VI.
Pleading

A.
Introduction

Let us now turn to cases on errors or alleged errors in pleading. In the classes of cases just above, there was a "truth" to compare with the party's misstatement or mistake. A verdict said one thing and the plaintiff another; or there was a legally correct way to frame a complaint over against the plaintiff's misconceived surmise; or the libel established what the ecclesiastical suit was about, whereas plaintiff-in-Prohibition misrepresented it. By definition, pleading problems proper arise when there is no "truth" in front of the Court. A man says something in order to move the Court to act for his benefit. The question may then arise whether he has "spoken properly," or whether he has spoken so improperly that the step he requests should not be taken. Has he contradicted himself? Spoken ambiguously? Been too vague? Said too little? The Court cannot respond by saying, "It makes no difference, for we know the truth and can act on that." It must respond in ways like the following: "There is a contradiction of sorts -- but either way, or at least one way, he has given us a sufficient reason to act in his favor"; or, "Though he might have been more precise or fuller, indeed should have been, what he has left out is not essential to his purpose"; or "Though he has not said enough to give us reason to act, we will presume that what is left out is favorable to him unless the other side says the contrary." Those, of course, are lenient responses. The judges may equally well insist on "immaculate speech" even when there is a reasonable basis for mitigating such insistence. What counts as "immaculate" in pleading is of course conditioned by the traditions of legal practice -- as meaningful, clear, or polite speech in ordinary discourse is defined by the conventions that have developed in many social contexts. Yet, for all the importance of convention, there are natural limits to the unintelligibility, vagueness, or incompleteness than even the most permissive court can tolerate.

So in ordinary life a request or order can be so garbled that it is impossible to carry out; or not fulfillable except by guessing -- without much confidence in one's guess -- as to what the speaker is driving at; or, short

of that, so unnecessarily muddy that it is unfair to expect the hearer to take the trouble to guess; or perhaps the speech is suspiciously unclear, as if the speaker were trying to get his way by creating confusion, knowing that a clear statement of his purpose would be laughed down. The common law, of course, had a proud tradition of "good pleading." Litigants were presumed to be advised by professionals who knew their business. The courts we are dealing with as a rule held the party responsible for "speaking properly" well-short of the "natural limits." We need to ask whether such standards were relaxed in the special circumstances of Prohibition law, but we should expect relaxation to be, at best, relative to a strict tradition.

In one aspect, then, the issue about pleading in any juridical context is how hard the litigant's utterance should be scrutinized as against the "natural limits" of clear and responsible speech. I.e.: Ought one to see mere unintelligibility where it *can* be seen through rather "cold" and rigorous logico-grammatical spectacles? Or ought one to avoid seeing it in legal discourse when it would not be visible in ordinary discourse, where we usually judge with the eye of common sense, having regard to the speaker's probable intent and probable justifiability in the real-life context?

In other aspects, pleading problems are more markedly the product of convention. So are everyday problems about "proper speaking" and whether to act on a request or order: "Pass the meat and potatoes" is not an unintelligible request, but it may be regarded as inappropriate and unworthy of being carried out, (a) because it is incomplete owing to the omission of "please" and (b) because it may be regarded as impolite to ask for two dishes at once. At the limits, an utterance strongly condemned by etiquette may seem *quasi*-illogical, or one may express the condemnation by picking holes in the logic. "The rule in this household is that requests for dishes must give evidence on their face of being made in a courteous spirit. By omitting 'please,' you have given no such evidence and therefore failed to state a cause why I should pass you anything -- just as if you had left out the word 'pass.'" Or: "Your request is contradictory or ambiguous because, for all that appears, it demands the simultaneous performance of two acts which cannot in all aspects be done at the same time. If that is not literally true, still I cannot imagine that your real intention is not to help yourself first to the meat and then to the pota-

toes, or *vice versa.* Surely it would have been clearer, as well as more polite, to make two separate requests in accord with the intended sequence."

One type of pleading problem strongly tied to positive legal tradition derives from the common law's "take your choice" policy -- demur, or traverse, or confess-and-avoid. In "nature," it is perfectly common and intelligible to say, e.g., "I did not hit you, but even if I had I would have been justified." The common law's insistence on either denying the facts alleged against one or admitting them and disputing their legal effect engendered problems in the construction and evaluation of pleading language: E.g., being forced either to deny or admit, I assert facts radically inconsistent with the facts alleged against me. but omit to deny the latter in the expressly negative language implied in the idea of "denial." If I have really done that, I have "spoken badly" in terms of convention. As in the meat-and-potatoes case, the failure of manners can be taken as a failure of logic, for there is a sense in which no affirmation, however pregnant with negation, is ever fully delivered of its burden. That would be true even if a choice between traversing and pleading were not insisted on, but the convention sharpens the eye to the contradiction. The etiquette is not necessary, and how deserving it is of strict enforcement is a typical problem, but it does have a basis in natural sense, for there can be genuine uncertainty, e.g., as to whether an affirmation is meant in effect to deny, or as to whether verbally it is tolerably close to at least an implied negation. (So, in some circumstances, a request to "pass me everything on the table" might be genuinely baffling to execute, as well as grossly rude and "constructively" illogical.) Within the set of standards dictated (as strict standards) by a positive legal tradition and considered deserving of strict enforcement, problems will arise as to whether the rules have really been broken -- e.g., a statement may mix affirmative and negative elements in such a way that it is problematic whether it is an affirmation improperly trying to do the work of a negation, or a good-enough negation with affirmations superfluously thrown in.

Legal convention is also strongly determinative of "burden of pleading" problems -- problems as to how much a party must say to move the Court tentatively in his favor (i.e., to move it in his favor unless and until the other party makes a countervailing statement.) What counts as "stating a *prima facie* cause of action" and what counts as "anticipating a defense" is a matter of convention, though the conventions are influenced

by real-life probabilities. E.g. To commence an action for battery, Smith might be expected to say "Jones struck me *intentionally,"* but not to add "and not in defending himself." Convention *could* permit Smith to omit the "intentionally," leaving it to Jones to plead accident. It *could* also require Smith to anticipate common defenses such as self-defense. Yet there is reason for the convention: people are often struck accidentally, so a striking should not be presumed intentional until the contrary is asserted; more often than not, intentional strikers appearing in the role of defendants were not defending themselves, so an intentional striker will be presumed at fault unless he speaks up to deny it.

The "burden of pleading" was usually clear at common law because of the writ system: The writs *ex hypothesi* stated valid causes of action; a plaintiff "declaring upon the writ" -- spelling out his complaint along the lines of the writ -- must obviously say as much as the writ says and equally obviously need not anticipate defenses which the writ does not anticipate. Prohibitions, however, were a species of "procedure without writ." Questions could therefore arise as to whether surmises said as much as need be said to state a good cause of Prohibition.

The interest of "substantial justice" is usually served by presuming in favor of the pleader when everyday probabilities and the everyday use of language provide a reasonable basis for doing so. I have reviewed the character of pleading problems in highly general terms, however, as a reminder that they occur in different contexts and that in those different settings the way to "substantial justice" and the feasibility of lenient solutions may vary considerably. In the context of Prohibitions, the "public stake" approach might justify a very lenient attitude toward plaintiffs: "If there is the least apparent ground to prohibit, prohibit. It is almost enough that someone has come here and claimed a Prohibition -- as it were, that someone has pointed, however vaguely, in the direction of an ecclesiastical court that *might* be out of bounds. Prohibit, then investigate. Let the truth come out, however badly the parties botch the job of assisting a clear and manageable truth to emerge -- the job for which they are responsible in private litigation." Such permissiveness would go against the habit of insisting on "good pleading," as well as the interests of private justice, and its feasibility may vary from situation to situation even within Prohibition law.

B.
Conformity between Surmise and Declaration

Summary: Must plaintiff-in-Prohibition's formal statement-of-claim (declaration) correspond exactly with the surmise by which he initially moves the Court to grant a Prohibition? The one case on this subject favors strict conformity.

* * *

Cases involving pleading problems fall into several sub-groups. Gomersal v. Bishop (1587 or 1588),[1] is the only case on one question: Is conflict between the plaintiff's surmise and his declaration fatal? As to the procedural setting: After a Prohibition was granted -- and assuming it was not quashed or undone by Consultation on motion -- the defendant had the nominal choice of obeying or disobeying the Prohibition. If he wanted to contest it formally, on the facts or the law, he nominally "disobeyed" -- i.e., consented to being attached as if he had actually disobeyed The procedures pursuant to an Attachment-on-Prohibition then came into play. The plaintiff-in -Prohibition set out his case by a declaration, analogous to the declaration on the writ (the plaintiff's first pleading move) in writ-initiated common law actions. The defendant was then free to demur, traverse, or confess-and-avoid. If he took either of the first two courses, issue was arrived at; if he took the third, pleading continued to issue in the standard common law way.

In Gomersal v. Bishop, plaintiff-in-Prohibition surmised in a tithe suit that the parson had *agreed* with him to take 7/ a year for the tithes for the rest of the parishioner's life. Upon attachment, the plaintiff declared that the parson had leased him the tithes for life at 7/ *per annum.* The defendant (with Coke as counsel) demurred. The Court held unanimously that the declaration was bad owing to the variance. A declaration in Attachment-on-Prohibition, the judges said, should conform to the surmise as a declaration on a writ should conform to the writ.

There is no doubt but that the variance between surmise and declaration here was real I.e.: A contract to take money for tithes was not the same thing as a lease, which conveyed the property in the tithes. The practical purpose of discharging a parishioner by agreement and leasing him his own tithes was much the same, but the transactions were manifestly different -- the words "contract" and "lease" were by no construction synonymous. The Court's decision may sound entirely in good form -- i.e., mean simply that a declaration must use the same words as the surmise or synonymous ones.

But the decision may not have been quite that simple. "Contract" and "lease" were in no sense synonyms. In form, the surmise and declaration plainly conflicted. What could the plaintiff (who also had a good lawyer, Godfrey) say for himself? The reports suggest an answer. Though they do not give the arguments at large, they have Godfrey saying that a con-

1 Leonard, 128 (dated T. 30 Eliz. Q.B.); Croke Eliz., 136; Add. 25,196, f.198; Harl. 1633, f.55b. (Croke and the MS. date the case T.31. The MSS. alone show that Coke was the plaintiff's counsel).

Note: The page margins have been expanded to accomodate new text in the second paragraph.

tract discharging tithes is a good cause of Prohibition, and Coke saying that a contract in discharge of tithes will support a common law action for breach of contract. From those remarks, I would reconstruct the plaintiff's contention as follows: Godfrey did not maintain that form never mattered in Prohibition cases -- i.e., that if the declaration is good in itself it makes no difference in any case whether it conforms to the surmise exactly, or even approximately. Rather, he maintained that the surmise and declaration here both stated good causes, and *equally* good causes, of Prohibition, and, in *that case* -- considering that there was no further conflict -- the pleading should be construed favorably. I.e.: The surmise should be dismissed as a mistake, innocent in the sense that the mistake caused nothing to happen that would not have happened otherwise -- for the parson was just as properly prohibited on surmise of a contract as if the parishioner had correctly surmised a lease.

