II.
SUBSTANTIVE SURMISES OF DISALLOWANCE

Summary: In the very broadest terms, perhaps judicial restraint, rather than great readiness to interfere in the handling of "foreign" suits, is the predominant impression left by the cases, Something of a trend toward greater restraint can be seen in the 17th century. No single theory, clearly and exclusively specifying when and why common law intervention is justified, emerges. The cases, in their several groupings, tend to caution against general theories capable of cutting though many classes. Although some results may be construed as reactions to ecclesiastical conduct thought merely unreasonable, the weight of careful thinking about disallowance cases went rather against conceiving the common law as enforcing a "rule of reason.'' Because there was an ecclesiastical appellate system capable of correcting errors by ecclesiastical standards and particular decisions so foolish by any standard that it could hardly be presumed that they would survive appeal, there was a strong argument for assigning a different function to the conduct-controlling Prohibition. The cases do not say with much precision what that different function was. Some decisions encourage the view that the common law should be made to prevail by Prohibition in the event of head-on rule-conflict. However, very few cases present even relatively unambiguous instances of such conflict. Some results can be seen as instances of directing non-common law conduct in order to protect interests in the common law sphere, but sometimes the courts refused to intervene even when a plausible case could be made that secular interests might be harmed. In the upshot, the most practically useful generalizations are lower-level ones, referring to particular kinds of cases -- e.g., that the chance of getting the common law courts to interfere with ecclesiastical assessment of the capacity of estates to bear legacies diminished as the 17th century went on; that Prohibitions would be pretty freely used to prevent complaints of defamation from being treated more tenderly in ecclesiastical courts than at common law; that the judges could very likely be persuaded to intervene if an ecclesiastical court took a more indulgent view of the legal capacity of married women than the common law; that tithe-payers had a fair chance of securing help by the disallowance surmise in the relatively rare circumstances in which that was their only route to common law assistance. On the whole, a man with an unusual case would be well-advised to try hard

in the ecclesiastical court and take appeals if he was not initially successful. A man tempted not to try very hard, even hoping that the ecclesiastical court would do something wrong enough to justify removing the suit to the common law by Prohibition, should be dissuaded from putting great stock in such calculations.

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A few relatively early cases, different from each other, will serve to introduce the topic. They go to show that ca. 1590 the courts felt free to intervene when pleas were in their judgment improperly disallowed. Whatever the conditions and limitations of such intervention, there are no signs of its having been challenged in general. That is to say, there is no evidence of a theory to the effect that power to control jurisdiction by its very nature entails indifference to the manner in which a court with admitted jurisdiction disposes of the case before it.

In Somers v. Sir Richard Buckley (1590),[1] a Prohibition was granted to the Admiralty on surmise that that court would not allow plaintiff-in-Prohibition to plead an agreement to divide a prize. Two ships had collaborated in taking the prize in such a manner that by Admiralty law their masters were entitled to split it. One master, plaintiff-in-Prohibition, was sued in the Admiralty by the master of the other ship for retaining more than his share. He claimed that they had agreed to split 4-1 in his favor, instead of 50-50. Allegedly, he was not allowed to assert the agreement. On its face, the disallowance seems outrageous, for surely a considerate agreement to share in a given way should prevail over the disposition that Admiralty law would make in the absence of a bargain. Subsequently, defendant-in-Prohibition's counsel moved for Consultation, claiming that the Admiralty would in fact allow the plea. A Consultation was granted on condition that it do so. The outcome suggests that plaintiff-in-Prohibition was either confused or disingenuous, more likely the latter. I.e.: He may have alleged the disallowance fictitiously, hoping that the defendant would leave it unchallenged and take issue on the fact of the bargain. The Court's willingness to grant a conditional Consultation on motion (as opposed to insisting on a formal traverse of the disallowance) might indicate a certain disinclination to prohibit by reason of a disallowed plea when there was an alternative course and the surmise looked improbable. The

1 32 Eliz. C.P. (No term) 2 Leonard, 182.

case does, however, make the point that the Admiralty's jurisdiction over prizes taken at sea does not entitle it to handle litigation over them in any way it chooses.

In Bennet v. Shortwright (1590),[2] a man was sued for tithes and claimed that he had duly set them out in the field, but that the parson had not taken them away. A Prohibition was granted on surmise that the ecclesiastical court had refused to let him plead his defense. Again, the disallowance seems so absurd as to be incredible, for the plea amounted to saying that the parishioner had performed his legal duty as normally understood. Was the ecclesiastical court really prepared to hold that a parishioner who had set out tithes would be liable for non-payment if (as remarks in the reports suggest was the case) the tithes were carried off by a stranger or eaten by beasts before the parson collected them? The Queen's Bench spoke on the assumption that the ecclesiastical court was prepared so to hold. In support of not letting it get away with it, the Court relied on the maxim that by setting out *decima transeunt in cattalla.* I.e.: By the common law, once tithes are set out the parson has property in them and can maintain an action of Trespass against a stranger who takes them.

An ecclesiastical rule holding the parishioner liable for loss of the tithes during the interval between setting out and collection would certainly jar with the common law rule, though perhaps the two rules are not strictly repugnant. According to one report (Leonard), the Court said by way of dictum that a man who sets tithes out and then, before the parson collects them, takes them back himself may be sued in the ecclesiastical court for non-payment. The effect of the dictum to say that tithes turned into chattels by the common law are not *ipso facto* taken out of ecclesiastical cognizance. That being admitted, an ecclesiastical rule that setting out does not discharge the parishioner from liability once and for all would be consistent with the common law rule that setting out constitutes payment in the sense of "a transfer of property from one owing a duty to the person to whom it is owed." The implied ecclesiastical rule in this case is only an instance of "a rule that setting out does not discharge the

2 M. 32/33 Eliz. Q.B. Croke Eliz., 206; 2 Leonard, 101 (dated, presumably erroneously, T. 30); Harl. 1633, f.l19; Add. 25,196, f.253b.

parishioner from liability once and for all." Therefore it is not strictly repugnant to the common law maxim. However, it would be odd to legislate that the parson may sue a stranger for taking the set-out tithes and at the same time may sue the parishioner as if he had not set them out. The oddness would be eliminated if the parishioner, having been forced to pay twice, could recover over against a trespasser. Indeed, the supposed rule amounts to treating the parishioner as an insurer pending collection. But because the common law rule transfers the property to the parson, the parishioner could not maintain an action (unless in equity) against a trespasser. He would therefore be an absolute insurer, which is an unreasonably hard position to put him in.

In looser terms, perhaps the implied ecclesiastical rule is not contrary to "natural reason." Still, it seems very hard to attach liability to the parishioner for an indefinite time after setting out, during which the tithes might spoil, and the risk of their being taken or destroyed by a trespasser would be perpetuated by the parson's own negligence. The hardness of such a rule, and its disharmony with the common law maxim, were quite enough to justify a Prohibition in the judges' eyes. The subsequent events of the case suggest, however, that the ecclesiastical court probably did not in fact propose to enforce so unlikely a rule. For defendant-in-Prohibition took issue on the disallowance. That he dared do so suggests that the plaintiff was mistaken about what the ecclesiastical court had actually done; or that he alleged the disallowance fictitiously, in the hope that issue would be taken on another element in his surmise (the fact of setting out or an exiguous customary variation from the *de jure* manner of tithing, which was also involved); or that the disallowance was really for evidentiary reasons, which the plaintiff concealed because he doubted that the King's Bench would block ecclesiastical enforcement of the two-witness rule.

In Pendleton v. Green (1591),[3] a parishioner being sued for tithes wanted to claim that one Taylor, rather than his adversary, Pendleton, was the lawful parson entitled to the tithes. A Prohibition was granted on surmise that the ecclesiastical court would not let the parishioner plead that

3 3 Leonard. 266 (dated M. 33 Eliz. -- either 32/33 or 33/34); Croke Eliz., 228 (dated P. 33, *sub. nom.* Green v. Penilden).

defense. The implied ecclesiastical rule would seem to be that a parishioner does not have standing to challenge the right to the parsonage. He must either pay the parson *de facto* or excuse himself by a *modus,* bargain, or the like. He may not plead that someone else is parson *de jure.* So I would state the implied rule to give it color of reason. (The reports are scanty.) Surely no ecclesiastical court would prevent a parishioner from claiming that his adversary had no pretense whatever to sue as parson. The parishioner here must have confessed Pendleton's *de facto* incumbency and sought to show a defect in his title. The Queen's Bench held that the rule was unreasonable because the parishioner might have to pay twice: If he cannot dispute Pendleton's title, he will have to pay him, after which Taylor, as rightful parson, might sue for the same tithes.

Is the decision in this case as clearly justifiable as those in the two cases above? Surely the prospect of an unjust double payment depends on how the ecclesiastical court would handle a future suit by Taylor. In the event of such a suit, justice would obviously require that Green be excused and Taylor be driven to recover against Pendleton. Why should the Queen's Bench assume the worst before it happened? In the two cases above, the vetoed rules attributed to the ecclesiastical courts had a strong flavor of unreasonableness. Here, a rule was vetoed because it might lead to injustice if not supplemented by other rules. The earlier cases would stand with the principle that "foreign" courts are entitled to their own rules so long as they do not offend against reason in a fundamental way. This case implies that the common law may impose its standards more freely, if not indiscriminately. There was, in this case, a prospect of injustice. It could be avoided now by imposing the judges' preference on the ecclesiastical court. Their preference was not arbitrary. It is probably more sensible to let the right of the parsonage be disputed and settled now than to restrict the rightful parson to recovery against the usurper. On the other hand, the implied ecclesiastical rule is reasonable in the sense that respectable reasons can be give for it. There is an advantage in not letting Green and Pendleton dispute about Taylor's interest in his absence. There is perhaps a public advantage, from the point of view of the Church's corporate interests and morale, in encouraging parishioners to pay the representative of the Church in possession promptly, leaving clergymen and their patrons to quarrel at their leisure about who ought to represent the Church. The question of title to a parsonage is likely to involve the right to the patronage -- an issue outside ecclesiastical competence. Because

the ecclesiastical rule can be defended by these reasons, Pendleton v. Green argues for a strong version of the common law's right to regulate ecclesiastical handling of ecclesiastical cases.

In Pett v. Baseden (1592),[4] a man bequeathed £100 to his wife *pro et in exoneratione* of her dower in certain land, the sum to be paid within a year of the testator's death. The widow promptly married Baseden, who exchanged mutual promises with the executor, Pett: The executor to pay Baseden £100 within the said year of the testator's death; Baseden to make the executor a discharge of the legacy and dower. Baseden then sued for the legacy in an ecclesiastical court. Pett pleaded: (a) that he had offered to pay the promised £100, but Baseden, hoping to recover both the legacy and the dower, would not make him a discharge, so that the agreement remained unexecuted; (b) that he was now ready to pay the £100, provided Baseden would make the discharge. The executor obtained a Prohibition because the ecclesiastical court would not accept his plea and proffer. On demurrer, the Prohibition was upheld.

I would reconstruct the ecclesiastical court's overruled position on the case as follows: (a) The legacy is not conditional on the dower's being discharged. Under the terms of this will, the executor must pay the legacy and leave it to those interested in the land to help themselves as best they can to avoid the dower. (The land was devised to the testator's son when he should reach twenty-one, the executor meanwhile to take the profits for payment of debts and legacies. Would equity not be the only resort for the executor or son to avoid the dower?) (b) The agreement is a temporal thing, of no consequence from the ecclesiastical point of view, whatever legal or equitable rights it may engender. Therefore it is not appropriate for the ecclesiastical court to force Baseden, in effect, to execute the agreement.

The Queen's Bench expressly rejected the first point, holding that the legacy was conditional. The ecclesiastical court ought not to have held the executor liable to pay the legacy until the dower was discharged and therefore ought to have accepted the executor's offer. If Baseden refused it, it ought to have dismissed his suit for the legacy. This being held, the

4 P. 34 Eliz. Q.B. Croke Eliz., 274.

agreement hardly matters except as reinforcement: It shows that Baseden had himself acknowledged that he ought to release the dower in order to have the £100. The executor's promise and attempt to perform it tend to excuse him of any negligence. But if the legacy must be taken as conditional, the case would be the same without these additional circumstances. (Baseden's counsel argued that the executor had not pleaded sufficient circumstances in his favor. They contended that his case would be better if he had shown expressly that Baseden had refused payment -- as opposed to merely declining to make the release -- and if he had shown exactly when he had offered to perform -- i.e., that he had done so within the year specified in the will. The Court was not moved by this argument. On my analysis, the reason would be that the conditional character of the legacy was the only really material point.)

Was the Queen's Bench justified in interfering with the ecclesiastical court's construction of the legacy? On the one hand, the interference seems dubious, inasmuch as legacies were purely ecclesiastical interests. The judges themselves said that the agreement would support a common law action. If the executor, having been compelled to pay the legacy, could sue Baseden for breach of contract if he failed to make the release, was the executor not pretty well protected? On the other hand, a damage suit is no substitute for specific fulfillment of the testator's intentions. It seems to me that the ecclesiastical court construed the legacy foolishly, in such a way as to defeat the plain meaning of the will. Whatever objections can be made against interfering in the construction of legacies -- at least when there is no utter violation of common justice -- the Queen's Bench saved trouble and possible hardship by deciding the case as it did.

With Lord Rich's Case (1594),[5] we pass to a line of connected reports which as a group provide the most coherent focus on disallowed pleas as a basis for Prohibition. Lord Rich the elder left £1500 to his daughter, provided she marry with the consent of his heir and another. Lord Rich the younger was sued as his father's executor for that legacy. He pleaded that the estate was utterly insufficient to satisfy the legacy (worth only £1500 and £5000 in debt.) Upon surmise that the plea of "No assets" was disallowed, he obtained a Prohibition. If there was nothing more to the

5 M. 36/37 Eliz. Q.B. Harg. 26, f.42; Harl. 4817, f.152.

case, the decision seems overwhelmingly justified. Disallowing "No assets" in unambiguous circumstances could only imply the unreasonable rule that legacies should be satisfied before debts. Even if legacy law as such should be considered beyond common law control, the interests of creditors must obviously be protected. One report of Lord Rich's Case (Harl. 4817) adds that the daughter-legatee had in fact married without the consent specified in the will. There is no apparent connection between this circumstance and the main point of the case. The reporter appends a note, however, which flatly contradicts Pett v. Baseden above: "...If she marries without assent, though by the common law the legacy is not payable, yet the spiritual court will award that she will have [it], and no Prohibition lies on that since it is [a matter of] testament and legacies." If correct, the suggestion is that ecclesiastical courts would either simply not recognize conditional legacies -- surely an incredible rule -- or that they would disregard some conditions, such as the attempt to limit freedom of marriage in this case. Whereas in Pett v. Baseden the common law intervened to prevent construing conditional language away (and perhaps *"pro et in exoneratione"* is not perfect conditional language), the reporter here would have the common law powerless to insist that a plain condition be respected. *Quaere.*

Norton and Sharp v. Gennet *et al.*[6] presents a variation on the theme of Lord Rich's Case. The basic situation was the same: Executors were sued for a £200 legacy. The estate amounted to £350. The testator was bound in £1000 and, according to the executors, the condition had been broken so that the £1000 were forfeit. The ecclesiastical court would not allow the executors to plead this matter, which amounted to a claim that the estate was insufficient to satisfy legacies. The problem of the case arose from the fact that it was disputable whether the bond had actually been forfeited. The principle that the common law may intervene to prevent enforcement of legacies against an insufficient estate or to the detriment of creditors was not controverted. There was some discussion of the effect of outstanding bonds on the ecclesiastical court's power to go ahead and award recovery of legacies. Coke, for the legatee, argued that legacies may not be recovered if bonds to pay money or the like are outstand-

6 T. 37 Eliz. Q.B. Owen, 72; Moore, 413; Harg. 12, f.41b: Harl. 1631, f.45b; Lansd. 1059, f.232b.

ing, but that they may be recovered if outstanding bonds are such that the condition may never be broken. Here the bond was of the second type -- a jailer's obligation to save the Sheriffs of London harmless if prisoners should escape. Save for Justice Fenner, who was in some doubt, the Court accepted Coke's distinction. The serious contention in our case -- whether the bond was forfeited or not -- need not detain us. The Court was finally convinced that it was not forfeited. A Consultation was granted on condition that the legatee enter into an obligation to the executors to make restitution if the bond should be forfeited in the future. For our purposes, the significance of the case is that the common law may intervene, not only to prevent recovery of legacies against an estate plainly insufficient to satisfy more than debts, but also to resolve doubts as to the estate's sufficiency to support legacies in view of the particular claims against it. (The alternative rule would be to trust the ecclesiastical court to work out a fair solution in ambiguous circumstances. Although that course might have something to recommend it in some cases, the present case points to the danger: Considerable common law technical competence could be required to evaluate claims against an estate.)

