

V. Self-Incrimination

A. Introduction

It would not have been plausible to hold that the two-witness rule, or "evidentiary formalism" generally, could *never* be applied within the ecclesiastical system. However disparaging a view one took of church law in England, however determined one was to see it as a foreign visitor with ifs and buts written all over its visa, a tenant at sufferance, a stream of alien source obliged to flow gently within dikes and sluices engineered by native law -- one had to admit that to "receive" ecclesiastical law at all was to accept its basic procedures and their corollaries. Opinions varied as to the conditions under which the ecclesiastical courts could be prohibited from insisting on the two-witness rule, but it was hardly disputed that they were *sometimes* free to insist on it. Though some evidentiary Prohibitions only reflect the judgement that formalistic requirements were unreasonably burdensome, it was probably more characteristic to look for a sense in which some interest within the common law sphere would be damaged by enforcement of ecclesiastical evidentiary canons -- in other words, to distinguish a purely ecclesiastical universe of rights and duties, where formalistic obstacles could be freely put in the way of establishing facts, from the limbo where ecclesiastical courts had jurisdiction but were too able to affect temporal interests to be left to their own devices. Over against the confused middle ground where most of the cases fall, there was a vein of opinion simply opposed to two-witness-rule prohibitions -- the theory that it was better to deny ecclesiastical jurisdiction over a given type of case or issue than to concede jurisdiction and then deny the ecclesiastical courts their procedures. There was not, so far as I can see, a corresponding position at the opposite end of the spectrum -- a theory that formalistic evidentiary requirements were contrary to so fundamental a policy of English law that they must not be applied in any court in England.

We now turn to a much more celebrated aspect of ecclesiastical procedure than its rigid evidentiary requirements. Speaking generally, without regard to qualifications in ecclesiastical law itself, ecclesiastical courts

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claimed the power to exact sworn testimony from parties, criminal defendants included. No such power existed at common law, not because the common law in any straightforward sense recognized a "privilege against self-incrimination," but because it relied on the jury for deciding issues of fact. In civil cases, it was only in the late 16th century that, by means of statute, even non-parties became compellable to give evidence. There were few situations on the civil side of the law in which a man coerced to testify might seek to avoid answering questions which would expose him incidentally to criminal or other detriment. Criminal defendants were subjected to notoriously unfair treatment, including statute-warranted interrogation before indictment in the hope of extracting confessions, but they were not obliged to testify at their trials, and preliminary examination was not under oath.

We have, therefore, a situation essentially like that presented by the evidentiary disallowance cases (and, more generally, disallowance cases of both types): contrasts, differences, conflicts, incommensurabilities (one word may be appropriate to one instance, another to another) as between the common law and ecclesiastical systems. The same range of options would seem to be available with respect to compulsory sworn examination as with respect to other dissonant features of ecclesiastical law. For example: (a) If a case is within ecclesiastical jurisdiction, the ecclesiastical court may do as it likes, subject only to ecclesiastical appeal and the ultimate power of the legislature to direct the future conduct of all courts. If a civil claim or crime belongs to the ecclesiastical system, ecclesiastical courts may use inquisitorial technique to their hearts' content, or to the extent ecclesiastical law permits it under control of ecclesiastical appeal. They may apply any sanction normally available to them to a party who refuses, upon due request, to take an oath to answer questions truly, or who refuses to answer questions after he has sworn to respond -- automatic loss of civil suit and costs, criminal conviction, punishment by spiritual sanctions for contempt. A man may be notified that he is suspected of an ecclesiastical crime and required to respond on oath without being "accused" in one of the usual legal senses -- complained of by an identified private person or public official, such complaint giving a fairly specific description of the particularly unlawful acts alleged; presented or indicted (i.e., said to worthy of being judicially proceeded against by a person or panel whose commission is precisely to say who in the community is so worthy, such solemnities as oaths laying a special duty to act responsibly,

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even skeptically, on such persons. I give an abstract definition to designate a type of proceeding, as opposed to the exact form of the common law grand jury and accompanying common law rules on what constitutes a sufficient indictment and the like. Ecclesiastical law had such accusation in the form of visitation presentments.)

There are, however, limits built into this most permissive, pro-ecclesiastical position. Suppose a man is ordered to appear before an ecclesiastical court, does appear, and is ordered to take an oath to respond to all such questions as he may be asked, absolutely no intimation being given of what the questions will relate to. One tends to react viscerally to the unfairness of such procedure, no doubt rightly. But there is an important sense in which one need never reach the plane of moral indignation if one is thinking in the categories of jurisdiction. For all the man knows -- and for all the common law court to which he complains knows -- the ecclesiastical court intends to ask him whether he committed larceny, which it plainly may not do, whatever freedom it may have to exact self-incriminating testimony within its jurisdiction. The only basis for denying prohibition is giving the ecclesiastical court the benefit of the doubt -- i.e., presuming that it is going to ask questions within its jurisdiction until it asks one which is plainly *ultra vires*, or not plainly *infra vires*.

If it is granted that Prohibition should lie on a totally unexplained demand for sworn testimony, then a question arises as to what is sufficient to make out jurisdiction. The surest-fire rule would be that the ecclesiastical court must give the potential examinee a copy of written interrogatories, to which it obliged is to stick. (Prohibition would lie on alleged failure -- controvertible as to fact -- to furnish such a copy; it would lie to halt any examination that departed from the interrogatories; and it would lie *quoad* as many questions as the common law court adjudged *ultra vires* -- by whatever standards the court might adopt for assessing the relevance of particular questions for a legitimate ecclesiastical concern, or their tendency to cut too close to matters outside the jurisdiction.) A somewhat less restrictive rule would be to require the matters the examination was to be about -- headings, as opposed to particular questions -- to be communicated to the examinee. (That could be done either orally or in writing, but writing would have the advantage of supplying the common law court with a definite document to judge. Plaintiff-in-Prohibition who complained that some of the articles of the examination were out-

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side ecclesiastical bounds could be expected to show the articles that had been delivered to him, and the common law court could assess them exactly as they stood, asking whether they were sufficiently specific and itemized to make it appear that the whole inquiry would be *infra vires*. A plaintiff who complained that he had not been informed of what he was going to be asked about could be held to mean that a physical act -- delivery of written articles -- had not occurred, whereas, if informing him orally were enough, awkward factual disputes about what he had been told and how would arise.) In any event, Prohibition would lie for failure to communicate articles at all, or in requisite detail; for asking questions not covered by the articles; and *quoad* any articles that were *ultra vires*.

A policy demanding communication of questions or articles in advance of examination would not necessarily require that they be communicated in advance of taking the oath. It would be possible to hold that Prohibition does not lie on a mere unexplained demand that an oath be taken, but that it does lie to halt actual interrogation before communication of questions or articles. Less exacting rules as to what ecclesiastical courts must do before examining would virtually require prohibiting as soon as an oath was demanded without explanation. A man comes and says he is asked to take an oath to testify about he knows not what. Assume the law to be that the ecclesiastical court need not precede examination by anything so definite as communicating the articles, but that there must be at least a vague indication that it is pursuing ecclesiastical business. Plaintiff-in-Prohibition may not be telling the truth when he says or intimates that for all he knows he is going to be examined about larceny, but the common law court will never know whether he is telling the truth until it prohibits. The ecclesiastical court, having been prohibited, can try to show that it is pursuing ecclesiastical business. Perhaps all it ought to be asked to do is to come and say very roughly what the proposed inquiry is about, and thereby show that the subject is ecclesiastical (whether or not it gave the examinee even that much information), but until there is a Prohibition on the table there is no way of finding out what is going on (save by informal inquiry.)

In sum, considerable restrictions on the operation of "inquisitorial procedure" are compatible with, indeed required by, the theory that admits the ecclesiastical courts' right to "inquisitorial procedure" most freely. This is a complexity not encountered in two-witness-rule cases. There, if

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one concedes ecclesiastical procedure within ecclesiastical jurisdiction, results follow easily: One must debate as to whether a suit or issue belongs to ecclesiastical jurisdiction, or belongs to it with the required degree of "purity"; if that is settled in the affirmative, it follows that two witnesses may be rigidly demanded to establish facts. Here, it is hard to say that the ecclesiastical court has jurisdiction until limits have been placed on the use of inquisition. The limits may be of different sorts -- at most, a requirement, enforced by Prohibition, that the examinee be clearly presented with charges, and hence that "fishing" interrogation in the strict sense be avoided; at least, a right to Prohibition if a particular question, by whatever criteria, transcends the jurisdiction. The only way to give "inquisitorial procedure" an absolutely free hand is to abandon the entrenched theory that ecclesiastical jurisdiction is intrinsically limited and stringently required -- under pain of prohibition and threat of *Praemunire* -- to stay out of the common law's territory. There was, of course, an ultra-ecclesiastical, ultra-royalist position which at bottom resisted that "entrenched theory," but it may be regarded as legally, though not politically, irrelevant.

(b) A second approach, supplementary to the first rather than alternative, would concede the ecclesiastical courts' right to use inquisitorial procedure "within the jurisdiction" *except when that method exposes the examinee to temporal detriment collaterally*. Position (a) says that the ecclesiastical court may examine perfectly freely, provided only that the examination is about something within ecclesiastical jurisdiction. The limits on inquisition generated from (a) are a matter of implementing the proviso. Position (b) says the examining under oath is permissible only insofar as it can have no effects beyond making the examinee accuse or convict himself of an ecclesiastical offense. As soon as he is asked to make an admission that might be used against him in the temporal sphere, the ecclesiastical court becomes prohibitable. In practice, there were some offenses which ecclesiastical courts were entitled to punish, but which were also subject to common law prosecution. These were exceptions to the usual principle that when the common law had jurisdiction the ecclesiastical courts did not -- typically, exceptions created by statutes which imposed a temporal penalty while expressly or by implication preserving ecclesiastical authority. In such instances, one can obviously not say the ecclesiastical court lacks jurisdiction. One can say that it must modify its procedures to take account of the concurrent secular jurisdiction and the

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interests resulting from such concurrence. In application to inquisitorial examination, that means that men should not, as a by-product of intrinsically proper ecclesiastical proceedings, be forced to supply sworn admissions which would increase the chance of their being prosecuted or convicted at common law.

This theory is analogous to the "common law interest" approach to two-witness-rule cases. That approach says that ecclesiastical courts are entitled to their "evidentiary formalism" -- whether or not it is reasonable -- so long as there are not likely to be reverberations in the common law sphere. So here: Whether or not asking a man to incriminate himself is a morally desirable practice, the common law has no interest to interfere with ecclesiastical courts' doing so, unless it will alter the game at common law -- unless the man's temporal position will be worsened as a result of the accidental existence of powers of discovery within the ecclesiastical system which are lacking in the secular. In this instance, the analogy with two-witness cases breaks down more in practice than in theory. It was difficult to make out exactly how ecclesiastical enforcement of the two-witness rule could impinge on the temporal sphere, given the premise that the suit fell clearly within ecclesiastical jurisdiction. The courts found it hard to stick to the most convincing paradigm of "common law interest" -- i.e., to prohibit only when one and the same document or transaction (a lease, say) would be likely to come into question in common law litigation, and therefore when failure to establish the transaction in ecclesiastical litigation for lack of two witnesses might lead directly to prejudice or anomaly. Coke's general opposition to two-witness-rule Prohibitions may be seen as a way of expressing the sense that the "common law interest" in preventing application of the formalistic rule was vaguely conceived and loosely expandable. By contrast, self-incrimination cases are easy. It is usually quite apparent when interrogation to discover an ecclesiastical crime would extract confessions capable of causing temporal detriment. If it was not a matter of taking note of well-known instances of concurrent jurisdiction, it was usually a matter of restraining a technique sometimes used by the ecclesiastical courts themselves. (Making people enter into penalty bonds to refrain from ecclesiastical offenses. If the ecclesiastical court later used inquisition to determine whether the offense had been committed, it exposed the examinee to forfeiture of the bond -- not criminal liability in

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the common law sphere, but loss of money by a breach of obligation which it would be harder to establish at common law without the assistance of a forced confession.)

It would, I think, have been hard to avoid the limit which position (b) puts on inquisition, even if one were otherwise opposed to interfering with ecclesiastical procedures. For how could one say that ecclesiastical courts must sometimes waive such standards as the two-witness rule, and yet hold them free to bring clearer-cut temporal harm on men than enforcement of the two-witness rule would ordinarily be likely to conduce to? Adopt Coke's opposition to two-witness-rule Prohibitions and perhaps one has a foothold to resist prohibiting sworn examination tending to expose to temporal detriment. But even then one would *only* have a foothold, for the two-witness rule may be regarded as a rather weak special case of a more inclusive principle. The principle is that ecclesiastical courts are not entirely free to handle their own cases in their own way, that they must sometimes, though not always, accommodate their law to the circumambient reality of the common law. Arguably, waiving the two-witness rule -- a mere aid in truth-finding adapted to the ecclesiastical method of trial -- is not the sort of accommodation that should be demanded. It does not follow that waiving other procedures out of respect for the common law system of relationships is too much to ask. To waive normally permissible sworn examination in order not to expose people to obvious sorts of temporal damage which they might otherwise avoid is arguably to respect the integrity of the common law system in a clear way -- more clearly, perhaps, than by taking note of the values expressed, and expectations engendered, by such common law rules as "Truth is a defense to defamation" or "The husbands act binds the wife."

(c) The third possibility is an application of the "rule of reason" approach to the control of non-common law conduct. Positions (a) and (b) make no objection to incriminating interrogation as such; they simply entail some limits on ecclesiastical freedom to use it. Position (c) expresses the attitude that the procedure must be hedged by safeguards to be tolerable, but not flat disapproval. It is of course possible to hold that the laws of God and nature forbid ever coercing a man to accuse or convict himself, whence it would follow, if the common law courts are God's and nature's

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executors, that all sworn interrogation of parties in criminal cases should be prohibited. So to hold, however, is to say that ecclesiastical courts must totally refrain from using a procedure with strong pretenses to be a "normal" device in their armoury and with a great deal of unquestioned usage in at least some circumstances, behind it. Moreover, inquisition was used in the criminal and quasi-criminal cases in the Star Chamber, a respected court and accepted pillar of order (and some of the uses of sworn examination in the Chancery were not so unmistakably civil as to avoid all aspersion from a radically moral point of view). A more moderate position is to admit that inquisition is a legitimate tool of ecclesiastical law and to insist that it is a dangerous one. The procedure is accordingly to be accepted -- tolerated as a traditional tentacle of the spiritual arm, or (less negatively and probably more typically) as an essential instrument of law and conformity in the Church, than which nothing is more vital. At the same time, inquisition is not an instrument with which ecclesiastical courts may be turned loose, provided only that they stay in their jurisdiction and refrain from affecting temporal interests by the way. The instrument has peculiar dangers, carries special risks of injustice; it is potent in ways the formalism of the two-witness rule is not, even in its most foolishly rigid applications. The common law courts must accordingly undertake to protect the subject from the abusive employment of a legitimate device.

No specific limitations on the ecclesiastical power to examine follow from those general principles. Some of the limits one would most readily expect to be deduced from them can also be drawn from theories (a) and (b) above. For example, inquisition is unfair if it is used to relieve the authorities of almost all need to investigate suspected offenses, all need to satisfy themselves that suspicions, tips, and rumors are half-way reliable before calling men in question. Therefore, mere "fishing," or requiring people to furnish virtually all the solid information on which they can be accused in the first instance, should be prohibited. *Or*, since inquisition is potent and dangerous, it should be confined to saving souls. It would be unreasonable to use so harsh an instrument for the comparatively low-grade goal of convicting men of petty misdemeanors; it is reasonable to use it for the theoretically higher, but materially less expensive, end of discovering their spiritual disorders, for which they should do penance or risk excommunication. Therefore, inquisition should never be used to

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conduce to men's prosecution or conviction for those relatively minor temporal offenses that corresponded to concurrent ecclesiastical crimes -- as it were, if the technique is too rough to use on suspected murderers (as its absence from the sphere of felony shows it was), surely it is too much for suspected defamers of the Prayer Book *qua* statutory offenders. As for heresiarchs and schismatics -- the procedure fits the crime.

The advantage of position (c), however, is that it can lead to limits on the power to examine which (a) and (b) will not reach by other routes. For example, inquisition carries the risk of inveiglement -- the trick question, the well-laid plan for leading a sworn witness into statements which he may intend in a sense other than that which they can be given by a hostile interpreter, or which he fails to understand as damning. Perhaps the risk is not too great, or at least worth running, when the examinee is fairly cleanly accused of a reasonably "overt" act. But suppose he is accused (cleanly enough, perhaps) of the kind of religious offense that consists in part of, or can easily be inferred from, professions of belief. Ecclesiastical jurisdiction is indisputable; perhaps the gravity of the offense fully justifies strong detection procedure. Nevertheless, is the risk of unfairness not intolerable -- the risk that someone whom the ecclesiastical authorities "have it in for" will be made out an unwitting heretic? (Two related doctrines which we shall encounter in the practice can be derived along these lines: the view that people may not be interrogated about opinions which they have never put into speech, nor about intentions; the rather strong view that laymen are altogether unexaminable about religious offenses, unlike clergymen, who are presumed able to avoid theological entrapment.)

Another possibility is to extend the idea of "temporal detriment" beyond what position (b) would seem to permit. Suppose someone is straightforwardly and specifically charged with fornication and asked to say under oath whether he committed the acts charged. Ecclesiastical jurisdiction is clear; since fornication is not a concurrent temporal offense, examination will not furnish the secular authorities with gratuitous assistance. Nevertheless, one may ask, is it fair to use the special pressure of an oath to make people tarnish their own moral reputations? Is conviction of the ecclesiastical offense -- albeit a desirable goal if the offense was committed -- an important enough end to justify pressing a man to defame himself? If he is convicted on evidence other than his sworn con-

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fession, well, perhaps the neighbors will not believe the witnesses against him. Perhaps they will not agree with the ecclesiastical judge. His reputation has half a chance. Is it a reasonable use of the strong instrument of inquisition to achieve by means of it a few more convictions of minor offenses than might be otherwise obtained, when the consequence is pain and damage greater than would be caused by the alternative modes of proceeding available in most cases?

Per contra (waiving the points touching religious offenses above), one can argue that inquisition is not similarly unreasonable when it is used to raise the conviction rate for crimes against the church, from heresy on down to disturbing divine service and the like. For (realistically enough) the people who offended in such ways (Puritans, priest-haters, desperate atheists, the lot) were hardly subject to the sexual offender's typical desire not to be found out. They of course desired not to be convicted (especially not to be convicted by courts whose procedures and very existence such people often considered illegitimate). But conviction hardly imposed an additional burden of shame, or of indeterminate material loss, comparable to that caused by defamatory statements insofar as they are believed. People pressed to disclose their trespasses against the good order of the Church were likely to be proud of what they had done, much though they might struggle to avoid being forced to go through the motions of penitence before authorities they despised. Their acts (as opposed to the "secret thoughts" concerning which men should perhaps not be examined in any case) were by nature public or political in some sense, subversive utterances meant to be heard, by the converted if not the unconverted; acts of demonstration or defiance, whether motivated by profound convictions of conscience or by a disrespect for the Church and the cloth of mere devilish inspiration; unlicensed religious assemblies which, if meant to be "private," were nonetheless shared. Fornicators seek the cover of night, to conceal the act of darkness from the eyes of men; conventicle-keepers try not to be where the ecclesiastical cops are looking. Malice, gossip, and jealousy are likely to lie behind the *ex officio* prosecution of fornicators, via undisclosed informers; the anonymous tipster who points to a Brownist may be performing a public service in the honorable tradition of stool-pigeons and police spies. Evidence of unlawful religious activity may indeed be hard to find except by protecting the anonymity of informers and examining suspects, for

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those who could provide evidence may often be co-participants, or sympathizers, or neighbors whose zeal for Church discipline is indifferent compared with their will to live and let live. No one, I think, unless in a mood of demented enthusiasm or a posture of perverse argumentation, would have contended that keeping down the commonplace sins of the flesh required tougher methods than were available for the repression of major secular crimes, convenient though such methods might be for the authorities, and edifying though it might be to catch a few more sinners than could otherwise be nabbed. It is much more seriously arguable that the enforcement of religious uniformity and of respect for ecclesiastical authority demanded strong methods if it was to take place in anything like fair proportion to the incidence of misbehavior, misbehavior which, to Establishment eyes, was grievous. Informers, examination (without *ex officio* oath, but often with torture) and one-sided trial heavily based on confessions made up the accepted way of dealing with political subversion. Could the ecclesiastical authorities be denied analogous powers in an analogous field?

Subjecting the power to examine on oath to "rule of reason" control may or may not lead to the particular limitations and discriminations above. By nature, that mode of control calls for a degree of "playing by ear." The general points to be emphasized are:

(i) However stringent the limitations which reason and fairness impose on inquisition, some scope must remain for it -- for otherwise the "rule of reason" is not a "mode of control," but a basis for categorically condemning the procedure, except perhaps in strictly civil suits. (And there, beware of taking the civil-criminal dichotomy too simply in relation to ecclesiastical law. If one leaves out a middle ground of trespass-misdemeanor the civil criminal line at common law is pretty clearly marked by differences of procedure and sanctions on the two sides. In ecclesiastical law, the procedural border is not entirely clear, and the sanction border is less so. Take the seemingly most civil of cases: a legacy suit, say. It is true that the executor will only be told to pay the legacy, or told he does not have to, depending on how the dispute turns out. Losing the suit is not much different from having judgment go against one in an action of Debt or, more properly, having an equity decree made against one in a dispute about the terms of a trust. But if the executor does not pay up, he will be cut off from the sacraments of the Church and, theoretically, the company of Christian

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people. He will fare no better than a grievous religious offender who refuses to express repentance. Is there not then a sense in which the thrust of the most humdrum testamentary suit is to expose the defendant to a dire spiritual penalty? Is it obvious that the executor should be compelled to testify under oath about whatever is in dispute -- whether the assets of the estate are sufficient to support legacies, whether the object allegedly given as a legacy had been conveyed away by *inter vivos* gift, or whatever -- when the tendency of the examination will be to increase the chance of his losing the suit and facing the choice between obedience and excommunication? Would there be no disparity between absolutely protecting men accused of crimes -- be it fornication, be it schism -- and not protecting an executor at all? Should one say that alleged ecclesiastical criminals need never put themselves in danger of spiritual sanctions, or in confrontation with the choice between obedience and excommunication, on their coerced confessions, whereas an executor may always be coerced to make confessions which will put him in that position? For practical purposes, one need not worry about these matters; ecclesiastical power to compel sworn testimony from parties to testamentary suits was generally admitted *obiter* and almost never challenged by Prohibition. If one worries about the matter philosophically, one will perhaps be disposed to bless those Puritans who were scandalized by the use of ideally grave spiritual sanctions for worldly business).

(ii) Controlling inquisition by the "rule of reason" would have at least "phenomenal" continuity with other species of control over the conduct of non-common law courts within their jurisdictions, though as a theory on which to justify such control in general it has its weaknesses. That is, some of the phenomena we have encountered in connection with disallowance-surmise Prohibitions probably come to little more than common law judgments that the conduct of "foreign" courts was foolish or unfair. For example: "Saying that a man has to have two witnesses to prove that he paid his tithes is ridiculously burdensome -- never mind whether a 'common law interest' in what goes to prove that transaction can be made out, never mind that we allow the two-witness rule to be insisted on in cases where we have more of an 'interest' -- it isn't so burdensome in those cases -- never mind that we might refuse to prohibit on an unexplained surmise that a plea of tithe payment had been disallowed -- we do not dispute that such questions as what constitutes 'payment' may be within ecclesiastical jurisdiction -- all we object to is the unreasonable

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holding in front of our eyes, the abusive application of an evidentiary standard to which the ecclesiastical courts are generally entitled." On the other hand, we have seen ways in which the courts were reluctant to set up as arbiters of reasonableness, reluctant to oversee the ecclesiastical system in the same spirit in which they scrutinized local custom. With respect to self-incrimination, we should at least be prepared to ask whether the phenomena have to be accounted for by the "rule of reason." Were the courts readier in this field than in others to say, "Yes -- you may use your inquisitorial technique -- when we see no harm in it, as we sometimes don't -- all depending on how necessary we think it is for legitimate ends of the legal system, how damaging in its side-effects, how fair the surrounding procedure, etc.?"

(d) Still another approach to inquisitorial examination is analogous to the "legal conformity" approach to disallowance cases. Whereas the "common law interest" theory looks to what will happen in the common law sphere of relationships if the ecclesiastical courts are allowed to go their own way within their jurisdiction, the "conformity" theory demands that ecclesiastical rules avoid conflict with the common law when rules in the two systems can be made out as parallel or commensurable. In general, "conformity" has much less meaning with respect to procedures than with respect to substantive law. It perhaps makes sense to say that ecclesiastical courts must follow the common law on, e.g., the legal capacity of married women, for no other reason than that it is better to have one rule on such subjects in one country, even though there are contexts in which a conflicting ecclesiastical rule would have no effect on property interests or the like. Inasmuch as no one was ready to say that the ecclesiastical system ought to scrap its trial method and go over to the jury, there was no very satisfactory basis for saying that evidentiary standards adapted to ecclesiastical trial "conflicted" with the common law. Better to say "The result of this trial is of such interest to us that we cannot let you put much higher evidentiary hurdles in the defendant's way than he would encounter in practice at common law," or even "Application of the two-witness rule is unreasonably harsh in this case," than to say "There is no two-witness rule at common law, so you may not have one either." Anyway, no one was ready to make such a statement categorically; the closest approach comes in unnecessarily awkward forms of saying "*This* issue is of interest to the common law, therefore you may not apply 'conflicting'

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canons of evidence." Should inquisitorial method be regarded differently? Is there any basis for maintaining that incriminating examination in some or all circumstances "goes against" the common law and therefore has no place in the same national legal system? Or is it better to take it as a procedure which simply fails to "meet" the common law; which, like the two-witness rule though less obviously, has a certain *prima facie* justification in a system wholly dependent on testimony, lacking the common law's capacity to draw on the knowledge and shrewdness of the community; which perhaps ought to be restrained by the "rule of reason," but let reason mean reason -- "natural" fairness -- for the common law has nothing to say as to when inquisition is or is not legitimate, much less that it is never permissible?

There are, I think, three senses in which a common law policy against inquisition, or at least some forms of it, could be made out, three ways in which exacting sworn admissions could be considered rather more specifically "against the common law" than formalistic evidentiary canons. (i) We shall encounter in the practice an occasional effort to show that there were common law contexts in which a "privilege against self-incrimination" was literally operative. That was a difficult undertaking, but a decent argument could be made. I omit the specifics until we come to the cases. (ii) There is an argument from negative evidence and the spirit of the law. The common law did not make people testify against themselves under oath. Why not? Though one answer is admittedly that there was no need, that the common law was furnished with other and better instruments, yet surely there must be some implication of disapproval in the absence of an institution of obvious attractiveness to the forces of law and order. To put the argument in terms which of course no historical character would have used: The common law sweated and strained to get criminals indicted and convicted -- in the process, since it was hard to get results without confessions, or believed to be hard, subjecting some suspects to exceedingly inhumane treatment -- and yet it stayed away from the possibly more effective, less cruel, and more reliable method of inquisition. Parliament made statutes requiring the J.P.s to examine arrested suspects, yet it never thought to add the assurance of an oath. Surely there is more

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implied in the absence of inquisition than in the absence of a two-witness rule from the common law sphere. Not making people testify against themselves is surely something the common law has *chosen* over its history, as it were in the face of temptation; subjecting facts to formalistic proof requirements is something, given the jury system, it would hardly have been tempted to do. Admittedly there is a sense in which the common law does not really "have" a "privilege against self-incrimination"; there is a sense, too, in which the common law does not "say" that a woman's immaterial interests, as in her good name, may be released by her husband. But the very creation of system that *de facto* avoids inquisition and can get along without it implies a moral judgment against it; likewise, by adopting firm rules giving the husband power to dispose of his wife's material interests, the common law has made a moral choice between rival constructions of the marital relationship so fundamental that it must carry over to the immaterial interests protected by ecclesiastical law. As I argue above in connection with substantive rule-conflicts, the psychological pressure for conformity-by-analogy is not necessarily strongest when moral alternatives are most stark. A paradox we have encountered before can be applied to inquisitorial procedure: One man may find the exaction of self-betraying testimony morally repulsive; seeing it absent from the common law, he prizes the native legal system for being unambiguously on the side of the angels and concludes that "foreign" law in England must at the very least refrain from what usage and "nature" join in condemning. A cooler man may note that a case can be made for inquisitorial technique, that it operates with much wider scope in many civilized countries than it could possibly be given in England by allowing it within the narrow bounds of ecclesiastical law; he does not sense an immense flow of moral forces in one direction; and yet -- precisely *because* he perceives a moral choice instead of a moral compulsion -- he comes out at the same place as his dogmatic fellow; for, he intuits, where there is a choice it is necessary to choose, where there are alternative shades of gray and yet the choice is important enough to be embodied in legal institutions and color a nation's "style," there is only room for one decision in one society; England has opted against oaths and self-betrayal, for better and worse; the ecclesiastical courts must go along. (So the "male chauvinist"

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may turn out to agree with the man who only thinks that England has so far committed herself to a male-dominance theory of marriage that the introduction of exceptions through ecclesiastical law would have a "disintegrative" effect. Modern critics of the privilege against self-incrimination like to point out that Continental inquisitorial systems are better for the innocent, the Anglo-American system better for the guilty. Along the lines above -- if they are not too hopelessly bound up with a long-obsolete belief in the "wholeness" of communities and Everyman's implication in historic choices -- one might reply, "Yes, true enough, our ancestors took the side of rascals and shysters -- the 'come-and-catch-me-if-you're-smart-enough' attitude toward criminal law-enforcement. There's no getting out of it now.")

(iii) There was a relevant history of conflict over inquisitorial investigation and arguably relevant material in the statute-book. These matters have been adequately discussed by others; when "positive" authority is used in cases directly, I shall take it up. Speaking only very roughly for the present: One could if one liked believe that the famous 29th Chapter of the *Magna Carta* ("*Nullus liber homo*, etc.") positively banned inquisition in any English court, including the ecclesiastical. Closer to earth, there were some at least arguable statutory limits on inquisition -- limits rather than interdictions. There was a rather important argument to the effect that inquisitorial power had been given to ecclesiastical courts in limited terms by the famous 15th-century heresy statute, whence it followed that they lacked such power "at common law" and lacked it now owing to the statute's repeal. In a loose way, the very fact that there had been trouble over ecclesiastical inquisition in remote times, that some statutes, whatever their value in particular cases now, had sought to contain it, and that affirmation of common law process could be seen in less directly apposite statutes, such as the *Magna Carta*, reinforced what I call the argument "from negative evidence and the spirit of the law." The common law not only avoided inquisition; there was historical evidence of positive efforts to keep it out of English law and to prevent its encroachment via the lackeys of Rome. The same could hardly be said of the two-witness rule.

To hold that inquisitorial procedure "disconforms" with the common law in a significant sense, meets it and contradicts it, is probably the best basis for opposing the procedure altogether. The only other reliable way

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to that end is to say that inquisition is flatly against the law of God and nature -- and in English jurisprudence, especially when it came to telling the churchmen that their understanding of God's dictates and nature's light was defective, one was well-advised to have the spirit of the common law behind one. The "conformity" approach does not, however, have to entail total condemnation of sworn examination. One may, for example, maintain that as a feature of *trials* it does not clash with the common law head-on, only differs, as does the whole method of trial which it, along with evidentiary canons, is an adjunct. Making a criminal defendant give sworn evidence, possibly to his detriment (if he guilty and fears perjury) may be seen as not wholly discontinuous with the unobjectionable use of purgation in some ecclesiastical proceedings (which, in turn, received a kind of sanction from the common law, where wager of law survived in a few civil actions). After all, an innocent examinee has something like a *de facto* chance to purge himself, for in practice, if he simply answers all the questions truthfully and does not let tell-tale evasions or contradictions creep into his testimony, the likelihood of his getting off may be very good. It is not guaranteed, but courts that exact oaths will probably tend to believe internally convincing testimony; more so, perhaps, than triers who are more accustomed to relying on evidence other than the defendant's deposition and to being more generously supplied with it. On the other hand, one may maintain, anything that smacks of forcing men to accuse themselves on oath, the use of sworn examination as a pre-trial procedure, does clash with the common law head-on. The common law system has pre-trial examination too; it avoids oaths. Whereas the contrasting trial methods may fail to "meet," there is only one situation a suspect hauled in off the street can be in, whether the hauling is done by lay or ecclesiastical officialdom: he is a suspect merely, not liable to be treated as an accusee until in some meaningful sense he is one, not liable to be subjected to *any* process designed to get at his guilt or innocence until some sort of ground for so subjecting him is shown. Forcing him to respond under oath then and there necessarily cuts to his guilt or innocence. Asking him questions without oath (as at common law) is permissible, even though both what he says and his refusal to talk may be used against him. There is perhaps no need that ecclesiastical courts imitate the common law accusatory system at all closely. Perhaps accusation methods

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may differ without "disconforming," as trial methods may. But something there must be -- if not a specified information from an identifiable informer, at least a reasonably specific statement of charges from the court, even if they are in a sense only implied in pre-furnished "articles of examination" from which a "reasonable man" could infer that the court accused him of definite acts recognizable as illegal. This *unum necessarium* the spirit and example of the common law do demand of every court in England. Here, at least, the *Magna Carta*, c. 29, is clearly relevant. If that vague guarantee of "due process of law" means anything at all, it must mean that some process of law, some first motion by authority to justify bearing down on men, has to precede the actual bearing down, whether with sanctions or with trial, for trial is the part of the road that ends in sanctions for the unlucky and from which there is no turning.

The main objection to worrying about the conformity of inquisitorial procedure with the supereminent common law model, or indeed, its compatibility with the *Magna Carta*, is that it leads either to a drastic conclusion or to one reachable by other ways. In the political forum, someone wanting to make a case against all compulsory sworn examination ought to lean heavily on its "disconformity" with the fundamentals of native law, the closest equivalent to "unconstitutionality" in English jurisprudence. In the judicial forum, one should not expect ultimate questions about the procedure's legitimacy to arise very often. A judge *could* make up his mind that every form of coerced testimony under oath was illegal and accordingly prohibit whenever it was complained of, citing no reason except that general proposition. But why should he? It is important to remember the contextual differences between politics and litigation. In litigation, even *a priori* consideration would suggest, not every case involving self-incrimination is going to demand a decision about the legitimacy of inquisition in general. In some cases, one would surely expect, the heart of the complaint would be that self-accusation, with little or no notice of charges, was being demanded. One could justify prohibiting in such a case by way of the moderate version of the "conformity" theory: that sworn self-accusation, though not self-conviction, is flatly illegal in England. But prohibiting in that case is likely to be justifiable also by the most conservative line of reasoning, (a) above. The two approaches lead to different perceptions of the situation in detail, but detailed questions may never come out on a litigative record. For exam-

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ple, if ecclesiastical courts are obliged to go through an accusation process roughly parallel to the common law's, it may not be enough that they furnish an examinee with a fairly specific set of "articles." It may be that full "constitutionality" requires a more explicit form of "charging," or perhaps a demonstration that the charge is backed by someone willing to put *his* oath behind statements of fact from which reasonable suspicion can be drawn. But if the ecclesiastical court has allegedly not *so much* as given the examinee a sufficient indication of what the examination is to be about, it is probably prohibitable for failure to make its jurisdiction appear. Plaintiff-in-Prohibition's allegation might not be true; until there is a Prohibition, and it is controverted as to in-court facts, no one will know. On the other hand, the view that real "constitutional" objection can be made only to self-accusation would narrow the range of Prohibitions more than theory (b) above, which holds that a man may not be tried by sworn examination in an ecclesiastical court so as to put him to temporal detriment collaterally. If a Prohibition could be justified by theory (b), why worry about whether a high "constitutional" position condemning all inquisition is sustainable? Again, there is nothing to prevent a judge from adopting such a position and relying on it. We shall want to ask whether any judges did. The point here is that cases in which drastic positions had to be either accepted or rejected are likely to be rare: for example, a case where an unexceptionably well-notified examinee is to be interrogated concerning an unexceptionably ecclesiastical crime, where convicting himself will not put him in any kind of temporal legal danger; where there is no obviously inviting objection to the questions on grounds of "reasonableness" (tendency to go into mere opinions or intentions, tendency to bring non-legal detriment, such as loss of reputation, on the examinees out of all proportion to the seriousness of the ecclesiastical offense, etc.) If either political caution or craftsmanly preference for narrow grounds dissuaded the judges from taking sweeping positions on self-incrimination, opportunity to stay off the "constitutional level" would probably be ample.

