VII.
Consultation on Motion

Summary: In practice, Consultations on motion were very common. Before *ca.* 1590, there was probably some doubt about the propriety of reversing Prohibitions without formal pleading, but on several occasions in the '80's the practice of doing so was upheld in general terms, and thereafter it was hardly questioned. Firm criteria as to when Consultation on motion should be considered and when full pleading should be insisted on where never evolved. The Jacobean courts probably assumed the freest discretion to act on motion, even when doing so required information from outside the record.

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We have seen numerous instances above of Consultation granted on motion It was common enough for Prohibitions to be granted when they should not have been -- on too hasty consideration or without adversary debate. In that event, the defendant could in practice move for Consultation. In cases within 2/3 Edw.6, properly granted Prohibition were required by statute to be reversed by Consultation for failure of preliminary proof. Consultations pursuant to the statute were ordinarily obtained on motion, as the statute surely demanded. 50 Edw.3, roughly speaking, banned more than one Prohibition in the same suit. Parties were allowed to move for Consultation on the ground that the record showed they had been once prohibited and then erroneously prohibited again, after the first Prohibition had been undone by Consultation. In short, Consultations on motion were a reality.

In theory, however, Consultations on motion could be questioned. Ruling out that maneuver would drive the defendant to plead to the declaration upon Attachment, a more cumbrous way to the end of arguing that the Prohibition was misgranted and should be undone. In addition to being more cumbrous for both parties, that course was more dangerous, especially for defendants, because of the possibility of being caught in an admission. It would be foolish, no doubt, to allow that effect in some circumstances, and possible not to. Even so, once one is in the toils of common law pleading there is a risk of getting caught. The courts would at the least have had to devise forms of excepting specially in deliberate pleading -- i.e., for raising special objections without fatal admissions.

Time would have been consumed in arguing over niceties. (We have just witnessed some dubious efforts to shoot down the defendant on pleading points. Increasing the role of formal pleading for the defendant would surely have multiplied such attempts.) In every way, Consultations on motion were a useful economy. Nevertheless, a theoretical case against them can be made: A Prohibition is a writ. Once granted (one may argue), a Prohibition is like any other writ -- i.e., like a Chancery writ. Once a writ had gone forth against you, you are committed to the process that emanates from it -- in the case of a Prohibition, to the choice of obeying, or else disobeying, suffering Attachment, and challenging the Attachment in due form. If a writ of Novel Disseisin issues against you, you may not go around to the back door and claim the it should never have issued -- however convincing your reasons. You must abide the process on the writ -- appear, plead, etc. Why should a Prohibition be any different?

This argument, as I say, is theoretical. It may have been given passing consideration in the late-16th century. Thereafter, the Consultation on motion was an established institution. The scope of the procedure sometimes came in question, however. The shadow of the theoretical argument against it perhaps did not disappear. Sometimes the courts hesitated as to whether to allow legal exceptions to Prohibitions on motion, or to insist that the defendant demur. They could not accept the motion as a fully respectable equivalent of the demurrer-in-law. Secondly, since Consultations on motion were basically accepted, defendants sometimes tried to push them too far -- or arguably too far. That is to say, they sometimes tried to smuggle in a few facts outside the record and move for Consultation so long as no one on the other side was heard to contradict those facts. The question then arose whether under any conditions Consultations could be granted on motion on the basis of facts not appearing of record. (Such facts as failure of proof within six months or a prior Consultation in the same case of course appeared by the record of the Court.) We turn now to a number of cases on the propriety of granting a Consultation on mere motion.

Three Elizabethan holdings come to sustaining the general proposition that Consultations upon motion are permissible. In none of the reports is the theoretical argument against them spelled out. The holdings appear, however, to be responses thereto. I conclude that in the 1580's it was se-

riously, though unsuccessfully, argued that Consultation may never be granted on motion, but only after demurrer or trial.

The first report comes in the case of Sutton v. Dowse (1583).[1] In this case, a Consultation was sought on motion and in the end denied on the merits. (We may omit the substance here.) The reporter adds that the judges also agreed that motions for Consultation are appropriate: A defendant who wants to except to the sufficiency of a surmise on its face does not need to demur, "but as *amicus curiae* he shall shew the same to the Court, and the Court shall discharge him." For the judges to have agreed on this publicly, the opposite -- need for a demurrer in all circumstances--must have been urged on the plaintiff's side.

The plaintiff's lawyer in Sutton v. Dowse was Coke. It was presumably he who advanced the general argument against Consultations on motion. Our next report[2] shows him going the other way. (Of course there is no contradiction. In Sutton v. Dowse he was arguing for his client. In the later report, he was either arguing for another client or -- more probably --just advising the Court.) According to this report, Coke said to the Court: "The common course of this Court is and always has been, and the law is clear thus, that if a man sues in spiritual court and defendant afterwards sues Prohibition and has it allowed, and makes insufficient surmise and insufficient proof in law to prohibit...the Court here will grant Consultation although the party does not demur...and that *ex officio*..." All the puisne Justices (Chief Justice Wray being absent) agreed with Coke's statement of the law.

The following points are to be observed: (a) Coke was speaking to the Queen's Bench and referring to the established practice of that court. Sutton v. Dowse was in the Common Pleas, where allowing Consultations on motion may have been less well- established. But however well-established the practice was in the Queen's Bench, some objection must have been made, or some puzzlement expressed, to call forth Coke's re-

1 M.25/26 Eliz. C.P. 1 Leonard, 10 (A M.S. report -- Harl. 6687, f330b -- does not contain the holding on Consultations on motion in general. Otherwise it agrees with Leonard and adds the detail that Coke was counsel for the winning side

2 T. 30 Eliz. Q.B. Harl. 1331, f.53; Harl. 15, f.176. (Quotation from Harl. Harg. states the point more summarily.)

marks and the judges' agreement. (b) Coke mentions unproved surmises as well as legally insufficient ones. This suggests the possibility that even Consultations on motion for failure of preliminary proof were questioned. The more serious possibility, I think, is that 2/3 Edw.6 was the entering wedge for Consultations on motion. The statute says that in the event proof is not supplied within six months defendants-in-Prohibition "shall upon his or their request and suit without delay have a Consultation granted." If that language does not absolutely require Consultations on motion, it comes awfully close. It is possible that a fund of "precedents" was accumulated in the first instance from motions pursuant to 2/3 Edw.6, in the face of which it was difficult not to entertain motions on other grounds It seems anomalous to let Defendant A discharge a perfectly good Prohibition on motion for failure of proof -- possibly only after debate on a difficult question of the statute's scope -- while forcing Defendant B to spend his time and money on formal pleading to point out an utterly worthless Prohibition. (c) Note the phrase *"ex officio"* in Coke's remarks, and *"amicus Curiae"* in Sutton v. Dowse. The public nature of Prohibitions could redound to the defendant's benefit as well as the plaintiff's. It would be anomalous to regard only plaintiffs as "informers in the public interest." If plaintiffs *qua* "informers" should be free to drag their opponents through three appeals before seeking a Prohibition, or prohibit their own suits, or call on the Court to help them out of misconceived claims, should defendants not be allowed to inform the Court of its oversights with a minimum of procedural fuss?

