

THE WRIT OF PROHIBITION:
Jurisdiction in Early Modern English Law

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Volume III:
THE RANGE OF
JURISDICTION-CONTROLLING PROHIBITIONS

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INTRODUCTION

In the preceding volumes of this study, I have examined: (a) procedural problems in Prohibition cases and (b) common law control over the conduct of "foreign" courts, where the conduct of such courts is expressly complained of and their jurisdiction is implicitly admitted. In this volume, I turn to the main body of Prohibition law -- cases in which jurisdiction-control, rather than conduct-control, is the essential theme. Jurisdiction-control is not a simple category, however. In the first volumes, I distinguished the following functions under that general rubric: (1) Preventing a "foreign" court from entertaining a suit which ought to have been brought at common law. (2) Preventing one non-common law court from entertaining a suit appropriate to another non-common law court, (3) Preventing a "foreign" court from entertaining a claim which no court should listen to -- from extending the "ambit of remediable wrong." (4) Preventing non-common law courts from determining certain issues arising in cases admitted to be originally within their jurisdiction. Control of the substantive law applied and procedures employed in ecclesiastical courts -- what I call control over their conduct -- is only one subdivision of this final category. It is perhaps the most striking and jurisprudentially interesting, but there are others, themselves amenable to distinction. For example, one can distinguish stopping a non-common law suit to insure determination by common law judges of an issue appropriate to their expertise; that can be contrasted to stopping one in order to make sure that facts are determined by jury when that is especially appropriate -- notably when a customary usage is in question (though customs also call for a common law judicial role, whose rationale is perhaps rather exclusive legal competence than special expertise, for if a custom is found or admitted as a fact its reasonableness must still be certified judicially.) Both of these operations differ from stopping a non-common lawsuit merely because its determination might *de facto* prejudice common law determination of a closely related matter. Stopping one to enforce a statute as construed by the common law court, on the theory that interpretation of statutes is a common law monopoly, is something else again. To a degree, these distinctions enter into the way this and ensuing volumes are arranged, but my organization also employs subject matter categories overlapping the analytic ones. (For the principles of organization, the reader is referred to the General Introduction at the beginning of Volume I.)

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Volume III (Part III of the study) deals with Classes 1-3 above, not with Class 4. It by no means includes all instances of these classes. The most numerous and important instances are taken up under subject matter categories. For example, Prohibition cases involving the Admiralty are dominated by Type 1 -- preventing a "foreign" court from doing what the common law could, or arguably could, do itself. Type 3 Prohibitions are predominant in cases involving courts of equity,¹ and some cases on defamation raise the question whether ecclesiastical courts may extend the scope of defamatory utterance as far as they like so long as they do not duplicate common law remedies. (Other defamation cases conform to Type 1 -- the question is whether a common law remedy is available and an ecclesiastical one accordingly an encroachment on common law territory.) The minor class, Type 2 -- protecting non-common law courts against each other -- is dealt with here, save for aspects entirely dependent on statute (for which see Part IV, in the Addenda to the study -- forthcoming but still incomplete). The point of Vol. III is to illustrate the range of cases within the large class of Prohibitions sought or granted because the non-common law suit should not have been brought at all. All such cases contrast with Type 4, where an originally proper non-common law suit should be stopped because of something arising in it. Unclassifiably individual cases and a few minor categories are used to illustrate the range, because they are uncomplicated by the special flavor of large subject matter categories. In the latter, the interests typically concerned and the need to work out a general judicial policy for a practically important area of the law can cut across analytic categories.

¹ For most of the substance of which, see Appendix at the end of this Volume.

I.
**Preventing Direct Encroachment on the Common Law:
The Paradigmatic Prohibition.**

A.
Introductory

In a sense, the least complicated and least dubitable proposition of Prohibition law is this: If the plaintiff in a "foreign" court could have pursued substantially the same remedy at common law, he ought to have done so. Accordingly, the "foreign" court should be prohibited from entertaining his suit.