Unlike most of the topics of this study, the relations between common law and ecclesiastical courts insofar as they concern inquisitorial procedure have been discussed extensively elsewhere. Suffice it to cite Leonard W. Levy, *Origins of the Fifth Amendment: The Right against Self-Incrimination* (New York, 1968), where earlier work is compre-

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hended. For the environment of opinion in which "cases and controversies" touching on sworn examination occurred in the late-16th and early-17th centuries, Levy provides much valuable information, which I shall not reduplicate. His treatment of the strictly legal history, however, -- just what the courts were invited to do and what they apparently did -- is not adequate. In large measure, that is a result of Levy's purpose. His treatment is teleological in an entirely legitimate sense, a matter of tracing the cumulation of attitudes and legal traditions which eventually led to the "privilege against self-incrimination" in English law and the United States Constitution. That purpose does, however, contain dangers, against which Levy does not make sufficient provision. He does not distinguish sharply enough between the "political forum" and the "litigative forum"; he over-identifies the judiciary with the "political left" -- with the centrally Puritan vein of opinion which, motivated by pervasive disapproval of the ecclesiastical legal system and the self-interest of its victims, formulated a radical critique of inquisitorial procedure drawing heavily on legal nativism. These "errors" on Levy's part do not vitiate his larger theme. In the long run, it was the opinion of the "left" (turned gradually into orthodoxy through the catalytic experience of revolution) that gave shape to a variety of legal liberalism in which freedom from inquisition was an important article. Levy's picture of the actual courtroom history, on the other hand, is somewhat vitiated by the imperatives of his theme. His awareness of the context, the whole range of relationships between the common law and non-common law courts, of which control over incriminating examination is a small corner, is extremely limited; he takes the significance of what the courts were doing when they exercised that species of control in particular cases too easily for granted.

Insofar as these remarks about Levy are critical, they are insignificant except as my treatment of partly overlapping evidence, below, is more convincing than his. I make them at this point to emphasize that there is more to the story of common law control over inquisition than I shall try to convey. Cases on this subject were more in the public eye than most other categories. Strong opinions on the issues (or, as usual when legal questions are politicized, something resembling the issues) existed in the community. Those opinions were intricately related to other strands of thought and feeling carrying a high political charge. Ecclesiastical

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authority and its religious and constitutional critics were not engaged in combat for the first time in the early-17th century; there was already an accumulation of passion focused on inquisitorial procedure at the time it became the focus of a significant body of litigation. Of course the courts operated, in this area even more than in Prohibition law generally, under the shadow of politics; that is a dimension of the context, no doubt determinative in some degree of the way the courts handled the cases.

Because that dimension is well-described in such works as Levy, I shall not dwell on it. Rather, I shall lean heavily toward what general accounts of conflict over inquisitorial procedure seem to me to have handled too uncritically; the exact structure of the cases, indeed the limitations of the cases, for one of the most important things about the hard-core legal material is that it does not admit of facile interpretation. In these introductory remarks, I have stressed the purely juridical context of the cases -- the opposite of the political. At an abstract level, I have examined the continuity of self-incrimination cases with other cases in which the common law's authority to scrutinize the conduct of ecclesiastical courts (especially their procedure) came in question. One cannot expect the approaches I have suggested by abstract analysis to be lined up and chosen among in concrete cases; my alternatives were perhaps not the judges', my sense of the relationship of self-incrimination cases to disallowance cases not theirs. No resolution of such doubts in terms is likely to emerge. It behooves us, however, to ask from the "inductive," case-by-case point of view what the judges seemingly, or probably, or possibly, thought they were doing when they interfered with inquisitorial proceedings in ecclesiastical courts or refused to. It behooves us to remember that quite a few distinguishable problems could arise under the rubric of "self-incrimination," that the various problems could be approached in various ways, and that there was a background -- analogous legal situations of the sort we have been dealing with throughout Vol. II of this study -- on which the judges at least might have drawn.

Two further complications, related to each other, add considerably to the problem of reconstructing the courts' approach to inquisitorial procedure. (a) The majority of relevant cases involve the High Commission (unsurprisingly, since the Commission was essentially a criminal court and one actively devoted to looking out for the security of the Church and stepping up the enforcement of ecclesiastical law beyond the level which

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the regular courts were able or willing to maintain). On one assumption, inquisition by the High Commission raised exactly the same problems as use of that procedure by other ecclesiastical courts, the assumption that the Commission had not been given any powers or procedures beyond those possessed by all other ecclesiastical courts. However, that assumption was subject to challenge, diversity of opinion, and unsettlement. Any self-incrimination case involving the Commission raises the question whether that court had the power to examine under oath in these circumstances or those, even granting that an ordinary ecclesiastical court could not examine in comparable circumstances. That question, in turn, implied further ones as to whence and in what terms the Commission derived its authority. (For example, did it owe its existence to the Elizabethan Supremacy Act, which appeared to empower the monarch to create such a special ecclesiastical court, or did the monarch have such power regardless of the statute? If the statute was crucial, did its language and intent limit the powers which the monarch could confer on the Commission, or did the act give him a virtual blank check -- *inter alia*, to authorize the use of inquisition in cases where other ecclesiastical courts could not use it? If the statute was not crucial, was the monarch's preexisting, "common law" authority to set up such a Commission so limited that no procedures could be given to it except those lawfully employable by regular Church courts? In whatever sense it was relevant, what did the latest royal patent creating a new Commission purportedly empower it to do?) Those questions as such will be dealt with in Part IV of this study. In this section, I shall only be concerned with their bearing on the Commission's power to examine, compared with that of ecclesiastical courts in general.

Another peculiarity of the High Commission is that it arguably, but only arguably, had restricted jurisdiction -- i.e., not general "spiritual" jurisdiction, but authority to deal solely with serious ecclesiastical crimes. This circumstance is complicating because complaints about the Commission's use of inquisitorial procedure could be combined with contentions that it had overstepped its limited statutory jurisdiction. One must accordingly beware of taking common law intervention to signify objection to inquisition when it may only signify the judgment that the matter in question was *ultra vires*. Positive indications of the basis for decision must be looked for; they are not always available.

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(b) The authority of the High Commission, including its authority to exact sworn testimony, was frequently challenged by *Habeas corpus*, rather than Prohibition. The reason for this is that the Commission *claimed*, by virtue of the statute of 1 Eliz. and pursuant patents, the power to fine and imprison, over and above the sanctions ordinarily available to ecclesiastical courts. That claim was much controverted, but *de facto* the Commission put people in jail; prisoners accordingly sought deliverance (outright or on bail) by *Habeas corpus*, invoking any or all of the objections commonly made against High Commission proceedings. (The matter was outside the Commission's limited substantive jurisdiction; *or*, the Commission had no authority to use non-spiritual sanctions within its jurisdiction; *or*, even if it could imprison a convicted person as a punishment, it could not imprison for contempt or to enforce its process (ergo not for refusal to testify under oath); *or*, even if there were no limits on the court's power to imprison as such, there were limits on its power to use inquisition (wherefore a man who was subjected to improper interrogation and then imprisoned, before or after convicting himself, should be regarded as wrongfully held and set free).

High Commission cases touching on self-incrimination are all the more difficult to disentangle when they also concern the power to imprison. That is true even if they arise by Prohibition, by which means imprisonments could also be challenged. (That is, the Commission could be prohibited from proceeding further in a given cause and concomitantly ordered to withdraw any sanction it had already applied, as other ecclesiastical courts could be prohibited from executing their sentences and required to remove excommunication if things had gone that far.) When the challenge to an imprisonment was made by *Habeas corpus*, it can be all the harder to make out whether the common law court was expressing objection to inquisitorial procedure (or, conversely, upholding it), as opposed to passing on the Commission's power to imprison or some other question about its authority. I shall defer explaining the reasons for this in detail until we encounter relevant cases. In brief, in Prohibition, someone aggrieved by an ecclesiastical court came and stated his grievances, perhaps redundantly enough to furnish several independent grounds for prohibiting, but at any rate the complainant put his legal contentions and alleged facts supporting them down in black and white. If one only knows that the judges prohibited, one at least knows the reasons they chose among. In *Habeas corpus*, a prisoner made a common-form de-

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mand that his imprisonment be justified. The common law court had officially before it only the imprisoning authority's frequently minimal justificatory statement. Any justification of an imprisonment by the High Commission necessarily put its power to imprison (its capacity to justify a committal at all) in question. But that question could be ducked if one chose to concentrate on the surface adequacy of the justification -- whether it was detailed enough, correct in point of form and so on. The extent to which other matters concerning the High Commission's authority, including its examining power, were strictly in question, or clearly the basis for decision, in particular *Habeas corpus* cases is not always evident, though such wider issues were often discussed under the rubric of *Habeas corpus*.

Owing to the special qualities of High Commission cases, I shall proceed by first discussing reports involving the regular ecclesiastical courts and then those concerned with the Commission. In theory, the ordinary courts and the Commission could have been held to enjoy quite different powers to examine under oath.

B. Regular Ecclesiastical Courts

Summary: There are not many cases on the power of ordinary ecclesiastical courts to exact sworn testimony from parties. The rule that non-common law powers of examination (one case dealt with here involves the Court of Requests rather than Church courts) may not be used so as to bring temporal detriment upon the examinee in the form of criminal prosecution, semi-criminal forfeiture, or forfeiture of a good-behavior bond receives support from the cases. The one case involving purely civil relationships, on the other hand, tends to uphold ecclesiastical courts' power to examine insofar as doing so is relevant for their purposes, despite the civil detriment that sworn confessions might cause in the common law sphere. Two cases point to the rule that people may not be coerced to confess to sexual offenses, where the effect is to bring "shame" or "self-defamation" upon them, but another decision tends to exclude persons accused by ecclesiastical presentment from the protection of that rule. One important extra-judicial opinion lays down further restrictions on ordinary ecclesiastical examining-power (see text), but they are untestable by cases not involving the High Commission. Blanket condemnation of incriminatory examination certainly does not appear between the

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lines of the cases; on the contrary, what appears, if anything, is a degree of hesitation about the common law's right to interfere.

* * *

The earliest case in point¹ is discussed in Vol. I of the study in relation to partial Prohibitions -- such a writ having been issued in the end as a compromise solution. For the shape and "drama" of the case as a whole, see the discussion there (Sect. VIII, note 18). Here we need to look more precisely at its bearing on the power to exact testimony from a party. As will appear from other cases on self-incrimination, the right of ecclesiastical courts to examine lay parties in testamentary and matrimonial causes was usually admitted -- often with the proviso that the right existed *only* in those two sorts of cases. In the present case, however, an attempt was made to challenge such interrogation in what would ordinarily be considered a "testamentary cause," though there might be a quibble about so classifying it, since the object of the suit was to revoke administration of an intestate's estate. Two judges, Periam and Wyndham, did not like the suit as such, being of the opinion that administration could not (by virtue of Henrician legislation on intestacy) be taken away from the intestate's widow and given to his common law heir. The heir was seeking such a transfer here on grounds of equity; the widow did not contest the appropriateness of the suit itself, but sought a Prohibition because she was being asked allegedly improper questions. Periam and Wyndham were in all probability inclined to be sympathetic to the widow's contention because they thought that the revocation suit as such should be prohibited (since the other two judges, Chief Justice Anderson and Justice Walmesley, sharply disagreed, Periam and Wyndham lacked the votes to treat the surmise as misconceived and prohibit for the reason they preferred). Had it been objected in terms that ecclesiastical courts have an unlimited right to examine in testamentary causes, Periam and Wyndham might have said that a suit to revoke administration is not a "testamentary cause" within the meaning of that general rule. The point would not be a mere *verbal* quibble, for it is

¹ T. - M. 31/32 Eliz. C.P. Lansd. 1073, f.108; Add. 25,194, f.6b; Add. 25,196, f.199b; Moore, 906. Only Add. 25,194 is dated T. 31. That report is virtually identical with Lansd. 1073, dated M. 31/32. I think it likely that Add. 25,191 is correct as to the first of three discussions of the case. Lansd. 1073 confusing that discussion, which it reports. with the final ones in the same case.

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arguable that the handling of intestacy cases was so regulated by statute that ecclesiastical courts operated under the common law's scrutiny, almost at its sufferance, in that area. Thus, waiving the objection that revocation suits such as the one in the instant case are simply unlawful, it might still be argued that the common law is so "interested," so obliged to keep a look-out and jump in if the statute should be violated, that the ecclesiastical courts are not at liberty to follow their own procedures. *Contra* in a true "testamentary cause" -- probate, legacy suit or the like -- where the rights of the parties are "merely ecclesiastical"; there, the common law has no interest in whether or how inquisitorial procedure is employed.

Turning to the main point: The heir sought revocation because the debts and claims of the intestate's personal estate were mixed up with his land. The report does not spell out the details, but the situation is clear in a rough way. The intestate had debts secured on the land by Statute Staple, so that the heir would have to pay the debts or risk execution against the land that had descended to him; the intestate apparently held some "bonds to make assurance" -- i.e., bonds on which he could recover if the obligor neglected to convey a secure title (by some such claim-extinguishing means as a fine) to certain lands of the intestate's, now descended to the heir; the heir claimed already to have spent money of his own paying off debts of the estate to protect his land, and to be solely interested in the assurances which some of the unaccrued claims of the estate secured; under these circumstances, the heir maintained that equity would be most likely to ensue from transferring administration to him (which meant in effect that any residue of the estate would go to him as partial compensation for the debts he had paid, without need to sue the estate, or risk that the widow would make off with its goods and prove hard to sue for maximum value). The widow complained that she was being asked what debts the intestate owed, what obligations he was bound in, and for performance of what covenants those obligations (i.e., security or penalty bonds) were made, whether the covenants were infringed, "etc." (Such is the report's degree of specificity. More precise information would be interesting.) She claimed that it was not necessary for the ecclesiastical court "to examine or hold plea of covenants, obligations, contracts, etc." (Note the argumentative tendency of "hold plea": as if to say, "If they needed to know about these matters so precisely as to require examining me, they would be setting up to *determine* what the estate owes and has

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coming to it, thereby infringing the common law. A kind of general survey of the estate, to the end of deciding whether there is any basis for re-assigning administration, is all the ecclesiastical court may undertake. The limits of that enterprise are defined by the ecclesiastical court's duty to stay out of common law territory.") Secondly, the widow complained that she might be forced into admissions detrimental to the estate, whoever the administrator finally turned out to be. If, for example, she said under questioning that the intestate had broken a covenant and forfeited the obligation securing it, the obligee's recovery would be facilitated ("... the person who is administrator will thereby be at mischief afterwards, for those to whom the covenant or obligation is made will show this confession on her oath against the administrator, which is not reason.").

My own opinion would be that the widow's first point is not worth much, but that the second point is weighty. Assuming the propriety of the revocation suit, the detailed condition of the estate was what the ecclesiastical court needed to know. Was it really likely that the net value of the estate would exceed what the heir ought to have as compensation for his expenses? The more reliably that was answered, I should think, the better. The widow and present administratrix seems a likely and legitimate source of relevant information; the estate sounds complicated enough to require rather painful unravelling, with the help of every legitimate resource. The second contention, on the other hand, rests on the theory that ecclesiastical interrogation is acceptable only when it is self-contained -- I.e., when it is a means *only* to the determination of an ecclesiastical question and will not produce side-effects in the common law sphere. So stated, that is an abstract form (perhaps too abstract) of a theory that was often acted on. As we shall see, the clearest ground for prohibiting inquisitorial procedure was its tendency to expose the interrogee to "temporal" liability. As a rule, the kind of liability in question was criminal or quasi-criminal. It makes a question, however, whether to put a creditor of an estate in a better position to win a common law action of Debt or the like against the estate is not to "expose to temporal liability." (Subject, of course, to the distinguishing questions: Is exposing the estate, or the interrogee *qua* representative of the estate, equivalent to exposing the interrogee as a private person? Is providing extremely useful evidence to a potential *civil* adversary equivalent to exposing oneself to criminal liability? Is there no possibility that a damaging admission could be excluded

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as evidence at common law? To these questions, other cases will lead us back.)

When the case was first brought up, only Chief Justice Anderson spoke. He could see no merit in the widow's claim. His words were as follows: "It may be for all we know that these articles could be material and pertinent to the first [original] suit, to bring knowledge to the Ordinary what things the heir has paid, and what the wife can take for the administrator by forfeiture of obligations, etc., if she should continue it, and therefore, he would gladly know from a civilian whether the Ordinary may for any cause that is not proximity of blood revoke authority previously given or not, as the statute limits, and whether, if he may, these causes and articles to which she is to reply are pertinent to the cause for which the administration will be revoked and what is put in the libel."

It is clear from these words that Anderson's original position was not categorical. He did not see enough on the face of the surmise to convince him that the interrogatories were *not* pertinent; he could imagine that they might be perfectly relevant; he was apparently not worried about the tendency of the questions to expose the estate to detriment in potential common law litigation, provided they were pertinent to a legitimate ecclesiastical purpose; at least he was not worried about any such tendency in the abstract, without a more specific showing than the record evidently provided as to what the widow was being asked. On the other hand, Anderson did not conclude flatly that there was no cause of Prohibition on the showing in front of him. He did not demand that plaintiff-in-Prohibition come in with a more convincing surmise if she wanted a remedy, but rather proposed to figure out what was going on in the ecclesiastical court by consulting civilians.

The need, he felt, was for legal information. What view do the ecclesiastical courts take of their power to revoke administration? Is it good ecclesiastical law (as distinct from what this particular ecclesiastical court was doing) to hold that administration is in general revocable for the kind of equitable considerations invoked by the heir in this case, where the party seeking revocation makes no claim to be the nearer relative? If so, precisely *what* kind of equitable considerations? Just what would an ecclesiastical court need to know in order, on its own legal assumptions -- correct ones from an ecclesiastical point-of-view -- to decide whether the

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equities favored revocation? If we knew the answers to all these questions beyond common law competence, then we would want civilian opinion on the relevance of the questions actually put to the administratrix for the issue as it is conceived in ecclesiastical law. With that kind of assistance we might be able to say more than that the questions might be material "for all we know." There might ultimately be a basis for prohibiting on grounds of irrelevance. That possibility Anderson did not exclude. The "rule" of his initial opinion is that compulsory interrogation of the party is legitimate in such a suit as this, provided the questions are pertinent to an issue properly conceived by ecclesiastical standards; *not* that the ecclesiastical court may exact any testimony it likes, granting that it has jurisdiction of the "principal" (here, granting that ecclesiastical courts are not prohibitable *ipso facto*, *a la* Periam and Wyndham, from entertaining a suit to revoke on equitable grounds).

The report of later proceedings in this case gives no indication that the civilian opinion called for by Anderson was ever taken. For the details of the Court's final line-up, see the discussion in Vol. I. For present purposes, the outcome may be summarized as follows: The Court considered prohibiting interrogation that concerned common law matters or interests -- rather than than insisting in terms on relevance for determining the ecclesiastical suit, or *only* insisting on such relevance. However, the judges found they could not in the end get together on that approach. Anderson came back to relevance; if the ecclesiastical court needs to ask certain questions in order to discharge a function within its jurisdiction, it may ask them, whether or not the questions concern common law matters. He would probably have been willing simply to deny a Prohibition in this case, nothing of the sort that he invited in his previous opinion having been shown -- i.e., nothing to make it seem that the questions were less relevant than "for all we know" they might be. Periam (Wyndham probably agreeing) was not willing to accept relevance as a sufficient excuse in this case, at any rate. He disapproved of the revocation suit enough to incline him, perhaps, to prohibiting flatly; at least, he thought, the ecclesiastical court must stay out of common law territory, whatever the relevance of questions for its supposed, dubious purpose. Walmesley agreed with Anderson, but thought a partial Prohibition cast in terms of relevance would be harmless, if not a better solution than denying Prohibition. Anderson had no reason to object, and Periam and Wyndham could not get a stronger Prohibition, so Walmesley's suggestion was in all prob-

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ability adopted (the ecclesiastical court was prohibited from asking questions that were not pertinent to its task of deciding whether there was any equitable basis for transferring administration. The implied rule of the case as it turned out is that possible detriment to such common law interests as an administrator's capacity to defend the estate against a creditor's claim is not a reason for prohibiting relevant questions in a "testamentary" cause.

In two Queen's Bench cases, one exactly contemporary with the Common Pleas case above and one a year later, Coke as counsel got Prohibitions to save his clients from self-betraying interrogation. Both were criminal cases. In the first,² a man sued for the ecclesiastical crime of incontinency was flatly asked to say whether he was guilty. All Coke says in the reports is, "By this means anyone can be compelled to accuse himself." He got his Prohibition. The second *Collier* (or *Cullier*) v. *Collier*³ was virtually identical. The suit was again for incontinency; the question put to him was perhaps a shade more indirect -- "if he ever had carnal knowledge of such a woman." Coke invoked the maximum "*Nemo tenetur seipsum prodere*" and applied it to mean that parties may not be made to answer questions to their detriment "where discredit ensues" (Moore) or "in such causes of defamation and discredit" (MS). That language is in one sense a little broader than, say, "where one is more or less directly asked to confess to a crime." It might be translated in such a way as to catch more collateral effects of interrogation -- e.g., "where the interrogee might be forced to make an admission detrimental to his reputation in a serious moral sense, whether or not it is likely to bring criminal liability, either spiritual or temporal, upon him." That kind of harm is obviously distinguishable from "common law detriment," a class illustrated in one way by the revocation case above ("tendency of ecclesiastical interrogation to exact information useful to an adversary in civil litigation at common law."). In *Collier* v. *Collier*, Coke and the Court said expressly that "*Nemo tenetur*, etc." does not exclude interrogation (even, presumably, to the interrogee's "common law detriment") in matrimonial and testamentary causes, "where no such discredit can arise to the party who makes the oath." Whether convicting or accusing oneself of *any* ecclesi-

2 M. 31/32 Eliz. Q.B. Add. 25,196, f.213b; Harl. 1633, 63b.

3 M. 32/33 Eliz. Q.B. Harl. 1633, f.160; Croke Eliz., 201; Moore, 906; 4 Leonard, 194.

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astical crime should be held "discreditable" is left unresolved. All the reports of *Collier v. Collier* agree that a Prohibition was granted, except for Leonard, which varies in three ways: (1) it is labelled C.P.; (2) it is dated 32 Eliz., without a term; (3) it says the Court wanted to advise, while suggesting that it was inclined to prohibit. Taking only the most probable of the possibilities which the anomalous report raises: I would guess that C.P. is simply wrong, but that the case was moved once before M. 32/33, on which occasion a note of hesitation was sounded. Hesitation implies that someone on the Court wondered whether the most direct sort of self-incriminatory interrogation could be prevented in so purely "spiritual" a matter as an incontinency suit, where the chance of *legal* detriment (as opposed to "discredit") outside the ecclesiastical sphere would be slight. Any such doubt was overcome, however.

The next year, ecclesiastical power to compel incriminating testimony was tested in an unusual way⁴ Dr. Hunt, the Archdeacon of Norfolk's Commissary, was indicted for coercing a man to give sworn testimony in a matter of incontinency involving himself! (We are not told how directly the man was asked to incriminate himself, but probably the questions were of the same sort as in the last two cases. Nor are we told for what crime Hunt was indicted. However, in his report of an extrajudicial opinion on the power of episcopal courts to compel sworn testimony (Note 8 below), Coke says that wrongful exaction of such testimony falls in the class of miscellaneous "oppressions" presentable before Justices or the Peace and Justices of Assize. Hunt's Case, a solitary instance in the reports, goes to show that Coke's doctrine was acted on.) The legality of the indictment came in question in the Queen's Bench, the issue being whether Hunt had done anything wrong in forcing the man to testify against himself. Chief Justice Wray said that this case had been referred to himself, Chief Justice Anderson of the Common Pleas, and the Chief Baron of the Exchequer to certify whether administering the self-incriminatory oath was illegal. (Again, one would like to know the circumstances under which the reference to the Chief Justices took place. Did the ecclesiastical authorities ask for an advisory opinion? The judges before whom the indictment was taken or someone promoting it?) In any event, the Chief Justices said, "where the knowledge of the matter did be-

4 33/34 Eliz. Q.B. Croke Eliz., 262.

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long to the Court Christian, they may proceed according to the civil law." The presumable application of that principle to the present case is that self-incriminatory interrogation is perfectly all right in a purely ecclesiastical cause, such as an incontinency suit. Whether Hunt had committed an indictable offense is, of course, not the same question as whether ecclesiastical courts should be prohibited from exacting self-incriminating testimony. As stated, though, the Chief Justices' opinion seems general enough to cover Prohibition cases (and to contradict the two Prohibition cases just above). The opinion seems to treat examination of accused parties as a normal feature of ecclesiastical procedure, uncontrollable once ecclesiastical jurisdiction is admitted.

Justice Gawdy spoke after Wray, to qualify the Chief Justices' opinion, but only to qualify it: "The oath cannot be ministered to the party, but where the offence is presented first by two men, *quod fuit concessum*; and it was said, it was so in this case." It is clear from this that Hunt was conducting a visitation court, inquiring by the presentment of churchwardens and sidemen about ecclesiastical offenses. With Gawdy's amendment, the Court held in effect that people accused by ecclesiastical "due process" in a visitation court have no "privilege against self-incrimination." *Per contra*, persons less reliably accused (by complaint or information of a private party, or by *ex officio* action of the ecclesiastical court without any analogue of the common law presentment-process), may not be asked to testify against themselves. The distinction identifies the evil in inquisitorial procedure with the "fishing expedition" -- not with asking people to convict themselves or to furnish damaging evidence against themselves under pain or perjury, but with asking them to accuse themselves, to confess to offenses which they may not be accused of for better cause than suspicion or malice.

The report says no more, gives no decision in terms. From what it does say, one must infer that the indictment of Dr. Hunt was quashed. The case is a significant indirect authority for Prohibition cases, but may be mitigated as such. The Chief Justices and then the Court may have leaned in Dr. Hunt's favor when it was a question of saving him from criminal liability. It is hard on an official to indict him for following what he understands to be the procedures of his court, even if they are not lawful procedures; when it was only a question of prohibiting, one might be less ready to be generous to ecclesiastical courts within their sphere.

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From the 17th century, I have only three cases not involving the High Commission. In *Bullocke v. Hall*,⁵ the Court of Requests was prohibited by Coke's Common Pleas from requiring a man to testify under oath concerning an allegedly fraudulent obligation. Bullocke brought a common law action of Debt against Hall as another's administrator; Hall pleaded that X. had sued him as administrator on an obligation and had recovered, with the result that Hall had no goods from the estate left to satisfy Bullocke. Bullocke then (apparently before judgment in the action of Debt) sued Hall in the Requests on the ground that X.'s obligation and the judgment thereon were fraudulent. He presumably aimed to convince the Requests of the fraud and enjoin Hall from defending the action of Debt on the ground he had chosen. The Requests proposed to examine Hall on his oath as to whether there was any fraud, wherefore the Common Pleas unanimously granted a Prohibition, Coke citing his beloved "*Nemo tenetur*, etc." The report of this case is not full enough to expose its precise significance. It makes best sense on the assumption that Hall was himself accused of fraud and was therefore being asked to put himself in criminal danger. (The report suggests that the *judgment* for X. was fraudulent, as well as the obligation, as if Hall had connived with X. to sue him on an obligation which Hall knew to be a fraud. Or perhaps, for all the report shows, he entered into the obligation himself, binding himself as administrator to satisfy X.'s claim against the estate, with the intention of freezing out other creditors.) Whether a court of equity may examine an administrator to discover information about the intestate's affairs, to the end of determining whether a claim against the estate is fraudulent (but without any pretense that the administrator himself committed deliberate fraud) is an interesting question. There the tendency of the examination might be to expose the administrator to detriment, but not to criminal liability (e.g., if Hall were enjoined from pleading X.'s recovery because the court of equity concluded that Hall acquiesced in X.'s claim too easily, whereas he should have suspected that the obligation was obtained from the intestate

5 P. Jac. C.P. Harl. 1631, f.365.

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by fraud). It is unlikely, however, that that question was involved in *Bullocke v. Hall*.

In *Spendlow v. Sir William Smith*,⁶ a parson sued his predecessor's executor for dilapidations (compensation for deterioration of the property of the rectory caused or suffered by the former incumbent.) In the course of the litigation, a question arose about an allegedly fraudulent lease taken by Smith (the executor) in trust for the parson. The bearing of that transaction on the dilapidations claim does not appear from the report. In any event, the ecclesiastical court proposed to examine Smith under oath concerning the fraud. The examination was prohibited; the court resting cleanly on its tendency to expose Smith to criminal liability. He could be prosecuted, the judges said, either in the Star Chamber or upon the "penal" law of fraudulent gifts. ("Penal" law, in the sense of a statute making some act subject to a pecuniary forfeiture, usually half going to the King and half to an informer who would bring suit.) It is conceivable that some question was raised as to whether liability to Star Chamber prosecution and forfeiture under a penalty-statute should count as "criminal" liability in a full enough sense to justify interfering with ecclesiastical procedure in ecclesiastical cases. The Court may have been saying in a conscious or considerate way (as opposed to taking it for granted), "Yes, we think those liabilities *are* to all intents criminal, not in the same class as merely civil detriment or such non-legal detriment as 'shame,' which we perhaps cannot prevent ecclesiastical courts from causing as by-products of their methods."

Finally, the Prohibition in *Spendlow v. Smith* was reinforced by an additional reason: The Court noted that the statute of 13 Eliz., c. 10, made various rules about clergymen's liability for dilapidations, some of them having to do with fraudulent practices, and said that the exposition of the statute, including what was fraud within its meaning, belonged to the common law. I think it is clear that the Prohibition was neither sought nor granted *because* of the statute. The report says expressly that the Prohibition was *quoad* the examination of Smith. That is, the ecclesiastical court was not stopped from going on with the dilapidations suit, nor from investigating the fraudulent lease by other evidence than Smith's testi-

6 Hobart. 84. Probably Jac. C.P.

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mony. Prohibiting on the basis of the statute would have been dubious without any showing that the ecclesiastical court had misconstrued it. The purpose of invoking the statute would seem to have been to establish a common law "interest" -- as if to say, "Despite the incriminating tendency of the examination, there might be some question about our interfering in a *purely* ecclesiastical matter. Perhaps the fact that 'incrimination' here *only* means 'exposure to Star Chamber and penalty-statute liability' could be urged against our interference in that case. But, in fact, the matter is not purely ecclesiastical. The statute gives us an interest, not only the duty to see that its provisions themselves are observed, but a right to insist on procedural standards acceptable to us in litigation on which the statute bears."

In Gammon's Case,⁷ the Caroline Common Pleas prohibited on a different theory in different circumstances. An ecclesiastical court, probably in consequence of an incontinency suit, compelled a man to enter a bond not to keep company with a particular woman "unless at church or in a market-overt." The man was later summoned into the ecclesiastical and asked to say whether he had broken the bond. The Common Pleas granted a Prohibition "because this forfeiture is a temporal thing." In other words, a man may not be asked to betray himself to the "temporal detriment" of forfeiting a bond (whether or not he could be asked to accuse or convict himself by exactly the same question, "Have you kept company with Mary Jane?"). Having used the device of a good-behavior bond, the ecclesiastical court tied its hands. It had, if you like, given the common law an interest by making someone within its jurisdiction enter an ordinary obligation, for breach of which a common law action would lie. Were a common law action of Debt to be brought straightforwardly on the bond, the ecclesiastical authorities could not make the defendant supply confessional evidence; they had no business using ecclesiastical procedures (however entitled to them they might be in other circumstances) to wring such evidence out of him in advance of suing at common law.

In addition to the cases above, there is a little miscellaneous evidence bearing on the courts' attitude toward inquisitorial procedure and the sub-

7 P. 3 Car. C.P. Harl. 5148, f.142; Hetley, 18.

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ject's right to protection against it. Let us also look at that before turning to the central body of High Commission cases. The most important document is an extrajudicial opinion reported by Coke.⁸ In the spring of 1606 (P. 4 Jac.), the Council, on Parliament's urging, asked Chief Justice Popham of the King's Bench and Coke himself when ecclesiastical courts may examine people on oath *ex officio*. (Coke was still Attorney General, but very soon to be made Chief Justice of the Common Pleas. The conventional step would be to consult the two Chief Justices. Very likely the reference took place after Chief Justice Gawdy of the Common Pleas was stricken with his last illness, an event that cannot be dated precisely, but may have occurred before the end of the Easter term in which Coke places the conference.) The question was not put with reference to the High Commission, but, on the contrary, with reference to the Ordinary (the diocesan and archdiocesan courts, existing *de commune jure*, as it were, in contrast to the statutory Commission). The rules stated on this occasion should be taken as valid for the High Commission only insofar as the Commission is held to have no title, under the Supremacy Act and the royal patents constituting it, to use procedures not available to ordinary ecclesiastical courts. It was arguable that it had no such title, though that position is hardly tenable as a generality covering procedures of all sorts (e.g., sanctions). The rules covering examination given by Coke and Popham may be contingently applicable to the High Commission as well as to the episcopal courts, but whether they are can only be ascertained by looking at holdings in High Commission cases.