A number of later cases retest the principle that the common law may protect the plea of "No assets" against legacy claims. In a Common Pleas case of 1597[7] the executor pleaded that he had paid out all the testator's assets to satisfy debts, showing how and to whom. It is not clear that the plea was actually disallowed. The report gives the Court's opinion that *if* the plea is disallowed Prohibition will be granted. The opinion emphasizes that there will be no Prohibition *unless* it is disallowed. That is to say, the executor has no right to have such facts as may be disputed -- the size of the estate, the truth about its indebtedness, etc. -- tried at common law. The common law will only guarantee that the ecclesiastical court accept the priority of debts over legacies as a matter of law.

The debate in Agarde v. Porter (1602)[8] reached a much higher pitch of jurisprudential interest than that in earlier related cases. In this case, the executor did not seek common law assistance until he had been sentenced to pay a legacy and the sentence had been upheld on appeal to the Dele-

7 39 Eliz. (No term) Add. 25,199, f.3.
8 P. 44 Eliz. Q.B. Add. 25,203, f.467 (the strong report); Add. 25,213, f.31 (brief).

gates. But apparently no attempt was made to hold his delay against him. When he got around to seeking a Prohibition, he surmised: (a) that he had pleaded that the estate was extensively indebted and that various debts due to the testator were desperate. (The report does not say that he alleged the estate's absolute insufficiency to pay legacies. The plea should be taken as a claim that no legacy should be paid pending collection of debts to the testator and payment of debts owed by him.) (b) He had offered to prove these facts by "reasonable testimony." (c) The plea had been refused. This surmise leaves it ambiguous whether the plea was refused because the circumstances were regarded, if true, as insufficient to excuse the executor from paying the legacy, or because the testimony offered was not regarded as "reasonable." Arguing for a Consultation, Tanfield claimed that the plea had not actually been disallowed, and that the ecclesiastical court was not seeking to enforce evidentiary requirements stricter than the common law would insist on. Tanfield also argued, however, that there should be no Prohibition even if the plea had been disallowed. The present interest of the case lies in this further argument.

Tanfield maintained in effect that common law intervention is justified only when the ecclesiastical court's "error" is *not* an error in the terms of ecclesiastical law. That is to say, the common law may intervene when the ecclesiastical court has correctly (in its own terms) applied a rule that conflicts with the common law. It may not intervene when the ecclesiastical court has made an "unjust" decision capable of being corrected by appeal within the ecclesiastical system. This position implies that the common law judges should take judicial notice of the rules of "foreign" law outside the context of the immediate case. They should try to estimate whether a given decision reflects an inexorable conflict of laws, or whether it is simply a particular judge's misguided attempt to apply rules which the common law would regard as tolerable in themselves. The common law court should *not* act whenever the rule implied in a particular decision seems unreasonable or at odds with the common law.

In a sense, Tanfield's distinction has axiomatic truth -- or speciousness. Plainly the Prohibition did not exist to do the same job as ecclesiastical appeals. Yet applying the distinction presents difficulties. Suppose an ecclesiastical court disallows a plea and a Prohibition is sought. Suppose the common law court calls in civil lawyers and, being persuaded that the disallowance was bad ecclesiastical law, refuses the Prohibition and tells the

party he must help himself by appeal. Then suppose the party exhausts all appeals, but the original disallowance is upheld at all levels. Is he entitled to a Prohibition now? Common sense might say "yes," since it is now his only remedy against injustice. But it is not clear that Tanfield's principle leads to that answer. (In the instant case, he plainly did not want it to, for his adversary had already lost in the Delegates, the highest normal court of appeal in the ecclesiastical system.) It is just as possible for successive ecclesiastical courts to apply their own law mistakenly as it is for the original court to do so. Appeals are only designed to reduce the practical likelihood of injustice and error. If the common law ought not to jump to the "positivistic" conclusion that the ecclesiastical law is what the original ecclesiastical court by implication says it is, should it indulge in "positivism" on second thought, holding that after all the ecclesiastical law must be what the highest appellate court says it is? Surely the common law should stick to its original determination -- that the disallowance does not reflect an intrinsic conflict of law. The losing party is no doubt pitiable, but he is no worse off than a man who loses in a Writ of Error. In the eyes of a critic of the judges in error, the loser there is pitiable too. Legal systems have to assign the last word. They can only do so at some risk of injustice. It is not a defect in the English legal system that it does not assign the last word to the common law in all circumstances. Subjecting every decision to a finite series of appeals is the most that can be done to reconcile justice and finality.

But to carry out the logic of Tanfield's position, it seems to me, is to ask too much of the common law courts. On the first round it is easy enough to say, "This is mere error or injustice. Take your appeal." It is a great deal harder when the error proves perdurable. To hold that a decision is merely foolish, and so remediable by appeal, is one thing. To refuse to intervene when there is no other way to prevent a decision one has already branded as foolish from taking effect is a harder thing. Moreover, it is anomalous to leap in when the ecclesiastical court is bound to apply a perfectly reasonable rule which happens to differ from the common law and to stand back when the ecclesiastical system has failed to reverse an unreasonable decision which can legitimately be regarded as bad in ecclesiastical law. I therefore conclude that Tanfield's principle is unworkable in the long run. Therefore I can see little point in invoking it in the first instance. Every economic advantage is on the side of intervening at once if intervention might ultimately be necessary. In addition, it is much sim-

pler to take the ecclesiastical law to be accurately reflected in what the ecclesiastical court has actually done than to engage in a constructive process to decide whether Prohibition or appeal is the right remedy. To reject Tanfield's principle is not to rob the ecclesiastical appellate courts of their function, or to make the Prohibition a mere equivalent of appellate control. For a distinction can be made between unreasonable decisions, which justify Prohibitions even though they might be reversable by appeal, and decisions only correctable by appeal because they are no worse than questionable by ecclesiastical law. Nevertheless, we shall encounter "Tanfield's principle" (as I shall continue to refer to it) at various points. It gives strong expression to the "conflict-avoidance" theory of the common law's title to intervene on disallowance surmises.

In Agarde v. Porter, Tanfield would appear to be applying his principle in two ways: (a) To say that ecclesiastical law does not "really" hold that legacies should be paid before it is clear that the estate can sustain them over and above debts -- whatever these particular ecclesiastical courts may have done. (b) To say that ecclesiastical law does not "really" insist on unreasonable evidentiary rules, or rules at odds with the common law -- whatever the particular courts may have done. The latter point we may leave aside until we turn to evidentiary rules. The former appears to contradict the preceding cases. In those cases as reported, there is no discussion about the "real" ecclesiastical law. The Prohibitions were issued as if the ecclesiastical law would prefer legacies to debts. The probability that a decision unambiguously charging an insufficient estate with legacies would be reversed within the ecclesiastical system was not discussed as a reason for denying Prohibition. (Tanfield cited Lord Rich's Case in favor of his general distinction. I can only say that on the basis of my slight reports there is no evidence that the Court acted on it in that case with respect to the plea of "No assets." It is conceivable that it was applied to the other issue -- the conditional legacy.)

Unfortunately, the Court did not produce a decisive resolution of the issue of principle raised by Tanfield in Agarde v. Porter. The judges did refuse the Consultation which Tanfield was seeking *by motion.* He was invited to plead formally if he wanted a Consultation. That means he could demur and use the arguments we have reviewed in support of the demurrer, or deny the disallowance as a matter of fact, or plead the ecclesiastical law as he understood it and challenge the other side to contradict

him or demur. There is no report of what he decided to so. In turning down the motion, the judges at least did not deny Tanfield's general argument as it relates to the plea of "No assets." They did not say that the Prohibition was good if it was true that the ecclesiastical courts had *de facto* refused to let the condition of the estate be pleaded, regardless of whether that act was in principle remediable by appeal. Leaving that question open, the judges denied the motion because they thought it at least probable that ecclesiastical evidentiary requirements would prevent the executor from establishing his defense. That was probable enough to require that the truth be investigated upon formal pleading. In effect, the Court ducked the legal problem and adopted a procedural solution, perhaps wisely.

In a case of 1605,[9] the plea of "No assets" was disallowed in more complicated circumstances. In effect: A. devised a legacy to B., making C. executor; B. sued C. for the legacy and had sentence to recover; before paying, C. made D. his executor and died; B. sued D. to perform the sentence; D. pleaded that he had no assets from A.'s estate and sought a Prohibition when that plea was disallowed. Three judges -- Gawdy, Yelverton, and Fenner -- favored the Prohibition, while Justice Williams opposed it.

Since the line taken by Tanfield in the preceding case does not reappear in this one, we are free to consider the ecclesiastical decision with respect simply to its reasonableness and congruity with the common law. In those terms, it will perhaps seem offhand that little can be said for it: D. cannot reasonably be charged with C.'s duties as A.'s executor unless he is in possession of goods which C. held *qua* executor. It is equally clear, however, that D. should be charged as C.'s representative to the extent that C. was responsible for the absence of A.'s goods in D.'s hands. If C. once had possession of A.'s goods in sufficient amount to satisfy A.'s debts and legacies but inexcusably let them out of his hands and died before satisfying his executorial duties, C.'s estate should be liable (subject to any priorities the law might assign to claims against C personally -- surely ahead of C.'s legacies.) If D. were sued at common law for A.'s

9 H. 2 and P. 3 Jac. K.B. Lansd. 1111, f.39b. (Second hearing dated P.1, but that must be an error for P.3.)

debts and pleaded that he had no assets from A.'s estate, the creditor could reply that C. had wasted A.'s goods and so should answer for the debt out of his own. *A fortiori,* one would suppose, when the debt is a judgment debt against C. as executor. No one, I take it, would deny that the ecclesiastical court would be entitled to behave analogously with respect to a legacy. The ecclesiastical court might well hold D. responsible for A.'s legacies out of C.'s goods if it appeared that C. had wasted A.'s estate. *A fortiori* when, as here, C. had been sentenced to pay the legacy. The issue then becomes whether, in disallowing D.'s plea that he had no assets from A., the ecclesiastical court was adopting a legitimate means to hold D. liable to the extent that he may justly be so held.

Justice Williams based his dissent on the possibility that C. had wasted A.'s goods. I think his position may be expanded as follows: The ecclesiastical court is entitled to hold D. liable as C.'s executor for C.'s unperformed executorial duties -- especially those confirmed by sentence -- unless an excuse is shown. It is entitled to say that the bare plea "No assets from A.'s estate" is an insufficient excuse. It may insist on a plea that the lack of assets is not C.'s fault, or presume that it is his fault in the absence of a contrary showing. In other words, the ecclesiastical court is entitled to subject C.'s own estate to C.'s duties as A.'s executor if D. cannot account for A.'s estate as C. would be obliged to do if he were alive. It is entitled to say to D., as it would to C., "Either show that A.'s estate was insufficient from the start to support legacies, or else pay." D.'s plea that *de facto* he has no assets from A does not necessarily show that.

Such handling of the case would not be strictly analogous to common law handling of the most nearly comparable case, for at common law the plea of "No assets" in response to a debt claim would be good in itself, subject to being answered by a plea alleging that the goods had been wasted. But why should ecclesiastical behavior be as analogous to common law behavior as possible? Moreover, Williams' position is especially reasonable in view of the fact that B. had already successfully sued C. If B. were suing D. for the legacy without having sued C. before, it might be argued that to presume a fault in C. unless D. can rebut it is unfair, hard on D., or contrary to the probabilities. One might argue that in fairness D. should be allowed to rely on the one fact of which he has manifest notice -- that none of A.'s goods are in his hands -- pending allegation and proof of a fault in his testator. The most likely explanation, af-

ter all, would be that C. had paid out all of A.'s goods for debts. But here B.'s recovery against C. surely raises the presumption that A.'s estate was originally sufficient to bear legacies. It does not *prove* the estate's sufficiency, because C. might have defended B.'s suit on other grounds. However, C. did have an opportunity to plead want of assets. Since he did not do so, at least not successfully, it is fair to presume that A.'s estate was sufficient, and therefore that the absence of A.'s goods in D.'s hands is owing to some fault in C.'s administration.

Williams's brethren, however, did not agree with the above position. In effect, the other three judges preferred offhand to insist that the ecclesiastical court conform more strictly to common law standards. A Prohibition was accordingly granted. The case was reopened the next term when Serjeant Heale moved for a Consultation. Heale's argument adds some facts and hence somewhat changes the perspective in which the case appears. According to Heale, C. had pleaded *non devisavit* when B. sued him for the legacy. C. claimed that his testator made no such bequest. C. lost on that plea and costs were awarded to B. Subsequently, C. brought two appeals and also sued (presumably in vain, or without full prosecution) three Prohibitions to the three ecclesiastical courts that heard the case successively. On the basis of these facts, Heale thought B. should have a Consultation at least for the costs which the ecclesiastical court had awarded against C. The justice of this demand seems very strong. It would seem that C.'s own estate should be liable for the loss which C. caused B. by contesting his legacy on a false plea.

The report does not make it entirely clear what Heale was asking for beyond such a Consultation. I take his position to be that *at least* a Consultation *quoad* costs should be granted, but that a full Consultation would be appropriate even on motion. Heale excepted to the sufficiency of D.'s surmise, but the report does not make his grounds clear. I am inclined to assume that his basic contention was what I project from William's opinion above: that D. should have claimed that C. was not responsible for the want of assets in D.'s hands, or at least that the ecclesiastical court was entitled to insist that he so claim if he wanted to avoid the legacy. The putative ecclesiastical position amounts to a rebuttable presumption of C.'s responsibility. The facts in a sense reinforce the reasonableness of the presumption, for it appears that C. went to great lengths to avoid paying the legacy, while at no time suggesting that the

estate could not support it. He also consumed assets of the estate in litigation. (Significantly, all the trouble was over a £10 legacy.)

The last point is related to the one clear additional argument contributed by Serjeant Heale. According to Heale, "by the ecclesiastical law if an executor appeals and the sentence is affirmed...he will be charged *de bonis propriis."* If that rule is enforceable, our case should be settled in B.'s favor, at least *quoad* costs, even though the other arguments for B. fail. The rule seems reasonable, being designed to prevent executors from consuming the estate by undue litigation. Yelverton (Henry, as opposed to the judge, Sir Christopher), arguing against the Consultation, said: "It is against a ground of law that he will be charged for the accessory who is discharged of the principal." To the extent that D. is not liable to pay the legacy (the "principal"), he is not liable to carry out the sentence against C. (the "accessory"), whether for the substance or the costs. Yelverton goes on to make the basic argument for D.: D. is liable for C.'s executorial duties only if he holds assets from A. or if C. wasted A.'s estate. D. denies the former and has not been contradicted. B. has not alleged the latter. Yelverton takes "C.'s executorial duties," generally -- i.e., to comprise both payment of legacies and execution of sentences to pay legacies. His "principal and accessory" argument comes to saying that the ecclesiastical rule stated by Heale is unenforceable: The common law ought not to tolerate a rule which shifts liability from the testator's estate to the executor's estate in the absence of actual waste -- ultimately, I suspect, because the common law would not do so itself in analogous circumstances.

The report ends with the Court telling Heale he may demur to the surmise if he wants to. All that can be inferred is that the Court by now was not convinced that the position taken by Heale and Justice Williams was utterly without merit. As in the last case, the judges avoided a difficult legal problem for the moment by sensibly refusing to face it on mere motion.

