VIII.
Partial Prohibitions and Consultations

Summary: Partial and qualified writs were common in practice, and there was very little question about their appropriateness in general. Some authority suggests that Prohibition should be total and unqualified, whereas limitations on the ecclesiastical court might be written into Consultations, but this difference was not consistently observed. The structure of some fields, such as testamentary law, made the partial writs particularly necessary. The availability of both partial Prohibitions and partial Consultations sometimes created rather complex specific problems as to whether and how they should be used. The partial writs allowed the common law courts to exercise a more flexible control over the rest of the legal system than would otherwise have been possible.

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As in practice Consultations on motion were common, so were partial Prohibitions and Consultations. We have already seen a number of instances. The principle of Consultations on motion was sometimes expressly questioned. Despite their acceptance in practice, the courts were never wholly satisfied of their legitimacy. Cases where it was problematic whether to *grant* a motion tended to awaken suspicion of the procedure as such. By contrast, I can see no open vein of skepticism towards partial Prohibition and Consultations. In numerous cases, it was problematic whether to grant the writs in total or in partial form, if they were to be granted at all. In such cases, I can find no instances of the judges' asking themselves outright or almost outright, "Should we be granting these writs in qualified or partial form? Are they perhaps meant to be all-or-nothing procedures?" I suspect, however, that in an implicit sense those general questions sometimes entered into consideration of the particular question, "Shall we grant a partial writ in this case?"

I argued above that there is a formalistic set of mind capable of militating against Consultations on motion: a writ is a writ is a writ -- once a Prohibition has gone forth, however unduly, there is no stopping it until it is overcome by a verdict against the plaintiff or a successful demurrer. A parallel objection to partial Prohibitions and Consultations can be framed: The "nature" of a Prohibition is to stop an on-going suit in a "foreign" court -- of a Consultation, to erase an existing Prohibition. An ecclesiasti-

cal suit is an integral thing. as it were. It can only be stopped or not-stopped. Having been stopped, the arresting hand can only be removed or not-removed. In everyday life, a partial inhibition or authorization is of course perfectly intelligible. ("Stop abusing your wife insofar as you are actually beating her. but otherwise how you treat her is up to you." "You may continue dealing with your wife as you like so long as you do not beat her.") But are Prohibitions and Consultations meant by their "nature" to say that sort of thing? The imperatives to the wife-beater aim at directing his conduct. They savor of "mandamus." If one were confined to considering whether or not the man had "jurisdiction" over his wife, perhaps one would feel constrained to answer "Yes" or "No" -- either he has no liberty to behave towards her as he ought not to behave towards other people, or else marriage is a relationship in which such authority is vested in the husband that one may deplore, but not dispute, his resort to the rod. But Prohibitions and Consultations concern "jurisdiction." Should one tell an ecclesiastical court "You may -- or may not -- proceed 'insofar as,' or 'so long as,' or *'quoad'"?* Is the common law function not rather to decide whether the suit belongs where it is and may go on, or does not belong there and must cease -- either absolutely or until a fact on which the suit's title to be there depends (e.g., the truth of an alleged custom) is determined? Admittedly, there may be a limit at which a partial Prohibition or Consultation could be justified without muddying the jurisdiction-regulating function and violating its "yes-or-no" imperative. One can imagine two easily separable claims lumped together in one ecclesiastical suit -- one plainly appropriate to the ecclesiastical court, the other manifestly inappropriate. There, sundering by a "Prohibition-*quoad"* what never ought to have been joined can perhaps be justified. That would come to saying, "There are really two ecclesiastical suits here, one prohibitable, the other not. We cannot prevent the ecclesiastical court from treating two suits as if they were one, but we shall prohibit the prohibitable claim as if it were a separate suit." Where, however, it is not possible to conceive the situation in those terms -- to think of the ecclesiastical "suit" as several suits in reality -- partial Prohibitions and Consultations should be avoided. For their effect is to dodge the "Yes-or No," "Jurisdiction-or-no-Jurisdiction," question which all application for Prohibition and Consultation raise. They would come to directing the conduct of the ecclesiastical courts -- e.g., by saying" You may decide this case if you can decide it without settling Issue X one way or the other." (Cf. "YOU may discipline your wife if you can think of a way to do it without

beating her.") Reasonable though that may sound, it evades the jurisdiction-regulating function, It is tougher and better to say, e.g., "You may not touch this suit until Issue X is resolved at law. Then we shall consider whether to give the suit back to you, to be decided in a manner clearly consistent with our resolution of X." Or else, *per contra,* "The suit is yours to decide as you like. When you have decided it, we may consider whether your decision was caused by an error within our power to control, and if so we may consider whether to prevent execution of your decision. But for now the suit is yours."

The theoretical argument against partial Prohibitions and Consultation did not rear its head so overtly as the argument against Consultations on motion. In some ways it is a less good argument, more of an exercise in formalism abstracted from common sense. Insisting that a Prohibition be pleaded to once it is granted can be justified by formalistic talk, but there is a point in so insisting -- the point of making sure that issues once raised are debated or tried in the context in which they will receive the most complete and fair evaluation. Once it is raised, perhaps even a very dubious claim might as well be subjected to the going-over that is most likely to be thorough. If a partial Prohibition or Consultation looks like the most sensible way to unsnarl a complicated problem, neat, pseudo-logical ideas about the writs' "nature" ought not to stand in the way. But *whether* a partial writ was the best solution could be problematic. The alternatives above (partial writ, full Prohibition pending common law resolution of an issue, no Prohibition, or full Consultation with power to review error reserved) could in some situations be live alternatives. When the immediate choice was among such alternatives, I think it is quite possible that a shadow of doubt about the partial writs as such was in the background. The possibility should be kept in mind when we look at cases exemplifying qualified writs. The shadow does not show on the surface; the legitimacy of such writs is not discussed. But perhaps decisions to grant them were half- felt victories over a certain reluctance. In rather indirect ways, same of the cases suggest as much.

The most interesting and problematic use of partial Prohibitions and Consultations was in testamentary cases. Let us reserve those for a moment, looking first at other instances.

One brief early report[1] illustrates a problem incidental to partial writs. The report says only that Consultation was granted for part of the matter in question and denied for part, and that "yet" damages were awarded "according to the statute." A later case -- Lord Riche v. Courmarke, M.36/37 Eliz. Q.B. -- is noted in the MS. as agreeing. "The statute" must be 2/3 Edw.6. A surmise must have been unproved, whereas only part of it was subject to the proof requirement; or else plaintiff-in-Prohibition combined several claims (e.g., several *modi* going to different tithes) and failed to prove only some of them. The problem was whether to allow defendant-in-Prohibition his statutory double damages. I assume the choices were (a) no double damages (b) double damages *pro rata* for as much of the surmise as stood unproved (as distinct from double damages for all -- though perhaps the latter cannot be excluded.) The interesting point is that "no double damages" would seem to have been argued for (n.b. the reporter's "yet".) In such an argument, there is a suggestion of discomfort with the partial Consultation -- as if the statute could only contemplate all-or- nothing, as if the partial Consultation were an irregularity that must raise a problem as to how to apply the punitive damages provision of the statute.

There is some point in the puzzlement. The statute gave punitive damages against presumptively vexatious Prohibition- bringers. Here, plaintiff-in-Prohibition emerged as not quite a "bad man" -- for his surmise was not made up out of whole cloth. Whatever might be said about single costs and damages at common law, are the punitive damages' directed against any but the unambiguously vexatious -- as opposed to those who are merely mistaken about their rights or careless about assembling sufficient proof? That, of course, is simply a question about the statute. But perhaps a question about the partial Consultation hovers. The statute might be said in an indirect way to warrant all-or-nothing writs If the statute is conceived as making a distinction between "bad men" who improperly try to stop ecclesiastical suits and "good men" who try to stop them properly and in the public interest, perhaps it implies a corresponding distinction between the "bad" who wrongfully sue at ecclesiastical

1 Broughton v. Prince. H. 32 Eliz. Q.B. Harl. 1633. f.78.

law and the "good" or "innocent" who properly assert their real rights in that forum. If the first distinction is "binary", so perhaps is the second. A man is not "good" in one sense and "bad" in another, but one *or* the other in a net sense. It is "bad" to bring a partly appropriate and partly inappropriate ecclesiastical suit, as it is "bad" to bring a partly justified and partly vexatious Prohibition. (Or else it is "good." in a net sense, to do either.) In reverse, the dichotomizing effect of the statute might be conceived as reflecting the either-or choice implicit in the nature of the writs: The statute-makers viewed plaintiffs-in-Prohibitions as either punishable or not-punishable because they thought of Prohibitions and Consultations as either stopping or disobstructing the ecclesiastical suit given as an "integral thing."

The Court in Broughton v. Prince, however, denied countenance to any such line of reasoning. That is clearly true if the decision points to *pro rata* double damages -- i.e., if it means "where part of the surmise requires proof and is not proved, a Consultation *quoad* shall be granted and double damages shall be assessed *quoad* that part." If the decision points to awarding defendant-in-Prohibition twice his litigative costs plus other damages for *all,* then the significance would be different -- a matter of saying that although Consultations *quoad* are legitimate in themselves, the statutory offense consists in bringing a Prohibition without *full prima facie* justification and therefore remains an offense in spite of partial justification.

But that decision would equally go to deny the connection between the ideas of the statute and the nature of the writs on which the argument above depends. In any event, the case supplies a *de facto* instance of a partial Consultations. Leaving aside the double damages provision, it is hard to see how 2/3 Edw.6. could be fairly applied without partial Consultations. As it is conceivable to say that the statute does not require Consultations on motion, so it is conceivable to say that it does not authorize partial Consultations (but means that proof for part counts either as proof for all or proof for none.) But those conceivable rules would be foolish and unlikely. As for Consultations on motion, the statute may have provided an entering wedge for partial Consultations.