The rules laid down by Coke and Popham, according to Coke, may be formulated as follows: (a) The Ordinary may not constrain anyone, lay or clerical, "to swear generally to answer to such interrogatories as shall be administered." That is to say, no one may be coerced by spiritual sanctions to answer questions under oath, or to take an oath to answer questions, unless the articles on which he is to be examined are delivered to him in advance. (*Quaere* as to the precise meaning of "articles." "Questions" or "headings"? That is, must the examination be absolutely limited to those questions which are set down in writing and handed to the examinee, or is it enough to indicate with reasonable exactitude what the

8 P. 4 Jac. 12 Coke, 26

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subjects of the examination will be?) The stated rationale of this rule is that the examinee ought to have an opportunity to consider in advance whether he is under any legal duty to answer the questions which it is proposed to ask him. ("... to the intent that he may know whether he ought by the law to answer to them.") (The practical effect of such notice would be (i) an opportunity to seek a Prohibition *quoad* a particular question or article of inquiry before actually being interrogated; (ii) if one does not seek a Prohibition before the questioning starts, an opportunity to take counsel as to what questions one may safely refuse to answer -- intending to seek common law assistance if the ecclesiastical court nevertheless demands an answer, either imposing direct sanctions for refusal or taking the refusal as an admission of the fact against the examinee. *Quaere* whether a man who is furnished with a copy of the proposed questions ought to take legal exception to them by way of Prohibition as soon as he knows what they are, as opposed to refusing to answer and seeking a Prohibition only when the ecclesiastical court insists or imposes sanctions. The rule requiring notice itself entails that an ecclesiastical court which fails to furnish a copy of the articles should be prohibited. It would clearly be prohibitable at the moment it demands that one take an oath to answer unspecified questions. If one took the oath and began to answer, then balked at a particular question, Prohibition would plainly lie *quoad* that question if it was one which the ecclesiastical court ought not to ask. But would a general Prohibition lie, owing to the impropriety of embarking on a "fishing expedition"? If the particular question was not *ultra vires*, would Prohibition lie at all?)

(b) "No man ecclesiastical or temporal shall be examined upon secret thoughts of his heart, or of his secret opinion: But something must be objected against him what he hath spoken or done." That is, no questions may be put to a man under oath, even with due warning, which directly ask, or tend only to get at, his opinions or feelings on some subject; all questions must have an evident tendency to disclose whether the examinee committed some act, including acts of speech, which he knows is charged against him as an illegal act. (So it seems fair enough to translate. Interpretation is obviously required to say whether particular questions relate only to opinion, or have enough relationship to establishing an "overt act" to fall outside the rule, but the principle is a clear foundation to build interpretations on.)

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(c) Laymen may not be examined *ex officio* -- i.e., be compelled to submit to examination by the judge under oath even if the examination is unobjectionable by rules (a) and (b) -- except in matrimonial and testamentary causes. Such examination *in* those two causes is justified, Coke and Popham thought, (1) because it tends to be necessary (the truth about matrimonial contracts and the condition of decedents' estates commonly being "secret" and not discoverable by documents and testimony voluntarily submitted); (2) because inquiry into those matters will not tend to disclose matter of "shame and infamy" to the examinee. (N.b., "shame and infamy," not "detriment," "common law disadvantage," or the like; and "shame" is broader than "criminal guilt," or "liability to criminal prosecution.") Laymen should be exempt from sworn examination except in those two cases where it is necessary and harmless because they are typically "not lettered, wherefore they may easily be inveigled and entrapped, and principally in heresy and errors of faith." Clerics are not subject to the same disadvantage and therefore are not within the privilege (except insofar as the inquiry is into mere opinion, for even clerics may not be entrapped into admitting that they hold heretical beliefs in an entirely "secret" way.) It is a corollary of the rule (in effect stated as such by Coke and Popham) that laymen accused of ecclesiastical crimes, "as adultery, incontinency, usury, simony, hearing of mass, heresy, etc.," may be examined under oath, however clearly charged with a specific crime and informed of the questions.

(d) Clerics or ecclesiastical persons charged with ecclesiastical crimes which are *also* "punishable" at common law may not be examined under oath, because admissions can be used in evidence against them, causing them to incur the temporal penalty. Usury is given as an example. (I mark out "punishable" because of the range of meanings it might cover -- "ordinary criminal liability," "forfeiture under a penalty-statute," "civil detriment." At least the first two are clearly within Coke's and Popham's meaning; they used the word "penalty," and usury was subject to a penal statute.)

Such was the extrajudicial opinion in rule form. The sources of the rules call for a little commentary. (a) and (d) raise no problem. (d) could easily be supported by decided cases, including several involving the High Commission. (a), as I argue in the introduction to this section, is virtually implicit in the idea of limited jurisdiction. (If by any chance the

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High Commission had authority to make people swear to answer wholly unspecified questions, its authority would be statutory. Ordinary ecclesiastical courts, unaided by statute, surely could not be permitted to make a man commit himself to respond without giving any sign that the matter had the least relation to their jurisdiction.) Rules (b) and (c), on the other hand, invite a "*Quo warranto?*" (b) has the ring of "natural justice," but one may still wonder where the common law got authority to prevent ecclesiastical courts from treating the mere private holding of erroneous religious opinions as culpable, and hence from investigating by the only meaningful method whether such opinions were held. (c) is a stringent categorical rule, neither deducible from the very nature of the relationship between common and ecclesiastical law nor a requirement of elementary fairness. For, by restricting inquisitorial examination to matrimonial and testamentary causes, it excludes such examination in some cases which were clearly within ecclesiastical jurisdiction, which concerned overt acts, in which the examinee was fully apprised of the questions, and in which there was no risk of legal detriment in the common law sphere. What right did the common law courts have to narrow the procedural freedom of the ecclesiastical to that degree?

These questions can be pretty well answered from the authorities cited by Coke in his report of the extrajudicial opinion. (He may have elaborated the historical authority in writing up the report, but there is no reason to suppose that he and Popham did not rely on it when they testified before the Privy Council.) For rule (c) there was the statute or ordinance called "*Prohibition upon Articuli Cleri*" (a document of uncertain date and standing, *vide Statutes of the Realm*, I, 109. Coke calls it an ordinance and assigns it to Edward I.) The ordinance appears to restrict examination of laymen to matrimonial and testamentary matters. I say "appears to" because the relevant section of the ancient document is anomalous -- in form, a mere instruction to sheriffs telling them not to permit laymen in their bailiwicks to be cited and made to take oaths except in matrimonial and testamentary matters. Coke may himself have been puzzled by that document and uncertain as to the force it could be given by itself, but with the help of other documents it persuaded him that there was a categorical "custom of the realm" -- a common law rule evidenced, if not directly confirmed by Parliamentary enactments -- against examination outside the two exempt cases. Particularly important for that conclusion was the statute of 25 Hen. 8, c. 14. That statute (a) repealed 2 Hen. 4 c. 15

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(*De heretico comburendo*), which act admittedly allowed examination concerning heresy and matters related thereto -- i.e., took away the only positive, statute-given examining authority ecclesiastical courts could be said to have outside the undisputed matrimonial-testamentary area; (b) used explanatory language, reflective of the Commons' complaints against the ecclesiastical courts in the Reformation Parliament, tending to suggest that sworn examination was against the law if (i) it aimed at procuring self-conviction to the non-legal detriment of the examinee in the form of "shame" or loss of reputation, at least in the absence of common-law-like accusation and (ii) if inveiglement of non-experts into admission of religious error was likely, whence support for Rule (b) above, as well as for doubting whether even overt religious offenses by laymen could be investigated by inquisitorial methods. In the extrajudicial context, I think Coke and Popham gave well-reasoned advice. A miscellany of sources taken together suggested that examination of laymen outside matrimonial and testamentary cases would be hard to defend. That sort of thing is about all an adviser can say when a concrete case and the arguments of counsel thereon are not before him. It is another matter whether the generalized limitation of inquisition to testamentary and matrimonial matters ever was, or ever needed to be, invoked and argued in real controversies. We have seen no instances of reliance on it in cases not involving the High Commission. We *have* seen a little evidence for the more limited proposition that detriment in the form of "shame" could not be brought upon a man by ecclesiastical examination. The extrajudicial opinion by implication defines "shame" so as to identify it with conviction for virtually any ecclesiastical crime ("[Testamentary and matrimonial matters] do not concern the shame and infamy of the party, as adultery, incontinency, usury, simony, hearing of mass, heresy, etc."). The cases we have seen so far would warrant limiting the "shame" doctrine to sexual offenses.

In support of Rule (a), Coke and Popham cited the practice of the Chancery and Star Chamber, where defendants were examined on oath, but only after they had a bill of specific allegations against them in hand, on which they could take legal exception. On other occasions as well, those courts were held up as examples in contrast to the ecclesiastical courts, as places where inquisitorial procedure operated within tolerable limits, essentially by avoiding open-ended oaths or flagrant self-accusation, the least defensible practice, especially on the part of courts whose

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jurisdictional border was much more disputed than those of the Chancery and Star Chamber. Aspects of the total history of self-incrimination fall under the history of conciliar and equity courts; I shall leave almost all of that aside, for it has been discussed by others and is outside the range of Prohibition law. I have, however, found a little evidence touching those courts which has not, I believe, been noticed and which illuminates their exemplary role in slightly different ways -- i.e., for purposes other than the commonplace one of showing that civilized inquisitorial courts did not make people commit themselves to answering any questions they might be asked. In a couple of other ways as well, restraint or "civility" in extracting detrimental information from parties was observable in the secular branches of the non-common law system, though the restraint was offset by tolerance for the strong instrument of inquisition in its place. What was observed there may have had some influence on the judges' perception of ecclesiastical cases. I do not represent that as more than a possibility, for the scraps of evidence below do not come, so far as appears, from contexts in which ecclesiastical cases were being discussed.

The first document⁹ is an undated statement, without indicated context, by Chief Justice Coke. It is of interest because of the emphasis it throws on exposure to penalty-statutes as a consequence of inquisition which ought particularly to be avoided. The Star Chamber, Coke said, will not hold plea upon bills claiming breach of a penalty-statute, "for it is not convenient that a man should be examined on his oath to draw him in danger of a penal law." Thus (Coke's example) the Star Chamber will not entertain a suit for the offense of maintenance predicated on the penalty-statute of 32 Hen. 8, c. 9. If, however, as was possible in that instance, one brings a bill for maintenance as a common law misdemeanor, the Star Chamber will hold plea. In other words, defendants in the Star Chamber were examined under oath. The Star Chamber (which policed itself, was never prohibited) regarded it as improper to ask men to convict themselves of violating penalty-statutes, as a result of which they would forfeit a fixed sum of money, partly to the plaintiff-informer. It saw nothing improper about asking people to convict themselves of the second-

9 Harl. 4817, f.191.

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rank (non-felonious) crimes over which the Star Chamber had jurisdiction, resulting in a indeterminate fine to the King or the corporal punishments short of life-and-limb which the Star Chamber imposed. If one were to project this distinction to the ecclesiastical courts, one would conclude that they should be prohibited from asking questions which might put a man in danger of a penalty-statute (and perhaps of other "temporal detriments"), but *not* from exacting testimony tending to convict a man of ecclesiastical crimes punishable by spiritual sanctions.

An early report relating to the Chancery¹⁰ points in a different way to a similar general principle -- limited use of "strong" inquisition when it is necessary to make the work of courts operating with non-common law procedure effective, restraint beyond those limits. According to this report (to all appearances of a decision or pronouncement in the Chancery itself), one accused of breaking a Chancery order within a year after it was made must answer interrogatories (i.e., testify under oath as to whether he committed the contempt, punishable by imprisonment, of violating a Chancery decree). But if more than a year has passed, the other party must put in a bill complaining of the violation, to which the accusee will make answer as he would to a fresh suit against him. Here, in contrast to the Star Chamber rule above, there was no question of keeping down collateral effects of inquisition, but rather of restricting the tougher sort of use of it to the most necessary occasions in the equity court's own sphere. A certain "disfavor in law" towards incriminating examination is implied, though a tolerance for it in a narrow space is admitted. If equity decrees were to have teeth, people could not be permitted to break them the day they were made, under no greater pain than the risk that the adverse party would successfully prosecute for the contempt. The court needed the power to call in those whom it was led to suspect of contempt and force them to accuse themselves by sworn examination. But the power was too stringent to endure indefinitely. After a year, the decree-breaker was asked to cooperate in his own condemnation only in the mild sense in which equity defendants generally were asked to do so. Answers

10 15 Eliz. Dalison, 91

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in the Chancery were affirmed on oath, so that for the normally civil purposes of that court, defendants were asked to choose between lying and giving information detrimental to themselves. I take it (*quaere tamen*) that the same would be true of the answer to a contempt prosecution initiated by the adverse party's bill, and that punishment for the contempt (as opposed to mere reiteration of the decree) could follow on successful prosecution. However, it was held in the Jacobean case of *Goldinge v. Holt*¹¹ that defendants' answers in Chancery, unlike the testimony of witnesses there, were not punishable under the perjury statute of 5 Eliz. Although that decision may not have swept away all danger of perjury (by way of prosecution in the Star Chamber), my guess would be that it confirmed common expectations: viz., that swearing by defendants in the ordinary course of Chancery proceedings was not to be taken very seriously, that the duty to tell the truth in what amounted to pleading was nominal. Whether a suspected decree-breaker examined within the one-year limit would be subject to statutory perjury I cannot say. Even if he were not, one cited before an authoritative court and forthwith subjected to sworn interrogation under pain of imprisonment for non-cooperation is under pretty strong pressure one way or another to say things harmful to himself. One who is only constrained to formulate a verified answer to a bill -- with legal advice and with knowledge that outright falsehood, let alone inaccuracy or slanted language, is perjury-proof -- is probably hardly more likely to condemn himself out of his own mouth than a common law pleader.

I intend no direct projection from this detail of Chancery law to the ecclesiastical situation, only to intimate that the range of analogies was complex. The Coke-Popham rules gave the ordinary ecclesiastical courts no power to exact an open-ended oath, which amounts to conceding them less power than the report above attributes in limited form to the Chancery, less power simply to call in a man and ask him to swear whether he has done something for which he might be punished. On the other hand, given reasonable notice of what the inquiry was about, Coke and Popham conceded that ecclesiastical courts had considerable scope to use inquisition against clergymen. Clergymen were subjects of the King and co-

11 P. 9 Jac. K.B. Harg. 32, f.59b.

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heirs of the liberties of Englishmen as much as other people; they were protected against *ultra vires* harassment, invasion of private opinion, and collateral legal detriment as much as anyone else. Yet, as there was a place for "tough" examination in the Chancery, so there was a place for rather more protection-surrounded forms of it in the ecclesiastical system, where the Church was engaged in enforcing its rules and conduct standards on its own personnel, and where the stream of authority tending to limit the examination of laymen to matrimonial and testamentary causes admittedly did not touch. With respect to the High Commission, we shall want to ask whether the place of incriminating interrogation was at all expanded -- under cover of the Commission's statutory powers, but perhaps ultimately for reasons not very different from those which explain the Chancery's limited power to make a man condemn himself: to enable a special court to accomplish its special purpose, the repression of unlawful religious activity.

A final piece of miscellaneous evidence, completely different in character, bears on the problem of legal detriment, or spill-over from ecclesiastical investigation into the common law sphere. A Caroline report¹² points to a control *other* than Prohibitions over detrimental testimony exacted by inquisitorial procedure -- viz., exclusion of evidence obtained by inquisition from common law proceedings. That seems an obvious control, in some ways preferable to prohibiting "foreign" courts from accomplishing their purposes by their own methods, but it was never considered as an alternative, and the present report is my only evidence even touching the subject. In this report, Justice Hutton says that testimony taken in courts not of record, such as spiritual courts, should be excluded from presentation to common law juries, even though such testimony was taken in a case within such a court's jurisdiction (i.e., properly taken; not taken in a case, or perhaps in a manner, which ought to have been prohibited).

As stated, Hutton's rule is general: *all* such testimony, not just the testimony of a party -- *a fortiori*, one would suppose, self-betraying testimony. At first, the other three judges disagreed with Hutton (the report does not say why), while admitting that a specific class of "foreign" testimony,

12 M. 4 Car. C.P. Littleton. 167

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depositions in the Councils of Wales and York, would be excluded. (What would differentiate those depositions from other testimony I do not know.) Afterwards, the report says, the other judges agreed with Hutton "in the case, because it was never used, they did not want to make it a precedent." I take it that that should be read "*but* because it was never used." In other words, the judges were willing to apply Hutton's principle to the case at hand (what it was is not reported) and exclude some particular piece of "foreign" testimony, but they were skeptical of the principle as a generality, if only because it did not seem warranted by usage. It is possible, though not certain, that Hutton was thinking about the problem of how to prevent "common law detriment" to persons examined in ecclesiastical courts without over-using the Prohibition. He may have been reflecting the attitude that it was important to prevent such "spin-off" from inquisitorial procedure and proposing a consciously new (rational rather than customary) way of doing it. If so, his brethren were unresponsive. (Perhaps because rules for the exclusion of evidence did not yet seem natural, when trials were still relatively formless and the ancient freedom of the jury to use its own knowledge, even to acquire it outside the courtroom, was waveringly respected.)

C. The High Commission

Summary: Cases involving the High Commission provide good confirmation for the surest restraints on ecclesiastical power to exact sworn testimony from parties. (a) It was held in some early Elizabethan cases, and affirmed in several ways in the 17th century, that compulsory examination in the "spiritual" sphere is not lawful when its effect is to expose the examinee to a penalty-statute or other clearcut detriment in the temporal. (b) The duty of the High Commission, as of other ecclesiastical courts, to inform an examinee of the articles of inquiry before interrogating him under a general oath to respond was affirmed on various occasions, though never as cleanly as rule (a) above. (I.e.: It is not confirmed by decisions to prohibit, or to deliver High Commission prisoners, *solely* on the ground that taking the oath, or answering by one who had not resisted taking it, was demanded without any notice of the subject of the inquiry.) (c) The rule that people may not be interrogated about mere thoughts or intentions was applied to the High Commission in one case.

Inssofar as the rules above were recognized as applicable to the Commission as well as to the ordinary ecclesiastical courts, the Commission's

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statutory authority was not considered *altogether* special with respect to examining power. That is, the Supremacy Act, on which the Commission was based, was not held to permit that tribunal to be given any power to exact incriminating testimony which the monarch might see fit to give it - - *even* to expose to temporal detriment, interrogate without any notice of the subject, or inquire into "secret thoughts." The most serious question about the Commission's examining power is whether it had greater authority than other ecclesiastical courts to exact incriminating testimony about religious offenses, when temporal detriment would not arise collaterally. The issue may be narrowed further to lay defendants: Ordinary ecclesiastical courts were said to have power to examine clergymen; the High Commission was clearly held to have it.

As to laymen, it was said *by way of dictum* that they were not examinable except in matrimonial and testamentary cases by the Commission, just as they were not examinable outside those civil contexts by other ecclesiastical courts (according to prevalent belief, though it was never confirmed by decisions directly in point). The dicta to that effect may be challenged by: (a) The closest thing to a decision upholding wide statutory examining powers in the Commission -- the *Habeas corpus* case of Maunsell and Ladd. Interpretation of that case is extremely complicated, but it is best read as a split decision that laymen may be examined about religious offenses under the permissive terms of the Supremacy Act. (b) More generally, the courts' failure to invoke categorical immunity for laymen when other grounds (e.g., the rules in the first paragraph above) would do. That is unsurprising, since such "categorical immunity" was undoubtedly more disputable than other grounds. But practical realities also enter in. Examining laymen about religious offenses meant in effect investigating Puritan activity. The judges show distinct reluctance to get in the High Commission's way in that field. This comes out most clearly in another major *Habeas corpus* case, Burrowes *et al.* There the Court (i) ignored counsel's invitation to assert "categorical immunity" for laymen, deciding in favor of the prisoners on the basis of rules (a) and (b), first paragraph above; (ii) dragged its heels until the Puritan prisoners had served a lengthy time in jail and then only bailed them conditionally, consciously not following precedents which would justify their outright release.

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In the upshot, then, the most interesting question of principle was never really resolved, for the High Commission or other ecclesiastical courts: May the common law restrain inquisitorial procedure insofar as it is strictly confined to the ecclesiastical sphere? For, with the exception of the practically unimportant "secret thoughts" doctrine, the modes of restraint actually relied on ultimately proceeded from the premise that the ecclesiastical sphere must not encroach on the secular -- either by causing collateral detriment or by concealing the subject of inquiry so as to prevent exception being taken to the jurisdiction.

Coke may be associated quite distinctly with cases on the High Commission's examining power, in the sense that parties seeking to challenge that power went to his courts rather than the alternative one and sometimes succeeded. However, this fact can easily be overdramatized. It is by no means clear that the cases on incriminating examination which Cokes's courts decided would have been handled differently by other contemporary judges. *Burrowes et al.* was in a sense Coke's most important self-incrimination case. Allowing for factual differences, it is hard to regard it as less conservatively handled than the pro-High Commission *Maunsell and Ladd*. Except for the early Elizabethan cases, litigation over the High Commission's power of inquisition was entirely Jacobean; the virtual absence of post-Cokean cases tends to reinforce Coke's association with "the privilege against self-incrimination," but the apparent pattern, once again, may be misleading.

* * *

There are a few early-Elizabethan cases involving the High Commission, none from the later years of the reign. The early cases are best discussed under the Jacobean ones, in which they were much relied on. *Maunsell's and Ladd's Case*, of 1607, was the "great case" on self-incrimination, comparable to the nearly contemporary *Brown v. Wentworth* on the two-witness rule. From before *Maunsell*, I have only a dictum on a collateral point. In *Berry's (or Birry's) Case*,¹³ it was said that a bond taken by the High Commission obliging a man to answer such interrogatories as are ministered is merely void. It was also said that the High Commission was in the habit of taking such bonds. It would appear from

13 M. Jac. K.B. Godbolt, 147; Add. 25,205, f.22.

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this that the High Commission had invented a device to save itself from being prohibited when it wanted to conduct "fishing expedition" examinations; it used its sanctions to force people cited before it to promise that they would answer unspecified questions under oath, the promise secured by a penalty-bond. Refusing to answer would break the condition and cause the penalty to be forfeited. The King's Bench said in Berry's Case that this disreputable trick would not work, for any such bond would be held void by reason of an unlawful condition. (The holding must be taken as a pure *obiter dictum*, for the reports give no indication of any connection with the principle case, a *Habeas corpus* bearing on the High Commission's power to imprison. It is confirmation that the High Commission was no more free than other ecclesiastical courts to examine without disclosing the articles of inquiry. I should not be surprised to see the High Commission prohibited from so much as demanding that one enter an obligation to answer unspecified questions, even though such bonds were not worth the paper they were written on.)

Despite the existence of good MS. reports, reconstruction of the major case of Maunsell and Ladd¹⁴ presents some problems. The basic reason is that it arose on *Habeas corpus*: Maunsell and Ladd were imprisoned by the High Commission; they sought to be delivered by the King's Bench on the ground that the imprisonment was unlawful. All the Court had before it, as in any such case, was the return on the *Habeas corpus* -- the jailer's words intended to explain and justify the imprisonment; all the Court was called on, or legally empowered, to decide was whether the return on its face sufficiently justified holding the prisoners. There was no pleading on a *Habeas corpus*, no way to challenge the factual truth of the return. The Court merely construed its meaning and decided whether, assuming its truth, it stated a sufficient cause of commitment. In practice, attempts were sometimes made to smuggle in information outside the record, as was done in this case; that may sometimes have been practically effective, but it was not, in strictness, "the name of the game." Returns on *Habeas corpus* characteristically said as little as possible -- i.e., tried to state a legally sufficient cause of imprisonment without revealing more

14 See "Endnotes," p. 430.

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than that end required. The upshot of these considerations is that we do not know with full certainty and in detail what happened in the High Commission leading up to the imprisonment of Maunsell and Ladd. If they had brought a Prohibition -- i.e., if they had the floor to state their complaint against the High Commission -- we would probably be better supplied. As it is, all we can expect to have (save for some "smuggled" information) is the High Commission's minimal justificatory statement. Regrettably, the reports do not give even that in full. The very statement of the case has to be put together from remarks made in the course of the discussion. I shall state it and analyze the positions taken by counsel and the judges by process of construction from the reports.

The return on the *Habeas corpus* probably said only that Maunsell and Ladd had been imprisoned for refusing to answer under oath a "summary question" concerning a conventicle (unlawful religious assembly). In the course of debate, Justice Tanfield said, "I do not understand what they mean by this word 'summary question.'" At that point in the discussion (though he changed his mind later) Tanfield thought that the return which used that unintelligible expression should be held insufficient for general vagueness. ("They must return precisely what the oath tendered to the prisoners was and recite that it was for a matter in their commission.") I have no more idea than Tanfield what a "summary question" is; no one else who spoke in the case expressed concern about it. We do learn from Tanfield that the High Commission replied specifically enough on the *Habeas corpus* to exclude two extreme possibilities: (a) that the men were imprisoned *merely* for refusing to take an oath to answer unspecified questions (for we know at least that on the record they were asked a specific question, which they declined to answer); (b) that the High Commission was inquiring into something utterly beyond its jurisdiction, or asking questions with a clear tendency to expose the interogee to common law liability or detriment, for the question, whatever exactly it was, had to do with a conventicle, a subject which the High Commission had clear enough authority over, and concerning which there were no "penal" or straightforward criminal statutes.¹⁵

15 See "Endnotes," p. 432.

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Whether *de facto* Maunsell and Ladd were informed of the articles against them, either (a) before they were required to take an oath or (b) after taking the oath but before they were asked any questions, is subject to some uncertainty. The printed version of Fuller's argument says that the oath was demanded of both men before they were informed of what the inquiry was about. It says that Maunsell (unlike Ladd, whose special situation will be discussed below) simply refused to take the oath. That statement jars with the apparent on-the-record fact that Maunsell's imprisonment, as well as Ladd's, resulted from refusal to answer a particular question (which does not prevent it from being true). At the time he made the remark quoted above, Justice Tanfield wanted to know the exact words of the oath. He presumably required that information in order to see whether the oath was excessively indefinite, whatever conclusion he would have drawn in this case if it was. (It does not follow that people who do take an improper oath have no duty to answer any questions they are then asked, or that they may not be imprisoned for refusing to answer a question which is in itself objectionable.)

In addition, it seems to me that we do not know with certainty that Maunsell and Ladd were asked an unmistakably self-incriminating question, as far as the record showed -- whether they themselves participated in the conventicle or the equivalent. To practical intents, the case was discussed on the assumption that they were -- that they refused to answer a particular question on the ground that they were being asked more or less directly to convict themselves of an ecclesiastical crime. If (this amounts to saying) that had been clearly and simply the fact, if the issue had been clearly and simply whether the High Commission may imprison for such refusal, the positions of counsel and the judges would all make sense. All the participants took clear stands on that question. However, there is a literal sense in which the only issue was the adequacy of the return, and the return did not make it clear that self-incrimination was demanded.

Theoretically, a judge could think that men may not be asked directly to confess to ecclesiastical crimes, and yet hold that the return was sufficient. That would come to saying that Prohibition will lie to stop incriminating questions from being asked, but that a return on *Habeas corpus* will be construed favorably to the High Commission. That is, the High Commission may examine people under oath and may imprison for con-

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tempt if an examinee refuses to cooperate; if an imprisonment is challenged by *Habeas corpus*, all the High Commission need show is that non-cooperation by an examinee was the cause (and perhaps that the refusal to cooperate took place during actual questioning, not when the prisoner was asked to take an improperly general oath); if the examinee wants to object either to the particular question or to the form of the oath, he must resort to Prohibition, or to some other remedy, such as an action of Trespass for false imprisonment.

In reverse, a judge might take no exception to incriminating questioning as such, but still demand a fuller return on the *Habeas corpus*, either as a matter of form or because he considered the terms of the oath and whether articles were furnished before the swearing of crucial importance. (If the latter, his position would amount to: "The High Commission must be restrained from swearing people to answer unspecified questions. Among other restraints, it must be prevented from imprisoning men for refusal to answer questions pursuant to such an oath, even though the particular question is unobjectionable in itself, and even though there is no doubt of the High Commission's power to imprison for refusal to answer a proper question when it has given the interrogee prior notice of what he is going to be asked. In order to make this restraint work, it is necessary to insist that returns on *Habeas corpus* show that an unduly indefinite oath was *not* administered to the prisoners. Returns that make no showing either way on that point will be construed against the High Commission.") We cannot exclude the possibility that the counsel and judges in *Maunsell v. Ladd* took one or the other of these positions, in addition to their stands on the somewhat hypothetical question whether incriminating questions may be asked.

We come now to facts of the case which did not, or probably did not, appear of record, but which did come out in the discussion as the reports recount it. The most interesting, and ironic, item goes to show that Ladd was not in fact imprisoned for simple refusal to answer an incriminating question. According to his counsel, Ladd had given sworn testimony on the matter in question before his diocesan (the Bishop of Norwich) without complaint. (Full facts depend on the printed argument -- viz. that the first investigation was in the episcopal court. There is no reason to doubt this. The reports say clearly that there had been an earlier interrogation, but do not say where. One would have no basis for supposing that it did

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not take place in the High Commission itself, were it not for the printed document.) Later, the High Commission proposed to examine him further about the same matter. He asked to see a copy of his former deposition; when this was denied him, he refused to testify further. By this account, the real issue, as to Ladd, was whether the Commission was entitled to use a special entrapment technique (reexamining a man after a lapse of time without letting the examinee refresh his memory) in the hope of catching him in contradictions. That might be objectionable even though adequate notice of the content of the examination had been given on both occasions. However, there is no sign that the "real case" as far as Ladd was concerned altered the thinking of the judges who were against the prisoners, and there is no way of knowing whether it strengthened the opinion of those who were for them.

Secondly, the reporter says that Maunsell was a clergyman while Ladd was a layman. Again, there is no reason to think that this appeared of record. Its relevance in the abstract is clear, if the rules laid down by Coke and Popham in their recent extrajudicial opinion apply to the High Commission, for according to those rules, there is a fundamental difference, at any rate, between a layman's liability to be asked to convict himself of ecclesiastical crimes and a clergyman's. (We had better put it in that cautious way, because there might be a question as to whether the layman's privilege extends to *all* ecclesiastical crimes, or only those involving "shame and infamy." Most ecclesiastical crimes were moral offenses, conviction for which would tend to bring "discredit" on a man, but it might be argued that that is not true of offenses against ecclesiastical discipline, such as participation in a conventicle.)

Finally, it was said by counsel that Maunsell and Ladd had been imprisoned for nine months. It is more likely that this fact appeared from the record, though uncertain. In any case, its relevance might be considerable, for the element of time forces the question of the nature of the imprisonment. That is, granting that the High Commission could imprison these men for refusal to testify, are they imprisoned as a punishment for contempt (in which case, there must be some limit on the amount of punishment the offense deserves, some point at which the High Commission must let the men go and content itself with deciding the case they were involved in without the help of their testimony)? Or may they be imprisoned until they relent and testify, the imprisonment being an unlimited

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means to compel testimony rather than a punishment? As we shall see, definite use of this final fact was made in the argument of the case.

The three facts beyond what the return barely and certainly showed -- the circumstances of Ladd's refusal to testify, Ladd's lay status, and the time the prisoners had already spent in jail -- are facts of the sort whose informal introduction into a *Habeas corpus* case might tend, as it were, to stimulate the judges' imaginations, even if they scrupulously excluded them from consideration as facts before the Court. How a minimal return should be construed and judged could depend, I think, on how many possibilities of abuse could be imagined lurking behind its language. If the judges found a return roughly acceptable, not manifestly vague and evasive, their tendency was to remand the prisoner (understandably enough, considering that the return might, for all the judges knew, be a tissue of outright lies). They did not insist on detailed factual accounts (possibly all lies) of how the imprisonment came about; that is to say, they did not expect every possible sense in which the steps leading to imprisonment might be unlawful to be anticipated and accounted for. When, however, off-the-record claims about what had actually happened were made, it must have made the judges more sensitive to the evils a brief justificatory statement *might* cover with technically "innocent" general language. How much particularity was demanded in returns was probably, in part, a function of the specificity with which possible abuses requiring control were suggested to the Court.

A painfully qualified statement of the case is unfortunately necessary in order to avoid seeing Maunsell and Ladd out of focus. One further complication needs to be put on the table before we turn to the unfolding of the debate. Subject to, and abstracting from, all that has been said so far -- there were essentially three interinvolved questions in the case: (a) May the High Commission imprison at all; or, granting that it may sometimes do so, may it imprison for refusal to testify, even though such refusal is wholly without legal justification? The High Commission's general power to imprison is discussed later in this study. For the present, it is only necessary to note that a judge who believed that the Commission lacked all power to imprison, or power to imprison for failure to testify, would favor delivering the prisoners and need make no decision on the other questions that follow. (Lacking power to imprison, the High Commission would, of course, *ceteris paribus*, have the same power as other

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ecclesiastical courts to excommunicate for contempt or to give judgment on the substance against the parties refusing to testify, such judgment to be enforced by spiritual sanctions.) (b) May ecclesiastical courts, including the High Commission, exact self-betraying testimony in a purely ecclesiastical criminal cause? (c) Assuming that ecclesiastical courts in general may not exact such testimony, or would not be allowed to in this precise case, is the High Commission an exception? This last question arises because the Commission had its authority from the statute of 1 Eliz., c. 1, and from the King's letters patent made pursuant to the statute. There was no theoretical reason why Parliament (or the King with statutory authorization, or, by one theory, even without it) could not give the High Commission powers which ordinary ecclesiastical courts lacked. The Commission's whole pretense to fine and imprison was based on the claim that it had been given such extraordinary powers by Parliament and/or the King; there was no theoretical reason why it could not also have been given extraordinary powers to exact testimony. In Maunsell and Ladd, it was seriously argued that it had been.

We are now in a position to look at the case as it unfolded and to assess the judges' opinions. In the upshot, subject to qualifications which will appear, it is fair enough to say that the Court divided 3 - 2, the majority of Popham, Williams and Tanfield against the prisoners, Fenner and Yelverton dissenting. Tanfield was the "swing-vote." (Cf. the same court in *Brown v. Wentworth*, where Yelverton wavered and finally came down on the "anti-ecclesiastical" side with Fenner and Tanfield. In both cases, Popham and Williams were the party for restraining common law interference in ecclesiastical proceedings, the senior Justice Fenner a consistent party-of-one the other way.)

The first argument for the prisoners was made by Nicholas Fuller of Gray's Inn. Fuller's presence is almost enough to serve notice of the heavy odor of politics hanging over this case, for Fuller was the most prominent "liberal lawyer" of his day. As an M.P. for London, he was much involved with Puritan and "opposition" causes, including political opposition to the High Commission. In Maunsell and Ladd, he was representing two Puritan victims of the High Commission. He is remembered for the most far-reaching of the arguments against monopolies in the famous case of *Darcy v. Allen*. Most of all, he is remembered for

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Fuller's Case, the direct sequel to Maunsell and Ladd; he was scandalously proceeded against for schism in the High Commission on account of words he spoke in his clients' behalf. There is, I think, a sense in which Fuller was asking for it. That does not for a moment excuse the Commission's vendetta against him, but it helps to explain the tone of Maunsell and Ladd. Fuller and his colleague, Finch, wanted to go after the High Commission with broad, principled arguments. They may have added to the stimulus on the judges which the sensitive situation already provided -- the stimulus to "make speeches," to lay down large principles suited to a "constitutional case," to get excited. Interpreting the judges' positions on the complex problem immediately before them is the more difficult because of a certain amount of gratuitous principle in their speeches.

In his lead-off argument, Fuller took three approaches: (a) With what I think it is fair to call standard 17th-century "liberal" piety, he ran through a number of old statutes, starting with Magna Carta, intended to show that the prisoners were entitled to refuse to testify, or at least could not be imprisoned for refusing. I shall not tarry over this line of argument. The law reports do not spell it out, but merely note that Fuller cited the statutes; it can be studied in spelled-out form in the printed version of Fuller's argument. In essence, Fuller thought that there was a policy in English law, expressed though not invented by the highly respected ancient statutes, against inflicting legal detriment on the subject without accusatorial and trial procedures at least analogous to the common law's. Causing a man to accuse or convict himself on his own oath clearly fell short of the standard.

