X.
The "Logical Individualism" of Prohibitions

A.
Miscellaneous Problems

Summary: For the general theme which these cases share, see immediately below. In some contexts, the "public stake" in Prohibitions was strong enough to keep Prohibitions alive in altered circumstances. For example, courts were inclined to hold that the death of a party destroyed an outstanding Prohibition, so that his executor could not take advantage of it. The death of the King was held to "abate" Prohibitions in the King's Bench if formal pleading had not taken place. On the other hand, the courts did not insist altogether strictly that only the "party grieved" in the narrowest sense had standing to sue a Prohibition.

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The "individualism" implied in such resistance as there was to joint Prohibitions crops up in an extended sense in a few other situations. In the narrowest focus, a Prohibition can be seen as an "arresting" or "braking" mechanism applied by one man, in consideration of harm done or threatened *to him,* directed solely against the *particular thing* doing or threatening such harm -- viz. an on-going, improper "foreign" suit, or such part of an on-going suit as affects that man. This narrow view, at odds with he "public" conception of Prohibitions, was tested in its implications in a few cases other than those on joinder. The most interesting cases of this type are those on the "collateral effect" of Prohibitions and Consultations -- i.e., those which ask whether the specific, inter-party act of stopping A.'s ecclesiastical suit against B. can ever affect C's right, or the future rights of A. and B. Before taking up the "collateral effect" cases, however, let us look at a few miscellaneous ones in the same general area.

Suppose one ecclesiastical suit is brought for several things -- e.g., tithes of several different products. A hyper-purist might argue that each item in the libel should be met by a fully separate surmise. Is a man sued by a conglomerate libel for wheat, oats, and barley not thrice grieved? Three prongs being stuck in him, should he not take three separate steps -- three several Prohibition suits -- to remove them one by one? (He may, of course, have good grounds for extracting one prong but not the others,

or different reasons for getting off different hooks.) We have seen plenty of examples to show that such "hyper-purism" is not to be taken seriously. Ecclesiastical defendants normally responded to conglomerate libels with conglomerate, itemized surmises. Partial Prohibitions and Consultations made it possible to deal with the situation where only part of the surmise was legally or factually sustainable. There is, however, one early holding expressly permitting conglomerate surmises, which suggests that the "hyper-purist" position was once urged. The holding, reported without context,[1] is simply that if A. libels against B. for several things, B may have one or several Prohibitions, as he prefers.

Another problem arises from the death of a party. Suppose A. sues B. for tithes and B. gets a Prohibition. Before proceedings on the Prohibition have reached a conclusion, B. dies. If the Prohibition is conceived as doing just one thing -- stopping the suit A. v. B.-- is it not meaningless the moment B is dead? There is no longer an A. v. B, because there is no longer such a person as B. Therefore the ecclesiastical court cannot be considered "frozen," or under inhibition, with respect to A. v. B. Therefore, -- for the practical consequence -- the ecclesiastical court is free to proceed against B.'s executor without requiring a new libel, if that is permissible under its own rules. If it does so proceed, the executor must get a new Prohibition in his own name to stop the ecclesiastical court again.

In a couple of cases, the courts accepted that line of reasoning. In Bowyer's Case,[2] a parishioner being sued for tithes got a Prohibition and died pending the same. Bowyer was his executor. The case arose on the parson's motion for Consultation. I think it is clear that the Court's whole doubt was whether a Consultation was necessary and appropriate in such circumstances. The judges decided it was not necessary, but still appropriate. I.e.: They agreed that as of the testator's death there was no longer any Prohibition in force -- nothing to stop the ecclesiastical court from proceeding against the executor if it saw fit. Therefore no Consultation was necessary. Nevertheless, the judges were willing to grant a Consultation -- presumably, as in other instances we have seen of "non-necessary" Consultations, to let the ecclesiastical court know where it stood in

1 M. 26/27 Eliz. C.P. Incorporated in the undated report of another case -- Noy, 131.
2 T. 41 Eliz. C.P. Lansd. 1065, f.20b (the fuller report); Harl. 3209, f.6.

somewhat doubtful circumstances. The fuller report of the case says clearly that a Consultation was granted. (The briefer one only gives the negative holding -- that the Prohibition died with its bringer.) In the fuller report, Justice Walmesley speaks separately, emphasizing that the Consultation was not necessary, that the ecclesiastical court should be able to tell that the Prohibition had lost its force just by reading it carefully. I imagine that Walmesley was uneasy with the Consultation, even though he apparently agreed to it. Given the negative holding, however, the Consultation was probably the right step. If the Prohibition was dead, the executor could not prosecute it to a conclusion. Giving the ecclesiastical court a nudge would stimulate it to act against the executor if it intended to, whereupon he could get a new Prohibition capable of determination. (I cannot believe that 50 Edw.3 would be an obstacle to a second Prohibition on the same libel in such circumstances.) Without a Consultation, the ecclesiastical court might dangle in doubt. The best reason for denying a "non-necessary" Consultation is a positive intention to inhibit the ecclesiastical court without doing so directly -- where the ecclesiastical claim looks fishy, or where delay (e.g., waiting on a common law suit for the land in a mixed will case) might be salutary. One respectable motive of that sort is imaginable in Bowyer's Case -- to encourage a new ecclesiastical suit against he executor, in contrast to proceeding against him on the libel originally laid against the testator. Such a preference is conceivable, but the very granting of the Consultation indicates that it was not actually felt.