In Buckhurst v. Newnton[2] a kind of reluctance to grant partial Consultations appears -- let us say reluctance to grant them on a somewhat speculative basis. A parson sued for wood tithes, viz. for faggots. The parishioner got a Prohibition on surmise that the faggots in question actually came from exempt timber trees (oak and elm) but that the parson had falsely pretended in his libel that they were tithable beech and thorn. (It was assumed in the surmise, and undisputed, that mere sticks from exempt trees -- picked up from the ground, lopped, or the like -- fell within the exemption, as well as the timber proper. That is a probably sound, but perhaps not altogether indisputable, proposition.) The parson moved for a Consultation covering such of the wood as was *not* oak and elm. The report is condensed, but I would construct his arguments as follows from the hints it provides: Prohibiting *in toto* in such a case as this is unfair and inviting to easy trickery on the parishioner's part. What is to prevent the parishioner from making faggots substantially of beech and thorn, but craftily inserting a stick of oak or elm in every one? The parson might have no knowledge of the trick and sue for every tenth faggot in the fullest belief that only non-exempt wood was involved. Even if he was aware of the stratagem, he might be justified in suing for every tenth faggot, on the theory that the amount of oak and elm was so nominal and the parishioner's intent so fraudulent that there was no legal need or practical possibility of claiming the tithe otherwise.

So long, however, as the parishioner claims that exempt wood was involved in the least degree, a Prohibition of some sort is unavoidable. The question then becomes whether it should be partial or total. If total, the parson would be vexed and delayed by what *might* be utterly frivolous Prohibition proceedings. He would have to prove the truth at common law, whatever it might be, and in the end would probably do no worse than partial Consultation. (I.e.: It is unlikely, though not impossible, that virtually every stick in the faggots would be oak or elm -- in the very nature of woodlands and stick-gathering. The more serious possibilities are: (a) that the parson will be altogether vindicated, the amount of oak and elm being at most so trivial, and its distribution so suspect, that the jury

2 M. 36/37 Eliz. Q.B. Croke Eliz., 347

will give a general verdict for the parson, or else the Court will hold that one who intermixes a little exempt wood with fraudulent intent is entitled to no consideration -- in which event, a full Consultation will issue; (b) that the amount of oak and elm will be found appreciable, or the intermixture of even a small amount will be found innocent, or the Court will hold that exempt wood remains exempt, however trivial the amount and even if it is distributed fraudulently -- in which event, the solution must be Consultation *quoad* as much of the wood as is not oak and elm.) In these circumstances. would it not make better sense to grant a partial Prohibition (or, with the same effect, a partial Consultation on motion) right now? The ecclesiastical court could then proceed at once to what it will probably be authorized to do in the end -- to figure out how much of the wood is beech and thorn and, if there is any oak or elm, to make a *pro rata* award.

The Court did not reject the idea of a partial Consultation, but refused to grant one until the parson somehow made his claim more specific. Just what the judges meant requires interpretation. They said that the parson must "show the special matter," namely, that the oak and elm are so intermixed "that he cannot do otherwise." I take this as an objection to the "speculative" way in which the parson's counsel had argued. They had in effect proposed partial Prohibition as the best *general policy* in this sort of case -- owing to the possibility of fraud and the likelihood that there would turn out to be some sort of intermixture of the two classes of wood, calling for sorting out and. pro-rating by the ecclesiastical court. The Court evidently wanted the parson to stand up and say something definite about this case -- that the amount of oak and elm was trivial, or was fraudulently distributed, or at least (what the judges specifically suggested) that the mixture in the faggots, whether fraudulent or innocent, was such that the parson had no practical choice except to sue for every tenth faggot and ask the courts to figure out whether he was entitled to that much. So long as there was a possibility that the parishioner had substantially kept the exempt and non-exempt wood apart, or that the parson could have easily known the approximate proportion of the two kinds and brought an honest suit for proportionately less than a full tenth, there was insufficient reason to deny the parishioner a total Prohibition and common law investigation of the truth.

The disturbing feature of the Court's position is that it comes to a demand for a factual claim. Is it therefore a demand for formal pleading? I.e.: Was the Court saying, "We cannot give you a partial Consultation on motion, but if you will plead the facts which you think would entitle you to one, the chances are good -- assuming of course that those facts are found or admitted in your favor"? The report does not make it clear whether or not that is what the Court meant. The alternatives would be: (a) The Court would act on motion, once the parson made a factual statement applicable to this case, and once that statement was informally verified. (As we have seen, Consultations on motion requiring information outside the record cannot be entirely ruled out, though they were rare.) (b) The Court would act on motion without any verification of matter of fact, but wanted a less "speculative" motion as a matter of form, to furnish a better basis for argument. (I.e., to give the parishioner a chance to argue against the Consultation even on the assumption that the parson was telling the truth. If, for example, the parson's claim was only that he had no way of knowing what fraction of the faggots, if any, consisted of exempt wood and therefore could only sue for the full tenth, the parishioner should perhaps have an opportunity to defend the full Prohibition, even though the Court were inclined to a partial Consultation.) The last possibility is less likely than the other two, but perhaps cannot be excluded in this peculiar kind of case -- peculiar because it is extremely hard to arrive at a sensible way of handling the timber exemption when mere sticks were in question. In principle, the judges were anything but opposed to a partial Consultation. They cited a case (Molyns v. Dawes) favoring that solution. Their reticence, I think, was lest they be unfair to a parishioner who really was being needlessly and dishonestly sued for a full tenth of his faggots. They probably wanted at least informally verified information that that was not the case -- but at the very least they wanted the parson to stick his neck out far enough to supply the parishioner with a hypothetical basis for argument.

In Gresham v. Lucas,[3] a *modus* was surmised, to pay 1d per milk-cow and 1/2d per mare in satisfaction for all cows, horses, steers, and other

3 M. 38/39 Eliz. C.P. Moore. 911.

cattle. A Consultation was granted *"dummodo non tractetur"* of milk-cows, plough-beasts, and animals grazed for domestic use. That is all the report says. The substantive point was in all probability that the *modus* was held unreasonable except as it applied to the milk-cows and mares, their products and sustenance (milk; calves; colts; herbage consumed by the breeding-stock and their young insofar as the latter could be counted as potential replacement-capital or domestic food.) In tithe cases arising from the troublesome cattle business, a typical problem was whether a sum calculated as so much per animal of one type (e.g., milk-cows) was a good *modus* for all animals (including, e.g., beasts fattened for sale.) The Court here said "No." Having said so, it did not simply send the suit back to the ecclesiastical court. (To send the suit back *in toto* would leave the parishioner to insist on his *modus* insofar as it was valid in the ecclesiastical court, as of course he might do successfully. *Quaere* whether, notwithstanding 50 Edw.3, he could have a new Prohibition on surmise that the ecclesiastical court had disallowed the *modus* even for the milk-cows.)

Rather, the Court used the partial Consultation to protect all the animals that ought not to pay tithes in kind, whether by virtue of this *modus* or *de jure*. Bringing a badly-founded Prohibition was not penalized. (The truth of the *modus* for milk-cows must be assumed for the partial Consultation to be reasonable. Its truth may have been established by verdict, after which a motion for Consultation was made in arrest of judgment. It may have been conceded by the defendant in connection with a motion for Consultation before pleading. Finally, it may have been held admitted by demurrer. In the latter event, it seems to me a special problem arises as to partial Consultations: The defendant demurs to the legal sufficiency of a declaration attempting to claim a *modus* for all cattle calculated as 1d x the number of milk-cows. The demurrer is upheld. It would seem very doubtful to take the demurrer as admitting a *modus* for milk-cows and their products so calculated. We cannot be sure from the report that the Court did not do so, but it is unlikely.)

One brief note in the reports[4] only goes to support the partial Consultation in the most obvious sort of case: If one sues for tithes of several

4 40 Eliz. C.P. Add. 25,199, f.7b.

things, and some are not tithable, there may be a Consultation covering only the tithable products. The very fact that the point is reported may mean that it was doubted.

In another case,[5] a tithe suit for various products was prohibited by way of preventing the ecclesiastical court from enforcing its two-witness rule. Specifically: The parishioner surmised that he had pleaded payment of one tithe (pigeons) in kind, but was in danger of losing because he did not have two witnesses to prove the fact of payment. The Prohibition was granted after some discussion of the merits. The parson subsequently moved for Consultation for the other tithes comprehended in the same suit, on the ground that the parishioner had not offered proof of payment (presumably by one witness) for those, as he admittedly had for pigeons. The partial Consultation -- *quoad* all except the pigeons -- was granted. The alternatives would have been: (a) to wait until the payment of pigeons had been tried at common law, then to grant either a total or partial Consultation, depending on which way the verdict went; (b) a total Consultation now, with the right reserved to consider another Prohibition after the *whole* ecclesiastical suit was settled, to the end of preventing execution of any part of the ecclesiastical sentence that could be shown to depend on enforcement of the two-witness rule; (c) regarding the whole matter as subject to common law trial since the ecclesiastical court had shown its unwillingness to apply reasonable evidentiary rules. (I. e.: in his declaration , the parishioner would be allowed to plead to all the tithes -- payment, *modus* or whatever -- and all action would be deferred until after verdict . A partial Consultation might still be necessary in the end, but it would have been eschewed until it was unavoidable.) None of these alternatives would have been as sensible practically as the course taken. All of them would express a bias against partial Consultations (inclination to avoid them if at all possible) of which the Court gave no sign.