It will at once be apparent that applying this principle is not simple. In the first place, whether a common law remedy was available could be open to debate. Secondly, while it is necessary to say "*substantially* the same remedy" in stating the rule, the modifier raises obvious problems. The injunctive relief provided by courts of equity and in effect by ecclesiastical courts (the former backed by temporal sanctions, the latter by spiritual) is not exactly the same remedy as damages and other common law judgments. "A given complaint is remediable at common law and should not be entertained by an ecclesiastical court" means "The common law provides *a* remedy; the remedy is adequate; a plaintiff should not take business away from the common law merely because he would prefer a different remedy or different forum; he should not be allowed to subject the defendant to 'foreign' procedures and to the risk of double vexation because of such a mere preference; 'substantially' the common law protects the interest of whose infringement this plaintiff complains." A classic problem of equity -- When should a party who could recover damages at common law be awarded specific performance of a *de jure* or contractual duty owing to the inadequacy of compensation? -- grows in the crack between *some* common law remedy and one substantially equivalent to that obtainable elsewhere.

Thirdly, the rule that an adequate common law remedy is preemptive leads to the problem of negative instances. If the common law will give damages on such and such a contract, and there is no reason to consider damages an inadequate remedy, then non-common law courts should be prohibited from entertaining a suit on the contract. But suppose the common law either would not or might not (subject to advisement in a

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problematic case) give any relief for breach of a given undertaking. Should "foreign" courts be prohibited from so much as considering whether to enforce that contract? Should the common law be regarded as having preeminent jurisdiction over the *field* of contract -- the right and duty to decide which undertakings should be enforced and which not, whether by the common law itself or by other courts (as opposed to the exclusive right to enforce those promises which it recognizes as actionable at common law?) If contracts should be regarded as a common law field -- if anyone complaining of breach of contract should be confined either to the common law remedy itself or to a "foreign" remedy on a contract intrinsically actionable at common law -- what about other areas? Take defamation: Assuming no common law action lies for "scoundrel" (as a mere everyday insult, too vague to be taken as defamatory), ought ecclesiastical courts to be prevented from treating that word as slanderous? If so, should one speak of the field of defamation as preeminently within common law jurisdiction, though not entirely covered by common law remedies? Or would it be sounder to avoid talking about "fields" especially appropriate to the common law and stick to the quadripartite schema above. I.e., would it be better to say that Prohibition lies when the common law positively furnishes a substantially adequate remedy on given facts and, beyond that, simply when "foreign" courts in *any* field threaten to stretch the "ambit of remediable wrong" too far? The choice of theories might make a practical difference. E.g., if the field of contract is thought of as preempted by the common law, it will be relatively easy to prohibit, say, suits on contracts whose considerateness fails to meet common law standards. Even though a reasonable case can be made for enforcing some promises that are not fully or literally considerate, the common law will probably regard itself as the only competent judge -- i.e., as the forum in which, if there is to be any relaxation of the consideration requirement, proposals for such relaxation must be fought out. If, on the other hand, the common law's authority to prohibit suits on inconsiderate promises is only an instance of its authority to check unfair, oppressive, or fundamentally "un-English" extensions of liability, one would probably expect the judges to listen to reasonable arguments against prohibiting in exceptional cases. It would be easier to say, "We would not give relief on this promise (cf. on these purportedly slanderous words) for want of consideration in our sense, but since allowing relief in the circumstances hardly offends against reason and the policy of the law, we will not stop a court of equity from giving relief if it sees fit (cf. punishing this particular defamatory utterance, since doing so would not

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come to attaching liability to a trivial insult or ridiculously inhibiting people from expressing themselves -- we do not want to impose an approach to defamation on other courts, only to prevent oppressive extensions)."

