

**THE WRIT OF PROHIBITION:
Jurisdiction in Early Modern English Law**

Charles M. Gray

Volume II:
Control of Judicial Conduct by Prohibition

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I. INTRODUCTION

Vol. I of this study looks at the law of Prohibitions through numerous procedural lenses. Apart from such interest as they have merely for a realistic picture of what administering that branch of the law involved, the cases on procedure bear on one important general issue: Without disagreement, Prohibitions were considered in principle to be sought "for the King" -- in order to protect a public interest in correct lines of jurisdiction. They could accordingly be sought by an "informer" who was not himself a party in interest, and -- again in principle -- the "informer's" procedural errors should not be held against "the King." I.e., when it was clear enough to the judges that a non-common law court was out of line, that court and the person suing there should be prohibited, even though the person responsible for making it clear -- plaintiff-in-Prohibition -- had made a procedural misstep that might be fatal to a merely private complaint. (Even defendant-in-Prohibition falls within the idea, though few cases turn on his procedural errors and neglects. His role, in theory, was to inform "the King" that there was no offense against jurisdictional order, and if that was substantially true Prohibition should be denied, though defendant performed his role imperfectly.)

In practice, on the other hand, the parties to Prohibition cases were virtually always parties in interest. Ordinarily someone being sued in a non-common law court was seeking for his own advantage to stop the suit against him. (Occasionally the non-common law plaintiff sought to have his own suit prohibited, in order to secure common law determination of an issue that had arisen in it -- equally for calculated private advantage.) The "public theory" of Prohibitions was therefore in constant tension with the imperatives of fairness to essentially private parties and the courts' duty as a general rule to enforce procedural propriety. The cases in Vol. I tend to ask how clearly the "public theory" was grasped and how consistently it was applied. They ask also how important to the judges jurisdictional order ultimately was, worth how great a sacrifice of procedural nicety. Behind the latter question is a more abstract, but historically real, one: how important the ideal jurisdictional order *ought* to be in modern -- post-Reformation -- circumstances, when all courts, including the ecclesiastical, were the King's agencies, all presumptively dedicated to seeing

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something like one "law of the land", as well as natural justice, faithfully applied.

In the upshot, the cases in Vol. I better illustrate the existence of the tension than any decisive resolution of it. Results are mixed, varying over a multiplicity of contexts. Perhaps, however, the point most to be emphasized is that the "public theory" did have an impact. Neither that theory nor a preference for common sense over nicety was drowned out by competing inclinations, including relative indifference as to whether cases and issues were decided where, by the ideal jurisdictional schema, they should be. From the ecclesiastical and royal point of view, such relative indifference -- and corresponding insistence that seekers of Prohibitions have clean hands and observe the normal rules of private litigation -- had more to recommend it than the common law judges would concede.

Vols. II and III of the study together deal with another large matter: the substantive scope of the Prohibition (substantive as contrasted with some "scope" questions treated under procedure in Vol. I -- e.g., whether the writ can be extended to somewhat more flexible functions than simply stopping a non-common law court from continuing with a suit before it.) "What is the Prohibition really for?" is another formulation of the question. This issue is naturally implicit in the subject-matter categories to which the study beyond Vol. III is devoted. Vols. II and III collect the cases on miscellaneous subjects in which it tends to be explicit and central.

The Prohibition was manifestly for one thing -- "paradigmatically" so, I shall say: to stop non-common law courts from entertaining suits which could and should be brought at common law. A section of Vol. III deals with miscellaneous cases involving these "paradigmatic" Prohibitions. Its burden is to show that even the simplest and most easily justified form of Prohibition was not entirely simple. Head-on encroachment on the sphere of business assigned to the common law courts was not always obvious to perceive. (Extremely blatant encroachment of course tends not to occur, or at any rate to produce cases worth controverting and reporting. Interesting instances in some way raise the question whether a situation actually does conform to the "paradigm" that would be represented, say, by an ecclesiastical suit to recover real property.)

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Four recurrent kinds of cases shade away from the "paradigm", or arguably, perhaps, carry the Prohibition beyond its proper scope, employ it for purposes wider than "what it is really for." Two of these -- relatively rare classes as far as miscellaneous cases are concerned, though the types are prominent in some subject-matter categories reserved until later in the study -- are treated in Vol. III. These are: (1) Cases in which an attempt is made to stop proceedings in one non-common law court on the ground that the suit belongs in another non-common law court. (2) Attempts to stop non-common law suits merely because, as I shall put it, the complainant is trying to extend "the ambit of remediable wrong" unduly. I.e., the non-common law plaintiff is in no position to recover at common law if only he would turn to the proper place; he is not even pressing a bad claim so related to established causes of action at common law that only a common law court should pronounce it bad; plaintiff-in-Prohibition simply thinks that his opponent is trying to make him liable for something *no* court should be permitted to hold a person liable for, even if the general flavor of the complaint is not especially alien to the normal responsibilities of, say, an ecclesiastical court.

Cases of both these types raise a fundamental puzzle, about which there is express controversy in the cases: Does the power of the common law courts transcend the self-protective function of preventing encroachment on their own territory? Do they have, besides that "paradigmatic" power, a general "superintendency" (as it was sometimes spoken of) over the English legal system as a whole, such that they may both police the internal lines of non-common law jurisdiction and be the arbiters of "the ambit of remediable wrong"?