In Bishop of Landaff v. Slugge,[3] a Consultation was sought on motion, and again there was apparently some discussion of the propriety of the procedure. All the reported arguments are on the merits of the motion, and may be omitted, but the Court is said to have agreed unanimously that "the Judges use, if the suggestion be not sufficient to maintain the Prohibition, to grant a Consultation without any formal demurrer...if the insufficiency of the suggestion be manifest." Coke was arguing against the Consultation on the merits, so if objection to proceeding

3 T.31 Eliz. Q.B. 1 Leonard, 181

on motion was raised by counsel, it is probably he who raised it, notwithstanding his remarks in the last report.

Beyond the early reports above, there are several cases in which the question whether to grant, or consider granting, a Consultation on motion arises, directly or indirectly. In Nicholls v. Small,[4] a parishioner was sued for tithes of his garden produce. He surmised a *modus* to pay 1d per year for tithes of his garden. The parson moved that the surmise was bad for failure to say that the garden in question was "ancient." I.e.: By the defendant's theory, the *modus* should be applied to a particular piece of ground that had always been a garden. It is not a valid *modus* to pay a fixed sum for garden produce wherever the garden is planted and however large it is. According to the reporter, the Justices who were present "seemed to agree" (Justice Clench and Chief Justice Popham were absent.) The reasons for the rule urged by the defendant are good: The plaintiff relied on a common custom -- a trivial payment, "garden-penny," appropriate to a small kitchen-garden. To let such a nominal commutation discharge the product of a greatly expanded garden -- even a commercial truck-farming operation -- would be unfair.

The Court in Nicholls v. Small did not, however, grant a Consultation, or quash or deny the Prohibition. (It is not clear which it was asked to do.) Rather, Justice Gawdy said to the defendant's lawyer "Demur on it." He said this, according to the report, because the plaintiff's attorney offered to stand on the prescription as stated. We do not have in this case a discussion of Consultation on motion, or any assurance that a Consultation was sought. We do have an instance of advice to demur, or apparent unwillingness to dispose of a bad surmise informally. Why were the judges disinclined here and now to say "Consultation," or "The Prohibition is null," or "No Prohibition"? I would not attach importance to the lack of a full Court. Two judges may not have wanted to act themselves, but they could have put off action by an adjournment. It was not necessary to advise demurring. The report suggests that the plaintiff's stubbornness was decisive. The judges plainly said to the plaintiff's attorney, "Why don't you amend you surmise and add ancient garden? We'll give you the chance." He plainly answered, "No, we'll stand on it as it is."

4 M. 42/43 Eliz. Q.B. Add. 25,203, f.265b.

Why then should Justice Gawdy turn to the defendant's counsel and say "Demur" (with the implication "We think your chances on a demurrer would be very good")? Why not say to the plaintiff, "Very well. No amendment, no Prohibition" (or "If you won't amend, the defendant will have a Consultation")?

Two explanations seem possible: (a) Plaintiff-in-Prohibition always has the option of forcing a formal demurrer. Disposition of cases on motion is acceptable if both parties are willing, but the plaintiff may stick by his guns if he chooses to. (This theory only makes sense if the Prohibition has already been granted -- as I think it probably had been in Nicholls v. Small. It is clear that no one had a right to a Prohibition in the first place without showing cause. Judges might grant a Prohibition when in doubt about the surmise's merit in order to bring on full debate, but a man certainly had no right to a Prohibition just because he insisted on one. Once the Prohibition was granted, however, it would be possible policy to say it will never be quashed or undone on motion without the plaintiff's agreement to an informal mode of proceeding. Such a policy would express the idea I suggest above -- that a Prohibition is a writ like any other, hence that a man with a writ in his favor is entitled to hold the other party to the procedures the writ entails.)

(b) If the Court is in doubt, or thinks that an issue worth debating has been raised, it should hold out for a demurrer, or at least wait on demurrer if either one of the parties so prefers. In other words, disposition on motion should be confined to open-and-shut, easy, or practically inconsequential cases -- at least unless both parties clearly agree to "have it out" pursuant to a motion. (Thus if the Prohibition has been granted. If the question is whether to grant in the first place, the rule might be as follows: If the judges think a surmise is dubious, but that a full debate would be desirable, they may grant the Prohibition; but they should do so with the intent of raising a demurrer; they should not grant a doubtful Prohibition with the thought of possibly turning around and undoing it on motion -- at least not without the parties' clear agreement to take the motion as solemnly as a demurrer.) This policy is so much the way of reason that in one sense it must be regarded as inevitable (unlike Policy-a above). I.e.: If the Court is in serious doubt, it must want full debate for its own *ex officio* purposes, not to mention fairness to the parties as private litigants. It should not grant Consultation on a mere *ex parte* motion

unless it is very sure the Prohibition ought never to have been granted. Similarly, it should not confuse casual or unprepared debate on a motion with full-dress debate. It does not follow, however, that full-dress debate should be exclusively associated with debate on demurrer. It does not follow that either party should be free to insist on a demurrer on the ground that he cannot be expected to show his best at any earlier stage. It is reasonable, for the sake of orderliness and conformity with ordinary common law actions, to say that ultimately adequate debate can only take place on demurrer, but it is not inevitable.

In Nicholls v. Small, the plaintiff does not seem to have been represented by counsel, only by his attorney. (The American usage of "attorney" for any sort of lawyer does not of course apply in present-day England, much less in the 16th century, when the professional distance between counsel and such ancillary practitioners as attorneys was greater than the comparable modern barrister: solicitor distinction. The plaintiff in Nicholls v. Small was not represented by anyone with the standing or putative competence to debate the merits of the surmise.) Therefore, *if* the Court was in doubt and wanted a debate, it must wait until another occasion. But "Demur" need not follow. Debate on a motion in full court at a later date, the plaintiff being notified, would do the practical trick. "Demur" may therefore imply a preference for putting full-dress debate in that context -- a reasonable preference, but not a necessary one (and as we have seen, demurrers had their disadvantages.)