The inconvenience of trying to get along without a Consultation in such cases comes out in Goodiar (or Goodyear) v. Master and Fellows of the College of Manchester.[3] A Prohibition having been granted in a tithe suit, motion for Consultation based on 2/3 Edw.6 was denied (because the surmise of a lease was held not subject to the proof requirement.) Later, the Court was informed that the original plaintiff-in-Prohibition was dead. Defendant's counsel plainly wanted a Consultation. The judges at first told him that no Consultation was necessary -- the Prohibition had died with its bringer, therefore the ecclesiastical court was free to proceed. Counsel insisted, however, that the

3 H. 43 Eliz. Q.B. Add. 25,203, f.296 (Discussed above for its other point. The other report cited there does not contain the present point.

ecclesiastical court would not actually proceed without direction. The judges therefore agreed to transmit a ruling to the ecclesiastical court, certifying that in their opinion it was at liberty to proceed. The principle that Consultations should not be granted without need was preserved, while the effect of a Consultation was achieved. (We shall see below other examples of special, flexible forms -- ways around the dichotomous choice between Prohibition and Consultation.) The Court said expressly in Goodiar v. Master and Fellows that the executor could have a new Prohibition if he was proceeded against. I.e.: There was no 50 Edw.3 problem. Along with Bowyer's Case, Goodiar v. Master and Fellows rejects one possibility: regarding the Prohibition as in force despite the plaintiff's death, and the executor as competent to plead thereon. (Cf. the rule above -- most notably in Woodruff and Coke v. Bartue -- that death of one party to a joint Prohibition does not terminate it. Could that rule be used as the basis for arguing that death of a single plaintiff need not terminate the Prohibition *quoad* his executor?) Bowyer's Case and Goodiar v. Master and Fellows clash on the acceptability of a Consultation, the later case endorsing a more puristic position.

One Caroline report[4] relates to the inverse situation: death of defendant-in-Prohibition. All that is reported is Justice Yelverton's recital of what he understood to be *King's Bench* usage, as follows: Death of the defendant, like death of the plaintiff, terminates the Prohibition. Therefore the defendant's executors are free to proceed. A ruling authorizing the ecclesiastical court to proceed (as opposed to a proper Consultation) will be made. Plaintiff-in-Prohibition may have a new Prohibition against the executors if he likes. This usage is entirely consistent with Goodiar v. Master and Fellows. There is no reason to suppose the King's Bench ever departed from the holdings in that case. Yelverton's bringing up the King's Bench usage in the Common Pleas suggests that the latter court had no settled way of dealing with death-of-a-party cases.

Another Caroline case[5] presents a different situation in which it was problematic whether a Prohibition was terminated -- the death of the

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4 M. 4 Car. C.P. Littleton, 155.

5 P. 2 Car. K.B. Harg. 30, f.218; Latch. 144. *sub. nom.* Watkin's Case, undated. I think there is no question but that the two reports are of the same case. There are detailed differences in the

King, rather than of a party. A legacy suit was prohibited in James I's lifetime. The King died before there was any Attachment and pleading thereon. The issue was whether there was a Prohibition now in force, upon which the plaintiff could have Attachment and plead, or whether he needed to start over with a new Prohibition. The Court held that a new Prohibition was necessary. That result was reached by an unusual combination of strands -- the public character of Prohibitions on the one hand; on the other, technical purism.

The King's death did not terminate ordinary lawsuits between party and party. The Court held, however, that a Prohibition in and of itself is not such a lawsuit. In its predominant aspect, it is merely a royal order, and therefore dies with the King. Admittedly, the naked Prohibition -- the royal order -- is the base from which proper inter-party rights are generated. Thus, the judges agreed, if proceedings had gone as far as Attachment in King James' reign, the monarch's death would have had no effect. *Contra* as things stood.

The fact that a Prohibition (unlike Attachment-on-Prohibition) was not a returnable writ counted against regarding the mere issuance of a Prohibition as commencing a proper lawsuit. I.e: A Prohibition was unidirectional. It went out against the ecclesiastical court and ecclesiastical plaintiff, but its delivery -- signifying that one party had "engaged" the other in litigative combat -- was not certified back into the King's Bench. In principle, plaintiff-in-Prohibition only "went after" defendant -- sought to "engage" him -- by complaining that he had violated the King's Prohibition. Therefore Attachments grounded on that complaint were returnable, while Prohibitions were not. Counsel in our case (according to the MS) tried to turn the very unreturnability of Prohibitions the other way -- into a reason for regarding a true lawsuit as existing before Attachment. As I understand it, the argument goes this way: As a rule, a lawsuit exists when a writ is returned -- when it is of record that a writ has gone out and reached its object. But that is the criterion for "when a lawsuit exists" only when the writ is returnable. In the case of an unreturnable Prohibition, that criterion makes no sense. In the case of an unreturnable writ,

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points covered, but the issue and result are the same. Latch does not usually date his cases, but they are all early Caroline. My discussion conflates the two reports.

the only feasible criterion for "when a lawsuit exists" is "when the Prohibition itself is entered of record." But counsel got nowhere with that. Neither did they succeed with the argument that plaintiff-in-Prohibition may be nonsuited before Attachment -- ergo there must be a suit. Justices Dodderidge and Jones denied the premise: There is no such thing as a nonsuit in Prohibition before Attachment.