What then was Coke's counter-position? He could perfectly well have argued that Prohibition simply does not lie on surmise of a contract, whereas it plainly lies on a lease: One who contracts to pay money in lieu of tithes may recover his loss by action for breach of contract if an ecclesiastical court forces him to pay tithes in kind in the face of the agreement. Therefore it is not necessary to prohibit the ecclesiastical suit, and doing so would amount to enforcing a contract specifically, contrary to the common law practice of "enforcing" contracts only by compensatory damages. This was entirely a legitimate opinion, probably the better opinion in the long run, and Godfrey cited recent authority *contra.* On this premise, Coke could proceed as follows: The Prohibition in this case should never have been granted. When a bad Prohibition slips through -- as could easily happen in the absence of adversary debate, especially in such a cases as this one, where opinions on the merits could legitimately differ -- it is only fair to stick the plaintiff with his original theory. It is unfair to let him improve his case on further consideration. Therefore in *this* case the declaration must be overruled -- whether or not verbal conformity between surmise and declaration matters, and whatever should be done when the surmise and declaration both state good cause for Prohibition.

An alternative argument can be constructed without claiming that the Prohibition in this case should never have been granted: Let it be admitted only that it is less clear that Prohibition should be granted on a con-

tract than on a lease. I.e.: In a full-dress debate as to whether Prohibition will lie on surmise of a contract, serious arguments could be made both ways -- irrespective of Coke's opinion, Godfrey's opinion, the better opinion, or decided cases on either side. A serious debate as to whether Prohibition would lie on a lease, *per contra,* is unimaginable. Or, short of that, admit only that the theory of Prohibition on contracts and that of Prohibitions on leases are not the same though the writ lies equally well on either surmise. Thus: Ecclesiastical judges should clearly not pass on conveyances or real property, the clearest case of "common law issue." Therefore tithe suits should be prohibited as soon as the parishioner comes and claims that he is exempt from tithes by virtue of a lease. In the case of a contract, ecclesiastical courts should allow parishioners the specific benefit of discharge-agreements -- i.e., not award tithes in kind in the face of a contract. If ecclesiastical courts fail to respect contracts in that' way, the Prohibition should be used to control them. But that is different from using the Prohibition to prevent ecclesiastical courts from entertaining issue beyond their competence. They are not incompetent to so much as listen to a claim of an agreement, though they are not free to dispose of such a claim by their own lights. Therefore, to surmise a contract and then switch to a lease at the declaration stage is in effect to obtain one variety of Prohibition and justify another variety. In other words, the disjunction between the surmise and the declaration in our case is extreme. No one would say that "contract" and "lease" are synonyms in the ordinary sense. Godfrey, however, tried to make them out as "virtual" synonyms in a special sense: "two related, easily confusable, grounds for Prohibition -- equally good grounds and the same sort of grounds." Coke might have replied: "For that argument to have color, two conditions should hold, neither of which does. (a) 'Equally good' should mean 'equally clear or uncontroversial,' not 'equally good in abstract truth.' (b) 'The same sort of grounds' should refer to the underlying theory of the Prohibition, not to the superficial resemblance in practical effect between protecting a tithe discharge based on contact and protecting one based on lease."

Though construction is required to state the arguments, I think it is clear from the reports that something like the exchange I have supposed took place -- i.e., that Godfrey tried to argue that the variance was superficial or inconsequential and Coke replied in one or both of the ways specified. (The exchange in reality may have been brief, informal and

implicit, not in form the kind of debate I have spelled out.) How is the interpretation of the decision affected? Godfrey's attempt to explain away the variance was rejected. That could be done, however, without accepting the replies I suggest Coke made. It could be done simply by insisting on literal correspondence between surmise and declaration, as a matter of good pleading, citing the analogy of declarations on writs. The reports suggest that that is what the Court did. In other words, the Court chose to regard the issue as one of form in the simple sense and to lay down a pleading rule conformable to common law habits, *when other approaches were available.* The judges chose not to consider whether the surmise was good in substance, and hence not to get into the question whether a bad Prohibition may be saved by a good declaration. They chose also not to consider whether an apparent or literal variance may under some conditions be tolerated, and hence to go into what those conditions are.

As it stands, the decision is strong for good form, though perhaps the availability of other approaches could be used to mitigate it in a "hard" case. Suppose a declaration departed from the surmise in a more plainly trivial way -- e.g., by changing the amount of a *modus.* As it stands, Gomersal v. Bishop should doom the declaration, at least to the extent that a comparable discrepancy would doom a declaration on a writ. But it is easily arguable that the discrepancy in Gomersal v. Bishop was much more fundamental than, e.g., a conflict between a 6d and a 10d *modus.* Should Gomersal v. Bishop be followed because the Court refused to go into the character and degree of the discrepancy? Or should it be not-followed because the Court neglected to go into that question although invited? Unfortunately there are no cases to resolve this nicety upon *stare decisis.* Fortunately, perhaps, there was no *stare decisis,* properly so-called, in the earlier 17th century. My guess is that a trivial difference between surmise and declaration would probably have been overlooked. As Gomersal v. Bishop stands, it is stricter than the run of holdings in parallel areas (variant verdicts and misconceived surmises), very possibly *because* it was perceived as a mere pleading case and a stock-response was furnished by common law practice. (The plaintiff in Gomersal v. Bishop might have done better to lie low until verdict. In all probability, the plaintiff originally mistook the transaction behind his discharge, then discovered on investigation and better advice that what he had and could hope to prove was a lease. Honorably, in a sense -- but also fearfully, lest he be nonsuited or verdict be given against him -- he

came forward and rectified his claim in the declaration. If he had said "contract" in the declaration and gone to trial, he might hope for a special verdict finding the lease, then denial of the parson's motion for Consultation on "judge by the truth" grounds. To say that the plaintiff's chances might have been better that way is of course to criticize Gomersal v. Bishop.)

C.
Pleading on the Plaintiff's Part: Surmise and Declarations

Summary: Although the courts hardly took every opportunity to be permissive, their holdings on statements-of-claim were largely liberal. There is only slight basis for saying that the pleading standard for declarations (which were pleadings properly so-called) was higher than for surmises (mere "informations"). The courts did not encourage demurring to declarations on points of form or subtly conceived points of law when a contest on the facts was possible. A few cases on the "burden of pleading" (plaintiff's duty to anticipate defenses) tend slightly against going easy on the plaintiff, but they are neither unambiguous nor readily discussable apart from the particular situations to which they relate.

* * *

Several cases turn on assorted errors and inelegancies of pleading, and a few on the "burden of pleading." (By the "burden of pleading" I mean: Must the plaintiff say X, or will X be presumed in his favor until the defendant says not-X? Some cases ask that. Those which we take up first ask whether a party had *misspoken,* as opposed to leaving too much to the other side.) Classifying cases as involving pleading errors, as opposed to substantive law, is inevitably problematic because an allegedly mispleaded claim is inherently an allegedly bad claim. E.g.: To set up a *modus* and lay no consideration is simply bad. But suppose a *modus* is set up and the surmise contains what looks like an attempt to make out some consideration. It may in some cases be ambiguous whether objection to the surmise is substantive ("The consideration alleged is not really consideration within the legal meaning of the term") or procedural ("If you want to claim that this is consideration for your *modus* you must state how that is so more clearly".) In classifying cases as essentially procedural, I have gone by common probability: If the chances are that the party had a perfectly good *prima facie* claim, capable of being stated in a more unexceptionable fashion -- so that presuming in his favor would have a reasonable basis -- the case is classified as procedural. There is

sometimes similar ambiguity in distinguishing "burden of pleading" cases from mispleading cases: "The plaintiff ought to have said X in addition to what he has said" could mean "He has not stated an adequate claim" *tout court,* or "He has left too much to the defendant." Again, I have gone by probability: If "Defendant struck me" is objected to, there is a "burden" problem, because there obviously are real defenses to such a claim, some of which, it is argued, the plaintiff ought to have anticipated. If "Defendant trespassed on my pasture" is objected to on the ground that the plaintiff should set out his title, the problem is mispleading, because the defendant probably has no defense based on the quality or quantity of the plaintiff's estate, but is merely saying that the unexplained "my" is too vague (too vague, of course, for a reason -- because people speaking as landholders ought to give earnest of their right to hold others liable in that capacity -- but not because the defense of "no interest" or "no right to speak as holder of this land" is so likely that it should be anticipated.)

Two cases bearing on good pleading raise a special problem. In Man's Case (1590 or 1591)[2] a Prohibition was undone by Consultation essentially because it had been granted on a too- general and inelegant surmise. Man was sued in the High Commission for incestuous marriage (his late wife's sister's daughter.) While the ecclesiastical courts had jurisdiction over the validity of marriages and the crime of incest, their authority was limited and directed by the statue of 32 Hen. 8, c.38, which confined forbidden marriages in England to those within the Levitical degrees of relationship. Prohibitions were sometimes granted to prevent ecclesiastical courts from enforcing marriage law inconsistent with the statute. Man's Prohibition was deserved on that ground in substance, for his marriage was outside the Levitical degrees. It was dissolved by Consultation, however, because it had been obtained by relying generally on the statute, not by reciting specifically that the marriage in question was not within the Levitical degrees.

2 4 Leonard, 16 Dated M. 33 Eliz. Q.B. (M.32/33 or 33/34)

That is all the report says about the ground for decision. Man presumably said in effect, "The suit against me should be prohibited because it contravenes 32 Hen. 8." He ought to have said "...because I am charged with incest in respect of a marriage not within the Levitical degrees, contrary to 32 Hen. 8." Is there any reason for holding the difference important? The answer, I suspect, trenches on substantive law. Why should the ecclesiastical court be prohibited? Two replies are possible in this type of case: (a) Because the ecclesiastical court is invited to deprive the plaintiff of a statutory right, and the interpretation of statutes belongs to the common law. (Analogous to "Because a claim in the ecclesiastical court depends on a lease, and the construction of conveyances is within exclusive common law competence.") (b) Because the ecclesiastical court is invited to dissolve and punish a marriage which may not legally be dissolved or punished, *vide* 32 Hen. 8. The theoretical difference between these two statements is considerable. Whether construction of statutes belonged exclusively to the common law was a difficult and sensitive question. To assert such proprietorship was to say that the King's ecclesiastical judges could not be trusted to understand and faithfully apply the statutes -- the highest law of the land, binding on every man because putatively every man's act -- as they could not be allowed to decide question beyond their professional training. Formulation (b) has the advantage of avoiding that implication. Of course, the common law courts protected the subject's statutory rights as they understood them by means of Prohibitions. But that -- says formulation (b) -- is only an instance of protecting the subject's rights generally. There is no special variety of Prohibition for protecting statutory rights or insuring that statutes are construed by common law courts. Therefore it states no cause of Prohibition merely to evoke a statutory right and show that it has been, or may be, violated. Plaintiff-in-Prohibition must rather state a specific way in which, on the facts as they are claimed to be, he has been, or may be, treated illegally. Therefore, because this distinction is important, the plaintiff must not *seem merely* to evoke a statutory right. He must not leave it ambiguous whether he wants common law help because a statute in involved, or because he has suffered, or may suffer, a specified illegality. If he does leave it ambiguous, his surmise will be construed against him, even though it is perfectly clear that he could prevail merely by rewriting his surmise. So I take the meaning of the decision in Man's Case. The circumstances being special, and the distinction involved a sensitive one, the case says little about the construction of pleading generally.