To Fuller, the standard was probably "constitutional" in the sense of "binding throughout all systems of law in England, unless Parliament unmistakably freed some court from it." Acts of Parliament should be construed as preserving the standard "throughout all systems" in the absence of unanswerable evidence of a contrary intention; 1 Eliz., on which the High Commission's claim to extraordinary powers depended, was as far removed as possible from any such intent, for it made every pretense of restoring an ancient order in which ecclesiastical jurisdiction not only *did* operate without power to impose penalties and exact sworn confessions, but was restrained from doing so by the law of the land. *De facto* encroachments on that "ancient order" were by definition latter-day, the di-

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rect result of the "Popish usurpation" which 1 Eliz. aimed at delegitimizing once and for all. I do not suggest that this was a bad argument; it was, I think, an excessive one in the light of the courts' handling of High Commission cases in general (those on the power to fine and imprison, as well as the power to examine) and in the light of the judicial attitudes disclosed by Maunsell and Ladd itself. I do not think that most judges were ready to buy a high constitutional and historical argument. They were not disposed to embrace a principle so "constitutional" that Parliament would be hard put to overcome it. They could agree that the problem of figuring out the High Commission's powers was simply one of construing 1 Eliz., and then proceed to disagree on what the statute meant. Restraining the Commission, and interpreting 1 Eliz. in order to reach that end, did not require assuming that to confer extraordinary powers on the Commission, the act must disclose an unmistakable intent, as it were, to amend the constitution. The mere absence of a clearly expressed intent to confer greater powers than other ecclesiastical courts enjoyed would do the job. As for judges disinclined to restrain the Commission (the majority in Maunsell and Ladd) -- inclined to read the statute in the Commission's favor -- I wonder whether it was very good strategy to try to persuade them that they were taking a modern statute as abrogating Magna Carta. I can imagine a judge so resentful at being lectured at in that way that he would wax all the more determined to "call the statute as he saw it." But perhaps not. Perhaps the only hope with some judges was to "go high" and perhaps others, such as the dissenters in Maunsell and Ladd, were moved by Fuller's ancient statutes. I state only impressions here.

(b) A second argument made by Fuller may have had more cutting-edge. It is one thing to say that there is a "fundamental" principle, implied in Magna Carta, by which incriminating examination by ecclesiastical courts was ruled out. So conceived, the principle seems to be thought of as "merely there," "part of the atmosphere," an immemorial common understanding that "foreign" courts must refrain from exacting incriminating testimony if they were to be received in England. It would at least add concreteness to the principle if one were able to show that it actually operated in English law, that besides being engraved in the hearts of Englishmen, it was applied within the common law system. It would then, like other important common law rules we have seen, have a claim

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on the non-common law systems as a kind of "senior model" -- a standard demonstrably representing the common law's choice among alternative standards, to which "foreign" courts should conform for the avoidance of anomaly.

However, there is no very obvious sense in which a "privilege against self-incrimination" can be said to exist at common law, except perhaps for the sense in which the common law incorporates what the laws of God and nature require. Because of its dependence on the jury system and its connected lack of power to compel testimony, the common law simply did not provide many contexts in which it was an issue whether a man could or could not be required to answer questions of a given type, or whether he could be made to take an oath to answer questions of a given type, or whether he could be made to take an oath to answer questions in such-and-such form, under such-and-such circumstances.

Aware of the lack of an obvious "common law standard," Fuller set out to think of a way to establish one. He came up with a perfectly relevant argument: When jurors were challenged, they were examined to the end of determining whether the challenge was well-taken. If it was only alleged, e.g., that they were kin to the parties in such degree as would disqualify them, they were examined under oath. If, on the other hand, something "that touches their credit" was alleged -- e.g., that a prospective juror had taken a bribe from one of the parties -- they were not examined under oath. (In Fuller's printed argument, the example of jury challenges is supplemented by the point that compurgation at common law was used only in strictly civil contexts. Even purgative oaths -- not to mention self-accusatory ones -- were excluded from actions of Trepass, which, despite their essentially civil nature, still carried a nominal liability to punishment. The power to clear oneself by swearing involves the possibility of condemning oneself by inability to swear, so the common law will not admit it where there is the least suggestion of criminal liability.)

Ergo, there are actual common law contexts in which "*Nemo tenetur*, etc." was operative. Ergo what? Well, whether or not any conclusion follows with the force of logic, the premise is useful. It is one thing to say that an ecclesiastical procedure should be banned because it is immoral or unjust. (Cf. "Tanfield's principle" in disallowance cases: Ecclesiastical courts should not be prohibited because they handle suits within their jurisdiction in an unreasonable or unaccountable fashion.) It is another thing to say that an ecclesiastical procedure conflicts with the "law of the

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land," in the sense that it departs from the common law on a point where a meaningful comparison is possible. (So, by "Tanfield's principle," ecclesiastical courts may be prohibited from applying a substantive rule at odds with the common law -- e.g., "The husband's release does not bind the wife" -- even in suits for purely ecclesiastical objects, such as legacies.) (Cf. the analogous problem with respect to the two-witness rule: Is there a significant sense in which the common law has a one-witness rule, or fails to have a two-witness rule, so that an ecclesiastical court that insists on two witnesses can be said to go against the common law, as opposed to merely doing something that common lawyers often considered unreasonable? Fuller's argument from jury challenges makes a rather better case for a common law policy against self-incriminating testimony than was ever made for a common law policy against requiring a minimum number of witnesses.)

(c) Fuller's third argument proceeded from the fact (stated by him, whether or not it appeared of record) that Maunsell and Ladd had already spent nine months in jail. (If they had counsel and yet waited nine months before attempting a *Habeas corpus*, it may be because their counsel thought that this argument would probably pack more power than general objections to the High Commission's proceedings.) The argument on this point is complicated, for it involves a concession which I think Fuller made only in a hypothetical sense. By one theory, such pretense as the High Commission had to imprison derived from 2 Hen. 4, c. 15 (*De heretico comburendo*). That act unmistakably gave bishops power to imprison persons suspected of heresy or specified related offenses (essentially participating in the dissemination of the Wycliffite opinions against which the act was directed). The 15th-century statute was repealed under Henry VIII, revived under Queen Mary, and repealed again by the Elizabethan Supremacy Act. Therefore, it had no relevance for the powers of ordinary ecclesiastical courts in the period we are concerned with. The statute was in force, however, immediately prior to the Elizabethan Supremacy Act, whence, by the standard theory, the High Commission derived its authority. It was arguable that the Supremacy Act intended to permit the Commission to be given such sanctions as were lawfully usable by ecclesiastical courts at the time, including the statutory power to imprison. According to this argument, repeal of *De heretico* removed the bishops' limited power to imprison, but intended to leave it open to the

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monarch to confer that power on the extraordinary tribunal it contemplated. In other words, the Supremacy Act by implication referred to *De Heretico*, a statute then in force; simultaneous removal of that statute from direct operation did not change the meaning of the Supremacy Act.

Fuller clearly disagreed with that argument. He was far from really admitting that the High Commission had imprisoning power by virtue of the Supremacy Act's implied reference to *De heretico*; quite the contrary, he thought 1 Eliz. repudiated that statute and everything it stood for by repealing it. What he did was to concede the argument by way of setting up an objection to holding the prisoners for as long as nine months. For 2 Hen. 4 contained an express proviso requiring persons imprisoned for suspicion of heresy, etc., to be tried within three months. ("... [S]o that the said diocesan ... do openly and judically proceed against such persons so arrested ... and determine that same business, according to the canonical decrees, within three months after the said arrest, any lawful impediment ceasing.") Fuller's point, then, is: The utmost power the High Commission can possibly have to hold unconvicted persons is such power as bishops had by virtue of *De heretico* when the Supremacy Act was made, power to hold them up to three months. It makes no difference why a prisoner is held -- for refusal to answer questions or otherwise. The rule is that they must either be convicted and subjected to appropriate punishment (concerning which *De heretico* made further provisions) or else let go within three months.

(d) Fuller anticipated and answered the argument that the High Commission had power by its patent to imprison and/or to exact testimony as it had tried to in this case. He speaks too generally to make it appear which of those powers he had in mind, if not both. It does not matter, for he conceded that the patent purported to give the Commission all the power it claimed. He denied, however, that the King had any authority to confer powers on the High Commission except insofar as the statute warranted his doing so unmistakably, as it did not do to any intent relevant here. On this point, Fuller only stated his conclusion in general terms, without going into the intricate arguments bearing on the interpretation of 1 Eliz.

(e) Lastly, Fuller argued that the King's Bench had authority to deliver the prisoners and ought at least to lean in the direction of doing so. I do

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not think its authority was really in dispute. Fuller was probably anticipating anything that might be said to cast doubt on whether *Habeas corpus* lay to challenge imprisonment by the High Commission, granting that it had statutory power to imprison. In the light of other cases, I do not think much doubt can be cast, but anything is possible in a sensitive area, and High Commission commitments were an anomalous class, hardly covered by ancient *Habeas corpus* precedents. Fuller cited some cases tending to show the comprehensiveness of the Court's power to deliver the wrongfully imprisoned. Then he invoked the time-honored maxim that the common law has special respect for the liberty of a man's body, indeed in its primal condition did not regard men as subject to imprisonment. (That is not a fanciful point if one has in mind the example that was probably Fuller's paradigm: execution against the body -- "imprisonment for debt" -- was a latter-day, 14th-century innovation. Beyond that, although plenty of people languished in jail in the good old days, there are various senses in which, strictly or ideally speaking, imprisonment was not an institution "at common law." Other titles to put men in jail than the High Commission's derived from statute; imprisonment for contempt or to enforce specific orders, as by the equity courts, was not "at common law," at least arguably; the gallows, the pardon, abjurement of the realm, and other devices occupied much of the ancient field. As is well-known, the modern habit of confining large numbers of convicts to jail is comparatively modern, -- one needs to remember that it was not a familiar aspect of the landscape in the 17th century.) From the "favor in law" due to the liberty of the body, it was meant to follow that the abundant doubts in such a case as this should be resolved by letting the prisoners go.

Chief Justice Popham, speaking first from the Bench, began by skirmishing with Fuller over his last point, to the end of not admitting too much about the "liberty of the body," not embracing that laudable bias of the law so enthusiastically that upholding the High Commission's power to imprison would seem incongruous. Yes, the Chief Justice conceded, the ancient common law favored the liberty of the body. Why? So that men would be at liberty to serve the King (lest it be conceived that liberty is an end in itself, lest it seem anything but a function of the subject's duty). Originally, to be sure, ecclesiastics had no power to deprive the King of his subjects' services; they were confined to threatening their

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souls with excommunication. Later, however, it was discovered that some men were heedless of excommunication. (Between the lines, read the good old pessimistic clichés: The times run down, wickedness increases. Spiritual sanctions were enough when men were better. When they deteriorate to the point where they not only reject religion and authority, but scoff at the very idea that the fulminations of the bishops can touch their souls ...). In consequence, *De excommunicato capiendo* had to be invented. (To pinch those obtuse souls where they'll feel it. In the face of such abounding wickedness, the King had to give up the services of some of his subjects -- for a certain class of subjects, perhaps no great loss. So, reading between the lines, as naughtiness proliferated further, still more instruments were required -- the High Commission to supplement the bishops, the court's direct powers of imprisonment over and above *De excommunicato capiendo*. True, the primal common law favored the liberty of the body; in these sad days, when Puritans keep their unlawful conventicles and refuse to cooperate with necessary investigations, we cannot afford the ancient generosity.)

Having had his joust with a Puritan lawyer, Popham got down to business, dealing with Fuller's argument from 2 Hen. 4. He made two major objections to it: (a) The statute required imprisoned suspects to be tried within three months, but surely that imperative implies the possibility of its being accomplished. How *can* a criminal cause be determined if the defendant stands mute for three months? Surely, the statute does not intend that the defendant should escape liability if he holds out for three months, making no answer or, as in this case, refusing to cooperate with the court. (To this, one may reply that there are conceivable ways to make the three-month rule work: If a man stands mute, an "automatic plea of not-guilty" can be entered, or the opposite course, regarding non-response as a confession of the matter charged, can be taken. If a man has a legal duty to testify against himself and refuses, he could be held constrainable or punishable within the three months. If that does not work, the ecclesiastical court could be held bound to dispose of the case on such evidence as it had been able to gather (counting or not counting his refusal to testify against him, according as the supervising court -- necessarily a common law court proceeding on Prohibition -- decides. These rational solutions, however, run into the "common law standard": A criminal defendant at common law who refused to plead was not treated

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as if he had pleaded either guilty or not guilty; rather, he was tortured, by the notorious *peine forte et dure*, until he changed his mind or died. It may be argued that a common law "mute" can at least die within a delimited time (a choice the guilty sometimes took because if they died unconvicted, they forfeited no land or goods) whereas an ecclesiastical court with power to imprison could hold a "mute" for the rest of his life. Better, surely, to take him for guilty and excommunicate him for the substantive offense; or, in the case of the High Commission, punish him by a definite prison sentence or fine, even though such procedure would not imitate the common law. It may also be argued that refusing to testify under oath is not the same as standing mute. The difference tends to disappear, however, when people may be asked to answer wholly unspecified questions. Assuming it is lawful for the High Commission to hail a man before it and question him under oath without the least intimation of a charge, there is no way for him to choose between pleading and standing mute; refusing to take the oath or to answer questions is equivalent to standing mute at common law in the sense of "not doing that which is essential if the court is to carry on its proceedings and bring them to a conclusion" -- a more radical obstruction than merely refusing to furnish evidence which a court would like to have and may lawfully demand.)

(b) Popham argued from the language of 2 Hen. 4 that the three-month limit could not be extended to the High Commission. The statute required the bishops to wind up cases within three months "according to the canonical decrees." That is to say, the statute made reference to the canon law, in effect saying that a lawful canonical solution was to be arrived at within the time limit. But the High Commission was founded on (or at least given specific powers by) the statute of 1 Eliz. Whatever those powers might actually be, one could not say that the High Commission was *intrinsically* bounded by canon law, competent *by its nature* to give cases only such solution as the canonical decrees warranted; for it was a statutory court, by nature authorized to determine cases in any manner Parliament ordered or permitted.

(To this it may be replied that if the Commission's whole pretense to imprison suspects derives from the Supremacy Act's reference to *De heretico*, its imprisoning power cannot exceed that which the bishops en-

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joyed by the older act, and imprisonment beyond three months without conviction does exceed that power. It might be true *in general* that the Commission was not confined to the canon law, if indeed 1 Eliz. could be read as giving it or permitting it to be given any powers that other ecclesiastical courts lacked. But the power to imprison suspects, if conferred on the Commission at all, is conferred by reference to another statute, which specifies that the cases of persons lawfully held for three months on suspicion be disposed of by canon law. At least to that intent, the Commission *is* confined to canon law. Therefore, one cannot argue that the three-month limit has no application to the Commission because it was imposed on courts bound to settle their cases by canon law exclusively. Popham might respond by rejecting the premise -- i.e., denying that *De heretico* had any relevance for construing the Supremacy Act. He would then be saying, as he probably believed, that 1 Eliz. permitted the monarch to give the Commission virtually any procedural powers he saw fit within its limited substantive jurisdiction -- *not* that 1 Eliz. permitted the Commission to be given only such powers as ecclesiastical courts then enjoyed, by statute or otherwise. Alternatively, Popham might respond as follows without throwing away *De heretico* as a basis for upholding the Commission's imprisoning power: "It is true that 1 Eliz. refers to *De heretico* by implication. It would not be so clear the Supremacy Act permitted the monarch to empower the Commission to imprison were it not for the fact that imprisonment was at that time a sanction lawfully usable by ecclesiastical courts. However, the reference is merely general -- to imprisonment as a type of sanction. 1 Eliz. does not authorize a new court to be permitted to do what *De heretico* says the bishops may do and no more. Rather, 1 Eliz. establishes or declares the monarch's authority to set up a new court, which need not be limited to the canon law, as the bishops expressly are by *De heretico* except as that statute directly gives them certain extra-canonical powers. 1 Eliz. does, however, limit the monarch's authority in one way: It does not allow him to give the Commission any sanctions or other procedures he may fancy, but only those (such as imprisonment) which are being, or, perhaps, have at some time been, lawfully used by ecclesiastical courts. There is a limit, but a general one; no duty is imposed on the monarch to stick to the exact bounds of *De heretico*."

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Having paid Fuller's argument from 2 Hen. 4 the tribute of rebutting it with some care, the Chief Justice proceeded to announce his stand on several points central to the case at hand. (a) There is no doubt but that the High Commission may imprison, speaking generally (i.e., without reference to whether it may imprison for refusal to testify). (b) "When a man has taken an oath *ex officio*, it cannot be said that it was against his will." I take this to say that one who has taken an oath to answer questions truly -- with or without a given degree of prior notice as to what questions, or what sorts of questions, would be asked, or as to what was charged against him -- may not object to a particular question or procedure (such as the refusal in this case to let Ladd see a copy of his first deposition). At least, he may not object by way of challenging his imprisonment in *Habeas corpus*, but as it stands, Popham's statement can be extended to Prohibitions as well. The projected rule would be: If one wants to contend that one should not be subjected to sworn examination, either because an unduly open-ended oath is demanded or because the purpose or probable effect of the examination as a whole is or will be to extract self-incriminating statements, one's only course is to refuse the oath. Having refused it, one can try to protect oneself against any consequences by Prohibition. If one neglects to do that and is imprisoned, perhaps the imprisonment may be challenged by *Habeas corpus*. But once one has taken the oath, the common law is without power to intervene.

(c) "Nor can it be said that it [the oath] is against the law, inasmuch as the statute has enabled it to be done, for the words of the statute are too general and very liberal for authority in the point." Whereas point (b) would seem to apply to ordinary ecclesiastical courts, this one only applies to the High Commission. It says (supplying the understood terms) that 1 Eliz. gives the monarch wide range to specify the powers, including procedural powers, of the High Commission. The monarch had, in Popham's opinion, at least given it extensive powers to proceed by sworn examination. (I so state it to void associating Popham with the view that there were *absolutely* no limits on the kind of oath the High Commission could demand nor on the questions it could ask an examinee. At this point, as I understand him, he was speaking generally, neither proving textually that the statute and patent had the meaning he attributed to them, nor anticipating hard cases. I take him as saying, in conjunction with point (b), "One who has taken the oath would at best be in a weak position to resist answering the questions he has sworn to answer; as an ex-

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aminee of the High Commission (as opposed to ordinary ecclesiastical courts) he is in a far weaker position; for even if he had not taken the oath, his position would certainly not be strong, since the statute and patent manifestly give the High Commission wide powers to proceed by compelling testimony.").

Finally, Popham took note of the fact, without expressing a conclusion, that there was authority for differentiating clergymen and laymen, the former being more subject to compulsory sworn examination. My guess would be that he was speaking from knowledge that Maunsell was a clergyman (perhaps the assumption that Ladd was too) and, therefore, simply adding another straw to the camel's back. It is possible, however, that he was raising a doubt as far as Ladd was concerned.

Justice Yelverton spoke next. He started off in a general vein, defending the antiquity and rightfulness of this court's supervisory powers over the ecclesiastical system, by Prohibition as well as *Habeas corpus*, and the comprehensiveness of its authority to liberate the wrongfully imprisoned by the latter procedure. I do not think there was any difference among the judges on these points as such. It is significant, though, that Yelverton spoke to the gallery -- to the courtier-Church world, where rumblings against the common law's supremacy were at their height at the time of this case -- in a "Whig" accent, as Popham used the liberty of the body as occasion for some "Tory" sentiments. For Yelverton turned out to be on the prisoners' side. Descending to brass tacks, he pursued two lines: (a) He went to citing cases to prove that the Court's *Habeas corpus* powers were comprehensive enough to take in those imprisoned by ecclesiastical authority. His first citation, an old one, shows only that, but then he comes to the influential early-Elizabethan cases on the High Commission's power to exact incriminating testimony, all *Habeas corpus* cases: Leigh's (or Lee's). Mitton's, and Hynde's. As Yelverton states those cases, they were authority for the Court's power to deliver people imprisoned for refusing to testify in criminal cases in the High Commission. They were unquestionably authority for that, but, as Popham quickly pointed out (see just below), Yelverton left out a crucial distinguishing feature common to all three cases. (b) Yelverton complained that the *ex officio* oath was offered to people only on "surmise"; he thought it "hard to imprison a man on every surmise and suspicion." It

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seems to me that Yelverton was *not* saying here that the High Commission had no power to examine on oath, even, perhaps, an utterly indefinite oath; nor was he disputing the High Commission's power to imprison in general, as a punishment, or perhaps even to enforce appearance. He was clearly expressing grave doubt as to whether the Commission could use imprisonment to force people to take the oath, or to answer questions once they had taken it. His objection does not seem to me to be confined to cases where the oath was extremely indefinite or no notice of the questions or accusation was given. For I take "surmise" to mean "anything well-short of the standard of reliable accusation set by the common law processes of presentment and indictment." In other words, the trouble with *ex officio* inquisition (even when it did not take the form of blatant "fishing expeditions") was that all it took to permit people to be examined was the Commission's belief or pretended belief that a crime within its jurisdiction had been committed. There was no check on the source or probability of the belief. What would count as a reasonable approach to "due process of accusation" need not be specified; *ex officio* ecclesiastical proceedings obviously did not approach it, *a fortiori* when the ecclesiastical court proceeded upon suspicion, rumor, or secretly supplied information so vague that it could not make anything like a definite accusation or advance formulation of specific questions or "articles." Even so, taking Yelverton's opinion strictly, he did not say that the High Commission was prohibitable for demanding sworn examination; only that the bias in favor of liberty was too strong to permit imprisonment to be used to enforce cooperation.

Popham then intervened to dispute both of Yelverton's points. (a) Leigh's, Mitton's, and Hynde's Cases all involved ecclesiastical offences which were also subject to temporal penalty-statutes (hearing Mass in the first two cases, usury in the third). Therefore, though the cases supported delivering High Commission prisoners on *Habeas corpus*, they were not applicable to the present case. For the offense here (a conventicle) was purely ecclesiastical, or at least not subject to a penalty-forfeiture. Popham did not controvert the earlier cases, however; his language indeed goes to affirm them. Therefore his general position must be amended as follows: High Commission examinees (even, I assume, when they have "voluntarily" taken the oath) may not be imprisoned for refusal to answer

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questions which will expose them to temporal liability, at any rate penalty-statute liability.

(b) "All suits in our Courts are originally surmises, yet men are imprisoned on them, and before it appears that the surmise is true or false." I question whether this is an adequate reply to Yelverton's point, but it has its merits. People were imprisoned in the common law sphere who had not been presented or indicted, much less convicted. Leaving aside civil execution, common criminal suspects were held in jail pending indictment if they were suspected of non-bailable offenses, could not raise bail, or were not admitted to it by the Justices of the Peace and other authorities with discretion to deny bail. Technically, people were imprisoned at common law when there was nothing against them but a "surmise." However, suspects who were arrested were required by statute to be examined by J.P.s (notably, *not* under oath), the decision to bail, not bail, or release being made after such examination of the prisoner and witnesses - - i.e., there was a procedure at least in rough form like the modern preliminary hearing. Yelverton's argument, it seems to me, could come to saying that the High Commission's procedures did not furnish the kind of protection to a suspect which those imprisoned "on surmise" at common law enjoyed. As such it is a reasonable argument, though hardly a conclusive one, for even in routine cases officialdom (the J.P.s) had some discretion to say that people merely suspected should be kept in jail for a limited time, and the Privy Council had effectively unchallengeable power to imprison indefinitely. In other words, officialdom was trusted not to abuse its discretion to hold the unindicted (especially high officialdom) to which the Commission claimed to be the spiritual counterpart.

To his general point that imprisonment of the merely suspected was not confined to the ecclesiastical sphere, Popham added: "So here, we do not know whether the suggestion of the High Commissioners concerns a spiritual or temporal matter before it appears by confession or trial." This seems to be a specific defense of imprisonment to force testimony, as if to say: "It is not objectionable *per se* to imprison those who are only suspected. It is, of course, true that the High Commission's power to imprison is limited to those suspected or convicted of ecclesiastical offenses. If it appeared to us that the imprisonment of these men was in consequence of their being suspected of a temporal offense, or an offense

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which is both temporal and ecclesiastical, as in Leigh's case, etc., we should deliver them. But if, having taken an indefinite oath, one refuses to talk, how will it appear to us that the suspicion on which the High Commission originally moved was improper to it? Here the opposite in fact appears: the High Commission moved on suspicion of participation in a conventicle, an ecclesiastical offense. But even if that were not clear from the return -- i.e., if we only know that Maunsell and Ladd had refused to respond to questions after taking the oath -- we would have no basis for saying that the moving suspicion was temporal. At common law, suspects may in some circumstances be held until a grand jury acts; they may obviously not be held any longer if the grand jury refuses to indict -- i.e., if the appropriate further investigation discovers that the suspicion was groundless. Examination under oath is the appropriate further investigation in the High Commission, the way by which the High Commission itself verifies or disverifies its suspicion, and, *also*, the way by which it can be made to appear to us that the suspicion related to a temporal or partly temporal offense. Only when that appears can the imprisonment be called wrongful. The closest common law analogy to delivering these prisoners would be where A. is duly imprisoned on suspicion, then -- the appropriate further investigation having taken place -- A. is indicted, then a superior court -- having an indictment before it -- quashes the indictment on legal grounds, with the effect of liberating A." (I construct Popham's opinion in this way to allow for the fact that he attached importance to the prisoners' having taken the oath. If the return had only said that an indefinite oath had been demanded and refused, giving no indication that the "moving suspicion" was of an ecclesiastical offense, Popham might have been willing to deliver the prisoners. *A fortiori* if the return itself revealed that the suspicion was of a partly temporal offense, as it probably did in Leigh's Case, etc. If, upon Prohibition, the prisoners had admitted taking the oath but alleged that they had refused to answer a temporally detrimental question, he might have been willing to prohibit, any factual dispute as to whether such a question was asked being triable on the Prohibition. But if it appeared that the prisoners had taken an indefinite oath, and if nothing had appeared as to what question they refused to answer, they must be regarded as properly imprisoned for refusal to cooperate with the

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investigatory process, out of which alone the propriety of the High Commission's dealings could emerge into visibility. In other words, having in a sense admitted the High Commission's jurisdiction to investigate, the prisoners had no choice except to answer all questions. If they convicted themselves of a temporal or partly temporal offense by doing so, and the High Commission proceeded to punish them by imprisonment, then they should probably be delivered from an imprisonment manifestly wrongful. Again, "admitting the High Commission's jurisdiction to investigate" would not necessarily preclude a Prohibition *quoad* "temporal" questions, just as pleading to an ecclesiastical suit was no bar to Prohibition.)

Justice Fenner, who spoke next, had not intended to give any opinion on the present occasion. He was moved by the rhetorical side of the debate, however, to make a few general observations of his own. They only go to assert the judges' authority and duty to enforce the law and the obligation of ecclesiastical courts, including the Commission, to observe it (like Yelverton's remarks on the same level, a "Whig" address to the hostile gallery). Fenner having said that it was the Court's duty to grant Prohibitions by way of enforcing the law on ecclesiastical tribunals, Popham intervened with "A Prohibition will not restrain them if the cause is not true." It must be said that the Chief Justice was on his toes, lest the impression be given that the Court made extravagant claims for its supervisory role. This particular remark is innocuous on its face -- in part, with tone and context added, perhaps a matter of saying, "Yes, of course, we are duty-bound to prohibit ecclesiastical courts if they violate the law. We do not throw Prohibitions about loosely, though. Prohibitions lie on *true* complaints of misdoing by ecclesiastical courts. We provide facilities for the truth of complaints to be challenged, as well as such further checks on their reliability as the preliminary-proof requirement. A Prohibition not founded on a true claim would be a nullity." (Here, of course, the law becomes more tricky, and it is uncertain how specifically Popham was thinking, but, in Vol. I, we have seen contexts in which "A Prohibition will not restrain them if the cause is not true" would have specific appropriateness: e.g., Prohibitions not reversible by Consultation because they manifestly fail to halt a "true" abuse and therefore cannot be said to put the ecclesiastical court under any restraint; the doctrine that Prohibitions reversed by Consultation on motion were void *ab initio*, "no restraint" because on the face of the record not granted upon a "true"

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cause.) In another aspect, Popham's remark cuts to the present case and harks back to the point he had last made: He did not think there was anything on the record (nor would have been even if the return had told less) to indicate Maunsell and Ladd had been dealt with as they should not have been. If Prohibitions should only be granted on "true cause," so only those who, to the Court's unmistakable perception on the record, were imprisoned unlawfully ought to be delivered on *Habeas corpus*. A vague bias for the "liberty of the body" should not induce the Court to throw the *Habeas corpus* about loosely in the delicate area of temporal-spiritual relations. The *Habeas corpus* should be used with at least as much caution as the Prohibition.

Justice Williams, the next speaker, displayed a touch of impatience with speeches to the gallery, and especially with Popham's efforts to reassure the critics of common law control: "I will not make apology for Prohibitions and *Habeas corpus*. They existed before the Conquest. The point now in question does not rest on that, but on the statute of 1 Eliz., c. 1." For Williams's taste, there had been too much heady and unnecessary talk in this case. The issue was only whether the statute and the patent implementing it gave the High Commission power to examine on oath and power to imprison. Williams thought that the Commission had all the statutory power it needed to do both, and hence to use imprisonment to force testimony, with the proviso that such power extended only to purely ecclesiastical matters, not to "mixed" ones. In short, Williams took Popham's position in a crisper and less subtle form. He apparently saw no problems about applying the principles he stated to the case at hand. That is, it seemed on the record a clear instance of statutorily warranted inquiry, the cause being purely ecclesiastical. Popham's position boiled down to that, but he talked to more contingencies outside the case and built up a more elaborate series of mutually reinforcing reasons. One reinforcing consideration was introduced by Williams. Speaking to Maunsell, or perhaps assuming that both prisoners were clerics, Williams took note of the clergyman's canonical duty of obedience, as if to suggest that any doubt about the High Commission's investigatory powers in spiritual causes must be raised in a layman's case, where at least there would be no inherent duty to obey the Church authorities' orders, over and above a bare statutory one.

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The spirit of Justice Tanfield's speech, though not its content, was somewhat like that of Williams's. Tanfield said expressly that he did not want to give a firm opinion; he made no sweeping observations; he thought that the main question was the precise meaning of 1 Eliz. and criticized Fuller for talking about everything but that question. On the statute, Tanfield's tentative thoughts went against the opinion of Popham and Williams. He doubted whether the act added anything to the common law. (A frequently encountered view. It involves the standard Anglican assumption that nothing in the Reformation legislation went to *make* the monarch Supreme Head of the Church, as opposed to recording that he *was* Supreme Head. That assumption leads to another: the Supreme Head possessed, in virtue of his office, the power to set up an extraordinary commission for ecclesiastical causes. If that was true, it was arguable that 1 Eliz. did not give the Queen authority to create the High Commission, but simply recorded that she already had such authority. But if *that* was true, the authority she had after the statute was no greater in extent than that which she had before. What, then, was its previous extent? Opinions could differ on this, but one plausible position (the one Tanfield was inclined to) held that the Supreme Head's power "at common law" was limited, in effect, to assigning certain ecclesiastical cases to any special commission she might choose to create, to be handled as they would be by ordinary ecclesiastical courts. That is to say, the Supreme Head had no common law power, and received no statutory power, to authorize the High commission to use different procedures or sanctions than other ecclesiastical courts could lawfully use. The consequence of this line of reasoning for the case at hand is that Maunsell and Ladd were wrongfully imprisoned, because ordinary ecclesiastical courts had no power to imprison. Collaterally, the reasoning implies also that the High Commission could be given no more power to examine on oath than other ecclesiastical courts had. Going by Coke's and Popham's extrajudicial opinion, ordinary courts probably could not examine a layman so as to cause him to convict himself of an ecclesiastical crime, though there may be grounds for doubting whether that rule applied to *all* crimes.) On the basis of the text of 1 Eliz., Tanfield was also inclined to doubt whether the act permitted the monarch to confer temporal powers or new procedures on the High Commission. (In other words, even if the statute was not declara-

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tory, it could still be argued, and often was, that its language and intent limited the monarch from giving the Commission any procedural powers or sanctions beyond the accepted ecclesiastical ones, not counting those conferred by the repealed *De heretico*. Popham, relying on the generality of the statute, rejected this argument; Tanfield found it persuasive.)

Having explored the central question of the statute, Tanfield spoke about the exact language of the return on the *Habeas corpus*. He was the only judge to do so; the others stuck to their general views on the Commission's powers. (Appropriately enough, considering what those general views were. Of the judges who had taken firm positions, Popham and Williams had every reason to be satisfied with the return. It clearly told them at least as much as they needed to know -- that the prisoners had refused to testify about a conventicle. Yelverton, on the other hand, did not think that the High Commission should imprison unconvicted suspects, whatever powers it might have otherwise. Maunsell and Ladd would have remained unconvicted suspects even if the return had been much more complete and had shown that they had been treated with relative procedural rectitude -- e.g., had been given detailed notice of the questions.) Tanfield, being unresolved, had the more reason to focus on the narrow issue of the return's adequacy. We have already seen what he thought -- that there was at least reason to demand a fuller return, if not to deliver the prisoners here and now. Tanfield doubted whether there was any basis for holding them, but was admittedly not sure of his ground; he thought the Court would be in a better position to decide the question before it if it had more information, especially as to the exact form of the oath. (Or perhaps, to give Tanfield's point a different possible emphasis, he was thinking more about good form than about additional information capable of affecting his and other judges' substantive view of the case. Perhaps, seeing a divided Court in an atmosphere of political acrimony, he was looking for the truly narrow or dilatory solution. As it were: "Might there be a way out of this troublesome case by narrowing our vision to the issue in the most literal sense -- the surface adequacy of the return? The return *does* seem rather cursory, and the phrase 'summary question' is baffling. Suppose we were to send the prisoners back to jail for the moment, but give a day for a fuller, more formal return to be put in. Even if a new return does not change anything in substance, a delay might cool the atmosphere. The

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prisoners or the Commission might have a change of heart, causing the whole matter to go away. Or the Commission might harden its heart and refuse to make a new return, in which case we would have a narrow procedural basis for releasing the prisoners, avoiding decision on a political question. Conceivably the Commission might not want to reveal the terms of the oath, from which it would perhaps appear that the oath was utterly indefinite. Even if that would not or should not matter legally, the Commission may be reluctant to let it be known on the record that it is using procedures widely regarded as unfair, or afraid that letting it be known *might* upset the judges. Or perhaps, given a delay, the prisoners might try a Prohibition, which would afford them a better chance to bring out facts in their favor, and which might put a more manageable question about the Commission's powers before the Court.")