Finally, comparison was made with Common Pleas practice. The judges admitted that things were different there. In principle, the Common Pleas did not have the same freedom and power to grant Prohibitions as the King's Bench. Only the King's Bench had a kind of *plena potestas* to protect the "royal dignity," however that worshipful interest was offended and however notice of the offense reached its ears. In principle, the Common Pleas was only entitled to protect its own narrower interest in its own jurisdiction. We shall encounter this distinction again. In practice it did not come to much, for by procedural rigmarole the Common Pleas was able to handle Prohibition cases virtually to the same extent and in the same way as the King's Bench. But the very rigmarole created a sense in which a bare Prohibition in the Common Pleas had more of the marks of an inter-party lawsuit than a bare Prohibition in the King's Bench. The judges in our case conceded that a Common Pleas Prohibition might not or probably would not be discontinued by the King's death prior to Attachment. Nevertheless, the King's Bench must stick to its own ways.

The decision represents no very significant triumph for the public theory of Prohibitions over the private. It uses the former to introduce an avoidable procedural nicety and inconsistency as between the two principal courts. It evades the sense in which Prohibitions were in fact private proceedings from the start, however much they were also public proceedings and as such free from some of the canons of common law correctness. The decision hardly seems consistent with those above on the death of a party. If a naked prohibition is so much the King's action that it dies with him, how is it enough the plaintiff's to surcease with his death? If there is no inter-party lawsuit before Attachment, why may not the original plaintiff's executor start one by attaching the supposed violator of a standing royal order? However, our decision stands, the only one on its subject. If you expect the King to die, hurry and get your Attachment, or else proceed in the Common Pleas.

The abating effect of King James' death on King's Bench Prohibitions had in fact already been upheld in two cases. One, Trumpley v. Maio (P. 1 Car. K.B., cited in Dickes v. Brown following, not independently reported), decided just that: if there had been no declaration or return on an Attachment, Prohibitions evaporate when the King dies. The second case, Dickes *et uxor* v. Brown[6] I am taking out of chronological order because it involves notable points of procedure beyond the matter of the King's death. In this case, a legacy suit was prohibited by the executor in P.22 Jac. (spring, 1625). He had lost in the court of first instance and lodged an appeal when he decided to desert his appeal and turn to the common law. Between the issuance of the Prohibition and M. 1 Car. (autumn, 1625), there had been no further proceedings -- no declaration or return. Now Calthrop, of counsel for the legatees (defendants-in-Prohibition), came and moved for Consultation. He argued for a Consultation partly because the Prohibition had abated, citing Trumpley v. Maio. The opposite view -- that the King's death does not affect outstanding Prohibitions -- was unsuccessfully urged by the executor's counsel. Calthrop also argued for Consultation on the merits -- i.e, on the ground that the Prohibition ought never to have been granted (a strong substantive contention, in the light of other cases on the same point -- the merits are discussed elsewhere.) Here is the point to note: By the "abatement" theory there was no Prohibition in being to be undone by Consultation; nevertheless, a Consultation was sought, no doubt because the ecclesiastical court would not move without one despite the King's death, or at least because the legatees did not believe it would go ahead and wind up a long-pending matter without positive authorization. Likewise, by the "abatement" theory, the ecclesiastical court ought to be encouraged to resume proceedings (with the help of a Consultation, if the judges could be persuaded that it was necessary and not too illogical to grant one) whether or not the Prohibition ought to be reversed on the merits; nevertheless, counsel went to the merits.

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6 M. 1 Car. K.B. 3 Bulstrode, 314; Benloe, 139 and 170 *(sub. nom.* Browne v. Dixe); Noy, 77 (Dixye v. Brown.) Balustrode is the report that gives the full unfolding of the case as I recount it. The other reports agree as far as they go, except that Benloe's two reports are dated H. 1 and P. 2 respectively (Noy is undated). It is perfectly possible that the case was started in M. 1 and dragged on into ensuing terms, though Bulstrode does not indicate that.

The Court's initial reaction was not adverse to a Consultation. It did not grant one immediately, however, but assigned a day for the other party to show cause why the writ should not issue. On that day, plaintiff-in-Prohibition came and admitted that his Jacobean Prohibition was dead. But instead of arguing against a Consultation even so, he simply moved for a new Prohibition. He grounded his motion, not upon the merits of the original surmise, but on the bare fact that a Prohibition had been granted. I.e: He contended that the Prohibition should be presumed granted for good reason, and should therefore be automatically renewed to get over the technicality of its "abatement," even though the Court could not at present see the justification for prohibiting. The effect of this ingenious idea would be to take positive advantage of the King's death to cut off a Consultation on motion. I.e: In the lifetime of one King, defendant-in-Prohibition could move that the Prohibition was erroneously granted and pray Consultation without formal pleading; he might not succeed, even if he seemed to have a good case in substance, but he was entitled to try. Now it was urged in effect that the Court ought not to look back on the decision to grant a Prohibition made in a former King's reign, but presume that the decision was right pending demurrer.