That jurisdictional issue overlaps considerably the ones that arise in the present section of the study, Vol. II. Cases in the forms collected in Vol. II represent a much larger part of Prohibition practice than the lines-of-non-common-law-jurisdiction and "ambit" cases. That is one reason why they are treated first. The other reason is that in a sense they strain the "paradigm" more, exemplifying in at least some dimensions the boldest use of the Prohibition.

The two remaining basic questions -- those involved in Vol. II -- are: (1) Does the scope of Prohibitions extend beyond stopping suits improperly brought in non-common law courts *ab initio*? May it be used to stop

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a suit which to begin with was quite properly brought there, in order to allow an issue that has arisen in such suit to be determined at common law? (2) Granting, realistically, that the answer to that question is "Yes", but even if it is not: May prohibitions be issued on complaint that a non-common law court, in an initially proper suit, *has actually made an unacceptable ruling or insisted on an unacceptable rule*? Two general responses to the latter question are possible: (a) it may well be that issues arising in initially proper non-common law suits can be recognized as appropriate for common law determination (jury trial or legal determination by common law judges.) Prohibitions may perhaps be issued on surmise that such an issue has arisen; the non-common law suit may be arrested unless and until the issue is resolved in such a way as would warrant Consultation. If, however, no attempt has been made to prohibit the suit merely because a given issue has arisen, Prohibition does not lie. No *action* of the non-common law court will warrant a writ; if the suit initially belongs to it, and no issue-arising is pointed to as inherently requiring common law determination, the non-common law court is free to handle the case as it sees fit -- to make such rulings or apply such rules as it likes (subject, of course, to internal appeal when available, as it always was in the ecclesiastical system up to the Delegates.) (b) Suits may perhaps be stopped when certain recognizable "common law issues" have arisen, but if that is true, they may *also* sometimes be stopped because of the way the non-common law court has handled the suit before it -- because, in effect, it has made an intolerable or erroneous ruling or proposes to apply a rule which cannot be countenanced. In addition to their power to regulate jurisdiction -- jurisdiction over certain kinds of issues, perhaps, as well as over certain kinds of suits -- the common law courts have, again, a kind of "superintendency" over the entire legal system. They are sometimes entitled to concern themselves with what goes on in other jurisdictions.

The first of the fundamental questions was not very controversial in general terms, nor is it the heart of Vol. II. "Common law issues" were in fact recognized; readers of Vol. I will have seen many Prohibition cases occasioned by them. There remained a penumbra of doubt. Beyond a few acknowledged "common law issues", some judges were skeptical of the category. They were inclined to say that once a suit was properly in a non-common law court's possession that court should be left alone to dispose of nearly any issue that arose; as they usually put it, the "incidents" should follow the "principal." Other judges were readier to see "common

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law issues" beyond the accepted few, less ready to trust the non-common law courts with matters they thought they themselves were more competent to decide. Although one Section of Vol. II ("Problems of the Disallowance Surmise") deals with some of the more difficult aspects of "common law issues" -- aspects which overlap the central concerns of Vol. II -- the residue of the subject is left until later in the study. (The General Introduction, at the beginning of Vol. I, explains this arrangement.) The heart of Vol. II is the second fundamental question -- the common law's title to intervene because of some action taken by a non-common law court and, granted its title in some sense, how the power was to be used in practice.

That title so to intervene was assumed to be part of the law cannot, in the light of the cases, be doubted. Non-common law courts were often prohibited on complaint about moves they had allegedly made, or were about to, in suits rightly before them, and such complaints were still more often considered, whether or not a writ was ultimately granted. Probably no judge could be found who would simply disclaim power to control the conduct of non-common law courts once their jurisdiction over a suit or issue as such was conceded. By contrast, power to police jurisdiction outside the common law system and to fix the boundaries of remediable wrong in situations of no direct concern to the common law was more cleanly debated. There was no agreement, but judges *could* be found to deny the power flatly. With respect to "conduct control", debate was about whether to intervene in this or that situation or type of situation and about the rationale of a power assumed to exist.

It is unsurprising that such debate should have been confused and divisive. One might almost be surprised that no judges, apparently, were ready to reject "conduct control" as a legitimate function of the Prohibition altogether, for it is problematic in the abstract, and in practice it was hard to find an agreed-on rationale and to intervene on consistent principle. The cases will illustrate, however, why a complete disclaimer would have been very difficult. Judicial division -- never satisfactorily generalized -- almost inevitably settled around the difference between an expansive approach to "conduct control" and a minimalist one, with shades in between. At the minimalist pole, intervention to prevent non-common law courts from making certain rulings or applying certain rules could be defended as an extended form of the self-protective function served by

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"paradigmatic" Prohibitions -- a way of preventing incidental damage to interests protected by common law jurisdiction, though the jurisdiction itself was not infringed. That is perhaps a more modest adaptation of the writ than, say, regulating jurisdiction within and among non-common law systems. The most expansive theory to justify such intervention tends to erect some standards and rules of the common law into something like constitutional law, binding on all tribunals. There are arguments for that theory, but they are tricky, and granting it entails a perplexing search for which common law standards to insist on as "national law", when, it was agreed, the non-common law systems were in general independent and entitled to be different from the common law in procedure and substance.

Save for those on self-incrimination in Section V (whose presence here I shall explain), the cases in Vol. II arise by way of what I shall call the "disallowance surmise": Plaintiff-in-Prohibition, implicitly admitting that he has no complaint about being sued in the non-common law court initially, surmises that he has made a move in that court which has been 'disallowed', wherefore the suit should be prohibited pending common law determination of the matter to which the disallowed move relates. I divide disallowance surmises into two species: (a) substantive (b) evidentiary.