In Man's Case, the Prohibition was granted after sentence against Man. There was no suggestion that it should have been sought earlier. The structure of the case, indeed, was such that the opposite suggestion might have been made if the circumstances had created the opportunity. I.e.: If Prohibition had been sought before sentence, it might have been urged that no cause of Prohibition had accrued. The distinction developed above perhaps points that way: If ecclesiastical courts are perfectly competent to entertain claims and defenses based on statutes, how can they be prohibited until they have committed an error? There is not just one answer to that question, for there is an argument from economy for prohibiting suits that cannot be good on their face as soon as they are brought. But a later opinion both confirms Man's Case and adds the rule that actual error in the application of a statute -- either interlocutory or final -- must be assigned to make out a claim to Prohibition.

In the later case, Samstead v. Dr. Huchenson (1612),[3] a parishioner, being sued for tithes, pleaded in the ecclesiastical court that the parson was presented by "corrupt agreement" -- i.e., that the owner of the advowson was bribed to present Dr. Huchenson to the living. The point of the plea was to claim that Huchenson was never installed in the living, by virtue of the statute of 31 Eliz., c. 3, which made admission to benefices pursuant to bribes *ipso facto* void. Therefore he had no title to the tithes. Huchenson replied that the King had pardoned him his simony. Samstead then sought a Prohibition on two grounds: (a) because the case depended on a statute; (b) because it depended on a royal pardon. I.e.: The theory of the surmise was that construing statutes and pardons was common law business as such. The report gives only the opinion of Chief Justice Coke, which is against granting Prohibition. Coke's preliminary words suggest that he did not have much faith that the ecclesiastical court would handle the case correctly and avoid Prohibition in the long run. (The bribe in this case was alleged to have been given by Huchenson's friends. In Coke's opinion, the statue extended to a bribe for a clergyman's benefit even though he himself had no knowledge of it. His words suggest that he did not think the ecclesiastical court would understand the statute that strin-

3 M. 10 Jac. C.P. Harl. 4817, f.224b.

gently. He also thought the pardon would not extend to validate Huchenson's installation -- i.e., a clergyman installed as a result of a bribe was simply never installed, and pardoning him could not change that, though it would relieve him of other sanctions attached to the offense. There too, perhaps, Coke was not confident that the ecclesiastical judge would make the right discrimination.) Nevertheless, Coke held that Prohibition would not lie until an error could be laid to the ecclesiastical court: "...no Prohibition shall be granted *dicendo* in his surmise that the statute is to be expounded by the common law. For since the statute says that the admission will be void, that is plain and sufficient direction to... the ecclesiastical court to give sentence against the parson...But if the judges of the ecclesiastical court will not allow the plea...And in the same manner if they misconstrue the statute Prohibition lies on surmise thereof."

The point of this opinion is that before assignable error no right to Prohibition has accrued. That point is substantive, not a matter of pleading. As stated, however, I think Coke's opinion goes to affirm Man's Case, and that it could be applied to a pleading problem: It is never good, according to Coke, to *say (dicendo)* simply that a statute is involved and therefore the suit should be prohibited until the statute's meaning is resolved at common law. I infer that in a true pleading situation -- where the right to Prohibition *has* clearly accrued -- the party must be careful to rest his surmise on a specified error, not on a general complaint that his statutory rights have been violated by an incompetent court. E.g.: Suppose Samstead had been in a position to surmise that his statute-based objection to Hucheson's seisin of the living had been disallowed. I would infer that he must be careful to say that and only that -- "I tried to plead that Hucheson was never lawfully installed in the living and entitled to the tithes, by virtue of such and such a corrupt bargain (spelled out) and the statute of 31 Eliz., and I was erroneously not allowed to make that plea." He must be careful not to short-circuit such a statement or expand it in such a way as to make it ambiguous whether the erroneous disallowance of a plea (analogous to many others involving no statute) or the suit's dependence on a statute was the theory of his claim.

Coke's opinion in Samstead v. Dr. Huchenson (as opposed to his preliminary comments on the legal merits) goes only to the statute, not the pardon. Possibly the same point should be made about a pardon -- i.e., actual error in the handling of a pardon must be surmised; a surmise assert-

ing or implying that claims based on royal pardons are beyond ecclesiastical competence is bad. But Coke made no such point about the pardon. Suppose for the sake of argument, however, that an ecclesiastical suit should be prohibited merely because a royal pardon comes in question, regardless of how the ecclesiastical court handles it. Then our case would be as follows: In the ecclesiastical court Samstead pleads the corrupt bargain and statute. His plea is not disallowed. Therefore, as Coke's opinion says, Samstead has no present cause of Prohibition -- only the possibility of cause if the ecclesiastical court ultimately misconstrues the statute. Hucheson answers the plea of the bargain and statute by pleading the pardon. We have stipulated that Samstead now has cause of Prohibition in principle. Is there any reason to deny it to him? There might be a pleading reason: Samstead rested his surmise on two grounds -- one good and one bad. When a plaintiff does that, the surmise should perhaps be taken against him. A less formalistic argument might say, "On his own showing, Samstead had no complaint against the ecclesiastical court. He accepted the ecclesiastical court's jurisdiction to the extent of making his plea, which the ecclesiastical court was perfectly willing to hear. If he had sought a Prohibition before pleading he would have been turned down, but that does not detract from his acquiescence. For his claim to a Prohibition on the basis of his own plea is no better now than it would have been earlier. Given such acquiescence, does Samstead have standing to claim a Prohibition because a 'common law issue' has been introduced by the other party? Is his position not like that of a man seeking to prohibit his own suit when he himself is at fault, or when he has created the situation in which the 'common law issue' is introduced in a meaningful sense (as opposed merely to suing in the only possible place)?" I doubt that that argument is very good (because Samstead had no choice except to plead the bargain and statute in the ecclesiastical court), but it is conceivable that weight could be given (a) to Samstead's failure to move as soon as he thought, though incorrectly, that he had cause of Prohibition (instead of waiting for something reinforcing to turn up) and (b) to the ecclesiastical court's apparent willingness to accept his correct interpretation of the statute (whether or not one expected them to accept it in the long run). Finally, there would be a practical argument for withholding Prohibition until sentence simply because the plaintiff's claim was complicated. We have seen cases above which can be taken as sanctioning the Court's discretion to "throw up its hands" when faced by complex claims to Prohibition -- i.e., to wait and see whether the ecclesiastical court will

do anything wrong, even though, strictly speaking, sufficient basis for Prohibition now has been stated. Such discretion may be conceived as the converse of discretion to deny a Prohibition because it is sought too late.

This analysis *quoad* the pardon is of course entirely speculative. The report gives only Coke's opinion *quoad* the statute. His omission of comment on the separate matter of the pardon *could* imply the opinion, on one ground or another, that Prohibition based solely on the pardon could not be justified. But it might equally well mean only that he reserved judgment on that point on the occasion to which the report relates. A final word of warning is in order with respect to Man's Case and Samstead v. Dr. Huchenson: These cases should not be taken as the last word on whether construction of statutes belonged as such to the common law. We shall meet with contrary suggestions on that question. The two cases do, however, recommend care in setting up claims to statutory rights vis-a-vis the "foreign" courts.

Markworth v. Colfes (1598)[4] raises a characteristic pleading problem: whether affirmative language will do when a point of negative import must be made to state a strictly valid claim. In this case, a *parson* sued for tithes of barley. The parishioner surmised a *modus* to pay 6/ to the *vicar* in lieu of barley tithes. It was objected that the surmise ought to use negative language -- that it is customary *not* to pay the tithes in kind to the parson, but instead to pay the commutation to the vicar. As it stood, the surmise left this negative to be inferred from the affirmative. The Court overruled this objection and laid down two generalizations about pleading in Prohibition cases: (a) The Court expressly invoked the "public" approach to Prohibitions as grounds for construing surmises favorably: A surmise is only an information to the Court, on which it may act according to the common sense meaning--here, the obvious implication that nothing was due to the parson by the custom. Strict canons of pleading are not applicable; (b) A surmise, in any event, is not a pleading properly so-called -- i.e., a statement to which the defendant makes a formal answer. There is a difference between the standard of pleading applicable to a declaration on a Prohibition and that applicable to a mere surmise. (I

4 M. 40/41 Eliz. C.P. Harl. 4817, f.172.

do not take the latter point as saying that a declaration in this case *would* be bad for omission of any explicitly negative prescription, only that it *might* be. In other words, on demurrer to a declaration, it would be relevant to argue that negative language was required, whether or not that is actually true. In the context of whether to grant Prohibition on a given surmise, the argument is irrelevant, however valid in the abstract.)

In another late-Elizabethan case,[5] it was objected that the surmise, claiming a *modus,* was defective for failure to set out plaintiff-in-Prohibition's estate in the land that produced the crop. The objection was overruled: "...for it is all one if he has an estate at will, for years, or a fee, for the tithes are demanded against him." That is plainly correct. I can understand the objection only as a speculative formalistic quibble. It is likely (the brief report does not say) that the *modus* here was private -- i.e., applicable to particular land (not to the whole parish or some other local unit.) In that event, the prescription would be laid as accruing to the present holder and those whose estate he has (i.e., his predecessors in estate.) The defendant's objection was probably a matter of arguing that it is incomplete to prescribe in *que estate* and not to say expressly that one has any particular estate in the land, or repugnant so to prescribe and leave the possible inference that one has no estate. But the Court's point was surely well-taken: The actual occupier or crop-producer was liable for tithes, and he was entitled to the benefit of a *modus* whether local or applicable only to particular land. Whatever would have been gained in formal elegance by setting out the estate, doing so would have had no relevance for the matter at stake. (It might be asked whether one without any legitimate estate -- a naked disseisor or abator -- may take advantage of a private *modus.* I know of no authority on this point, but the answer is probably that even then the occupier's interest in the land is irrelevant.)

A couple of cases turn on the special problems of pleading prescriptive claims. In the Rector of Tunstall's Case,[6] plaintiff-in-Prohibition said "that before. the time of memory two acres of meadow were allotted to the parson's predecessor in lieu of tithes...and that the rector for the time being received and had the aforesaid two acres in recompense of the

5 P. 41 Eliz. C.P. Add. 25,203, f.5b.
6 P. 5 Jac. K.B. Add. 25,215, f.35.

tithes...from time whereof memory of man does not exist." This was not an elegantly pleaded *modus* because it alleged an event (allocation of the two acres) before the time of memory. The second part of the quoted sentence speaks properly and says enough -- that the two acres have been enjoyed in consideration of the tithes from time beyond memory. By the theory of prescription, to say that a specific event took place before memory involved an implicit contradiction -- as if one were to say, " I know event X took place at a time that nobody knows anything about." There is no contradiction, on the other hand, in what amounts to "Practice X has been going on and no one knows when it started. "The defendant in this case stated his objection to the plaintiff's claim by saying that he could not take issue on the allocation. I.e.: An asserted event should be capable of being denied. But an event asserted to have taken place at a time nobody knows about cannot be denied. This objection came to saying that since the first part of the prescription was bad the whole should be taken against the plaintiff. The Court, however, ruled that since the second part of the claim was good the first part could be overlooked. In the terms of the defendant's objection: the judges told him he could take issue on the immemorial usage. In other words, the claim as a whole did not prevent the defendant from taking issue on the relevant fact.