After all the judges had spoken, the prisoners' other lawyer, Finch, addressed the Court. I think there is no doubt that this was Henry Finch, a man of considerable distinction, remembered mainly for his important legal treatise, *Nomotechnia* (1613). Finch was a brother-member with Fuller of Gray's Inn. There is no particular reason to associate him with Fuller on the "left" side of current religio-political debate. His career seems to have been "Establishment" enough, though the Bench was to be an honor reserved to his distinctly royalist son, John, in Charles I's reign. Henry Finch got into hot water in one curious episode of the 1620's, for writing a book foretelling the imminent reestablishment of the worldwide temporal kingdom of the Jews, an idea which King James found subversive. Perhaps there is some basis for imagining him as an exceptionally intellectual lawyer with an original turn of mind. Perhaps in the atmosphere of 1607, he was led by personal conviction to take a hand in an onslaught on the High Commission, or a struggle for justice for two persecuted Puritans. The maverick Fuller got into trouble for it; the well-connected Finch apparently did not.

Finch took off from Justice Tanfield's doubt as to whether the High Commission's authority depended on the statute of 1 Eliz. Appositely citing Cawdrey's case (discussed later in this study) for the conclusion that it did not, he argued that therefore the question was whether special commissioners to whom the monarch assigned ecclesiastical causes before the statute could examine on the *ex officio* oath. No, they could not, Finch held. It was not the usage in ecclesiastical courts, and ecclesiastical law

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itself frowned on the notion of powers of which there was no evidence in practice. Moreover, demanding self-betraying testimony contravenes the law of nature, in the sense that it goes against the natural instinct of self-preservation. (The most common early-17th-century sense, it is my impression, in which positive legal institutions were said to conform or not conform with the law of nature. If a positive norm took account of, or did not try to fight, universal and inevitable drives, it complied with or incorporated the "law of nature." In other words, the factual sense of "law of nature" rather predominated over the normative in common lawyers' discourse. See, for example, Coke's proof in Calvin's Case that the law of nature is part of the common law. This is not to say that the theoretical distinction was of any practical importance. "*Nemo tenetur*, etc." -- which Finch repeats -- was no doubt widely regarded as a rule of the law of nature in the normative sense. For the force and flavor of attitudes toward self-incriminating testimony, however, it is of some importance that the maxim was conceived as part of the normative law of nature because it expressed in a particular "ought" the more general proposition that "oughts" should not try to drive human conduct into channels that human nature inevitably resists. In one way, so explaining "*Nemo tenetur*, etc." weakens its force. If one conceives exacting self-incriminatory testimony as morally offensive in the most fundamental sense, at odds with what good conscience can tolerate, perhaps one is equipped to say that it is never permissible, perhaps even that a statute permitting it should not be given effect. If one conceives it as only a normative projection of "the way things are," one is in a better position, perhaps, to say that if human government does choose to intervene against the grain of reality -- as by making an unambiguous statute permitting self-incriminatory examination -- there is no ultimately moral basis for condemning it. Lack of realism or of "natural piety" are not quite evil; they may even be the faults of an idealism that shoots too high. The majority of the present Court, after all, did not think that the statute of 1 Eliz. should even be *interpreted* so as to avoid the moral scandal of violating a "natural" norm; as his subsequent argument shows, Finch *only* claimed that it should be interpreted as respecting the self-preservation instinct of nature insofar as its language was too general to force the opposite conclusion.)

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Having taken his stand on nature, Finch proceeded to reinforce it with the Gospel. "Woman, where be thy accusers?", Christ said. "So it was held unlawful to condemn anyone without accusation of another," Finch concluded. (Some further Scriptural citations to the same effect are added in the printed version of Fuller's argument.) Where the question was of ecclesiastical law, the authority of the Scriptures was particularly relevant, and such was the question. To suppose that ecclesiastical commissioners before, or independently of, 1 Eliz. could examine *ex officio* required supposing they could do what had never been done, that they could or would contravene the law of nature and, moreover, proceed in a manner which the Scriptural sources of Church law directly discountenanced. If it is granted as a general proposition that 1 Eliz. only declared the common law, then there is no way to make out that the High Commission has power to examine *ex officio* on oath. If that is not granted, Finch in effect continued, correct canons of statutory interpretation require the same conclusion. For the statute is very general. What that should imply is *not* that the act gave the monarch authority to confer virtually whatever powers he chose on the Commission; rather, that there was no intention to make lawful what was not lawful before. Moreover, the law of nature (in the sense above, the universal and inevitable facts of human nature) should be taken into account in construing language too general to reveal any positive intent to go against it. (For this, Finch cited a holding that an anti-champerty statute did not extend to maintenance of a father by his son, such maintenance being founded on "natural" affection or sense of duty.)

Finch was unable to spring his prisoners, however. The judges said they wanted to be better advised in a case of such importance, wherefore they adjourned it and sent Maunsell and Ladd back to jail. When the case was brought up again the next term, Fuller led off and Finch followed. Fuller tried now to take advantage of the precise circumstances of Ladd's refusal to answer (the Commission's unwillingness to let him see his former deposition). For the rest, he spoke to the construction of 1 Eliz. with reference to the High Commission's power to imprison for any purpose. (We may omit the details of that argument here.) Finch confined his argument this time to close exposition of the statute, to the intent of showing that it gave the monarch authority to *limit* the Commission's powers, but not to extend them beyond those already possessed by ecclesiastical

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courts. Like Fuller, he focused on the power to imprison rather than the power to examine.

Justice Williams now expressed a softened version of his former position. He said that he did not want to give a resolute opinion, but still found it hard to see how the Court had any title to intervene when, as here, the examination concerned a properly ecclesiastical matter. Clearly, he said, the prisoners could not be asked to testify about a secular crime. Williams had not changed his mind, but perhaps he had been shaken by counsel's arguments going to the statute. Formerly, he had thought that the case depended wholly on the statute, and that the statute plainly gave the Commission the power it needed. His change of emphasis and assurance suggests to me that he may have become worried about taking the statute as giving the monarch very wide delegated legislative authority to confer powers on the Commission. He may have decided that it was better to rest the case against the prisoners on the ecclesiastical subject matter of the inquiry -- to concede that the statute and patent perhaps gave the Commission authority to imprison for contempt when parties refused to cooperate with an investigation within its jurisdiction, but not to concede much else. (An ordinary ecclesiastical court might have authority to examine concerning a conventicle, though not to imprison. It would certainly have such authority over a clergyman, and perhaps over a layman -- depending on whether forcing a man to confess to participating in a conventicle or otherwise violating good order in the Church was like forcing him to confess to such a "discreditable" act as fornication. I am suggesting that Williams may have swung to the view that the High Commission should be treated as much like an ordinary ecclesiastical court as possible -- as opposed to seeing it as a completely special case owing to a permissive statute.) In the end, however, to posit a real change in Williams' opinion is speculative, and on one basis or the other he remained inclined against the prisoners.

Justice Tanfield's further reflections, on the other hand, had led him to reverse his former opinion. He now held that the intent of the statute was clearly to permit creation of a new ecclesiastical court with "teeth" that the regular ones lacked; that the language of the act served that intent by giving the monarch very general authority to confer powers on the Commission; and that the patent plainly permitted examining on oath and imprisoning those who refuse to cooperate. He took Finch to task for saying (the reports do not give Finch's precise words to this effect) that if the

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statute was taken liberally enough to justify the examination and detention of these prisoners the King might as well be held to have virtually unlimited power in relation to the Commission -- e.g., to authorize it to hang men. Tanfield thought the language of the act was restrictive to *some* intents, but that it was meant to be permissive for all purposes relevant in this case.

Justice Fenner spoke last. All he said was that a man is not bound to answer on a *Subpoena* unless a bill is put in against him. In other words, in the Chancery and Star Chamber, people were not forced to testify without a specified claim or charge against them backed up by a specific accuser. Fenner took no unmistakable position on the case at hand, but both his present point and his earlier generalities indicate a disposition in favor of the prisoners.

With this, the reports end. No final disposition is reported, but it is clear that as of the second discussion of the case there was not a majority for releasing the prisoners. Chief Justice Popham died close to the beginning of T. 5 Jac., when the second discussion took place, and his successor, Sir Thomas Fleming, was not appointed until late in the term. Taking the Court as short-handed, it was pretty clearly divided Williams-Tanfield *versus* Fenner-Yelverton. If we count Popham's vote (and he was more resolute than Williams and Tanfield) there was a 3-2 majority against the prisoners. Cutting through the complexities of the case, which reduce its authority, it may be considered a holding that the High Commission may examine on oath -- probably an utterly indefinite oath given without notice of the "articles" of examination -- so long as it appears that the interrogation concerned an ecclesiastical offense -- such power of examination extending to laymen and being enforceable by unlimited imprisonment. On the other hand, there was no disposition on the Court's part to reverse Leigh's, Mitton's, and Hynde's Cases. In other words, a man's privilege to avoid incriminating himself *in the sense of exposing himself to penalty liability* was indirectly upheld even vis-a-vis the High Commission. Save for the power to use imprisonment, the High Commission was not handed a great deal that the ordinary ecclesiastical courts lacked -- perhaps somewhat greater authority over laymen, perhaps wider freedom to administer an indefinite oath without any notice of the content of the examination. For the important last point, a Prohibition challenging an

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oath before it was taken would be a better test than the tangled *Habeas corpus* case of Maunsell and Ladd.

No further cases on self-incriminating testimony occurred in the King's Bench until Coke was transferred to the Chief Justiceship of that court. This fact by itself counts as slight evidence that Fleming's King's Bench stuck to the position of the majority in Maunsell and Ladd. Meanwhile, several cases occurred in Coke's Common Pleas.

Edwards' Case¹⁶ touches on the power to examine only lightly. The High Commission proceeded against Edwards *ex officio* on several articles, none of which the Common Pleas considered within its jurisdiction, wherefore the suit was prohibited. There was no question of an indefinite oath or failure to give notice of the inquiry's content; the "articles" charged against Edwards are all laid out in the report. One of the articles, however, announced a design to examine Edwards about his intentions: He had drawn a horn in a letter to Dr. Maders in which he referred to Dr. Walton; the Commission said that it proposed to examine him under oath as to whether he meant to imply that both of those worthies were cuckolds -- hence to defame them (essentially, he was charged with defaming Walton in various ways.) This particular article led the Court to rule *inter alia* that no ecclesiastical court, including the High Commission, may examine a man "upon the intention and thought of his heart." The principle was extended to the rather more serious matter of religious opinions.

In 1609, two *Habeas corpus* cases directly concerned with compulsory testimony occurred in the Common Pleas. (That court did not share the King's Bench's general authority to deliver the wrongfully imprisoned, but it could do so if it had an "interest." One of our two reports says expressly that the prisoner was a litigant in the Common Pleas, hence within its protection; it may be assumed that the same was true in the other case.) In Parson Wransfield's Case,¹⁷ a clergyman was deprived for inveighing against the Book of Common Prayer. He was then proceeded against in the High Commission and required to submit to sworn examination about

¹⁶ M. 6 Jac. C.P. 13 Coke, 9.
¹⁷ H. 7 Jac. C.P. Harg. 52, f.15

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the same misconduct. He was imprisoned, apparently for refusal to take the oath at all, wherefore he sued the *Habeas corpus*.

Parson Wransfield got short shrift from the Common Fleas. The Court remanded him to jail, making the following holdings: (a) The matter was an "enormous" offense and hence within the High Commission's jurisdiction (by the widely endorsed theory that 1 Eliz. excluded the Commission from civil and petty-criminal cases, but authorized it to deal with major ecclesiastical crimes -- of which "subversive utterance" about the Prayer Book would, I think, usually have been considered an example). (b) A man properly within the Commission's jurisdiction may be examined under oath without showing him the interrogatories in detail. It is enough (and by clear implication it is necessary) to show him summarily what he is to be examined about. (c) A man who takes a general oath is not *ipso facto* bound to answer every question. The oath only commits him to answer insofar as the questions relate to matters in the Commission's jurisdiction ("*quatenus de jure tenetur*" -- perhaps one should add "and insofar as the questions are otherwise proper, e.g., within the subject of the inquiry as the examinee has been 'summarily' informed of it.") The Court's example of an improper question is one concerning treason or felony. (Should one add the lesser forms of "temporal detriment," such as exposure to a penalty-statute?) The Court said that failure to answer improper questions is not perjury. (I should assume that Prohibition would lie *quoad* the improper question. In principle, one imprisoned for refusal to answer an improper question should be delivered, *sed quaere* whether the return on a *Habeas corpus* need be specific enough to reveal the particular question which the examinee refused to answer.) (d) After the examinee has replied to questions, he must be given a copy of the interrogatories (and presumably of his answers.) Cf. the alleged violation of this rule in the case of Ladd. The Common Pleas said that Prohibition would lie for failure to observe this requirement. (Again, it is doubtful whether violation could be made to appear on the record in *Habeas corpus*.) (e) The High Commission may examine a clergyman, such as Wransfield, on matters of religion, but not a layman. One might take that to mean that a clergyman may be asked to testify about his religious opinions, at least when the questions are tied to an overt act and meant to get at its intent, whereas a layman may only be asked about overt acts, including such acts as inveighing against the Book of Common Prayer. *Sed*

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quaere. The alternative interpretation would be that no one may be examined about such overt *religious* acts as the one in question here. I would opt for the first alternative as the more probable, save for two remarks by Coke. He cited the well-known rule that laymen may be examined on oath by ecclesiastical judges only in matrimonial and testamentary causes. The immediate point was that Wransfield, as a clergyman, was outside the rule; the point to observe is that Coke made no exception for the High Commission. Secondly, the Chief Justice cited Leigh's Case for an unusual purpose: not for the rule that the High Commission may not examine offenses subject to penalty-statutes, but as an example of a Prohibition granted to prevent examination of a layman about religious matters. (Other citations, particular enough to be taken as correct, represent Leigh's Case as a *Habeas corpus*. It is of course perfectly possible that a Prohibition was also granted in the same matter.) Coke's remarks suggest that he, at least, took the High Commission's power to examine as exactly coterminous with that of ordinary ecclesiastical courts, while conceding it extraordinary power to imprison.

The second *Habeas corpus* from the same term, Darrington's (or Warrington's) Case,¹⁸ does not appear to have involved the High Commission's power to examine. The question was whether the Commission was entitled to hold Darrington in prison in somewhat complicated circumstances; at least on the record, it appeared that he was guilty of such unlawful religious activities as consorting with Brownists and speaking against the Prayer Book. In discussing the High Commission and control of it by *Habeas corpus*, however, the Court took the occasion to reiterate its views on the exaction of testimony. The effect is to clarify the rulings in Wransfield's Case. This time the Court as a whole laid it down that laymen may not be compelled to testify under oath except in matrimonial and testamentary cases, making no exception for the High Commission. The historical authorities relied on in the Coke-Popham extrajudicial opinion discussed above were cited -- the old ordinance of "Prohibition upon *Articuli Cleri*" and materials expounding it. Clergymen, on the other hand, are not within that restriction and may be examined on oath

18 T. 7 Jac. C.P. Harg. 52, f.20b: 2 Brownlow and Goldesborough, 3. (The MS. only contains the dicta on examination.

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concerning heresy and other religious matters, "because they have more knowledge to render account of their religion than laymen have." But even a clergyman need not respond to questions not touching religion or not within ecclesiastical jurisdiction, such as treason or felony. Leigh's Case and Hynde's were brought up again, the former cited as from 9/10 Eliz., the latter from 18 Eliz. The record of Leigh's Case was read. (It was, as other references confirm, a Common Pleas *Habeas corpus*, Leigh being an attorney of that court. Nothing was said on this occasion to suggest that there was also a Prohibition in that case.) Although the reports are too succinct to make the point stand out altogether clearly, a couple of remarks suggest that the judges were consciously concerned about the theory behind the two precedents. Coke said of Leigh's Case (apparently after the record had been brought in and read) that the reason for Leigh's discharge was his refusal as a layman to be examined under oath about a religious matter (Mass-attendance.) On the other hand, Coke and Justice Foster seem to agree that the reason in Hynde's Case (which Foster remembered personally) was the tendency of the examination to expose him to common law liability for the (non-"religious") offense of usury. Hair-splitting over the early cases is important insofar as precedential evidence for the general exemption of laymen from High Commission examination concerning ecclesiastical crimes was felt to be desirable. For restraining the High Commission, Leigh's Case was more useful if it upheld that general exemption than if it only showed, with Hynde's Case, that examinees need not supply confessions that could be used against them at common law. Two restrictive theories were better than one.

In the case of *Huntley v. Clifford*,¹⁹ the High Commission must have set some sort of record for massive abuse and maximum prohibitability. Among the reasons for prohibiting was abuse of the power to examine. In brief Huntley complained to the Commission that Mary Clifford, having contracted to marry him, was about to marry one Cage. (The first strike against the Commission, in the Court's opinion, was that it had no jurisdiction over this civil dispute.) The Commission proceeded to have Mary and Cage arrested and committed. (*Held*: Clearly unlawful in it-

19 H. 8 Jac. C.P. Harg. 15, f239; 2 Brownlow and Goldesborough, 14 (*sub. nom.* *Huntley v. Cage*).

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self. The Commission's power to imprison, whatever it was, did not include the power to arrest accusees, especially in civil cases.) Having her in custody, the Commission let Mary go only after she entered into a £2,000 (sic -- both reports agree) penalty-bond obliging her not to marry pending Huntley's suit and to appear before the Arches. (I.e.: The Commission did not propose to settle the matrimonial dispute itself, but used its pretended coercive power to make sure that Mary answered in a regular ecclesiastical court and did not elude Huntley's claim on her by marrying Cage. The Court held the obligation void because it was obtained by duress.) The obligation (of which the King was of course the beneficiary) was subsequently assigned to one Sir William Armstrodder. He suspected that Mary had married Cage and was naturally enough moved to collect on the bond if he could prove the forfeiture. He found a promising ally in one Serle, who held the office of King's Proctor and, as a perquisite thereof, the right to twenty-five percent of all fines and forfeiture accruing to the King through ecclesiastical courts (hence a £500 interest, alongside Armstrodder's £1,500 interest, in the case.) Serle procured the Commissioners to proceed *ex officio* against Mary, citing her to appear and answer articles under oath. She was at first asked directly whether she had married Cage, which she refused to answer on the ground that she was being required to expose herself to forfeiture of the bond. Refreshingly, the Commission acknowledged her right to refuse and caused the question to be amended. The revised version, a master-stroke of legal wizardry, inquired whether she had lived in the same house as Cage in an unmarried condition. Taking the position that the new question was no more capable than the old of being answered without incurring forfeiture, she refused again. At last, showing all the matter above, she sought a Prohibition. The Court granted one with visible enthusiasm.

The examination gave the Court an opportunity to hold that the Commission could not ask people to betray themselves into such "temporal detriment" as forfeiture of a bond -- as the judges said, "to incur any penalty pecuniary or corporal." This holding was of course based on the assumption contrary to the fact that the obligation was valid and therefore forfeitable. By way of a further reason, Coke reiterated the rule that laymen are examinable only in testamentary and matrimonial causes, elaborating his historical argument for that proposition with a little new

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material (with the implication that the examination in this case -- aimed at whether the bond was forfeit -- did not count as in a matrimonial cause, despite the subject matter). Justice Foster cited an interesting case in confirmation of the principle that testimony exposing to forfeiture on a "penal" statute may not be demanded: Ralph Bowes, holder of the celebrated playing-card monopoly before it passed to Darcy (cf. Vol. I, II.B.1, Note 8), brought an English bill in the Exchequer against one who imported cards into England. (I.e.: The monopolist brought an equity complaint -- the Exchequer having equitable as well as common law jurisdiction -- against an alleged infringer of his privilege, no doubt seeking to enjoin him from dealing in cards.) It was held that the defendant could not be compelled to make sworn answer to the complaint because it would expose him to a penalty-statute. (The importation of cards was forbidden by statute, subject to a penalty; the monopoly was based on a royal dispensation from the statute for the monopolist exclusively.)

A final case from the Common Pleas, *Parson Latters v. Sussex*,²⁰ is not dated but comes from the Cokean period. Here, the Court prohibited the High Commission from examining a clergyman on oath concerning simony allegedly committed by him. The reason was that the examination exposed him to temporal loss, namely of his church. I take it that there would be no way of stopping the Commission or any other ecclesiastical court from examining Latters about simony if that offense were nothing more than an ecclesiastical crime. I take it that the same would be true if the crime were punishable by deprivation of the living merely by force of ecclesiastical law (i.e., if the ecclesiastical judge had discretion to deprive a convicted simonist, and even if ecclesiastical rules correctly applied gave the judge no choice except to deprive him.) Because, however, simonists were deprived *ipso facto* by the statute of 31 Eliz., c. 6 (i.e., by committing simony, not by being convicted of it by ecclesiastical process), asking Latters whether he had committed the offense was asking him to supply a confession that he did not hold the living. Temporal detriment of many sorts would ensue; Latters would have no basis to claim an indisputably common law interest -- his freehold, in the right of the church, in all the physical property and titles (as to tithes) constituting the

20 Noy, 151 (dated "T. and M. Jac." C.P. -- i.e., the year is omitted by mistake).

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benefice. (The report does not spell out these steps, but I think there can be no doubt but that they represent the Court's thinking.)

The variant of the case that might arise if the simony statute had been different is interesting: Suppose that statute required simonists to be deprived, but provided that they continue incumbent until actually deprived by ecclesiastical sentence. Should a man be forced to convict himself of an ecclesiastical crime where conviction could only lead to his deprivation? It is conceivable that even in the absence of any statute an ecclesiastical court should not be free to require self-conviction where deprivation -- hence loss of the living -- would be the likely or legally binding result of conviction (contrary to my assumption above.) The actual statute, however, renders these cases hypothetical. The decision in *Latters v. Sussex* should be taken as equating automatic loss of living by operation of a statute with such "temporal detriments" as forfeiture of a bond or liability under a penalty-statute. It should *not* be taken as authority that a clergyman may not be asked to convict himself of any ecclesiastical offense where conviction is likely to lead to deprivation. In *Latters v. Sussex*, Coke again cited Leigh's Case (the report says Smith's, but from the date and matter it is clearly Leigh's), this time as a Prohibition case again, the reason for the Prohibition being that Mass-attendance was subject to a £100 penalty (*not* that Leigh was a layman being examined concerning religion.)

On the basis of the above cases, it is possible to say that Coke's Common Pleas drew the borders of the High Commission's inquisitorial powers more stringently than the contemporary King's Bench. Such a conclusion needs qualification, however. (a) The King's Bench position has to be projected from the morass of Maunsell and Ladd. Parties complaining of self-incriminatory examination seem to have expected a kindlier reception in the Common Pleas, judging by the absence of King's Bench cases. The absence of cases, however, means that the King's Bench got no opportunity to clarify its position. That court was closely divided in Maunsell and Ladd; how it would have handled easier cases, especially ones arising by Prohibition, is uncertain. (b) The Common Pleas laid down restrictions beyond those the King's Bench would perhaps have endorsed *by way of dictum* (in *Wransfield* and in *Darrington*.) (c) Its actual holdings were relatively limited, probably not stronger than what the King's Bench as of the time of Maunsell and Ladd would have

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accepted. (A clergyman may be examined on oath about a religious offense and may be imprisoned for refusal to testify -- the only relevant decision on *Habeas corpus*, a pro-ecclesiastical decision. On Prohibition: A man may not be asked about a mere intention -- *Edwards* -- and there were ample other grounds for prohibiting in that case; otherwise, examination exposing to temporal detriment -- forfeiture of a bond, loss of a benefice by force of a statute -- is prohibitable, a proposition indirectly conceded in *Maunsell and Ladd* on the basis of the early Elizabethan case, narrowly construed.)

Caution is necessary here, for we are involved with Coke's reputation as a particular friend of "*Nemo tenetur*, etc." and a particularly eager prohibitor of High Commission examinations. One document of a different class from the law reports has been relied on to establish that reputation.²¹ We must take note of the document here. Stowe MS. 424, ff. 158-164b lab, is a compilation of Prohibitions to the High Commission issued by Coke and subscribed by him personally during his Common Pleas period. There is no reason to doubt its accuracy. It goes to show that Coke's court granted a number of Prohibitions to the Commission of which there is no sign among reported cases. Otherwise, I think, the document's legal significance must be qualified virtually out of existence. (a) I would not discount the document because of its source. It is manifestly hostile to Coke -- a list of Prohibitions believed by the compiler to be unwarranted, plainly drawn up as ammunition for the Commissioners, or the ecclesiastical authorities generally, in their political battle with the common law courts and with Coke in particular. Outrage at the Prohibitions is revealed in the very description of the cases. In a factual sense, however, they are clearly described; there is no reason to doubt that the compiler stated the cases correctly from documents he had before him (as we shall see, a few can be verified from reports.)

(b) The trouble is the nature of the documents, or the nature of the information conveyed by the compilation. In essence, it is the kind of

²¹ See Levy, 245. Levy recognizes that Prohibitions to the High Commission were more often than not based on other grounds than objection to incriminating examination and by no means connects all the Stowe MS. case with protection against self-incrimination. He does, however, associate some of them too clearly with that function.

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inconclusive information conveyed by fragmentary official records. The compiler plainly had the writs of Prohibition before him. With those, and probably additional information from ecclesiastical records or personal knowledge, he describes the suits prohibited; he then gives the grounds for the Prohibitions. *in the sense of the points made by the plaintiffs-in-Prohibition in their surmises.* I.e.: When an ecclesiastical court was prohibited, it was told that such-and-such had been surmised. It was not, of course, given the reasons for the Prohibition in the sense of the judges' reasoning -- the sorts of things the judges said when they discussed in open court whether or not to prohibit. Law reports alone give that reasoning, alone show why a Prohibition was granted in the legally significant sense of "why." Beyond statements of fact (descriptions of the ecclesiastical suit and proceedings) surmises ordinarily stated rules and considerations of law supposed by the plaintiff to recommend a Prohibition. Plaintiffs of course "threw the book" at the court they hoped to prohibit.

For example, in all the Stowe MS. cases, the surmises recite the 29th ("*Nullus liber homo*") Chapter of *Magna Carta*. But the fact that a Prohibition was granted on a surmise reciting *Magna Carta* does not mean that the judges gave a moment's thought to whether that venerable statute operated to render the proceedings in question unlawful. We have seen in Vol. I that the courts would prohibit even when surmises were misconceived in their central legal theory, provided it appeared from the statement of facts that Prohibition would lie on an alternative theory; when a surmise put forward a number of reasons, including *Magna Carta* and the maxim "*Nemo tenetur*," and when the facts and some of the reasons indicated a Prohibition, the courts would obviously prohibit; their doing so implies no acceptance of all the arguments written into the surmise. If, for example, the High Commission was entertaining a divorce suit, it might in fact -- as one would gather from a law report -- be prohibited solely on the commonplace ground that matrimonial disputes were outside its statutory authority. But nothing would prevent the surmise from invoking *Magna Carta* and "*Nemo tenetur*." Such invocations would not be inappropriate. *Magna Carta*, c. 29, has an arguable application to almost any supposed violation of "due process of law"; it was certainly widely believed, and not irrationally, that High Commission procedure offended against the standards guaranteed by *Magna Carta*, principally because people were put to examination without accusatory process designed to establish *prima facie* grounds for suspecting the examinee of a

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definite offense. Granting a Prohibition on a surmise invoking *Magna Carta* among other considerations does not, however, imply judicial endorsement of any line of argument making use of *Magna Carta*, or of "*Nemo tenetur*" as a natural or "fundamental" principle. Truly apposite argument from those sources requires construction -- e.g., 1 Eliz. gives the monarch no authority to give powers to special ecclesiastical courts which he did not have before, and before the statute the monarch could not empower a court to call subjects in question without due accusatory process -- see *Magna Carta*. Alternatively: 1 Eliz. may give the monarch new power to set up special ecclesiastical tribunals and confer special powers on them, but the statute should be read narrowly enough to save the elements of "due process"; it should not be read as repealing *Magna Carta* to any intent. Those are both plausible constructions and arguments, but there is no basis for attributing either of them to the judiciary in the absence of reports in which judges so reason. Arguments relying on *Magna Carta* and the fundamentals of fair procedure are in fact "hard" arguments -- lines to use on a court that seems inclined to uphold the High Commission (like the King's Bench in Maunsell and Ladd.) If one only knows that the High Commission was prohibited in such-and-such a case, the most probable assumption to make in the first instance is that the prohibiting court "did it the easy way" -- held that 1 Eliz., by its words and intent, limited the Commission's subject-matter jurisdiction and that the suit in question was beyond its statutory authority, or else held that 1 Eliz. meant to give the Commission no procedures and sanctions beyond those enjoyed by other ecclesiastical courts, whereas in the suit in question it had exceeded ordinary ecclesiastical powers.

(c) From the bare fact that a Prohibition was granted in a given case, nothing can be known with certainty about the ultimate fate of the Prohibition. That is true even when reports show that the first motion for Prohibition was debated by counsel, or at least among the judges on *ex parte* initiative. Even then, there is no telling for sure what finally happened, in the absence of further reports relating to subsequent stages or the full record. Plaintiff-in-Prohibition could get his writ and then fail to prosecute; the defendant might for all sorts of reasons decline to contest the Prohibition further, even when a legal prognosticator might think the chance of breaking the Prohibition on careful argument quite good; the parties

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might settle; the Prohibition might be reversed on motion for Consultation, or on demurrer, or after trial of controverted facts.

If, however, one knows that a Prohibition was granted with some discussion, and therefore knows something about the judges' thinking, there is a certain basis for guessing about the next step. If the judges saw a case a certain way, and especially if they gave at least brief attention to the arguments for seeing it another way, then probably they would see it the same way in the less-than-likely event of a motion for Consultation or demurrer. If, in periods of good reporting, a case disappears after a considered decision to grant Prohibition, the chances are that the losing party gave up when he saw the judges' disposition, unless he took issue on the facts. Prohibitions were sometimes granted, however, on little or no consideration, sometimes by individual judges in chambers, merely because the surmise seemed to state a good cause offhand.

Insofar as "precedents" such as those listed in the Stowe MS. do not turn up in reports (in such "periods of good reporting" as the early 17th century), the probability is that the Prohibitions were granted without discussion or out of court. If one knows that a Prohibition was granted in that way and knows nothing else, one is entitled to infer that the prohibitee, by reason of his legal calculations or from other motives, did not think it worthwhile to contest the Prohibition -- for if he moved for Consultation or demurred the chances of a report relating to those steps would be good. That is a significant inference, but it is different from the inference one is entitled to make from knowledge of a considered Prohibition. If the defendant acquiesces in a Prohibition granted without consideration -- if he passes up the opportunity to fight the Prohibition even without complicated pleading, by moving for Consultation -- he must believe his case is very weak, unless he is determined by non-legal motives. Recognizing that one's case is hopelessly weak is different from deciding that another try, in the face of a Bench that has already shown itself opposed to one's legal position, is unpromising.

Such are the general principles to bear in mind when dealing with evidence of granted Prohibitions in the absence of reported judicial discussion at any stage. Prohibitions halting *ex officio* proceedings are a special case in one sense: Private ecclesiastical plaintiffs whose suits were prohibited had only one recourse -- to fight the Prohibition in court. If they

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fail to do so, the inference that they considered their case weak is valid (though it is of course only a *prima facie* inference. One needs to look at the case, of whose factual character there is evidence, to decide whether, in the light of the courts' usual practice, the chance of defeating the Prohibition would have been slight indeed.) The High Commission had another recourse: politics. There is ample history to show that the Commission put stock in that method. The Commission plainly thought that all the Stowe MS. Prohibitions were ill-granted. It may have considered it hopeless to try to talk the Common Pleas out of them; it may, on the other hand, have disdained to try, preferring the political route, along which the MS. itself is strewn.

(d) I have belabored the cautionary generalities above because the Stowe MS. cases can be used to argue that Coke waged a Prohibition-war against the High Commission *because he considered its inquisitorial procedure unlawful*. The error of so using them derives from a lack of appreciation for the pitfalls in the kind of evidence the MS. represents. It is valuable evidence if correctly used, but it does not go to establish a Cokean position on self-incrimination. Although "Prohibition-war" is not a very apt expression, we shall see that Coke's Common Pleas prohibited the High Commission heavily, relative to other courts; the Stowe MS. adds to our knowledge of *how* heavily. But the real reason for so many Prohibitions is that Coke's court made up its mind that the Commission's jurisdiction was limited by the terms of 1 Eliz. to "enormous" offenses and settled on a short and definite list of "enormities." Some of the Stowe MS. cases are clearly Prohibitions to prevent the Commission from proceeding against offenses too petty for its jurisdiction, to the derogation of diocesan courts; some have other features making the Prohibitions easily explicable. The question we need to ask here is whether *any* of the Prohibitions are likely to have been based on objection to inquisitorial procedure. As I have already argued, mere invocation of *Magna Carta* and "*Nemo tenetur*" in a surmise says nothing in itself about judicial thinking.

It is, I think, much more than an assumption that when judges could prohibit by the "enormity" test, or on equally uncomplicated grounds, they did so. (For reported cases show them prohibiting on such grounds. And yet, unless he had an unusual opportunity to get a Prohibition before the Commission laid hands on him, virtually every High Commission defendant *could* complain that he was asked to incriminate himself. A

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judge *who had no doubt* that adultery, say, was outside the Commission's authority would be out of his mind to worry about whether the Commission's procedural powers were exactly coterminous with those of other ecclesiastical courts.) There were, however, cases in which the only possible basis for prohibiting was improper interrogation. We must therefore ask specifically whether any of the Stowe MS. cases are of that sort.

Two of the cases occur in law reports, as follows: (1) Langdale's Case (M. 6 Jac. 12 Coke, 50 and 58.) Langdale was sued by his wife for putting her away and not supporting her, and also for adultery. The report indicates that the Prohibition was granted solely because the offense was not "enormous," the court relying on a reason commonly given for the "enormity" test -- that there was no appeal from the High Commission, and save in cases of exceptional gravity subjects should not be deprived of their normal ecclesiastical appeals. There is no specific complaint about incriminating examination in the surmise as given in the Stowe MS., though *Magna Carta* is invoked. The surmise also alleges a general pardon -- a common ground for Prohibition, provided the judges thought the ecclesiastical offense in question fell within the substantive terms and time-limit of the pardon.

(2) Symonds v. Green (H. 8 Jac., 2 Brownlow and Goldesborough, 16). Giles was contracted to marry Eleanor Green. Symonds *et al.* set about to alienate his affections and procure his marriage to Symonds' sister, Rose. Eleanor sued Giles in the diocesan court of Worcester "in a cause of Matrimony." Giles appeared and confessed his contract to Eleanor, whereupon the court ordered him not to marry anyone other than Eleanor pending her suit. Symonds, with his confederates and henchmen, then carried Giles off in the night and clandestinely married him to Rose in an alehouse -- unlawfully, because there were no banns or marriage license, in contempt of the Bishop of Worcester's order, and against his guardians' will. (It sounds as if "young Giles," as he is named, may have preferred Rose, no doubt because he had been wickedly influenced. For, in addition to living adulterously with Rose at the "sufferance" of the Symonds faction, "that young Giles also practiced with a kinsman of his to go to bed to Grene's daughter (Eleanor), that he might take occasion to rid himselfe of her." We are not told whether the stratagem came to fruition.) The Bishop of Worcester then requested the High Commission to come to his assistance. The Commission "for avoyding adultery did se-

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quester young Giles, till he should give Bond to forbear ye Company of Rose Symonds." Before doing so, it examined Giles, from whose testimony the facts above appeared. Then the Commission "thought it meet to send for some other of the practisers." It was they, not Giles, so it appears, who obtained the Prohibition. Their final mischief, upon being summoned, was to convey "the minister (that made ye unlawfull marriage) cleane out of the Diocese to ye further part of Wales." (What they had in mind there is not explained. Perhaps the bargain called for protecting the alehouse priest from the authorities. Perhaps he was eloiigned to prevent his giving evidence.)