With Herdy v. Herdy,[10] a Common Pleas case of 1605, we return to the simple case: disallowance of an executor's plea that he lacks assets to pay legacies. Herdy v. Herdy is significant in three ways: (a) It reveals a

10 M. 3 Jac. C.P. Add. 25,205, f.40.

shift in Common Pleas opinion. According to the brief report from 1597 above, the Court agreed that such disallowance warrants a Prohibition. In Herdy v. Herdy, the Court was divided. (b) The argument made by Tanfield in Agarde v. Porter reappears in simpler circumstances and is pretty clearly embraced by two judges. (c) New arguments the other way -- i.e., in favor of granting a Prohibition -- are introduced.

Chief Justice Gawdy and Justice Daniel favored a Prohibition in Herdy v. Herdy. They were willing to take notice of ecclesiastical law and concede that the disallowance was erroneous by ecclesiastical standards. Therefore the party seeking a Prohibition could equally well have helped himself by appeal. But that did not seem a sufficient reason to refuse a Prohibition. The two judges seem to accept duplication of remedies without apology. It is worth noting, however, that they did not adopt what I call above the "positivistic" approach -- inferring the ecclesiastical law solely from what a single ecclesiastical court had done. They were willing to consider what the ecclesiastical law "really" was, and hence to recognize that there is a problem as to whether the Prohibition should be used when it is not strictly necessary. Just by recognizing the problem, they left the possibility open that duplication of remedies is not *always* unobjectionable. Their reasons for thinking it unobjectionable in this case therefore have the greater importance. Two such reasons are given.

(a) The factual issue -- whether the estate is really insufficient to pay legacies in addition to debts -- is "a temporal thing triable by our law" This statement is momentarily disturbing. One might suppose that if the issue is "temporal" Prohibition should lie whether or not the ecclesiastical court disallowed the plea. The truth of a *modus* or validity of a deed should be tried at common law; therefore an ecclesiastical court will be prohibited even though it is perfectly willing to let the party plead his *modus* or deed. If Gawdy and Daniel thought the condition of the estate triable at common law, should they not have considered the disallowance -- and hence the problem of duplication of remedies -- irrelevant? The answer, I think, is that they were using the "temporal" character of the issue as a reason for permitting duplication of remedies *here,* not as a reason for prohibiting even if there had been no disallowance. Their position may be stated as follows: Granting a Prohibition in a legacy suit, over which the ecclesiastical court has clear jurisdiction, is only warrantable if an error has been committed. Granting a Prohibition to correct an error is

problematic when the error could be corrected by appeal. It is justified, however, when the effect of granting a Prohibition will be to try a question at common law which (negatively) will not take the common law court out of its depth, or (positively) which in itself is more suitable to the common law than to an ecclesiastical court.

(b) Gawdy and Daniel also argued that there is a *relevant,* though not *immediate,* conflict between ecclesiastical and common law. According to Gawdy and Daniel, although the two laws agree that debts have priority over legacies, they disagree about the executor's obligations with respect to the estate remaining after debts are paid. The ecclesiastical law requires the executor to do his best by all legatees, while the common law permits him to satisfy one ahead of the others. (I.e.: A leaves £10 to B and £10 to C, and the estate after debts amounts to £10. By ecclesiastical law the executor must pay £5 to each. By the common law, he may pay B his full legacy and nothing to C. If he does pay £10 to B -- Gawdy and Daniel would presumably say -- C's legacy suit should be prohibited.) But granting that such a conflict exists -- What was the judges' purpose in pointing it out? The plea disallowed here was that the estate would only satisfy debts. The executor was not trying to excuse himself on the ground that he had used up the estate paying other legacies, as by common law standards he might. Once again, the relevance of the argument is to justify a Prohibition here notwithstanding the availability of appeals. The argument must come to saying that in such a case as this it is not unlikely that a dispute over the priority of legacies will arise later, and therefore that it makes sense to seize the moment -- to make sure now that the matter is settled in a manner acceptable to the common law and avoid the risk of another Prohibition's being sued. One might add that it would also avoid the risk of another Prohibition's being foreclosed. To see the force of this argument, imagine that plaintiff-in-Prohibition is told that his remedy is by appeal. He appeals, and the appellate court does the right thing: remands the suit with instructions to allow the plea of "No assets to pay legacies." The plea is allowed and contradicted by the other party. Upon trial it is found false, so that the executor is sentenced to pay this legacy. The fact is, however, that the executor has used up the estate paying debts plus one of several legacies. According to Gawdy and Daniel, he should now be entitled to a Prohibition to stay execution of the sentence. Since this sequence of events is not wildly improbable, it surely makes better sense to economize by granting a Prohibition now. More-

over, if a Consultation were issued at the present stage, 50 Edw. 3 might stand in the way of a new Prohibition when, in the imagined sequence of events, the executor became entitled to one.

Justices Walmesley and Warburton vehemently opposed Gawdy and Daniel, on the ground that their opinion tends to dispossess the ecclesiastical courts of their rightful appellate role. For Walmesley and Warburton, jurisdiction over a suit in principle gives the ecclesiastical court power to try any issues arising in that suit. The generally valid response to a man who dislikes the way an issue is tried is "Take your appeal." At what point this ceases to be the valid response -- so that a Prohibition becomes appropriate -- Walmesley and Warburton did not try to say. They would presumably have said what Tanfield did in Agarde v. Porter: when it is evident by judicial notice of the ecclesiastical law that an appeal could not possibly produce a result acceptable by common law standards. (Tanfield himself argued in Herdy v. Herdy, but nothing is reported of his argument except that he cited Lord Rich's case -- to what intent does not appear.) The alternative to adopting that position (which the language and examples used by Walmesley and Warburton do not exclude) is to say "Never" -- i.e., that once the ecclesiastical court has jurisdiction there is no way of making it conform to common law standards, only the ecclesiastical appellate system to insure that unreasonable rules will not prevail. To take this latter position is to reduce the Prohibition to its paradigmatic role -- regulating jurisdiction. I doubt that Walmesley and Warburton were ready to go that far.

A conclusion is not reported in Herdy v. Herdy. Civilians were called in so that the judges could be sure they understood the ecclesiastical law correctly. The civilians agreed that the disallowance was erroneous and that appeal would lie. Then, the Court being deadlocked, there was nothing to do but put off decision. The Chief Justice said the Court would stay until other judges could be consulted. I have found no further traces of the case.

In Angell's Case (1607),[11] an executor was not allowed to excuse himself from paying a legacy by pleading that he had spent the estate paying

11 T. 5 Jac. K.B. Add. 25,213, f.77b.

debts on simple contracts. The King's Bench refused a Prohibition because the creditors whom the executor had satisfied could not have recovered by common law action. Duties to pay money founded on oral agreements (as opposed to specialty debts) could not be enforced at common law against an executor, though they could be against the contractor during his life. The decision in Angell's Case need not imply approval of the ecclesiastical holding, or of a putative rule that legacies should be preferred over debts on simple contracts. (In reason and equity they surely should not be.) What the decision does imply is that common law intervention is justified only to protect common law interests: If an ecclesiastical holding is merely unreasonable, the remedy should be by appeal (or conceivably, in a case such as this one, in a court of equity.) If enforcement of the legacy would make it less easy for creditors entitled to common law actions to recover against the executor, or if it is likely to result in an unfair charge on the executor's own resources, a Prohibition is appropriate.

Carried far enough, this distinction would permit one to say that the common law has no interest in either the reasonableness of "foreign" law or its conformity, by analogy or directly, with the common law. The common law's interest, aside from regulating jurisdiction in the strict sense, is confined to protecting potential common law litigants who might be hurt by "foreign" decisions. In the context of "No assets" pleas, the distinction makes sense. In other contexts, it was not carried to its logical conclusion, for the Prohibition was frequently, if tacitly, used to enforce a "rule of reason," as well as reasonable congruity with common law standards. If the Prohibition was bound to be so used, might it not have been used here to save an executor who had done the right thing by his testator's honor? If the executor could save himself by appeal or by resort to equity, a Prohibition would save him more expeditiously. It would save him from "temporal" loss and permit disputed "temporal" facts to be tried at common law. His interests seem closer to the common law's concerns and competence than, say, those of a man sued in the ecclesiastical court to make him apologize for a defamatory remark. Yet, as we shall see, the common law would intervene to prevent ecclesiastical courts from applying their own standards in defamation cases.

We have seen signs of retreat from the courts' original confidence that Prohibition lies when ecclesiastical courts will not allow executors to

plead "No assets." Our next case, from 1624,[12] goes all the way. According to the brief report, the executor alleged that his assets were less than sufficient to pay debts. The plea having been disallowed, the Common Pleas refused a Prohibition. Two reasons are given: (a) "... Legacies are things merely determinable in that court and no other court can have cognizance thereof." (2) "... This is a thing that consists upon the judge's discretion." Unqualified, the first reason implies that the Prohibition may never be used to control the conduct of a court having jurisdiction, however indefensible its decisions are, even however detrimental to common law interests. The second reason operates as a qualification by specifying why control by Prohibition is inappropriate in *this* case.

The second reason points to a significant peculiarity of legacy suits. It is quite true that judging the sufficiency of an estate is likely to call for considerable discretion. Even if we assume that the court has a perfect inventory of the testator's goods before it, the real value of the estate is likely to be uncertain. There will be claims against it and debts owing to it. The realizability of claims of both sorts must be in some degree doubtful. Any number of legal doubts may surround the claims, and if all of those were resolved the solvency and attachability of debtors would remain uncertain. The legacy in question may be one of several large ones, a single trivial one, or anything in between. In the absence of rigid rules requiring claims for and against an estate to be realized within a certain time or fail, the decision whether to require payment of a legacy now is necessarily discretionary. It must be based on an estimate of the probability that the estate can support the particular legacy in question.

The issue, of course, is "Whose discretion?" There are certainly respects in which the common law courts seem to be the best judge. They are particularly competent to judge the one thing that is most likely to be problematic -- the validity of creditors' claims against the estate and of the executor's claims against debtors. (Cf. Norton and Sharp v. Gennet, above.) On the other hand, ecclesiastical courts could pretend to expertise in the law of wills and executors' duties. If the common law could better judge the strength of an unrealized estate, the ecclesiastical law was perhaps the better judge of an executor's conduct. Legatees must often have

12 P. 22 Jac. C.P. Harl. 5148, f.11.

had long waits and painful struggles before collecting their sometimes modest due from over-cautious or unfriendly executors. The ecclesiastical courts had a legitimate claim to know best how to balance fairness to the executor against respect for the testator's intentions and the legatee's expectations. Refusing a Prohibition does not, after all, mean condoning a particular ecclesiastical court's disallowance of what on its face was an undoubtedly good plea. It means trusting the ecclesiastical system as a whole to work out a fair solution. In some cases, I suspect, disallowing the plea of "No assets" was a response to proffered evidence, not anything so absurd as a rejection of the legal theory that debts come ahead of legacies. To the extent that such responses depended on over-strict standards for establishing facts, there was a genuine conflict-of-laws problem. But if the reason for the disallowance was evidentiary, plaintiff-in-Prohibition should say so, raising the genuine problem. Otherwise, disallowance of "No assets" must almost always have been a function of discretion -- a matter of whether or not to count debits and credits of the estate in assessing its sufficiency to bear a particular legacy in the light of others. The ecclesiastical appellate system was equipped to control the exercise of such discretion by the original court, and, if necessary, to correct true errors of law and failures to respect the principle that debts have priority.

In sum, good arguments can be made for the Court's resolution of the case of 1624. That resolution breaks with earlier cases, but carries out a trend already perceptible ca. 1600. It may be symptomatic of a more indulgent attitude toward ecclesiastical jurisdiction as the 17th century went on. On the other hand, it may only be the result of cumulative rethinking of a real problem. It may have implications beyond "No assets" cases, but such implications are not clear, since the decision was predicated on the peculiarities of legacy suits.

A couple of Caroline cases tend to confirm the 1624 decision. In the briefly reported Tomlinson's Case,[13] an executor sued for a legacy pleaded *Plene administravit* -- virtually the same thing as "No assets," that the estate had already been used up in satisfying legitimate claims against it. A Prohibition was sought because the plea was not allowed, but the Court denied it, saying simply that the ecclesiastical court was compe-

13 T. 7 Car. C.P. Hetley, 168.

tent to judge whether the estate had been fully administered. In another late case,[14] an executor was sued, not for a legacy, but for his testator's dilapidations. The testator was a clergyman, who had allegedly failed to keep up the property of the benefice, to the damage of his successor. The claim against the estate amounted to a tort claim on behalf of the corporate living and its present holder. Such suits were entirely appropriate to ecclesiastical jurisdiction. In our case, the executor pleaded that he had used up the estate to satisfy debts, and his defense was disallowed. The report only says that the Common Pleas was in doubt as to whether to grant a Prohibition, inasmuch as the subject matter of the claim -- dilapidations -- was of purely ecclesiastical cognizance. Like the first reason in the case of 1624, this doubt seems to imply the extreme rule that the common law has no way of regulating an ecclesiastical court's conduct, once its jurisdiction is clear. Fuller discussion might have added a qualification analogous to that in the 1624 case: To recognize its jurisdiction is not always to give the ecclesiastical court a *carte blanche,* but in testamentary matters it is practically advisable to give it a very free hand. Jurisdiction does not entail unlimited power to behave unreasonably. To deny that an executor's primary obligation is to satisfy debts would be unreasonable, but it is a safe assumption that ecclesiastical courts will not do so and have not actually done so when they have disallowed the plea of "No assets." The best assumption is that they are only using the discretion which they need to deal with estates, and to concede discretion is to deny oneself the privilege of scrutinizing its exercise. It is arguable that dilapidations fall more clearly within a legitimate discretion than legacies. It is easy to see that debts have a higher claim on a dead man's assets than legacies. "Natural reason" (as distinct from the common law) might not necessarily rate even debts above reparations for the dead man's wrongful neglect of property in his trust. Giving ecclesiastical courts scope in legacy cases carries some risk of injustice to creditors as against legatees. In the dilapidations case, perhaps justice has less to choose, as between creditors and the Church, or creditors and a successor whose property has been damaged.

In addition to the "No assets" cases, there are a few other significant ways of grouping cases on disallowed pleas. Let us look now at three

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14 T. 17 Car. C.P. Harg. 23, f.78b.

defamation cases. The first of the cases, Ambler v. Metcalfe,[15] is appropriate to consider immediately after the "No assets" group, for it presents a contrast. In Agarde v. Porter, Tanfield suggested that ecclesiastical courts might legitimately be prohibited when they disallowed pleas owing to head-on conflict with the common law. His concern was to show that "No assets" cases were not of that sort. Disallowing that plea, he maintained, was not the result of a difference between ecclesiastical and common law -- rather, of the exercise of a discretion appropriate to the ecclesiastical court, controllable by appeal if misexercised. In effect, Tanfield's view prevailed in the long run, though not at once, with specific reference to the "No assets" plea in legacy suits. Ambler v. Metcalfe, by contrast, presents head-on rule-conflict between ecclesiastical and common law.

A case was as follows: A man was sued for defamation in an ecclesiastical court. The alleged defamatory words were, "Thou art a lyer and a bastard and begotten without the feare of God." The ecclesiastical defendant sought to justify the words as true. *(Quoad* bastard. Nothing was said about "liar" in the discussion of the case. We may take it as if "bastard" were the only aspersion.) To that end, he pleaded that his opponent was born after his parents had contracted to marry, but before they actually married. By the common law, one born in those circumstances was a bastard. By the ecclesiastical law, he was not. I.e.: We have here a straight and well-known rule-conflict. By ecclesiastical law, marriage legitimated retrospectively any children born between contract and actual marriage. By the common law, only those born after actual marriage were legitimate (and hence entitled as heirs.) The defense (that the words were true because by common law standards the adversary party *was* a bastard) was disallowed, and sentence was given against the ecclesiastical defendant. He then appealed to the Delegates, who affirmed the sentence. Then he sought a Prohibition on the ground that the defense had been improperly disallowed. The puisne Justices of the Queen's Bench, Chief Justice Popham being absent, granted the Prohibition. (No issue was made over the delay until after sentence and appellate sentence.) The next term, the case

15 M. 38/39, H. 39, and P. 39 Eliz., Q.B. Lansd. 1099, f.38b (the good report, which alone gives the full facts and the discussion on Cokc's motion); Add. 25,198, f.210 (relating to H. 39); Harl. 1631, f.155 (relating to M. 38/39.)

was reconsidered and the decision to grant a Prohibition confirmed. The term after that, Attorney General Coke moved for a Consultation. Three judges (Popham, Clench, and Fenner) remained convinced that the Prohibition was properly granted (Justice Gawdy saying nothing), but they adjourned the case without definitive decision on Coke's motion.