It seems to me that that theory deserved to be dismissed out of hand, but the report suggests that it may not have been dealt with quite that simply. At any rate, counsel for defendants-in-Prohibition seem to have taken it seriously. For instead of attacking the theory itself, they tried to show that the Jacobean Prohibition was not only ill-granted as a matter of law, but granted by procedural inadvertence. (As if to say, "Perhaps the Court is not entitled to look back on the merits of a judicial act of the last King's reign, but it is not obliged to renew an abated Prohibition automatically if that Prohibition was a mere mistake, not an intended judgment of law at all.") Specifically, the prohibition was said to have been granted as a result of failure of notice to the defendant: When the Prohibition was originally sought, the Court, following common practice, took no immediate action except to assign a day for the defendants to show cause against it; they were never notified that a Prohibition was being sought or that the day to show cause had been set; when they failed to appear, the Prohibition issued automatically. That in itself would not necessarily undercut the plaintiff's claim to have the Prohibition renewed without question, counsel implied, (such failures of notice were probably common),

had he done anything to follow up the Prohibition, so that the defendants could see that he meant to persist and move for the Consultation which they thought they were entitled to on the merits. Under all the circumstances as they were, they thought they should have a Consultation now.

Whether the defendants needed to go to such lengths to win the judges to their side is unclear. In any event, they were pretty successful. Justice Dodderidge took the plaintiff to task for his conduct generally -- first for appealing and only then seeking a Prohibition, now for trying to get his substantively worthless Prohibition renewed in such a way as to force formal common law proceedings on the defendants, delaying them still longer, until they should have spent more on litigation than their legacy came to. The rest of the judges agreed with Dodderidge that there was no cause of Prohibition on the merits as the surmise stood. They accordingly agreed that Consultation would be granted unless the plaintiff came up with a more satisfactory surmise by an assigned day; meanwhile, the ecclesiastical court was ruled free to proceed. Under the circumstances, that solution may seem tender to the plaintiff, but it is explicable by the substantive issue. (The plaintiff had predicated his Prohibition on a plainly bad legal theory -- that ecclesiastical courts were not competent to try whether an estate had been used up paying debts and could therefore not meet legacies. The judges realized, however, that in such cases an executor might be in a position to claim that evidence tending to show that the estate was exhausted had been improperly excluded by the ecclesiastical court -- probably a good ground for Prohibition. Despite his questionable behavior, the executor was given a last chance to switch his surmise to a better theory before being cut off by Consultation, since there was a fair chance that he might have the requisite facts on his side to do so.) In sum, Dickes et uxor v. Brown confirms that bare Prohibitions die with the King, supports "non-necessary" Consultations, and provides a complex instance of the use of judicial discretion when plaintiff-in-Prohibition delayed unconscionably.

One further case,[7] different from any of those above, may be considered as testing "narrow-gauge individualism" in Prohibition law. In this case, two churchwardens in their official capacity sued a parishioner for a

7 H.7 Jac. K.B. Add. 25,208, f.91b.

repair rate. The parishioner lost in the first instance and appealed. Pending the appeal, one of the churchwardens released the claim. The parishioner got a Prohibition on the ground that the ecclesiastical court was going to proceed to judgment in spite of the release. The other churchwarden -- the one who did not participate in the release -- challenged the Prohibition by demurrer. His contention was substantive: Churchwardens together -- let alone one of them -- may not release a claim that belongs to the parish. The other side contradicted that proposition, but also made a procedural argument: Whether or not the release was a valid transaction, the original ecclesiastical suit was brought by *both* churchwardens. *Both* were prohibited -- i.e., the suit as originally conceived, A. and B. v. C., is what was prohibited. Now one churchwarden was proceeding upon the Prohibition, seeking Consultation. The other one *de facto* was not prosecuting the defense against the Prohibition, whether or not he could do so in the face of his release. In effect, withdrawal of one ecclesiastical plaintiff/prohibitee discontinued the suit (presumably driving the other churchwarden to start all over in the ecclesiastical court if he hoped to collect the money in spite of the release.) Counsel reinforced this point by saying that the two churchwardens brought the suit in their own names -- not, in terms, for the parish -- and would consequently be in a position to recover costs and damages to their own use.

In the event, the Court settled this case without regard to the arguments made by either side. The judges agreed unanimously that the Prohibition should never have been granted, and therefore that Consultation should be granted now. They reached that conclusion without making any decision about the release's validity. Rather, they held that there was simply no basis for taking the suit away from the ecclesiastical court. The question of the release's validity was amenable to adjudication there. In other words, it was not a "common law issue." At least, there was no basis for prohibiting without a definitive and erroneous sentence (and I imagine not even then, since the power of churchwardens to bind the parish was probably a purely ecclesiastical question.) Having taken this view of the case -- "going by the legal truth," rather than by the shape of the case as the parties' actions and arguments defined it -- the judges had no occasion to rule on the plaintiff's procedural contentions. The Court handled the case as if the non-releasing churchwarden had moved as *amicus curiae* for dismissal of an improperly granted Prohibition. His standing to demur in the face of his partner's withdrawal could be sidestepped (if indeed it is

worth worrying about.) For our present purposes, the case is of interest only for the occurrence of an unavailing argument in an "individualistic" vein.

A couple of cases test the "individualism" of prohibitions by way of "standing to sue." In a narrowly private focus, A. should be allowed to stop an ecclesiastical suit only if it is *against himself.* In less narrow, but still private, terms, a man whose interests are threatened by a suit against someone other than himself might be allowed to prohibit that suit. In public terms, anyone, interested or disinterested as an individual, should be able to prohibit an ecclesiastical suit brought "in contempt of the King's jurisdiction." The early case of Love (or Land) v. Pigott[8] accepts the private vocabulary, but extends "standing to sue" beyond the party grieved by improper proceedings against himself. In that case, the following rule was stated and said to be supported by several precedents: A. leases land to B. for years. B, as the occupier, is sued for tithes. A, the reversioner, may prohibit that suit. B's payment of tithes in kind -- either because he prefers paying to pressing his defense or because he loses a fully contested suit in the ecclesiastical court -- could of course make it more difficult for A. to establish a *modus* or other exemption in a later prohibition suit. The same can be said about any two parishioners in any situation depending on a local custom: one's non-resistance to an ecclesiastical claim, or loss in the ecclesiastical court, could make things harder for the other later on. Habits of mind formed by property law probably made it easy to say that the reversioner may prohibit a suit against the lessee -- to "protect the freehold" against harm to the property and its value done or suffered by a temporary tenant. Would Parishioner B. have stood a chance to prohibit a suit against Parishioner A.?