The final question to ask about Nicholls v. Small is whether it is at all likely that the judges *were* in doubt about the merits. The reporter say they "seemed to agree" with the defendant's counsel, as if they sounded hesitant. My guess would be that their state of mind fell somewhere between legal doubt and the sense that a visibly deliberate decision would be practically useful. *Modi* such as the one the plaintiff's attorney chose to stand on -- 1d for the garden, whatever its place and size -- look unreasonable from one angle. But they are a little puzzling. Is it not possible that a man could have paid a fixed sum for his garden from time immemorial while moving the garden about from year to year? So long as the garden stayed about the same size, is such a custom necessarily unreasonable? Perhaps "garden-penny" *can* be good without being applied to a particular "ancient garden." Perhaps it belongs to the parson to show that a parishioner's gardening has changed so significantly in nature and scale

that the old commutation is no longer appropriate. So much for the legal doubts. On the other hand, the judges were at least inclined against the plaintiff's surmise. They could have been strongly so inclined and still want a deliberate decision. For suppose they thought that just what the plaintiff was attempting should be decisively struck down. The attorney must have had a reason for refusing to amend. The garden must at least have changed location within memory.

Perhaps more was at stake. Truck-gardening for the London market, like the cattle business, was a "growth industry" at the end of the 16th century. Perhaps the plaintiff knew exactly what he was gambling on -- viz. making an ancient trivial commutation stick, so as to keep the produce of a commercial operation tithe-free. Perhaps the judges had no doubt that the gamble ought to fail, but wanted it to fail upon debate, to set a precedent and discourage other truck-farmers. The important thing would be a debate -- something to attract attention in the legal community -- but as a pure "precedent" a judgment upon demurrer would be even better. Hence, on one construction, there is a reason in the circumstances of this case -- without implying much beyond it -- for "Demur," in preference to "Move again when counsel for the plaintiff are present." On the same construction, "Demur" may be thought of as intended for the plaintiff's ears, though addressed to the defendant -- as if to say "We encourage you to demur in order to let us set a strong precedent against the kind of mischief the plaintiff insists on making against our advice" (to be understood by the plaintiff as "We've warned you that you're headed for a fall. You'd better reconsider your project of making this *modus* stick -- better take some proper legal advice before you declare. For if you push ahead you're going to have to fight your case on demurrer against all odds.")

In Henry v. Soame,[5] a Consultation on motion was denied on the ground that it could not be granted without stepping outside the record. A parson sued for tithes, some of which the parishioner acknowledged to be due. Sentence was then given for the parson, apparently with respect to all the tithes. After the ecclesiastical suit had been prohibited *in toto*, the

5 P. 4 Jac. K.B. Harl. 1631. f.305.

parson tried to get a Consultation on motion covering as many of the tithes as the parishioner had acknowledged. The Court denied the motion on the ground that it had no way of knowing from the record that the acknowledgment had been made. The parson was told to plead the acknowledgment, after which the Court would give him an answer.

In the most basic sense, the correctness of this sort of decision is beyond doubt. The courts obviously could not assume disputable facts on a party's say-so. What they could do would be to investigate facts of the sort that could be easily ascertained informally. Here, the certificate of the ecclesiastical court, or perhaps careful inspection of the sentence, would supply the needed information, if the judges were strongly disposed to grant Consultation on the parson's version of the truth. Perhaps they were not, for their language was hardly encouraging. They did not tell the parson he would certainly have a partial Consultation if the acknowledgment was duly pleaded and confessed or found in his favor. They told him to plead, then "we'll see." It is probably not self-evident that Consultation should lie even though the parishioner had beyond question acknowledged the tithes in the course of ecclesiastical proceedings. A court might hold that the parishioner was free to dispute whether the tithes were actually due in Prohibition proceedings, notwithstanding the acknowledgment and the sentence partially pursuant thereto. If the judges were uncertain about that point of law, their inclination to wait and see is the more understandable.

In the later Jacobean Pitt v. Harris,[6] a judge's refusal even to consider a Consultation on motion can perhaps be linked to his suspicion of the motives and probable justification of the party moving. The ecclesiastical suit in this case was for tithes of rakings. It was prohibited on the ground that rakings were exempt de jure unless the parson expressly alleged that they were fraudulently excessive. On the occasion when the Prohibition was granted, Coke said that "he did not like such greediness." (In other words I take it: "I am happy to have this chance to prohibit one of those greedy parsons who try to squeeze the last drop out of the tithe-payer by unwarrantable suits for by-products.") On a later day, Serjeant Finch, for the defendant, told the Court that "the party [parishioner] makes great

6 T. 14 Jac. K.B. 1 Rolle, 379; Harl. 4561, f.222.

gain by it, for he carries it into his barn." Coke replied, "The Prohibition is now granted, and therefore plead if you want to have Consultation."

As reported, Finch's remark does not make much sense. Coke's reply, on the other hand, is a clear refusal to consider a Consultation now, so that must be what Finch was asking for. I can only suppose that Finch was in some way saying that the parishioner was fraudulently counting tithable hay or corn as rakings. Perhaps "he carries it into his barn" means "he has gathered up his so-called 'rakings' by the cart-load -- obviously they are not honest rakings." It looks as if Finch was introducing new facts, thus raising the question whether a Consultation should ever be granted on motion on the basis of facts outside the record. Obviously such as Consultation could not be granted on Sergeant Finch's bare say-so. He was presumably requesting the Court to take informal verification-measures -- either to examine the party or to ask his counsel whether they would dispute that the rakings were excessive. (As to the latter: Counsel could be asked "Will you stipulate that the rakings were excessive in fact and nevertheless try to uphold your Prohibition in this case as stated?" If they say "Yes," argument on "this case as stated" could proceed on motion for Consultation. I shall show why the plaintiff's counsel might be willing to make such a stipulation.)