A substantive surmise of disallowance says that the non-common law court has made a ruling which is unacceptable as a matter of substantive law and which the common law court should prevent from being given effect. Almost always the ruling consists in ruling out a defense. For a semi-realistic example: Suppose A sues B for ecclesiastical defamation -- properly in the sense that the words are perfectly actionable in an ecclesiastical court. B admits he spoke the defamatory words but claims they were true. The ecclesiastical court disallows the defense, thereby implying the legal position that defamatory speech cannot always be justified by proving that what was said was true. B seeks a Prohibition on the theory that ecclesiastical courts should not be permitted to adopt that legal position.

Evidentiary disallowance surmises were occasioned by a formalistic proof requirement in ecclesiastical law. By a "formalistic proof requirement" I mean a rule that *prima facie* evidence of a certain type or quantity must be produced to back up a claim if that claim is to be listened to at

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all. Evidentiary formalism contrasts to the practice of letting litigants present whatever evidence they can to the judge of fact, the judge being free to draw his conclusions from such admissible evidence as is put before him, or from the lack of it (also, in the case of the English jury under the ancient theory, from any knowledge of his own that falsifies or supplements presented evidence.) The actual embodiment of ecclesiastical formalism was a two-witness rule -- i.e., a rule that required certain claims to be supported by the oral testimony of two competent witnesses if those claims were to be considered. For a realistic example of an evidentiary disallowance surmise: Suppose A sues an executor in an ecclesiastical court for a legacy. The executor claims that A released the legacy and offers to prove the release by one witness. The executor seeks a Prohibition on surmise that proof by one witness was disallowed. He does not maintain that the ecclesiastical court has taken an unacceptable position of substantive law (such as that a legacy may not be released), but that the two-witness rule ought not to be enforced against him.

In both types of case -- substantive and evidentiary -- the effect of a Prohibition would be to let the excluded plea, or the evidence which ecclesiastical standards regarded as defective, be used for plaintiff-in-Prohibition's benefit at common law. In the defamation case, that means that the ecclesiastical suit must not continue if the words were true. Their truth would accordingly be tried by jury. If they were found true, the Prohibition would stand; if false, the ecclesiastical suit would be revived by Consultation. So in the release case: If the legatee wanted to deny that he had made a release, he must do so pursuant to the Prohibition. A jury would decide. The testimony of the executor's one witness could of course be presented to the jury, which might or might not believe him, might be influenced by other evidence or by the lack of more evidence than the single witness, and might use its own knowledge. If the verdict went for the executor the Prohibition would stand; if for the legatee, Consultation would lie.

In other words, the Prohibition operated to cause any factual dispute between the parties to be tried at common law. Similarly, any legal questions arising by the way would be decided by the common law court (presumably using common law standards, though a nicer question than is directly raised in any of the cases below can perhaps be asked about that.) E.g., with reference to the examples: There can sometimes be ambi-

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guities about classifying utterances as "true" or "false", and whether a transaction constitutes a valid release can be controvertible. (The "nicer question" would be, e.g., whether the criteria for a valid release of an interest or expectation in the common law sphere need be the same as those for valid release of a legacy, or whether construction of language for purposes of determining its "truth" need follow the same rules in both spheres.)

This is to say that ecclesiastical courts were not normally ordered to treat defenses as legally good or to accept proof by less than two witnesses. I know of no attempts to order them to do such things directly--by *Mandamus* -- and doing so indirectly -- by Prohibition *quatenus* a certain defense or certain evidence is ruled out -- was not normal. Once a common law court decided to prohibit on a disallowance surmise, it almost always took over. It should be noted, however, that to surmise disallowance of a plea or proffered evidence was to allege a fact; defendant-in-Prohibition was in general free to deny that any disallowance had occurred. As against that point of general principle, we shall encounter a judicial inclination sometimes to presume that a type of claim always would be disallowed by ecclesiastical courts. Moreover, it would be risky as a rule for defendant-in-Prohibition to evade taking issue on the merits of his case and go to a jury on a question of what happened in an ecclesiastical court. That is the sort of situation in which jurors are likely to go to the merits on their own accord, or to suspect that a party who resorts to quibbling over jurisdiction has no case on the merits.

Both types of disallowance surmise raise the large question: Do common law courts have any business intervening because of something an ecclesiastical court has done in a case wholly within its jurisdiction? With reference to the examples: What title has the common law to care whether truth is a defense to acts of defamation solely remediable in ecclesiastical courts by spiritual sanctions? What title has it to insist that the proof requirements of a sister branch of the legal system may not be enforced in cases, such as litigation over legacies, solely within that branch's sphere? Does the power to control jurisdiction even in the more extended senses -- to assume jurisdiction over issues arising in proper non-common law cases, to regulate the "ambit of remediable wrong" and to keep non-common law courts out of each other's territory -- entail this further power?