The only case that bears directly on that question[9] does not provide a very satisfactory answer. In this case, a tithe suit was prohibited by a parishioner other than the one against whom it was brought. The substantive ground of the Prohibition was that the parson had no *de jure* title to a full tenth of the fish caught in a seaside parish. Hence a custom limiting his take to a certain percent of the fishermen's share and wholly exempt-

8 P. 29 Eliz. Q.B. Croke Eliz., 56; Moore, 915.
9 H. 45 Eliz. C.P. Lansd. 1058, f.57.

ing the boat-owners' share was claimed to be perfectly valid and a reason to stop the parson's suit for a full tenth. That is to say, the basis for the Prohibition was one of which any parishioner engaged in fishing might have occasion to take advantage. The parson moved for Consultation because plaintiff-in-Prohibition was not personally party to the ecclesiastical suit. To this motion, Justice Walmesley replied: "The spiritual judge may advise himself whether to proceed." In other words, Walmesley would not grant a Consultation on motion to prevent a non-party form prohibiting an ecclesiastical suit. On the other hand, he would not say that Parishioner B has standing to prohibit a suit against Parishioner A by invoking the common law and a parish-wide custom. Rather, Walmesley left it up to the ecclesiastical court whether to obey the Prohibition or to proceed (on the theory that the Prohibition was null owing to the plaintiff's want of standing.) He must have expected that the ecclesiastical court would *not* proceed in such doubtful circumstances. The parson's lawyer, having failed with his procedural motion, turned his attention to persuading Walmesley that the Prohibition should be reversed for substantive insufficiency. He did not get anywhere, for Walmesley simply disagreed with him concerning the tithability of fish. The judge's views on the substance perhaps color his procedural opinion: In this case, Walmesley saw what he considered a plainly unwarranted tithe suit. Its unwarrantedness was basically a matter of law, not of a custom which might or might not be true. To favor a Consultation on mere motion in such circumstances would have taken convictions strongly opposed to non-party Prohibitions. We can only conclude that Justice Walmesley was not *that* opposed to them, and not so ready to support them in all appropriate circumstances as to speak generally in their favor. His solution hardly seems a happy one in general. If cases in point had arisen, the courts ought either to have decided that non-party Prohibitions were unacceptable as a rule, or to have let such Prohibitions stand in language that would have said plainly "Do not proceed."

One final miscellaneous case on the "logical individualism," or "one-to-oneness," of Prohibitions[10] presents the following mixed-up situation: A parson sued for tithes of milk from 60 cows. That suit was prohibited

10 M. 28/29 Eliz. Q.B. Harl. 1331, f.40.

in the Common Pleas. That Prohibition was then undone by a Consultation covering *40* cows. The substantive reason for Consultation is not reported. The substitution of "40" for "60" must be taken as a clerical error, for otherwise our case makes no sense. I.e.: It cannot have been an intended partial Consultation, or if it was the language did not show it by some such expression as *"quoad* 40 cows." The parishioner then sought another Prohibition, this time in the Queen's Bench. All the report tells us is (a) that the question was moved whether the ecclesiastical court was free to proceed; (b) that the question was adjourned, suggesting that the judges found it doubtful; (c) that the better opinion as the reporter gathered it held that the ecclesiastical court *was* entitled to proceed. I take the puzzle to be as follows: The *id* to be prohibited is "suit pertaining to 60 cows." *Idipsum* is prohibited (surmise relates correctly to the libel.) A Consultation issues apparently referring to a non-entity ("suit for 40 cows".) Is the *id*-prohibited not-disprohibited? (If so, there is no need for a new Prohibition. Defendant-in-Prohibition is attachable on the existing prohibition in the event the ecclesiastical court should proceed by color of the Consultation. Plaintiff-in-Prohibition should go back to the Common Pleas and follow up his Prohibition. The Queen's Bench has no business taking action unless the ecclesiastical court is committing a *new* offense -- i.e., not the offense of violating an outstanding Prohibition, but that of proceeding *quoad* 40 cows contrary to an alleged *modus* or whatever.) Strict logic, or "individualism," would say that there is no dis-prohibition, with those consequences. (A Prohibition can only prohibit an on-going suit -- e.g., it cannot prohibit "A v. B" when there is no such living person as B; likewise, a Consultation can only wipe out a Prohibition *in esse* -- e.g., it cannot wipe out a prohibition referring to a libel for 60 cows except by aiming unambiguously at that Prohibition.) The "better opinion" of the Court was perhaps more sensible. In one sense, there seems to be no reason to refuse a new Prohibition, with the effect of stopping the ecclesiastical court from entertaining a suit which it had not been *clearly* told to entertain *quoad* the 40 cows, but might well believe it was authorized to proceed in to at least that intent. In all probability, the Common Pleas meant to authorize continuation of the original suit for 60 cows, but it had so confused things that perhaps the best measure was to stop proceedings until the mess was cleared up, by starting over if necessary. On the other hand, the judges may well have wanted an excuse to send the plaintiff back to the Common Pleas, where the mess was created. He complicated it by coming to the Queen's Bench, instead of to where the

record was, hence where an informed and economical solution might be worked out. If my reconstruction of the problem is correct, there was a pretty convincing technical argument for refusing a "redundant" Prohibition and so driving the plaintiff back to the Common Pleas where, if he had a real complaint, it made sense for him to stay. (Court-switching inevitably suggests sharp maneuvering. It is not unlikely that plaintiff-in-Prohibition here had no real case, but hoped to take advantage of a slip. I.e.: If he had gone back to the Common Pleas, some such simple step as correcting the Consultation from "40" to "60" might have finished him.)