Coke's argument came to a contention that since the ecclesiastical court had jurisdiction its conduct was beyond control. The Court's response, as expressed by Chief Justice Popham, requires somewhat complex statement. (a) Coke said that "bastard" will not support a common law action for slander unless spoken in such a context that someone's interest as an heir to land might be damaged. Since a common law action would not lie, Coke argued, there was simply no basis for prohibiting. In other words, he proceeded on the theory (dubious, as we shall later see) that ecclesiastical courts may be prohibited from entertaining defamation suits only when the plaintiff there could have sued at common law. That being the only basis for prohibiting, Coke maintained, it followed that the ecclesiastical court's manner of handling a defamation suit within its jurisdiction was no basis. Popham, Fenner, and Clench quarrelled with Coke on the common law actionability of "bastard." They thought (also dubiously) that "bastard" will support a common law action in whatever circumstances it is spoken, because there is always a chance that the imputation will affect interests in land. Two possible consequences follow from the judges' position on this question. (i) If words were actionable at common law, they were usually for that reason *not* actionable in ecclesiastical courts. I.e.: If "bastard" would always support a common law action, the usual reasoning would conclude that every ecclesiastical suit for "bastard" should be prohibited. If the judges meant to follow that usual line, they had a basis for Prohibition in the instant case without regard to the disallowance. (ii) It was not *always* held that when the common law had jurisdiction over particular words the ecclesiastical courts lacked it. I.e.: Concurrent jurisdiction over defamation was occasionally admitted. Suppose the judges would have conceded that "bastard" may be sued on either at common law or in the ecclesiastical court. Would they not then have a special reason for insisting that the ecclesiastical court observe common law standards -- I.e., that a defense which would be good at common law be accepted by the ecclesiastical court? It is surely arguable that uniformity is especially important where jurisdiction is fully concurrent. One could reasonably say that ecclesiastical courts are free to apply

their own rules and standards in suits that can only be brought there, but that they are not free to do so when the party has a choice of courts. It is not socially healthy for people to be able to pick the court whose rules suit them better.

(b) However, Popham expressly waived his disagreement with Coke on the common law actionability of "bastard." "Though the words will not support an action at common law," he said, "yet because by the common law he can justify and it is not punishable, therefore the Prohibition lies." Popham's rule seems clear: Any justification for defamatory words which the common law regards as valid must be accepted by ecclesiastical courts, even in cases plainly and exclusively within their jurisdiction. As Ambler v. Metcalfe actually stood, the principle has two applications: (i) In fact, the ecclesiastical court was careful not to insist on the definition of "bastard" implicit in its rule on legitimacy. Instead, it did something more portentous -- refused to accept truth as a defense. (This is clear from the sentence, the words of which are reported in order to convey this point. For retraction and denial of the defamatory remarks were not required. What was required is not reported specifically -- no doubt some nominal penance plus costs. The ecclesiastical court did not hold that untrue words -- by its standard -- had been spoken and therefore should be retracted. It held instead that *"pro temeritate sua et quia nixose dixit"* he should be punished. He was regarded as guilty of gratuitous malice and uncharitableness, regardless of whether he spoke truly or falsely.) Popham's principle obviously requires that truth be accepted as a defense to alleged slander.

(ii) However, the ecclesiastical court should presumably not be prohibited merely for *intending* to reject truth as a defense. If it appeared from the record that the alleged slanderer had in fact spoken untruly, there should be no Prohibition. It would so appear if the ecclesiastical definition of "bastard" applied. Since the judges were inclined to uphold the Prohibition, they must have been ready to insist on the common law definition. Popham did not only mean that certain general principles of defamation law, such as "Truth is a defense," are binding on ecclesiastical courts. An ecclesiastical court which accepts those general principles can still expose itself to Prohibition by failing in more particular ways to be guided by the common law.

Ambler v. Metcalfe was complicated. Despite their inclinations, the judges were in sufficient doubt to put off decision. (Reluctance to grant a Consultation on motion in a doubtful case may have entered into their hesitation.) Going on their inclinations, several observations should be made. On the surface, the case seems to point to a strong form of common law control, and to the sort Tanfield in Agarde v. Porter said was justifiable: The ecclesiastical law has a definition of "bastard" different from the common law's. It seems hard to say that one is more reasonable than the other. The ecclesiastical definition is more humane. (Though it should be noted here that the common law rule on legitimacy was sometimes pointed to with pride as "more moral," more dissuasive to adultery, than the Church's rule -- *even* the Church's.) Nevertheless -- just because the legal definitions clash -- the ecclesiastical court is not free to use its own standards in its own cases. Likewise, the ecclesiastical law holds that truth does not always justify defamatory speech. (The report of Ambler v. Metcalfe states that as a rule as straightforward as the legitimacy rule. I am not sure it was, but at any rate it was the rule implied in the actions of the ecclesiastical courts in our case, including the highest court of appeal.) There is an obvious case in "natural reason" and Christian morality that saying uncharitable things about one's neighbor is not necessarily excusable by truth. Nevertheless --just because the common law holds truth a defense -- ecclesiastical courts must do so too. Truth was a defense in common law actions for defamation causing material loss and punishable by damages; therefore it must be a defense in ecclesiastical suits, the nature and consequences of which were quite different -- rather psychological satisfaction to the offended than economic restoration.

Below the surface, however, having regard to the peculiarities of defamation law, the Court's inclinations in Ambler v. Metcalfe seem to me less stark than the above picture suggests, and basically sensible. First, one must take account of overlaps in the field of defamation, even short of the special problem of strictly concurrent jurisdiction noted above: A. calls B. a bastard in a context such that the defamation is only actionable in an ecclesiastical court. C. calls D. a bastard, and because D. happens to be heir-apparent of an estate a common law action will lie. To let the legal definition of words and rules on justifiability produce different results in circumstances identical except for the slight difference of context that drives B. to one court and D. to another is to admit a pretty jarring

anomaly into the legal system. Even in less close cases, it was often problematic whether a suit belonged in one court or the other. In sum, the field of defamation was an exceptionally shared field, and hence an especially apt one for uniformity.

Secondly, "Truth is a defense to slander" is one of those rules of law that expresses a pretty fundamental moral choice -- choice, not axiom. The opposite rule can also be defended by reason, but precisely because both rules are defensible a society has to make up its mind which it prefers. As it were: Shall we be the kind of society that encourages and protects truth-speaking, even when that means immunity for certain kinds of anti-social conduct? Or shall we be the kind of society that favors charity and considerateness even though that entails some compromise of the generally valid principle that people may and should speak the truth? This kind of choice is not quite like the choice among mere rules of law because it is so close to the choices individuals make among "life-styles." Visceral expectations are influenced by legal choices of this character as they are not by choices as to what shall constitute a valid conveyance or the like. A man who says something malicious and insulting but true may feel justified in a genuinely moral sense if the legal institutions surrounding him suggest that truth is always a defense against a charge of slander. It may be damaging to social morale for such a man to find himself in a court where his understanding of the law and the morality behind it turn out to be wrong. In short, within a national system, conflicting attitudes toward truth as a defense are more dangerous than routine conflicts of law, and uniformity dictated by the senior member of the system has much to recommend it. Insisting on the common law on that kind of question is in a way closer to insisting on "reasonableness" than to upholding the common law when and insofar as ecclesiastical law conflicts with it directly.

Once one considers the realities of defamation law, the same can be said of the common law definition of "bastard." A man who calls another a bastard is hardly thinking of the legal meanings of the word. The common law meaning was the same as the everyday -- simply "born out of wedlock." That is what a speaker would ordinarily mean. It would be hard to let a man be punished for saying truly what he meant to say (assuming truth to be a defense.) An ecclesiastical court which followed the ecclesiastical meaning (as the court in Ambler v. Metcalfe did not) would

in reality do something worse than contradicting a common law rule. It would in effect make use of a legalism to stick a man with liability for defamation. That would be more significant as a violation of a common law *policy* than as a violation of a common law *rule.* For the common law typically resorted to legalism for just the opposite purpose -- to avoid attaching liability for words. The common law courts tried to find a "favorable sense" of allegedly defamatory words (often a sense much more favorable than what the speaker obviously meant.) The pedantry that effort engendered served a valuable end -- to discourage defamation-happy people from quarrelling in the courts. It would make sense to insist that ecclesiastical courts follow the general bent of judicial policy as the common law set it in an area shared between the two systems. Again, to insist on that is more like insisting on vague "reasonableness" than like denying the ecclesiastical courts their own rules in their own cases.

Two late-Jacobean cases may be considered alongside Ambler v. Metcalfe, since they also involve disallowance of attempts to justify defamatory words. In Webb v. Cook,[16] the ecclesiastical suit was for saying the plaintiff had a bastard. The defendant confessed speaking the words and justified by pleading that two Justices of the Peace had adjudged the plaintiff reputed father of a bastard under the statute of 18 Eliz., c.3. (The act authorized J. P.s to make such findings and to charge reputed fathers with support of their offspring.) A Prohibition was granted *(nisi,* according to Lansd. 1080, but there is no report of any reconsideration or change of mind) because the justification was not allowed. Apparently the Court was in agreement, though Lansd. 1080 gives a hint of doubt on the part of Chief Justice Montagu. The defamatory words in a case two years later[17] were that the plaintiff had a bastard and that a named parish was charged with his maintenance. Again the justification that the plaintiff had been adjudged reputed father was disallowed; again a Prohibition was granted without dissent. I shall discuss the two cases together since the issue was the same: Were the ecclesiastical courts bound to accept administrative findings of reputed parentage as conclusive proof that the words were true?

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16 P. 17 Jac. K.B. Croke Jac., 535 (dated T. 17); 2 Rolle 82 *(sub. nom.* Cooke's Case); Lansd. 1080, f.74b: Add. 25,213. f.232.

17 M. 19 Jac. K.B. Harg. 30, f.114b.

There was no discussion in these cases as to whether the ecclesiastical courts had to accept truth as a justification and no inclination to assume that they would not. Indeed, a remark in one report of Webb v. Cook (Rolle) shows that the judges took it for granted that truth was as good a defense in the ecclesiastical court as at common law. Justice Houghton said that a Prohibition would *not* be granted if the ecclesiastical court had disallowed a *general* justification on grounds of truth -- i.e., if the defendant had simply pleaded that the words were true. For then, Houghton said, the remedy for the improper disallowance would be by ecclesiastical appeal. In other words: Truth being a good ecclesiastical defense, disallowing the justification amounts to an error by ecclesiastical standards, not correctable by Prohibition -- in accord with "Tanfield's principle." The error in the instant case, however -- unwillingness to take the Justices' finding as conclusive -- was not to be considered a violation of ecclesiastical standards. (Why not? Could one be sure that an ecclesiastical court of appeal would back up the original court on what amounted to a factual presumption? The answer, I assume, is that one could not be confident that an appellate court would reverse, even though it might, just because there was no notorious rules or familiar experience on which to base a prediction.)

In Webb v. Cook (according to Lansd. 1080), Justice Houghton put the following case by way of dictum: A sues B for the defamatory word "bastard." B. pleads a common law verdict (as in a property suit) finding A. a bastard. If the plea is disallowed, Prohibition lies. Houghton presumably thought the instant case close enough to that model to justify the same result. Chief Justice Montagu seems to have doubted the model case. ("It seems otherwise, per Montagu, where the slander is merely spiritual.") It is from his doubt about the model, which seems the stronger case, that I infer Montagu's possible doubt in Webb v. Cook itself. His doubt may have gone to the essential point: Whatever control the common law may exercise over the rules of law applied in ecclesiastical courts, does it follow that mere results or established facts outside the ecclesiastical system have to be given any particular weight? Ecclesiastical jurisdiction over defamation is "merely spiritual," a matter of correcting un-Christian conduct, a purpose too far removed from those for which verdicts or Justices' findings are made to require carrying established facts over from one sphere to the other. It is more likely, I think that by "merely spiritual" Montagu meant to distinguish a defamatory expression such as "bastard,"

which, if believed, could affect secular interests even though punishable in the ecclesiastical court. He agreed with Houghton's case, but warned against extending it so far as to say that any truth established by verdict must be taken as true by ecclesiastical courts for the purpose of justifying defamation.

The important problem raised by Houghton's model is how close it is to Webb v, Cook. Verdicts were a singularly solemn and conclusive method of establishing the truth. The anachronistic term "administrative" may be applied to Justices' findings because they were statute-based, did not involve juries, and were designed to alleviate a contingent social problem in a fair and expeditious way. That is not to say they were unjudicial in form, procedurally unfair, or less likely to be true than other kinds of fact-finding. (There was a right of appeal to Quarter Sessions, for example.) Still, they were "administrative" in that they did not serve the ultimate purpose of law -- to put men at peace, to conclude by "art" the differences that "nature" would leave festering -- but the shorter-run ends of welfare and regulation. The specialness of the verdict comes not so much from its putative reliability as from its association with the need for finality, for feigned certainty in the absence of knowledge. Is there any need -- is it more a gain than a loss -- to extend the special aura of conclusiveness to other proceedings which the legislature invents from time to time? That is an issue worth reflection. Whether the judges in our cases were worried by it does not appear. In both cases, they went the way of common sense, stopping the reinvestigation of matters already investigated, foreclosing men adjudged bastard-makers from vindicating themselves and casting aspersions on the local authorities. They favored the credit and authority of statutory proceedings, for which special claims could always be made because the putatively unanimous will of the community lay behind them and all courts owed them respect.

In the second of our cases (not, so far as appears, in Webb v. Cook), much was made of the fact that the Justices of the Peace had only found, as they were required to, that the ecclesiastical plaintiffs were *reputed* fathers of bastards. The defamatory words would be true, and so justified, only if the plaintiffs were *really* fathers of bastards. Why should the ecclesiastical court not be free to regard the reality as an open question, however bound it was as to the reputation? Why should it not be free to regard men's bad reputation as rebuttable by any evidence of the truth

that might be forthcoming -- conceivably evidence not available when the J.P.s made their determination? Should the ecclesiastical court be forced in effect to lower its standard of what is defamatory -- i.e., to hold that it is not defamatory to say that one who is certainly reputed to have sired a bastard actually did so? In our case, the judges rejected such worries as "not material, for there is no way to know a father but by reputation. The mother may be certainly known." That seems to me a sound answer. The J.P.s were strictly speaking only charged with establishing reputed fatherhood and could presumably infer it from reputation in the literal sense. But they were surely willing and obliged to listen to evidence bearing on actual fatherhood -- i.e., to anything that would rebut reputation. Practically, an ecclesiastical court investigating real fatherhood would be going over travelled ground. At the same time, if the ecclesiastical court chose to be strict and exclude evidence of reputation it might run a high risk of contradicting the J.P.s and weakening their authority. In the end, the considerations which I suspect were important in Ambler v. Metcalfe probably influenced the outcome of the later cases too: An inclination to check defamation suits wherever they occurred, an inclination both to indulge and restrain legalism to that end. Not falling into the gap between real and reputed fatherhood is an instance of restraining it.