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In the rest of this Introduction, I shall try to adumbrate at a few steps' remove from the cases some of the considerations to keep in mind when looking at them. Let us first ask whether there is a difference of principle between substantive and evidentiary disallowance surmises. Is there any reason why an ecclesiastical court should be entitled to its procedure, including its evidentiary formalism, but not always to its legal positions? Or is the opposite discrimination more defensible? It seems to me that there are basically three possible stands on these questions: (a) Ecclesiastical courts have a pretty clear right to their evidentiary standards -- at least to the kind of proof requirements they actually have. The two-witness rule is not irrational, even if it is undesirably rigid. It is meant to insure reliable truth-finding, an end nobody quarrels with; the ecclesiastical method of trial, where a single judge decides the truth on the basis of testimony, requires such insurance (as the perhaps superior common law method of jury trial does not, but since there is no way of converting the ecclesiastical system to common law procedure altogether, it must be permitted safeguards appropriate to its way of doing things); formalistic proof requirements do not ordinarily work real hardship on people, but only require them to take a little more trouble to have transactions witnessed and penalize the imprudent. Insisting that facts be proved in a certain way, when that method is not irrational and the facts bear on a question that only concerns ecclesiastical courts, can hardly be called *wrong*. It is at least more plausible to become disturbed over a legal ruling -- e.g., that truth is no defense to defamation -- which, if nothing worse, goes against expectations formed by common law practice.

(b) Rigid evidentiary requirements prevent rights or immunities of whose legal validity no one has any doubt from being established. They prevent such rights from being established when "by accident" a man finds himself in an ecclesiastical court. The immediate cousin of an ecclesiastical right -- e.g., a release of debt -- would have an excellent chance at common law although only one witness supported it; just because the thing released "happens" to be a legacy instead of a debt, the release without two witnesses will be out of luck. Is that not a strange and unfair discrepancy? Perhaps a strong case can be made for letting ecclesiastical courts recognize such substantive rights and duties in their sphere as they see fit, at least within reason -- e.g., to enforce in their defamation cases the widely-subscribed "higher morality" that says a man should abstain from making cruel and gratuitous remarks about people even when they

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are true. The case for letting ecclesiastical courts block rights which they themselves acknowledge and would have no conceivable justification for not acknowledging -- for letting them close themselves off from even considering in particular cases whether there is any basis for doubting that an act not supported by two witnesses took place -- is much weaker.

(c) There is no basis for saying that evidentiary holdings are generally more or less deserving of control by Prohibition than substantive holdings. Comparing evidentiary and substantive disallowance-surmises is "the wrong way to slice it." The right way is to focus on the claim being made in an ecclesiastical court, not on why that claim is obstructed. Thus: An executor wants to allege a legacy-release. The common law court knows that he is being prevented from using that defense, and that is all it needs to know. It only muddies the issue to worry about whether the executor's claim is blocked because of the two-witness rule or because the ecclesiastical courts do not regard legacies as releasable, for it makes no difference which is the reason. The issue is whether common law courts have any title to interfere in the handling of legacy suits, or the handling of legacy-release claims. Maybe they do, maybe they don't. It all depends on the theory that justifies action on some disallowance surmises but not on others -- if indeed there is such a theory, if action on such surmises is ever justified, and if it is not justified whenever the common law court disapproves of the ecclesiastical result -- the *result*, not how the ecclesiastical court got to it. For example, if we adopt the theory that ecclesiastical practice should conform as closely as possible to the analogy of common law practice, then perhaps releasees of legacies ought to get the same treatment as releasees of debts; an ecclesiastical court should be prevented from standing in the way of anyone who can convince a common law court that he has a release, for whatever reason it stands in his way. By the same theory, ecclesiastical courts should be prevented from standing in the way of a defamatory speaker who was telling the truth.

A different theory might discriminate the two exemplary cases. E.g.: The common law should not concern itself with legacy suits or any incidents thereof because a legacy is an interest of which the common law simply takes no account; as it were, when a man comes crying that he has not been allowed the advantage of a legacy-release, common lawyers ought not to understand what he is talking about; if ecclesiastical courts wanted to say that testators may not leave legacies, or that legacies may

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never be released, or that legacy-releases must be proved by the oaths of twelve bishops, it would be entirely their privilege to do so. Defamation, on the other hand, is something that the common law does take account of; some types of defamation it does not remedy itself, but permits the ecclesiastical court to; the fact that a defamation suit is, as it were, delegated to the ecclesiastical courts does not mean that the common law has no interest in it; therefore common law courts are entitled to insist that ecclesiastical courts handle their defamation suits by approximately the same standards, substantive and evidentiary, as analogous common law suits would be governed by.

Conversely: Legacies and legacy-releases may involve serious property interests and be mixed up with common law affairs. E.g.: An executor to whom a large legacy has been released may suffer consequential loss if he cannot establish the release and has to pay the legacy; his capacity to satisfy the debts of the estate, even out of his own pocket, may be diminished. Also, many releases are general -- comprising all claims, or debts and legacies. An executor who could not establish such a release in a legacy suit might conceivably be hurt in a subsequent common law action -- as if the jurors had heard that he paid the legacy referred to in a comprehensive release and therefore concluded that the release was a fake. Prohibition is justified by the common law's responsibility for protecting the subject's property and his interest in potential secular litigation. Ecclesiastical defamation, by contrast, was petty stuff. The common law remedied slanders likely to bring pecuniary loss or other serious damage on people, leaving the ecclesiastical courts with "spiritual" power to make casters of moral aspersions apologize. It is reasonable to say that the common law had washed its hands of such defamatory conduct as it did not remedy itself, that ecclesiastical defamation by definition had no material consequences, and that the field was a specialty appropriate to churchmen in their pastoral capacity -- for all which reasons, ecclesiastical courts should be free to have any rules or evidentiary standards they like in the area of defamation. In sum, there are various ways of discriminating cases in which common law intervention is and is not justified, but they ought not to depend on the distinction between substantive and evidentiary surmises.