B.
Collateral Effect of Prohibitions

Summary: Although policy was never firmly settled on this matter, the courts were inclined to be liberal in granting Attachment and other special remedies to remove the necessity for multiple Prohibitions to stop virtually identical ecclesiastical suits. The tendency, perhaps stronger in Elizabeth's reign than later, was to avoid extreme "individualism" to the end of preventing vexatious litigation.

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We may now turn to cases directly on the "collateral effect" of Prohibitions. One group concerns the availability of Attachment in slightly irregular circumstances. Normally, a defendant-in-Prohibition was attached because he ostensibly violated one specific Prohibition, going to one specific ecclesiastical suit. There is, however, good authority for not insisting on that link between Prohibition and Attachment in every case -- i.e., for permitting Attachment and procedures pursuant thereto without a Prohibition precisely in point.

In Stafford's Case,[11] a parson sued for tithe-milk and was prohibited on surmise of a *modus*. Then the parson brought a new libel against the same parishioner for the same tithes and the same time-period. He made one alteration, however: In the second libel he claimed the milk from a smaller number of cows than in the first. The parishioner then prayed for Attachment upon his existing Prohibition -- as opposed to putting in a new surmise going directly to the new libel. The Court granted the attachment: "…for otherwise a prohibition should be granted to no purpose."

Two reports of Sharington (or Swarrington) v. Fleetwood[12] give two different but related rules. (a) The MS. gives the following as a unanimous holding of the Court: If Parson sues Parishioner A. for tithes and is prohibited on grounds of a local *modus*, he will

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[11] P. 30 Eliz. C.P. 1 Leonard, 111.

[12] M. 37/38 Eliz. Court uncertain. Lansd. 1059, f.340b; Moore, 599. (Lansd. 1059 is a version of Moore's reports, varying from the printed version and containing numerous additional cases.)

* This section was omitted from the original published copy. Pages are numbered 360-i through 360-viii in order to maintain consistency with the original page numbering. Chapter XI begins on page 361 following this section.

be attached if he sues Parishioner B. for the same tithes, *provided* that A.'s Prohibition-suit is undetermined. (N.B. the proviso.) (b) According to the printed report, all the judges held that if a parson sues A. for tithes of 1590, he will be attached if he starts a new suit for the same tithes from 1591, provided the first Prohibition-suit is undetermined. It is perfectly likely that both rules were laid down in the same case, perhaps one by way of decision and the other by way of dictum.

In a nearly contemporary Queen's Bench case,[13] a parson sued one parishioner for tithe-hay and was prohibited on surmise of a *modus*. The parson then dropped that suit and sued a second parishioner for the same tithes. When the second suit was prohibited, he dropped it and went after a third parishioner. After five parishioners had obtained separate Prohibitions, Serjeant Yelverton, evidently representing a sixth, moved the Court as follows: "Inasmuch as his client was a poor man, and not able to afford the expenses of a Prohibition, and also inasmuch as the suit in the Court Christian was commenced against all of them upon one and same cause, solely for vexation, and to make every parishioner of the parish either be condemned there or sue Prohibition here, the charge of which amounts to four marks at least, whereas perhaps the tithe owed to the plaintiff by each of them is worth no more than 2d., and the prescription being all one for all the parishioners, he prays that the Court here will award that the said plaintiff render a reply or issuable plea to some [*ascuns* -- perhaps 'any, at least one'] of the said Prohibitions, and that he not proceed against his client nor against any other of his parishioners in Court Christian until that suit is determined here."

The Court replied as follows: "The Justices hold it reasonable that Attachment should issue against the party to make him come in person, and then upon his examination to commit him to prison if it seems just; and to make examination whether there is a prescription throughout the whole parish to discharge tithes, and so to order that he proceed solely upon one of the Prohibitions, and that he relinquish the suits in Court Christian against the others." The quotations speak for themselves and amply demonstrate why a narrowly individualistic relationship between Prohibition and Attachment would have been untenable.

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[13] P. 38 Eliz. Q.B. Add. 25,198, f.132b.

Shortly later, however,[14] two Common Pleas judges were in disagreement over whether one may be attached for doing anything except exactly what he is prohibited from doing. No context is reported, no indications of a "hardship case." All the report says is that Justice Glanville thought Attachment lies when, pending a Prohibition, the defendant-in-Prohibition libels *de novo*; whereas Justice Walmesley held the contrary -- that a new Prohibition must be obtained.

In Downes v. Hackesby,[15] Coke's King's Bench appears to have reversed one of the rules laid down in Sharington v. Fleetwood. For the Court agreed that suing for tithes from 1611 is acceptable even though a suit for the same tithes from 1610 is or was prohibited. I say "is or was" because the report does not distinguish between a determined Prohibition for the earlier year and an undetermined one. In any event, Attachment was sought and denied, and the Court used general language about taking "inhibitions" strictly.

