson, he has a "plea," a good-enough basis for believing he may proceed with impunity.

(3) "Jones v. Robinson" notwithstanding, the Court probably assumed that the ecclesiastical judge would not proceed without a Consultation. The Court probably intended, by denying the Consultation, to avoid inflicting any penalty on plaintiff- in-Prohibition and to insure that the case would turn out as if the trivial variance did not exist. While the parson *could* go try to persuade the ecclesiastical judge to proceed -- and if, per-

haps against the odds, he was successful, he would be out of peril of the attachment procedures that followed on violation of a Prohibition -- he would no doubt be better advised to contest the *modus* at common law if that was the real question. After all, in this case the choice was Consultation or no-Consultation. No-Consultation was the way to go easy on plaintiff-in-Prohibition, short of some special measure to protect him absolutely against the consequences of his mistake, and the court was not invited to think about that. (E.g., staying ecclesiastical proceedings in the "real" suit until the plaintiff amended his surmise to conform to the libel, then issuing a new Prohibition.) If it is at all relevant that the Court did not propose something like that on its own -- then the decision was in a sense a compromise: the parson was dared to go back to the ecclesiastical court, the parishioner perhaps a little frightened by the chance that he might.

(4) The Court said the ecclesiastical judge was free to proceed because there was no Prohibition referring to the Rector of Beddington. I.e.: The Prohibition in this case followed the surmise and said *Nether* Beddington. The chances are that the discrepancy was not noticed when the Prohibition was issued. A seemingly pettifogging, but perhaps not wholly insignificant, question may be raised on this point, however. Presumably if a judge notices a variance he ought to grant no Prohibition at all -- just as if no copy of the libel were affixed. Plaintiff-in-Prohibition, being apprised of the reason he could not have a writ, would be perfectly free to start over or, if permitted, to amend his present surmise, *Sed quaere.* Two other courses would be theoretically open to a judge who noticed a variance: (a) to grant the Prohibition, following the surmise -- thus leaving the ecclesiastical plaintiff and ecclesiastical judge free "at their peril" to proceed in the real suit; (b) to grant a Prohibition in the terms of the libel, without requiring plaintiff-in-Prohibition to recommence or amend. In contradistinction to the case of failure to affix the libel, no statute forbade either of these courses (unless, along Egerton's line, variance cases should be regarded as the same in effect as failure-to-affix case -- within the policy or even the equity of the statue.) Course (a) would seem an unintelligent thing to do, for it would create an entirely unnecessary problem for the ecclesiastical court and defendant-in-Prohibition. Course (b) would be both sensible and oriented toward the public purpose of halting unwarranted ecclesiastical suits economically and without regard for carefulness of the "informer's" behavior *qua* private party. It is, however,

(apart from any bearing of 2/3 Edw.6) subject to the kind of philosophic disquiet I have indicated above. Gibbs v. Rowlie does not answer these questions , but it might be considered relevant in its implications if they were to arise.

In Lovegrove v. Inocke (1588),[17] George Lovegrove was sued in an ecclesiastical court. He got a Prohibition, naturally enough, in that name. It appeared from the libel, however, that the ecclesiastical suit was brought against "Gregory" Lovegrove. The reporter makes it clear that "Gregory" was simply a mistake. All the brief report says is that the Prohibition "was abated." I.e.: It was held merely void on account of the variance. The ecclesiastical court was left free to proceed against a non-existent person! If there was a motion for Consultation (of which the report gives no sign) it was denied. George could perhaps find a way out by rewriting his surmise so as to show the misnomer in the libel and request in terms that the Prohibition refer to the suit against "Gregory." If he wanted any further protection, he would have to make such an attempt. As things stood, the Court would not act on its own to make sure that the ecclesiastical judge refrained from any further moves against him. The danger, I should think, would be that the ecclesiastical judge would permit rectification of the libel and then proceed against a person *in esse.* George could no doubt have another Prohibition in that case, showing the amended libel, but the responsibility would be his. A stay of proceedings or new Prohibition now, referring to the suit against "Gregory," would have something to recommend it, I think. But what if (contrary to the clear truth here) there really was a Gregory? Should George be able to initiate prohibition of the suit against Gregory? From a public point of view, we may say "Why not?," but the public point of view could not be pushed that far.