Beyond these problems about the simplest kind of Prohibition, there is a more basic question: Is it unambiguously legitimate? Is it *true* that "foreign " courts should be prohibited if the common law supplies an adequate remedy in the same circumstances? Is that really the case in which the propriety of prohibiting is most beyond doubt? Of course these questions are somewhat artificial. On intuitive grounds alone, it seems evident enough that questions of principle are easier to raise about other types of Prohibition: Does the common law have interest and standing to tell one ecclesiastical court to stay out of another's territory, instead of leaving it to the Church to thrash out its own jurisdictional conflicts? What theory makes the common law courts judges of the "ambit of remediable wrong", to the exclusion of other courts under the same Crown and Parliament? If a suit belongs in an extra-common law court in the first instance, should that court not be allowed to determine any issues that arise in the suit, at least if it shows no sign of mishandling any issue for which the common law furnishes a governing standard, or in which it has a specifiable interest? If jurisdiction over the "principal" ever carries the power to settle the "incidents", by what criterion can it be said not to carry that power in some cases? By contrast, protecting the common law's monopoly seems, logically and historically, the common law's clear right. The inconvenience of conflicting rules when several courts are competent to act upon the same complaint; the impropriety of giving litigants a chance to speculate on which of several concurrent courts they will fare best in; the presumption that Englishmen prefer trial by jury and common law procedures generally, that indeed they have a birthright in them, of which they should not be deprived without very good reason; the historical fact that Prohibitions originated in reaction to ecclesiastical claims over areas which the common law staked out for itself in the days of an autonomous international Church: -- all these considerations support "the simplest kind of Prohibition."

There are still a few complications. We have seen in Vol. I, for example, that Prohibitions to insure the common law's handling of suits which it was capable of handling were not always the most privileged Prohibitions in the procedural sense. Specifically, parties who sued in the Admiralty on contracts remediable at common law were denied Prohibitions if they acquiesced in Admiralty jurisdiction until sentence went against them.

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Ecclesiastical litigants were much less likely to be foreclosed from a Prohibition by failure to seek one promptly, even though the end of the Prohibition was often less straightforward than stopping a suit whose effect was to deprive the common law of business. The good practical reasons for this discrimination do not detract from the present point: Persons who manifestly "ought" to have sued at common law were allowed to get away with suing in the Admiralty if the adversary failed to object in time; persons who were perfectly entitled to sue in other non-common law courts were often prohibited on this ground or that in spite of the adversary's seeming acquiescence. The public interest in the "simplest kind of Prohibition" was not consistently regarded as stronger than the public interest in more questionable kinds.

Secondly, there are instances in which concurrent jurisdiction was accepted. Some statutory offenses punishable at common law were also liable to ecclesiastical prosecution. Admittedly, the criminal and statutory character of such instances makes them a special case. Parliament obviously could take a *quondam* ecclesiastical offense and make it a common law misdemeanor, while, by clear language or constructed intent, preserving ecclesiastical authority. In the absence of clear counter-indications, there is little reason to suppose that Parliament would ever intend to cut the ecclesiastical system out of low-level criminal law enforcement in areas where it had customarily engaged therein. For when Parliament singles out an activity as deserving of temporal punishment, it presumably wants to see that activity suppressed as vigorously as possible, by whatever officials are willing to take the initiative or in whatever court private complaints find their way to. (The argument loses force if one imagines an ecclesiastical crime turned into a felony, for then the sanction becomes so grave that it would be hard to deny suspects the protection implicit in exclusively common law procedure. Ecclesiastical proceedings, even without incriminating interrogation, would call attention to suspected offenders and turn up evidence against them, thereby -- in the absence of guarantees against double vexation -- increasing the chance of common law conviction. In practice, the overlap in criminal or semi-criminal -- "penal" -- law was at a relatively petty level.) For present purposes, the only point to be made is that some concurrency existed in the criminal area and was not resisted by every resource (as by construing temporalizing statutes against the preservation of ecclesiastical powers if at all possible.) "If the common law has jurisdiction, no 'foreign' court has it" was not an absolutely embedded principle.