One undated report,[16] probably late-Elizabethan and probably from the Common Pleas, comes to a compromise position. The holding says: (a) Attachment lies without a new Prohibition if the parson starts a new suit for tithes of the same year. (b) But if -- pending a Prohibition for tithes of 1600 -- the parson sues for tithes of 1601, he will not be attached *at once*. Rather, he will be ordered not to sue (i.e., restrained by special order, not a new Prohibition, from pressing his second suit) until the first Prohibition is tried. If, however, he violates the order and prosecutes anyhow, he will be attached.

In sum, one must conclude that the matter of a party's attachability outside the circumstances in which Attachment was manifestly appropriate was never firmly settled. The Elizabethan Queen's Bench took a strong position, allowing one Prohibition to generate Attachment collaterally in several situations. But the Common Pleas was not persuaded to go so far, and the Jacobean King's Bench seems to have drawn back to some extent.

Alongside the cases on Attachment, we may consider an attempt to use the restraining order to the same effect -- i.e., to insure determination of outstanding Prohibitions and

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[14] P. 41 Eliz. C.P. Add. 25,202, f.5.

[15] M. 12 Jac. K.B. 2 Bulstrode, 289.

[16] Harl. 4817, f.205b.

obviate the need for repeated Prohibitions in closely related cases. In the case of the Parishioners of Rolvenden,[17] the controversy was over the manner of choosing churchwardens. The Ecclesiastical Canons of 1604 purported to insure the power of incumbent clergymen to appoint parish officers. Numerous Prohibitions were brought to prevent enforcement of the Canons in the face of parochial customs. In Rolvenden, the alleged custom was for the parishioners to elect one churchwarden and the vicar to appoint the other. The vicar, claiming by virtue of the Canons to appoint both churchwardens, proceeded to name two men. The parishioners proceeded to elect one man in accord with what they claimed to be the custom. The bishop *qua* ecclesiastical judge then inaugurated proceedings against the parishioners to compel them to obey the Canons -- i.e., to accept both of the vicar's appointees and give up their own. A Prohibition, based on the custom, was granted to stop those proceedings. Then the bishop changed tactics. Instead of either dropping the matter or contesting the Prohibition, he instituted a new suit: One of the vicar's appointees (presumably his second choice, that one being recognizable as the parish-electee's competitor) was cited into the ecclesiastical court to show cause why he should not exercise the office -- obviously a *pro forma* maneuver intended to get the controversial churchwarden "into action" by virtue of a court order, exposing anyone who resisted him to harassment for contempt, while the Prohibition hung nominally obeyed and perpetually untried.

At this point an attempt was made (apparently by the parishioners as a body) to stop the second suit without a new Prohibition. The King's Bench was asked to order the ecclesiastical court not to proceed in the pseudo-suit against the vicar's appointee while the existing Prohibition was outstanding. Counsel maintained that the second suit did not need to be prohibited separately because it was a mere dependency of the suit already prohibited. I.e.: Determining the existing Prohibition would decide whether there was any title to compel the vicar's second appointee to exercise the office. Such was the polite, legalistic way of calling attention to a patent subterfuge. But despite the glaring circumstances the Court refused the motion for a special order. The judges said that they would order a *party* not to proceed in the ecclesiastical court in a comparable situation -- i.e., where someone

[17] P. 5 Jac. K.B. Lansd. 1111, f. 366.

tried to start a new suit dependent on another suit already arrested by an unresolved Prohibition. (E.g. -- presumably -- if the vicar *qua* private complainant had proceeded against his appointee to compel him to exercise his office, he could be restrained by mere order.) But the judges considered themselves powerless to bind the ecclesiastical court itself by a restraining order. They needed to bind it in this case, where the ecclesiastical court was proceeding *ex officio*. Therefore the motion was denied and the parishioners told to get a Prohibition, which they did. I think there is no doubt but that they had a right to a Prohibition for the specific purpose of stopping the suit against the vicar's appointee, quite without regard to the prior Prohibition. In other words, the second Prohibition was good on its own merits. It was not generated by the first. The only way to have given the first Prohibition "collateral effect" would have been to grant the special restraining order. Although that course was rejected in the circumstances of this, case, it was given sanction by way of dictum for use against a private party.

In another case, Wells v. Agar,[18] an outstanding unresolved Prohibition was simply used as the ground for another Prohibition -- as opposed to a reason for *avoiding* multiple Prohibitions. As far as can be made out from a scanty report, the case was as follows: A. prohibited a tithe-suit on surmise that the ecclesiastical plaintiff was not parson of the parish in question. (Nothing in the report explains the situation. There are many reasons why it might be claimed that someone suing as Parson of Dale was not legally or actually such.) Later, B., another inhabitant of the same parish as A., was sued for tithes by the same clergyman. B. sought and obtained a Prohibition, apparently by alleging nothing more than that he was in the same case as A. I.e.: I take it that B. did not spell out whatever basis there was for claiming that the ecclesiastical plaintiff was not parson of the relevant parish. Rather, he relied on the bare fact that there was an unresolved Prohibition outstanding in an exactly analogous case. Although the Prohibition was granted, Chief Justice Fleming is reported to have had some (unexplained) doubt. It may be arguable that the better course for one in B.'s shoes would be to pray Attachment or a restraining order, avoiding multiple Prohibitions and the possibility of conflicting resolutions.