In Hutton v. Barnes (1605),[18] the surmise said that the tithe suit in question was for 40 fleeces of wool. The libel showed that the suit was in fact for 400 fleeces. On account of this variance, the ecclesiastical plaintiff moved for Consultation. The Consultation was granted at Assizes (the only instance of such a step at Assizes I know of.) The propriety of

17 T. 30 Eliz. Q.B. Croke Eliz., 105.
18 M. 3 Jac. K.B. Yelverton, 79

the Consultation was brought in question in the King's Bench by writ of error. The Court reversed the judgment below.

In justifying the decision, the Court relied on the substantive grounds for Prohibition and said that the Consultation would have been appropriate if those grounds had been different. In other words, sometimes Prohibitions granted despite variance between surmise and libel should be undone by Consultation and sometimes not, depending on the nature of the common law's title to prohibit. In Hutton v. Barnes, plaintiff-in-Prohibition claimed a total exemption from tithes by virtue of the Statute of Monasteries and an exemption allegedly enjoyed by the monastic house at the time of the dissolution. The Court said that the variance was not material in this case because the claim to Prohibition came to asserting the ecclesiastical court's total lack of jurisdiction in the suit--meaning by its "total lack of jurisdiction" its alleged want of power to hold the land in question charged by any tithes at all ("... the suggestion discharges the Spiritual Court from all manner of power for any tithes at all; and therefore the variance is not material." Earlier in the report, plaintiff-in-Prohibition's prescription is said to "oust the Spiritual Court of all jurisdiction.") The Court then proceeds to distinguish *modus* cases: There, the tithe suit does "originally" belong to the ecclesiastical court, therefore agreement between libel and surmise is material. ("...the suggestion is grounded upon the libel, and the plaintiff is to stay the proceedings there but for one cause certain.")

This decision is not easy to make sense of. It must, I think, be analyzed from two angles (a) "at common law"; (b) in the light of 2/3 Edw.6. (a) As to the first: is there any point in considering variances more material in one case than another, and particularly in distinguishing monastic-discharge from *modus* cases? The colorability of the distinction can be seen by comparing polar-opposite cases: Imagine an ecclesiastical suit utterly and scandalously beyond ecclesiastical jurisdiction -- e.g., a suit for five-pounds damages for breach of contract to sell a horse. Suppose to surmise for a Prohibition says four-pounds, or a cow instead of a horse, and that the truth is immediately evident from the libel. It is unimaginable that a Consultation would be granted in this case. On the other hand, imagine a suit for hay tithes and a *modus* alleged applying to corn tithes. (The Court in Hutton v. Barnes put this latter case.) A Consultation must obviously be granted here, if despite the variance a Prohibition slips through. For a *modus* applying to corn is simply irrelevant

vis-a-vis parson's claim to hay. Yet writing "corn" instead of "hay" is just as likely to be a mere slip as writing "40" for "400.") Thus, comparing extremely divergent cases shows (1) that variance between surmise and libel must sometimes have a material bearing, and sometimes not, on whether to prohibit and whether to grant Consultation; (2) that the distinction does indeed have to do with the ecclesiastical court's "original" jurisdiction or lack of it. The Court in Hutton v. Barnes took two steps -- perhaps not necessary steps--within this framework. (1) Asserting a monastic discharge was assimilated toward (in our example) asserting the ecclesiastical court's utter incapacity to entertain a suit for breach of contract. The difference is obvious: No one ought to bring a contract suit in an ecclesiastical court, and the ecclesiastical judge ought not to touch one. The statutes of *Praemunire* were made against just that. But a parson who seeks tithes from Blackacre does no wrong to sue in a ecclesiastical court, and the Court no wrong to listen to him, though the parishioner may have reason to stop the suit until the matter can be tried at common law. What difference if that matter is a monastic-discharge or a *modus?*