The report of the Rector of Tunstall's Case concludes by saying that the parties joined issue by consent and waived demurrer. Thus it is clear that the discussion above was not on demurrer (but on motion for Consultation or to quash, for a Prohibition had been granted.) The Court's opinion was of course dissuasive to demurring. It is possible, however, that a higher standard of pleading would have had to be considered if the Court had faced a demurrer to a declaration which repeated the inelegance of the surmise (and *quaere* how far a declaration may correct the surmise.) For that reason, and in the interest of substantial justice, it is possible that the Court used some persuasion to see that the defendant took issue on the facts.

Prose v. Dr. Leyfield[7] arose on demurrer. In this case, a parishioner sought to stop a tithe suit by showing one type of monastic discharge -- a prescriptive exemption at the time of the dissolution. In pleading the monastery's exemption, he made the mistake of saying that the abbey was discharged from its foundation to the dissolution. I.e.: Instead of saying that it was discharged from beyond the time of memory until the dissolution (an indefinitely long period of time), he referred the usage to a specified period (the distance between two events -- the foundation and the dissolution.) The parson demurred on account of this violation of the theory of prescription, and the Court upheld the demurrer. The parishioner's counsel argued unsuccessfully that it would have been enough simply to allege that the land was discharged in monastic hands at the dissolution -- i.e., that it was unnecessary to say *why* it was discharged. Therefore the admittedly bad pleading was surplusage and should not be held against the plaintiff. But the Court rejected this argument. Having rejected it, there was no way to hold for the plaintiff, it seems to me. For if the plaintiff had to show the manner of discharge and chose prescription, then he must plead an adequate prescriptive title, which he utterly failed to do. Justice Dodderidge, with Chief Justice Coke concurring, said that the plaintiff's plea would have been good if he had expressly laid the foundation of the monastery before memory (albeit, cf. last case, a "specific event.") As it was, there was mere failure to claim immemorial usage. The Court would not presume, until the contrary was shown, that non-payment throughout the monastery's history was non-payment from time immemorial. Nor would the Court permit monastic discharges to be alleged in general terms, without showing the manner of discharge.

As noted, Prose v. Dr. Leyfield arose on demurrer. *Quaere* whether Prohibition should have been granted in the first place, and whether a motion for Consultation should have been granted if one had been made. As the Court finally saw the case, the surmise was bad on its face. Could anything be said in favor of indulging it until a formal challenge came on demurrer? Possibly, for the plaintiff here probably had a perfectly good basis for a proper prescriptive claim. Most monasteries were established

7 T. 12 Jac. K.B. 1 Rolle, 54.

quite a while before the dissolution. The intelligent move would probably have been to claim a straight prescriptive exemption for the monastery and leave it to the defendant to prove if he could that the monastery was established at a known time (which is to say, within memory.) Possibly a bad surmise should be let through until either: (a) the plaintiff improved his declaration, say by adding that the abbey was founded before memory (in which event the question whether the surmise and declaration sufficiently conformed could be taken up); or (b) the defendant took issue on the fact (i.e., whether the abbey was paying tithes at the dissolution and before), in which event the truth could prevail despite bungled pleading. *Sed quaere.*

The last two cases above indirectly suggest the question whether standards of precise pleading should be the same on demurrer as on preliminary challenge to a Prohibition. The case of Price v. Mescal[8] is a pleading case in only a marginal sense, but it contains an important indication of the judicial attitude toward demurrers in typical Prohibition cases. For that point, the report should be noted here. In substance, Price v. Mescal was a complicated *modus* case. A parishioner was sued in one action for several sorts of tithes. He surmised five distinct *modi* covering those several tithes. The plaintiff declared upon his Prohibition, and the defendant demurred. Upon the demurrer, the defendant's counsel urged objections to all five *modi.* The issues debated essentially concern what constitutes a legally valid *modus.* Though that question is often hard to distinguish form whether a *modus* is *well-stated,* and some of the points in dispute could possibly be reduced to pleading, I shall defer the matter of this case.

The point to note here is the strong exception to the demurrer taken by Chief Justice Coke: "...to demurre upon such matters, is a very desperate kind of practise, and I would never have done so, but to joine issue upon the customes, and first to try whether there was such a custome or not? and if it be found so, then afterwards to demurre upon the validity of this in law." In other words, Coke did not approve of demurring to prescriptions. He liked to see the truth established by verdict first. Legal debate, if any should be necessary, ought to come upon motion in arrest of judg-

8 T. 12 Jac. K.B. 2 Bulstrode, 238

ment or, where appropriate, upon a special verdict. His words perhaps suggest that the "desperate practise" of demurring was in his opinion both foolish from the defendant's own point of view and a mischievous thing for counsel as "officers of the Court" to do -- risky for the defendant to stake everything on the refined construction of a pleaded "text" when a jury might find straightforwardly that the tithes has been paid in kind; mischievous to burden the Court with difficult problems of law when the alleged customs might be unprovable in fact.

Coke could not, of course, get around the demurrer by disapproving of it. He necessarily went on to discuss the points of law that had been raised. In the event, Consultation was granted *quoad* two of the five *modi*. In taking this step, Coke and the Court said that even where a demurrer is "bad," the Court should look at the declaration on its own and grant Consultation if it is defective. I am not sure I understand the force of this remark in relation to the case. I do not think the demurrer was considered legally "bad" just because Coke thought it a foolish and mischievous step. The Court's reason for granting the partial Consultation seems to have been essentially a matter of pleading -- the plaintiff's incompleteness in stating his claim. (He claimed a discharge for certain classes of cattle without showing that the cattle in question belonged thereto. He claimed the right to pay a fixed number of cheeses in consideration of certain tithes without showing that he produced any cheese. These flaws would seem offhand to be in the airtightness with which he stated his claims, rather than in the probable merit of the claims.) Perhaps the effect of the total demurrer to the declaration's sufficiency in law was a waiver of these formal objections (the defendant's counsel argued against the prescription on other grounds than the Court thought decisive.) In any event, the ill-advised defendant was treated generously and the plaintiff held to high standards of pleading.

Coke's objection to the demurrer as "practise" has a bearing on our procedural concerns. If it was bad practice to raise possibly unnecessary debate on the legal merits of *modi* -- a species of debate that involves the muddy line between the *modus* "as is" and "as stated" -- is it not also bad practice to raise possibly unnecessary debate on purer pleading questions? *Quaere.* But if so, there is an argument for not looking too hard at surmises: Let formally doubtful surmises through, hoping -- and using the Court's influence to urge -- that issue will be taken on the facts, so that

the contention can be settled on the truth. The public interest in prohibiting when Prohibition is due would be served thereby. On the other hand, Price v. Mescal itself insists on high pleading standards for declarations. Surely the best way to insure demurrer-proof declarations (and to avoid problems of conflict between declaration and surmise) would be to withhold Prohibition on formally inadequate surmises. Once, however, a Prohibition slips through, it should probably be allowed to stand if at all possible (i.e., not undone by Consultation on motion), in hope of factual issue.

The final feature of Price v. Mescal goes to vindicate Coke's objection to the demurrer, The reporter tells us that the remaining three prescription (those with respect to which the declaration was held good) were tried by jury "at the Bar" (i.e., in Westminster Hall). Since the fact of those *modi* finally came to trial, I can only suppose that the defendant was persuaded and allowed to abandon his demurrer, for the effect of demurring ought to be admission of the customs as "facts." The jury found for the plaintiff, upholding the *modi* "against the directions of the Court, and contrary to all their evidence, insomuch that the Court said unto them, that they never heard of so ill a verdict, they having no proof at all for the prescription...but for the tithe to be paid in kind, and therefore the Court said that it should be tryed again by another jury..." In addition to its value as evidence of a new trial awarded for a verdict against the evidence, the results show how foolhardy and unnecessary it was to demur. If courts could be depended on to control biased juries as this one did, parsons had no reason to figure demurring as the lesser risk, compared with pro-parishioner jurors.

The ill-advised demurrer in Price v. Mescal must have been abandoned. In Foster v. Hade (or Hide),[9] a demurrer based on a point of pleading was given up with the consent of Coke's King's Bench. Here, a Prohibition was granted on the standard ground that the bounds of parishes had come in question in the ecclesiastical court. When plaintiff-in-Prohibition declared, he undertook to show how the parsonage came to his opponent. (The relevance of such a showing does not appear.) He said that it came to the King by the dissolution of the monasteries, was

9. H. 13 Jac. K.B. 1 Rolle. 332; Harg. 47, f.110b.

granted to a corporation by the King's letters patent, and then granted over by the corporation. In some way, however, he allegedly failed to plead these transactions adequately, wherefore the defendant demurred. (Just what was wrong does not appear from the brief reports. There were special rules about the pleading of letters patent and deeds. It was not enough to say, e.g., "Jones got Blackacre from the King by letters patent." The date, effect, etc., of such documents had to be specified if one wanted to rely on them.) Coke, speaking for the Court, agreed that the declaration was defective for the reason alleged. Nevertheless, he refused to grant a Consultation with the effect of permitting the ecclesiastical court to determine the bounds of parishes. With the Court's assent, the parties then took factual issue. In effect, the Court's response to the demurrer was "forget about it." The defendant was not given the advantage of his apparently well-taken pleading-point. On the other hand, he was not stuck with his demurrer when the Court decided that a common law issue could not be turned over to ecclesiastical trial just because the plaintiff had mispleaded. By permitting the defendant to withdraw the demurrer and take issue, the court denied the plaintiff the advantage of the admission of fact in his favor which the demurrer ought to imply.

Demurring on pleading points was discouraged. In one sense, that is to say that pleading was not given consummate importance in Prohibition cases. But it does not follow that pleading points could not be insisted on by means other than demurrer. There were four other contexts in which to complain of bad pleading on the plaintiff's part, all of which appear in cases below: (a) In adversary debate before any Prohibition was granted; (b) On motion to quash a Prohibition; (c) On motion for Consultation; (d) On motion in arrest of judgment after verdict on a factual issue.

In Allen's Case,[10] a parishioner surmised a *modus* to pay 1d per acre "or thereabouts." The Court, speaking through Chief Justice Coke, had no hesitation in denying Prohibition. To state the point substantively: A *modus* must be definite to be good. To state it as a matter of pleading: It is not enough to say, in effect, that a *modus* exists, without making any definite statement as to what the *modus* is. The Court will not presume --

10 M. 7 Jac. C.P. Add. 25,211, f.189; Harg. 47, f.29.

even with the help of an approximate averment -- that there is a basis far prohibiting the ecclesiastical suit. It will not let the Prohibition through in order to see whether the jury will come up with a definite sum.