So much from the Stowe MS. -- the report shows nothing of the detailed story. What it does show is how the case was handled by counsel and the Court. Counsel representing the Commission realized that they had a feeble case in one way: the offense in question -- conniving at and attending a clandestine marriage -- was a poor candidate for "enormity"; the misbehavior of Symonds and Company was no doubt aggravated by the element of contempt of the Bishop of Worchester, but that perhaps only reinforces the point that, *ceteris paribus*, the matter belonged in the diocesan court, as counsel virtually conceded. (Lest it be objected that something like child-stealing or forcible abduction may have been involved: those would of course not be ecclesiastical offenses at all.) Counsel accordingly took the intelligent tack of arguing that the Commission was entitled to intervene, even though it lacked subject-matter jurisdiction, when local considerations made it impossible for the diocesan courts to do the job -- here, because the clandestine marriage took place outside Worchester, in Gloucester (and, as it happened, the priest who performed the marriage lived in Oxford, so that even if he had not been conveyed into Wales an important co-culprit and witness would be beyond reach of Worchester.)

The Court, as it turned out, neither accepted nor rejected that argument, because the case was disposable on other grounds. The reported *ratio decidendi* was that the commission had improperly caused plaintiffs-in-Prohibition to be arrested by a pursuivant -- a circumstance that does *not* appear in the Stowe MS. statement of the case nor from the surmise as recited there. The Prohibition was granted to enforce procedural rectitude on the High Commission, but not to prevent examination on oath, though

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the surmise ritualistically invoked the "privilege against self-incrimination." The Court's point was that the Commission possessed no extraordinary power -- i.e., power not shared by other ecclesiastical courts -- to arrest parties whom it proposed to proceed against; it was confined to summoning them and punishing them for failure to appear, by whatever sanctions it could lawfully use (the holding need not and does not specify what those sanctions are.) (The compiler of the Stowe MS., for his purpose of demonstrating the mischievousness of the Prohibitions he collected, tells the sequel: When the Prohibition was issued, Giles "contemptuously departed out of sequestration ... (and) betooke himselfe againe to ye Company of Rose Symonds with whom he lived in adultery till sentence was by his Majty's Judges of ye Delegates confirmed for Elenr Green, which was near two years after so as his prohibition served for no other purpose but only to protect ye adulterous course of Life of the said Edmond Giles and Rose, and ye contrivers & effecters of their unlawfull & ungodly marriage from ye punishmt due unto them." This is a bit confusing, since from nothing else does it appear that Giles was a party to the Prohibition, whereas this part of the account says "his" prohibition. It is possible that he simply figured, correctly *de facto*, that he could flout the High Commission with impunity, once the "contrivers and effecters" had frustrated its efforts to get at them. Giles may also have been improperly arrested. Apart from that circumstance, it seems to me that the Commission's claim on Giles was, if anything, weaker than its claim on Symonds *et al.* Giles was basically charged with the non-"enormous" -- indeed civil -- wrong of breaking, or intending to evade, a marriage contract, compounded by contempt of the Bishop of Worchester and adultery. By way of Eleanor's suit, he was already in the Bishop's hands. Is there any reason to suppose that the Bishop needed the Commission's assistance to deal with him? Symonds *et al.*, on the other hand, were basically charged with participating in an unlawful event outside the diocese of Worchester, so that there might be doubt as to the Bishop's legal authority, as well his *de facto* power, to bring them to justice.)

(3) A third case in the Stowe collection of Prohibitions occurs in the reports as a *Habeas corpus* -- the Darrington's Case discussed above for its dicta on self-incrimination. There is nothing necessarily surprising about a Prohibition and a *Habeas corpus* in the same controversy (and

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here there was clearly only one controversy), though how they fit together in any given instance makes a problem. Here, the documents point to the following sequence: The High Commission gave sentence against Darrington in H. 6 Jac., to "make submission" and pay a £6 fine; he was subsequently imprisoned, for sometime between that term and T. 7 Jac. he brought an unsuccessful *Habeas corpus* -- whereupon he was advised to go make submission; in T. 7 Jac., he brought another *Habeas Corpus*, clearly claiming that he had made submission but was still being held; the reports differ as to what happened on that occasion -- one says he was remanded, the other that he was bailed to appear from that day to day -- , but he was in any event not released; a year later, T. 8, he obtained his Prohibition. The Stowe MS. indicates that he was still being held at that time, which comports easily with his having been remanded upon the second *Habeas Corpus*, but is not inconsistent with his having been bailed in a manner plainly designed to insure that he made submission, for the bail might have been canceled when he failed to do so.

In any event, Darrington was not discharged because he had been subjected to improper interrogation. The report which says he was bailed (and also contains some incidental discussion of the Commission's power to examine) -- Harg. 52 -- gives the excessive vagueness of the return as the reason. The other (and better) report presents the Court as somewhat dissatisfied with the Commission's treatment of Darrington, but unable to help him by the austere *Habeas corpus* rules -- i.e., because nothing on the record showed that he had made submission. The Stowe MS. account helps here, for it says (with, of course, its special-pleading intent) that Darrington "howbeit he came publicly into ye Cort & made show as if he wd *p*forme his submission wch was delivred unto him in writing, under ye Registers hand of ye Cort to be by him read, but he beginning to read the same sometimes added thereto & sometimes omitted sundry *p*tes & clauses thereof, & unless he might go on in that course wd not *p*forme his submission at all" My guess would be that the Court had an off-the-record picture of this scene and was in an understandable quandary as to what to do. Perhaps the judges were rather sympathetic to Darrington's contention that he had submitted, but ought not to be forced to read a "canned" statement. At the same time, perhaps, the judges could not be sure -- What did the prepared statement say? Were Darrington's emendations innocent, or a matter of refusal to make professions beyond the minimum commitment to repentance, orthodoxy, and good behavior

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which the Commission was entitled to demand? (A common form for such "submissions," as we have seen, was provided by the statute of 35 Eliz., c. 1.) What did his demeanor as a whole say about his submissiveness? Confronted with this situation, the Court may well have responded by "going to the book" ("None of this reality appears on the record. We cannot be sure that the prisoner has satisfied his duty to the Commission - - and his duty to obey our own former instructions. It is unsafe to step outside the record on the basis of a cloudy hunch that the Commission is being hard on this man. Therefore, we must remand. Maybe Darrington can find a better way if he has really been mistreated -- e.g., a Prohibition, where he can spell out his contention on the record.") By the same token, the solution given by the MS. report would be perfectly plausible. ("We suspect that Darrington has been treated harshly, but we can't be sure he has satisfied his duty, and the 'austerity' of *Habeas Corpus* confines us. But it is not too slack to bail him and keep him under our eye. After all, he is only imprisoned for failure to go through the ritual of submission, and it is not altogether clear that he *has* failed to. Keeping him on a tether *a die in diem* will subject him to pressure to make his peace with the Commission, and perhaps our doing something for him will put a little pressure on the Commission to be reasonable. The return, come to think of it, is pretty vague, so we probably have good enough technical grounds not to remand.")

It is implicit in the story of the case as I have recounted it so far that the Common Pleas did not think Darrington's offense beyond the Commission's jurisdiction. If it had, it would have discharged him in the first place, instead of ordering him to submit. In fact, he was charged with several things: consorting with Brownists and possibly (Stowe) "maintaining sundry Opinion of ye Brownists and publishing ye same both by word & writing"; maintaining the damnable doctrine that unjust kings may justly be deposed (Brownlow); speaking against the Book of Common Prayer; slandering his ordinary (an archdeacon) and a minister by saying that the former had sold the latter his parsonage for £300 -- had committed simony, in other words; and finally, according to Stowe, "slandering ye Judges, sayeing they all took *pt* with him agt ye Corts Ecclicall." Assuming that this conglomerate -- arrived at by combining the two reports and the Stowe MS. -- is correct: As to some parts, there is surely grave doubt whether any ecclesiastical court, including the High Com-

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mission, should have jurisdiction -- most notably, slandering the judges and maintaining a treasonable political doctrine -- and whether the slanderous imputation of simony to a clergyman was within ecclesiastical jurisdiction is at least questionable. (Because, in addition to being an ecclesiastical crime, simony was grounds for the forfeiture of livings by statute, and an incumbent had a freehold in the benefice. Therefore, temporal loss could follow from the slander's being believed -- the usual basis for saying that an act of defamation was remediable at common law. When, however, the slander also consisted in the imputation of an ecclesiastical crime, or involved, as here, disrespect for ecclesiastical persons in positions of authority, it is arguable that common law jurisdiction was not exclusive.) The Brownism, however, was quite enough to insure the Commission's jurisdiction to proceed against Darrington and punish him. (And note that he was not punished very severely. I take it that a £6 fine, plus "submission" amounting to professed acceptance of the Church of England, should be presumed a proportionate penalty for the part of Darrington's misbehavior that fell clearly within the Commission's jurisdiction.) Coke (in Brownlow's report) said that the Brownism was heresy; if that is too strong, it was surely schism, and consequently "enormous" by conservative standards. Upon the *Habeas corpus*, I think it is clear enough that there was no substantive reason to interfere with the Commission; such procedural or technical doubts as there were about the propriety of holding him in prison seem to have had nothing to do with inquisitorial investigation.

Why, then, did Darrington eventually get a Prohibition? The best way to approach that question is to look at the surmise as reported in the Stowe MS. The surmise invokes *Magna Carta*, but there is no specific complaint about self-betraying examination. To invoke *Magna Carta* generally is only to claim that one is imprisoned or otherwise materially damaged by the authorities without "due process of law"; Darrington certainly so claimed, on several specified grounds. (i) He maintained -- probably implausibly *quoad* the Brownism, but plausibly *quoad* slandering the Archdeacon and minister, insofar as that offense was within ecclesiastical jurisdiction -- that the offenses charged against him were not "enormous." (ii) He maintained that mere "scandalous speeches" unaccompanied by overt misbehavior of the requisite "enormity" (so, I think,

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one may fairly translate the idea behind the words "*dumodo lesiones enormes non existunt*") were not within the Commission's authority nor subject to fine or imprisonment. I should take this complaint as inclusive by design, a matter of saying "Mere loose speech, whether slanderous toward individuals or disrespectful toward established institutions and opinions, is not within the Commission's power to punish the gravest ecclesiastical crimes, even if it is punishable by other courts, and even if speech-acts of a more deliberately doctrinal sort that I am charged with can sometimes count as heresy or schism." *Quaere* whether, as a generality, this position is not too liberal for the common law court Darrington was looking to, and *quaere* whether he was not charged with rather more, in the way of Brownism, than "mere loose speech." However, it is not an unintelligent surmise for the purpose of getting a Prohibition. A judge might prohibit in order to make the Commission show whether the speeches attributed to Darrington had any serious heretical or schismatic tendency if that was ambiguous on the face of the surmise. (iii) The surmise maintained that "all pleas" concerning simoniacal contracts -- being violations of the statute of 31 Eliz. -- belonged to the common law. I take the applied meaning to be that since simony was "temporalized" by the statute, defamatory imputation of that crime was exclusively common law slander. Though an argument can be made *contra* -- that defamatory imputation of an ecclesiastical crime temporalized by statute is *both* common law and spiritual defamation -- the position taken by the surmise is entirely plausible. Unless, there was an immediate opportunity to debate the legal problem in court, a judge probably ought to prohibit on such a surmise in order to halt dubious ecclesiastical proceedings for the time being, until the legal problem could be debated on motion for Consultation or otherwise. (iv) Finally, Darrington claimed that the Commission's proceedings against him were in effect a conspiracy to defraud the king and to interfere with the course of justice in the Common Pleas! The simoniacal contract, he rehearses, was in fact made. One Nicholas Weston brought an action upon information in the Common Pleas in his own behalf and the King's. (Standard penalty-statute procedure.) Darrington, "being a speciall witness for ye King is drawn into question before ye Comrs on purpose to destroy & annihilate his Testimony, thereby disinheriting ye King of his Right belonging unto him and his Crowne." However veracious this unusual claim, I should sup-

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pose it merits a Prohibition until the truth could be investigated and the legal implications considered.

It seems to me that a Prohibition was inevitable on this surmise. Even if the surmise showed on its face that consorting with Brownists or uttering Brownist opinions was involved (which we do not know, for the Stowe MS. gives the surmised grounds for Prohibition but not the surmise as a whole, whence it would appear how the plaintiff represented or misrepresented the charges against him), there seems to be ample *prima facie* reason for a partial Prohibition. It was probably Coke's own opinion that ecclesiastical suits prohibitable in part should be prohibited *in toto* in the first instance, then undone so far as was appropriate by partial Consultation on motion. The only wonder (assuming the chronology above to be correct) is that Darrington waited so long to help himself by Prohibition. My guess would be that he knew he had no chance of getting out of jail by way of Prohibition at an early stage, because the Commission would only have to show that he had been convicted of Brownist activity. (His main object, presumably, was liberation -- not prohibiting the Commission *quoad* certain items in the conglomerate charge.) He was not ill-advised to use the *Habeas corpus*, for by doing so he at least got the Common Pleas into the act. He got the common law court to order him to make submission. He thereby got the chance to go do so, according to his own lights, and then come back and complain to the Common Pleas that the Commissioners were insisting on an unreasonable form of submission. He may even have succeeded in liberating himself temporarily -- by a combination of creating doubt as to whether he had submitted and picking holes in the return -- though I doubt the report that he was bailed. After some time had passed, the chance of deliverance by Prohibition may have been considerably improved. For after holding Darrington for over a year, the Commission might decide that he was sufficiently punished for what amounted only to refusal to make submission in the form demanded. It might at any rate decide that trying to defend holding him any longer would be an embarrassing and unpromising venture. In short, it might let him go and refrain from contesting the Prohibition. For our immediate purposes, the point to insist on is that the Prohibition raised no questions about incriminating testimony. Darrington's Case only touches on self-

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incrimination by way of statements made in the course of the *Habeas corpus*, statements which appear to be *obiter*.

Among the rest of the Stowe MS. cases, some are fairly simple instances of Prohibitions based on the "enormity" test: (4) The case of Richard, Joanne, and Daniel Pearce (21 November, 8 Jac.) These persons were pursued by the Commission on the request of the Bishop of Llandaff for publishing a defamatory libel against that prelate's Registrar and "Temperance his wife terming her a whore & a Bawd and saying that there were not above 6 or 8 honest women in all Chapstowe (Monmouthshire)." Richard and Daniel were also charged with "notorious adultery with three severall Women apiece specified and named in ye Articles besides sundry other misdemeanors punishable by Ecclicall Authority for proof whereof there were Twenty witnesses examined." Unless there was something more convincing among the "sundries," there is nothing here -- given the "enormity" test -- to justify High Commission involvement. I do not believe there is the least reason to distinguish imputing whoredom to a diocesan official's lady from imputing it to anyone else; there is probably nothing to be said for a theory to the effect that a Bishop can give the High Commission jurisdiction by calling it in (especially in the absence of conditions such as those in *Symonds v. Green*, where the Bishop's power to look into events, or reach parties or witnesses, outside his diocese may have been seriously questionable.) The surmise in this case challenges the Commission's power to examine laymen under oath, outside matrimonial and testamentary causes, rather more specifically than most. However, it is also very explicit in claiming that none of the offenses charged were "enormous," as they were not (adultery included by the better opinion.)

(5) The Case of Richard Rochester and Mary and Alexander Mascall (23 November, 6 Jac.) would be as simple as Pearce's Case, save for two elements. Basically, Richard and Mary were charged with adultery and Alexander with collaboration. However: (i) They had already been brought before the Commission once, on which occasion they were convicted and assigned penance, and Richard and Mary were ordered to "refrayne each others company but in publick places." Nevertheless, "Rochester frequented her Company more comonly than before, and comitted adultery with her to ye gen'all offence of ye Country, usually lying with her in her husbands house, and lying with her in one & ye same

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Bed, & sometimes lodging her in his own house for many weeks together, her husband being absent. And to prevent suspicion ye sd Mary went in Mans Apparell & wore a Rapyer. And Rochester had her picture in his house as she was so attyred, for wch & other misdemeanors as namely *p*-jurie & subornation of *p*jury in an Ecclicall Cort they were convented. And Alexander Mascall her husband was convented for being a Bawd to his wife, & craved ye benefit of his Majtys Pardon for ye same." It is perhaps arguable that one who acquiesces in the High Commission's jurisdiction over such a non-"enormous" crime as adultery or pimping, and then flouts its injunctions by repeating the crime, is within its contempt-power. (ii) Rochester and Mary were "cousin Germans." In Darlington's Case, (Brownlow's report) Coke listed two sexual crimes, incest and polygamy, as "enormous," together with the religious offenses of heresy, schism, and recusancy. Whether cohabitation with a cousin is incestuous enough to count I do not know.

Owing to those two features, I should consider the chance that the Prohibition was related to self-incrimination better than average in this case. ("*Nemo tenetur*" is specifically invoked in the surmise.) Even so, I imagine that *prima facie* non-"enormity" sufficiently accounts for the Prohibition. As far as Alexander is concerned, the surmise, as well as the compiler's statement of the case, shows that he claimed a pardon. The compiler was scandalized, I think, at the idea of pleading the King's pardon to escape the charge of pimping for one's wife. Nevertheless, Prohibition ordinarily lay on surmise that an ecclesiastical court was proceeding in the face of an apparently applicable pardon. Whatever may have been involved in "perjury and subornation of perjury in an ecclesiastical court," I do not think there is any basis for maintaining High Commission jurisdiction over that offense, unless possibly as an immediate incident of proceedings properly before that court.

(6) Arthur Leves and Joan Holliday (10 October, 6 Jac.) Here again, adultery was tainted by incest. (The compiler's statement of the facts says that Joan was "near to him in Blood," but not how near. He states the charge as incest *or* adultery. It is also reported that they had several children, conceivably an aggravating circumstance where there was an element of incest.) Further misbehavior was charged against Arthur -- adultery with three other women who were his servants, plus "lewd & wicked practises by him used for concealing ye sd Incest & Adulteries,"

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plus "sundry contempts to his ordinarie" -- but the "enormity" hangs on the incest. The compiler recites from the Prohibition that the judge in this case had taken notice of the articles, so we may assume that he did not act on a misleading surmise (one that left out any mention of the incest.) (I think it is safe to assume that judges as a rule did not prohibit the High Commission on completely unsupported surmises, though only some of the Stowe MS. summaries contain the phrase that occurs in this case -- "The Judge taking notice of ye articles." It would be too easy to get Prohibitions if plaintiffs were allowed to say that they were prosecuted for non-enormous offenses when the articles of inquiry would show that that was simply untrue, though in circumstances as tangled as those of Darlington's Case above a degree of misrepresentation might, as I suggest there, be possible.) Perhaps the most material feature of the surmise in *Leves and Holliday* is a claim that the offense charged was within a general pardon, though it may be less likely that incest would be held within a pardon than adultery. There is no specific complaint about asking laymen to accuse or convict themselves, though it is more doubtful in this case than others whether there was sufficient reason to prohibit apart from that.

(7) Thomas Emery (13 April, 6 Jac.) Emery expelled his wife from his company, whereupon she sued him for restitution of her large marriage portion in a regular ecclesiastical court (the Court of Audience.) He was sentenced and excommunicated, but still refused to pay. He also spoke "vile and scandalous word agt ye audience Court & ye Ecclicall Courts in generall." The High Commission intervened at the request of the Court of Audience. In short: as clear an *ultra vires* case as Langdale's above, except on the very dubious theory that the High Commission was entitled to come in when the ordinary ecclesiastical courts were ineffectual in enforcing their decrees, or the equally doubtful supposition that an aggrieved litigant's railing against the ecclesiastical system was a High Commission crime. One feature of the compiler's summary is of interest: ". . . upon Emery's answers (i.e., he was examined) there was allotted unto his wife pro expensis alimoni only ten shillings a week, and she left at liberty to prove ye matters by him denied." The compiler, I think is as usual expressing his outrage at the Prohibition, here by pointing to the limited nature of the Commission's intervention. It was prohibited when it had done nothing more than perform a function analogous to that sometimes performed by courts of equity when complicated property disputes were

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pending and justice seemed to require an interim arrangement: It examined Emery and, on his version of the story -- counting nothing against him except his own admissions -- it awarded modest support to the wife (presumably less than her version of the story entitled her to.) Yet it was prohibited. That it was rightly prohibited, however, seems to me beyond doubt, for though a supplementary ecclesiastical court to secure enforcement of awards and serve a quasi-equitable function would perhaps be a useful institution, there was little basis in current legal doctrine for regarding the High Commission as such a court. Emery neither did in any specific way, nor could, object to his examination, for no one contested that laymen could be forced to testify in matrimonial causes. The sole basis for prohibiting was that such cases belonged in every respect to the ordinary ecclesiastical courts.

Several of the Stowe MS. cases involve High Commission proceedings against clergymen. It can be reliably assumed in these cases that the Prohibitions were not based on any objection to examination of the party as such, for clergymen were universally distinguished from laymen with respect to the duty to testify. It is clear that clergymen could only resist being asked to incriminate themselves when temporal detriment would accrue to them. The Stowe cases present a variety of situations.

(8) Richard Barwicke (1 June, 6 Jac.) Upon the complaint of his ordinary, Barwicke was convicted by the Commission of being "grossly ignorant, unable to render an account of his faith in Latin or English, that being enjoined to employ his time in learning hath followed ye Cart as a Carter, and other secular business, that he hath neglected his Cures, unorderly serving the same, that he hath made false Certificates unto his ordinary & swore falsely in matters Ecclicall, That he hath railed in ye church, & suffered Dilapidations in ye Buildings, & contemned ye Authroity of ye Comission Ecclicall." The proceedings here were plainly prohibitible on the ground that routine discipline of a clergyman for inadequacy and low-level misdemeanors was exclusively diocesan business. Barwicke's surmise claims the benefit of a general pardon, but probably with doubtful relevance; he objects to being proceeded against for ignorance on the theory that the statute of 13 Eliz., c. 12 required ministers to be able to render an account of

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their faith in Latin, and hence (I take it) that anyone with a benefice should be presumed to have passed that test -- an objection which, if good at all, would be as good against one ecclesiastical court as another; he claims that the Commissioners had put him in jail with the sinister plan of preventing him from seeking legal remedy "for wrongs done by them unto him," thereby "intending to diminishe the proffits of ye Crowne." The last article is probably the silliest item in a piece of attorney's verbiage; yet there can be little doubt but that the first article of the surmise -- that such proceedings were beyond the Commission's statutory powers -- states an open-and-shut ground for Prohibition.

(9) Thomas Rocke (14 November, 6 Jac.) Most of the charges against Rocke were on the same level as those against Barwicke. (Gross ignorance; "imploying himself in servile base offices, neglecting his calling"; "abuseing his neighbour Minister in contumacious Terms"; "intruding himselfe into another minister's charge baptiseing children in private houses out of his own parish.") There was, however, an additional charge of simony. Although *qua* ecclesiastical crime simony was certainly regarded as serious, there was, as we have seen in several places, a problem about asking a clergyman to accuse or convict himself of simony because of the automatic loss of benefice imposed on offenders by statute. Therefore, any case involving simony should be regarded as at least in part a self-incrimination case, though in a special sense. Coke in Darrington's Case does not put simony on his list of "enormities," not, I would suggest, because it lacked gravity, but because the High Commission's customary style of proceeding -- using the *ex officio* oath without private accusation -- was certain to cause simoniacal clergymen to expose themselves to temporal detriment. Nothing in Rocke's surmise is specific to the charge of simony. Like Barwicke's, it relies on 13 Eliz. *quoad* the "gross ignorance," and it also alleges a pardon covering the offenses charged.

(10) John Packs (or Packe) (27 October, 6 Jac.) Simony was central in the charge against Packs. In addition, he was accused of non-residency and neglect of his cure. His surmise is heavily concentrated on the contention that simony, as well as the lesser offenses, was confined to diocesan jurisdiction. By reciting the statute and the temporal penalties it enacts, he in effect gives a reason for the rule which he represents as categorical: that the High Commission simply lacked authority to deal with simony. Formally, he says "I have been forced to answer concerning *ul-*

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tra vires matters," not "I have been forced to answer where I might expose myself to temporal detriment," but in the case of simony the difference is academic.

(11) Robert Withers (27 April, 6 Jac.) Withers was a vicar-choral of Exeter. The summary says that he was charged with simony, but also with "intruding himself into ye Choir after his deprivation & deposition to ye great disturbance of ye vicars" and "insolence and scornfull Behaviour before ye Ld Bishop of Exceter his ordinarie both in words & gestures ye sd Revd father judicially sitting." It would appear that the Commission was not proceeding against Withers for simony originally, for he had already been deprived (presumably for that offense, at the diocesan level.) It seems clear enough that here again the Commission was simply giving the Bishop a helping hand with an ornery customer. Perhaps justifiably, the ecclesiastical authorities could see nothing wrong with that, but the law was against them. Withers' surmise relies mainly on the manifestly true proposition that his wrongdoings were petty diocesan matters, though he duly recites the simony statute to cover himself on that front. (It would be of legal interest to know what would happen if a man were proceeded against in his diocese for simony and deprived, and then prosecuted criminally in the High Commission for the same act of simony. For if he was *already* deprived, testifying against himself would not expose him to temporal detriment, and it might be argued that the intrinsic evil of simony was quite sufficient to make it a High Commission crime. Whether the common law courts should intervene to prevent double prosecution within the ecclesiastical system -- by different courts for different ends, but respecting the same offense, and that offense one with which the statute law was involved -- makes a good moot case. It is not utterly out of the question that Withers' Case presents such a situation. I doubt, however, that the Commission was really proceeding against him *de novo* for simony, as opposed to providing ancillary services in a case that had simony at its root.)

A further case also concerns simony, but two of the defendants before the High Commission were laymen. (12) William and Peter Prittman and Robert Dade (4 February, 5 Jac.) According to the compiler's summary, William was owner of a advowson. He and his son Peter sold the immediate right of presentation to a clergyman called John Waddesworth, who presented himself. (Such was the simoniacal transaction.) Waddesworth

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was later converted to Catholicism and fled the realm. An unnamed clergyman was authorized to serve the cure left vacant by Waddesworth's defection. William and Peter, together with Dade, a clergyman, were accused of disturbing divine service, laying violent hands on the officiating minister, and abusing him with words while High Commission proceedings were pending. (I.e.: The Commission apparently started out prosecuting the simony alone, then added the other charges.)

The surmise presents a different version of the facts: William presented John Waddesworth. Then he conveyed the next presentment to Peter, who assigned it to Dade. When Waddesworth fled the realm, the Bishop of Norwich sequestered the tithes and committed them to Dade's custody. A squabble developed over the tithes with one Nathaniel Waddesworth and Theophilus Field. (Field was a royal chaplain and future bishop, later to enjoy the honor of impeachment. There is no telling what the trouble was in our case, but perhaps the presence of a rising ecclesiastical operator points to cathedral politics and helps explain the High Commission's interest.) When John Waddesworth died, Dade went about to exercise his right of presentation. Being hindered by the Bishop and Field, he got a Chancery writ to command them to let him present his clerk (a *Quare impedit*, I suppose.)

The legal point of surmising those facts is perhaps to say in effect, "We are being prosecuted for simony which we did not commit, and no ecclesiastical court should determine a contested question of simony to the detriment of the patron, especially where the patron is taking legal action to protect his interest." For the rest: by statute, the patron lost the next presentation if his clerk came in by simony; therefore a lay patron, if anything more clearly than a clergyman, ought not to be compelled to convict himself of direct participation in a simoniacal deal; therefore *ex officio* proceedings for simony in the High Commission against patrons should be prohibited. The other offenses charges against the Prittymans and Dade were petty.

We may now turn to the other Stowe MS. cases in which laymen were prosecuted for misconduct towards the Church of one sort and another (as distinct from sexual offenses). (13) Sir William Clifton's Case (25 June, 8 Jac.) is a simple *ultra vires* Prohibition. Clifton was accused of grievously beating a clergyman named Stoks, "boasting that he had beaten

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forty ministers, and that Mr. Stoks was ye xli th," and "reproaching Mr. Stoks to ye scandall of his function, calling him bald preist, Rascall preist, & scurvy preist, affirming that Mr. Stoks was ye worst man in ye Company, & that no Preist within ye land was a fitt companion for him ye sd Sr William." Although laying violent hands on a clergyman was an ecclesiastical offense, as well as a common law assault, it was no doubt considered non-enormous. So was defamation, even with an element of scurrility against priests in general.

(14) Priss Prithergh. (So I read the name. 15 June, 6 Jac.) This man was only charged with the obviously non-enormous offense of disturbing divine service -- creating a rumpus at the high moment of Holy Communion with the pretext of serving a writ on two of the parishioners. The Stowe MS. compiler pleads again that the offender was not severely punished -- only ordered to acknowledge the offense and pay costs. Again, that point goes to the law as it perhaps ought to have been, not as it was. The process-server surmised immunity in the line of duty in addition to his unanswerable legal grounds for Prohibition.

(15) Burnham, French, et al. (27 May, 6 Jac.) These men's misbehavior had a touch more of sacrilege and presumptive Puritanism in it, but still fell clearly enough in the non-enormous class. ("... prophation (sic) of ye Church by laying of violent hands upon Mr. Green in ye Church pulling ye Surplus (sic) from off his back"; "... detaining ye Bread & Wine from ye Comunicans wn they were ready prepared upon their knees to receive the same, so as there was no Comunion there that day"; "... hindering Mr. Green at another time from reading Divine Service.")

(16) The case of Edmond and Anne Jennor (28 November, 8 Jac.) is the only one in the Stowe collection, save for the complicated Darrington's Case, in which laymen were charged with a probably enormous offense, namely Brownism. They were also charged, however, with the diocesan-level misdemeanors of disturbing divine service and reviling the minister and his wife (the latter as "a Preists whore".) The mixture of schism and small potatoes would sufficiently explain the Prohibition, on the theory that partially prohibitable suits should be stopped as a whole and started up again in part. Secondly, the Jennors relied on a pardon more than casually, taking care to plead that the unlawful speeches attributed to them had been uttered before the pardon of 1609. They *claimed*

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quite expressly that nothing charged against them was major enough for the High Commission, and that the serious Brownist activity alleged (publishing a schismatical book maintaining Brownism -- otherwise, they were only vaguely accused of "defending" it) was only punishable as seditious libel at common law. I doubt, however, that that claim would stand up in isolation. In sum: Jennor's Case is hardly a precedent for prohibiting the High Commission from forcing laymen to accuse or convict themselves of schism. If only Brownist activity had been charged, if there had been no pardon, and if we could be sure that the degree of Brownist activity in question constituted at least schism, then we would have a stronger candidate for a self-incrimination case than most of the Prohibitions above.

The last case in the Stowe MS. is at once the least obviously justifiable Prohibition and the farthest removed from self-incrimination. (17) Sir Henry Vyner (5 February, 5 Jac.) Vyner sued his local clergyman for failure to provide services in a chapel of ease in the parish. Such a suit was utterly inappropriate to the High Commission, and the Commissioners all but said so. For, although they looked into the circumstances instead of simply refusing to touch the suit, they discovered that the bishop had already dealt with the matter, whereupon they dismissed the suit and charged Vyner with costs for unjust vexation. Vyner then got a Prohibition for the sole purpose of evading the costs. The ritual invocation of *Magna Carta* occurs in his surmise, it is interesting to note, but of course the substance of his claim was that the matter was outside the Commission's statutory power by the enormity test. Despite the Courts' tolerance of legitimate forms of self-prohibition, I can see no excuse for permitting it when a man has himself gone to the wrong court (here, presumably, he was dissatisfied with the service he got from the bishop in his effort to coerce the parson into extra work) and then complains that that court lacked initial jurisdiction. Even so, I would not hasten to accuse Coke of intemperate jealousy toward the High Commission. Vyner's claim presents enough of a legal problem to warrant judicial discussion, and hence a Prohibition pending motion for Consultation, if there were not an immediate opportunity for debate. May a court utterly without jurisdiction ever award costs, even when the parties acquiesce in its jurisdiction? Is the power to award the costs of Suit X, to either party, "by nature" an adjunct of true lawful power to dispose of Suit X, so much so that common-sense considerations of justice must be set aside?

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Suppose that Vyner had won, his adversary making no complaint about being sued in the High Commission, and that costs had been awarded to Vyner; suppose the other party willingly performed the substantive award but sought a Prohibition to avoid the costs. If Prohibition lay for him, should it perhaps not lie when the shoe is on the other foot? Does the High Commission as a statutory court have a special responsibility to recognize that a suit is *ultra vires* and to cut it off before costs are incurred? These questions are certainly worth discussing, though Vyner's Prohibition probably deserved to be reversed.

So much for the Stowe MS. cases. None of them contributes even inferential information about the courts' position on inquisitorial investigation, save for those few in which there is a shadow of a doubt as to whether the Prohibitions are fully explicable on other grounds. To confront the questions that arose about self-betraying testimony -- whether it can ever be exacted from laymen, whether and in exactly what sense it must avoid exposing the examinee to temporal detriment, what safeguards it must be surrounded with when it is permissible -- the common law court must confront a suit within the jurisdiction of the High Commission or other ecclesiastical tribunal; by and large, the Stowe MS. cases are clear examples of *ultra vires* Prohibitions. It is of course possible that distaste for inquisitorial methods motivated limiting the Commission's jurisdiction, but construction of the language and purpose of 1 Eliz. is the immediate explanation. Details of the limitation, notably the exclusion of simony from the category of enormous crimes, may be explained by the most conservative of the theories on which self-incriminating examination could be objected to -- the principle that ecclesiastical techniques must not be used when the effect is to bring detriment on a man outside the ecclesiastical sphere.

Returning now to the law reports: Caution should attend seeing Coke as the enemy of incriminating examination *par excellence*. It is nevertheless significant that there are several self-incrimination cases from the King's Bench during his tenure there (none involving the High Commission from Sir Henry Hobart's Common Pleas.) The first case from Coke's King's Bench, Sir William Boyer v. High Commission,²² pro-

22 H. 11 Jac. K.B. 2 Balustrade, 182.

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vides a gloss on *Latters v. Sussex* above and on some of the Stowe MS. cases. Unfortunately, the report is somewhat garbled, and it does not provide a clear statement of the case. I reconstruct it as follows: This much is certain -- The High Commission proposed to examine on oath in a case of simony; a Prohibition to stop the examination was refused, the court regarding the proceedings as *pro salute animae* merely (i.e., as prosecution for an ecclesiastical crime pure and simple); the Court said it would prohibit if it could be shown that anything in the examination touched the title to the living. Secondly, Coke seems to state as a fact (not an hypothesis) that the incumbent who allegedly came in by simony was dead. (His immediate reason for saying so was to make the point that the crime was still alive -- hence examinable and punishable -- even though the incumbent was dead.) Taking it as true that the beneficiary of the simony was dead, it would seem that the proceedings were against someone who had made a corrupt bargain to the end of bringing about the late incumbent's presentment. But we are not told who it was or what the bargain involved. It may have been the patron or one who bribed the patron; it may have been someone whose offense was less direct -- e.g., one who sold his influence with the patron to the late incumbent. In any event, we know enough to clear this case of conflict with *Latters v. Sussex*: an incumbent was not asked to say whether he came in by simony, hence to admit his statutory non-incumbency. There was nothing to suggest that any consequence beyond ecclesiastical punishment would accrue to the self-convicted examinee.