On the other hand, the contract case and the monastic-discharge case can be stated to look alike. In the contract case, the surmise for a Prohibition says "No suit of this type has any business in the ecclesiastical court" (implying -- we have agreed -- "whether or not I have described the particular suit against me accurately, for all that is material is the *type* of suit".) In the monastic-discharge case, the surmise says "No suit of any sort for tithes from Blackacre should be brought, for the land is totally exempt." Why not the same implication, "whether or not I have described the particular suit against me accurately, for all that is material is that it is a tithe suit, and no suit of that sort is good *quoad* Blackacre"? In a *modus* case, the mere *type* of suit -- that the ecclesiastical suit is for tithes -- cannot possibly be *solely* material, for then Prohibition would have to be granted, or Consultation denied, in the impossible case (where the libel says "hay" and the statement of the *modus* in the surmise says "corn.") Putting it more practically, when the libel says "hay" and the surmise "corn," the common law judge would be warranted to say, as it were, "Wait a minute. What about this discrepancy? Hasn't there been a clerical mistake here?" But he ought not -- the reasoning goes -- be free to say that. When on the face an utterly irrelevant *modus* is alleged, the judge's only choice should be to deny Prohibition. (2) From the proposition that

some variances in *modus* cases must be material, the Court in Hutton v. Barnes advanced expressly to the generalization that accuracy is material in *modus* cases, and to the application thereof to the *modus* case directly parallel to the principal case: In a *modus* case, the judges said, a variance as to the amount of tithes sued for (e.g., 40 fleeces as against 400) would be just as material as a mix-up between hay and corn. Again, this step is not necessary, though the difficulty of distinguishing degrees of accuracy and materiality perhaps justifies it.

(b) As to 2/3 Edw.6: The statute probably entered into the decision, at least to help the distinction above come out. It could account for the decision altogether. With respect to another issue, the statute was directly involved in Hutton v. Barnes: The Assize Justices, in addition to granting Consultation, awarded defendant-in-Prohibition double costs under 2/3 Edw.6. This award was also objected to by the writ of error, and it too was reversed by the King's Bench. The Assize Justices clearly reasoned as follows: The statute gives double costs to defendant-in-Prohibition when the surmise is not proved within six months. Since the proof requirement and the requirement that a copy of the libel be attached are linked together in the statute, double costs must also be given when plaintiff-in-Prohibition fails to affix the libel. Since there is no difference between affixing no libel and misrepresenting the one affixed, double costs should be given in the principal case. In reversing the award of costs, the King's Bench held expressly that the double-costs provision of the statute applied *only* to failure of proof within six months.

Now, as to the merits of the Consultation: The Assize Justices, in reasoning as they did about the costs, must have reasoned similarly about the substance. Viz.: "2/3 Edw. 6. requires attachment of the libel with the same force and seriousness as it requires proof within six months, for it penalizes violation of both procedural requirements in the same way. Insisting with that force and seriousness on attachment of the libel points to a policy of making demands on plaintiff-in-Prohibition, of making sure that his surmise is in reaction to an ecclesiastical suit that is actually going on. Leniency toward inaccurate surmises, or indifference as to whether the Prohibition is really 'grounded' on the libel so long as a libel is there, would violate the policy, if not the direct force, of the statute." In reversing the conclusion to which this reasoning was probably the path, the King's Bench might have said, "2/3 Edw. 6 does not involve such rigor

against plaintiffs-in-Prohibition. It limits double costs to one of the requirements it sets up. The other one -- affixing the libel -- is shown to be less serious because violation is not punished by double costs. It perhaps is to be enforced by the other and lesser sanction -- obligatory Consultation if a Prohibition slips through. But must it always be so enforced? There has been doubt as to whether even the more serious proof requirement applies beyond *modus* cases. Its application to monastic-discharge cases has certainly been questioned. Perhaps the history of interpreting the proof requirement points to a distinction between cases 'originally' belonging to the ecclesiastical court and others. If so, the same discrimination favoring plaintiff-in-Prohibition must apply to the lesser demand on him -- affixing the libel. The more so because there would be reason for making such a distinction even if there were no statute (the reasons under (a) above.)

Therefore we conclude, at least probably, that no libel was required by the statute to be affixed in this monastic-discharge case, or at any rate that no Consultation should have been granted if no libel had been attached. If that is true -- even probably -- the still lesser offense of inaccurately reciting the ecclesiastical suit, or not 'grounding' the surmise on the libel precisely, which is not directly within the statute, should have the benefit of the distinction." The Court in Hutton v. Barnes did not, so far as the report shows, talk in these terms -- rather, it discussed the case "at common law." I suspect, however, in view of the statute's involvement in the case and in view of the difficulty of treating the matter of the costs and the matter of the Consultation as entirely separate, that such thoughts as I have spelled out entered into the Court's perspective on the case. It would have been possible and rational, though the report does not indicate that this happened, to hold simply that the requirement of showing the libel does not apply to monastic-discharge cases, and hence that variances do not matter in such cases *by any pretended force of the statute.* It would remain a question at common law whether defendant-in-Prohibition could come forward and show the libel, claiming Consultation on the ground that plaintiff-in-Prohibition had misrepresented the ecclesiastical suit.