If we visualize a rakings case, Finch's proposal will perhaps not seem unreasonable: The parson sues for rakings by that name, alleging no fraud in his libel. The parishioner gets a Prohibition by invoking the *de jure* exemption -- merely pointing to the libel. I.e.: He does not allege in his surmise that the rakings were left behind despite due care and honest intent. Serjeant Finch now figures that he has two strings to his bow. (1) An argument -- probably weaker than the argument *contra,* but, as we have seen, possible on some authority -- that the parishioner ought to have alleged that the rakings in question were honest. (2) Strong evidence that they were not in fact honest. His obvious course is to plead the facts formally. But how sure-fire is that? First, there is the risk that every parson runs with a jury of tithe-payers -- and perhaps a "greedy" claim to rakings would run a special risk. But even waiving that, trusting the overwhelming evidence -- will the parson necessarily win even if fraud is established by verdict? Is it arguable that the parson is out of luck in a rakings case unless he has alleged fraud in his libel? I.e.: May the parson plead fraud pursuant to a Prohibition when he has neglected to rely on it

from the outset? Given these legal questions, a motion for Consultation begins to make sense. Finch would like to make a pleading argument against the surmise, but he dares not risk everything on that and throw away his strong facts. Yet he is not sure that the facts will help him. Why go to the trouble of further pleading? Why not try to convince the Court -- and, with a little help from the Court, the other party -- that the facts are not seriously in dispute, that the real questions are of law and might as well be discussed here and now? It is in everybody's interest to avoid waste, and waste will be inevitable if formal pleading is insisted on. For if the plaintiff is forced to declare, Finch will not demur on the pleading point -- through he might reserve it for a last-minute motion in arrest of judgment. If the plaintiff is forced to declare, Finch will plead the fraud.

The plaintiff might then raise the legal issue by demurring to the plea. But perhaps he will want to try his luck with a jury (assuming reasonably that the Court will let him take advantage of his legal point on motion if he loses.) So there would be an unnecessary trial, and in the end a legal debate on motion anyhow! In sum, it is to Finch's advantage to show his evidence now and stimulate legal argument on a motion; it is arguably to the Court's advantage to consider whether the case could not be abbreviated; even if the facts in Finch's favor cannot be established positively by informal means, the plaintiff may believe enough in his legal case to stipulate the facts against him and save himself time and risk. For these reasons, I can see color in a motion for Consultation on a likely construction of the reality.

Coke, however, said "No." He told Finch to plead the facts in his favor. That is not necessarily to say that the facts would help him -- only that he had better try that if he wanted to make a case for Consultation. The interesting question upon Coke's opinion is whether it signifies anything about the general acceptability of Consultations on motion. I would make three observations: (a) Hostility to Consultations on motion *as such* cannot be inferred from unwillingness to go outside the record for facts. It is one thing to entertain such a motion on a pure point of law, sidestepping demurrer; another thing to take informal steps to establish the facts in order to sidestep a plea in bar. (b) Coke's opinion might be given some weight as authority against such expeditions outside the record. (c) His earlier remark on the "greediness" of parsons suing for rakings vitiates the

opinion as authority even for that. He may have thought that a parson who first sued for rakings without saying anything about fraud and then came crying "Fraud" was intrinsically suspect. His first motive was greed, not an honest belief that the parishioner had cheated him. His afterthought -- finding his hope of bullying the parishioner frustrated by a Prohibition -- was to bring in a claim of fraud by irregular means. Instead of abiding the consequences of his original decision, he hoped to force the case into the shape it would have had if he had alleged fraud in his libel. It is conceivable that in other circumstances Coke would have been less unfavorable to an "expedition outside the record."

The case of Gilby v. Williams[7] is noteworthy as evidence of reluctance to grant Consultation without formal pleading. The ecclesiastical suit was of an unusual sort: A vicar alleged that there were two churches in his parish; for as long as sixty years past, the vicar said services in the two churches on alternate Sundays; more recently, he had agreed with his parishioners to say services in both churches every Sunday; in return for the extra work he was to have 40/ [per year, presumably] from each of the two villages to which the two churches belonged, the sum to be taxed on the inhabitants. The present suit was against an individual parishioner for 4d representing his share of the tax. A Prohibition was obtained on the ground that the prescriptive claim in the libel was not founded, as far as the language of the libel showed , on immemorial usage. I.e: The vicar claimed the right not to serve both churches every Sunday. He claimed to have relinquished that right in consideration of the payment for which he was suing. He claimed the right by usage, but not by immemorial usage. By the theory of the surmise, (a) the usage must be immemorial for the right to be valid and (b) the right must be valid for the money to be due.

In the event, the Court reversed the Prohibition by Consultation. It justified doing so without formal pleading as follows: "And for that the suit was before the prohibition and affirmed in the appeal, a consultation was granted without inforcing him to appear and plead to the prohibition." It justified the Consultation on the merits by saying (a) that the suit was in effect for a "spiritual pension" and, as such, within ecclesiastical jurisdic-

7 P. 21 Jac. K.B. Croke Jac. 666.

tion; (b) that the usage for up to sixty years would be presumed immemorial until the contrary was shown. The *explicandum* here is why the judges thought it necessary to justify the Consultation on motion by reference to the plaintiff's delay until after appellate sentence against him. They seem to say, "We really ought not to undo this Prohibition without pleading, but we will because the plaintiff has already subjected the defendant to protracted ecclesiastical litigation." Why should they say that, when they thought the Consultation was due and there was no question of relying on facts outside the record? Does the judges' conduct militate against Consultations on motion in general?

I suspect it rather militates in favor of the rule "Do not grant Consultation on motion unless you are sure." The very unusualness of this case probably meant that the judges did not feel quite sure. Their basic view of the case, I think, was that the vicar's claim appertained by its nature to the ecclesiastical court, and that therefore the suit should be prohibited only upon a showing of error. So, that is to say, they would have seen the case if the Prohibition had been sought as soon as the ecclesiastical suit was started. As it was, two ecclesiastical courts had made decisions for the vicar. The error, if it was one, of upholding a non-immemorial prescriptive right had been committed. But whether there was any error is surely a question of some complexity: (a) For the vicar to have had any claim to the money, must it have been promised in consideration of relinquishment of his *right* (not long-standing *practice)* of alternating churches? (b) Could such a right exist only by virtue of prescription in the common law sense (as opposed to the ecclesiastical sense, whereby sixty years was more than enough to establish titles)? (c) Whatever the true answer to these question, was resolving them clearly beyond ecclesiastical competence? (d) Granting that it was, and that the answer to the two preceding question is "Yes" -- even so was there any error? I.e.: Did the ecclesiastical courts *decide* not to apply the common law standard of prescription when confronted with evidence against the usage from more than sixty years ago? Or did the question simply never come up? Is it error for any ecclesiastical court to give sentence for A when A *pleads* the wrong kind of prescriptive title (ecclesiastical-type instead of immemorial), but when there is nothing to suggest that the other party tried to offer evidence going beyond the ecclesiastical period?