Though concurrency mainly obtained in a small area of criminal law, there was some spill-over to civil relationships. For one thing, defamation was linked to crime. Slandering

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someone as a murderer, say, was the clearest case of actionable defamation at common law; analogously, to impute a pure ecclesiastical offense -- say by calling someone a heretic -- was indisputably ecclesiastical defamation. Therefore, if Parliament temporalized a spiritual misdemeanor, it ought at least arguably to be taken to have temporalized defamatory imputation of the offense also. But if ecclesiastical jurisdiction over the crime was preserved should not ecclesiastical authority over the defamation not be preserved as well? For another example, the Church's right to tithes was reinforced by statute so that persons who failed to pay their tithes were in some circumstances exposed to common law actions. There was never any question, however, but that the traditional ecclesiastical jurisdiction over claims to tithes survived concurrently. (See Sub-sect. F below for one way in which statutory intervention in tithe law probably created concurrent civil remedies.) Again, exclusiveness was not absolutely characteristic of the English system.

Another complicating factor is the criminality or tortiousness of violating the common law's territory under some conditions. The ancient and grave statutory crime of *Praemunire* consisted basically in using the ecclesiastical apparatus so as to derogate from the jurisdiction of the King and the common law. The *Praemunire* statutes were notoriously vague; it is extremely hard to say textually just what specific acts amounted to the offense and what acts of a similar nature failed to. At any rate, some of the acts of suing, or entertaining suits, which Prohibitions were used to cut off would seem to be within the range of *Praemunire*. In addition to the crime of *Praemunire*, opportunities existed for parties proceeded against in improper "foreign" courts to recover damages and penalties against their adversaries and the non-common law tribunal. Several statutes allowed such recovery, and a common law right to an Action on the Case for wrongful vexation was recognized in principle.

Two questions arise from the existence of *Praemunire* and of penal and civil remedies against suing in the wrong court. (a) Can any color be given to the thesis that Prohibition should be an alternative to other remedies? Assume that A has either incurred *Praemunire* or committed a tort or tort-misdemeanor by suing B in an ecclesiastical court. Is there any possibility of arguing that B should not be able to prohibit A's suit, because B is adequately protected by other means -- he can help himself by suing for damages or a penalty, or the serious threat of *Praemunire* is sufficient deterrent to manifestly improper suits? (Cf. the following realistic case: Parishioner promises to give, and Parson to accept, a sum of money

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in lieu of this year's tithes. Parson sues for tithes in kind in violation of the agreement. It was argued -- and the argument was usually considered good -- that since an action for breach of contract at common law will lie against Parson, his suit should not be prohibited. Prohibition would amount to a redundant remedy and to specific enforcement of a contract on which the common law allows damages). In general, with respect to *Praemunire*: When the law makes an act a serious crime, ought it in effect to enjoin the criminal from continuing on his criminal course? With reference to tort remedies: Is it appropriate to treat wrongs as both compensable and stoppable? One way of answering these questions would lead to the paradoxical position that the most unexceptionable-sounding kind of Prohibition is in fact the most questionable. For, obviously, criminal and tort remedies can only apply to one who sues in an improper court in the first instance -- one who ought to have started a common law suit if he wanted to sue at all. One who brings a suit in an ecclesiastical court because that is the only place to start a suit of a given type clearly does no wrong, yet his suit may be prohibitible on several grounds. Should the Prohibition perhaps be confined to originally non-wrongful suits?

(b) Granting that criminal and tort suits can only apply to initially misplaced suits, do they cover all instances thereof? Or is there a line between serious or inexcusable offenses -- especially those worthy of the pains of *Praemunire* -- and other instances of encroachment on the common law? Let us take it that if A.'s ecclesiastical suit amounts to *Praemunire* or actionable wrong, then *a fortiori* his suit is prohibitible (the opposite of worrying about whether the suit's criminality or tortiousness might be a bar to Prohibition.) Is the "simplest kind of Prohibition" coterminous with the scope of *Praemunire* or with that of wrongful litigative vexation? Or are some suits prohibitible on the ground that they ought to have been brought at common law, despite the fact that suing elsewhere is not a crime or a tort?