Thus a party who genuinely does not know the amount of the *modus* affecting his land must still take a stab at a definite sum. As we have seen, he would probably be safe enough if the jury found a different sum. But for just that reason the decision in Allen's Case may perhaps be questioned. Ignorance of the details of a *modus* could be excusable. Is it better to insist on definiteness in the surmise and then go easy on a variant verdict, or to tolerate an honest expression of uncertainty in the surmise and simply ask the jury for the truth? Making the plaintiff plead definitely when he may not know the truth makes him run the risk of a general verdict against him. Short of that, it invites the problem of what to do with a variant special verdict -- a source of legal contention, one must admit, even if one is strong advocate of "judging by the truth." But the other course -- the one ruled out by Allen's Case -- raises problems too: If "1d or thereabouts" is tolerated in a surmise, should it be tolerated in a declaration? Merely to leave that question open is to risk demurrers. To permit a vague surmise but insist on a definite declaration raises the problem of conformity between surmise and declaration. Assuming an equally vague declaration would be acceptable, what does a traverse mean, and what *can* the jury find? "There is a *modus* for 1d. or thereabouts" can be read as "There is a *modus* of some sort" (="There is a *modus").* Denying that seems to say "There is no *modus* at all." If that is what the traverse means, may the defendant introduce evidence of, say, a 6d *modus* without cutting his own throat? Could the jury ever find its way to a special verdict -- even out of its own knowledge -- if the question before it must be logically reduced to "Is there *any* sort of *modus?* Perhaps that reduction is not inevitable, but at least the question arises.

For the reason last given, the decision in Allen's Case seems right. The problems one way are worse than the problems the other way. At least as far as the brief report indicates, the Court saw the case as cut-and-dried. Coke cited an analogy -- a Cox's Case, where a copyholder prescribed to pay a fine of "not above 2/" and the prescription was adjudged bad for vagueness. I would suggest that the analogy may have been seductive. In the end, it probably points the right way, but an argument *contra* can be made for the special circumstances of Prohibition cases.

"All prescription must be definite -- look at copyhold cases" might at least arguably contain a fallacy. (Cf. Gomersal v. Bishop, the possible fallacy in "Surmise and declaration must conform -- look at the relation declaration must bear to writs.")

Price v. Osborne[11] shows a pleading point successfully made on motion, but with the effect only of quashing the Prohibition, not of obtaining a Consultation (as the defendant presumably desired.) The report of this case is skimpy, but I reconstruct it as follows: A Prohibition was granted to stop a suit for hay tithes on surmise of a *modus* that the parson enjoyed five acres of meadow in consideration of all the hay tithes of a vill. The parson then moved that the surmise was defective for failure to aver that the land which produced the hay in question in this suit had lately been converted from arable to meadow.

Assuming the conversion to be a fact, why should the plaintiff aver it (as, in the event, the Court thought he should have)? I think that question can only be answered by appreciating the lurking substantive matter. Changes in land use understandably raised problems in tithe law. *Modi* such as the one in this case (i.e., where the commutation was not computed at so much per acre or other unit, but as a lump sum or the equivalent for all tithes of a given sort) could not as a rule be allowed to stand in the face of major changes in land use. Leaving inflation aside, 5/ for all hay might represent fair value according to the traditional employment, let us say, of 100 acres -- where roughly 1/4 of the land was usually in hay, the rest in other crops, either tithable in kind or subject to their own commutations. If the farmer suddenly converted all 100 acres to hay, the parson's income from this land would be drastically and unfairly diminished. The *modus* in that case would probably be interpreted as applying only to hay produced on land that had always or sometimes produced hay. A *modus* unmistakably alleged to apply to all hay produced within a given area, regardless of how much it was devoted to hay, would probably be held an unreasonable custom.

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11 M. 15 Jac. C.P. Harl. 5149, f.25.

To return to the pleading point in Price v. Osborne: The parson must have alleged the conversion from arable to meadow in his libel, attached to the surmise. Otherwise, it could not be taken for a fact which the parishioner was obliged to aver. To say he should aver it means, I assume, that he should either affirm it or deny it. I.e.: He should plead his *modus* and say the land was *not* recently converted to hay, in which event the parson could admit the *modus* and take issue on the conversion (reserving points of law until after verdict.) Or else the parishioner should plead his *modus* and admit the conversion, in which event the parson could demur to a concordant declaration or move for Consultation, so raising the legal issue -- whether the *modus* should be interpreted or allowed to apply to any converted land (apparently only one acre was allegedly converted in this case.) The fault was saying nothing at all about the alleged conversion.

This objection to the surmise seems well-taken, as the court agreed. At the very least, it was unnecessarily loose pleading, leaving the parson to plead at common law what he had already made part of the record. I.e. suppose as things stood the parson could admit the *modus* and plead the conversion, leaving it up to the parishioner to demur to that plea or traverse it. But the extra step was avoidable by forcing the parishioner to plead in such way that the parson could get to the point at once. The Court accordingly "disallowed" the Prohibition and "ordered" that the ecclesiastical court proceed. But it refused Consultation (So I take the words of the report *"mes navera procedendo").* So in the upshot the plaintiff's mispleading hardly hurt him, for there would be nothing to prevent his making a correct surmise and having a new Prohibition. The case was handled like some of those on conflicts between libel and surmise -- the Prohibition was void, the parson and ecclesiastical court could carry on at their peril and if they had time to move before a new Prohibition issued. If I reconstruct the case correctly, it can indeed be seen as a libel-surmise conflict of a somewhat problematic sort. (The standard libel-surmise case was a misrecitation of the ecclesiastical suit. Here, it might make a question whether sliding over one element in the ecclesiastical claim -- the conversion -- is equivalent to, say, misrepresenting a suit for 400 fleeces as a suit for 40. That the suit here was for tithes in kind from such-and-such land was not misrepresented, though the legal theory behind the parson's claim -- that no *modus,* if there was one, applied to

the converted land -- was ignored).

In the Caroline case of Wood and Carverner v. Symons,[12] the Common Pleas was divided on one sort of objection to a surmise and united in insistence on tight pleading in another respect. In this case, a man being sued for hay tithes surmised: (a) In consideration of extra work in making up hay in the meadows, the parishioners were customarily exempt *quoad* hay grown on "headlands." (I.e.: They did more than their legal duty in preparing the parson's share of the main hay crop, probably by shocking and binding it in more convenient form than they had to -- and in return paid no tithes on hay harvested from the uncultivated ends of arable open fields where the plough-teams turned around.) (b) No tithes are due for headland hay *de jure.* The plaintiff omitted, however, to say expressly that the hay in question in this case came from headland! On account of that omission, the judges agreed that the suggestion was "naught" and denied Prohibition. In addition, the surmise was objected to as duplicitous -- for claiming a discharge via a *modus* and via the common law. The two Justices whose remarks are reported responded differently to this objection. Yelverton thought the double allegation immaterial. One might suggest twenty grounds for Prohibition, he said. Richardson disagreed with Yelverton's principle, though without holding the duplicity fatal to the surmise in this case. So, at least, I take his meaning, for he said that the claim of common law exemption was surplusage (mere unnecessary added words, to be ignored.) The real difference between these two positions is not obvious. Yelverton's principle would argue for granting Prohibition unless all the alleged grounds were inadequate, Richardson *might* argue for picking the weakest ground alleged and denying the Prohibition if that is not strong enough (i.e., construing duplicitous surmises against the plaintiff to that extent.) In the instant case, it is more likely that he took the first ground mentioned in the surmise as the plaintiff's claim and the other ground as surplusage. But what does that imply? Consider these possibilities; (a) The *modus* comes first and is held bad on its face. Will the Prohibition be denied even though the Court thinks the product being sued for non-tithable *de*

12 M. 5 Car. C.P. Hetley, 147.

jure? Such a result would be inconsistent with the cases on misconceived surmises above. (b) The *de jure* exemption comes first and is held bad. Will the ecclesiastical court be turned loose to determine a *modus?* I should doubt it. In short, I wonder whether Richardson's adverse reaction to Yelverton's general point would turn out on reflection to mean anything in the context of deciding whether or not to grant Prohibition in the first place.

Later on, it might mean something. Richardson's point might come to saying: "Having put the *modus* first, the plaintiff must declare upon the *modus.* I.e.: He must offer the defendant a factual issue. After an unfavorable verdict, perhaps the plaintiff may move in arrest of judgment that the product is exempt *de jure.* Perhaps the Court ought to intervene on its own motion to prevent collection of tithes not due *de jure* -- using its discretion as to when to intervene. Those bridges we will cross when we come to them. The immediate point is that declarations cannot be duplicitous. The best way to prevent their being is to construe the surmise as asserting a single claim and insist that the declaration conform. The best way to that end is to take the first good ground alleged in the surmise as the plaintiff's sole pleaded claim." Would Yelverton have disputed this? In the actual context of Wood and Carverner v. Symons -- the first motion for Prohibition -- Yelverton's opinion sounds righter than Richardson's -- i.e., more accordant with the "merely informational" nature of the surmise. Looking ahead, however, I find it difficult to suppose that Yelverton would be equally tolerant of duplicity in the declaration. How is the defendant to answer twenty separate claims, or even two? (If the declaration were permitted to assert two claims, at the least a problem of interpreting a demurrer or traverse would be introduced. If the defendant demurs to challenge the claim of *de jure* exemption, does he confess the *modus?* If he takes factual issue on the *modus,* does he waive the right to argue that the product is tithable *de jure?)* Granting that the plaintiff must take a single stand at the declaration stage, it would make perfectly good sense to say he may take his choice, and perhaps that is what Yelverton would let him do. The disadvantages thereof are: (a) Introduction of a possible conformity problem. (Does a single-claim declaration follow a multiple-claim surmise as a valid declaration on a writ follows the writ? Richardson's approach, by giving the surmise a definite single-claim interpretation, establishes a clear criterion of what the declaration must conform to if it is not to fail.) (b) Attaching no penalty at all to a duplicitous

surmise, provided the duplicity is eliminated in the declaration. (Perhaps there is no need to attach a penalty. Richardson's approach would attach only the mild one of eliminating the plaintiff's free choice at the next stage. That mild penalty is perhaps comparable to the "penalty" of merely denying the Prohibition when the surmise is loosely pleaded -- as the Court actually did in Wood and Carverner v. Symons -- for denial was no bar to starting over with a more "artistic" surmise. We have considered the wisdom of being tough on ill-stated surmises -- to that mild extent -- precisely in order to avoid trouble later on.)

In Henchman v. Parsons,[13] defendant-in-Prohibition tried to take advantage of a mispleading late in the game and failed because he had waited too long. A man was sued for a parish rate to repair the church. He got a Prohibition on surmise that there was an ancient "chapel of ease" in the parish, to the upkeep of which he had always contributed, and that he had customarily been discharged from repair-rates for the main church. This was a common type of response to rate suits, analogous to the *modus* in tithe suits, I.e.: It was common and lawful to claim a customary duty to maintain a chapel, and in consideration thereof a customary exemption from helping maintain the church. In this case, however, the plaintiff failed to say expressly that he was discharged from repairing the church *in consideration* of repairing the chapel. He laid down a negative prescription (non-repair of the church) alongside an affirmative prescription (repair of the chapel), but he omitted to say expressly that the two usages had any relation to each other. I.e.: He left it to be inferred that the one was consideration for the other -- a safe enough inference by common sense, but *stricte juris,* the mere coincidence of the two usages in no way legitimated the negative one. Simply never paying rates for the church would not establish a right not to pay them, any more than immemorial non-payment of tithes would establish a lawful exemption; always repairing the chapel by itself would only go to establish a customary duty of so doing, over and above the parishioner's legal duty to the church.