In reflecting on the relationship between substantive and evidentiary disallowance surmises, we have touched on some of the possible theories

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for distinguishing justifiable and unjustifiable instances of common law control over non-common law conduct. Let us now look away from the substantive-evidentiary distinction and ask directly what alternative theories seem possible for that purpose. Our hypothesis -- only an hypothesis -- is that common law intervention is not justifiable *whenever* "foreign" courts fail to meet preferred standards; that common law control over the system is less than all-inclusive; that the non-common law courts were sometimes entitled to be let alone, whatever Westminster Hall thought of their way of doing things. The hypothesis demands a criterion and a conception of the common law's supervisory role to back it up -- a test to identify the situations in which the judges ought to sit back and let ecclesiastical courts do as they will. It seems to me that three criteria and corresponding theories should be put on the map. The degree to which traces of them, rivalry between them, or the prevalence of any one can be seen in the cases will be the underlying question throughout Vol. II.

(a) In some ways, the most attractive theory *a priori* is the "rule of reason." Might the simplest approach not be for the common law courts to ask only whether the complained-of conduct of a "foreign" court failed to meet elementary standards of fairness and accountability? Of course application of a "basic reasonableness" test is an intuitive affair. One cannot expect criteria of reasonableness to remain altogether steady over a multiplicity of situations, nor will "positive" standards and habits, such as the rules of the common law, fail to influence what those accustomed to them take for reasonable. The great advantage of the "rule of reason," however, is that it implies the right to be different. It is suited to a mixed system under central control because it recognizes the legitimacy of mixture. The common law courts would not be put in the position of telling other courts that they must dance to the common law's tune -- that they operate within their sphere at the common law's mere sufferance -- but only that the common law courts have a trust to protect the subject against abuse. One-sided rules (it is important that ecclesiastical courts were presumptively apt to favor clerical interests), rules which imposed ridiculous burdens on the everyday conduct of business or which took insufficient account of their own implications, must be denied enforcement; otherwise, non-common law courts are entitled to apply their own rules to suits and issues admittedly within their jurisdiction. The basic function of the supervising agencies is to control jurisdiction; "foreign" courts *do* operate at the common law's sufferance in the sense that they may only touch

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what it says they may. Beyond that basic function, all the common law courts need is a loose power to insure that what is suffered is not misused. If the common law needed to ride closer herd on the "foreign" courts than that, it ought probably to restrict their jurisdiction more narrowly. Better, in other words, to say that issues of given types must be determined at common law than to leave them to ecclesiastical courts and then interfere when they are handled in a way that offends common law standards. Such interference, after conceding jurisdiction, should be confined to the exceptional case, where an issue is grievously mishandled, by standards so fundamental that one could not have anticipated their violation.

(b) We may call the second approach the "conflict-avoidance" theory. The presupposition of this theory would be that "foreign" courts must look to the common law's lead when it is meaningful to do so; that such courts must imitate the common law at those points where it supplied relevant analogies. The imperative implicit in the threat of Prohibition should not say simply "Be reasonable," but "Take the common law for your guide whenever it makes sense to do so; treat your litigants as they would be treated at common law in analogous situations." The question for the supervising agencies to keep in mind would be whether a meaningful common law analogy existed. There is no mechanical way of answering that question--no more than there is an easily-arrived-at set of criteria into which the "rule of reason" can be translated. But which question is asked -- "Is this rule basically unreasonable?" or "Is there a fruitful common law analogy to which the ecclesiastical court could be made to conform?" -- might considerably affect the disposition of a case. Referring back to our examples above: "Truth is not always a defense to defamation" might of course fail a reasonableness test, depending on the length of the judge's foot. It would have a hard time *not* failing a conflict-avoidance test, since defamation was shared between the common-law and ecclesiastical systems. A meaningful common law analogy existed, for the very suit would be at common law if the opprobrious words had been a little different. *Per contra*, one might question whether the common law provided any analogies for legacy cases, since it had no such category. On the other hand, it handled release cases. Whether a case of a legacy-release should be considered a legacy case or a release case is a problem under the conflict-avoidance theory, but not under the reasonableness theory. One might question whether the two-witness rule could conflict with the common law, since it was geared to a different -- and ac-

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cepted-as-different -- procedural system. Using the reasonableness test, one would no doubt have to say that the two-witness rule was reasonable enough in general (the alternative, at any rate, would be to hold it altogether unreasonable and block it in every instance); yet one would be quite free to differentiate reasonable and unreasonable applications of it -- e.g., reasonable to apply it to some transactions but not to others; reasonable to insist on two witnesses in the absence of any documentary or circumstantial evidence, unreasonable not to allow other evidence to be substituted for one witness.

The conflict-avoidance test rests on the conception of the common law as the *lex terrae* in a broader sense than "the law of the pre-eminent courts, including the rules by which they control the jurisdiction of other courts." It involves saying that the rules applied by those pre-eminent courts within their own jurisdiction represented more than the law of one part of the legal system. They also represented the norms of the community at large, embodied its values and defined its expectations. They did so because of their prescriptive warrant: more than the sum of a tribunal's precedents, they were the sum of a community's experience through infinite ages. This way of thinking about the law was commonplace; its brass-tacks significance is indeterminate. One possible application to real legal problems is our present one: If the common law were only the law of Westminster Hall, there would be little point in asking that "foreign" courts in some sense and degree conform to it. Within the limited sphere the law of the land allows them, and subject to Westminster Hall's residual power to insure that what is allowed is not perverted to injustice, they would seem entitled to their own law. The "grant" of a delimited sphere to judges whose art and tradition was not the common lawyer's would seem to imply the intent that "foreign" law should prevail *infra libertatem*. But the common law is not only the law of Westminster Hall. It contains the standards by which Englishmen are to be treated wherever authority is exercised over them, and by which they are to design their conduct. There is accordingly a condition implied in the "grant" of non-common law jurisdiction -- a proviso that "foreign" judges conform to the common law when it furnishes an imitable model, that they have regard to the values and expectations which all Englishmen share, which they have a moral right to, and which they enjoy the benefit of in that major part of their legal relationships governed by the common law. Of course the proviso has only a limited application. Obviously the "foreign" courts cannot simply

