XII.
Miscellaneous Cases on Procedure

A number of reports contain points on Prohibition procedure which do not fit any of the categories above. They may be noted, as follows:

(1) Sir Gilbert Gerrard v. Sherrington. P.20 Eliz. Q.B. 1 Leonard, 286. (Discussed above for its main point.) Plaintiff- in-Prohibition delivered his surmise by attorney. It was objected that he ought to have appeared in court in person. *Held unanimously:* Acting by attorney was good enough (although the clerks said that delivery of surmises by attorney had not been the practice for twenty years.) Note that this case comes at the beginning of the period when Prohibitions became extremely common. Ability to act by attorney is an obvious convenience to plaintiffs and may have been contributed to the frequency of Prohibitions.

(2) Nash and Usher v. Mollins. M. 32/33 Eliz. Q.B. 1 Leonard, 240. Apart from the substance of this case, the reporter notes that when the Prohibition came to trial, no evidence was given to prove that defendant-in-Prohibition prosecuted in the ecclesiastical court in the face of the Prohibition. Nevertheless, the jury found for the plaintiff. This *nota* is important for explaining the theory and reality of Attachment proceed-. ings. As we have seen, Prohibitions could not be *formally* contested as such. Pleading to issue only occurred upon Attachment. In principle, one was attached for *violating* a Prohibition. Therefore, in principle, it should be an issue in every pleaded case whether such a violation had in fact occurred. If defendant-in- Prohibition did not admit as much in his pleading (by demurrer or plea in Bar), it was an open issue for the jury (i.e., among the material facts covered by a general traverse.) In reality, however, it is clear enough that Prohibitions were not commonly violated. Defendants simply did not dispute the nominally alleged violation when their purpose was to have the factual issue raised by the Prohibition tried in the only possible place -- at common law. The present report, however, is the only explicit evidence I have found on this point. It comes from fairly early in the history of heavy Prohibition practice. The reporter, a student perhaps, noticed that no evidence of violation was offered at a trial pursuant to Attachment -- i.e., that one logically necessary element in the plaintiff's contested factual claim was entirely unproved. He noticed that the jury

nevertheless found for the plaintiff -- i.e, returned a general verdict in his favor, founded exclusively on evidence going to the substantive factual dispute (whether certain land was discharged from tithes in the hands of a *quondam* monastery.) He noticed, presumably, that the defendant and judge made no objection. In principle, I suppose one might say, the jury was free to find of its own knowledge that the Prohibition had been "violated" when the jury had reasonable grounds for thinking that the really material facts were such as would warrant the Prohibition. (We have seen indications enough that juries were not left free to find such "really material facts" against the evidence or without evidence, even though the jury's theoretical duty to stick by the evidence and means of controlling juries were still underdeveloped.)

(3) In connection with the last case: Facy v. Lange. M. 15 Car. K.B. Croke, Car., 559; Jones, 447. This case shows that actual violation of a Prohibition sometimes occurred and could be made a real issue for the jury: A tithe suit was prohibited on grounds of a *modus*. The jury found two issues for the plaintiff; (a) His *modus* was true; (b) He was actually prosecuted in the ecclesiastical court after delivery of the Prohibition. In consequence of the second finding, the jury awarded the plaintiff £15 damages and costs.

The question for the Court was whether the award of damages and costs was lawful. After some discussion and inspection of precedents, the judges held that damages were lawful, in consideration of the wrongful prosecution and driving the plaintiff to his Attachment. The following observations may be made: (a) The report gives no indication as to whether any special form of pleading on the plaintiff's part was necessary to raise an "actual violation" issue. It is possible that between the early case above and this one pleading rules evolved whereby an actual violation could be and had to be alleged in a special way, distinct from the nominal violation needed to justify Attachment. The latter may have come to be pleadable in meaningless "common form" language. All I can say is that I have no evidence on this. (b) Assuming there was no special way of pleading an "actual violation," it was presumably up to the plaintiff to bring in evidence going to show one, and the jury's duty to say "Yes" or "No", with reasonable respect for the evidence, when such violation was made a real issue. (c) The fact that the damage award gave the Court trouble tends to confirm that actual violations were rare. I.e.: The