In the abstract, the Court thought the surmise in Henchman v. Parsons defective. However, the judges refused to grant Consultation because the

13 T. I6 Car. C.P. Harg. 23, f.65b (Incorporated into the report of a Sir Thomas Houlte's Case.)

defendant did not move for it until after a verdict was given against him. Originally, he took issue on the negative prescription -- whether the plaintiff had in fact customarily contributed to the church. After the jury found that issue for the plaintiff, the defendant brought up the point of pleading (or, if you prefer, the point of law -- that customary non-contribution to the church, which the verdict established, plus the admitted contribution to the chapel, did not legitimate the exemption.) In refusing Consultation at this stage -- and apparently only because this stage had been reached -- the Court was in effect willing to infer that the one usage was claimed as consideration for the other. That amounts to taking the problem as one of pleading. *(Quaere* whether similar permissiveness would have been shown at any stage in a tithe case. In the rate case, the Court may have been moved at heart by the established fact that the plaintiff "did his bit" for the church-edifices in the parish. Letting a man out of economically valuable tithes in kind -- to the parson's real loss -- was more serious.)[14]

Alongside the mispleading cases above, we may consider a few on the "burden of pleading." A late-Elizabethan opinion[15] goes as follows: "Rakings" are exempt from tithes by the common law, but the plaintiff-in-Prohibition must surmise that tithes of the main crop were set out without covin. "Rakings" means hay or corn raked up or gleaned after harvesting the bulk of the crop. There are many cases concerned with tithes of rakings. As with second crops in a single year and other post-harvest land uses, it was a question whether rakings were exempt *de jure* or only exemptible by considerate *modus.* The present holding (in accord with most other opinion on that subject) says as a matter of law that rakings are exempt *de jure,* provided that the rakings represent what was left behind by inevitable or honest accident. Obviously enough, a man could not be allowed to leave a substantial part of the crop lying on the ground

14 In one earlier case (Shelton v. Mountaine. H. 13 Jac. Court uncertain), a defendant tried to raise a pleading point by motion in arrest of judgement after verdict against him. This is the only thing about the case that is really worth noting. The motion was turned down, but because it was without merit of any sort. The plaintiff had claimed to be discharged for tithes of a park. The defendant argued that the claim was not well-stated because he did not say it was an ancient park. The Court did not hold that this was no inelegance, or a forgivable inelegance, in pleading, but rather that the antiquity of the park was utterly irrelevant, since the suit had nothing to do with park products, such as game. In effect, "park" was just a geographic description of the area to which the *modus* applied.

15 H. 38 Eliz. Q.B. Add. 25,198, f.112b. (Litigative context not reported.)

until a second raking-over in order to evade a substantial part of his tithes. As a matter of pleading, the opinion says, plaintiff-in-Prohibition must allege in his surmise that the rakings in question were not left behind fraudulently. He must not leave it to the defendant to plead fraud.

Only three years later, in the well-reported Greene v. Hunne,[16] the same court appears to go the other way on the same issue. But it is not finally necessary to see a conflict. In Greene v. Hunne, a man sued for barley-rakings surmised a *modus* to do extra work in making up the main crop into cocks, and in consideration thereof to be discharged for rakings "not willfully dispersed." I.e.: The parishioner relied on prescription rather than *de jure* exemption, and in describing the *modus* he said that it only applied insofar as there was no deliberate or fraudulent failure to catch as much as possible the first time over. A Prohibition having been granted, Francis Bacon moved for Consultation on behalf of the defendant. Bacon contended that the surmise was bad for failure to allege that the rakings in question in this case had in fact *not* been "willfully dispersed." I.e.: The plaintiff claimed benefit of a custom covering only honest rakings but did not say the rakings he was sued for fell in that class.

The Court was unanimously against Bacon on this point. But we must be careful in constructing its exact meaning. Chief Justice Popham spoke first, making the following points: (a) There was no need to allege a prescription at all, for rakings are exempt *de jure*. (Implication: Though the plaintiff here rested squarely and solely on prescription, he should be treated -- at any rate in the context of a motion for Consultation -- as if he had relied solely on the common law. Cf. "misconceived surmises.") (b) Of course the *de jure* exemption only applies to honest rakings, but the parson suing for rakings has the responsibility to say that they were "willfully dispersed." I take this to mean that he must say so in his ecclesiastical libel. In other words, if it appears from the libel (attached to the surmise) that the parson is claiming dishonest rakings in terms, the ecclesiastical suit should not be prohibited, except on surmise that the rakings were not, in fact, dishonest (assuming that the fact of fraud should be tried at common law -- probably a safe assumption). If no such thing ap-

16 M. 41/17 Eliz. Q.B. Add. 25,203, f.120; Add. 25,200, f.164b.

pears from the libel (but only that the parson is suing for "rakings," or only, say, for "hay tithes"), Prohibition lies. Plaintiff-in-Prohibition has no responsibility to say the rakings are honest. If the libel says "raking," the surmise need only, as it were, point to the ecclesiastical suit. If it says "hay tithes," the surmise need only say that the real object of the suit is "rakings" (not "honest rakings"), tithes on the main crop having been paid. If this is a correct reconstruction of Popham's position, it disagrees with the earlier opinion above. (Granting that the parishioner never needs to plead his honesty unless the ecclesiastical libel expressly accuses him of dishonesty, it would remain a question whether the parson may introduce a plea of fraud later on. I.e.: Assume the parson sues for "rakings" merely. The surmise, and accordingly the declaration, rest on *de jure* exemption. May the parson now plead fraud and force the parishioner to traverse? Probably, *sed quaere.)*

It is not clear that the rest of the judges accepted Popham's position in full, though they came to the same result. Kempe, the Clerk of the Court (clerks were often consulted as to "precedents"), said that he had never seen an averment of the sort Bacon said was necessary. Justice Fenner agreed that it was not necessary to aver that the rakings in question were not willfully dispersed. These opinions do not imply, however, that rakings were exempt *de jure,* or at any rate that the plaintiff in this case could escape the prescription he stood on. Therefore they do not have to imply anything as to the burden of pleading in a *de jure* -exemption case. I.e.: They might mean only that to surmise a *modus* as applicable to honest rakings is to assert clearly enough, though not quite directly, that the rakings in question *are* honest . (A *modus* alleged to apply to dishonest rakings would obviously be held unreasonable. Therefore expressly applying the *modus* to honest rakings has the more title to count as claiming honesty for those in question.) Whereas Kempe and Fenner maybe meant to follow Popham and maybe not, Justice Gawdy explicitly stuck with the case as it was--a *modus* case. For he said in so many words that the averment Bacon found lacking was implied in the surmise. Gawdy attached importance to the plaintiff's saying the parson's suit was against the custom alleged. I.e.: In addition to claiming exemption only for honest rakings and thereby implying that those in question were honest, the plaintiff used further language to reinforce that implication. He said there was a custom discharging honest rakings and then added that the ecclesiastical suit went

against that custom. The addition surely goes to imply that the suit is for rakings which are honest.

A further speech in the report, labeled *tota Curia,* says generally that it is always the parson's job to allege willful dispersion. Possibly the generalization was meant to reach the *de jure* exemption case which Pophan wanted to see in the case at hand. But taken conservatively Greene v. Hunne does not have to rule that case or overrule the opinion above.

Besides the rakings, the surmise in Greene v. Hunne claimed several other prescriptions and exemptions for other products, to all of which Bacon took exception. One such exception goes to the burden of pleading, as distinct from substantive criteria for a valid *modus. Inter alia,* the parishioner was sued for herbage consumed by cattle. He claimed that the pasture land in question was used for breeding cattle for his dairy and plough, and therefore exempt *de jure.* Bacon did not dispute the underlying point of law: pasture consumed by breeding-stock and their calves was not tithable insofar as the calves were replacements or additions for the dairy herd or the farmer's supply of draught animals. The surmise did not say, however, that the animals who consumed the grass in question were in fact used as dairy -- or draught -- replacements. Bacon argued that this was a defect in the surmise. Popham and Gawdy replied that there was no defect: It was up to the parson to allege anything about the actual employment of the animals that would remove them from the exemption.

There are numerous cases testifying to the reality behind this exchange. Parsons were trying hard to collect their share from the expanding livestock business. They had no claim on "replacement and expansion capital," by means of which the "tithe-base" would be maintained or increased, but they had every right to collect in respect of animals bred and raised for sale to butchers or other farmers. Parishioners had a natural tithe-dodge in the inherent uncertainty of an animal's destiny. At a given moment -- say when he is sued for tithes from 1590 -- a farmer could say with factual truthfulness and fraudulent intent that the cattle who ate the grass in question over the last year were either cows temporarily out of milk-production or replacement-stock. The next moment -- say as soon as the suit against him is prohibited -- he sells off some steers, as of course he had every intention of doing. If the parson

wants to go to the trouble of a suit (or another suit), he can presumably recover something. "Go ahead and sue me," says the farmer (knowing that besides the steers he sold he has ten more to sell.) Maybe the parson knows that too and decides to wait. Maybe he waits until not even honest men can remember whether Farmer Brown raised any cattle for sale year before last. In short, livestock operations -- in a predominantly mixed and small-scale agricultural economy -- were much more likely to slip through the tithe-net than field-crops.

The exchange between Bacon and the Justices in Greene v. Hunne, though nominally on a point of form, should be considered against this background. It is not entirely clear from the surface of the report what Bacon was asking for. I suspect that the Justices may have reacted adversely because it was not entirely clear to them. Bacon said that a farmer claiming his "breeding-stock and replacement capital" exemption should allege that the animals in the "replacement capital" category were *actually used* as such. I do not see how that could be asked for literally, since young animals honestly or dishonestly assigned to the "replacement" category would not as yet have been put to the dairy or draught uses for which they were purportedly intended. It would make sense, however, to require the parishioner to speak with more particularity than the Justices were ready to insist on. He might be asked to spell out his situation as follows: "All the animals that used the pasture fall into the classes (a) breeding-stock (b) immature beasts bred from the farmer's own stock (c) adult animals already in use for dairy or draught purposes; none of the animals that used the pasture (a) have been sold (b) are old enough to be used for dairy or draught purposes but have not actually been so employed." If farmer could not say just that truthfully -- or undertake the risk of proving just that -- then he should not have a general Prohibition. He should rather be driven to plead the truth to the end of obtaining a Prohibition covering only as much as he was really entitled to. As things stood -- with the approval of the Court (for although only Popham and Gawdy speak to this point, the Prohibition was finally upheld *in toto)* -- a general Prohibition could be had merely by saying in effect, "I claim the breeding-stock/replacement-capital exemption." If the parson had not already anticipated that claim in his libel (by alleging that the pasture was used by animals which had been sold and/or adult animals not employed for "pail or plough" and limiting his suit to the herbage consumed by these animals), his only course would presumably be to plead

specially to the declaration -- that so many animals fell outside the exemption. That course throws the burden of knowing something about the farmer's livestock operations onto the parson. (We know too little about 16th-century trials to say confidently that it throws the burden of proof onto him, but it probably has at least that tendency. Unless the parson could maintain that there was no basis for claiming the exemption at all, he would be driven to make a factual statement about the use made of a specified number of animals. Since juries retained the right to draw on their own knowledge, we cannot say the parson would be put strictly in the position of having to produce evidence or risk a directed verdict, though in practice his position might not be very different from that. The institution of special verdicts might relieve some of the strain on the parson. I.e.: Failure to sustain such a statement as "The farmer sold nine steers" might lead to nothing worse than a special verdict for six steers. Nevertheless, some shift in the real distribution of trouble and risk would be likely to follow the burden of pleading.)