One further point should be observed on Hutton v. Barnes. The Court held that Consultation should not be granted in the instant case. Where does that leave the parson? Free "at his peril" to carry on in the ecclesias-

tical court? Not subject to procedures incident to violation of a Prohibition because only a non-existent suit concerning 40 fleeces had been prohibited? Though the judges said nothing as to that, it is unlikely that that is the implication they wished to leave. Denial of Consultation was based on conceiving plaintiff-in-Prohibition's claim as an objection to *any possible* tithe suit with respect to the land in question, whether the one described in the surmise or not. The Prohibition should be interpreted correspondingly, as "carrying out the plaintiff's request" -- viz. as saying "You are forbidden to entertain *any* tithe suit with respect to this land, whether the one for 40 fleeces described by the plaintiff or any other, pending common law adjudication of the matter of discharge." On the other hand, by way of strong dictum, the Court held that Consultation should be granted in *modus* cases when the surmise varied from the libel. No exceptions appear to be admitted. Both ways, therefore, Hutton v. Barnes goes counter to the two misnomer cases above.

Beyond the three cases just considered, I have found none directly on the effect of variance between surmise and libel. A few others involve the rule that surmise and libel ought to correspond, but in less direct ways. Dean and Chapter of Wells v. Goodwin[19] illustrates how, in a complicated case, it could be problematic *whether* the surmise and the libel really disagreed. The ecclesiastical suit purported to be for a pension settled on a vicar by the former monastic owner of a rectory, in which case the claim was plainly within ecclesiastical jurisdiction. (There was a class of annuity-like payment known as a "spiritual pension" running between parson and vicar or other ecclesiastical persons. The common law took no notice of such dues but left the ecclesiastical courts free to enforce them, as intra-Church business.) The rector wanted to show that what the vicar was, or should be, suing for was not a "spiritual pension," but what amounted to a rent or annuity charged upon the rectory -- i.e., an ordinary temporal due, concerning which the common law should ultimately judge -- and then to show that nothing was now owing under the temporal transaction which in reality gave the vicar's claim such color as it had. He attempted to plead the matter which would tend to show this in the ecclesiastical court, then got a Prohibition on surmise that his plea had been disallowed. The vicar argued in the King's Bench that the surmise

19 P. 4 - T. 5 Jac. K.B. Harl. 1631, f.302b.

had misrepresented the ecclesiastical suit -- in effect, that whereas the libel set up a claim to a "spiritual pension," the surmise talked as if the ecclesiastical suit were to recover the temporal due which the rector thought was the only colorable claim. The rector denied this, arguing that he had represented the *purported* object of the ecclesiastical suit accurately, and then gone on to show his reasons for believing that its real object was, and only could be, something else. The Court finally held for the vicar, granting Consultation. I find it difficult to access this decision and to discern in what degree it depended on perceiving a conflict between the surmise and the libel. In other words, *could* the surmise have been rewritten to conform better to the libel? Or was the rector trying to do the impossible (move his properly ecclesiastical claim -- that there is no "spiritual pension" as alleged -- over to the common law by surmising what amounted to his evidence -- that the vicar had once been granted a rent and in virtue of that grant had collected something which he now claimed to have collected in virtue of his "spiritual pension")? I think the latter is likely -- i.e., that conflict between libel and surmise here was not a procedural mistake, but an inevitable symptom of a misbegotten attempt.