The last case is pretty close to the limit at which complaint against partial writs would hardly be rational -- for a single suit for several tithes might as well be several suits. If there was reason to prohibit *quoad* one tithe, but no reason whatever *quoad* the others, the best procedure might

5 P. 41 Eliz. C.P. Add. 25,202, ff. 3 and 4b.

be a partial Prohibition. But if a total Prohibition got through, undoing it by partial Consultation is next-best. The motive of the partial Consultation was to return to the ecclesiastical court what belonged to the ecclesiastical court, no strings attached. The motive was not to influence its conduct, though that might well be the effect. (I.e.: The ecclesiastical court would be unlikely to insist on the two-witness rule again if the parishioner went on to plead payment of another tithe and offer proof by one witness, If it did, I doubt that 50 Edw. 3 would protect it against another Prohibition, *sed quaere.)*

In another sightly later case,[6] the same court used a qualified Consultation to direct the ecclesiastical court's conduct, but in an interestingly restrained manner. The statement of this case is mutilated in the MS., but the part that concerns us here is clear enough. The ecclesiastical suit was against a bishop for improperly instituting a clergyman in a living. It is not clear why a Prohibition was sought and obtained. As soon, in any event, as the judges thought seriously about the matter, they concluded that the Prohibition was without merit. An attempt was then made to get the Consultation qualified. The report brings out the motive behind the attempt: The ecclesiastical suit was expected to lead to sequestration of the tithes and other profits of the living. (I.e.: The matter of the suit was whether A had been wrongfully instituted, but the ecclesiastical court was expected to proceed by cutting the income from the living off from A, pending settlement of the substance.) It was argued that such a sequestration would affect the interest of the patron, a lay interest with which the ecclesiastical courts were not supposed to meddle. The reason for that was that a parson's receipt of the profits counted as evidence of his patron's seisin of the advowson. Cutting off the profits from the clergyman would be like putting the patron out of possession and therefore nullifying his power to generate rights by adverse possession. Counsel requested language in the Consultation expressly forbidding any sequestration.

The judges would only go half-way. They agreed with everything counsel said -- i.e., that a sequestration was likely and would interfere with the patron's interest. But they would not write a Consultation saying

6 M. 42/43 Eliz. C.P. Lansd. 1065, f.66.

in effect "We return this suit to you, but you must not sequester the profits of the living." Rather, they qualified the Consultation with *"dummodo non agatur de iure patronatus."* The difference is between overt and oblique direction of the ecclesiastical court's conduct, between warning the ecclesiastical court and enjoining it. The rejected formula would have prevented the ecclesiastical court from using a recognized ecclesiastical procedure . The accepted formula only reminded the ecclesiastical court not to do what it in any case had no business doing. The ecclesiastical court was left to judge for itself whether sequestering the profits *would* come to meddling with the partonage. Technically, at any rate, that was left to the ecclesiastical court. Actually, the judges left little doubt as to what they meant. For when they turned down counsel's request for more explicit language, they added "...but if they proceed to sequestration notwithstanding that, if they complain to us we will find a remedy" In sum, the case is evidence of two things: (a) willingness to use qualified Consultations to direct or almost- direct the behavior of ecclesiastical courts -- as opposed to using them merely to split off an easily detachable part of a conglomerate suit; (b) recognition of the dubious implication in that use of the qualified Consultation and reluctance to push it too far -- insistence that in theory a Consultation does, after all, liberate the ecclesiastical court to do what it likes with the suit before it.

If I read it correctly, Sir William Hall v. Ellis[7] illustrates a special use of the qualified Consultation -- to protect a plaintiff-in-Prohibition from being caught in a procedural snarl. The ecclesiastical suit was brought by the farmer of an impropriate rectory to recover a seat in church. His original libel claimed a seat *"in dextra parte Cancellae."* Then he added to his libel, making it "*pro primo loco,* and principally *in dextra parte Cancellae."* The adverse party obtained a Prohibition on surmise that he and his predecessor in estate of a certain house had always sat *"in dextra parte praedict."* The Court held in principle that an impropriate rector or his farmer had a *de jure* right to the chief seat (I.e., "first place") in the chancel, but that another could claim it against him by prescription. In other words, there would be nothing against the claim plaintiff-in-prohibition probably wanted to make -- a prescriptive claim to the chief seat.

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7 T.7 Jac. K.B. Noy, 133.

A Consultation had to be granted, however, because he had not actually made that claim. His claim was only to a seat in the right-hand part, and that was not the object of the ecclesiastical suit as amended. But the Consultation was granted with a *quoad.* The report does not give the language of the *quoad* clause. I assume it went to authorize the ecclesiastical court to proceed in the case before it (for the chief seat), but is such manner that it did not contradict the plaintiff's alleged prescriptive title to a seat in the right-hand part. It is not clear from the report whether the original libel and corresponding surmise concerned one *particular* seat or one seat among several. (If the latter, the original libel would in effect have aimed at "bumping" the plaintiff -- "If anyone is to be displaced from the right side of the chancel, it is X., not me.") If a particular seat was in question, the Consultation as I reconstruct it would give the suit back only *pro forma.* If not, it would come to saying "You may not displace the plaintiff from the right side, but you may determine the precedence as among those entitled to sit there." In sum: Though the report of Hall v. Ellis is obscure, it would seem to illustrate a rather generous use of the *quoad* Consultation. Plaintiff-in-Prohibition strictly speaking had no right to a writ, for he had shot down a non-existent suit (for a seat -- one in particular or any one -- on the right-hand side.)

But the Court helped him out by not granting a total Consultation. Very possibly the Court was lenient because the misfiring of the surmise may not have been entirely his fault, inasmuch as the libel had been amended. Once the libel had been amended, the surmise ought to have been amended correspondingly if the plaintiff thought he had a case against the new-framed ecclesiastical suit, but neglect of that step might be forgivable. Despite its obscurity, the decision is a suggestive precedent for cases in which a surmise failed to describe the ecclesiastical suit at which it was aimed. Those cases must be distinguished into two classes -- (a) those in which a copy of the libel had to be affixed to the surmise by force of 2/3 Edw. 6, and (b) those in which affixing the libel was not required. Hall v. Ellis presumably falls in the latter class. At least within that class, it suggests saving the plaintiff so far as possible by qualified Consultation. (Whether that technique does him more good than the alternative one of quashing the Prohibition *totaliter* and leaving the ecclesiastical court to proceed "at its peril" is questionable. Cf. cases on conformity between surmise and libel above.)

All the cases above involve partial Consultations. Don Siego Serviento v. Jolliff and Tucker and Sir Richard Bingley[8] presents us with a partial Prohibition. In this case, the Spanish Ambassador sued in the Admiralty as "procurator" of Spanish subjects. He sought to recover two ships belonging to Spaniards. Jolliff and Tucker had allegedly captured the ships piratically at sea. They had brought them to Ireland. Thereafter (the libel not specifying where), the ships came into Bingley's hands, who converted them to his own use. Bingley sought a Prohibition, which the Court unanimously granted. The Prohibition was confined to as much of the Admiralty suit as concerned Bingley. The Ambassador was told that he could proceed against Jolliff and Tucker for the wrongful taking of the ships at sea, for the libel clearly placed it there. Bingley's receipt and conversion of the ships, on the other hand, was not laid on the high seas. The libel did not expressly assign it to any particular place, but suggested indirectly that it had occurred in Ireland.

Since there was no basis for presuming that Bingley's dealings with the ships took place at sea, and substantial basis for supposing that they took place on land, the suit as it concerned him was clearly beyond Admiralty jurisdiction. There was considerable discussion of the merits (whether the Ambassador suing as "procurator:" should be prohibited, inasmuch as he was not owner of the ships and therefore could not maintain an ordinary action of Trover for them at common law; whether the Admiralty should be prohibited from determining a claim in the nature of Trover-on-land when the original act of misappropriation was a crime on the high seas.) Having resolved those questions against the Ambassador, the Court had no apparent hesitation about splitting the suit up by way of partial Prohibition.

Coke's report of the well-known Fuller's Case[9] contains a fully articulated generalization about partial Consultations and Prohibitions and provides a complex example of the former. The substance of this case will be discussed later in the study. In brief, the King's Bench sent a criminal suit against Fuller back to the High Commission because he was

8 Hobart, 78. Undated. Jac. C.P.
9 T. 5 Jac. K.B. 12 Coke, 41.

being prosecuted for schism -- a major ecclesiastical offense of the sort that clearly fell within the High Commission's much-debated jurisdiction. The Consultation was qualified in two ways, however: (a) Fuller was accused of slandering the High Commission, as well as schism. The King's Bench took the view that any contempt or slander. he had committed against the High Commission was solely punishable by the common law courts The Consultation was qualified accordingly: *"Quatenus nun agat de aliquibus scandalis, contemptibus, seu rebus quae ad communem legem aut per statuta regni nostri Angl sunt punienda et deteminanda."* (b) Fuller's alleged schism and contempt consisted largely or wholly in things he had said while arguing for his client in a Prohibition case. It was of course scandalous in the extreme for the High Commission to prosecute a lawyer for vigorously disputing its jurisdiction in the line of duty. But so long as he was accused of schism the King's Bench could not prohibit the prosecution. So, at least, the judges were constrained to think in this politically charged case of a "radical lawyer." It is probably fair to say that the second qualification attached to the Consultation was "the best the Court could do for Fuller." The words were: *"Quatenus non agat de authoriatate et validitate literarum patentium pro causis ecclesiasticis vobis vel aliquibus vestrum direct' aut de expositione et interpretatione statuti de anno primo nuper Reginae, etc."* The whole controverted matter of the High Commission's jurisdiction depended on the meaning of the clause of the Elizabethan Act of Supremacy that authorized the court, plus the meaning of letters patent pursuant to the statute by which the court was constituted. Part of the controversy was whether interpretation of the statute and patents belonged exclusively to the common law courts. It is hard to say exactly what the second *quantenus* clause added to Fuller's Consultation would prevent the High Commission from doing in the case at hand. If his "schism" consisted in statements about the meaning of the statute and letters patent, could he be convicted without a determination that the statements were untrue, and could such a determination be made without violating the qualified Consultation? In any event, if the tendency of the *quatenus* clause was to warn rather than enjoin -- to remind the ecclesiastical court where its "peril" lay -- the function was precedented.