In sum, Bacon was probably suggesting a rule of more than formal significance -- a rule that might have been of real help to parsons in a contentious area of tithe law. Besides merely reacting negatively, probably without much consideration and without extended explanation on Bacon's part, the Justices said one thing -- in effect, that Bacon's theory was untenable because homebred animals might die before they were "apt" for dairy or plough. That does not seem much of an objection to requiring more particularized pleading in the form I spell out above. It does, however, point to the kind of complication that might arise once one demanded that plaintiff-in-Prohibition do more than claim his exemption generally. It might make a question of law whether the pasture consumed by beasts who die young should be within the exemption (because the animals might have been used as replacement-stock if they had lived) or outside it (because they were not so used.) The Justices plainly preferred the first alternative (surely correctly, I should think). I assume that answer in the proposed form above (i.e., that home-bred young beasts are exempt if they are not sold, whether they live or die). But if Bacon's proposal were taken a little differently and more literally -- as demanding an allegation that all users of the pasture either were already or might still become replacements -- then the beasts who died young would not be covered in terms. If they were not to be taxed, as they should not be, they would have to be brought within the language of the surmise by interpre-

tation, at the expense of argument and doubt. To generalize the point: The simpler the surmise, the fewer problems; demand particularity and problems will arise as to how much particularity, what kind, and whether certain cases (such as the beasts who die young) fit the formula arrived at; where the complex land use means that tithe claims will often have to be settled on a partial or pro rata basis in the end, the simplest surmise -- the least problematic way to turn the ecclesiastical suit off and let the common law unscramble the matter -- is a generic claim to the "breeding-stock/replacement-capital" exemption.

One much later brief report[17] goes to the "burden of pleading" in suits for rakings. It confirms the first Elizabethan opinion a above, rather than the apparent (but uncertain) meaning of Greene v. Hunne: plaintiff-in-Prohibition must allege that he rakings were *"sparsim"* involuntarily. If there is any doubt that that was a pleading-duty, a well-advised pleader would still be careful to assert his innocence and most did.

Another *nota* in the reports[18] makes what may be regarded as a burden-of-pleading distinction for another situation. As laid down, the rule is: It is enough for plaintiff-in-Prohibition to surmise that he exposed ("exposuit") corn-tithes; but in the case of wool-tithes or the like "exposuit" by itself is not enough, for the manner of setting forth must be shown. The reality behind this is that paying tithes of field-crops -- grain and hay -- was a stereotyped and easily monitored operation; *contra* for other sorts of products. Harvest was a notorious annual event. When a man cut his grain or hay, it was his duty to shock or stack it in some manner and to set the parson's 1/10th apart from the rest in the field, so that the parson could see for himself whether he was allotted his honest share. That -- "exposing" the tithe -- was all. There was no common law duty to deliver the tithe to the parson, prepare it in a particularly convenient form, or expressly notify the parson that it was ready. (One was not, of course, to cheat -- as by separating the tithe *pro forma* and then carrying it off to one's barn before the parson had a reasonable time to view it over against the 9/10ths and pick it up, or by obstructing the parson's access to the field.) This system obviously would not work for other products: Things like milk and eggs came on every day; lambs and calves were born at this time and that; wool was harvested when the farmer happened to shear,

17 Cicill v. Scott. P. 3 Car. C.P. Littleton, 31.
18 H. 43 Eliz. C.P. Lansd. 1058, f.3.

possibly some of his sheep now and others later, and even where shearing time was as regular an event as corn harvest there was no analogue of the natural process of mowing, drying, raking, stacking -- a process extending over days in one highly visible place. It was therefore necessary, in the case of animal products, to put more burden on the parishioner. Custom often did the job by prescribing a time, place. and manner of payment. Otherwise, it was the parishioner's responsibility to inform the parson when a tithable product was available and to give him a reasonable chance to see that he was getting his fair share.

Our holding follows the allocation of substantive responsibility in the matter of pleading: If the parishioner's duty is only to "expose" in the sense explained above, he need only say *exposuit.* But where his duty cannot be reduced to the duty to "expose," *exposuit* is not enough. He must (as the report says) "show how" -- i.e., tell what he actually did by way of paying or proffering the tithe -- and also (the report is again explicit) make it appear that it was "in such manner as the parson could take them" -- i.e., that the mode of payment or proffer recited gave the parson a reasonable chance to judge what he had coming and take possession of what he was offered. It is in the latter situation that the pleading point is of interest. In the case of corn and the like, the opinion comes to saying that the word *exposuit* by its meaning describes what the parishioner claims he did (which by the law is all he needs to do.) By the same token, *exposuit* does *not* describe any process of paying or proffering such things as wool (and hence does not imply satisfaction of legal duty.) If *exposuit* were taken more loosely, as a way of saying "paid or proffered in a legally sufficient manner," then our opinion holds that no such general surmise would justify a Prohibition. The parishioner-plaintiff may not say only that, leaving it to the parson-defendant to plead to the generality. (I can only imagine its being pleaded to by the special kind of traverse commonly used to get around the objection to affirmative matter in a negative pleading -- positive statement of the alleged truth followed by an *absque hoc* denying the other side's plea expressly. E.g.: "The parishioner did not notify me that he had sheared his sheep at the time it was done or allow me to see the newly sheared wool, *absque hoc* that he *exposuit* the wool as alleged." As the holding stands no such pleading would be required. The parishioner would state concretely traversable facts and make the demurrable claim that the steps to pay or proffer he went through were legally sufficient.)

Finally, we should note a way in which the *exposuit* opinion is puzzling -- not for its content, but its existence. When could one have a Prohibition for corn tithes by surmising *exposuit,* or for wool tithes by surmising payment/proffer in a spelled-out manner? In the most standard case, the answer is "Never." I.e.: A parishioner could not prohibit a tithe suit by saying he had paid the tithes, for that was a perfectly cognizable and acceptable plea in the ecclesiastical court. How then could the question to which the opinion relates come up at common law? The answer, I suspect, lies in the nature of certain *modi.* Some *modi,* as we have seen, required extra work on one product in consideration of exemption for another. Thus a man might have occasion to say he *exposuit* his tithe-hay (in a form superior to what was obligatory, e.g., in bound sheaves) in consideration of some other tithe. Secondly, *modi* for "small tithes" tended to be only specifications as to how the duty should be performed. E.g.: A man sued for wool tithes surmises that by custom he is to pay wool tithes at Easter and that he paid them at that time. This is not to surmise payment merely (which would fail to state a cause of Prohibition), plus the additional fact of performance according to the *modus.* For there is no common law duty to pay tithes at any specific time, but whenever shearing occurs. A custom specifying Easter is therefore a *modus* like any other -- determinable at common law as to its truth, meaning. and validity. It meets the consideration test for *modi* because there is a benefit to the parson in assuring him his tithe at a definite time and relieving him of the trouble of claiming and collecting the product at scattered times. (So held with respect to some of the prescriptions in Greene v. Hunne above, for example.) Therefore, men could have occasion to say *exposuit* or "paid or proffered" in surmises as an adjunct to claiming certain types of *modi.* Our holding says that *exposuit* is not the right expression. It at least suggests that "paid or proffered" by itself might be inadequate, though probably surmising just that *in conjunction with claiming a "specifying" modus* would be enough. ("This is the customary mode of payment and I have paid" may be taken as implying "I have paid in accord with the custom, which, if the custom is reasonable in itself, is a sufficient discharge of my legal duty.") Finally, we should inquire whether ecclesiastical courts ought to have final authority to decide pleas of payment of "small tithes." I.e.: Suppose the parishioner pleads payment of wool tithes in the ecclesiastical court. Suppose the ecclesiastical court decides that he did not give the parson adequate notice of the product's

availability or a reasonable chance to see and take his due. Should the parishioner be able to challenge that decision by Prohibition? *Quaere.*

D.
Defensive Pleading

Summary: These cases are on plaintiffs' exceptions to the defendant's manner of traversing declarations. On the basis of few cases, nothing like a bias in favor of plaintiffs-in-Prohibition can be seen. Most refined logical objections to traverses were probably recognized as plaintiffs' attempt to escape from a weak factual case, and such attempts were not treated indulgently.

* * *

The cases above ask what standard of pleading plaintiff-in-Prohibition should be held to. In a few other cases, pleading points arose from defensive pleas. In Hockleton v. Prince,[19] a man being sued for tithes of eggs surmised (and subsequently declared) a *modus* of the sort commonly claimed for "small tithes" -- not so much a commutation as a customary way of computing what was due. In this case, the alleged custom was to compute the egg tithe from the number of chickens kept by the farmer (three eggs per cock and two eggs per hen.) To the declaration setting forth this *modus,* the parson pleaded as follows: Before bringing his suit for tithes in kind (i.e. ten per cent of the eggs produced), he demanded payment according to the customary method of computation, *absque hoc* that the plaintiff was ready and offered to pay, as the plaintiff alleges. To this plea, the parishioner-plaintiff demurred, for two reasons: (a) It is repugnant to sue for tithes in kind and then plead that one had demanded tithes according to the custom; (b) the traverse (i.e., the negation of a point in the plaintiff's plea introduced by *absque hoc)* is bad because it goes to deny a subordinate clause. (The plaintiff said that the customary computation-method existed, and that he was being sued for tithes in kind *although* he was ready and offered to pay according to the custom. The defendant's traverse went, not to the whole sentence, but to the "al-

19 M. 37/38 Eliz. Q.B. Add. 25,201, f.796.

though" clause.) The Court upheld the demurrer, giving judgment for the plaintiff.

By common law standards of good pleading, the decision seems correct. Off-hand it may seem a little rough on the parson, if we imagine the human situation. Assuming the parson to be telling the truth. the story would go as follows: The parson demands eggs according to the custom. For same reason, the parishioner refuses to pay. "Very well," says the parson, "I'll sue you for tithes in kind." When he cools off and takes some legal advice, the parson sees that he has no chance of breaking the custom. He needs a plea that will "take back" his ill-conceived suit for tithes in kind but still insist that his just tithe was withheld. Why not let him so plead? Why not let a jury say whether the customary tithe was offered? There are, I think, two difficulties in that: (a) Juries had no business deciding the bare question whether tithes had been paid or offered. That question was within ecclesiastical competence. Upholding the Prohibition would not be ruinous for the parson, because he could start a new ecclesiastical suit for the customary tithe, pursuant to which the ecclesiastical judge could decide whether the parishioner had satisfied his duty by a proper offer to pay. (b) If the jury said an offer had been made, the Prohibition should presumably stand. But suppose it said no offer had been made. What then? The suit for tithes in kind could hardly be sent back by Consultation. For even if the parishioner wrongfully refused to pay the customary tithe, he ought not to be liable for tithes in kind. Therefore a "fancy" solution would be needed -- a qualified Consultation in effect requiring the ecclesiastical court to pretend that the suit before it was for the customary tithes. It is much simpler just to uphold the Prohibition on pleading grounds, as the Court did.