The court in Gilby v. Williams answered the last of these questions: In the absence of any showing to the contrary, sixty years' usage should be presumed immemorial. (Possible generalization: to have a Prohibition, it is not enough to say that your opponent relied on an inadequate prescriptive title in the ecclesiastical court; you must say specifically that he would not have been able to sustain an adequate one.) Even that point, however, might be problematic enough to warrant full debate -- ideally, or in other circumstances. The other question would surely warrant it. Full debate would not necessarily require pleading. For all that appears from the report, the plaintiff may not even have been represented by counsel; the Court may have been justifying Consultation, under the circumstance of the plaintiff's delay, on the defendant's motion merely, without *any* adversary debate. I think that unlikely, but the possibility exists. In any event, proportionately as the legal question were complex, debate in formal setting was the more to be recommended -- in principle. In practice, the plaintiff had not thought of a Prohibition until losing on ecclesiastical appeal. When he got around to a Prohibition, he raised a tangle of issues most disproportionate to the 4d at stake in the suit. (Cf. the cases above on Prohibition sought after ecclesiastical appeal.)

Gilby v. Williams tends to make Consultation on motion an act of discretion, rather than something ordinarily to be considered in the absence of distinct reasons against doing so. Parish of Aston v. Castle-Birmidge[8] makes the same point with a different emphasis, for here the Court assumed a conscious discretion to grant Consultation on motion on the basis of facts outside the record. The case was a standard one: Some parishioners were sued for a rate to repair the church. They got a Prohibition on surmise of a prescriptive discharge in consideration of repairing a chapel-of-ease instead. The defendant's normal recourse would have been either to traverse the prescription or to pick legal holes in it as stated. The defendant (Parish of Aston) was allowed, however, to introduce evidence upon a motion for Consultation. The evidence was of a sort hardly amenable to contradiction. The Parish showed: (a) an ecclesiastical sentence from 16 Eliz. requiring the plaintiffs ("men of Castle-Birmidge") To con-

8 Hobart, 66. Undated. Probably Jac. C.P.

tribute toward repair of the main church; (b) an ecclesiastical sentence of 30 Eliz. requiring certain men of Castle-Birmidge to assume the office of churchwarden in the main church (whereas in their surmise the plaintiffs had said that the chapel had its own churchwardens and other privileges -- an attempt, common in such cases, to show that the chapel was *quasi* an independent parochial church.) Further evidence of the same order, wholly or partly conflicting, was also introduced (by whichever side): (a) Five ecclesiastical sentences in favor of the men of Castle-Birmidge. But all five had been reversed on ecclesiastical appeal! (b) An acquittance from 11 Eliz. for a contribution made by Castle-Birmidge for the repair of Aston church, the said acquittance reciting that the money was received "as a benevolence and not of duty."

In the light of this evidence, the Court granted Consultation. The following points are to be observed: (a) The Court emphasized the discretionary character of its act and the special circumstances of the case: "...for though the surmise were matter of fact and triable by the jury, yet it is in discretion of the Court to deny a prohibition, when it appears unto them that the surmise is not true, and especially in a case of this nature, when the delay of reparation may turn to a final decay of the Church, and the intolerable charge of the parishioners both in repairing and in suit, for the suit in this case had cost already (as was said) three-hundred pounds." (The uncontradicted statement that the suit had cost that much must be taken as a further fact outside the record by which the Court was moved.)

(b) The evidence that moved the Court no doubt ought to have moved a jury. But it is challengeable with respect to its decisiveness and completeness. I.e.: Should the ecclesiastical sentences be given great weight -- not to say decisive -- against the alleged prescription? Castle-Birmidge no doubt relied on usage in all that ecclesiastical litigation, but how much should ecclesiastical decisions against a prescriptive claim (which perhaps the ecclesiastical court ought not, properly speaking, to try) count against its "real" validity? Is it significant that so far as appears Castle-Birmidge had never attempted a Prohibition before? Granting that the ecclesiastical decisions deserved great weight, should they *outweigh* other evidence of the sort that might be taken into account by a jury (oral testimony and the jurors' own knowledge) but could not be put before the Court as undisputed truth? In sum, was the Court in Aston v. Castle-Birmidge riding a reasonable hunch too far? Was it assuming a perhaps justi-

fiable prerogative to step outside the record but abusing it -- for is it true in this case that a jury *could* not find for Castle-Birmidge without blatant fraud or inexcusable credulity?

From the way the Court's opinion goes on, I suspect the judges were sensitive to the criticism implied in those questions. Their decision is not *quite* so crude as saying "No responsible jury could find for Castle-Birmidge, so we will grant a Consultation without trial." Aside from stretching a point to avoid financial hardship on ordinary people and the decay of churches, the judges seem to me to have softened the edge of their decision in the following ways: (i) Consultation on motion would have been far less controversial if it could have been argued for on legal grounds. That was not straightforwardly possible here. There was, however, a sense in which Castle-Birmidge's claim was less than airtight. The reporter's statement of the case says that the chapel performed all the functions of a church, including the sacraments; that it had its own churchwardens; that the "precinct" of the chapel was regularly perambulated (the Rogation Day perambulation was a standard parochaial practice); that the Vicar of Aston provided a curate for the chapel; that the chapel did not have a graveyard, but inhabitants of the "precinct" were buried at Aston. I take it that all these points appeared from the surmise. They show what Castle-Birmidge was shooting at: to establish its virtually parochial status. The attempt has one or both of two meanings: to serve in lieu of a sufficient prescriptive title, or to enforce the "consideration" for the prescriptive discharge. I.e.: Conceivably a true "quasi-parish" could claim a *de jure* exemption from repair rates in the proper parish to which it belonged. More likely, "quasi-parochial" status would tend to justify an inference of prescriptive discharge in the absence of sufficient evidence of non-contribution to the "mother church," or in the presence of evidence of occasional contribution.