The reports of Webb v. Cook suggest one further angle. They emphasize that the ecclesiastical court accepted the defendant's confession (that he spoke the words), while rejecting his justifying plea. That emphasis perhaps reflects an attempt in the surmise to make out that the ecclesiastical court was unfair. If it was going to refuse the plea, should it not have ruled out the confession, putting the burden of proof that the words were spoken on the plaintiff? There is no discussion of this point. If it was actually made, there is a sense in which it seems odd. At common law, a man could confess and avoid. His plea in avoidance was subject to demurrer. If his justification was held legally bad on demurrer he was not allowed to retract what he had confessed and go to trial. What had the ecclesiastical court done in our case but rule a justification insufficient in law and stick the pleader with what he admitted to be true by the act of claiming it was justified? If an objection can be made to the ecclesiastical court's conduct on this score, it must be based on the premise that in one respect ecclesiastical courts were not free to imitate the common law. Realistically, such a contention might have merit. Would the defendant have had an opportunity to argue for his plea at all comparable to that

which was available upon demurrer at common law? Would he have known that the confession would be held against him if the plea was disallowed with anything like the certainty with which men could be expected to know about the rules of common law pleading? (For that matter, was the ecclesiastical court right by ecclesiastical standards?) Nothing having been said about these ticklish questions, one may suspect that the judges were pleased to settle the case without getting into them.

An incidental point in the second of our cases adds a final dimension. When the Prohibition was being discussed in that case, it was said that the ecclesiastical plaintiff had in fact appealed to Quarter Sessions before the words were spoken, where the original finding by the J.P.s was reversed. The Court said that a Consultation would lie on those facts, but that they must be pleaded. The judges would not consider a Consultation on motion, or denying the Prohibition, on the basis of informally ascertained facts outside the record. Perhaps the bias against quarrelsome defamation suits is reflected in their unwillingness to cut procedural corners. The other point to note is that Consultation would be granted, upon due pleading, if the words were spoken after the reversal at Quarter Sessions -- *not*, presumably, if they had been spoken before. (The importance of dates may have been one reason why full pleading was insisted on.) May 1, A. is found reputed father. June 1, B. calls him bastard-maker. July 1, Quarter Sessions reverses the earlier finding. A. now sues B. in the ecclesiastical court and B's plea is disallowed. The Prohibition will stand. Fair enough, in a sense: When he committed the slander, B. had a good excuse. But that result is a little hard on A. By the higher record -- Quarter Sessions -- the truth is that he is not so much as the *reputed* father of a bastard. Yet there is no way he can vindicate his honor. The ecclesiastical court is bound to look to B.'s excusability when he spoke. It is not free to take the position that slanderers speak at their own risk -- justifiably if they speak the truth, but only if it appears to have been the *real* truth by the most conclusive evidence *now* available (granting that official records are conclusive.) If a case of this sort had arisen, what was said by the way in our report could possibly be questioned.

Prohibitions were granted because of disallowed pleas in two other defamation cases. In both, it seems to me, pretty good arguments can be made against prohibiting. (The reports are too brief to show arguments *pro* and *con.)* I am inclined to see in both, as in the preceding cases, a

policy of favoring when possible those who were hauled into court for words. In Philips v. Piper *et al.,*[18] a man and wife sued the churchwardens and sidemen of their parish for saying that the plaintiffs kept a bawdy house. The defendants admitted so saying, but pleaded that they did so in the line of duty -- viz. by way of presentment under oath at the time of visitation. (When bishops and their officials visited parishes under their authority, it was customary to swear in the churchwardens to give information about moral offenses, in the manner of a presentment jury.) A Prohibition was granted on the surmise that the justification was disallowed. A motion for Consultation was denied *per Curiam* the next term. It seems to me that two doubts can be raised about this Prohibition: (a) The ecclesiastical decision does not seem flagrantly unreasonable, taking it to be that a false presentment is defamatory. (b) Granting that it would be more reasonable to regard presentments as immune from defamation-liability (deliberately untrue ones being under pain of perjury), the presentment was a purely ecclesiastical act. Granting (as in the above cases) that ecclesiastical courts are concluded by statutory paternity-findings, should they not be free to make their own rule as to whether defamation can be committed by making a false accusation in an official *ecclesiastical* capacity? Surely their liberty to do so can be defended, even if it is true that a common law action for defamation would fail in analogous circumstances (as if grand jurors present for a felony and the presentee is acquitted and sues members of the grand jury for slander.) However, assuming the common law rule to be clear in that case, there is an advantage in uniformity. It would be confusing for men called on to perform apparently similar public duties to be subject to the risk of defamation in one case and not in the other. A grand juror might be over-cautious because of an unfortunate experience as a churchwarden. Finally, the decision in Philips v. Piper may have been influenced by the nature of the defamatory words. "Bawdy house keeper" was arguably actionable at common law (because keeping a brothel, unlike fornication *per se,* was a secular misdemeanor) with the consequence that the expression was either not actionable in ecclesiastical courts or concurrently actionable in both jurisdictions. The brief report suggests that the occasion on which the words were spoken, rather than the words themselves, was the *ratio*

18 T. 44 Eliz. K.B. Add. 25,203, f.556b.

decidendi. But if there was doubt about the ecclesiastical actionability of the words, or if jurisdiction was concurrent, common law scrutiny over the justifying plea is perhaps more defensible. Certainly it is more understandable.

In Howell v. Come,[19] two men with a quarrel arising from, or resulting in, defamatory words agreed to arbitration. The report does not say whether they so agreed after one had commenced a suit against the other or before any litigation. In any event, the arbitrator made an award. One party began, or persisted in, an ecclesiastical suit. The other party pleaded the arbitrator's award and sought a Prohibition on surmise that the plea was disallowed. The two judges whose opinions are reported, Winch and Chief Justice Hobart, favored a Prohibition. There is no report of the reasoning. The disallowance does not seem to make sense off-hand, but, as usual when that is true, one may wonder whether it would survive appeal. Going a step deeper, should ecclesiastical courts not perhaps be free to hold that ecclesiastical defamation is not by nature arbitrable? So holding would seem colorable because of the criminal character often attributed to ecclesiastical charges of defamation: May an offended individual give away the Church's right to punish a slanderer? Perhaps he should be held to have given away any right to litigative costs by his agreement to abide by arbitration, but so far as appears our case was about the substance of the suit, not costs. On the other hand, the considerations brought out above strongly argue for the Prohibition: Defamation was a shared field, where uniformity was desirable in itself. (Presumably an action for words at common law would be barred by a plea of arbitrament.) Moreover, judicial policy was dissuasive toward vexatious suits for hot words. Surely the last way to serve that policy is to allow second thoughts to people who have patched up their feud to the extent of agreeing not to afflict the courts with it.

The defamation cases just discussed do not in reality present hard-and-fast rule-conflicts between ecclesiastical and common law. In Ambler v. Metcalfe, the ecclesiastical court did not actually insist on its definition of "bastard," though its right to do so had to enter into discussion of the case; some ecclesiastical courts may have held that truth was no defense to the

19 M. 16 Jac. C.P. Harl. 5149, f.245.

charge of defamation, but we have seen positive reason to doubt that was a generally understood and consistently applied rule; in a couple of cases, ecclesiastical courts refused to accept findings of reputed fatherhood as concluding them in defamation cases, but such decisions can hardly be taken as reflecting ecclesiastical *rules* (as opposed to *ad hoc rulings* on a rather ambiguous question of logic and policy.) Our next group of cases, involving the legal capacity of women, provides the strongest example of truerule-conflict.

In Glanvyle v. Newport (1600),[20] the Common Pleas was divided over whether the ecclesiastical court should be permitted to apply a rule straightforwardly at odds with the common law. In this case, a woman sued for defamation, viz. calling her "whore." The defendant pleaded her husband's release of all actions. A Prohibition was sought because that defensive plea was disallowed. The effect of a Prohibition would be to enforce the common law rule that the husband's release binds the wife. Two Justices opposed the Prohibition and one favored it, Chief Justice Anderson remaining silent. The final decision was to invite a demurrer -- i.e., to grant the Prohibition only in order that the issue might have full-dress debate. Since there is no report of further proceedings, there is no way of knowing whether the parties accepted the invitation, or whether plaintiff-in-Prohibition preferred to drop his suit rather than try to persuade a divided court.

Justice Glanville thought that the husband's release must bind the wife even in an ecclesiastical suit for defamation. ("... for against the husband's release it is not reason that the wife should proceed in the suit there.") Moreover, he said, "such a case was so ruled in 14 Eliz. in the King's Bench when I was a reporter there, as other students are now here, for it was said there that we are all subjects and are held in both laws to take notice of such discharges."

Justice Kingsmill opposed the Prohibition, "for the suit is for the defamation of the wife's good name, for which there will be no pecuniary recompense, but restitution of credit." The rule that the husband's release binds the wife, that is to suggest, is a function of the husband's property

20 H. 42 Eliz. C.P. Lansd. 1065, f.42b.

in his wife's goods. His release would block the wife's action for damages because releasing the possibility of damages is tantamount to conveying property which he has in her right. The wife has no interest in damages or specific property apart from her husband's, because he has legal authority to dispose of her goods. But, because the wife lacks full legal personality *qua* property-holder, it does not follow that she is a non-person otherwise. It does not follow that she has no separate interest in her good name. There is no reason to foreclose her from vindicating it by the non-pecuniary sanctions of retraction or penance, whether or not the husband's business concerns have accidently led him to release actions to his wife's slanderer, and whether or not he values her good name as much as she does. (It is of course not hard to imagine domestic situations in which a husband would be content to see his wife's whoredom uncontradicted.)

Justice Walmesley opposed the Prohibition more vehemently and for different reasons; "See the statute, that in the case where the suit is in the Court Christian for cause of defamation, Prohibition will not be granted, and that is a mortal offense, which no one may release except only God." The statute that Walmesley refers to is *Circumspecte agatis* (13 Edw. 1). While it is true that the statute affirms ecclesiastical jurisdiction over defamation, it is difficult, though not utterly implausible, in the light of numerous cases, to argue that defamation suits are simply unprohibitable (save -- to make an exception which Walmesley would *perhaps* not have disputed -- when the same defamatory words are actionable at common law.) The difficulty of so arguing, even in cases where there was no common law remedy for the words, was pointed out by Glanville in reply to Walmesley: "...the statute of *Circumspecte agatis* gives to the Court Christian as great authority to hold plea in case of tithes as in case of defamation, and yet there if the defendant pleads a lease and it is proved by the testimony of only one and the judge of the spiritual court disallows the proof because it is not by two, there is no doubt but that Prohibition lies." Walmesley's other point seems to be that the ecclesiastical court might, even ought to, disallow the wife's own release-- *a fortiori* the husband's. Again, Walmesley's point is plausible, though probably not generally acceptable. It comes to saying that a private ecclesiastical suit for defamation (like, one might note, a Prohibition) is not strictly a private suit, but a criminal charge -- in ecclesiastical terms an "information" of a sin, which, for the slanderer's own good and that of the Christian commu-

nity, ought to be punished even though the offended party does not insist. Here too, Glanville expressly contradicted Walmesley: "That is true [that the offense may only, in strictness, be released by God], but yet if an offense is committed against me I may remit it as to me." On this point, Kingsmill would probably have agreed with Glanville, for his position, in contrast to Walmesley's, was only that the rationale of the common law rule rendered it irrelevant in this case -- whether or not ecclesiastical claims for defamation were generally prohibitable or releasable.

In Stevens v. Totty (1602)[21] the Queen's Bench was confronted with a similar case. Here again, the ecclesiastical court's alleged fault was disallowing a husband's release in a wife's suit. Two circumstances distinguish this case from Glanvyle v. Newport: (a) The wife was suing for a legacy rather than for defamation. (b) The husband and wife were "divorced." No mention was made of Glanvyle v. Newport. It was assumed in Stevens v. Totty that apart from the divorce the ecclesiastical court would be obliged to let the husband's release bind the wife. That assumption repudiates any theory to the effect that ecclesiastical courts may apply whatever rules they like in cases within their jurisdiction. It does not in any way repudiate Justice Kingsmill's position in the earlier case, for there is a clear difference between legacy and defamation. In releasing a legacy left to his wife, a husband in effect conveys property which is his during the marriage. Such a release falls within the rationale of the common law rule as Justice Kingsmill understood it. Even Justice Walmesley's stronger position in Glanvyle v. Newport was confined to defamation in its terms and is therefore consistent with the opinion of the Queen's Bench in Stevens v. Totty.

Consequently, the argument in Stevens v. Totty turned entirely on the "divorce." There were both factual and legal uncertainties. When the case was first argued, it was assumed that the husband and wife had been divorced *a mensa et thoro* by ecclesiastical process because of the husband's adultery. I.e.: Although the marriage had not been adjudged void

21 T. 44 and M. 44/45 Eliz. Q.B. Add. 25,203, f.548b and 609b (the best report); Croke Eliz., 905 *(sub. nom.* Stephens v. Frances Totty, M. 44/45); Add. 25,213, f.35 (brief, but the only report to show there was a demurrer, T. 44); Noy, 45 (P. 44, misdated, since the report relates to the final disposition.)

ab initio (annulled, as we would say), the partners had been fully released from all conjugal duties and forbidden to cohabit without license from the ecclesiastical court. Later, however, the judges inspected the record and found that the ecclesiastical sentence was weaker than that: The award was only that the partners be separated from bed and board until they were reconciled and agreed to cohabit again, and it did not appear of record what the reason for the award was. The difference between the stronger and weaker kind of "divorce" was probably not decisive for the outcome of the case, but reinforcing. Upon the first argument, when they were assuming the stronger kind, all the judges were somewhat uncertain, but two of them (Gawdy and Fenner) leaned clearly in favor of the Prohibition. In the end, the whole Court favored the Prohibition, probably even on the assumption that the divorce was as strong as it could be, short of annulment.

The problem concerning the "divorce" may be analyzed into the following questions: (a) What is the exact meaning in ecclesiastical law of a "strong" divorce *a mensa et thoro?* (b) Apart from its exact meaning in ecclesiastical law, does the common law in its own sphere (with respect to the wife's capacity to maintain common law actions and hold property separately) attach any consequences to cessation of the full, normal marital relationship? (c) Exactly how are these questions relevant for the case at hand?

To help answer the first question, civil lawyers were called in. Initially, the common lawyer Dodderidge argued against the Prohibition (upon demurrer, but there is no report of the arguments by counsel *contra.)* Although unpersuaded by Dodderidge, Gawdy and Fenner did not resist Justice Yelverton's express request that civilians be heard. (The Chief Justice was silent if he was present.) According to the best report, two civilians argued on each side. On the basis of their argument, the Court was persuaded that even a "strong" divorce does not dissolve the matrimonial bond itself -- i.e., so that the parties may remarry. If they had been persuaded the other way, even Gawdy and Fenner would no doubt have agreed that the husband's release would not affect the wife. It is surprising that it was thought worth discussing whether the divorce was full enough to permit remarriage, for we tend to assume that divorce in the modern sense was simply not recognized by the Church of England. Dodderidge, however, argued that the prohibition on remarriage after a

"strong" divorce, at any rate, was a comparatively recent innovation. The arguments of the civilians are not reported at large, but it would appear that Dodderidge found two civilians to back him up.[22]

On the second question, Dodderidge argued that the common law for its own purposes distinguished the matrimonial bond as such from the "society" of marriage. When the "society" is dissolved, whether by a sentence of divorce (perhaps even a "weak" one) or by such accidents as the husband's exile, the wife is given separate legal capacities which she would otherwise lack. The Court was not impressed by this argument. The judges thought that divorce can only restore separate legal capacity to the wife if it is an absolute dissolution of the bond of matrimony by ecclesiastical law, though they had to concede, on the basis of authority cited, that other circumstances, such as the husband's exile, might restore her separate legal capacity. To the extent that instances could be cited in which a once-married woman had been restored to single status after divorce, the judges preferred to assume that the divorce was a true annulment.