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follow the common law; they are permitted and intended to do things the common law does not do, to enforce duties which it does not recognize except by conceding the power of other tribunals to enforce them; inevitably, given the acceptance of "foreign" jurisdictions within the system, there will be senses in which the common law fails to "meet" the law of other jurisdictions, to be comparable, to supply meaningful analogies. But *quatenus* comparability does exist, to that extent Prohibitions should be used to assure the subject this birthright of common law standards.

The "rule of reason" (the argument goes on) is appropriate where English jurisprudence clearly employed it: judicial scrutiny of local customs. Local law is as much the subject's birthright as the common custom of the realm; that which is as old as the common law -- as much grounded in immemorial native usage -- has every right to vary from it. There, the subject is only entitled to protection against customs which a jury might find (perhaps because the evidence indeed showed long continuance and no sign of commencement), but which a mythical "reasonable man" could hardly believe had really stood the test of infinite time. The rule that every special custom must be reasonable in the judges's eyes was the means to that order of protection -- protection against extremely one-sided customs; customs which those affected by them could have had no interest in consenting to; customs which, if indeed infinitely old, must have originated in the tyrannous imposition of one man's will on others and survived through lack of occasion to test, or lack of imagination to perceive, their vicious implications. If other facets of jurisprudence are considered, it will be apparent that the "rule of reason" and the minimal standard of control it implies do not describe the check on exceptions to, and qualifications of, the common law in England. Equity, for example, ought to "follow the law." That means in essence that it should not criticize the common law head-on, should not frustrate the operation of the law merely because some of its rules are less than ideal, or because a man is standing on his legal rights with something less than an unspotted conscience. It should positively respect the values and expectations embodied in the common law; it should block only those unconscionable activities which the law is not structured to prevent or punish, but to which it gives no sort of countenance. "Foreign" law proper -- ecclesiastical and civil law -- is on the far end of the spectrum of institutions permitted to encroach on the common law's simple, universal hegemony. At one end is custom and the tribunals, such as manorial and borough courts,

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largely devoted to administering local law; in the middle "natural equity," which in its place -- as the power to make exceptions in hard cases, to fulfill the policy of the law while occasionally infringing the letter -- no legal system can do without, and which ancient English practice has institutionalized in the Chancery and other conciliar organs; at the other end, courts and laws admitted to occupy precisely delimited spheres, to perform specialized functions, to supplement the common law in ways which it would have every right to do without or to make its own provision for. At one end, the "rule of reason," designed only to check abuse of an inherently just privilege, was the single appropriate control; in the middle, a tradition of restraint, largely enforced by the courts of equity themselves, insured that the power to mitigate the common law was not used to subvert it; at the far end, at least ecclesiastical law was positively bound to refrain from contradicting the common law -- bound not to do what, within reason, custom was fully entitled to do and what, so long as it was under the species of "mitigation" or "directing the conscience of the party," equity was needed to do.

The restraint on ecclesiastical law was recorded in the statute book (25 Hen.8, c. 19, sect. vii), though Protestant-Anglican-Erastian orthodoxy insisted that the statute only declared what had always been law: canon law has force in England only insofar as it does not conflict with the statutory and common-customary law of the realm. Admittedly, it may not be technically necessary to deduce our "conflict-avoidance" theory from that requirement. I.e.: It would be possible to say that jurisdiction-control proper is a sufficient means to guarantee that "foreign" law at odds with the common law is not suffered; that the rule expressed in the statute is best implemented by prohibiting ecclesiastical courts from entertaining suits and issues which they cannot be expected to handle without depriving the subject of rights assured to him by native law; that the decision to allow a suit or issue to ecclesiastical courts ought to imply the judgment that nothing the ecclesiastical court can do (short of abuses controllable by the "rule of reason") will conflict with the law of England. On the other hand, there is at least harmony of spirit between the positive legal restraint on the freedom of canon law and the "conflict-avoidance" approach to disallowance cases. Inasmuch as the law of ecclesiastical courts must not contradict the common law, it makes sense to argue, it ought to have regard for the values, standards, and expectations embodied in the common law. Ecclesiastical courts ought not to proceed on the assumption that canon

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law is licensed (i.e., guaranteed to be sufficiently consonant with the common law) to the extent that suits and issues as such are left to their disposition. They ought rather to use their jurisdiction with an eye to minimizing conflict with the common law in those contexts where the law whose direct imperatives they may not resist provides applicable analogical guidance. Prohibitions should be used to insure such practice.