On the other hand, the Court suspected that there *might* be a threat of temporal consequences; it expressed willingness to prohibit if such danger could be shown specifically. Coke's remarks explain the possibility. He started off by saying that simony is an "enormous" offense, "worse than felony," (hence within the High Commission's jurisdiction.) He illustrated its enormity by showing how seriously the makers of 31 Eliz., c. 6, took it: Not only does the incumbent lose his living; the patron loses the next presentment -- i.e., the right to present the immediate successor of the deprived incumbent -- even though he had no knowledge of the corrupt bargain; if the patron is privy to the corruption, he is punishable. The statutory loss of the right to present would seem to be the clue to the possible temporal interest. On the general principles governing this case,

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Coke and the Court were clear: With the examination and punishment of simony as a crime the common law has nothing to do; "otherwise it is where they will ... examine the person upon an article tending to the title of the patronage." I take the second principle to mean that sworn examination may not tend to reveal that the patron has lost his unquestionably temporal right to the next presentment. I take it to mean further that such information may not be exacted from *anyone*, whether in a self-betraying fashion from the patron himself or from someone else.

If this is correct, most investigations going to whether simony was committed would tend to be temporal detriment of the patron. There would only be an outside chance that the investigation would not have that tendency (e.g., if the monarch, to whom the forfeited next presentment went, had already presented -- or, to make the patron absolutely safe and to mark the ecclesiastical proceedings as *necessarily* confined to the ecclesiastical crime, if the monarch had presented A., and A. had served his term and died, in which event the patron would have no temporal loss if the earlier simony was established. If the monarch had presented A., claiming simony, and A. was still alive, establishing the simony would make it impossible for the patron and his presentee to challenge A.) The Court in this case would not prohibit on a bare showing that the investigation concerned simony -- i.e., would not presume that nearly any investigation of the crime must affect the patron's interest. By my analysis, all plaintiff-in-Prohibition needed to do was to make his surmise specific enough to remove the "outside chance" that the patron was free and clear. *Quaere tamen* whether my analysis might not be too stringent. A court might conceivably hold that attempts to establish simply whether simony was committed are not prohibitable (unless, perhaps, the attempt was to extract that information by way of self-betrayal from the vulnerable patron himself.)

In Bradshawe's (or Bradstone's) Case,²³ the King's Bench discharged a prisoner on *Habeas corpus* partly because the High Commission proposed to examine him in such a way as to lay him open to material loss. The sequence of events and their details are not quite clear from the re-

23 M. 12 Jac. K.B. Add. 25,213, f.163; 2 Balustrode, 300 (*sub. nom.* Bradstone v. High Commission Court).

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ports, but roughly: Apparently after a separation, Bradshawe's wife sued him in the High Commission for alimony, or strictly (the MS. suggests) for an accounting related to his support of her. Anyhow, on that occasion he was required to enter into a £300 penalty-bond conditioned on his payment of alimony plus (Bulstrode) an indefinite commitment "not to use his wife otherwise than well." Subsequently, the wife sued before the Commissioners again, complaining that her alimony had not been paid. He refused to submit to examination on the ground that he would be entrapped into forfeiting the bond, and was therefore imprisoned. (The reports do not say exactly at what point he resisted, or what the terms of the oath and circumstances of administering it were, but it would seem likely that he simply refused to take any oath.)

How this information got before the Court is not clear, for Bulstrode gives the return on the *Habeas corpus* and it is extremely general, reciting none of the facts above and indicating what the complaint against Bradshawe was only to the extent of saying that he was imprisoned for adultery (as perhaps he was in the indirect sense that his adultery was the origin of his marital dissension, whereof the wife continued to complain in her repeated attempts to secure alimony.) Plainly, the Court in this case got the true story from the prisoner and his counsel, or believed their story sufficiently to justify taking action. According to Bulstrode, the action was only bailing Bradshawe until the next term, and Coke dismissed him with instructions to "go unto the Bishop of London, and submit yourself unto him, and use your wife better hereafter." I.e.: He was set free for the moment, but bound to put in an appearance in the King's Bench next term, and how he would be dealt with on that occasion might depend on how he had carried out the Chief Justice's injunctions. (The MS. says simply that he was discharged, but Bulstrode, the longer report, is likely to be right on the exact nature of the Court's action.)

The discharge on bail might, strictly speaking, be justified on the bare record -- because the return was excessively vague, because the High Commission's power to imprison for adultery was questionable. By the same token, the Court may have felt constrained to stop at bailing the prisoner for a term and instructing him to behave himself because it was not unmistakable from the face of the return that the imprisonment was wrongful. *Habeas corpus* proceedings had considerable flexibility. On the other hand, it is plain that the judges were moved by what they knew

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informally of the real circumstances. Their opinion was perhaps "off the record" in the strictest sense; in substance, it condemned the imprisonment on three counts. (a) The High Commission lacked authority to imprison for non-payment of alimony. (A well-founded opinion in the light of other cases. It was more than questionable whether the Commission had jurisdiction to so much as listen to alimony claims and other marital complaints, let alone employing temporal sanctions in such cases. I take it to be implied that since the Commission could not imprison in order to force a man to pay alimony, or to punish him for not doing so, neither could it imprison a man because he would not answer questions about alimony, even conceding that interrogation would not under all conditions be wrongful in itself. In short, insofar as the Commission is not prohibitable for so much as meddling with alimony, it at least has no powers in such cases beyond those of ordinary ecclesiastical courts.) (b) Coke and Justice Dodderidge (Bulstrode) were sharply critical of the Commission for making Bradshawe enter into a bond. They did not say that the bond was void, but Coke called it an "unreasonable usage" and Dodderidge said he could see no need for such practice. (The ecclesiastical courts had their ordinary powers and sanctions -- authority to award alimony and "spiritual" execution against a party who refused to carry out an award. Why was the Commission not satisfied with regular process, like other courts, temporal and spiritual? Why make men enter bonds to carry out awards which they have an otherwise enforceable duty to carry out? The effect of the practice, Coke said, was to make men "double charged" -- liable to ordinary execution and also to forfeit a sum of money for the same act that brings execution upon one. Such bonds, Coke further observed, were heard of in the Court of Requests, but never in the much more respectable Star Chamber, not to mention the common law.) (c) Given the bond, Bradshawe could not be examined on oath and forced to expose himself to forfeiture.

For our present purposes, Bradshawe's Case is not very strong, for the prisoner was not released outright; the High Commission's lack of jurisdiction -- or at least of authority to imprison -- in alimony cases was probably a sufficient independent reason to let him go; the examination was held wrongful only because (which was all the context required) the gratuitous bond raised the danger of "temporal detriment"; and the self-in-

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crimination aspect of the case did not appear on the record. In the discussion, Coke cited a Gawen's (or Gowen's) Case from the time of Sir Christopher Wray in the King's Bench -- a Prohibition against incriminating examination -- , but the circumstances are not recounted.

The *Habeas corpus* case of Burrowes, Cox, Holt, and Dighton²⁴ was in many ways Coke's most important one touching self-incrimination.

24 T.- H. 13 Jac. and T. 14 Jac. K.B. The several reports of this case relate to the chronology as follows:

(a) 3 Bulstrode, 49 (*sub. nom.* John Burrowes, Will. Cox, Dyton, and Other Plaintiffs, against The High-Commission Court), the fullest account, reports separate discussions in T. 13, M. 13, and H. 13 on the first *Habeas corpus*, plus the discussion of the second *Habeas corpus* in T. 14.

(b) 1 Rolle, 220, 337, and 410 (*sub. nom.* Roy v. Dighton; Holt and Dighton) reports the discussion of T. 13 and the discussion-decision of H. 13, plus T. 14.

(c) Harg. 47, ff.60 and 114 (Dighson, Holt, Burrowes, and Cox; Dighton and Holt), T. 13 and an undated entry clearly relating to H. 13. Virtually identical with Rolle.

(d) Croke Jac., 388. H. 13, with a note that the case had been debated over three terms.

(e) Moore, 840 (Deyton's Case) Misdated H. 14; reports the decision of H. 13.

(f) Harl. 4561, f.251b (Holt and Dighton). T. 14, the second *Habeas corpus* only.

There are no conflicts among the reports, only differences in completeness and details. I rely principally on Bulstrode, which, despite the disorderliness generally characteristic of that book, both tells most and comes closest to the living texture of the discussion. Particular points at which other reports are used are noted in the text.

Two brief anonymous reports seem to me from their dates and contents almost certain to come out of the debate of Burrowes *et al.*:

(a) T. 13 Jac. K.B. Add. 25,211, f.146b. A *nota*: the King's Bench judges agreed that laymen committed by the High Commission, but not clergymen, should be delivered on *Habeas corpus* for refusing an indefinite oath; plus citation of Leigh's and Hinde's Cases for the temporal-detriment doctrine. We know from the full reports of Burrowes *et al.* that both the clergyman-layman distinction and the temporal detriment doctrine were urged by counsel and discussed by the Court in that case in T. 13. If this note refers to Burrowes and is correct, there was more agreement on the layman-clergyman distinction and the layman's immunity from examination than appears from other reports. Coke certainly embraced the distinction, but dropped reliance on it; if the other judges also embraced it, they too dropped it.

(b) M. 13 Jac. K.B. Add. 25,211, f.148. A *nota* stating the rule that 2 Hen. 5, c. 3, required articles to be furnished to High Commission examinees. We know from the full reports of Burrowes that Coke argued for the rule in that case in M. 13. The note states more clearly than other reports that 2 Hen. 5 was taken to be declaratory of the common law, a point said to be apparent from the preamble. It says further that a duty to supply articles grounded on the statute could not be extended to the High Commission *except* on the assumption that the statute was declaratory: "Otherwise there is no remedy in this case by that statute, for the High

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Like Maunsell and Ladd a decade earlier, this case involved Puritans and was discussed with obvious sensitivity to circumambient political passions. The Court allowed debate to extend over three terms, and even then the case was only tentatively decided, to be revived in an alternate form on a new *Habeas corpus* several months later. The reports do not give the return on the original *Habeas corpus* in terms. Going by statements of counsel and the apparent absence of confusion as to what precisely was before the Court, it would seem that the return was specific enough to raise the following question straightforwardly: May the High Commission commit for refusal to testify under oath concerning slanderous speech against the Book of Common Prayer and the government of the Church *aut similia*? (Croke says "slanderous words" explicitly. Other reports are vaguer, indicating only that *something* concerning the Prayer Book was involved. Bulstrode at one point has Coke saying that refusal to receive the rites prescribed by the Prayer Book was the offense, but it is clear from miscellaneous hints that there was more to it than merely passive refraining from compulsory worship. One respect in which the return was arguably too general in suggesting the nature of the inquiry is discussed just below. Partly because it was excepted to on that point, I infer that it otherwise gave a sufficient picture of the subject matter.)

The prisoners were represented by Serjeant Finch, who had formerly been of counsel with Maunsell and Ladd. In favor of their dismissal, he advanced three arguments: (a) Laymen, unlike clergymen, are exempt from such examination. For this, Finch cited some of the standard historical authority. He added: ". . . this diversity (between laymen and clergymen) I learned from Popham in Maunsell's Case." (Popham mentioned the distinction in that case and endorsed it in the extrajudicial opinion concerning diocesan courts delivered by Coke and himself. However, Ladd's lay status did not, in Popham's eyes, count in his favor in the actual circumstances of Maunsell and Ladd. It seems probable that Popham turned the distinction over in his mind but decided it did not apply to the Commission.)

Commissioners' authority commenced long afterwards, by the statute of 1 Eliz., and so the statute of 2 H. 5 will not trench to it."

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(b) Citing Hinde's Case and Leigh's (plus Scrog's, another early case, not involving ecclesiastical courts but illustrating the same principle): Sworn examination, by the High Commission as well as other inquisitorial courts, must be avoided when it will expose the examinee to penal or other secular criminal liability. Here, offenses against the Prayer Book of the sort in question are subject to temporal penalty by virtue of the Uniformity Act. (This point is the one for which Popham in Maunsell and Ladd ought to have been invoked, for despite his generally pro-Commission stand -- which Finch of course had to "forget" -- Popham endorsed the temporal-detriment theory and the early precedents on which it was based. There is no ambiguity about the basic applicability of the temporal-detriment theory to the instant case: The Uniformity Act subjected defamation of the Prayer Book and related offenses -- interfering with a minister using the established Book, "maintaining" a minister who refused to stick to it -- to a stiff pecuniary penalty, with "escalation" clauses for repeated offenses and failure to pay penalties. We should perhaps be emphatic at this stage: If Finch does not win with this argument -- never mind the others -- Hinde and Leigh and all uncontradicted later authority posited on those cases will be as good as reversed, subject to one quibble discussed later, and unless some quirk of *Habeas corpus* law were to justify remanding the prisoners on very narrow grounds. Can Finch lose?)

(c) Though the return showed substantially what the prisoners were to be examined about, it made the mistake of adding "and other things." Finch jumped on this vagueness: For all the Court could know, the Commission proposed to ask the prisoners whether they had committed felony -- to expose their necks to the gallows as well as their purses to a penalty. In fact, Finch went on, (smuggling information) they *would* have been asked about felony, for one of the articles inquired into whether they had stolen a surplice from a church! (Note that the articles were no secret. We shall see below that the articles were not duly communicated to all the prisoners, but they were not entirely in the dark. Finch's final argument boils down to *Habeas corpus* law -- the requisite specificity of returns -- but taking his factual statement as true, the case for the prisoners is possibly strong in another elementary way: presumably proceeding against them for larceny, or in any way investigating such an offense, should be regarded as *ultra vires*. Waiving the temporal-detriment doctrine: *quaere* whether the High Commission should be allowed to hold

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men for refusal to testify at all when some of the questions to be asked lack so much as color of propriety.)

So far as the reports suggest, only Chief Justice Coke spoke from the Bench on the first hearing of the case. He said nothing about Finch's third point (it was unnecessary to), but agreed with the others. (b) was the heart of the matter, sufficient reason to hold in favor of the prisoners; on that Coke naturally put his major emphasis. The precedents were strong and precisely in point -- *Habeas corpus* cases involving the High Commission. Distinguishing the Uniformity Act from the Mass-attendance and usury statutes to which Leigh and Hinde were exposed is difficult. (Possible, however, if there is any mileage in the difference between a penal statute which creates a stake for private informers and one, such as the Uniformity Act, which assigns the full penalty to the monarch. As Coke said in connection with Leigh's Case (Bulstrode), "... the parator would be always ready to take one by the back for the penalty, if he once confess the matter against himself." In other words, conduct which was subject both to a penalty partly recoverable by an informer and to ecclesiastical punishment offered a particularly unsavory and unfair opportunity: The flunkies of ecclesiastical courts could round up suspects whose misconduct was subject to penalty-statutes, use facilities not available to others in the informing game to exact confessions, then take advantage of their inside knowledge to sue for the pecuniary penalty themselves. Arguably, it is less of an occasion for corruption and less generally objectionable to let ecclesiastical powers come to the aid of the temporal authorities when the bonanza from overlapping jurisdiction would accrue entirely to the monarch.

Coke did not expressly rebut this distinction, but I think he may have intended to brush it aside as insignificant. After reciting the precedents, he notes that the matters in question were temporal offenses under the Uniformity Act. Then he adds (Bulstrode), "This is a new case, but yet it is an old and a beaten case, and hath been before this time argued." In that sentence, there are echoes of Coke in Calvin's Case, of his view that a really new case at common law is a rarity not to be believed. In the immediate context, it may perhaps be taken to say: "True, the ecclesiastical courts' right to use inquisition in the area of overlapping spiritual-temporal offenses has not been tested with specific reference to the Uniformity Act, nor with reference to other statutes which give the whole penalty to

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the monarch. However, the cases which have arisen on informer-type statutes have established the principle that ecclesiastical inquisition must not expose to temporal detriment. Any attempt to undercut the principle by dwelling on the peculiarity which the old cases do not share with this 'new' one would seem unpromising.”)

In addition, though going beyond the temporal-detriment doctrine was hardly necessary, Coke expressed pretty firm agreement with the laymen-clergymen distinction urged by Finch. That he held that opinion with respect to ordinary ecclesiastical courts is clear. On this occasion, he restated the basic historical picture behind his opinion: There was no ecclesiastical power to examine laymen outside matrimonial and testamentary cases at common law; *De heretico comburendo* conferred a statutory power to do so in further cases; repeal of the statute wiped out the power. Coke did *not*, however, go into possible arguments for making the High Commission an exception -- e.g., that the Elizabethan Supremacy Act intended to let the Commission be given the powers which *De heretico* had given the bishops, while taking them away from the latter. One should not conclude that Coke was dead set against such theories from his remarks in *Burrowes et al.* -- from a comparatively casual indication of agreement with counsel, on an occasion when no arguments *contra* were advanced, and when there was a very strong separate reason in the prisoner's favor.

The Chief Justice's concurrence with the prisoners' counsel did not, however, result in the prisoners' release, even on bail. There is no way of knowing what was in the other judges' minds at this point, and perhaps Coke himself was not confident enough to act without further discussion. Immediately, a later day in the same term was assigned for rehearing. On that day, the case was continued until the next term and the prisoners remanded. The Court said it wanted to be further advised and, more particularly, that it wished to honor the High Commission's request to be heard. The latter point is notable. I do not think the propriety of releasing or bailing the prisoners without giving the Commission a chance to argue could be challenged, were the judges as conscientiously convinced as the temporal-detriment doctrine perhaps permitted them to be that the Commission's action was unlawful. They either thought that there was room for doubt or that scrupulous treatment of the Commission was owing -- if not merely politic. The decision not to dispose of the case this

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term, T. 13 Jac., was made at a private conference which the judges held at Coke's house to talk over several pending *Habeas corpus* cases (discussed later -- none of the others bears on our present concerns in substance.) Sensitivity to the politics surrounding the cases is probably reflected in the holding of such a conference, but so, perhaps, was confusion about *Habeas corpus* law and the desire to handle the cases consistently.

The first time the case was brought up in the next term, no one representing the Commission seems to have been present. Presumably the prisoners' counsel simply moved the case to reopen it. On this occasion, again, only Coke spoke. In substance, he said nothing new, only reiterated Leigh's and Hinde's Cases and added the rule that a patron could not be forced to betray himself in an ecclesiastical investigation of simony. (The addition is of value for clearing the temporal-detriment doctrine of undue association with informer-statutes, for the losses a patron would incur if forced to confess his involvement in a corrupt bargain were of a quite different type.) Further language used by Coke is of interest, not for the merits of the case, but for the policy of the Court. His words are not fully articulated in the report (Bulstrode), but I think their thrust is clear: The case having been moved again, the Chief Justice spoke resolutely on the prisoners' side once more. No other judge contradicted him.

What then was holding the Court back from relieving the prisoners? Counsel must have asked that, or else Coke knew they would ask, for he went on to say why. The answer was that the civilians had not yet been heard to defend their proceedings, and still ought to be. But "ought to be" is given a special force -- not because there should generally be adversary argument on a *Habeas corpus*, even an open-and-shut one if any interested party wants to oppose it; not because an official body of the Commission's dignity should be respected; but because more good would come from persuading the Commission of the limits on its powers than from offending it by discharging its unlawful prisoners without, as it were, a personal explanation: "Here the civilians are to shew cause why they proceed there in this manner. And as touching this matter, I will confer with them of the High Commission Court, and I will shew unto them what hath been done in like cases in former times; and I will further shew unto them the books: for it is very clear, they cannot proceed so, and so I will satisfie them herein for the time to come. And all this I will

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doe for the future ease of the subject, and so to present (*sic* -- prevent) motions in the like cases. And this I will doe, (not that we are afraid here to doe justice) for this howsoever we will doe, but this I will doe for their future directions." The first person singular is Cokean, as is the confidence in his teaching powers. There is obvious defensiveness in "not that we are afraid here to doe justice." The prisoners remained in jail while the exercise in judicial statesmanship went forward.

The only definite step taken at this time was to order that the articles of examination be brought in and read on an assigned day. (The Court appears to be reluctant to presume against the Commission on the basis of the return -- to conclude that the inquiry *must* tend to expose the examinees to the Uniformity Act penalties without seeing from the actual articles that such a tendency was unavoidable.) When the day arrived, Coke again took the floor. Although he came back to Leigh and Hinde -- *not*, incidentally, to the layman-clergyman distinction, which makes no further appearances in the case -- Coke now dwelt primarily on the Commission's duty to furnish a copy of the articles to the examinees. Rolle and Harg. 47 say that failure to supply the articles in our case was put before the Court as a fact by affidavit. When the civilian Dr. Martin at last came to argue for the Commission, he said that the articles had been furnished to one prisoner, Burrowes. Whether or not he was telling the truth, and if he was, whether or not the articles were given to Burrowes before he was asked to take an oath (or only before actual questioning), Martin admitted that they had not been supplied to the other prisoners at all. (At least not individually. Martin's position may have been that one copy supplied directly to one of several persons to be examined as, in effect, co-defendants satisfied any requirement that might exist. His speech is not reported articulately enough to show whether he was advancing such a theory. His more probable position was that there was no duty to furnish the articles, but that Burrowes had been treated liberally.) In any event, inadequate notice to the examinees by the standard Coke thought binding may now be taken as a fact of the case; it was later assumed as a partial basis for decision.

Coke relied heavily on the statute of 2 Hen. 5, c. 3, for establishing the proposition that the articles must be furnished (before any oath is required, his language strongly suggests, though he does not absolutely lay

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it down that a man who took the oath without having received the articles and *then* was furnished with them could not be imprisoned for refusing to testify to such of the matters as were appropriate in themselves.) 2 Hen. 5 in terms dealt only with civil litigation commenced by libel in ecclesiastical courts. It required that a copy of the libel be furnished to the defendant before he was obliged to answer, the purpose being to supply him with a firm basis for framing his answer and also for seeking a Prohibition if he should wish to. Coke now adopted the position that 2 Hen. 5 also operated to establish that ecclesiastical courts proceeding *ex officio*, including the High Commission, must furnish a copy of the articles. There are two theoretically distinguishable grounds for so holding: (a) 2 Hen. 5 simply declared the common law. The common law requires ecclesiastical courts, in whatever mode they are proceeding, to give defendants a document on the basis of which they can decide what move to make on their part, including whether to seek common law protection against unwarranted ecclesiastical proceedings. Parliament in 2 Hen. 5 only recognized this existing general rule by clarifying or emphasizing its application to the particular case of libel-commenced suits. If the general common law rule were to be questioned, the statute so construed would be conclusive evidence of its existence. (b) *Ex officio* proceedings are within the equity of 2 Hen. 5. I.e.: Even granting that no relevant rule existed at common law, *ex officio* and libel-commenced proceedings cannot be reasonably distinguished. Parliament having made a rule respecting the latter, the judiciary ought to exclude anomaly by extending it to the latter. The evidence suggests that (a) was Coke's position. The line between the theoretically different approaches was inherently shadowy; I doubt that Coke or anyone else was worried about choosing between them and mention the distinction only because there are faint indications in the reports that both crossed the judges' minds. (Croke and Dr. Martin in *Bulstrode* speak of the equity of the statute; otherwise the statute is spoken of as a declaration of the common law.) It is conceivable, though improbable, that someone asked, "Are we invited to extend the statute by the equity, or only to use it for inferring the common law, and does it matter which?"

The important thing is that the statute was seized on. Coke had perhaps come to the view that the statute book was the solidest possible underpinning for restraint on an obviously unacceptable form of conduct,

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that a firm stand on the meaning of 2 Hen. 5 was the surest way to remove ambiguity. I argue in the introduction to this section that requiring people to take an indefinite oath and start testifying without any prospective notice of the subject of inquiry was obviously unacceptable -- for no further reason than that all ecclesiastical jurisdiction was limited and subject to Prohibition. That was apparent without reference to 2 Hen. 5. By laying hold of the statute, however, one could cut off any lingering contention that a presumption should be made in favor of *ex officio* inquiries -- i.e., that ecclesiastical courts proceeding without libel should be presumed to be operating within their jurisdiction until it appeared that a specific question was *ultra vires* or objectionable by the temporal-detriment doctrine.

The statute, if it could be made relevant for *ex officio* proceedings at all, established that notice of the articles was simply a requirement of the law, to be observed whether or not a case could be made for according "faith and credit" to ecclesiastical officialdom in the absence of a specific showing of impropriety. Moreover, the statute, if relevant, laid down neat requirements: A man must be given a copy of the articles *in writing*, if *ex officio* articles were equivalent to the civil libel; it would be hard to argue that a man had a duty to take an indefinite oath and only then a right to receive the articles, if strict parallelism with procedure by libel was required -- for a civil defendant's right to make no answer until a copy of the libel was delivered seems equivalent to an *ex officio* examinee's right not to open his mouth, even to take an oath, before delivery of the articles. Any contention that informal notification would satisfy common justice and the needs of a mixed legal system is cut off. The final point to note is that Coke gives no sign of considering whether the High Commission might be a special case. It would be possible to hold that *ex officio* proceedings and those commenced by libel are in general within the same rule, but that the statutory authority of the High Commission was broad enough to exempt that court. The duty to furnish the libel or articles, conceived as a common law rule, could be held to apply only to those ecclesiastical courts which existed at common law, not to a court created by statute in recent times. By implication, Coke held *contra*: the High Commission is in the same boat as other ecclesiastical courts in this respect; nothing in the Supremacy Act is nearly specific enough to indicate an intention to except the Commission out of the rule expressed in 2 Hen. 5.

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On a later day in the same term, Dr. Martin, an eminent civilian and King's Advocate for the High Commission, appeared and argued. His statements as reported by Bulstrode are clearly not everything he said. For example, Coke takes Martin to task for "censuring" a Serjeant at Law, whence I infer that he must have said something directly impolite to or about Serjeant Finch, as opposed to merely countering his arguments, but the words of "censure" are not given. From what is reported, it would seem that Martin took issue with the argument from 2 Hen. 5 in the obvious way: by maintaining that there was no warrant for extending the statute beyond the proceedings by libel to which it literally applied.

Secondly, Martin seems to have contended that at least two of the prisoners, Holt and Dighton, were under investigation for schism, in the form of very sweeping speeches against the established system of Church government. The legal thrust of this point is hard to make out, but Martin contributes some new factual information in connection with it. According to him, there were originally eight persons under investigation for the same matter or related ones. Six cooperated with the Commission, but Holt and Dighton were deliberately chosen to hold out and test the duty to testify. As we have already seen, Martin shortly later said that Burrowes was in a different boat than the other prisoners because he was furnished with a copy of the articles.

The upshot of this information is only to create confusion about the true facts. We know that there were more prisoners than the four whose names are given; why those other than Holt and Dighton were being held is not clear, if indeed those two men were tagged to make the test case. The best guess would be that there were eight parties altogether, of whom a maximum of six, including Burrowes and Cox, were imprisoned upon confessing to offenses which the Commission considered punishable in that way, Holt and Dighton alone being held for refusal to testify. All I can say here is that the Court seems to have been confused too. For Coke unconfused the situation by insisting on the return: "All this which you have thus said to this purpose, is out of the book, this not appearing unto us by your return so to be." In other words, I take it, the return appeared to claim that *all* the parties to the *Habeas corpus* were jailed for refusing examination about offenses against the Prayer Book; now Dr. Martin came and said that the case was not that simple; quite rightly, the Court insisted on sticking to the "book."

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Was there, in any event, any possible legal mileage in the contention that the matter was schism? Grant that the Court cannot go beyond the return as to facts. Grant that *prima facie* the Commission ought not to exact sworn testimony concerning temporally punishable offenses against the Prayer Book. Then suppose that it is made to appear *as a matter of ecclesiastical law* (taking Dr. Martin as an expert witness, the usual role of civilians admitted to be heard in common law courts) that the tendency of the investigation was to discover the major crime of schism. (I.e.: In contemplation of ecclesiastical law, the specific acts inquired into would add up to schism; questions about those acts should be construed as essentially means to discover schism, not as direct attempts to discover temporally punishable offenses against the Prayer Book.) Is it arguable that the temporal-detriment doctrine should be modified in this sort of situation? (As follows: Where an offense is both temporal and spiritual, inquisition must not be used to extract confessions of that offense *in and of itself*. But if inquiry into such an offense is incidentally necessary in the process of investigating a purely ecclesiastical offense, such as schism, exposure to temporal detriment is an unavoidable by-product, to be tolerated because otherwise ecclesiastical courts cannot do their job. Cf. the doctrine endorsed above in a civil context (V. B., Note 1): civil detriment to a party required to testify in a will-revocation case might be a reason for restraining the ecclesiastical court if and only if the interrogation were plainly irrelevant for fulfillment of a legitimate ecclesiastical purpose.)

Is it further arguable that the duty to furnish articles should be modified in the case of a High Commission examination into schism? (In general, articles must be furnished, and perhaps that duty applies to the Commission insofar as it is proceeding against ordinary ecclesiastical crimes. But when it comes to the high crimes which the Commission was *especially* created to repress -- e.g., schism -- it has statutory or inherent powers which the general rule does not restrain. Here, if run-of-the-mill violations of the Uniformity Act were directly and exclusively in question, perhaps the articles should be supplied; when, in contemplation of ecclesiastical law, the ultimate question is schism, the duty to give the examinee his normal break is in abeyance.)

It is possible that Dr. Martin wanted to argue in such a vein. If so, it got him nowhere, perhaps because he was boxed in by the return. (The Court may have taken the position that the Commission was not entitled

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to claim that the object of the examination was schism when it had not taken the trouble to say so in the return. There is a distinction between trying to add to or modify the mere factual content of a return and coming in with what amounts to a legal interpretation in the terms of "foreign" law -- here, with the argument that by ecclesiastical law the return *meant* schism even though it did not say schism. But the distinction need not be a reason for leniency -- for letting a return be amended with an explanation when the explanation could perfectly well have been incorporated into the original language of the return.) For the rest (and possibly his talk about schism only comes to this), Dr. Martin's argument sounds in *raison d'état* ("crimes of this nature which concerns the State," "*suprema lex; salus populi*," "these men are well known to be schismatics, and it is against the policy of the State, to shew unto them the particulars upon which they are to be examined". All the thanks he got for taking that high line was Coke's response, "And as a states-man: in this also you are much mistaken." I think it is fair to say that the Commission would have done better to retain a common lawyer. Dr. Martin's performance reflects the sense in which, I suspect, most civilians had trouble talking the language of the common law. The way to beat the *Habeas corpus*, if any way would work, would have been to descend to the particulars of 1 Eliz. -- i.e., to argue by close exposition of the Supremacy Act and its history that the Commission was given special powers to repress "enormous" crimes, so that ordinary restraints on ecclesiastical inquisition did not apply to it. In Maunsell and Ladd, where the inapplicability of the temporal-detriment doctrine made the prisoners' case harder, the pro-Commission judges stood up for a permissive reading of the statute and forced the prisoners' counsel to fight on the ground of precise exposition. In Burrowes *et al.*, where the *prima facie* case for the prisoners was strong, no one made the best available argument for the Commission. It is true that the argument from the statute comes to the same conclusion as Dr. Martin's royalist language: Parliament foresaw the need for one ecclesiastical court with extraordinary powers to protect the spiritual *salus populi* against the gravest kinds of threat; it authorized the creation of such a court in words so general that they can only be taken as giving the monarch a free hand to exempt it from the restraints on other ecclesiastical courts. A chapter-and-verse "demonstration" of

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that interpretation might have been hopeful, even against the odds created by a possibly ill-advised return, the clear applicability of the temporal-detriment doctrine, and the Court's readiness to erect a categorical general duty to furnish articles on 2 Hen. 5. To say in effect that extraordinary powers were a necessity of state, without showing that Parliament had provided such powers to meet the necessity, was an unpromising way to talk the judges out of their well-warranted view of the law in this case, especially to talk them into reversing Leigh and Hinde.

Aside from indicating that he was not impressed by anything Dr. Martin had said, Coke for the most part only came back to the heart of the matter -- to Leigh and Hinde (with a pointed reminder that "contemporanea expositio is best," i.e., that the Commission was asking for reversal of precedents set only a short time after the Supremacy Act, when the judges were presumptively best aware of the statute's intent) and to the simony case (on which Coke now added a specific precedent -- the unreported Brown and Hixon, from the Common Pleas in Chief Justice Anderson's time, where prisoners committed for refusing to submit to examination about simony were delivered by *Habeas corpus*.) But two further remarks by Coke are of interest. "No Judges that ever were in former times," he said, "have done more for the High Commission Court than we have done." We should not dismiss the remark until we have looked at the history of relations with the Commission in other areas than self-incrimination; it could be true. True or not, it reflects the Chief Justice's view of the situation -- and perhaps his resentment at being lectured on necessity of state in a case where his Court had so far respected that interest as to withhold relief from the prisoners for several months and give the Commission every opportunity to defend its position. Then Coke went on to say, "We will not here encourage any sectaries," a sentiment that was to be repeated. The judges leaned over backwards to express their solidarity with the Commission's objective, to insist that their only concern was to enforce legal standards which were not really such an obstacle to religious discipline as the churchmen fancied. For, Coke added, "if this matter, as you say, was done publickly in the church: this is then notorious, and therefore you need not examine them upon oath as touching this, when as all the parish can well inform you of it." Coke's remarks were then echoed by his brother Dodderidge: "We do all of us agree with you in the due

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punishing of these sectaries; and in this we will rather strengthen than weaken you; and will acquaint them of the High Commission Court with this before we will do any thing herein." And so it was that once again the prisoners were put off until the next term.

In the next term, H. 13 Jac., they were at last delivered -- on bail to reappear in this Court in the ensuing term, with instructions to go "submit themselves" to the High Commission in the meantime. At the very start of his announcement of the Court's position, Coke emphasized that the prisoners had been in jail for three-quarters of a year, so that the time to release them had arrived. He took pains to give the time they had served as a third, separate-and-equal reason for the decision, alongside the two reasons why they should never have been imprisoned in the first place (exposure to a temporal penalty and failure to furnish the articles.) He ostentatiously pointed to the way in which the Court was modifying the inescapable precedents on which its decision was primarily based: the idolatrous Mass-addict Leigh was discharged outright; the present sectaries were only bailed and put under pressure to use their precarious liberty to make peace with the Church.

The handling of *Burrowes et al.* can be taken as a study in comparative courage, an assertion of judicial integrity with as little compromise as possible in the face of political pressure. It can also be seen as a display of simple cowardice, of foot-dragging until all excuse for delay had been exhausted and the prisoners could be nominally relieved without cost to the Commission's real authority. The third possibility is that courage and cowardice are beside the point, that the judges' sympathy for the Commission's problems was sincere and their own conflicts genuine. Were they restrained by the better part of valor and eventually impelled by the rasher part? Or were their judgments indeed trapped between a view of the law which could not in conscience be repudiated and the realization that policy-ends which they themselves acknowledged might suffer from a strong decision against the Commission?