Courts saw verdicts for the plaintiff-in attachment-on-Prohibition all the time. In theory, such verdicts implied a violation. But it was unheard of to give damages to the plaintiff, as if he were really the victim of unlawful conduct by the other party. Obviously he almost never was in fact, despite the pretense. When an actual-violation case occurred, the judges had to search for precedents on damages. The reports suggest they found just one -- 7 Jac. C.P. (d) Against the damage award, counsel argued for the principle that violation of a Prohibition is damage only to the King -- wherefore a fine is appropriate, but not private damages. The argument may be placed among unsuccessful tributes to the "public theory" of Prohibitions, for the Court rejected it.

(4) In connection with trials and evidence: Sir Henry Carewe v. _____. P. 18 Jac. C.P. Harg. 30, f.76. It was surmised in a tithe suit that the parson enjoyed a piece of land in lieu of the tithes. This *modus* was tried "at the Bar" in Westminster Hall. (Such trials before the full court, as opposed to trials in the country at *Nisi prius,* were clearly exceptional -- *how* exceptional in Prohibition cases I cannot say.) Plaintiff-in-Prohibition's evidence went to show that his land had always been tithe-free, and that it was the common opinion ("and that was not ancient in time") that the parson's enjoyment of the piece of land mentioned was the consideration for the discharge. The jury found for the plaintiff. That it was permitted to on such evidence struck the reporter as notable, perhaps surprising ("...the cause was but slenderly proved..."). The language of the report suggests that the Court may have positively encouraged the jury to infer that the consideration related to the discharge, for the report states the upshot of the case in the form of a rule of law, as if the judges said as much ("...when the land...has been always discharged...it is to be presumed that it was by a lawful discharge, although one may not plead this discharge simply of itself without alleging a cause for it.") As stated, that would seem to go even beyond the case -- i.e., to suggest that the jury should be permitted or encouraged to find for the plaintiff even if *no* evidence relating the consideration to the discharge were produced. *Quaere* what a higher standard of proof would require, except for "common opinion" of a somewhat more ancient vintage. Proof of a specific transaction, whereby the parson agreed to take the land instead of the tithes, would tend to defeat the immemorialness of the usage. Yet something of the sort seems to be what the reporter found missing, for he notes that the

plaintiff "gave in evidence nothing of the original to the parson's predecessor."

(5) This and the following two cases in connection with juries in Prohibition cases: M. 12 Jac. K.B. Harg. 30, f.173b. A *modus* was laid in the Manor of Dale, to pay something to the Rector of S. at the Church of S. on such a day. The venue from which the jury was taken was solely the manor. It was moved in arrest of judgment that the venue should have been the manor *plus* S., the place of payment. Counsel so moving conceded that venue within the manor alone would be correct if the custom had been stated simply as a duty to pay the Rector of S. -- i.e., if no specific *place* of payment outside the manor had been alleged. The Court was inclined to hold that there was a mistrial owing to incorrect venue, but adjourned the matter to advise. *Quaere* whether the Court's hesitation implies any inclination to be less fussy about venue in Prohibition cases than in other comparable cases. (A custom *of* a manor requiring performance of a duty *outside* the manor must be a rarity in any other context. Logic of one sort suggests that only inhabitants of the manor would know its custom, which is strictly the thing in dispute. Inhabitants of the parish at large would provide a check on any tendency manorial tenants might have to find a favorable custom dishonestly -- for they could say whether the payment at S. was in fact habitually made, and if it was not infer that there was no such custom. Logic of another sort suggests that venue should relate to all necessary parts of the matter to be established -- e.g., where a man was stabbed and where he died, for without a felonious assault in A. there would be no murder, and likewise no murder unless he actually died in B. *Quaere* whether that logic really applies here. The Court's inclination to follow it anyhow perhaps implies a wish to be fair to the parson.)