(c) The third possible approach to disallowance cases may be called the "common law interest" theory. What I have in mind here amounts to a modification of the "conflict-avoidance" theory. It says that that theory is correct in principle, but only applicable in certain cases, where the common law has a specifiable interest in the way an ecclesiastical issue is handled. In other words, there are some cases in which, admitting ecclesiastical jurisdiction, the common law courts should not concern themselves with whether common law analogies, values, and expectations are respected. Such cases, if not the majority, are perhaps at least the norm, in the sense that the common law should be presumed to have no concern with the disposition of ecclesiastical suits unless an interest can be made out specially. But if such an interest can be specified, then maximum feasible approximation to common law standards should be demanded.

Like the other two theories, this one has no determinate application. Like those theories, it only points to a criterion -- "Does the common law system have sufficient interest in this ecclesiastical matter to insist on closer observation of common law standards than would ordinarily be expected?" "Interest" has no pre-defined meaning. One might, for example, argue that the common law is "interested" in defamation suits because it entertains a large share of them itself. The most obvious kind of "interest," however, arises where a single transaction has effects within both the common law and ecclesiastical systems and might come in question in common law litigation. E.g.: A parishioner being sued for tithes pleads a lease of the rectory to himself. The common law is interested in the lease because more depends on it than the parishioner's discharge from the ecclesiastical duty to pay tithes; common law litigation depending principally on the lease could happen any day -- say an action of Trespass or Ejectment over the right to the physical property of the rectory, an action of Debt for the rent.

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By the "common law interest" theory, the ecclesiastical court should clearly be prohibited if it will not handle the lease case by common law standards. But here an important question arises: Should the ecclesiastical court not be prohibited from determining the validity of a lease at all? Is a lease (or, more generally, any transaction in which the common law has the clearest kind of "interest") not a "common law issue," which the ecclesiastical court should not touch, whether or not it is willing to observe common law standards? As I point out above, there is reason to doubt whether the "common law issue" was a universally and simply acceptable category. The "common law interest" approach to disallowance surmises affords a way to have something like that category in effect without recognizing it straightforwardly. I.e.: The courts *could* endorse the rule that the "incidents" follow the "principal," and then modify it by prohibiting on surmise of disallowance in accord with the "common law interest" theory. In other words, they could hold that ecclesiastical courts are always entitled in principle to determine all questions that must be determined in order to dispose of suits properly before them -- *provided* that questions in which the common law has a specifiable interest are determined by common law standards. By this approach, a party may never have a Prohibition by surmising that an issue of a certain type is before an ecclesiastical court; he must surmise that an issue of a certain type (one in which the common law is interested) is before an ecclesiastical court, *and* that the ecclesiastical court has wrongfully refused to handle that issue in a common law way. Whether the courts *did* take such an approach -- avoiding the "common law issue" as a category of untouchable questions, but creating a class of issues which ecclesiastical courts could handle so long as they conformed to common law standards -- is one of the inquiries to be addressed to the cases. (Of course the courts would not be presented with a stark choice. It would be possible to have some "untouchable" issues, other issues that must be determined by common law standards, and still others which were entirely the ecclesiastical courts' business, subject at most to "rule of reason" control. The cases will bring out another possibility, that some "untouchable" common law issues were created by fictionalization of the disallowance surmise -- i.e., by holding that ecclesiastical courts' alleged failure to handle issues in a manner acceptable to the common law could not be denied.)

Leaving aside its intersection with the problematic category of intrinsic "common law issues," the "common law interest" theory would seem to

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have firmer implications than the rival theories for two-witness-rule cases in particular. The two-witness rule can hardly be considered unreasonable across the board; there are problems about seeing conflict with the common law in evidentiary rules adapted to an alien system of procedure. If, however, one focuses on the common law's "interest" in what happens in an ecclesiastical suit, it is difficult to give free run to ecclesiastical procedure. For the focus is shifted to results and their impact in the common law sphere. For example, if a lease of a rectory is unestablishable is a tithes suit, knowledge of that result, or of the consequent payment of tithes, might dispose jurors to be skeptical of the lease when it came in question by way of an action of Trespass for breaking into the glebe. Therefore it becomes strongly arguable that the ecclesiastical court must not insist on the two-witness rule with the effect of making it impossible to establish a lease -- a lease which might be establishable under common law procedure and which ought not to be prejudiced at common law by ecclesiastical events. (*Per contra*, it is possible to argue that the common law has no interest in legacies since they can never be the subject of temporal litigation and the transaction on which they depend -- the making of a will disposing of personalty -- has no status at common law. Ergo, nothing about a legacy, such as whether one has been released, is of interest to the common law. Ergo, however unreasonable one considers the two-witness rule, or however ready one is to see a "conflict" where a release of a £100 debt is easier to establish than a release of £1 legacy, one should swallow one's scruples and let the two-witness rule have its head. In the lease case, however reasonable and unconflicting one considers the two-witness rule, the common law has an interest in blocking it. Given comparable assumptions as to reasonableness and conflictingness, the same distinctions apply to substantive rules on what makes a lease or release valid.)

The three theories outlined -- "rule of reason," "conflict-avoidance," and "common law interest" -- perhaps ought to be thought of as alternatives, but there is no logical necessity that they be so considered. In other words, it might have been good judicial policy to think out the theory that justifies intervention to control the conduct of non-common law courts and to apply consistently the criterion appropriate to that theory. But there is nothing logically wrong with saying that all the theories are true - - i.e., that "foreign" courts may be prohibited if they propose to apply rules which the supervising court finds unreasonable; that they may also

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be prohibited from enforcing rules that conflict meaningfully with the common law, whether or not such rules would be held unreasonable by the standards applied, say, to local customary law; that they may in any case be prohibited if they refuse to determine issues in which the common law is specially interested by common law standards. Among other questions to be addressed to the cases is whether the courts approached anything like a choice among theories, or whether signs of all three appear in such ways as to suggest that all were embraced and choice among them avoided.