In Wrothmeal v. Gill,[20] as I understand the case, a Prohibition was denied in part because interpreting the surmise so as to make it state a sufficient cause for Prohibition would throw it into conflict with the libel. The parishioner in a tithe suit wanted to say, in effect, "I am being sued by a mere hired curate, not the holder of the living or his vicar -- hence by one without title to the tithes." He could not surmise this as a *fact,* because as a fact it could (as the Court held) be pleaded in the ecclesiastical court. If the ecclesiastical court ruled out the defense -- i.e., took the erroneous position that a "stripendiary" curate was entitled to recover tithes -- Prohibition would lie straightforwardly, but not before. If the parishioner was to get a Prohibition now -- before pleading in the ecclesiastical court -- he needed to make it appear from the face of the libel that the ecclesiastical suit was brought by a legally unqualified person. The case turns on his attempt to do so. The surmise found fault with the libel for reciting that the ecclesiastical plaintiff was curate without saying that he was "admitted, instituted, or inducted" (the three distinct "legal ceremonies" whereby

20 M. 1 Car. K.B. 3 Bulstrode, 310.

a man was installed in a living.) In other words, the parishioner claimed that the libel failed on its face to show that the ecclesiastical plaintiff held a living with tithes appertaining. The Court refused to accept this argument. By construction of the word *"curatus"* itself, plus other language in the libel, the judges held that the ecclesiastical plaintiff had sufficiently set out his *pretense* to be holder of the living, whether or not it was true. At this point, if I understand the report correctly, the parishioner's lawyer tried to save the day by arguing that his surmise sufficiently pleaded the "truth" (that the parish was impropriate, having neither parson nor vicar with cure of souls), and that Prohibition should lie on that showing (though not on a showing simply that the person suing in the ecclesiastical court did not hold the living).

Whatever the merits of this (either as to construction of the surmise or as to the law), Justice Dodderidge said that a surmise to such effect would be contrary to the libel. The rest of the Court clearly agreed, for the Prohibition was denied and the party told to plead his matter in the ecclesiastical court. I take the point to be: According to the libel as construed, the ecclesiastical suit was brought by the holder of the parish living, a *"curatus."* A surmise which said in effect, "There is no such thing as a *'curatus'*-holder-of-the-living in this parish" would contradict the patent reality that the ecclesiastical suit was brought by "such a thing," though of course his claim to be that might be false. (Cf. the last case: "I claim so much as a 'spiritual pension'" cannot be met by "But you cannot possibly be claiming a 'spiritual pension' -- though you might have color to claim a rent." So here: "I am suing you as the beneficed clergyman of X" cannot be met by "But you cannot possibly be suing me in that capacity -- for X has no beneficed clergyman." The legal pretense of the libel, however refutable, must be accepted, as must its factual statements -- e.g., that tithes for so many acres, so many fleeces, such and such a product, are claimed -- though those statements may of course be untrue, in the sense that a man sued for hay from 100 acres might in fact have only ten acres of hay. In both of the last two cases, however, it seems to me that speaking of conflict between libel and surmise is only a manner of speaking. Plaintiffs-in-Prohibition were not held to accuracy as a matter of procedure, but rather told as a matter of substance that Prohibition will not lie on surmise of facts tending to show the ecclesiastical suit's lack of color, or "impossibility," anymore than on

the surmise that what a libel says is simply untrue. In either case, the matter should be pleaded in the ecclesiastical court and resort to the common law had only when and if the ecclesiastical court commits an error within the common law's power to control.)

In Townshed v. Baker,[21] a *modus* was surmised to stop a suit for tithes of furze (a shrub used for fuel, sometimes cultivated.) Defendant-in-Prohibition demurred to the suggestion. He advanced a number of objections to the surmise, *inter alia* a conflict between its language and that of the libel: Whereas the libel said that the suit was for tithes of "furze lands," the surmise said it was for tithes of "furzes." In relation to the matter of the contention, the discrepancy was not trivial, since the parson's suit was directed at land *sown* with furze, and therefore possibly withdrawn from production of other tithable crops, as distinct from furze harvested in the state of nature. In substance, a *modus* applicable simply to "furzes" might be interpreted to apply only to the wild variety. On behalf of plaintiff-in-Prohibition, however, it was argued that the demurrer amounted to a waiver of objection to the surmise-libel variance. That is, the admission of facts involved in every demurrer was, *inter alia,* an admission that the ecclesiastical suit was what the surmise said it was. The Court apparently accepted this point, for the Prohibition was upheld. The decision, of course, was based on the Court's opinion that the *modus* was legally sufficient. Holding the demurrer to admit that the surmise recited the ecclesiastical suit correctly, notwithstanding the libel, would in no way have prejudiced the parson's claim that the *modus* did not extend to cultivated "furze lands," or any other of his legal contentions. For our present purpose, the decision only says "Demurrer waives objection to variances." Therefore a defendant-in-Prohibition who wanted to take advantage of a variance should be advised to move for Consultation instead of demurring.