Having qualified the Consultation in two ways, the judges in Fuller's Case proceeded to lay down a general justification of partial Consultations. Their doing so suggests that a doubt was raised by counsel, or at

least existed in the judges' own minds. As they said , there could not be serious doubt in view of prior cases. At any rate, having used the partial Consultation in a visible, political case, the judges understandably wanted to make it explicit that they were following a perfectly regular procedure. The generalization as Coke states it was as follows: Where the ecclesiastical suit contains several matters, some prohibitable and some not, standard procedure is to grant a *general* Prohibition, and then to undo it in part by Consultation on motion -- "the writ of consultation with a *quoad* is frequent and usual, but a prohibition with a *quoad* is *rara avis in terra nigroque simillima cygno."* Whether or not there is better reason for qualifying Consultations than for qualifying Prohibitions, the rule is an accurate description of practice. We have seen but one black swan above.

If Consultations *quoad* were common, Consultations *ita quoad* were not. This verbal hair is split in one brief report.[10] The report does not say why a partial Consultation was sought or whether it was granted, only that *quoad* rather than rather than *ita quoad* was said to be the correct expression. But the substance can be guessed at from the reported surmise. A parishioner being sued for tithes of lambs claimed by prescription that lambs born in Parish A and subsequently pastured in Parish B were tithable in A. I imagine that it was argued that this amounted to prescribing for total exemption from tithes relating to the lambs in B and was therefore unlawful. A qualified Consultation was probably sought to allow the parson of B to recover something for the pasturage of the lambs in his parish, while his suit was stopped *quoad* the lambs themselves insofar as they were born in A. (*De jure*, one out of ten lambs born was due in kind.)

An advantage of the practice recommended in Fuller's Case -- general Prohibition and partial Consultation , as opposed to partial Prohibition -- is brought out by another report.[11] The substance of the case is not reported, only the following: A partial Prohibition was granted. Defendant-in-Prohibition then sought a Consultation *quoad* those parts of the ecclesiastical suit that had not been prohibited. The Consultation was requested because the ecclesiastical court was allegedly in doubt as to how

10 Parson Earle's Case T.7 Jac. K.B. Add. 25,208, f.51b.
11 M.8 Jac. C.P. Add. 25,209, f.205b.

far the Prohibition extended. In other words, the ecclesiastical court wanted to be told positively wherein it should proceed, because it did not understand exactly what it had been prohibited and not prohibited from doing.

The Common Pleas, however, refused the Consultation--a redundant Consultation for insurance purposes, we might call it. Without knowing the circumstances of the case, there is no telling whether the ecclesiastical court was in legitimate or over-cautious doubt, and whether that made any difference to the common law judges. But the decision underscores the advisability of confining *quoad* clauses to Consultations: A partially prohibited ecclesiastical court might be reluctant to construe the Prohibition, and hence to proceed in the matters never prohibited. If the decision in this case -- no Consultations to clear-up partial Prohibitions -- represents a general policy, there is all the more reason to keep Prohibitions-*quoad* in the rare bird category. That partial Prohibitions continued to be occasionally granted and that they remained somewhat questionable appears from the late Lush v. Webb (1641).[12] The ecclesiastical suit was for tithes and offerings. The surmise of a *modus* covered only the tithes. The award of a Prohibition *quoad* the tithes only was striking enough to report, and for Siderfin to cite one other case (Coleman v. Gilbert) as an example of the procedure.

The partial Consultation was used in anomalous circumstances in a case 1612.[13] A parson sued for wool tithes, not *de jure* but by virtue of an alleged custom more favorable to the parson than common right -- he claimed to be entitled to 1/10th of the wool "without the view or election of the party." It is hard to visualize what this customary method of payment would amount to. It goes, in any event, in derogation of the parishioner's ordinary right to take part of his wool and say to the parson, "Here, I offer you this as your fair tenth of the total crop." The parson was evidently claiming some sort of right to come to the shearing place and take *his* pick, and he was evidently complaining that this had somehow been made impossible for him. The parishioner got a Prohibition to contest the truth of the alleged custom and proceeded to declare

12 P. 17 Car. K.B. 1 Siderfin, 251.
13 P. 10 Jac. K.B. 1 Bulstrode, 204.

on his surmise. The parson then demurred and struck out the words "without the view of election of the party." The report leaves it ambiguous whether he struck out the words -- presumably from his libel, attached to the surmise and part of the record -- before or after officially entering his demurrer. But it is clear what he was trying to do in effect: He wanted to amend his original claim, dropping the unconvincing custom so that the claim would amount to a straightforward demand for tithes in kind. If that was his claim, the cause of Prohibition now set forth in the parishioner's declaration would be groundless, and Consultation should lie. The parson accordingly moved the Court for a general Consultation. What he got was a qualified one -- *quoad* tithes in kind due *de jure.* As to the custom, the parson was told he must proceed at common law without amendment of his claim.

This solution was, I think, rather generous to the parson. For what he got was the go-ahead signal to the ecclesiastical court that he needed. The partial Consultation would say to the ecclesiastical court, "The suit of A v. B which we prohibited has now been amended into a straight claim to tithes in kind. So long as it is that and remains that, you may proceed." A harsher solution from the parson's point of view would have been no Consultation. He could justifiably have been told, "You may not change from a custom-based claim to a *de jure* claim at this point. The suit we prohibited is and must remain custom-based. If you want to start a new ecclesiastical suit for *de jure* tithes, or to try to persuade the ecclesiastical court to proceed with an amended version of the existing suit, that is your business . But we will not help you out by telling the ecclesiastical court wherein it is safe to proceed in the existing suit." The more lenient solution that the parson wanted (general Consultation) would have had two disadvantages: (a) It would in principle, no doubt send back the suit as amended, but the language of a general Consultation ("You may proceed in the erstwhile-prohibited suit of A v. B") would not communicate the understood qualification -- "as amended." (b) Suppose the custom cropped up again in the future. A general Consultation would be a record against the parishioner. The partial Consultation would count as a record in his favor so far as any claim by the parson based on the custom was concerned. If on some future occasion the parson were to reassert the custom, the parishioner might be able to make make use of the record in his favor. The Court was right, it seems to me,

in preventing the parson from escaping by latter-day amendment all consequences of his original suit (including, perhaps, costs) and also in issuing a writ that let the ecclesiastical court know where it stood.

In Gerey's Case,[14] a partial Prohibition was issued in somewhat problematic circumstances and with some hesitation. The hesitation may have extended to whether partial Prohibitions were ever proper procedure. The statute of 2/3 Edw.6 provided for punitive damages against persons who withheld due tithes. As the statute was applied, ecclesiastical courts were allowed to assess double damages. A parson could recover still more valuable treble damages, but to do that he had to go to the added trouble of suing an action of Debt at common law for the penalty. In Gerey's Case, an ecclesiastical court improperly awarded treble damages after giving sentence for the parson to recover his tithes. A Prohibition was sought on the ground that the ecclesiastical court had exceeded its jurisdiction in awarding the treble damages. That some sort of Prohibition must be granted was clear, but the Court hesitated between a general one (prohibiting execution of the sentence altogether) and a special one (prohibiting execution *quoad* damages above the amount the ecclesiastical court was entitled to award). The problem in the immediate circumstances arose from doubt as to whether ecclesiastical procedure permitted a definitive sentence to be divided for purposes of execution. I.e.: Did the ecclesiastical court have the procedural flexibility to obey a Prohibition going only to execution of the unlawful damages? If not, the only alternatives would have been no Prohibition or a general Prohibition, the first impossible in fairness to the subject, the latter excessive and unfair to the parson.

The Court finally decided on a partial Prohibition. Surely that was the sensible course. If the ecclesiastical court was so tied up in its procedure that it could not obey the Prohibition except by not executing its sentence at all, so much the worse for it. A general Prohibition would surely have prevented the sentence from being executed *in toto.* (Unless it was undone by partial Consultation. But if the ecclesiastical court could not execute only part of its sentence in obedience to the partial Prohibition, neither could it do so by way of following a partial Consultation.) The re-

14 H. 11 Jac. C.P. Moore, 873.

port suggests that the Court was helped to its conclusion by being convinced that partial Prohibitions were as such legitimate, as if the judges had some doubt about that apart from the peculiarity of the case at hand. For several cases are given in the report as cited in favor of the partial Prohibition. One is an example of a partial Consultation, citation of which suggests that doubt may have been raised about *both* writs in partial form. One , so far as appears, goes only to the general propriety of partial Prohibitions. (Cullier v. Cullier, 37 Eliz.: The ecclesiastical suit was for defamation -- saying the plaintiff had a bastard. Prohibition was granted *quoad* the bastardy, but the ecclesiastical court was permitted to proceed *quoad* the defamation. *Quaere* what this decision would mean. The object was clearly to prevent the ecclesiastical court from bastardizing someone -- to the possible prejudice of his secular rights, as to inherit land -- as an incidental effect of a petty suit for words. But how can the truth of "You had a bastard" be investigated without inquiring into whether X is the plaintiff's bastard, and how can the defamation suit be determined without going into the truth of the words? Possibly the Prohibition leaves the ecclesiastical court free only to inquire into whether the words were spoken -- i.e., to clear the speaker if he never spoke them. I doubt that it would be left free to rule out truth as a defense -- i.e., to punish the speaker if he spoke the words, regardless of their truth. It would be interesting to know who brought the Prohibition in Cullier v. Cullier.) The third citation comes a little closer to Gerey's Case, in that the partial Prohibition was granted after sentence, with the effect of blocking execution in part. The sentence looks more easily divisible than the excessive award of damages in Gerey's Case, however. (Took v. Stafford, 2 Jac. The citation does not state the case very clearly. It would appear that the ecclesiastical suit and sentence covered several sorts of tithes -- probably certain tithes in kind, plus sums of money claimed by the parson in lieu of tithes for agistment. The Prohibition blocked execution for the tithes in kind but not for the rest, for whatever reason.)