That Dodderidge made a separate argument on the third of the questions above is less manifest, but I think it is visible in one sentence. ("And [the opinion of] those in the spiritual court, who best know the effect and force of this divorce, is that the release is not allowable.") If that sentence contains an argument, it must be the following quite sensible one: Whether or not the partners could remarry, the ecclesiastical court is enti-

22 The passage on this point goes as follows: "And it has been used that after such a divorce the parties have married others, which Waterhous, Clerk of the Crown Office, and he said that it was in question in a Yorkshire case whether after such a divorce the woman may be endowed or not, and it was held that she may, but he said that of late time after such divorce the parties have been forbidden to marry any other." There is obviously an omission in the MS. (not appearing as a hiatus or illegible word.) Perhaps Waterhous was consulted and is the speaker, instead of Dodderidge, for the rest of the passage; perhaps the clause should say "which Waterhous ... confirmed (agreed to, or the like)" after which Dodderidge continues. Conceivably there was only a reference to a case involving Waterhous. The substance is in any event clear. If a woman could recover her dower after a divorce (as if her ex-husband were dead) there would be an excellent argument against letting his release affect her, even if the partners could not remarry. (Such, in the context, would seem to be the significance of the Yorkshire case. A more predictable issue about divorce and dower would be whether land acquired by the husband after the divorce is subject to dower. A holding that it is -- i.e., that the woman "may be endowed" -- would argue for the indissolubility of the matrimonial bond.)

tled to hold that for *other* ecclesiastical purposes, such as this legacy suit, the divorce (even, perhaps, in the "weak" sense) makes the wife a separate legal person again. In other words, the very act of disallowing the release construed the meaning of the divorce to one intent, however it should be construed to others. To that intent, it is irrelevant what further consequences ecclesiastical law would attach to the divorce, what the general theory of such divorces is, or, on the premise that the ecclesiastical construction is decisive, how the common law treats divorces for its own purposes. Without answering this argument, the court rejected it. The judges' implied position was that uniformity should prevail -- that the wife should not escape her husband's release in a legacy suit if she ought not to be treated as a separate person in analogous common law situations. In order to decide how a divorce should be treated in *all* situations, it was thought necessary to know how the ecclesiastical law construed the divorce in general, with particular regard to the remarriage test. Seeing that by the better ecclesiastical opinion there was no dissolution of the *vinculum matrimonii,* the judges held that the ecclesiastical courts had no power to determine the effect of their divorces to miscellaneous ecclesiastical intents.

The Court's opinion in Stevens v. Totty was less humane than its final action. The holding obviously invites abuse: A husband who had made life intolerable for his wife and in consequence legally forfeited the right to have anything to do with her could nevertheless defeat her interests from motives all-too likely to be spite. Realizing the danger, the Court examined the executor who brought the Prohibition. The examination revealed that the legacy was large and the release made for little or no consideration. Having every reason to suspect mischievous collusion, the Justices told the parties that a Consultation would be awarded unless they would compound. A clerk of the Court was assigned to work out a settlement with the parties, which he did. The flexibility characteristic of Prohibition proceedings served a good purpose in this case.[23]

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23 One report (Noy) has Popham saying that unless the parties would compound a partial Consultation would be granted -- *ita quod* the plea of the release be allowed. One of the civilians who argued, Dr. Crompton, then said that the wife would certainly recover if such a Consultation were issued. I take it that the Queen's Bench judges intended that effect, since their purpose at this point was to protect the wife against the husband's fraudulent deal with the executor. The point is of technical interest, though moot (because the parties in fact settled.) The partial

Glanvyle v. Newport and Stevens v. Totty meet in the later case of Motam v. Motam.[24] There, a wife sued for defamation after a divorce similar to that in Stevens v. Totty. (Counsel made contradictory statements about the exact terms of the divorce. One side said it was *a mensa et thoro et mutua cohabitatione,* while the other side said the decree contained the additional words *de omnibus matrimoniis obsequiis.* Nothing in the arguments depends on the difference. In any event, the divorce was stronger than the actual divorce in Stevens v. Totty.) Sentence was given for the wife and costs awarded to her. The ecclesiastical defendant then appealed. Only at that point did the divorced husband release, The defendant pleaded the release before the appellate court, which disallowed it, remitting the case to the lower court for execution of the sentence (penance) and costs. According to Rolle and the virtually identical MS., the judges were plainly inclined to deny the Prohibition but withheld decision in order to advise further. According to Bulstrode, they did deny it. Stevens v. Totty was cited and distinguished[25] on essentially the grounds taken by Justice Kingsmill in Glanvyle v. Newport (though not so as to exclude Justice Walmesley's still stronger position in that case): A legacy is a material interest, with respect to which husband and wife are inseparable, while the wife's interest in her good name is intrinsically individual. The costs gave the award a property aspect, but the Court discounted that feature because the costs were only an appurtenance to the principal matter, covering only the expenses of litigation -- i.e., were not damages. An additional argument by the wife's counsel was not mentioned by the

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Consultation would "save face." I.e.: The judges would not decide that the plea should be allowed but still, on grounds of equity, flatly overrule the Prohibition. At the same time, apparently, sentence could be given for the wife without violating the condition in the *ita quod* Consultation. I take that to mean that the ecclesiastical court could fulfill the condition by allowing the plea, then proceed to consider whether the release was obtained by fraud. The other reports do not intimate that the threatened Consultation was partial.

24 M. 14 Jac. K.B. 1 Rolle, 426; Harl. 4561, f.266; 3 Bulstrode, 264 *(sub. nom.* Motteram v. Motteram.)

25 The fallibility to which the use of judicial precedents was subject in the 17th century is nicely illustrated here. Counsel arguing for the Prohibition (Coventry) cited Stevens v. Totty, describing it correctly. The "precedent" (record) was physically shown to the Court, but something was missing, for "the precedent did not comprehend the divorce." Justice Dodderidge came to the rescue: He "said that he well remembered the case when it was argued, that there was talk of a divorce *(que parlance donque fuit del divorce)."* Fifteen years earlier, Dodderidge himself had argued at length on the significance of the divorce. Memories dim, and authority often depended on memory. (Rolle/MS. Bulstrode has Dodderidge remembering Stevens v. Totty more precisely.)

judges -- that the ecclesiastical court of appeal in any case had no power to take the release into account, since such appellate tribunals are confined to reviewing the lower court's actions, and the release did not exist at the time of the original sentence.

Motam v. Motam is formally distinguishable from Glanvyle v. Newport because there was a divorce in the former but not in the latter. The divorce was not decisive in the resolution of Motam v. Motam, however. The case should be taken as deciding that the husband's release will not bar the wife's suit *for defamation.* As such, it follows an earlier Jacobean case in the King's Bench, Fenton v. Edwards.[26] There, a woman sued separately for defamation, and the plea of her husband's release was disallowed. From the Bar, Yelverton said that he had been of counsel in such a case where a Prohibition was granted, and Richardson urged that the prospect of costs' being awarded gave the husband a releasable pecuniary interest. But counsel got nowhere. Justice Williams, noting that the woman's very capacity to sue without joining her husband was a peculiarity of ecclesiastical law, took the position that the ecclesiastical court was entitled to decide what effect the release should be given. ("Since the action originally belongs to their court, and you plead your release there, you must be adjudged by their law.") Williams added that when he was a Serjeant the Common Pleas would not grant a Prohibition in such a case. Nor would the Common Pleas do so now, Chief Justice Fleming added. The Prohibition was accordingly denied in the instant case.

A year later, however, Coke's Common Pleas made a flatly contradictory decision in the identical case of Vincent v. Genis.[27] If Williams and Fleming in Fenton v. Edwards were right about former Common Pleas practice, then that court reversed itself. The position taken by Glanville in Glanvyle v. Newport prevailed. In Vincent v. Genis, the wife's suit was for "whore." The husband's release having been disallowed, a Prohibition was unanimously granted. Coke, speaking for the Court, cited what he called the "like case" of Bosome v. Sletter from the time of Chief Justice Wray (1574-1592) in the Queen's Bench, taking no note of more recent precedents in that court precisely in point. In Bosome v. Sletter as Coke

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26 M. 7 Jac. K.B. Add. 25,208, f.73.
27 M. 8 Jac. C.P. Harg. 15, f.227.

describes it, a conveyance of a parsonage came in question collaterally in an ecclesiastical suit. A Prohibition was granted to prevent the ecclesiastical court from holding that the parsonage passed by deed, without livery of seisin. In other words, the common law intervened in that case to enforce a fundamental and notorious rule of real property. Coke made no distinction between that form of intervention and enforcement of a husband's release against a wife's suit for "spiritual" defamation.

Finally, the King's Bench took one more turn. In Motam v. Motam, that court held expressly that a husband may no more release the costs recovered by his wife in a separate suit for defamation than the action itself. That position was reversed in a Caroline case,[28] without any reported reference to Motam v. Motam or other earlier cases. In this case, the husband's release was only pleaded upon appeal from a sentence, plus costs, in the wife's favor. (Whether the release was made before sentence does not appear.) The Court held that the release ought to have been allowed *quoad* the costs, though not *quoad* any penance or other punishment imposed on the slanderer. A Prohibition *nisi* was granted to that end.

The reasonable rule that a husband may not release his wife's ecclesiastical suit for defamation had its best moments in the Jacobean King's Bench. A few cases on other subjects tend to confirm that that court was less ready than others to impose a rather mechanical conformity with the common law on other jurisdictions. One case, Wise v. Wapthorp,[29] involved the legal capacities of married women. In this case, a man made his wife executrix, left legacies, and died. After the wife had remarried, a legatee sued her without joining her new husband. She pleaded that as a married woman she ought not to have been sued alone, and a Prohibition was sought when the ecclesiastical court disallowed the plea. The Prohibition was denied, 3-1, the aged Chief Justice Popham not participating. Justice Williams doubted whether the ecclesiastical law had been correctly applied, but held that if it had not been the remedy was by appeal. The matter being within ecclesiastical cognizance, there was no warrant for insisting on common law standards. Justices Yelverton and Tanfield

28 T. 7 Car. K.B. Croke Car., 222.
29 P. 4 Jac. K.B. Harl. 1631, f.302.

agreed. Justice Fenner dissented, holding that intervention is appropriate "if they proceed contrary to the law and reason" (law and reason, for Fenner, being defined by common law standards as to women's separate capacity.) The decision seems strong, inasmuch as the husband could be held responsible for his wife's executorial duties at common law (i.e., for debts of the estate.) His liabilities could be affected, say, by the wife's failure to assert the estate's incapacity to support legacies. Even on Williams's assumption that the ecclesiastical decision was correctable by appeal, non-intervention in such circumstances was generous.

A case from the next year is similar.[30] Here, a man made his wife and son executors and left a legacy to his grandchild. The grandchild, "to spare his father and put all the charge on the wife," sued her alone for the legacy. She was not allowed to plead that there was a co-executor, who had joined her in proving the will and ought to have been joined in the legacy suit. However unreasonable or bad in ecclesiastical law the disallowance may have been, the King's Bench refused to grant a Prohibition. The reported reason was simply that legacies are of exclusively ecclesiastical cognizance.

The non-interfering spirit of the Jacobean King's Bench is again exemplified in a case of 1608.[31] A man made his wife executrix and left £60 to his daughter. The testator further willed that the executrix might retain the £60 so long as she and the daughter agreed, and that if they agreed the money should be delivered to the local Overseers of the Poor for safekeeping. The money was accordingly delivered to the Overseers, who made a signed and sealed receipt. The daughter subsequently sued the executrix for the legacy. The executrix tried to plead the above facts and the Overseers' acquittance, but was not allowed to. A Prohibition was denied by Justices Yelverton, Williams, and Croke, alone in court. They did not in this case rely on the generality that legacies were the ecclesiastical courts' business. Three circumstances making the ecclesiastical court's conduct reasonable were mentioned: (a) If the executrix could excuse herself, the daughter would have no means of recovering her legacy in the ecclesiastical court, since no suit against the Overseers would lie

30 M. 5 Jac. K.B Add. 25,213, f.78b.
31 M. 6 Jac. K.B. Add. 25,215, f.48.

there. (Presumably a court of equity would be her only way to get at them.) (b) The daughter was within age when she agreed to let the money be delivered to the Overseers. (c) If the executrix loses anything, it is her own fault, since she could have been taken a bond from the Overseers to save her harmless. In short, the ecclesiastical court had made an equitable decision. That is especially true in view of the daughter's nonage (which would be relevant for her contractual liability at common law as well.) If we waive that consideration, it is perhaps questionable whether the ecclesiastical decision (right or wrong) implies any clash with the common law comparable to the rule-conflicts on husband-and-wife and co-liability in the cases above. The strongest construction of the circumstances against the daughter would be that she released the legacy in consideration of the benefit to her of having the money kept (and perhaps increased by investment) by the Overseers, assuming the risk of recovering it from them on demand. Whether an ecclesiastical court that refused a legatee's unambiguous, considerate release (as distinct from one that refused a husband's release of his wife's legacy) should be prohibited makes a question. Could such conduct be taken as anything but downright irrational, hence correctable by appeal? On the other hand, a Prohibition could perhaps be justified where the transaction was ambiguous (as here) on the theory that releases even of "spiritual" legacies are "temporal" by nature, hence construable at common law. If disallowing the plea implied a misconstruction of the transaction, Prohibition should lie. In the instant case, the Court could have reached the same result by saying that the transaction did not amount to a release of the legacy or agreement not to sue the executrix -- i.e., that the ecclesiastical court had passed correctly on a common law issue. Judging by the report, however, the Court did not go through such steps, but simply chose to stay out of a legacy matter which gave every appearance of having been fairly handled by the court with jurisdiction.

A further case, Starkey v. Berton,[32] bears a superficial and misleading resemblance to the cases above on the husband's power to bind his wife. Here, two churchwardens sued a parishioner for a rate levied to repair the church. The parishioner pleaded the release of one churchwarden and sought a Prohibition when it was disallowed. The King's Bench turned

32 H. 7 Jac, K.B. Croke Jac., 234.

him down unanimously, but the reason was not that the subject belonged to the ecclesiastical courts. Rather, the judges considered the nature of churchwardens and held that the ecclesiastical court had acted correctly. (Churchwardens were a corporation in effect. The corporation, rather than the churchwardens as individuals, held the property and claims of the church to the use of the parish. One lacked capacity to convey property or release claims without the other. These must be regarded as points of common law, correctly understood by the ecclesiastical court in this case. Presumably the ecclesiastical court would have been prohibitable in principle if it *had* allowed the release, or even for no further reason than that the effect of a release by a single churchwarden had come in question.) Counsel in Motam v. Motam urged Starkey v. Berton in support of the proposition that the ecclesiastical court was entitled to disallow the husband's release. The irrelevance of so using it was pointed out.

One undated case closely resembling Starkey v. Berton[33] seems to contradict it. Churchwardens jointly sued a parishioner for a repair tax. The parishioner pleaded that he had offered to pay, and sentence was given in his favor. That sentence was reversed on appeal, and £15 costs awarded to the churchwardens by the appellate court. They then sued in an ecclesiastical court to recover the costs. The parishioner pleaded that one of the churchwardens had released the costs. The report says that it seemed to the judges (of whichever court) that Prohibition would lie *if* the plea was disallowed (suggesting that disallowance had not been alleged -- either that the Court was not sure whether it had, or else that the Prohibition was sought merely because the effect of the release was in question.) The report contains a note on the seemingly contradictory Starkey v. Berton, and a note (whether or not relating to that case) that costs recovered by churchwardens are to the use of the parish. It is not clear whether this contrary authority was cited or only recorded by the reporter in his notebook alongside the judges' opinion. The case seems distinguishable from Starkey v. Berton only on the theory that while rates are due to the churchwardens as a corporation and therefore are not releasable by one, litigative costs recovered in suing for rates belong jointly to the churchwardens as individuals and are accordingly releasable by either one. Assuming such a distinction, the reported case implies that it amounts to a

33 Gore v. Stark. Noy, 129.

rule of the common law binding on the ecclesiastical court -- i.e., that ecclesiastical courts are not free to construe the nature of their own costs awards.