The cases will of course reveal many complexities which I have made no attempt to anticipate. Except for one component, however, I have perhaps said enough at a general, *a priori* level to introduce the contents of Vol. II. The arrangement of the material is in a sense implicit in the analysis above, though practical considerations have influenced the exact order in which I shall discuss the cases. I shall first take up cases arising on substantive disallowance surmises in which such surmise was probably the only hope for Prohibition. That is to say, I shall exclude from Section II those cases in which the disallowance surmise occurs, but in which it *may* not have been necessary because the ecclesiastical suit *may* have been prohibitible on the ground that a "common law issue" had arisen. The latter class will be treated in Section III, "Problems of the Disallowance-Surmise." There I shall consider the cases in which the disallowance surmise may have been used unnecessarily, but may, on the other hand, have served to render the category of "common law issues" superfluous or suspect. With that class of cases, a couple of other groups are connected -- cases in which the fictionalization of the disallowance surmise was considered; cases in which parties failed to get Prohibitions by maintaining that a "common law issue" had arisen, but were told that Prohibition would lie if wrongful disallowance was attributed to the ecclesiastical court. Section IV deals with the numerous cases arising on evidentiary disallowance surmises. In the final Section V, I shall deal with cases on self-incrimination, the appropriateness of which to this chapter I must briefly explain.

Evidentiary disallowance surmises bring in question the ecclesiastical courts' right to their procedure -- arguably, at least, a more (or less) defensible right than the right to dispose of their own suits by their own substantive rules. Cases on the power of ecclesiastical courts to demand

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sworn testimony put the same right in question. Despite numerous contextual differences, title to insist that claims be supported by two witnesses and title to compel men to supply evidence under oath are both titles to go about ecclesiastical business by methods well-warranted in ecclesiastical law. Moral responses are readier-to-hand to condemn inquisitorial procedure; they were available to the judges and lawyers we are concerned with, as, through the medium of the history of the "privilege against self-incrimination," they are available to us. But those responses themselves want scrutiny. Inquisitorial procedure admitted of abuse; so, in the form of extremely inflexible application, did the two-witness rule. At the margin of downright unfairness and stupidity, both ecclesiastical practices -- especially the former, of course -- admitted of "rule of reason" control. Short of that margin, it may be questioned -- and often has been -- whether there is anything intrinsically wrong about asking reasonably suspected or charged persons to tell the truth under oath about their activities, insofar as the information they can supply is relevant for the disposition of a legitimate case. Such investigation can be unfavorably compared to the common law way of doing things -- whereby (under the old system, before the power to compel testimony of *any* sort was introduced) cases had to be disposed of on the basis of voluntarily presented evidence and the jurors' own knowledge. By very much the same token, one might consider ecclesiastical "evidentiary formalism" pretty silly. It was nonetheless the ecclesiastical way. Assuming that there is a prominent gap between "pretty silly" and "utterly unreasonable and unacceptable," it would not do to block the two-witness rule in every case. Distinctions and rationale were called for, criteria for singling out those ecclesiastical cases in which the common law courts had grounds for insisting that ecclesiastical evidentiary canons be waived. Likewise, disapproving of a system which countenances, and perhaps needs, the power to exact potentially self-incriminating testimony does not lead straight to the conclusion that the exercise of such power must be totally banned. It does lead to the kinds of questions we have been reflecting on abstractly and which pervade the disallowance cases. E.g.: *However* strongly one disapproves of a system that countenances and needs inquisitorial procedure, can one admit ecclesiastical law into a limited sphere and then turn around and simply forbid the operation of one integral aspect of ecclesiastical procedure? Is the "rule of reason" a drastic control on inquisitorial procedure? a sufficient one? (I.e.: Is it flatly contrary to the law of nature to ask a man to convict himself of a crime, so that all inquisition in criminal matters

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should be banned, leaving the power only in civil cases? If so, the "rule of reason" would be a drastic control. Or can reason only object to extremely offensive forms of inquisition -- such as "fishing expeditions" not preceded by any specification of charges, or questioning designed to entrap in especially unfair ways? If so, are further controls necessary?) Is there any sense in which the common law has a "privilege against self-incrimination," and hence any foothold for demanding that ecclesiastical courts avoid contradicting the common law, at least in some cases? (Cf.: Is there any sense in which the common law has standards which conflict with the two-witness rule, as opposed to a wholly different system incapable of conflicting in respect of particular rules?) Are there "common law interests" in whose name inquisitorial investigation may sometimes be blocked and sometimes not? E.g.: May an ecclesiastical court be prohibited from exacting testimony that might put a man in danger of secular liability -- either criminal prosecution or civil loss -- whereas forcing a man to accuse or convict himself of a purely ecclesiastical crime must be tolerated (short, at least, of extreme unfairness)?

In sum, self-incrimination as a topic of inter-jurisdictional law -- a much better-known topic than most of those studied here -- is "formally" of a parcel with disallowance cases, part of our present concern with common law control over the conduct of "foreign" courts in suits within their spheres. The "material" senses in which self-incrimination cases are distinct, such as their involvement with the statutory powers of the High Commission, will be specified when we come to those cases. In the separate Introduction to Section V, general considerations bearing on self-incrimination and its relation to the wider concerns of Vol. II are discussed in greater depth.