In Hoskins's Case,[15] a partial consultation was sought and denied in circumstances somewhat different from any of the cases above. The re-

15 Hobart, 115. Undated in Hobart, but clearly the same case as Eve v. Hoskins, M. 13 Jac., probably C.P., Lansd. 1172, f.52b. Hobart's report brings out the point better than the MS., though they basically agree.

porter (Hobart, who was probably a judge in the case) seems to have doubted the decision's correctness. The ecclesiastical suit was for tithes from a specified area. A Prohibition was obtained on surmise that the tithes from two- thirds of that area had belonged to Queen Elizabeth, who had granted them to X, whom plaintiff-in-Prohibition had paid. (The monarch was "capable of tithes" by prerogative, apart from impropriations. Tithes from land which did not belong to any parish, for example, were due to the monarch of common right. The basis for the Prohibition here was presumably that the validity of the royal grant was brought in question, or else that the bounds of parishes were in question. The mere claim that the tithes had been paid to the proper person should not warrant a Prohibition.)

A Consultation was then sought *quoad* the one-third of the land concerning which the surmise manifestly made no claim. This seemingly reasonable request was denied, however, on the ground that the Consultation must conform to the libel. The libel was "entire" -- i.e., the ecclesiastical suit aimed at recovering tithes from the area as a whole -- ergo the Consultation must be "entire" too. Since continuation of the ecclesiastical suit as originally cast could not be authorized, no Consultation could be granted. Defendant-in-Prohibition was told to start a new suit for tithes from the one-third that the surmise said nothing about.

This decision seems to me to go pretty squarely against the grain of holdings in favor of partial Consultations. I can see no necessary distinction between splitting up an ecclesiastical suit territorially and splitting one up according to subject matter. I.e.: Parson sues for pigs and lambs. Parishioner shows cause of Prohibition covering only the pigs. If a Consultation *quoad* lambs is proper in that case, why not in the principal case *quoad* the one-third not covered? There is admittedly a distinction between a partial Consultation that splits up the ecclesiastical suit and a qualified Consultation of the *"quatenus non agatur"* type. The latter respects the "entirety" of the ecclesiastical suit as conceived, but indicates channels within which the ecclesiastical court must stay in handling the suit. But the former type was precedented as well as the latter (though not, it should be noted, as numerously, judging by the cases above), and would seem to present less of a theoretical problem in most respects. Hobart appends a *quaere* to his report of Hoskins's Case. So far as appears,

the *quaere* goes straight to the decision -- i.e., asks "Were we really right in deciding the case as we did?"

In the Caroline Matingley v. Martyn,[16] a partial Consultation was proposed and probably granted. The case was as follows: William and Joan were prosecuted at ecclesiastical law *ex officio* (publicly or criminally, without private complainant) for "suspicious cohabitation" -- i.e., living together as husband and wife without being married, or at least (as the accusation against them read) without its being known or probable that they were married, since marriage banns had not been read in their parish and they had no license dispensing them from banns. William and Joan's essential defense was that they had a marriage license from the Archbishop of Canterbury. After unsuccessfully trying to plead their defense in the ecclesiastical court, they got a Prohibition. Their claim to a Prohibition rested essentially on the statute of 25 Hen. 8, c.21. That act gave the Archbishop the dispensing powers formerly vested in the Pope. William and Joan maintained that the ecclesiastical court was pretending that the statute did not give the Archbishop power to dispense from marriage banns, or at least that the meaning of the statute was in question, whereas the exposition of statutes belonged to the common law. In other words they maintained that insofar as their license was not allowed, the ecclesiastical court was depriving them of a statutory right, or at least purporting to construe the statute by disallowing a license made pursuant to the Archbishop's statutory powers.

I think it is fair to cut through the complexities of this case by saying that the judges at last saw the light and perceived that William and Joan had no claim. Claims to Prohibitions on the ground that a statute was involved raised special problems in any event. The claim here was particularly flimsy. For one thing, the Archbishop's license was no better by virtue of the statute than it would have been without it. (Though the statute gave the Archbishop the Pope's dispensing power for all England, every bishop and archbishop had non-statutory power to dispense from marriage banns within his diocese or archdiocese. William and Joan lived in, and their wedding took place within, the Province of Canter-

16 P.8 Car. K.B. Jones,257.

bury.) Secondly, there was nothing to suggest that the ecclesiastical court actually *had* done anything that would count as interpreting the statute, or that it would be required to -- much less that the statute had been *mis*-applied. In other words, even if the license is taken as an exercise of the Archbishop's statutory power, overruling the license, or refusing to accept it as a sufficient defense to the charge of suspicious cohabitation, does not *ipso facto* point to an act of interpreting the statute. The reason is that the *formal* sufficiency, meaning , etc., of licenses issued by the Archbishop pursuant to his statutory powers were clearly within ecclesiastical jurisdiction. I.e.: The ecclesiastical court may not deny that the Archbishop has licensing power by the statute. It perhaps may not even entertain questions, if any were to be controverted, about the scope of his power, But it may certainly consider, nay, decide, whether a statute-based license is in the right form by ecclesiastical standards (as it were, whether it is on the right kind of paper, signed in the right place, etc.) For 25 Hen.8 did not set up a special manner of licensing -- only transferred power to issue due ecclesiastical licenses from one ecclesiastical officer to another. Similarly, marriage licenses invariably had provisoes -- provided that the licensees are not within forbidden degree of consanguinity, etc. The factual question whether conditions laid down in an ecclesiastical license had been met belonged to the ecclesiastical court, whether the license was made pursuant to statutory powers or otherwise. In the instant case, the charge of "suspicious cohabitation" may have been sustainable without raising any question about the license's validity as an ecclesiastical document -- much less about the statute behind it. For it was an issue in the case whether the couple's local ecclesiastical authorities had notice of the license.

To all appearances, what really happened was that William and Joan got a perfectly good and utterly uncontroverted license from the Archbishop to be married without banns in a designated church in London. They lived somewhere else, however. It was a question of fact whether they had given the local authorities where they lived notice of their lawful marriage, and perhaps a question of law whether cohabiting without giving such notice constituted a crime of "suspicious cohabitation." But all these questions -- what constituted sufficient notice, whether such criteria of notice had been met, whether living together without giving due notice was an ecclesiastical crime even if the couple were married in fact -- were

perfectly within ecclesiastical competence and perfectly independent of the statute.

In sum, William and Joan got up a farfetched theory that could lead to prohibiting every marital suit involving an Archepiscopal dispensation, whether or not there was the least question as to what powers the statute gave the Archbishop. William and Joan *said* that the ecclesiastical court was proceeding against the statute (i.e., on the pretense that marriage licensing belonged only to the bishops), but there was nothing to suggest that that was true. Their saying so was only by way of stating their theory. So the judges agreed in the end, holding that there was no present basis for prohibiting, though there might be in the future, upon a showing that the ecclesiastical court had actually misapplied the statute -- i.e., had held that the Archbishop had no power to issue such a license.

The road to the above conclusion was circuitous, however. The matter of qualified Consultations arose along the road. The case was discussed only after full pleading and demurrer (declaration; plea in bar; replication; demurrer by the defendant, the ecclesiastical judge). On the first hearing, Justice Jones favored a Consultation, upholding the demurrer. The rest of the Court (Richardson, Croke, and Whitelocke) went the other way. Then the case was reargued, the able Attorney General, William Noy, speaking for the defendant. Chief Justice Richardson was now converted to Jones's opinion. But since the Court was still divided 2-2, outside judges were called in -- two from the Exchequer (Chief Baron Davenport and Baron Denham) and two from the Common Pleas (Chief Justice Heath and Justice Hutton). These advisers favored a Consultation with a qualifying clause -- *"ita quod non agatur"* of the Archbishop's statutory powers. Was their advice taken? The report fails us. We are told that on the occasion of their conference with the four outsiders the King's Bench judges reached agreement on the *substance* as I have outlined it above. That is to say, Whitelocke and Croke were talked out of their previous opinion. (On the main question. There was a further pleading question, on which everyone held for the defendant, and an additional question as to whether the *ex officio* proceeding against William and Joan was lawful without any presentment. On the last question, Croke and Whitelocke thought the proceeding unlawful, contrary to their colleagues and the outside judges.) We are not told, however, whether the *"ita quod"* clause was finally put into the Consultation.

The chances are that it was. The proposal to insert it has the look of a compromise: The outside judges clearly agreed with Richardson and Jones on the real matter. They were faced with two stubborn hold-outs -- two stubborn hold-outs in a thoroughly argued case, where the issue was broad enough to have a political flavor. Croke and Whitelocke were resisting the ecclesiastical interest and the arguments of the Attorney General. They were also (in my opinion) wrong -- though possibly wrong from good motives and with some technical justification. (As to the good motives: Here was a couple being harassed by the churchmen for the curious offense of "suspicious cohabitation," when they were probably doing nothing immoral. Here were the churchmen, with government assistance, making a "Federal case" out of this trivial matter -- raising grave and difficult questions about the independence of the ecclesiastical judiciary and its relation to the statute law. Fair-minded judges -- as well as Puritans and fornicators -- might well take offense at such a display of Laudianism. As for the technical justification: The pleadings on their face did claim that the ecclesiastical judge had violated the statute -- unlikely though it is that that was anything but a pretense.) The outside judges probably saw themselves in a mediating role -- charged with bringing two "right" judges and two "wrong" ones together if at all possible. The *"ita quod"* clause was in one sense a small sop to offer Croke and Whitelocke, in another sense a large concession -- the perfect compromise. On the one hand, it would tell the ecclesiastical court not to do something it was virtually sure not to do anyhow. On the other hand, it would give Croke and Whitelocke what they were holding out for in principle -- recognition that ecclesiastical courts have no intrinsic authority to construe statutes, are bound by the common law interpretation, and may be prohibited from meddling with statutes without a showing that they have made a decision necessarily dependent on misapplication of a statute. It is more likely that Croke and Whitelocke agreed to the qualified Consultation than that they were so wholeheartedly converted as to accept a general Consultation. It is likely that Richardson and Jones would have accepted the *"ita quod"* for the sake of unity. We cannot be sure, however. We cannot even be sure that the case was decided for the defendant, for where the report stops Croke and Whitelocke were still holding out on the separate question of whether the ecclesiastical suit was lawful at all in the form it took. That question was not raised by the pleadings. If Croke and Whitelocke

wanted to insist on it, they were proposing that the "legal truth" be followed, instead of the pleadings -- as in the cases on "misconceived surmises" above. Since, counting the outside judges, they were outvoted, the chances are that they would not have refused the Consultation on that ground in the end. (The outside judges were only advisers. I.e: The case was not formally adjourned into the Exchequer Chamber, to be decided by *all* the judges of the three principal courts. But unless their feelings were very strong indeed, Croke and Whitelocke would in all probability have accepted the votes of their outside colleagues as binding on them.)