On the other side, it was questionable whether contributing to the upkeep of *any* chapel, however immemorial, was good consideration for discharge from ordinary parish rates. If the chapel was little more than a place to pray or get in out of the rain, one's chances would not be very good. In other words, it would not be presumed that regular users of the parish church were let off scot-free for doing something mainly for their own benefit and hardly at all for the parish's. If, on the other hand, the

chapel functioned virtually as a full church, one's chances would be good. A second church relieved the strain on the main church, or at least enriched the religious facilities of the parish. Maintaining it was therefore a benefit to the parish as a whole, and the frequenters of the chapel would derive no great benefit from any rates they were forced to contribute to the main church. Now, the Court in Aston v. Castle-Birmidge pounced on the two facts that were not favorable to the plaintiffs: the lack of a cemetery at Castle-Birmidge and the curate. The former went to show that Castle-Birmidge was less than a quasi-parish, even if it came pretty close. The latter -- a separate curate -- was no doubt intended by the plaintiff to elevate the chapel's standing, but then he was *only* an appointed curate. As the Court said, the Vicar could let the curate go if he liked and serve the chapel himself. (An endowed or perpetual curate -- a quasi-benefice attached to a quasi-church -- would have looked better.) Ergo, said the Court, "they were to all purposes part of the parish of Aston, and therefor de communi Jure, were liable to reparation with the rest."

This remark must not be taken out of context, however. The context was created by the evidence against Castle-Birmidge whereof the Court was taking notice. The judges were clearly *not* saying: "We can forget the ecclesiastical sentences and other evidence and still dismiss the Prohibition, because Castle-Birmidge has undertaken to show its quasi-parochial status in pleading and failed." Rather, I take them as saying: "We may in this case grant Consultation on the basis of evidence which strongly undercuts the prescription, even though it may not destroy it decisively. For besides the apparent weakness of the plaintiffs' jury case, there is at least reason -- supplied by their own admission -- to question whether their legal case is strong enough to prevail in the end.

Even if, contrary to the clear reality, their evidence in straight support of the prescription (non-contribution to the church, contribution to the chapel) were very strong, there would still be a question whether contributors to a chapel who are free to use the church and must do so for burial can escape parish rates. Even if we disregard the ecclesiastical sentences, the plaintiffs' attempt to make out quasi-parochial status suggest the need to -- i.e., that they do not have much straight evidence for the prescription (such as testimony or documents relating to really old practice.) They trust in its being inferred from the fact that the chapel has

been an independent 'going concern' in recent times. Yet by their own admission it is not fully independent, and a jury that wanted to take it as such and so find the prescriptive title might have to be checked,"

(ii) The Court was careful to give Castle-Birmidge a chance to show its evidence and to rebut the one piece of favorable evidence it could produce. As the Court said, "the proof lay on their [the plaintiffs'] side' -- i.e., in a trial upon a traverse, the plaintiffs would be expected to show something in support of their prescription. In practice (subject to the still-existing problems of the judge's power to prevent a jury from relying on its own knowledge against the evidence), Aston could sit on its ecclesiastical sentences, confident that it would win without them if Castle-Birmidge could produce nothing. Proceeding upon the motion for consultation, the Court accordingly invited Castle-Birmidge to show what it had. The court was careful to avoid asking itself simply, "Which party would be likely to win upon trial?" It also asked the stricter question "Is there any likelihood that the plaintiffs can sustain the burden of proof?"

Had the plaintiff produced substantial evidence, perhaps the motion would have been denied in spite of the Court's conviction that the defendant's evidence was much better and more likely to prevail in the end, As it was, all Castle-Birmidge produced was the acquittance of 11 Eliz. Against that, the Court made two points: First, the language of the acquittance ("as of benevolence and not of duty") was only the language of the two receivers who had written it. As the judges said, "...the folly of two men could not change the right nor bind the parish." Secondly, the acquittance had been pleaded and overruled in the ecclesiastical suit of 16 Eliz. One might add the obvious point that was no doubt understood: The acquittance went to show that Castle-Birmidge *had* contributed to Aston, even though it had claimed not to do so as an obligation, and the claim had been accepted by two dead-and-gone collectors whose honesty and knowledge were anyone's guess. Thus, the plaintiffs were invited to show evidence and produced worthless evidence.

The acquittance need not, of course, exhaust the evidence that the plaintiffs might ultimately produce. They were in effect allowed to show their evidence of the type amenable to evaluation by the Court -- documentary evidence. The Consultation could probably not be justified merely by the plaintiff's lack of convincing *prima facie* evidence. But it

could be given weight in the context created by the defendant's good negative evidence and the legal doubts surrounding the plaintiffs' case.

On the whole, Aston, v. Castle Birmidge: (a) is too special to provide much of a lead in other cases; (b) does, however, count against the proposition that going outside the record is *never* justified upon a motion for Consultation; (c) gives a kind of countenance to the view that *every* Consultation on motion (save perhaps for such special cases as failure of proof under 2/3 Edw.6) is an act of discretion, so that the judges need never go out of their way to justify waiting on the normal course of pleading.

In the Caroline case of Wood v. Symons,[9] the Common Pleas refused to go beyond the record on a motion for Consultation. The ecclesiastical suit was for hay tithes. The parishioner surmised that the hay in question came from "headlands," and that in consideration of paying his regular hay tithes he was customarily discharged for hay produced on headlands no larger than was necessary for turning the plough. The parson's counsel tried to move the Court to grant Consultation without pleading by saying that in truth the hay in question did not come from legitimate headlands, but from strips alongside the arable land as wide as the cultivated ground itself. Counsel got nowhere. The Court told him to join issue or demur, since the Prohibition was granted.

The last phrase gives one pause because it suggests that there might have been a basis for denying the Prohibition in the first instance. The report is not good enough to make such basis visible. I would suggest the following possibilities: (a) The Court would in fact have been willing to look beyond the record to the truth if the Prohibition had not already been granted. (In which event, the decision points to different standards as between the two occasions -- initial motion for Prohibition and motion for Consultation). (b) There was a basis for at least doubting the surmise's legal sufficiency. I can think of two likely grounds for doubt: (i) The plaintiff pleaded his *modus* as applicable only to legitimate headlands -- what was actually necessary to turning the plough -- but perhaps did not say with sufficient specificity that the hay in question came from such

9 Hetley, 32 Not specifically dated. 3-7 Car. C.P.

land. (ii) The *modus* was bad. The alleged consideration was payment of regular hay tithes, whereas performance of one duty was never consideration for exemption from another. It is more than likely that headland hay should be regarded as tithe-free *de jure,* but it can be argued that one who alleges a *modus* is stuck with his prescriptive claim. Either of these grounds might have justified a demurrer, which the Court suggested to counsel as one of his possible courses. But counsel did not move for Consultation on legal grounds. His theory may have been like that I ascribe to Finch in Pitt v. Harris above: Consultation could not be confidently moved for (nor a demurrer taken) or legal grounds alone, but legal questions would or should ultimately be raised when the truth was established by verdict. If the truth is not really likely to be much in dispute, there is an advantage in establishing it early by informal means or stipulation and getting on to the real problem.