It was relatively rare for Prohibitions to be sought because of disallowed pleas in tithe cases. Suits for tithes were as a rule either prohibitable because the defense was triable at common law, whether or not the ecclesiastical court would allow it, or not prohibitable because the defense was perfectly valid by ecclesiastical law and triable as to fact by the ecclesiastical court. By what we have called "Tanfield's principle," an ecclesiastical court which unaccountably refused a valid ecclesiastical defense ought not to be prohibited because such an error should be appealable. A few tithe cases test "Tanfield's principle," however. One case from the Elizabethan Queen's Bench contradicts it. In Moore v. Buttoll,[34] the parishioner pleaded simply that he had performed his legal duty, viz. severed the tithe from the rest of the crop and set it out in the field. He obtained a Prohibition on surmise that the plea had been disallowed. A Consultation was sought on motion, on the ground that the defense was triable in the ecclesiastical court (unlike, e.g., a *modus.)* As far as the brief report shows, counsel did not elaborate, to the effect that the disallowance was correctable by appeal. The judges (without Chief Justice Popham, who was absent) were in any event unwilling to grant the Consultation on motion. They took the disallowance "positivistically," as implying the unacceptable rule that the parishioner is bound to deliver the tithes. ("For the parishioner has done his duty, and it is not reason that he should be compelled to carry the tithes to the parson's house.") It is of course possible that the Court could have been persuaded upon demurrer that ecclesiastical law "really" had no such rule.

Two other cases from the same court tend the same way, a little less decisively. In Green v. Hun,[35] a prescriptive variant from the *de jure* rules of tithing was pleaded -- viz. that wool was payable at Lammas whenever during the preceding year it was sheared (at the time of shearing being the *de jure* rule.) The parishioner claimed to have duly set out the wool at Lammas. Upon demurrer, counsel opposing the Prohibition

34 M. 43/44 Eliz. Q.B. Add. 25,203, f.425.
35 M. 41/42 Eliz. Q.B. Croke Eliz., 702.

argued that a custom merely governing the time at which such a product as wool should pay tithes, unlike a customary commutation, is triable in the ecclesiastical court. Whether or not correctly, the Court apparently accepted this point. It sustained the Prohibition, however, because it was alleged (and admitted by the demurrer) that the defense had been disallowed. In effect, the judges took the ecclesiastical decision as implying that custom may not vary the *de jure* time of payment. There was no discussion as to whether such a decision would be likely to survive ecclesiastical appeal. Possibly the question did not arise because the custom, if not a *modus,* was still *modus*-like. Even if it was in theory triable in the ecclesiastical court, the judges may have thought it just as well for it to be tried by jury. They might not have gone along with the distinction between a timing-custom and a commutation if the disallowance had not given them an alternative way to uphold the Prohibition. Moreover, the custom affecting wool tithes was only part of a lengthy prescriptive surmise addressed to a conglomerate tithe suit. Although a Consultation *quoad* the wool could have been granted, there was a practical advantage in such cases in upholding or overruling the Prohibition as a whole. On all the additional controverted points in this case, the Court thought the Prohibition should stand.

In Gusling v. Hincke,[36] a parson sued a parishioner's executor for tithes due in the testator's lifetime. The executor pleaded that his testator had agreed to pay 10/ in lieu of the tithes in question and had paid that sum. A Prohibition was granted on surmise that the executor's defense was disallowed. Justice Williams warned plaintiff-in-Prohibition that the alleged disallowance had better be true. I.e.: In Williams's opinion, there was no basis for Prohibition merely because the testator's bargain with the parson was in question. (We shall deal with the fictitious or immaterial allegation of disallowance below. The effect of insisting that the disallowance was material was to make it a traversable fact.) As in the last two cases, it would seem arguable that the disallowance was so unreasonable as to be correctable by appeal. Williams's insistence that the alleged disallowance be true suggests that he did not believe the ecclesiastical court had really rejected the defense as such (as opposed, perhaps, to rejecting proffered proof of the bargain.) But nothing about appealable er-

36 P. 9 Jac. K.B. Lansd. 1172, f.180b.

ror was said. It is possible that the Court was in doubt as to whether ecclesiastical law would "really" recognize an oral agreement by a dead man in defense to a tithe claim against an estate. The case was not a common one.

A couple of later tithe cases go the other way. In Allen v. Mady,[37] a parishioner claimed that his plea of mere payment was disallowed. A Common Pleas Prohibition was granted, but Chief Justice Hobart (no one contradicting him) was ready to undo it by Consultation on motion. In another case where the same claim was made,[38] the Prohibition was simply denied.

A final case of late vintage,[39] however, leaves the standing of "Tanfield's principle" in doubt. A parishioner being sued for tithe-lambs pleaded a custom of a type that was common in the case of young animals. Since lambs, calves, etc., are not normally born in multiples of ten, it was necessary to have some way of dealing with irregular numbers. The custom pleaded in this case was a typical formula: 1/2d. per lamb if the number born in a given year is less than seven; if there are seven, the parson to have the seventh and refund 3d., etc. According to the parishioner in this case, the parson would not accept what was due to him according to the customary formula, but insisted on waiting until a tenth lamb was born and claiming that. The ecclesiastical court refused to let the parishioner allege this matter in his defense. The King's Bench was divided as to whether Prohibition would lie. Justices Berkeley and Jones opposed prohibiting. They were on solid ground because the parson here was not standing on his *de jure* right against the custom in a simple sense. If the ecclesiastical law had simply given the parson the tenth animal when it was born (e.g., nothing in 1600 though nine lambs were born, one lamb in 1601 though only one was born that year), three solutions would be possible: (a) Prohibition whether or not the plea was disallowed, *modi* being triable at common law; (b) Prohibition if the plea was disallowed (on the theory that this special type of *modus* -- like the wool-at-Lammas custom above -- could be tried in the ecclesiastical court but must be accepted as

37 H. 16 Jac. C.P. Harl. 5149, f.280b.
38 H. 9 Car. K.B. Harg,. 378, f.25.
39 P. 11 Car. K.B. Croke Car., 403.

a defense under pain of Prohibition); (c) No Prohibition (on the theory that the defense is triable in the ecclesiastical court and that exclusion of the plea is correctable by appeal.) But in fact, as was well-recognized, ecclesiastical law did not simply give the parson the tenth animal whenever it was born. Rather, it had a *de jure* formula at least similar to the one claimed as customary here. I am not sure whether the *values* were exactly the same, or indeed whether there was one consistently applied and notorious formula as to values. In the report, Berkeley and Jones seem to say that what the parishioner claimed was exactly the same as what the ecclesiastical law gave him. But perhaps their position does not depend on the truth of that proposition. If the ecclesiastical law only recognized the principle that liability for young animals in a given year was limited by a formula covering irregular numbers, there would be a good argument for denying Prohibition. I.e.: Assume that the ecclesiastical law as it "really" is says negatively that parishioners are not liable for the tenth animal in succession whenever it is born, and positively that a given formula *or any reasonable variant warranted by custom* will be applied instead. Then the disallowance of the defense in this case would seem, however inexcusable, to be an appealable error. *A fortiori* if indeed the standard formula was exactly the same as the formula pleaded.

Chief Justice Brampston and Justice Croke disagreed. As I read the report, they did not altogether dispute the theory that Berkeley and Jones were going on. If the parishioner had expressly stood on a standard ecclesiastical formula, or if it had been unmistakable that the "custom" relied on was only the standard formula, they too would have opposed prohibiting. As it was, they were ready to give the parishioner the benefit of any doubt because he had stood on a custom. The ecclesiastical court had at last acted as if it regarded the parson as entitled to the tenth animal whenever born, and as if a custom could not prevail against that rule. Brampston and Croke preferred to look no further. In effect, they adopted position (b) of the three outlined above. The Court being thus divided, Berkeley and Jones agreed to a Prohibition in order to draw a demurrer and permit fuller debate. There is no report as to whether the parson thought it worthwhile to demur.

The remaining, miscellaneous cases on disallowance are best classified as between those in which the Prohibition was granted and those in which it was denied. Let us take the latter group, which is larger, first. In one

late-Elizabethan case,[40] a parson leased his tithes. Subsequently, the whole living was sequestered for dilapidations. I.e.: Because the parson was permitting the property of the living to run down, to the detriment of future holders, it was made over by due ecclesiastical proceedings to the equivalent of a guardian or trustee. The property of the living generally -- right to tithes, glebe, parsonage-house, etc. -- was so "sequestered." The trustee then sued certain parishioners for tithes. They pleaded the lease of the tithes and alleged that they had paid the lessee. A Prohibition was sought because the plea was disallowed, but apparently denied. ("Apparently": The report does not state the outcome sharply, but gives a clear opinion against prohibiting. It appears to come from a judge and is uncontradicted.)

"... We do not know the quality of their sequestrations," the opinion says. In other words, sequestering a living is a lawful ecclesiastical process, the incidents of which are defined by ecclesiastical law. If by ecclesiastical law the sequestration extends to the whole living, including tithes, and if prior leases are postponed to the sequestration (i.e., the sequestered parson's lessee loses what the parson-lessor would lose) -- so be it. The ecclesiastical law is entitled so to hold (even though a lease of tithes *qua* transaction was an ordinary secular conveyance, and in that sense the lessee had an interest recognized and protectable by the common law.) "The lessee," says the opinion, "at his peril must provide with the parson when he accepts the lease that no such forfeiture will be committed." (It is worth noting that the ecclesiastical rule here hardly clashes with the common law applicable to analogous situations. A lessee of forfeitable property was normally subject to the risk of forfeiture -- e.g., lessee of a life-tenant where the life-estate is forfeited by the life-tenant's making a conveyance in fee.) No more pity was spared for the parishioners, who had paid the wrong man and would have to pay twice, than for the lessee himself. (No doubt they could get restitution if they could catch the lessee, but the "peril" of not knowing about the sequestration rested on them.) One final remark in the opinion is interesting: "... We will not presume that this is covin in the parson or the Bishop or corruption in the spiritual judges in their courts, no more than they will presume it of us."

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40 39 Eliz. (No term) C.P. Add. 25,199, f.2.

The implication there is that an actual showing of "practice" might change the case, that despite the legal reasons for non-interference a Prohibition might be employed to control abuse of ecclesiastical process. (The possible "covin," I suppose, would be for the parson to connive at the sequestration in order to defeat his own lease, or else for the ecclesiastical authorities to sequester on fabricated grounds in order to "get" an unfavored parson and/or lessee.) But the Court would not see foul play by presumption.

In Quarles and Cawllye v. Fairechilde,[41] the Queen's Bench was urged to intervene in an ecclesiastical suit for a different reason than usual: not because a defendant's plea was disallowed, but because the ecclesiastical court would not let a stranger come in to protect his interest. The underlying dispute in this case was over whether a living was "donative" or "presentative." (The patron of a living, or advowson-owner, normally had the right to *present* a clergyman to the bishop. If the presentee was acceptable, he was installed in the benefice by the three legal ceremonies of institution, admission, and induction. Some advowsons, however, were "donative." That meant that the patron could convey the living directly to a clergyman, without going through the bishop and without installation ceremonies.) In our case, one J. -- claiming to be the owner of a presentative advowson -- presented Fairechilde. But the living was already in the possession of Forth. Forth got the living by the gift of Quarles and Cawllye, who claimed to own the advowson and that it was donative. Fairechilde sued in the ecclesiastical court to secure induction -- i.e., to force a legal decision as to whether the living was presentative, in which event he would be entitled to induction. As the Queen's Bench was to hold, Fairechilde's suit was essentially *ex parte* -- a claim addressed to the bishop asserting the right to be inducted. However, as was proper in such suits, he named Forth as "disturber" of his alleged right. Forth appeared, contested Fairechilde's claim, lost, and appealed to the Delegates. Pending the appeal, Forth died. Thereupon his patrons (Quarles and Cawllye) sought, in effect, to take his place. I.e.: They claimed that their interest was affected by the outcome of Fairechilde's suit and accordingly asked to be received by the Delegates to show that the living was donative. The ecclesiastical court refused to receive them, wherefore Quarles and Cawl-

41 H. 41 Eliz. Q.B. Add. 25,203, f.43b.

lye sought and obtained a Prohibition. Our report gives the arguments and decision upon a motion for Consultation.

The case was argued by great men -- Coke against the Consultation, Tanfield for it. The Court, *per* Chief Justice Popham, decided to grant the Consultation. Popham's opinion, however, contradicted Tanfield's argument for the same result. (a) Tanfield argued that the Prohibition should never have been granted because there was nothing to prohibit. That was true, he said, because Forth's death killed Fairechilde's suit. (By, it would seem, universal-necessary, hence ecclesiastical, standards, not by a standard peculiar to the common law: "For it is in the Court Christian as in other Courts, that to every suit there must be two parties ....") Therefore when Quarles and Cawllye asked to be received, they were asking for the impossible -- to be made quasi-parties to a suit that did not exist. Therefore the basis for their claim to a Prohibition -- improper refusal to receive them -- was nugatory. Since a Prohibition which ought not to have been granted had been, it should be undone by Consultation. (It seems implied in Tanfield's argument that what the ecclesiastical court was *actually* doing was irrelevant. If the ecclesiastical court regarded the suit as still alive and was carrying on with it, it was, so to speak, flapping its wings. I take it that two consequences might follow from this somewhat surrealistic perception of the situation: 1) If the ecclesiastical court was behaving in an absurd, unreasonable, or unlawful-by-any-standard manner, it should not be prohibited, for, by "Tanfield's principle," "foreign" courts should only be prohibited when they are correctly applying rules of their own which, by controlling common law standards, they ought not to apply. To that, one might, of course, make the "positivistic" reply that if the ecclesiastical court -- indeed, the Delegates -- regarded the suit as alive it was alive by ecclesiastical standards, which standards, by Tanfield's showing, are "wrong." The alternative to saying the ecclesiastical court was behaving absurdly is of course to say that its refusal to receive Quarles and Cawllye was a function of its "correct" recognition that there was no suit to receive them into. The report gives, and perhaps the record gave, no positive indication that proceedings in Fairechilde's suit were continuing, though it is obvious that they either were continuing or were likely to. Tanfield's client wanted a Consultation badly enough to hire an expensive lawyer, hardly a good investment unless there was in reality something to authorize the continuation of. Still, it was clever legalism to contend that refusal to admit Quarles and Cawllye was right, and hence

no basis for Prohibition, even though the ecclesiastical court did not deduce that holding from the correct premise, viz. that the suit was dead. 2) Nothing the ecclesiastical court did as a result of entertaining a non-existent suit could have any effect. If Fairechilde was inducted, that would be a manifest error. No weight could be given to it in any common law litigation over the status of the advowson. Therefore, one might argue, there is no common law interest to protect by prohibiting. Quarles's and Cawllye's common law interest in their donative advowson, if they had such an advowson, would be just as well off without a Prohibition as with one. And what basis for Prohibition could they have except that interest? They ought to go ahead and appoint a new clergyman, and if Fairechilde got in their way bring a *Quare impedit.* Fairechilde's having secured induction would not hurt their cause. Indeed, it would probably help it, by constituting an actionable interference with their right of patronage.)

Coke immediately jumped on Tanfield's general reasoning: If there was nothing to prohibit (at least in any sense "real" enough to worry about), then there was nothing to authorize the continuation of by Consultation. The Consultation Tanfield sought would be "in vain," for surely a flesh-and-blood Consultation operates to let the ecclesiastical court do what it lawfully can and actually will do once the arresting hand of the Prohibition is removed. Coke was on plausible ground here, for, as we have seen in Vol. I, there were situations in which a Prohibition that utterly misfired -- failed to shoot down an ecclesiastical suit actually in being -- could be held void, but *not* be undone by Consultation. However, I doubt whether Coke's counter-stroke of logic-chopping was necessary to convince the Court that Tanfield's theory itself was pretty much "in vain." In any event, the Chief Justice rejected the notion that the ecclesiastical suit did not or should not exist. Because the suit was essentially *ex parte,* Popham said, there was no reason why the death of a quasi-party, or one "in for interest," should terminate it. Therefore the Prohibition stopped something about whose reality there was no doubt; therefore it must either stand or be reversed straightforwardly.