With respect to partial Consultations, two observations on Matingley v. Martyn should be made: (a) If I reconstruct the drama correctly, qualifying the Consultation was a compromise. Judges who thought the right solution was no Consultation and judges who thought it was a general Consultation got together on an *"ita quod."* In one way, recognition of the qualified Consultation as a legitimate form provided a useful instrument for compromise and similar motives. "We might as well put in a qualification, just to make sure the ecclesiastical court does not stray out of bounds" was a possible thing to say -- when doing so would enable a divided court to act, or when the judges had a skeptical or hostile attitude toward ecclesiastical proceedings which they were powerless to prohibit.

On the other hand, it seems questionable whether qualified Consultations *ought* to be granted "just to make sure," to make someone feel better about permitting the ecclesiastical court to continue. The cleaner, more rigorous course is to decide between no-Consultation and general Consultation, unless a qualifying clause will genuinely serve to direct the ecclesiastical court away from misconduct which might require another Prohibition later on. When there is no real expectation that the ecclesiastical court will exceed its jurisdiction or come into conflict with the common law, the etiquette of a mixed legal system is probably best observed by leaving the ecclesiastical court alone to do its business, not by surrounding it with warnings and conditions, which themselves may raise problems of interpretation. In the particular matter of statutes, it is perhaps best to act as if one assumed the ecclesiastical court would apply the statute correctly -- an assumption hardly contrary to fact in many circumstances.

(b) Matingley v. Martyn was a fully pleaded case. The qualified Consultation was proposed as a solution upon demurrer. Ordinarily, partial Consultations were sought on motion before pleading (insofar as they were sought on purely legal grounds -- i.e., not pursuant, say, to a verdict finding for the plaintiff *quoad* one tithe and the defendant *quoad* another). That is what the resolutions in Fuller's Case contemplate -- partial Consultations on motion as procedurally preferable to, but not different in effect from, partial Prohibitions. Is there any difference? Arguably, perhaps. In the first instance or nearly the first instance, one might say, the Prohibition should be tailored to cover only as much of the ecclesiastical suit as the surmise shows to be prohibitable. If, however, the plaintiff declares on an "overstated" Prohibition, and the defendant demurs to the Prohibition as declared on, perhaps the parties have challenged each other to an "all-or-nothing" contest. The plaintiff has said *inter alia* that his Prohibition is not "overstated," the defendant that its "overstatedness" is among its flaws wherefore a total Consultation should lie. Therefore partial Consultations should not be granted upon demurrer, or at least they should be granted more reluctantly than upon early motion. From the perspective of private litigative warfare, there may be some point in this argument. Matingley v. Martyn is a precedent *contra,* but vitiated by the special need to unjam a divided Court.

Alongside the miscellaneous cases above, we must consider testamentary cases exemplifying qualified writs. I treat these as a special class because they may have been the entering wedge for partial writs in general. It would have been hard to avoid such writs in testamentary cases. Without the example of testamentary cases, they might have been avoided elsewhere. It is arguable that simple conglomerate suits should not be split up by partial Prohibitions or Consultations. (If a parson sues for pigs and lambs and a *modus* covering only the pigs is surmised, the effect of granting a total Prohibition and letting it stand will be to make the parson start a new suit for lambs. Arguably, people who bring conglomerate suits undertake to make them stick across the board, or else to go back and sue separately for separate items.) As for *"quatenus non agatur"* Consultations, designed to warn or direct the ecclesiastical court -- questions can be asked about their propriety and utility in enough contexts to raise the general question whether they were a very good idea. In testamentary law, however, the division of labor between common law and ecclesiastical courts was such that qualified writs were close to a practical necessity.

If they had not been needed in that area, perhaps they would have been less willingly recognized elsewhere. Even so, it was sometimes problematic in testamentary cases themselves whether a partial writ was the right solution. Let us now turn to cases in the special testamentary group.

In Harvey v. Harvey (1584),[17] a qualified Consultation was expressly sought by the ecclesiastical plaintiff, Clare, who was suing an executor, Sebastian, for a legacy. Sebastian's essential defense was that the testator was in debt to him (by a "Statute Staple," a special type of obligation by which land was made liable to execution to satisfy the debt) and had given him all his goods by *inter vivos* gift, so that he had nothing as executor from which to pay legacies. He prohibited the legacy suit on surmise of the Statute Staple and *inter vivos* gift (both transactions which, if questioned, were clearly within common law jurisdiction.) Clare then moved for a Consultation *"quatenus non agitur ad validitatem facti* [i.e., the deed of gift of the goods allegedly made in the testator's life], *aut statuti."*

Lady Lodge's Case (above) was urged as authority for such a Consultation (by Egerton, who had himself been of counsel in the earlier case.) But Chief Justice Wray, whose opinion alone is reported, was inclined against it. His reported words go only to distinguish Lady Lodge's Case, but his full point needs to be put in somewhat broader terms: There was a practical reason in the instant case for seeking a Consultation -- albeit necessarily qualified. At first sight, that may not be apparent, for if the testator gave *all* of his goods to Sebastian, how could the ecclesiastical court do anything for Clare without venturing where it plainly must be forbidden to go -- i.e., without passing on and invalidating the deed of gift? The answer (as Wray acknowledged) is that there might be debts *owing to* the testator which Sebastian had collected, or could collect, and out of which the legacy could be paid. The *inter vivos* gift of all goods would not operate as an assignment of such debts owing to the testator. So why not (in effect) Consultation *quoad* any assets in Sebastian's hands by virtue of obligations falling due to the estate -- the Prohibition to stand *quoad* any property of the testator comprehended in the deed of gift? In

17 P. 26 Eliz. Q.B. 1 Leonard, 20.

answer to that, Wray turned to the Statute Staple. Sebastian claimed to have £2000 coming to him by virtue of the Statute. For that large sum, he had a claim against the estate -- i.e., against anything that came to the estate by virtue of obligations to the testator (offset, I suppose, by any equities arising from the gift -- i.e., a claim against the estate for £2000 minus the value of the goods, if the gift was intended as, or should be presumed, a partial satisfaction of the debt, a question presumably resolvable in a court of equity).

In sum, I believe Wray's point comes to this: The qualified Consultation might be justified if only the gift had been surmised -- for the estate might still be sufficient to satisfy legacies. Likewise if only the Statute Staple had been surmised -- for an estate worth £10,000, say, should be subject to legacy suits even though it was encumbered with a £2000 obligation. But putting the two together, the chance that the estate could satisfy the legacy was extremely marginal -- not theoretically excludable, but extremely marginal. Better to stop the ecclesiastical suit altogether, pending common law determination of the gift and Statute, than tempt the ecclesiastical court (even while forbidding it) to meddle in common law matters. Given license to award the legacy so long as the gift and Statute were not questioned, it might soon find itself involved in other issues beyond its depth -- e.g., the validity of obligations to the testator -- raising the possibility of new Prohibitions (and 50 Edw. 3 problems). Better avoid *"quatenus"* Consultations except where there is a real chance that the ecclesiastical court can settle the matter in its own terms -- where it only needs to be warned away from questions it is unlikely to touch.

Lady Lodge's Case was very possibly at the opposite pole from Harvey v. Harvey in the way that matters. I.e.: It may have been the perfect case for a *"quatenus"* Consultation -- a case in-which the chance of an ecclesiastical resolution without touching common law ground was better than good. In specifically distinguishing Lady Lodge, Wray relied: (a) On the fact that the deed in Lady Lodge constituting the "common law issue" was made by a previous executor, rather than the testator. *Quaere* whether that is a distinction without a difference. (B conveys away all the goods he has as A.'s executor. B makes C his executor and dies. A's legatee sues C. The ecclesiastical court is told to go ahead *"quatenus"* it does not touch B's conveyance. That is Lady Lodge's Case minus further complications. Wray seems to say the Consultation was justified there

because the conveyance was B's. Where X conveys all his goods to Y and makes Y, his executor and dies (Harvey v. Harvey) Wray seems to say that the Consultation is *less* justified, even apart from the additional factor of the Statute Staple. Why? In the first case, if B.'s own estate was big enough to satisfy its debts should the ecclesiastical court be free to charge it with A.'s legacies, either prior or posterior to B.'s legacies? *Quaere.*) (b) Though B. in the above outline of Lady Lodge had conveyed all of A.'s goods away, there might have been debts collectable by A.'s estate out of which A.'s legacies could still be satisfied. In Harvey v. Harvey, the heavy charge represented by the Statute Staple made that improbable.

One further feature of Harvey v. Harvey should be noted. As of the time he brought his Prohibition, Sebastian had been excommunicated for failure to appear and answer Clare's suit and imprisoned upon *De excommunicato capiendo.* As far as the report indicates, nothing was made of this circumstance against Sebastian. Wray talks about the differences between his case and Lady Lodge's in a vein favorable to plaintiff-in-Prohibition. There is nothing to suggest that Sebastian's title to have and maintain his full Prohibition was vitiated by his non-appearance and his delay in suing the Prohibition.