In Austin v. Clifton *et al.,*[20] a traverse was challenged on a nicety of pleading, but upheld. A man had charged some land to answer for his taxes and public duties -- viz., at least to pay his Parliamentary fifteenths and 5/ *per annum* to the poor. The real issue in this case was whether, over and above those encumbrances, the land was charged to pay any surplus profits it produced for maintenance of the church. The churchwardens sued the landholder for such surplus profits. To have a Prohibition,

20 M. 10 Jac. K.B. 2 Bulstrode, 20.

he set out the encumbrances for fifteenths and the poor and said that he was to have any surplus to his own use. The churchwardens pleaded as follows: The surplus profits were to go for repair of the church, *absque hoc* that they were for the plaintiff's own use. The plaintiff demurred to this plea, arguing that the traverse *(absque hoc.* etc.) was bad. (The point is, I think, a refined one. The plaintiff's counsel made two arguments: that a traverse "waives" a plea in bar, and that the traverse here was directed at an "inducement" to the plaintiff's plea rather than the thing itself. Perhaps the following restatement catches the point: If we think of the affirmation as "waived," the churchwardens have no case. I.e.: Whether or not the plaintiff has the surplus to his own use, the churchwardens have no claim to it unless it is for repair of the church. In other words, the churchwardens must say something positive to make out a claim. The negation -- *absque hoc,* etc. -- could not stand on its own feet. But a good traverse must be able to stand on its own feet. A traverse in the *absque hoc* form may be *explained* by affirmative language, but must by itself deny the adversary's statement in such a way as to destroy his case. The negation must "go to the heart." Thus, its effect must not be merely to deny an introductory statement or conclusion, either of which could be falsified without destroying the adversary's case. Here the plaintiff's claim to prohibit the churchwardens from collecting the surplus profits could be valid even though he was not entitled to the profits for his own use.) The Court overruled this objection to the defendant's plea, pouncing on its evident weakness: What *could* the defendant traverse, the judges asked, except the claim that the profits were to go to the plaintiff's own use? (This point may perhaps be spelled out as follows: The affirmation could not stand by itself as a plea in bar, because it implicitly denies that the plaintiff has the profits to his own use. An explicit negation -- an *absque hoc* -- was therefore necessary. A mere negation -- without the accompanying affirmation -- could have been employed, but it would have negated the same thing, the only thing there is to negate, and would do so in less useful form than the present plea, which shows the positive basis for the churchwardens' ecclesiastical suit.) I conclude that the decision was correct in the purest pleading terms. I.e.: The Court did not overlook a doubtful pleading in the interest of justice; it overruled a fancy argument against a plea that could not be improved on. The report says that judgement was given against the plaintiff. I.e.: He was apparently stuck with his demurrer, so that the real dispute never reached a jury. In the light of the cases above in which defendants were allowed or encour-

aged to waive demurrers, that course may seem a little rigorous -- in this case on plaintiff-in-Prohibition. Possibly the plaintiff showed his hand all too clearly in taking a far-fetched demurrer -- i.e., suggested to the judges' intuition that he had no serious hope of winning on the facts.

The report of Dr. Bowles's Case[21] does not give the Court's decision, but it serves to illustrate further the kinds of objections to defendants' pleas that could be made. In this case, a parishioner claimed the temporary tithe exemption for recently reclaimed land provided by 2/3 Edw.6. The parson wanted to plead that the land in question had not been reclaimed from unproductivity so as to qualify for the exemption. He said the land was *"fructuosa et non stirrilis* [sic]." The plaintiff objected that the proper plea would have been "The land was fruitful, *absque hoc* that it was sterile." I.e.: The plaintiff having said "sterile" or the equivalent, the defendant was bound to contradict him expressly. It would have presumably have been all right to say "It was not sterile" *tout court.* But having used one word -- "fruitful" -- which only by implication contradicted the plaintiff, the expressly negative language -- "not sterile" -- must be set off in an *absque hoc* clause. It would be interesting to know whether the Court allowed this point of elegance. The report says that the plaintiff *moved* his objection to the defendant's plea, not that he demurred. Assuming that it is not a mere manner of speaking -- i.e., that there really was no demurrer -- what did the plaintiff hope to gain? If the plaintiff persuaded the judges, would they do any more than delay the trial until the defendant amended his plea? One suspects a dilatory intention.

In Rochett v. Gomershall,[22] a parson sued for tithes of furze. He said in his libel that he was suing for furze used as fuel (furze which the parishioner *"convertebat in focale and combustible.")* The parishioner surmised and declared that the furze had been burned in his "house of husbandry," and that furze so used was exempt from tithes by custom (upon the usual consideration when such discharges were claimed by prescription -- because heating the "house of husbandry" contributed to maintaining the "tithe-base"). The parson then pleaded as follows: The furze in question

21 P. 22 Jac. C.P. Harl. 5148, f.18.
22 P. 7 Car. C.P. Littleton. 367.

was sold, *absque hoc* that it was burned in the parishioner's house as alleged. The parishioner demurred.

In support of the demurrer, counsel argued that the plea and the libel conflicted: Having sued for furze *burned,* he now buttressed his denial that it was burned as domestic fuel by saying it was *sold.* It was also argued that allowing the plea would be unfair to the parishioner. According to counsel, there were in fact two customs in the village, one covering furze burned domestically, and the other covering furze sold. (If you are reluctant to believe counsel on a statement of fact outside the record, it is enough to say, "Suppose there were two such customs"). The parishioner, being sued in terms for furze burned, naturally invoked the custom discharging furze burned as domestic fuel. If he had been sued for furze sold, he would have (or "Who knows but he might have?") invoked the other custom.

This argument sounds convincing, but the Court turned it down. In fact, I think, the Court was right. I suppose there is a sense in which the "cleaner" plea would have been a mere denial of the plaintiff's statement that the furze was consumed in his house. The appearance of conformity between the parson's libel and his pleading would thereby be preserved. But the pleading as it stands puts that question -- the only question raised by the parishioner -- in issue. The appearance of unfairness to the parishioner seems to me specious. Let us grant his version of the facts: Of the furze cut, some was burned in the parishioner's house; some was sold; none was burned anywhere else; tithes of furze sold were discharged by a separate *modus.* Now, trial of the issue raised by the defendant's plea as it stands could lead to any of the following results: (a) No furze cut was sold; all was burned in the parishioner's house. (Upshot: Prohibition stands.) (b) None sold; none burned in house -- i.e., all burned by the parishioner elsewhere. (Consultation) (c) Some sold; all the rest burned in house. (Result indeterminate. Either Consultation *quoad* the furze sold -- in which case the ecclesiastical court may decide whether the libel extends to furze sold; or Prohibition stands -- because the common law decides that the libel only extends to furze burned by the parishioner.) The following points should be observed in connection with these possibilities: (i) The problem of what to do here only arises if one of several possible verdicts is returned. Why not get a verdict first and "cross that bridge when we come to it"? (ii) The libel is genuinely ambiguous. It can be read as a suit for "furze burned by the parishioner, i.e.,

not sold," or as a suit for "furze taken out of the state of nature and converted to use as fuel, whether directly by the parishioner or by his harvesting and selling it as a fuel-product." The parishioner argued that he was entitled to read the libel in the first way, but that is not clear. He would at least have been better advised to allow for the other reading -- i.e., to claim the separate *modus* for furze sold if he had in fact sold some. (iii) An excellent case can be made for allowing the ecclesiastical judge to resolve the ambiguity in the libel. Surely "What does the libel mean?" is an ecclesiastical question. We have, however, left the common law court to decide that question, should it consider the meaning of the libel open-and-shut and the risk of its being over-extended by the ecclesiastical court excessive -- in which case the parson would be driven to start a new suit for furze sold. (Justice Hutton said expressly that in his opinion the libel was good for furze sold -- i.e., that it should be read in the second sense above.) (iv) Should the case go back to the ecclesiastical court *quoad* furze sold, the parishioner ought presumably to be allowed to rely on the separate *modus* applicable to that special class, notwithstanding his failure to rely on it in seeking a Prohibition. (Though he ought to have read the libel correctly, surely his failure to is understandable.) Could he have a new Prohibition based on that *modus* either because the ecclesiastical court would not allow him to plead it or because a custom subject to common law trial was at issue? 50 Edw. 3 would raise a problem here, though perhaps not an insuperable one. (There is no indication that the Court thought about this contingency.) (d) Some was sold; some burned in house; some burned elsewhere by the parishioner. (Consultation as to that burned elsewhere by the parishioner; as to the rest, same questions as above.) (e) All sold. (Same questions.)

In sum, it seems to me that the demurrer should have been overruled, as it was, because the defendant's plea pointed as well as the complicated structure of the case permitted to a resolution on the merits. The alternative plea, a simple denial, could ultimately have been less in the parishioner's own interest. (If the jury said "No, the furze was not burned in his house," a straight Consultation would probably have been unavoidable. Yet it would have been ambiguous what the jury meant by "the furze." All the furze cut? Only the furze burned by the parishioner? The common law would have less opportunity to consider whether the libel could reasonably be construed as extending to furze sold and to grant or withhold Consultation accordingly.) Having overruled the demurrer in

Rochett v. Gomershall, the Court granted Consultation. The effect of the demurrer was to admit that all the furze was sold and none burned in the parishioner's house. No question of waiving the demurrer was raised. If there was any chance of blocking the Consultation on the ground that the libel extended only to furze burned by the parishioner, I imagined the chances would have been better on motion after a verdict establishing the same truth. In this case as in others, demurring to pick holes in an *absque hoc* plea has a look of desperation.

In our last case on defensive pleas,[23] a tithe suit was prohibited on the standard ground that the bounds of parishes were in question. To get a Prohibition on that ground, the parishioner had to say that the parson suing him claimed that the land was in A., whereas in fact it was in B., wherefore the bounds of parishes were in question. In this case, the parson- defendant answered such a statement with: The land is in A., *absque hoc* that it is in B. The plaintiff's counsel excepted to this traverse (without, apparently, demurring). All the report says is that the Court overruled the exception and upheld the traverse. I can see no reason for doing otherwise. What would be a better plea? Simply "It is not in B." could presumably lead to a verdict for the defendant if the jury thought it was in C. (but not A.). But the defendant ought not to have a verdict unless the land is in A., his parish which is what he offers to prove by pleading as he did. Again, one suspects that shooting at the pleading was a forlorn hope or a delaying tactic.[24]

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23 H. 12 Car. C.P. Harg. 23, f.6.

24 In connection with the cases on defensive pleading, we may note one in which, instead of the plaintiff demurring to a traverse, the defendant demurred to a replication (plaintiff's plea responding to defendant's "confession and avoidance.") Matingley v. Martyn (P.8 Jac. K.B. Jones, 257) is deferred for its principal point. The case was decided in the defendant's favor on substantive grounds. That conclusion was reinforced by a pleading point against the plaintiff. Full explanation is impossible without going into the complexities of the *case.* In effect: the Court held that an *absque hoc* traverse (of the defendant's plea, by the plaintiff) was bad on several grounds, essentially because it did not cleanly negate the central point of the preceding plea. Refined pleading considerations were used to shoot down a traverse -- but in a tangled case where, with some difficulty, the Court had managed to persuade itself to go for the defendant on the substance. Two judges inclined the other way on the merits were presumably willing to overlook or get around the objections to the traverse.