(b) The Court then went on to hold that Consultation should be granted because (as above, without the tortuosities) Quarles and Cawllye would not be hurt if Fairechilde got his induction, while Fairechilde had a real interest in trying for it. In other words, if the Church was donative, Quarles and Cawllye could not protect their interest at common law whether or

not Fairechilde was inducted. His induction on the premise that the church was presentative would simply have no effect on a common law test of the premise. If, on the other hand, the church was presentative, Fairechilde needed induction before he could take any profits from the living (challenging the adverse claimants to sue him) or himself bring any action at common law to test the nature of the advowson and hence his right. It seems to me that the Court did not hold that the Delegates were *right* to exclude Quarles and Cawllye (allowing them to come in would seem conducive to an intelligent decision on Fairechilde's title to be inducted, as Forth's participation had been), but that whether they were right or wrong did not matter for any common law purpose. Coke's main argument against Consultation came to saying that the nature of the living was ultimately determinable at common law (as it unquestionably was), and therefore that the Queen's Bench should keep the possession which the Prohibition gave it until the real issue was tried. Practically, that is a very sensible argument. If Fairechilde had been forced to deny that the church was donative to reverse the Prohibition, the problem could be settled here and now. As it turned out, the ecclesiastical Court was left to consume its time on a question ultimately beyond its competence, and further common law litigation was almost guaranteed. In rejecting a course with such clear practical advantages, the Court showed considerable scrupulosity about prohibiting when the theoretical basis for doing so was shaky. In the abstract, the Prohibition was hard to justify (as Coke probably realized, for he made no very formidable case for it.) To say that an ecclesiastical court is not free to rule out intervention-for-interest by a non-party -- at that, a lay non-party whose interest in the right of patronage is secular -- would be interfering indeed. *A fortiori* when, as here, such intervention was ruled out only at the appellate level, for it is surely defensible to hold that a suit should not be restructured by the addition of parties-in-interest when the judgment of a lower court, predicated on the old structure, is under review. Though Forth's death pending appeal created an ambiguity in our case, it was surely the ecclesiastical court's business to resolve it.

In Child v. Caninge[42] an occupier of land cut his hay and sold it without paying the tithe. Instead of suing the occupier, the parson sued the vendee. In principle, that was certainly an odd thing to do, for the duty to pay tithes belonged to the producer, not to persons into whose hands tithable produce might later come. Practically, it is not so hard to imagine what happened. The report says that the occupier put the hay (all of it, without severing the tithe) in a rick and sold it. Probably the property in the hay changed hands while physically it stood right there in the field. Probably the parson took on the vendee, pointing out that the tithe was unpaid and that it would be perfectly easy for him to pay it now in approximately the normal way. But the vendee refused, making himself the "enemy" -- the obstinate one. (Perhaps the producer politely, or even truly, told the parson that he had reminded the vendee to take care of the tithe before he hauled off his hay, the vendee saying of course he would.) Some such story, at any rate, might explain why a parson believed it was appropriate or fair to sue the vendee (unless, of course, his motive was simply the hardboiled one -- to go after the person more likely to be able to pay, hoping to make a legal case for an unorthodox suit.)

Whether the Prohibition that was sought in this case was based on an alleged disallowance is not clear. Claiming a Prohibition solely on the ground that the tithe suit was directed at someone other than the producer would have been entirely plausible, whether or not successful. Chief Justice Hobart said, however, that "if they of the Court Christian will not allow this plea, the defendant is without remedy." That suggests that the surmise "sounded in disallowance"; I.e.: The vendee was sued, for all that appeared from the libel, as if he were the normally-liable producer. Instead of immediately seeking a Prohibition on the bare surmise that he was a non-liable vendee, he sought to plead that fact in the ecclesiastical court and brought a Prohibition when he failed. In any event, Hobart's opinion is strong: A vendee sued for tithes may not have a Prohibition, not even when it is clear that he cannot help himself, at least in the ecclesiastical court of first instance (much less if he has not tried.) The opinion is all the stronger because Hobart himself said that suing the vendee was improper ("Clearly the vendee cannot *[ne poet,* perhaps *ne doet,*

42 T. 16 Jac. C.P. Harl. 5149, f.209b.

ought not] pay them.") Nevertheless, Hobart took his stand on the proposition that the suit was "merely spiritual." Perhaps that comes to an application of "Tanfield's principle": There is no basis for saying that the *common* law rules out holding a vendee liable for tithes in certain circumstances, as it rules out, for example, suits for tithes of exempt products. The very unorthodoxy of the attempt to nail the vendee makes it hard to say that the common law has any rules, *pro* or *con,* on the subject. On the other hand, insofar as the attempt looks novel and unreasonable, there is a basis for predicting that it would not survive ecclesiastical appeal.

Justice Hutton disagreed. He did not think the case was open and shut ("It seems a good question whether he will have a Prohibition or not"), but on balance he though prohibiting could be justified, apparently without reference to whether the vendee had tried to defend himself and been disallowed. Hutton was troubled by the unfairness of making a vendee answerable even in the kind of situation I sketch above (where he is in a sense morally responsible, has an opportunity to take care of the tithes.) For suppose the vendor falsely tells the vendee that the parson has been satisfied. Such a lie would not be false on its face even when the whole crop was lying in the field, plainly untithed, for the parson might have accepted a substitute by agreement. Surely it is hard to put responsibility for knowing the truth on the vendee, hard even to make it his job to prove that he was deceived. At heart, perhaps, Hutton thought that letting ecclesiastical courts get a foot in the door to hold vendees liable spelt trouble, however sensibly ecclesiastical courts would try to behave; under the surface, perhaps Hobart did not think that attaching liability to vendees would be a disaster if it were done with great restraint, only in cases of fraud. (Fraud is imaginable: Sell your crop the moment you cut it or before, give the vendee a piece of paper certifying the tithes satisfied -- known by him to be utterly fabricated -- and "skip town.")

The report tells us that when the case was taken up again later it "appeared in another manner than is here put." How is not specified. In the event, the Prohibition was denied. However much that was a result of the reformulation, the report says that Hobart repeated his opinion on the question as formerly conceived.

In Browne's Case,[43] the King's Bench made a clear self-restraining decision. Browne was proceeded against in an ecclesiastical court for not attending services at his parish church. He sought a Prohibition because what he took to be his reasonable and lawful excuse was disallowed. (He said that he went to another church nearer home, could not reach the parish church at all in winter owing to impassable roads, but nevertheless went there three times a year and received the sacrament.) When the case was first taken up, no conclusion was reached. Only Justice Dodderidge's remarks are reported. Dodderidge said that this excuse was satisfactory for the purposes of 1 Eliz. (the Uniformity Act, making church attendance compulsory, subject to temporal penalties), but not by ecclesiastical law. I.e.: The statute required attending one's parish church as a general rule, but in respect of the temporal penalties accepted attendance elsewhere if one had a reasonable excuse; ecclesiastical law, as Dodderidge understood it, treated parish-church attendance as a categorical duty. On this occasion, Dodderidge expressed no conclusion. Subsequently, the Court agreed unanimously to deny Prohibition. The judges in effect refused to give the statute any "preemptive" operation -- i.e., to take it as bringing secular law into the field of church attendance, formerly occupied solely by ecclesiastical law, and thereby imposing secular standards on the ecclesiastical courts in that field. Conflict between the spiritual and temporal spheres was not in this instance considered disturbing. (It is a nice question whether conflict occasioned by statutory incursion of secular law into the ecclesiastical sphere is less bad than conflict between ecclesiastical law and analogous common law. The Court in this case took on no such large, and perhaps fruitless, weighing-problem, but simply found no intent in the statute to interfere with ecclesiastical rules on church attendance. Its words were: "For notwithstanding this statute, they [this Court] have nothing to do with coming to churches, for this statute does not give authority to meddle with such things, but was made in corroboration of the canons." I take this as equivalent to saying that the statute "preemp-

43 2 Rolle, 438 (dated T. 21 Jac. K.B.); Lansd. 1063, f.20b (dated T. 22.) From the party's name and the substantially identical facts it is clear that both reports relate to the same case. Rolle gives Dodderidge's tentative remarks and ends with an adjournment; the MS. gives the decision and Dodderidge's further concurring remarks. A full year is a large gap between first hearing and final disposition, but even if one of the reports is misdated, they plainly relate to two successive discussions.

ted" nothing. It cannot be considered as doing no more than reaffirming the canon law and leaving church attendance solely to ecclesiastical courts, for it undoubtedly did create a secular duty and penalty. The point must be that the statute was meant to add "teeth" to an ecclesiastical duty by superadding a secular liability, but for that very reason could not be meant to take away any existing ecclesiastical power or alter the way it was used. If the statute directed the secular authorities to enforce a somewhat less stringent duty than ecclesiastical law insisted on -- i.e., did not demand parochial attendance so strictly -- that was a mere contingency; as it were, the added "teeth" were in one respect a little blunter, but there was no intent to make the existing one less sharp -- or voracious. This conclusion is good statutory construction, for the act is markedly affirmatory of the ecclesiastical courts' power to enforce all its provisions.)

On the second hearing, Justice Dodderidge made two further individual observations: (a) A prescriptive title to attend a church other than that of one's parish will not avail unless there is a "spiritual composition." Judging by the reports, it would not appear that Browne set up a true prescriptive claim -- i.e., a claim that his right to go to a "foreign" church was based on immemorial usage, as opposed to a claim that it was his established and justified habit. (It would obviously make no sense for an individual to claim a prescription, but one might do so as the occupier of a tenement or an inhabitant of an outlying sub-division of a parish.) I take Dodderidge's statement as a dictum leading to an *a fortiori:* A prescription like those enforced by Prohibition against some ecclesiastical duties will not prevail against the duty of parish-church attendance; the only way out of that duty is some sort of composition or dispensation sanctioned by the ecclesiastical authorities (and perhaps usage to the degree that ecclesiastical courts are themselves willing to count it as evidence of, or equivalent to, such a composition.) *A fortiori,* a common law court's mere opinion that an excuse is reasonable, or the fact that the excuse would be good vis-a-vis the additional statutory duty to attend church, cannot justify interference with ecclesiastical autonomy.

(b) Secondly, Dodderidge said, "The temporal judges have no business reforming *[nont riens a reformer]* the injustice of the spiritual judge." That is to state the negative branch of "Tanfield's principle": whatever conflicts of law or overlaps of interest do justify Prohibitions on disallowance surmises, they are *not* justified when a common law court thinks an

ecclesiastical result unreasonable or unjust by universal standards, standards which ought to be, and presumptively are, recognized by the ecclesiastical system. In application to the present case (I take it): The most that can be said against the ecclesiastical court's conduct is that it has foolishly and unfairly disallowed what sounds like a very good excuse, which is precisely *not* a basis for Prohibition. (To make any other charge against the ecclesiastical court would involve doing just what the judges were unwilling to: taking the statute as giving the common law an interest in church-attendance cases and creating an undesirable conflict between secular and ecclesiastical standards.)

So much for miscellaneous disallowance cases in which the Prohibition was denied. In those following it was granted, or at least may have been. In James v. James,[44] the Prohibition was considerably qualified, so that perhaps the case is mainly evidence of restraint in interfering in ecclesiastical business. Mrs. James was called to account as administratrix for the goods of her husband's estate. She pleaded a deed of gift to a daughter of some or all of the goods, made by the husband in his lifetime, and sought a Prohibition on surmise that the plea was rejected. I find it difficult to state the shape of the case quite crisply on the basis of the reports, but I think the gist was as follows: No one on the Court thought that the ecclesiastical suit should be prohibited merely because the *inter vivos* gift was pleaded. The disallowance was essential; the ecclesiastical court was entitled to consider whether certain of the husband's goods had in fact been conveyed away in his lifetime and were therefore not part of the estate to be accounted for, provided that it applied common law *legal* standards in assessing whether such a gift had been effectually made and what it comprised. The question that caused trouble, provoking an extended debate between Chief Justice Coke and Justice Dodderidge, was whether the bare surmised fact that the gift had been disallowed was sufficient basis for concluding that the ecclesiastical court had violated a binding common law standard. Coke's position was the readily intelligible one: A partial Prohibition should be granted because the gift was a perfectly good plea to account for as many of the husband's goods as it did and legally could comprise; the disallowance implied rejection of that proposition; admittedly, only a partial Prohibition *(quoad* the goods in-

44 H. 12 Jac., K.B. 2 Bulstrode, 315 (best report); 1 Rolle, 123; Add. 25,213, f.169 (brief.)

cluded in the gift) would lie, for the gift could not account for everything the administratrix was liable to account for (specifically, the estate's claims, which, as choses in action, were not conveyable to the daughter even if the intestate meant to give her everything he had.) Justice Dodderidge seems to have been skeptical as to whether the disallowance really did imply rejection of any "common law truth." He wanted to be surer than the record permitted him to see as to *why* the plea was rejected, suspecting that it may have been ruled out on grounds of form. He was worried by its manifest inadequacy as a *full* answer to the demand for an accounting. (I.e.: The record did not show that the administratrix had done anything *more* than plead the gift. Did that not show that she was proceeding on the indefensible premise that she could discharge her accountability merely by establishing the gift, which the ecclesiastical court was entirely right not to permit?) In short, I think the issue was between Coke's willingness to see error in a disallowance that made no immediate sense and Dodderidge's belief that the context should be more thoroughly scrutinized before an error worthy of Prohibition was seen -- an important issue of judicial policy. In the end, a compromise was arrived at. The rest of the Court went along with Coke, being somewhat moved by the fact that the administratrix sought her Prohibition before sentence. But to satisfy Dodderidge a *nisi* was appended to the partial Prohibition and arrangements were made for a civilian to appear before the Court to show why the plea was disallowed. The Prohibition would fail if the judges were persuaded that the disallowance was a reasonable act in context, implying no rejection of legal standards which the common law would insist on.

Harrison v. Hearing[45] yields only a dictum on the present subject. It was decided in that case that probate of a mixed will (comprising land and goods) should be prohibited only *quoad* land even when the sanity of the testator is challenged. (This went against other holdings on the same question.) It was said by the way, however, that the ecclesiastical court would be prohibited *in toto* if it disallowed the plea that the testator was insane. In other words, the ecclesiastical court may settle the sanity ques-

45 P. 14 Jac. K.B. Add. 25,211, f.155b. Two anonymous reports of the same case (1 Rolle, 358, and Harl. 4561, f.201b) do not contain the dictum.

tion by its own lights for its own purposes (taking the will as if it concerned only personal estate), but it must permit that question to be raised.

Creedland's Case[46] is badly reported, but it may be another instance of a granted Prohibition. Creedland was made interim administrator of his brother's estate during the minority of the brother's son. (The son would have been entitled to administer by statute if he had not been a minor, for there was apparently no surviving wife or other children. By the same token, the son would have been entitled to everything the father had after paying debts.) The son made Mrs. Hindman his executor and died. Hindman sued Creedland to account for the father's estate. Creedland pleaded that he and Hindman had made an agreement to settle accounts, pursuant to which Creedland had paid Hindman £80 in full satisfaction. A Prohibition was sought on surmise that the plea was disallowed. The two judges who speak in the report (Richardson and Croke) appear to agree on one point: if Creedland had pleaded only that he had *paid* £80 in satisfaction of the account, there would be no basis for Prohibition. That means (I take it) that the common law has no authority to scrutinize an ecclesiastical accounting insofar as the pleading in the ecclesiastical court goes only to the state of the account. It would be presumed that the ecclesiastical court had its own reasons for disallowing a plea that went merely to say that Creedland had paid Hindman £80 and that there was nothing more to account for, whether or not the reasons were evident. If the disallowance was in any way improper, ecclesiastical appeal would have to take care of it, for it would amount to an error in the ecclesiastical business of evaluating the state of the account. On the other hand, both judges thought that the agreement between Creedland and Hindman altered the case. Croke appears to say that the agreement would justify a Prohibition (whether because the plea was disallowed or because the agreement should be tried at common law, disallowed or not--which is not clear.) Richardson appears to say that Prohibition would lie if the agreement alone had been pleaded, but not when actual payment of the money was also pleaded. The report is inconclusive as well as unclear. It is mainly valuable for pointing to a case in which Prohibition by virtue of a disallowed plea would *not* be granted -- viz., when the plea claims mere payment on administrator's account. (Cf. "mere payment" of tithes).

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46 3-7 Car. C.P. Hetley, 18.