A case of 1590[18] exemplifies the qualified Prohibition in circumstances we have not heretofore encountered. Prohibitions were sometimes used to prevent ecclesiastical courts from exacting detrimental testimony from parties by inquisitorial investigation. Such cases, including this one, are discussed in substance in Vol. II of the study. The famous instances concern criminal suits, primarily in the High Commission. But there are civil instances as well. The general principle to keep in mind is that inquisitorial procedure was not objectionable -- or at least not controllable -- as such. Requiring the party to answer interrogatories was the way ecclesiastical courts did things -- objectionable, or controllable, only insofar as it took certain unfair forms in criminal suits, or, in civil

18 T. 31-M. 31/32 Eliz. C.P. Add. 25,194, f.6b; Lansd. 1073, f.108 (two nearly identical reports, giving Anderson's initial speech); Add. 25,196, ff. 199b and 204 (the second and third hearings -- of primary importance here; Moore, 906 (brief report, misleading because it does not say that the Prohibition was qualified).

suits, at least matrimonial and testamentary suits, insofar as it might tend to the damage of a man's common law interests.

In our case, the ecclesiastical suit was to revoke administration. The intestate's wife had been made administratrix; his heir (i.e., real-estate heir -- his blood relationship to the intestate does not appear) sought to have administration transferred to him, on the ground that the debts and credits of the personal estate were bound up with the land he had inherited, in consequence of which he had paid off some of the estate's debts. There was serious question as to whether ecclesiastical courts had jurisdiction to entertain such revocation suits at all, because the statute of 21 Hen. 8, c. 5, sect. ii, severely limited their discretion in awarding administration. The statute as the common law judges understood it was frequently enforced by Prohibition. In this case, however, the widow-administratrix did not claim that the suit should be prohibited because it was unlawful by the statute. Rather, she sought a Prohibition on the ground that she was being compelled to answer improper interrogatories -- questions about the condition of the estate and the intestate's affairs which she claimed were irrelevant for the ecclesiastical court's purposes, intrinsically "temporal," and apt to extract admissions that could be used against the estate in common law litigation with the creditors.

Whatever else could be said against them, it was not entirely clear from the surmise that the questions were irrelevant. Chief Justice Anderson, who alone spoke when the case first came up, was unwilling to conclude out of hand that they were. When the case was discussed again, the court was inclined to agree that a partial Prohibition was the right solution: tell the ecclesiastical court not to proceed on "points belonging to the common law" (as the report puts it), otherwise let the suit, including the interrogation process, go on. In some sense, that must perhaps be considered what plaintiff-in-Prohibition was asking for, since she did not object to the revocation suit as such or, it would seem, maintain that she should not be interrogated to any intent. What the form and effect of such a partial Prohibition would be is problematic. Would the Prohibition specify which questions were so "temporal" that the ecclesiastical court must stay away from them, whether or not they were relevant, or the ecclesiastical court considered them relevant, for its purpose? Or would the Prohibition be cast in general terms and operate only in a minatory way -- in effect,

"Go ahead and ask questions which you consider essential for your purpose, but be careful about asking anything that is likely to affect common law interests -- for any inessential questions that trench on our sphere will put you in danger of violating this Prohibition?"

When the case was taken up a third time, the Court found itself in serious disagreement. Chief Justice Anderson insisted on the ecclesiastical court's right to ask any questions that were relevant for its purposes, whether or not they were about "temporal" matters and whether or not they might lead to detrimental admissions: "If the examination of the other matters is a necessary circumstance to prove the principal point, there is no reason to prohibit them. As if it [a suit] were begun there for a legacy, and defendant pleaded a gift by the testator in his life of all his goods except those with which he should pay such-and-such a debt -- if they are at issue on the gift, they may take examination concerning the gift, and yet the gift is determinable at common law..." (N.b. Anderson's parallel example. Lady Lodge and Harvey v. Harvey show that the ecclesiastical court could be prohibited *quoad* an *inter vivos* gift. Anderson should not be taken as disputing that.

Rather, his point is as follows: If the ecclesiastical defendant chooses to rely on such a gift by way of ecclesiastical plea, and does not get a Prohibition, then the ecclesiastical court may make him answer questions about the gift, even though it is an intrinsically "temporal" matter and even though admissions capable of being used against him in common law litigation might be exacted. Justice Periam replied to Anderson briefly and sharply: "In our case itself, I hold the contrary." I take Periam as not wanting to dispute Anderson's general principle or his parallel case, but as favoring a strong Prohibition in the instant case -- either general, or qualified so as to rule out the questions about "temporal" matters specifically. Periam's underlying point must be that the relevance, or high-degree relevance, of the questions was not evident in the case at hand. He must have taken the surmise as importing the claim that there was no "justifying relevance" here. Perhaps he was unable to imagine any. Therefore the ecclesiastical court should be strongly prohibited, pending a showing, by pleading to the Prohibition, that the "temporal" questions were in fact essential. (In Anderson's parallel case, on the other hand, the relevance of the question is evident.) Anderson, by con-

trast, was taking the surmise as defective for failure to claim irrelevance, or lack of "justifying relevance," specifically.

Anderson came back at Periam rather testily: "My case was law before my age and will be afterwards, and there is a book case *circa* H[en.]4, where one sued in the spiritual court for a mortuary." Justice Walmesley then intervened to suggest a compromise: "Yes, sir. His case is good law, and thus is 8 H[en.] 4 and 2 R[ich.] 3. But it seems to me there may be a special prohibition -- that if it not be pertinent to the cause to surcease, otherwise to proceed. And Anderson agreed to that in this plea." These remarks are puzzling in that "my case" and "his case" have the look of referring back to Anderson's parallel case (the *inter vivos* gift), as if Periam had said "in *your* case itself' -- i.e., "I dispute your parallel case itself, *a fortiori* what you are implying about this one." However, I read the MS, as clearly *"notre,"* not *"votre,"* and Periam's position makes good sense as reconstructed above. In any event, Periam and Anderson disagreed about the case at hand. Walmesley essentially agreed with Anderson, but thought there was no harm in a weak, or "minatory," Prohibition, to which Anderson had no objection. The fourth member of the Court, Justice Wyndham, was present, but said nothing on this point.

The Justices went on, however, to discuss whether suits for revocation of administration ought to take place at all. On this, Periam and Wyndham lined up squarely against Anderson and Walmesley. The first pair thought that the Henrician legislation regulating administration removed all basis for revocation suits. (This position amounts to the following: Anyone entitled to administration by statute should proceed by Prohibition to block the appointment of improper persons. Except for such persons deprived of their statutory right, no one could have any basis for disputing the ecclesiastical court's appointment -- i.e, seeking to have the old grant revoked and a new one made. The statute preempted the field -- requiring the appointment of certain classes of relatives when persons in those classes were available, otherwise giving the ecclesiastical court discretion.) Anderson and Walmesley disagreed "strongly." (They would not, I am sure, have denied that the statute severely limited the ecclesiastical court's discretion, or that the statute was enforceable by Prohibition. Their position was presumably: (a) that a person entitled by the statute could if he liked sue for revocation in the ecclesiastical court instead of bringing a Prohibition: (b) that where neither contender was entitled by

the statute, the ecclesiastical court was free to allow its original grant of administration to be challenged on any grounds that would have been appropriate in ecclesiastical law before the statute.) The report only tells us that the judges were divided over whether the suit for revocation was proper in the first place -- i.e., does not spell out the counter-positions as I have done.

The court's further exchange leads to two conclusions: (a) Periam's view on the ecclesiastical court's power to exact self- betraying "temporal" testimony must have been influenced by his skepticism about the revocation suit as such. Logically, his opinion on the former question is independent, and that is the question raised by the surmise. But Periam hardly needed to worry about whether plaintiff-in-Prohibition had made out the irrelevance of the questions sufficiently, in view of his position on the other question. At strongest, he could favor a general Prohibition according to the "legal truth" that the revocation suit ought never to have been brought. Short of that, he could reason as follows: "It is doubtful whether the ecclesiastical court should even be entertaining this suit. Granting that it may, at least so long as no complaint is made in terms, the claim to revocation must be based on the statute, or else it must be a mere objection to an exercise of discretion -- for the statute defines the sole *legal* reason why anyone in particular should have administration, so that, at most, the ecclesiastical court is free to reconsider its original act of discretion. Temporal transactions cannot be relevant for any claim based on the statute, because the statute only refers to familial relationships to the intestate. If the claim is not *de jure,* but a mere request for reconsideration on grounds of equity or convenience, it is not important enough to justify asking a man to betray his temporal interests. The ecclesiastical court might like to know about them to the end of assessing its discretionary act wisely. But so long as that is its only purpose -- so long as it has no strict legal duty to reconsider at all, or to give any particular weight to this or that factor -- it cannot be said to need the information to do its legal task, or to need it so badly that it is entitled to extract it from the party. Therefore *ex hypothesi* the questions are not 'relevant' in the proper sense of the word. Therefore it does not need to be shown that they were irrelevant. 'Temporal' interrogatories should always be banned in revocation-suits."

(b) Since Wyndham agreed with Periam on the legitimacy of the revocation-suit as such, and since views on that question and views on the propriety of the interrogatories are likely to have been connected, it follows that Wyndham and Periam were probably united against Walmesley and Anderson across the board. Therefore, as far as the report takes us, the Court looks deadlocked. My guess would be that Walmesley's compromise -- the weak *quoad* Prohibition -- was adopted in the end. (Moore's report indicates that a Prohibition of some sort was granted.) No-Prohibition would have suited Anderson, and Walmesley probably would not have complained. The choice for Periam and Wyndham was a deadlock resulting in no-Prohibition or a weaker *quoad* than they would have preferred. On my reconstruction, the qualified Prohibition -- like the qualified Consultation in Matingley v. Martyn above -- figures as an instrument of compromise.