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[18] M. 8 Jac. K.B. Lansd. 1172, f.168.

The last case points to another variety that is mainly conspicuous by its absence from the reports -- what we may call the *res judicata* or estoppel case. The cases immediately above deal with unresolved Prohibitions stopping suits intimately related to suits subsequently commenced. They tend to involve vexatious suit-dropping -- suing A., then as soon as he gets a Prohibition, dropping that suit and proceeding against B. on an indistinguishable claim, hoping to catch someone who would rather pay up than litigate. What then about the *determined* Prohibition (and the corresponding vexation of losing and trying again, possibly against a less resistant or economically weaker adversary)? A. is sued and brings a Prohibition; the parties proceed to issue of law or fact; A. wins; B. is sued upon an indistinguishable claim. Should B. have a Prohibition merely by surmising the prior result -- as opposed to alleging his substantive reasons for a Prohibition and using the prior result as evidence (in the case of a verdict) or as a judicial precedent? Or should B. have still stronger remedies -- Attachment or restraining order, without a separate Prohibition? Contrariwise, suppose A. in the above sequence loses and B. is sued upon an indistinguishable claim. B. obtains a Prohibition on the same surmise as A. formerly made. Should his adversary be able to undo the Prohibition on motion by showing the verdict and/or judgment in A.'s case? If he does not or may not seek a Consultation on motion, should he be able to plead such verdict and/or judgment as *res judicata*, as opposed to pleading the merits? One might guess about the detailed answers to these questions, but there is no point in doing so in the absence of relevant cases. It is of course unsurprising that the cases raising such questions do not occur frequently. It will rarely be worth a loser's while to try again, even if there is nothing except the strong *de facto* chance of losing again to restrain him. It seems to me, however, that such attempts -- mere vexatious gambling on "better luck next time" – were even rarer than one would predict. Their rarity suggests that parties in easily-recurrent situations -- typically parsons and parishioners in tithe disputes -- expected that the courts would give *res judicata* effect to earlier decisions precisely in point.

There is one relevant case to be considered here, however. Pottinger v. Johnson[19] involved a parson's attempt to take advantage of an earlier verdict. Parson Johnson sued Aubrey for hay-tithes from the second cutting of a meadow. Aubrey surmised a custom --

[19] P. 43 Eliz. Q.B. Add. 25,203, f. 324.

viz., that when they cut the hay the first time they make it into cocks of "perfect hay," and in consideration of rendering first-crop hay in better form than the law requires are discharged form tithes for the second crop. Johnson and Aubrey took issue on the custom, and the jury found it true as alleged. Later, Johnson sued another parishioner, Pottinger, for tithes of *first-crop* hay. However, he did not sue simply for his *de jure* tithes. Rather he sued for his customary tithe, according to the earlier verdict -- viz., cocks of "perfect hay." Pottinger got a Prohibition on surmise of a different custom -- that first-crop hay was customarily rendered in the form of grass-cocks (less than "perfect hay," less thoroughly treated, but still arranged in a manner somewhat more convenient to the parson than bare legal duty required). Thus, the form of the Johnson-Pottinger litigation was: Parson sues for what he has coming to him by virtue of an admitted *modus* -- e.g., 6d. per acre for corn; parishioner seeks a Prohibition on the ground that the *modus* is different -- e.g., 4d. per acre. There was some doubt (raised in the case) as to whether such a ground for Prohibition was good in itself. I.e.: It was arguable that when a parson waives tithes in kind and sues upon a *modus*, the ecclesiastical court is competent to decide between that *modus* and an alternative one alleged by the parishioner. The Court in the instant case rejected that argument, however.

For the matter of present concern: Pottinger having got his Prohibition on surmise of an alternative *modus*, Johnson moved for Consultation. His main ground was that his *modus* -- the "perfect hay" -- was found by verdict *inter* himself and Aubrey, wherefore Pottinger was estopped to claim an alternative *modus*. He added a reinforcing ground: Pottinger himself had been a foreman of the jury that found for Aubrey!

The Court denied the motion for Consultation. But the decision was put on narrow enough grounds to leave room for the underlying idea of Johnson's motion -- invoking a verdict in a prior case to estop plaintiff-in-Prohibition. *In this case*, the Court could see no inconsistency between the verdict for Aubrey and Pottinger's present claim. The verdict for Aubrey would still be correct though Pottinger's version of the custom -- grass-cocks -- were true. In other words, Aubrey's jury (and its foreman) should not be taken as saying only what it need say: "Second-crop hay is tithe-free, in consideration of the benefit to the parson in the customary manner of rendering the first crop." What the customary manner was, grass-cocks or hay-cocks -- whether Aubrey stated the custom correctly and whether or not he had been doing more for the parson than he needed to -- was beside the point. On the other hand, the Court at least did not deny that Johnson's motion might have been granted in

other circumstances. E.g.: Suppose Pottinger were sued for second-crop hay and surmised a wholly different *modus* -- say 1d. per acre for second-crop hay. Or suppose that he claimed *de jure* exemption for the second crop instead of a *modus*. Or suppose he were sued for first-crop hay upon Aubrey's *modus* and claimed that he only owed the hay in *de jure* form -- neither in grass-cocks nor hay-cocks. All those hypothetical cases strike me as tricky. All one can say is that Pottinger v. Johnson does not in terms rule out taking advantage of a custom established by verdict in the parson's favor by way of motion for Consultation.

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