(6) M.7 Jac. C.P. Harl. 4817, f.205b. *Held:* Defendant-in-Prohibition may not sue a *Venire facias* upon issue joined in Prohibition unless there is a default of record on the plaintiff's part. I.e.: In the first instance, it is the plaintiff's responsibility to have a jury summoned to try an issue of fact upon a Prohibition. The defendant may take steps to get a jury only after the plaintiff has delayed for a certain time. The rule imports a slight advantage for, say, the tithe- payer who has obtained a Prohibition on a shaky *modus.* The parson cannot take steps to get a trial the moment is-

sue is joined. I do not know what kind of delay would occur before a default would be entered on record against the plaintiff.

(7) Read v. Hide. M. 10 Jac. C.P. Add. 25,210, f.8b. Issue was joined on the truth of a *modus.* The trial (exceptionally) took place "at the Bar" in Westminster Hall. One prospective juror was challenged because he had been on the jury in an earlier case between the same parties "upon such a matter in the same place." (It is not clear from the last phrase whether the two cases were exactly the same in the sense of "same parties, same tithes, same *modus,* different year." Even if the relationship was not that exact, the report is possibly evidence of a reopened question of fact. I.e.: There were evidently two at least similar and overlapping cases, both of which came to trial. There is no sign that either party tried to claim a *res judicata* or estoppel.) A second juror was challenged because he was tenant of one of the parties. *Held:* "Because these challenges do not touch them in their credit, they themselves were examined on their oath, etc." *Quaere* whether they only examined as to whether the facts alleged by the challenger were true, or as to whether they were actually prejudiced. If the former, then the challenges were legally good. The tenant raises no problem: If a tenant cannot be expected to be free of bias in his landlord's favor, then he should be excluded. The juror in an earlier case is more interesting: Insofar as *modi* could be retried between the same parties, or the same parson and another parishioner, is it so clear that one man should never serve on more than one jury? How far should one go to make sure the *modus* was considered *de novo* each time? The point of examining them on their oath only when the challenge does not "touch them in their credit" is that otherwise they would be exposed to self-incrimination.

(8) Baker v. Brent and Robinson. T.41 Eliz. Q.B. Add. 25, 203, f.87. We have encountered a few cases showing that Prohibitions could be granted by the Chancery as well as the principal common law courts. This case is of interest because it illustrates the mode of cooperation between the Chancery and common law courts with respect to a Prohibition. Although the Chancery and the common law had their differences, there was in general a tradition of cooperation and mutual respect. Issues appropriate to common law trial were regularly "farmed out" by the Chancellor. That occurred in Baker v. Brent and Robinson. We may omit the

substance of the case (a complicated matter on ecclesiastical livings.) The original Prohibition was granted by the Chancery, and the parties pleaded to issue there. Being at issue on the facts, the case was remitted to the Queen's Bench for jury trial. The jury returned a special verdict. The plaintiff moved that on the facts as found the Prohibition ought to stand. He so moved *in the Queen's Bench.* After elaborate debate by counsel, the judges held in favor of the plaintiff's motion. The point to note is that more than fact-finding was delegated to the common law. Although the Prohibition was granted by the Chancery, the Queen's Bench both found the facts and decided the legal questions on which the case depended. It was axiomatic that legal questions incidental to *equity* cases should be decided by the common law courts insofar as they were questions *of* common law (usually about the rules of property.) With regard to Prohibitions, the Chancellor shared common law jurisdiction with his brethren of the other courts. Nevertheless, this case suggests, farming out a fact issue for trial carried such power even though here, in contrast to equity cases, the legal issues were not beyond the Chancellor's putative competence.