Lastly, there is one case from the Admiralty in which the principle that libel and surmise must conform was in a sense tested. Prohibition to the Admiralty were not within 2/3 Edw.6 -- i.e., the statutory requirement that a copy of the libel must be attached to the surmise. Therefore, inso-

21 P. 13 Car. C.P. Harg. 23, f.11b.

far as failure to represent the libel accurately was conceived as equivalent to failure to attach the libel, conformity perhaps need not be insisted on in Admiralty cases. Moreover, conformity in one strict sense could not possibly be demanded in the most common Admiralty case: A sues in the Admiralty on a contract allegedly made on the high seas. B seeks a Prohibition on surmise that the contract was made on land. Obviously B's whole point is to contradict something the libel says. Granted that Prohibition lies, B cannot be asked to accept A's pretense in the way one being sued for what was labeled a "spiritual pension" was required to accept the ecclesiastical plaintiff's pretense. (Though claiming a "spiritual pension" contrary to the reality could be a jurisdiction-giving maneuver like alleging a contract to have been made at sea.)[22]

In Don Alonso v. Cornero,[23] however, there was a reasonable question as to whether the surmise followed the libel properly. In this case, the Spanish ambassador sued a Spanish subject in the Admiralty, alleging that Cornero's goods had been confiscated for crimes against the King of Spain, and that Cornero had come to England carrying 3,000 lbs. of tobacco worth £800. The ambassador prayed attachment of the confiscate tobacco in the hands of _____. I.e.: He left a deliberate blank in the libel, by way of saying "I request attachment of the goods in whosever hands they now are, Cornero's or anyone else's." The tobacco was actually attached in the hands of Watts, who then sought a Prohibition. The theory behind his application was that the present ownership in England of the goods (which he claimed to have bought for value) should be determined by the common law, even though the goods were confiscated before they were brought into England. The court accepted this substantive theory

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22 The point that a surmise may say that a contract was made on land, contrary to the Admiralty libel, was relied on in Hughe's Case (M. 11 Jac. C.P. Godbolt, 214, to support a parallel and equally obvious ruling: That a surmise founded on 23 Hen.8, c.9, may aver that the ecclesiastical defendant is being sued out of his home diocese, though that does not appear from the libel. That this was held, *inter alia,* in Hughe's Case suggests that the point was challenged. I can only imagine a serious challenge as a way of saying that Prohibition should not lie at all to enforce 23 Hen. 8. I.e., "Surmises should conform to libels. If a libel says or implies that the defendant lives in the diocese where the suit is brought, he may not surmise the contrary. Therefore, exception to ecclesiastical suits based on 23 Hen. 8 must be left to the ecclesiastical courts." The parallel with the Admiralty then comes to saying that Prohibitions to enforce 23 Hen. 8 are just as acceptable in principle as Prohibitions to stop contract suits falsely or fictitiously laid on the high seas.

23 M. 9 Jac. C.P. Hobart, 212.

and granted the Prohibition. It was argued by the way, however, that Watts had no standing to bring a Prohibition founded on the libel against Cornero because he was not named therein. The Court expressly rejected this argument, saying that as "a party grieved by that undue suit" he was entitled to his Prohibition. (N.b., as a "party grieved," a party in interest -- *not* because the interest of an "informer" is irrelevant as long as the suit is undue.) The decision on this point seems entirely sensible, especially considering the blank in the libel. Strictly speaking, however, allowing a party whose involvement does not appear from the libel to stop a "foreign" suit may be seen as inconsistent with the usual policy of insisting that the libel attest to the reality of the suit to be prohibited. (If Watts had been turned down on a nicety, he would perhaps have been able to stop the attachment proceeding as such, as opposed to the suit against Cornero. *Quaere.)*

By and large, one must conclude that conformity between surmise and libel was demanded. The serious exception was the one made in Hutton v. Barnes for Prohibitions conceived as going to the original or total jurisdiction of the ecclesiastical court. However, the logical peculiarities of this subject and the direct or indirect intrusion of a statutory rule tend to disqualify it as a test of the "favor" of Prohibitions or the relative weight of "public" and "private" values.