The only other feature of the report is a statement by Chief Justice Richardson. Richardson said that grassland along the sides of enclosed arable fields could be discharged of tithes, as well as headlands properly so-called. I take it: Whereas in open-field agriculture only literal headlands were exempt *(de jure,* presumably, or else exemptible by the kind of pseudo-*modus* that only assured that the parson got hay from other sources), consolidation of strips might change the picture. A man should be entitled to ancillary grassland attached to his arable equivalent to what he would have had in common with others under an open-field system. But the physical arrangement might be different from what obtained where there was a long field with ample turning space for large teams along the two ends. Thus -- I take Richardson to be saying -- the bare "truth" that counsel wanted to insist on out of order (that the hay did not come from headlands strictly so-called) would not necessarily permit resolution of the case. The full truth -- how much ancillary grassland there was, how it came to be arranged as it was -- would come out more reliably by verdict than by any informal investigation. With the full truth known, lurking legal questions as to what should be counted as headland hay could be more intelligently discussed (unless, of course, the defendant thought he had a sufficient point of law here and now, in which event he was free to demur.) On this analysis, the Court was not frowning on Consultation on motion as such, nor even on all "expeditions outside the record." It simply thought that the case was not amenable to solution on the basis of easily ascertained facts and the law.

In another Caroline case,[10] a Prohibition was obtained on 23 Hen. 8, because the ecclesiastical suit was brought in the Arches instead of a court of the diocese where the ecclesiastical defendant lived. A Consultation was sought on motion on the ground that the diocesan or sub-diocesan court had remitted jurisdiction to the Arches. Such surrender of jurisdiction by an inferior court to a superior was permitted in same circumstances by ecclesiastical law. It might make a question whether a Prohibition pursuant to 23 Hen. 8 could invariably be overcome by showing that such an official "remission" had occurred. But that question could not be approached until it appeared *de facto* or by admission on the pleadings that the remission had taken place. Defendant-in-Prohibition here was trying to get it established *de facto* without pleading. He was asking the Court to go beyond the record, but in a relatively easy and controllable way -- by ascertaining the official act of another court. That is less than asking for informal establishment of such facts *in pais* as whether hay was grown on proper headlands. Nevertheless, the Court denied the motion, saying that the matter must be pleaded. The decision counts at least against going outside the record on motion.

The important case of Margaret Hide v. Bishop of Chester[11] reveals a clearcut judicial division over Consultations on motion. In this case, there was no question of noticing or attempting to ascertain facts outside the record. The Consultation was sought because the Prohibition on its face was alleged to have been misgranted. Two judges, Jones and Whitelocke, thought that the Prohibition ought not to have been granted in the first place. But they also thought it could not be reversed on motion. ("Although prohibition has been unduly granted, it is not the court's discretion to grant a consultation on motion without answering.") The other two judges, Richardson and Croke, thought the Prohibition was well-granted, thus that no Consultation was deserved on the merits. They thought, moreover, that there was a *special* reason (explained below) why a Consultation on motion could not be considered in this case. (I.e.: They opposed consultation on motion here even conceding that the Prohibition was bad in its main aspect, for this one had a special aspect.) But

10 Latch, 180. Not dated. Early Car. K.B.
11 M. 7 Car. K.B. Croke Car., 237.

Richardson and Croke went out of their way to disagree with Jones and Whitelocke on motions for Consultation in general. ("But perhaps in some cases, when prohibition appears in itself unduly granted, defendant, before appearance having committed no contempt, may move for consultation.")

The Case was as follows in Hide v. Bishop of Chester: William Hide was a priest of the diocese of Chester. When he died, the Bishop sued Margaret Hide for a mortuary fee, claiming it due by custom. Margaret's surmise for a Prohibition (a) recited the statute of 21 Hen. 8, c. 6 (which, generally speaking, set the mortuary fees that the ecclesiastical authorities could charge); (b) averred that there was no such custom as the Bishop was invoking; (c) said that she had paid the lawful mortuary to the parson of Bunberry. Margaret said also that the Bishop had prosecuted his suit after the Prohibition was granted. Since the original surmise could not possibly say that, it is clear that we are dealing with a declaration. The Bishop was trying to escape on motion, not before *any* formal pleading, but after declaration.

This circumstance markedly influenced Richardson and Croke. They would have considered a Consultation on motion if they had seen anything wrong with the original surmise, as they did not. But as they expressly said, the charge of contempt -- that the Bishop had actually disregarded the Prohibition -- must be answered. Even if the Prohibition should never have been granted, he must say something to that. (Probably he must deny it and prove his innocence or else face punishment for contempt. At the least, he must admit it and argue for his legal innocence. The possibility of his being legally innocent though factually guilty must be allowed for because of the theory we have encountered that legally defective Prohibitions are adjudged void *ab initio* when they are reversed. A parson who persisted in a tithe suit after a Prohibition based on a *modus* would unquestionably have committed a contempt, because the Prohibition unquestionably "ought to have been granted." *Quaere* where the Prohibition ought not as a matter of law to have been granted, though it was. If Richardson and Croke allowed for the latter possibility (the Bishop's legal innocence) they would have been saying, "The Prohibition's original validity is too serious a matter to decide on motion, considering that a man's liability for contempt depends on it -- or *might* depend on it, the question as between 'does' and 'might' being it-

self a serious legal problem." If they did not consider that possibility, they would only have been saying "However bad the Prohibition is, it cannot be reversed until the Bishop denies the contempt and clears himself.")