(9) Hutton's Case. Hobart, 15. Undated. Jac. C.P., after 1613, on the virtually certain assumption that the report was actually written by Hobart. (The reporter writes "we".) The procedural point raised in this case is whether the central common law courts can ever be obliged to stand aside in favor of a franchisal court with power to issue Prohibitions. The case in brief was as follows: Hutton, owner of an advowson, presented a clerk to the Bishop. The Bishop refused him. Hutton appealed to the Archbishop of York, who ordered the Bishop either to institute the clerk or appear and show cause. Upon his default, the Archbishop instituted Hutton's clerk himself, and he was accordingly inducted into the living. The Bishop and one King then sued in the Delegates to nullify the Archbishop's acts on the technical ground that they were done outside the Archdiocese, in London. (King, the rival candidate for the living, is described by the report as a "great scholar" presented by King James, Hutton's rival for the right to present. He may be Henry King, the poet and future Bishop of Chichester, or another of the same distinguished family.) Hutton now sought a Prohibition. The Court thought he should have it, because induction was a temporal act, triable at common law. I.e.: Hutton's clerk, being inducted, could not be dislodged by challenging the preliminary "spiritual" act of institution in an ecclesiastical court. That

probably means the only way to get him out would be for King James to sue Hutton in *Quare impedit,* pursuant to which the "spiritual" issue would be determined with civilian advice or by certificate of an ecclesiastical judge.

The procedural wrinkle rests on those foundation. As it happened, the church in question was within the jurisdiction of the Duchy of Lancaster. Presumably any common law action to try the matter should be brought before the Duchy Court, which had general jurisdiction, including power to issue Prohibitions. To complicate matters, Hutton had already commenced a *Quare impedit* in Lancaster (presumably against the Bishop.) He apparently intended to claim his Prohibition partly on the ground that a common law writ going to the same matter as the ecclesiastical suit was actually hanging. The Court, however, instructed him very firmly not to do that (probably requiring amendment of the surmise). For Hutton had got his clerk inducted and therefore had no title to a *Quare impedit* (the purpose of which was to complain of interference with a patron's right, *preventing* him from putting his clerk in.) In short, Hutton must not seek a Prohibition because a *Quare impedit* was hanging, when on his own showing *Quare impedit* with himself as plaintiff did not lie. He must rest solely on the common law's jurisdiction over induction. Therefore it was not arguable -- not relevant to argue -- that Hutton should have brought his Prohibition in the Duchy of Lancaster because it depended on a suit hanging there. Nevertheless, the Court spoke to the objection that the Prohibition should have been brought in Lancaster. I.e.: It was argued -- or assumed to be arguable -- that where the proper mode of trying the matter would he a suit in Lancaster (presumably *Quare impedit* with Hutton as *defendant),* the Prohibition should have been sought here. The Court rejected that argument, however, in language broadly affirmative of the central courts' comprehensive responsibility to protect all forms of common law jurisdiction, not only their own: "...the title of the advowson is not hereby questioned [if *that* were questioned Lancaster would have jurisdiction]; but the intrusion upon the common law (whereof this Court hath general care) is to be restrained..."

One other feature of this case is of interest: "This act of Court [the Prohibition] was complained of to the King, and he signified his pleasure both by Sir Thomas Lake [Secretary of State from 1616, an important courtier before then] and the Lord Archbishop of Canterbury, that he

would have a consultation granted: but we answered His Majesty by letter, that we could not do it by the law, and in the end, after many passages to and fro, it was left, and so it stood." This is a rare and damning instance of royal interference in an individual suit aimed directly at dictating the result (as distinct from: a. Royal interference aimed at influencing the policy of the courts, but without reference to specific pending cases; b. Royal interference by writ of *Rege inconsulto,* aimed at delaying a suit to insure adequate representation of the King's interests. The judges -- not led by Coke, but by his successor at the Common Pleas, Sir Henry Hobart -- struck by their guns and prevailed.