Our remaining cases concern a problem we have already touched on -- the "mixed will," a single document comprising the two legally separate transactions of bequeathing personal estate and devising land. In a case of 1596,[19] the ecclesiastical suit was to annul such a will. It does not appear whether the will had been proved, so that the suit aimed at reversing probate, or whether it aimed to block probate in the first instance. In any event, the claim in the ecclesiastical suit was that the testator had revoked the will in question during his life. The ecclesiastical defendant -- presumably the executor named in the disputed will -- sought a Prohibition on surmise that the ecclesiastical court was on the point of giving sentence to annul the will as a whole (or *qua* integral document), whereas it had no authority to allow or disallow a will of land. A partial Prohibition was granted -- i.e., *quoad* the devise of land -- without reported dispute. (The alternatives, for any of which a case can be made, would have been: *a.* No-Prohibition -- for an ecclesiastical decision about the document's authenticity may not be given in evidence in common law litigation about the land and therefore will not significantly prejudice common law interests, whereas a partial Prohibition is incapable of being meaningfully obeyed by a court asked to pass on an integral document; upholding or annulling a will ostensibly *quoad* the goods only is just as likely to be

19 M. 38/39 Eliz. Q.B. Add. 25,199, f.23b.

prejudicial as upholding or annulling it as a whole. *b.* Total Prohibition, pending a showing that the will has actually been affirmed or disallowed in a common law suit, or pending determination of the will's authenticity pursuant to pleading on the Prohibition itself -- the only sure-fire way to avoid prejudice to common law interests. *c.* Total Prohibition, subject to motion for partial Consultation -- which, apart from being the better procedure in general, allows for at least a brief delay, during which the ecclesiastical court cannot move, and the party who fears for his common law interests may take steps to assert them; if such steps should actually be taken, the Court might conceivably notice the fact judicially and withhold Consultation.)

Our case arose at the next stage -- upon a motion for Consultation *quoad* the personal estate. As in the comparable Jacobean case discussed above (see note 11), the court denied the motion: The ecclesiastical judge was not prohibited *quoad* the goods; therefore he need not be authorized to go ahead to that intent; therefore he *should* not be. The reality that undercuts that unimpeachable logic came out, however. Godfrey, of counsel, in favor of the motion: "But they there [the ecclesiastical court] being prohibited as to part will not examine the other part of the will." But the Chief Justice was obdurate. Popham: "Consultation may not be granted except where Prohibition is granted to the testament of goods. Therefore the Prohibition will stand."

We have no way of knowing how timid the typical ecclesiastical court was. It is not self-evident that a partial Consultation would ease its plight. But the report suggests a line of reflection: In mixed-will cases, a Prohibition *quoad* the land operated in practice (so Godfrey said) like a general Prohibition. Did the courts anticipate that effect and therefore deliberately use partial Prohibitions, instead of full Prohibitions subject to partial reversal, in such cases? Did they intend, in other words, to make it hard for ecclesiastical courts to do anything with mixed wills, but without taking the bull by the horns -- i.e., without granting and upholding full Prohibitions until the document's authenticity was settled at common law? Was there any advantage in not taking the bull by the horns, except for the "public relations" or "etiquette" advantage in not ordering ecclesiastical courts to desist from doing what they had an unquestionable right to do? Possibly there was an advantage in mere vagueness -- in Prohibitions that may in *effect* have said to the ecclesiastical court "Go ahead, but watch

your step." Circumstances might have a lot to do with how hard the ecclesiastical court took the warning. Estates are enormously various. Imagine on the one hand a mixed will devising thousands of acres and bequeathing large legacies, on the other hand a will involving trivial legacies and a few acres. A Prohibition *quoad terram* might provoke different reactions in the two cases -- in the first, reluctance to act, the sense of having been warned against infringing common law interests, combined with virtual certainty that the devise of real-estate would be challenged in common law litigation; in the second, awareness that the common law interests involved were of slight value and that delay would work mainly to deprive some poor servant or spinster daughter of a little legacy.

In other words, the ecclesiastical court in our case may have been balking, not because *quoad*-Prohibitions were intrinsically impossible to obey, or any harder to follow than *quoad*-Consultations. It may have been balking because common law interests were involved and because the Prohibition conveyed just the message it was meant to under the surface -- "We can't prohibit you from annulling this will with a *pro forma* statement that you are only doing so *quoad bona,* but before you do that look the situation over. Consider the magnitude of the values and who would gain and lose by delay in settling the personal estate." Godfrey may have been making the move that offered desperate hope to his client interested in the personal estate. One can imagine him saying to his civilian counterpart, "Let me try to pursuade the Queen's Bench that a *quoad*-Consultation is a harmless or logical complement to a *quoad*-Prohibition, a desirable clarification of an intrinsically hard-to-follow order. If you can come armed with a Consultation, the ecclesiastical court will probably be deprived of its pretext for delaying sentence to annul the will, and then we can promptly get our client appointed administrator of the personal estate."

On this construction, the Court in rejecting the motion prevented its perfectly conscious policy from being subverted by a clever lawyer. When we take up mixed-will cases from the substantive-law point of view, I think the need to look behind the legal surface to the real difficulties of handling such cases fairly will appear. The construction above is speculative, but it looks to the large-looming reality -- the immense variety of estates, confronted by cumbrously divided jurisdiction and categories ofjurisdictional law that took no account of that variety. Partial writs

were a necessity in that situation; we have explored a sense in which the partial Prohibition -- as distinct from the generally superior partial Consultation -- may have provided an inelegant but useful way-out.

The Marquis of Winchester's Case[20] involved the large estate of a nobleman, whose mixed will substantially disinherited his legal heir in favor of bastard children named executors. In the event, probate was prohibited *totaliter,* and the executors' attempt to get a partial Consultation *quoad bona* was turned down, pending the outcome of common law litigation over the land. The reason for the decision was that the Marquis's sanity was challenged. The Court thought that the possibility of a conflicting or prejudicial ecclesiastical decision on the question of his sanity should be headed off. It seems to be implied that a partial Consultation would have been granted if there had been no sanity issue -- i.e., if plaintiff-in-prohibition had merely sought to stop probate pending litigation over the land, without claiming in his surmise that the marquis was insane and thereby showing *how* he hoped to break the will. *Quaere* if some other specific reason for contesting the will -- such as the revocation in the testator's lifetime in the last case -- had been laid. An ecclesiastical decision on a Marquis's sanity, in a case well-flavored with high-society scandal, is surely the sort of thing that would get around, to the prejudice of other litigation reopening the same issue -- more so, no doubt, than a decision on some such duller question as whether the will had been revoked, superseded by a later document, or the like. On the other hand, given the size of the estate and the certainty of common law litigation, the judges may have welcomed a good reason to stop the ecclesiastical court altogether, and might have made do with a less good one had there been need.

From a procedural point of view, Winchester's Case is interesting for the maneuvers that led up to the conclusion. When Prohibition was first sought, the Court was inclined to grant a partial writ. Coke, representing plaintiff-in-Prohibition, immediately urged the Court to grant a full Prohibition subject to motion for partial Consultation. He said that that procedure was the Court's usage and cited Lloyd v. Lloyd as a case in point.

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20 P. 41 Eliz. Q.B. 6 Coke, 23. Hetley, 120; Add. 25,203, ff.59 and 61.

Others at the Bar confirmed Coke's memory of Lloyd v. Lloyd, and the judges thereupon followed his advice. Good Form was not the only beneficiary of Coke's quick victory on this point. For when, on a later day the same term, Serjeant Williams came to move for partial Consultation, he was turned down. In considering Williams' motion, the Court took up the effect of the insanity issue, as it had not done on the first hearing. The insanity was laid in the surmise, but Serjeant Heale, who spoke for the original motion for Prohibition, did not, so far as the reports show, say anything about it. He did not need to, for the mixed will by itself was reason enough for some sort of Prohibition. When the court offered a partial Prohibition, Coke intervened with his point of form -- not with the argument that the Prohibition should be total in this case because of the insanity issue. If he had brought that up at once, Serjeant Williams might have been saved the trouble of his motion. One cannot be sure about the motives and strategy. Perhaps Coke decided to shoot for a full Prohibition on the point of form first, because if that worked he would gain time to prepare his arguments on the point of substance. The other side might in the meantime decide that a partial Consultation was not worth pushing for. Conceivably such intervening events as actual commencement of a suit for the land could affect both the other side's thinking and the Court's.

Coke's argument from the usage of the court in Winchester's Case is contradicted by our last case above. That case at least furnishes an individual counter-example. If there is anything to my argument that partial prohibitions may have had positive advantages in mixed-will cases, one would expect them to be common enough to constitute a counter-usage. That the Court's first instinct was to grant a *quoad* -Prohibition suggests there was previous practice that way. The non-testamentary cases above show that in general there was practice both ways, though Coke's full-Prohibition-subject-to-motion procedure should probably be regarded as preferred. On balance, it may have been more favorable to plaintiffs-in-Prohibition. A full Prohibition is a bird in the hand. The other side may have trouble wresting it away -- as in Winchester's Case -- even though in theory, or *ceteris paribus,* he is entitled to an automatic Consultation *quoad bona.* Cf., however, the argument above that *some* plaintiffs-in-Prohibition may have been better off with nominally partial Prohibitions. If the ecclesiastical court had been prohibited only *quoad terram* in Winchester's Case, one wonders whether it would have dared go ahead -- say to pronounce the nobleman sane and put his bastard favorites in posses-

sion of vast quantities of goods, while the legitimate heir and representative of the family -- the more likely favorite with a jury -- stood an excellent chance of breaking the will at common law. Godfrey in the last case may have been right -- partial Prohibitions were sometimes as good as full ones, with the added advantage of being Consultation-proof.

In almost all mixed-will cases, the propriety of partial writs is in some way an implicit issue. Except for the two cases just discussed -- on the relative claims of partial Prohibitions and partial Consultations -- I shall treat such cases later, under substantive law. On the one hand, mixed-will cases naturally suggested partial writs, in one form or the other, and provided some of the precedents for such writs as a generally appropriate procedure. On the other hand, the suggestion was sometimes rejected -- i.e., sometimes it was argued that partial writs were precisely *not* the way to handle such cases, without necessarily denying their appropriateness in other contexts. Such arguments sound to a degree in procedure, but in their more major aspect go to the function of Prohibitions and modes of justifying them. For that reason, further mixed-will cases are deferred.