The fact that they were faced with a declaration could mitigate the opinion of Jones and Whitelocke. I.e.: It would be a plausible rule to say, "Consultations on motion are perfectly acceptable -- at least if they are confined to law -- so long as they are made before any pleading. But once the plaintiff has gone to the trouble of declaring the defendant must come back with a commensurate plea and may not resort to motion." Jones and Whitelocke do not make such a distinction, but they may have intended it. In any event, the case before them did not require a general condemnation of Consultations on motion, only of motions for Consultation brought too late. On the other side, Richardson and Croke did not rely on the *mere* fact that the pleading had proceeded as far as declaration, but rather on the fact that the Bishop's contempt was now an additional issue. They may have meant that Consultation on motion is "perhaps" permissible before declaration, but never after, though they do not say that exactly. (The "perhaps" is worth noting. Richardson and Croke did not give Consultations on motion an overwhelming endorsement.) The substantive question that divided the judges in Hide v. Bishop of Chester need not detain us here. It should only be noted that they were flatly divided on a question of some difficulty. That in itself supplies a motive for waiting on further pleading. (Would the Bishop's counsel -- encouraged by Jones and Whitelocke and equally discouraged by Richardson and Croke -- believe enough in the Prohibition's legal insufficiency to demur? Could they demur to the substance of the Prohibition without confessing the contempt as a fact? Almost certainly, I think, the Bishop would be driven to take issue on the custom -- assuming he wanted his mortuary enough to carry on -- thus permitting resolution with a minimum of complexity.) The division of opinion also supplies a reason for waiting: Proportionately as a legal issue is serious or divisive, there is reason to settle it in the solemn context of a demurrer. Despite their two-layered difference of opinion in Hide v. Bishop of Chester, the judges agreed on the result.

Division of opinion over Consultations on motion appears again in Netter v. Brett,[12] but this time roles were reversed. The judges' views of acting on motion corresponded with their opinions of the merits. The case presented a complicated mixed-will problem, the details of which we may omit. In brief: A Prohibition had been granted to stop probate of a will comprising land and goods, and Consultation was moved for. Such cases were problematic when they occurred in simple form, and here there were complications arising from the exact way the will was drawn (in effect, how mixed, or how separable, the devises of personal and real estate were) and also from the exact way the libel and surmise were cast. Justices Jones and Berkeley strongly favored a general Consultation, while Justice Croke was equally vehement for a Consultation *quoad* the goods only. (Chief Justice Richardson, who was on his deathbed, did not participate.) It was Croke who made an issue of proceeding on motion, with the evident, though entirely respectable, motive of blocking what he regarded as a bad, precedent-breaking decision until there could be further debate before a fuller Court. Croke did not deny the propriety of Consultation on motion under any and all conditions, but he came pretty close to saying that a single judge with serious dissenting views should be privileged to insist that the parties proceed to formal pleading. (Again, a highly defensible position. That way of putting it is mine, not Croke's, but his insistence on the inadvisability of Consultation on motion in "doubtful cases" pretty much comes to that -- a cynic would say the doubts were all Croke's. It should be noted, however, that Croke had plenty of authority on his side, and a neutral prophet might well have predicted that in the long run his side would prevail. Croke argued that glibly granting Consultation on motion would deprive plaintiff-in-Prohibition of the Writ of Error he would be entitled to if he should lose after full pleading -- for Error did not lie upon motions for Consultation, no more than on the decisions to grant Prohibitions which they opened for reconsideration. Croke plainly thought that if plaintiff-in-Prohibition should lose after pleading in this court his chances for reversal in Error would be excellent.) Croke argued

12 H.10 - P. 11 Car. K.B. Croke Car., 391 and 395; Harg. 378, f.32; Jones, 355. (Croke is the best report on the matter of Consultations on motion.)

further that Consultations on motion should be scrupulously limited to cases where the mistake of prohibiting lay exposed on the face of the record. He contended that that condition had not been strictly met here. Apparently the will had been shown to the Court, so that the judges' sense of the reality was informed by a little more than the record. Croke thought the bare record -- libel and surmise -- put no obstacle in the way of upholding the Prohibition for the land, whereas looking at the will created questions about that course which the Court had no right to take account of.

It was Jones, not Berkeley, who expressly disputed Croke's position, though in Hide v. Bishop of Chester he had opposed Consultations on motion on principle. Now he defended them with rather cavalier generality. Without taking on the serious problems, including the implicit issue of judicial comity, raised by Croke, Jones came up with an historical theory: "...anciently in this Court there were no declarations and suggestions upon prohibitions, but they were granted upon motions. And consultations were granted upon motions without demurrer..." Whatever the historical truth, that was not a very responsible position to take, for contemporary practice did treat motions for Consultation and formal pleading as alternatives, and for that very reason the question of which alternative was preferable in particular cases was unavoidable. Whether or not it was justifiable to proceed on motion in this case, merely to assert the general respectability and "antiquity" of so doing was hardly to establish that. Indeed, I think it is clear that Jones and Berkeley were too eager by half to grant a general Consultation.

Even though his position of the moment on motions for Consultation may have been too conservative, Croke had the moral upper hand in this case. A remark in Berkeley's opinion gives the point away: The judges had committed themselves to the King to refrain from blocking probate of mixed wills. Jones and Berkeley may have been right on the merits of the case even apart from any weight they actually gave to that commitment, but I suspect they were reluctant to let a point of procedure frustrate an opportunity to carry it out by the most expeditious means.

A final undated case[13] from the Common Pleas may be cited to illustrate the situation in which Consultation on motion was most obviously appropriate. To stop a tithe suit, a parishioner surmised that he had fully set out his tithes -- period. The Prohibition was granted, plainly erroneously, for it was well-settled that ecclesiastical courts were competent to entertain and try mere pleas of payment. The parson promptly moved for Consultation (at least within the same term) and got one. That is all the report says. I doubt that such a motion would have been denied at any time in the later-16th and 17th centuries.

As for more complicated situations, the cases show a faintly discernible arc. In the beginning, there was doubt about Consultations on motion. Their general propriety was clearly asserted by the late-Elizabethan courts. There is a little to suggest that the Jacobean courts may have felt the freest discretion to grant such motions, even when it required going beyond the record, but they were also clearest in perceiving their power *as* discretionary. The Caroline courts were in general a little more conservative. If easy Consultations are seen as pro-ecclesiastical, Netter v. Brett is the only sign of deliberate favor to Church interests in the High Church mood of Charles I's reign, and that case was decided over the vigorous objection of one judge. If willingness to consider motions for Consultation is a symptom of the "public" approach to Prohibition law, then the Jacobean courts were perhaps the most public-minded -- the most inclined to think of Prohibitions and Consultations as *ex officio* acts, to be granted or withdrawn when the judges in their discretion saw fit. Later and perhaps earlier, the courts' spirit looks a bit more "private" -- more inclined to want Prohibition cases to be pleaded out like other cases between party and party.

But perhaps the most significant conclusion is the one that Hide v. Bishop of Chester and Netter v. Brett points to: In the 1630's there was no agreement about Consultations on motion. Earlier cases were hardly strong enough to force a consensus.

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13 Harl. 4817, f.194.