Strictly speaking, in any event, the Court's reliance on the time which the prisoners had already spent in jail undercuts the holding as a decisive endorsement of either the temporal-detriment doctrine or the duty to furnish articles as a duty "proved" and explained by 2 Hen. 5. Those reasons were embraced, but the "narrow ground" was made conspicuous -- the

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rule that the High Commission may not hold parties perpetually for refusing to testify, but only for as long as constitutes a reasonable punishment for contempt. Coke said that three-quarters of a year was "too long for a contempt" (Rolle. Harg. 47 has "*plus long temps.*" There might be a small question as to whether he meant that the time they had served, thanks largely to his Court, was *excessively* long, or only very long -- quite long enough.)

Of the other judges, two may have been more exclusively fixed on the narrow ground than Coke was. Their words are so cursorily reported, and Coke so dominates the reports, that one cannot be sure whether there was a range of opinion within the Court. For what it is worth: Justice Croke is reported as agreeing with Coke and adding one small point of his own. (That sworn examination in the Star Chamber was based on ancient usage -- presumably countering the contention that the High Commission should not be more restrained than the Star Chamber was. Croke's picking up that point is a hint of agreement with the substantive reasons in the prisoners' favor.) Justices Dodderidge and Houghton do not express any disagreement with the substantive reasons, but their brief remarks on the occasion of decision (Rolle and MS.) emphasize the Court's unanimity on the proposition that the prisoners should not be held perpetually. There is not sufficient evidence to make out a minor split, but if there was one I should guess that Dodderidge and Houghton were less willing than their brethren to put the Court behind strong limits on the Commission's examining power.

The narrow ground does seem irresistible -- that the Commission's imprisoning power does not include authority to hold persons who refuse to talk until they change their minds, but at most the power to punish contempt and exert pressure by reasonable imprisonment (the standard of reasonableness probably being determined by the approximate severity with which other courts customarily punished contempt. It should be noted that there was no suggestion that the Commission must confine itself to determinate punitive sentences.) High Church royalism of Dr. Martin's brand would no doubt like to have seen unlimited trust and corresponding power to coerce reposed in the Commission (as in those pre-Petition of Right days they were to all intents reposed in the King and Council.) But that is to shoot too high. As a statutory court and a participant in the inherent limitedness of all "spiritual" jurisdiction, the Commis-

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sion must stop somewhere -- if not necessarily or unqualifiedly where the temporal-detriment doctrine draws the line, if not where the Commission's incontrovertible duty to stay in the "spiritual" sphere would suggest erection of a "No fishing" sign, then at least short of infinite power to compel cooperation. Let us take the law to be as favorable to the Commission as it could be in substance, thus: There is no duty to furnish articles to examinees, and no duty to refrain from exposing to temporal detriment; there is, of course, a duty to stay *infra vires*. Translated into rules for *Habeas corpus* proceedings: All the Commission need return is that A. was imprisoned for refusal to testify; it will be presumed that the inquiry was within the Commission's jurisdiction unless the contrary appears on the face of its own return, or at least if the return, unsupported by articles, specifies *infra vires* subject matter; no off-the-record information will be taken into account. Under these rules, there would be no check on the Commission's utterly exceeding its jurisdiction and usurping the role of the temporal legal system, save as its imprisoning power is limited to punishing contempt or exerting finite pressure to cooperate. The most conservative way to achieve that limitation is the one taken in *Burrowes et al.*: allowing prisoners to remain in jail until the common law court itself has in effect caused them to serve as long a time as can be considered reasonable (for then no step outside the record is required.) And -- as if that were not conservative enough -- the Court in *Burrowes et al.* still did not discharge the prisoners outright. Perceiving that the matter was not flatly beyond the Commission's jurisdiction, the Court used its own authority to help the Commission exert discipline on the prisoners over and above what it had already exerted. We shall see the sequel.

We should ask here whether the holding that the power to imprison is intrinsically limited clashes with *Maunsell and Ladd*. In that case, it will be recalled, counsel urged that the prisoners had been held for nine months, about the same time as *Burrowes et al.* spent in jail, and that they should be delivered for that reason if for no other. The argument did not impress the majority of the Court. It was, however, both presented and rejected in a special form: in connection with Fuller's argument that the Commission was under statute-based duty to wind up cases within three months. In rejecting that contention, Chief Justice Popham gave a certain countenance to the view that the Commission had indefinite power to co-

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erce testimony. One may wonder, however, whether Popham's Court would have refrained *forever* from doing what Coke's Court did in *Burrowes et al.* Maunsell and Ladd may have been imprisoned for nine months, but it is not clear that the record showed as much, and even if it did, they had not been held for that long by the common law court's virtual permission. At least on the "most conservative" theory, perhaps a man who sits in jail for a while before bringing a *Habeas corpus* has no right to claim credit for such a time. There is perhaps a sense in which I am not strictly being *punished* for non-cooperation with the legal process -- or subjected to the kind of "inimical" pressure which must stop somewhere -- until I have made protest. Up to that point, I may be seen as taking the "friendly" option of withholding cooperation and accepting the sanction, of challenging the authorities to get along without my services or accommodate me in their jail. At that stage, the sanction is necessarily open-ended; a right to a war of nerves implies both sides' privilege to be indefinitely stubborn. But the picture changes when I say, "I ought not to be held any longer, I am detained in the face of my contention that holding me is wrongful." It changes even though the contention is not legally correct -- even though committing me was not in the first instance unlawful -- , for even so I have made it clear that I am not acknowledging the propriety of making me choose between cooperation and incarceration. In a legal system equipped with the *Habeas corpus* and the Prohibition, it makes sense to treat resort to those remedies as the criterion of protest -- as it were, the only sufficient sign that an authority's "possession" of a man's body is "adverse." In *Maunsell and Ladd*, a majority of the Court thought the imprisonment originally lawful: all the more reason to give no weight to the time served before the *Habeas corpus* was brought, and perhaps to be more generous in the amount of time allowed thereafter, even if the Court would ultimately have relieved against perpetual imprisonment. In *Burrowes et al.*, at least half the Court thought the imprisonment originally unlawful, though even that half may have been reluctant to press the point: all the more reason for the Court to agree on limiting the clearly "adverse" detention without bail to three quarters of a year. In sum: there is a possible conflict between the two cases, but a head-on comparison is difficult.

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Two terms later, T. 14 Jac., at least the prisoners Holt and Dighton were back in jail. Serjeant Harvey, who succeeded Finch as their counsel, attempted to reopen their case on the old *Habeas corpus*. The Court turned him down, on the ground that "there may be other new matter happened in all this time." A new writ was accordingly granted and a day assigned for presenting the return. On that day, Harvey took exceptions to the return; the Court's only action was to fix a later day, by which time the return was to be put into final shape for argument. The only report that gives these details (Bulstrode) does not tell enough to show whether the Commission was significantly indulged with an opportunity to amend the return in the light of the Court's agreement with exceptions to it. In any event, when the day for full argument arrived, Serjeant Harvey objected that the prisoners had been committed without a "bill" against them. The Court quickly dismissed his contention and remanded the prisoners.

The situation was as follows: In accord with the Court's advice at the time they were bailed, the prisoners presented themselves before the Commission. As the return on the second *Habeas corpus* showed, they were then and there asked to say whether they would conform to the Established Church and receive communion kneeling. For refusing to give a direct answer they were committed. Bulstrode tells what they did say ". . . that they came thither to satisfie the Judges: de B. R. and if they offended afterwards in this, they would submit themselves, but made no other answer ..." If their response implies a position -- as distinct from mere continued determination to resist the Commission -- I take it to be that the "submission" required of them by the King's Bench meant only putting in a respectful appearance and acknowledging, if asked, that the Commission was in principle and *ceteris paribus* entitled to prosecute offenders against the Prayer Book. (I take "if they offended afterwards, etc." to mean: "As far as any acts for which we were formerly being investigated are concerned, we take our stand on the fact that the King's Bench had discharged us from your custody and thereby prevented you from coercing us to testify about them. We do not dispute that such acts are against the law and within your jurisdiction. If you should accuse us of committing like acts in the future, we would not dispute our duty to abide the award of your court, provided always that your court proceeds in a manner compatible with the common law.") Negatively, the prison-

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ers' position would seem to be that "submission" did not involve answering any new questions or taking a generalized pledge.

Serjeant Harvey's argument (which is not reported at large) must come to a version of that negative point: Whatever motions the King's Bench wanted the prisoners to go through in the way of "submission," the High Commission had no business doing what on the present record it did -- no business hailing people before it and asking them a general question about their willingness to conform. The articles formerly prepared for these prisoners were aimed at certain offenses against the Prayer Book. On the basis of those existing articles or quasi-charges, perhaps the Commission was entitled to "try again" -- to ask the parties whether, in the light of the King's Bench's rather hedged handling of their case, they would now be prepared to testify. If they again refused, it would be another case. Or perhaps, on the basis of the existing articles, the Commission would be entitled to ask for an indication of willingness to refrain in the future from acts of the sort they were at least by implication accused of committing. If they refused and were imprisoned, the King's Bench would have to consider whether that degree of unsubmitiveness was a breach of the quasi-condition which it had imposed on these highly disfavored parties when it bailed them. But as the case now stood, the prisoners were held for refusal to answer a question which the earlier proceedings against them did not anticipate. Their position should be taken as equivalent to that of a man with no previous history of trouble with the Commission: X. is simply ordered before that court and asked (albeit without an oath, for there is no indication that the prisoners were required to swear their "submission") whether he is willing to conform to the Church. Surely X. may not be imprisoned for refusing to answer this question, unaccompanied as it is by even an implied accusation of past misconduct. Surely he may not be confronted with the choice among going to jail for non-response, lying if he is not in conscience able to pledge conformity, and convicting himself of a crime by the very act of saying "No" truthfully (for presumably one who openly says he will not conform to the Church is *ipso facto* a schismatic.)

So I should construe Serjeant Harvey's objection to the want of a "bill." I do not think that can be taken literally -- "bill" in the sense of a

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private accusation. He must mean *any* accusation, *anything* behind the question and tending to justify it. Very likely he is going on the assumption -- well-warranted by Coke's remarks in the earlier phase of this case though not quite sustained by the outcome -- that *ex officio* examinees must be given a copy of the articles, as equivalent to a "bill," before being asked any questions, indeed before being asked to take an oath. One may project from that to the rule that any interrogation, even unsworn, even about future intentions, must be preceded by delivery of a document giving at least *some* indication of charges and *some* basis for judging whether the questions relate to their verification.

But perhaps Harvey's point can be sustained even without a firm requirement that the articles be delivered in ordinary *ex officio* cases. Absence of such a requirement would mean that the Commission could exact an oath and go to asking questions without fear of common law interference; danger of interference would accrue only when a particular inappropriate question was asked. Assuming such a rule: Is it not arguable here that the question in its nakedness -- i.e., unaccompanied by any charge toward whose verification it might contribute -- is intrinsically inappropriate? In the first place, it comes to a question about intentions. Is a question in the form "Will you ... ?", "Is it your intention to ... ?" distinguishable from one about, "secret thoughts," against the lawfulness of which there was authority -- "Is it your opinion that ... ?", "When you said such-and-such, did you mean ... ?", *et similia*? Perhaps such a question is objectionable even without an oath.

Secondly, the question is incriminating in the special sense that one answer *constitutes* a crime, as opposed to supplying matter of fact whence a crime can be inferred. In at least a formal sense, the most directly incriminating question -- e.g., "Did you commit fornication with Mary Jane?" -- is of that latter sort; the examinee is asked to supply evidence which could in principle be furnished by a non-party witness. Asking a question whose truthful answer may be an *ipso facto* crime has affinities with inveiglement -- with subjecting a man to interrogation for the evident purpose of "setting him up" to say something damaging to himself, something which the interrogator had no apparent specific anticipation of and could not have hoped to discover from non-party witnesses. It would be possible to give a free hand to ecclesiastical inquisition insofar as it had the least apparent tendency to discover specific "anticipated" or sus-

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pected offenses, and yet to draw the line at proceedings apparently designed to trip up people whom the authorities only vaguely suspected of dissidence or merely "had it in for." Although there is nothing tricky about asking "Will you conform?" it is like tricky sworn interrogation in that it seems intended to make criminals out of people whom the authorities are strangely unable, not only to accuse straightforwardly of any crime, but even to question in such a way as to suggest that those authorities are in possession of confidential information pointing to a specific crime. In sum: I take Serjeant Harvey's objection that there was no "bill" as a way of saying that there was no "ground" for the Commission's putting its question to the prisoners -- neither a set of articles nor so much as an inferable claim that they had committed a particular crime. The alternative interpretation would be that he was asking for a private complaint, quasi-indictment, or information verified by identifiable accusers -- surely an unlikely position in a case where the King's Bench had been so reluctant to crack down on *ex officio* investigation.

The Court was entirely unmoved by Serjeant Harvey's objection to the Commission's proceedings. Coke started off by rejecting what I understand as a crucial link in Harvey's approach: his contention that the earlier proceedings against the prisoners would in no way sustain the present ones, so that the latter must be judged in themselves. Coke's words (Bulstrode) were: "... their bill is not discharged by that which we have done before, we commanded you to attend the archbishop, but did not discharge you. As to this manner of proceeding, I do doubt of it, but no new libel is to be." Again, I do not think "bill" and "libel" are meant literally. The point must be the opposite of Harvey's: Whether or not the Commission's present treatment of the prisoners could be questioned (and Coke *did* "doubt of it"), it was not *de novo*. The earlier history of the case (including this Court's step of granting bail and requiring "submission," instead of discharging the prisoners free and clear) furnished a "ground" for asking them about their willingness to conform, even if the propriety of the question was subject to doubt. The prisoners were not in the same boat as a man simply hauled off the street and asked about his readiness to conform, without any direct or implied accusation of a past crime.

Justice Dodderidge then delivered a stronger opinion against the prisoners. Coke trumped Harvey's highest card (the theory that the prisoners were attacked *de novo* without anything like an accusation), but reserved

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a little room to debate whether the Commission ought to have demanded what it did, instead of some other form of "submission." Dodderidge dismissed all doubt (perhaps a further hint that his position on the first *Habeas corpus* as well was more pro-Commission than Coke's.) Dodderidge's words according to Bulstrode were: "Whether there was a libel or not, it belongs not unto us to determine this; they are there to deal with heresies and schisms by the statute; and this is a schism, this is also the manner of their proceedings, and we are not to take notice, whether they proceed there, in this case by libell, or not; but we do know this, that the matter, for which they were committed, is a schisme."

Although this reads like an answer to a literal complaint that there was no libel -- as if it said merely, "We cannot prevent them from proceeding *ex officio*" -- I again think the intent must be broader. I should take the opinion as dismissing all objections to the present proceedings, along the following lines: "The 'groundlessness' of the question asked would be no objection even if it were not 'grounded' on the 'undischarged' earlier proceedings against these men. The Commission has every right to drag people in and ask them about their willingness to conform. The absence of any stated accusation of a specific crime, analogous to a libel, is no objection. We have no authority to say that the High Commission must produce a 'stated accusation' before it proceeds in any form. We do not even have authority to insist that the accusation of a specific past crime be implied in the questions asked. All we can consider is whether the Commission is within its jurisdiction (plus, no doubt, what we considered on the first round of this case -- whether the investigation exposes to temporal detriment and whether that is an objection, whether there are any positive rules, such as a duty to furnish articles in advance of *sworn* examination, binding on the Commission.) Here, the Commission is clearly proceeding to detect and punish schism, which is manifestly within its jurisdiction. If such language is useful, then to ask people, in effect, whether they intend to commit schism is as much as to 'accuse' them of that crime and simultaneously to ascertain whether they will dispute the accusation. Their non-response may, so far as we have the authority to concern ourselves, be taken as the equivalent to saying 'No, we will not conform.' (It is equally manifest that *only* schism is in question -- i.e., that no temporal detriment will come upon the prisoners, assuming that the Commission may not expose

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men thereto. Similarly, sworn interrogation is not involved, so that no duty to furnish articles before demanding an open-ended oath comes into play, assuming such a duty exists.)"

The Court, speaking through Coke, then expressed concurrence in Dodderidge's opinion and remanded the prisoners. This outcome seems to me quite unsurprising when the whole case is seen in perspective. At most, Coke had voiced slight misgivings at the Commission's latest treatment of the prisoners -- perhaps no more than "I don't quite like it, but hardly see that we have any legal power to interfere." When Dodderidge set down the reasons against interference fairly strongly, Coke was probably only confirmed in the view of the case which he already saw as next to inevitable. His final speech for the Court essentially restates the projection from Dodderidge I give above, with emphasis on what I put in parentheses. The final impression Coke sought to leave was of the difference between this *Habeas corpus* and the earlier one. Here was plain schism; whether or not one much liked the Commission's ways, the matter fell solely in its jurisdiction, and the manner of a "foreign" court's proceedings is not controllable without special reason. Earlier, there was no simple lack of jurisdiction, but there *was* special reason for interference -- preeminently the precedent-based temporal-detriment doctrine, secondly the statute-grounded duty to furnish articles in advance of sworn interrogation, and (for anyone who doubted those two points more than Coke did) the Commission's want of power to imprison perpetually for non-cooperation.

In the end, the prisoners were required to incriminate themselves in the perfectly meaningful sense which Serjeant Harvey was probably trying to articulate: though without an oath, they were made to accuse and convict themselves of schism; they were given no choice except lying, for unwillingness to say whether they were schismatics was as much an admission that they were as saying so directly; they were put in that choiceless position without even a clearly implied assertion that they acted schismatically before being called in question. One could argue that English law had a comprehensive policy against forced self-incrimination of any sort, or at least of so blatant a sort. From decisions restraining ecclesiastical inquisition and from opinions such as Coke's view that articles must be delivered before demanding the *ex officio* oath, one could project such a general rule. Burrowes *et al.*, however, stands prominently against any

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such picture of the law. The case is ambiguous authority for (a) the rule that even the High Commission may not force people to supply confessional evidence capable of being used against them at common law and (b) the rule that furnishing articles is a categorical duty even for the Commission. It is solid authority for the general proposition that the Commission may not imprison perpetually for refusal to testify, with the qualification that the common law courts' discretion to cut imprisonment short is also discretion to put pressure on recalcitrant parties to cooperate even after they are adjudged to have endured the direct pressure of jail long enough. In the end, the case is also firm authority for the common law's refusal to put a comprehensive rein on self-incriminating interrogation. The Puritan prisoners (whose naughtiness Coke's final speech reemphasized) and political pressure to give the Commission scope to deal with such offenders help account for the case's course. But the result on the second *Habeas corpus* also has an excellent claim to be mere good law in its time. For there is little basis for saying that a "privilege against self-incrimination" in any general sense was ever enforced on ecclesiastical courts. The closest analogy for the problem raised by the second *Habeas corpus* would be sworn examination unambiguously for schism alone, articles having been furnished before the oath was administered. I would expect no interference with that proceeding, unless when imprisonment for non-cooperation threatened to become perpetual. Though an argument *contra* is possible, it seems to me that the principle implied there -- "Hands off, with a few qualifications, when the matter is purely ecclesiastical" -- is reasonably extendable to the situation presented by the second *Habeas corpus*: a procedure of very dubious fairness, certainly one intended to "make criminals" on the interrogees' own word (or silence) alone, but reducible to the *infra vires* function of catching schismatics by such means as ecclesiastical law itself would tolerate.

While Burrowes *et al.* was pending, the King's Bench decided one case touching very lightly on the High Commission's power to examine. In Codde's Case²⁵ the return on a *Habeas corpus* said that the prisoner

25 M. 13 Jac. K.B. 1 Rolle. 245. (For the point in question here. Other reports on the main body of the case are discussed later in the study.)

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refused to respond on articles "drawn in form of law" concerning opprobrious words he had allegedly spoken about the Commission. The prisoner was immediately bailed and discharged outright the next term, mainly because the return did not specify the words. (The Court thought that some forms of opprobrium directed at the Commission were only punishable at common law.) That is to say, the case does not test the extent of the Commission's examining power, for no one claimed that prisoners could be held for refusing examination unless it appeared on the face of the return that the subject of the examination was *infra vires*. I mention the case here only because Coke, speaking for the Court, made something of a separate point of the return's failure to specify the articles (as distinct from the opprobrious words.) It looks to me as if the Commission in this case was trying to be careful on one score -- by making it appear that articles had been furnished to the examinee "in form of law." It hoped to get away with saying in effect, "Articles have been duly furnished; the subject is opprobrious words about us; i.e., the matter is *infra vires*; therefore we are entitled to imprison the examinee for non-cooperation." As it turned out, the Court did not think that jurisdiction was shown clearly enough without further specification of the words. But Coke *also* said that the reference to the articles was too vague; *they* needed to be further specified in order to assure the Court that nothing in them concerned common law matters. ("Common law matters" could presumably include subjects where there was risk of temporal detriment, as well as ones exclusively within common law jurisdiction.) The Chief Justice's manner of speaking perhaps suggests that he would have taken exception to the return even if he had not thought that the Commission's jurisdiction over the subject needed to be made out more clearly. In other words, one could argue from Codde's Case that the Commission must not only deliver articles to the examinee, but also spell them out for the benefit of the common law judges if the examinee's commitment is challenged by *Habeas corpus*. It should not be presumed that the articles are unobjectionable in detail so long as the general subject is proper to the Commission, and so long as the prisoner relies on the *Habeas corpus* instead of seeking a Prohibition on the basis of specified objections to the articles. Such a ruling would amount to a fairly important procedural clarification in connection with the Commission's examining power.

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From Charles I's reign, I have found no straightforward self-incrimination cases involving the High Commission. What should be inferred from the absence of cases I am not sure; perhaps one should be careful about inferring too much. The precedents were strong for granting Prohibitions and releasing prisoners when interrogation threatened temporal detriment; they were not strong in "ecclesiastical discipline" cases. It is perhaps as likely that the Commission learned its bounds and watched its step as that gloom about the courts' willingness to protect the subject against self-incrimination in even the clearest cases pervaded the community. The closest approach to a Caroline self-incrimination case arose in the Common Pleas upon Prohibition, and little was made of the element of self-incrimination in resolving it. In this case,²⁶ Miller complained that he had been summoned before the High Commission without any private accuser and without any notice of the charge as of the time he was summoned -- merely to answer to whatever he should be asked. He claimed that he had a good excuse for not attending (because he was employed as the King's collector), but that he had nevertheless been fined £40. By his admission, however, he was not left in the dark as to what he was to be examined about, for his surmise recited the articles preferred against him, and his counsel argued for Prohibition on the ground that the regular ecclesiastical courts, rather than the High Commission, should have jurisdiction. (The charges amounted to petty forms of Puritan activity -- making life difficult for a "conformable" minister, participating in unofficial public fasts, taking up unauthorized collections for the Palantine, receiving communion sitting, saying that it would be to a Mr. Angel's credit as a minister if he would not conform. The contention was plainly that these offenses against the Laudian idea of good behavior were not "enormous" enough -- not in the heresy-schism-etc. class -- to belong to the High Commission.) I mention the case here only because the surmise included language presumably intended to raise a question about the Commission's procedure by the way, should the main contention fail to impress the judges -- that Miller had been summoned without any specification of charges (as it were, threatened with a "fishing expedition" on

26 T. 5 Car. C.P. Littleton. 274.

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paper, even though it was not actually proposed to subject him to one) and fined for non-appearance in response to such a summons.

Miller got nowhere. Chief Justice Richardson seems to have had a little doubt about the fine in principle, but held that nothing could be done about it by Prohibition because it had already been estreated into the Exchequer. For the matter, Richardson held that the offenses in question were quite "enormous" enough for the Commission. Justices Hutton and Harvey agreed, and Prohibition was denied. Except for a remark by Harvey cutting that way, nothing was said about the indefinite summons, nor should have been in such a "religious discipline" case, once the "enormity" question was resolved in favor of the High Commission.

But perhaps the most interesting note in the case is Harvey's remark: "I once moved such a motion, which was on the statute of 1 Eliz. c. 2, for an offense against the Common Prayer Book, for which penalty is ordained, and yet I could never have a Prohibition." That sounds like Burrowes *et al.* misremembered a few years later. If the prisoners in that case brought a Prohibition as well as a *Habeas corpus*, there is no other sign of it. As far as we know, Harvey was only involved as counsel in the last phase of the case, at which time the temporal-detriment doctrine -- formerly the strongest substantive ingredient in the prisoners' relative success -- was irrelevant, or at least not invoked. After a few years, Harvey remembered his failure in Burrowes *et al.*, and remembered that exposure to temporal detriment had given the prisoners a much better claim than Miller could begin to make out here. If those adversaries of the High Commission failed, so surely must Miller. Such are the uses of legal memory.

ENDNOTES

FN 14. P. - T. 5 Jac. K.B. Add. 25,206, ff.55 and 59b; Harl. 1631, ff.353b and 358b. My account of the case is essentially based on these two nearly identical reports. They have not been previously used. Earlier discussion of Maunsell and Ladd has been based on a printed version of Fuller's argument and the indirect evidence of Fuller's Case, whence nothing is to be learned about the judges' opinions.

The printed document is *The Argument of Master Nicholas Fuller in the Case of Thomas Lad, and Richard Maunsell, his Clients. Wherein it is plainly proved, that the Ecclesiastical Commissioners have no power, by vertue of their Commission, to Imprison, to put to the Oath Ex Officio, or to fine any of his Majesties Subjects* (1607). The sub-title is enough to reveal what the printer's preface makes manifest: the argument was published (abroad) as a pamphlet in the Puritan cause: "[By Fuller's argument] the unjust usurpation of the Prelates over his Majesties Subjects is notably

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discovered, and the lawes and liberties of the land (the high Inheritance of the subjects) are worthily stood for and maintained, maugre the malice of the Prelates; who as I heare studie, and strive, even with might and maine, to beare downe all before them, to the ruine of that sometime-flourishing Church and Commonwealth."

However, the motive for publication need not impair the document's accuracy as an account of what Fuller said. It accords perfectly well with the law reports in general substance. Being more spelled-out -- for the law reports, though good, have the note-taker's brevity characteristic of all mere, unedited reports -- it gives a smoother statement of some of Fuller's positions and contributes a few points which do not appear from the reports. There are, however, ways in which a certain misleadingness is built into the document. There is no telling whether the argument as printed was written by Fuller himself or by someone who heard him (possibly with his collaboration). The printer goes through the sort of rigamarole commonly used as camouflage for subversive publications: He pretends to have got the argument from an anonymous "gentleman," with a covering letter (reproduced) professing ignorance of the subject and inviting the printer to peruse it and let the sender know his opinion. The printer, of course, found the argument so important that he could not resist making it available to the public -- "altogether [of course] without the privitie either of the Gentleman himselfe (whose bandes I would be loth any maner of way to increase) or of the silenced Ministers, who have felt the weight of these lawles proceedings too too long" The reference to the gentleman's "bandes" might be a hint that he was Fuller himself, who was being persecuted by the High Commission; the camouflage in such cases was hardly expected to fool anyone -- half literary mannerism, half a matter of not handing evidence to the authorities.

All that matters to us is that the argument is in the form of a single written-out speech. Fuller may perfectly well have written his highly deliberate arguments in advance of giving them. We do, however, know from the reports that Fuller did not give one speech. He spoke on *two* occasions, and, on both of them, he shared the floor with his colleague Finch. The published argument clearly combines the remarks made by Fuller on the two occasions and probably incorporates some of Finch's. There is, therefore, at least a mechanical sense in which the printed argument is retouched. Again, the essence of what Fuller had to say is not distorted, but the emphasis or tone may be to a degree. The published version serves its function as pamphlet by emphasizing the most general arguments against the High Commission's proceedings and pretenses. Fuller undoubtedly made such arguments in court. What may be questioned is whether he went on at such length or devoted so large a share of his time to some of them as the written-up speech would suggest. The reports are too shorthand to resolve that. What they do is document the context: Fuller was trying to persuade judges whose receptivity to the most sweeping anti-Commission positions was unlikely to compare to that of readers of Puritan pamphlets, in the event, a Court narrowly divided against him and a hostile strong Chief Justice. It is significant that on the second hearing of the case, Fuller narrowed his sights and concentrated on (a) the special reason for Ladd's refusal to testify (which the printed version brings out as a fact in stating the case, but does not bring out "dramatically" -- as a circumstance urged by a lawyer who was not about to win his case on general arguments); (b) the straightforward construction on 1 Eliz., which one undecided Justice had criticized Fuller for evading in favor of more sweeping points (in the printed version, one part of the argument among several -- "dramatically," it was a matter of getting down to what at least a majority of the Court considered the only thing worth debating). It is significant that one of Fuller's arguments from special circumstances (the length of time the prisoners had already been held) makes no appearance in the printed version: It involved using the statute *De heretico comburendo* to prove that unconvicted persons could not be held for longer than three months; the general line developed in the printed version called for disputing the legitimacy of

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the Popish statute so fundamentally that an argument based on conceding its relevance might seem anomalous -- as well as too complex for a lay audience. Furthermore, the non-appearance in the law reports of some points made in the printed document may signify more than the brevity of the former source. For example, in the printed version, Fuller makes some "Whiggish" general remarks about legal limits on the royal prerogative. He refers to his own famous argument on the bounds of the prerogative in *Darcy v. Allen* and the judges' agreement with his contentions in that case. These remarks are relevant for one line which Fuller was undoubtedly pursuing (that the royal patent constituting the High Commission had no force except as it stayed within the bounds of the King's statutory authority to create such a court and should, like other royal acts, be restrained by the judges to such channels as the law permitted the King's discretion to operate in). However, they are to a degree gratuitous: one did not have to persuade the Court that the law restrained the King in general to persuade it that the words and intent of 1 Eliz. confined the powers he could give the High Commission. One was not likely to do one's client any good before Sir John Popham's court by disputing about the prerogative more than was necessary. If I were Fuller, I would not remind the judges of *Darcy v. Allen* -- a case in which they had been constrained to hold against the prerogative to their considerable embarrassment (Cf. Vol. I, II-B-1, Note 8) in order to embolden them to discharge two maltreated prisoners. In short, there is reason to doubt whether some things in the printed argument, but of which there is no sign in the reports, were actually said in the courtroom.

In sum, the printed argument corresponds closely enough to Fuller's "live" arguments; the reports, like all reports, can be misleading too; they do not tell all; they require construction to get at what counsel were pressing and how their pressure on the judges worked. I shall occasionally use the printed document in the text for supplementary purposes. The only real point to be made is that Fuller, to his credit as the able barrister he was, worked for his clients with everything he had; he did not *only* make a great general attack on the High Commission such as the printed document comprises; to his credit as an able politician, he used both the Bar and the press to fight for justice as he understood it.

FN 15. There was a statute (35 Eliz., c.1) which in a sense did put participants in conventicles in temporal danger. Nothing was said in the discussion of Maunsell and Ladd to suggest that anyone was worried about that act, or the interrogation's tendency to expose the prisoners to it. Three considerations may explain this: (a) The peculiar system instituted by 35 Eliz. The act did not impose a pecuniary penalty on conventiclers, nor simple liability to determinate temporal punishment. It provided that persons convicted be imprisoned without bail until they should make public "submission" (in effect, apologize and promise to behave in the future) by a form prescribed in the act. Further, if one convicted refused to make such "submission" within three months of conviction, he was required to go into exile (i.e., to go through the legal ceremony of "abjuring the realm" and depart accordingly). If he refused to do that, or to stay away once he had abjured and departed, he became a felon. Abjuration under the act entailed outright forfeiture of goods, and of real property for life, though not "corruption of blood." The act is not explicit as to authority to proceed against conventiclers and convict them, but it clearly contemplates that the temporal courts should have such power, as they had in the related case of Popish recusants. It does not expressly save the jurisdiction of ecclesiastical courts. Like other statutes on religious conformity, it should certainly not be taken as *depriving* ecclesiastical courts of authority, but there is no affirmation of it whence those courts' freedom to disregard the temporal

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consequences of their procedures could be deduced. We may therefore ask: Is there any difference between forcing a man to accuse or convict himself so as to expose him to a penalty-stature and forcing him to do so when the more serious consequences of imprisonment and abjurement might follow? The obvious difference is that the penalty represents a certain loss, whereas a convict under 35 Eliz. was "handed the keys of the jail." In one case, if ecclesiastical courts are permitted to use compulsory sworn examination, a man can be forced to supply a confession which will make it very easy for a prosecutor to exact the penalty. In the other case, if an ecclesiastical court obtains a confession which causes or assists the process of 35 Eliz. to take effect, no certain harm comes upon the victim. He has only to make the act of "submission" (and, by another provision, to stick to the good behavior he promises, for a relapse was to be counted as cancelling the "submission") to escape all detriment whatever. Even if he refuses, he is given the option of leaving the country. Though that choice involved forfeiture of whatever property a man could not contrive to make off with, the loss can perhaps be regarded as a kind of price for lenient treatment, for *not* being punished in spite of a deliberate unwillingness to agree to obey the law or to do so after agreeing, conduct for which any subject perhaps deserves punishment. It is, of course, arguable that my distinction is unimportant. I make it only by way of saying that there might have been problems about bringing a forced confession to a conventicle within the "temporal detriment" doctrine.

(b) 35 Eliz. as I read it would take effect only if one failed to attend the services of the Established Church *and* took part in conventicles. According to the printed version of Fuller's argument, Ladd participated in what was probably technically a conventicle, but he regularly attended church. In fact, the "conventicle" was nothing but an after-church discussion group in which the minister took part. These circumstances are probably spelled out in the printed argument by way of showing how innocuous the activities for which Ladd was being persecuted were. If they are true, however, they would mean that Ladd was in no danger of 35 Eliz., that the High Commission was proceeding for a lesser, purely ecclesiastical form of conventicle-keeping. His counsel would not want to rely on exposure to the statute when investigation of the real facts would show that their client was not within it.

(c) According to the printed argument, Maunsell (who, unlike Ladd, was a clergyman) was really being proceeded against for involvement in petitioning Parliament (no doubt in Puritan causes. I see no sign that this fact, if true, was before the Court, that the return on *Habeas corpus* said anything except that both prisoners refused to testify about a conventicle. Again, however, if there was more, or something a little different, in the investigation of Maunsell than conventicle-keeping, there is all the more reason to doubt whether he was in danger of 35 Eliz. We are not told that he was a beneficed clergyman, only that he was a preacher. But if he was practicing his trade in anything like a legal manner, it is unlikely that he was staying away from church. If he was "wanted" in part for political activity of a sort unacceptable to the hierarchy (which, of course, does not preclude his being asked about conventicles too) it is all the more likely that he was a benefice-holder, curate, or lecturer operating in church, whatever else he was doing on the side. For what were the prelates more apt to dislike than a clergyman in technically good standing engaging in anti-Church politics? I suspect that the printed argument emphasizes the petitions to Parliament by way of saying "This man is persecuted for exercising the mere rights of a subject" -- morally an excellent point, but it is probably not so clear that the ecclesiastical courts lacked authority to discipline one of their own for activity of that sort. Be that as it may, the point here is that clues from the printed argument help eliminate the possibility that a "temporal detriment" contention based on 35 Eliz. was a serious missed opportunity, in Ladd's case or Maunsell's.