The point of these questions is largely taxonomic, but legal implications may be wrapped up in them. E.g., if every suit initially misbrought in a "foreign" court is both prohibitible and an offense against the *Praemunire* statutes, would there ever be any justification for mitigating the rigor of Prohibitions? I.e.: If A. has done something so bad that he ought to suffer the ruinous penalties of *Praemunire*, B. should probably not be held to have foreclosed himself from prohibiting A.'s suit, by acquiescence in the jurisdiction or other laches. If, on the other hand, only rare and blatant encroachments on the common law

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come to *Praemunire*, there would seem to be less objection to pragmatic discretionary treatment of an unclean party's right to a Prohibition.

For another possibility, if suing in an ecclesiastical court when one should have sued at common law is always prohibitible and always *Praemunire*, it may be tempting to argue that liability to *Praemunire* is the test for open-and-shut prohibitability. The suit is one of those evil incursions on the "royal dignity" which the Prohibition is manifestly designed to prevent. But if it is not *Praemunire*, then prohibitability becomes a more open question. Can any suit which is not initially misplaced, and hence not *Praemunire*, be regarded as categorically prohibitible under any set of conditions -- as opposed to prohibitible by judicial discretion which need not be exercised with complete consistency? Should the courts perhaps rather lean against prohibiting suits -- say on account of collateral issues arising, or the "foreign" court's disallowance of a plea -- which do not wear that stigma of wrongfulness whose surest mark is danger of *Praemunire*? If, on the other hand, suits wrongful enough to incur *Praemunire* (or perhaps even civil actionability) are reduced to a small class of enormities, then all ordinary Prohibitions will tend to seem on the same level. As it were: "Sometimes suits are indisputably prohibitible because they ought to have been brought at common law, but comparatively few even of those are really wrongful. The Prohibition is not a handmaid of *Praemunire*, but a routine, essentially civil, mode of regulating a mixed legal system. Sometimes Prohibitions may be more disputable than in those paradigm cases where the suit ought to have been brought at common law, but the difference is not that between the wrongful and the non-wrongful. When the question is only 'To regulate or not to regulate?' -- not 'Is this jurisdictional mix-up essentially worse than that?' --, perhaps it does not matter very much what the ground or theory behind the proposed Prohibition is, so long as it will conduce to the smoother or fairer operation of a complicated system."

Because the law of *Praemunire* could have implications for the theory of Prohibitions, I propose first to look at the scant group of cases that touch on both topics and at a few related cases on penal and tort remedies for wrongful suits. When, if not always, is it *Praemunire* to bring a non-common lawsuit that should never have been brought? When, if ever, is it an actionable wrong?

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**B.
The Line between Prohibition and Praemunire and between
Prohibitible Suits and Suits Constituting Actionable Wrongs**

Summary: We have considered how in principle the existence of *Praemunire* and of actions for vexation in inappropriate courts could make problems for the "paradigmatic" Prohibition, "the simplest kind." There is little authority relevant for this matter. Although not very decisive, it points to two conclusions: (a) No case can be made for not prohibiting when, or merely because, *Praemunire* or a tort action lies, (b) Many suits are prohibitible and yet do not incur *Praemunire* or actionability. Among such suits are ones which are not obviously outside the scope of *Praemunire* or tort, as a legitimate suit which in the first instance must be in a non-common law court surely is. But it is not very clear how the two classes -- criminal/wrongful vs. merely prohibitible -- should be distinguished. In practice, *Praemunire* was a *rara avis*, strong medicine unlikely to be applied unless someone misbehaved grievously (or in a manner to which the common law authorities took essentially political exception, as in Coke's famous attempt to have a lawyer indicted for seeking an equitable remedy in the face of a judgment.) Civil actions for wrongful prosecution in non-common law courts were rare too, as one would expect in the light of the Prohibition's availability to cut off the offense. Authority on *Praemunire* and tort actions is accordingly scanty.

* * *

An early 16th century report, without litigative context,² lays down the most important generalization: Prohibition often lies when *Praemunire* does not. Two examples are given. One is "great trees" -- i.e., where Parson sues for allegedly tithable wood, but the timber in question is in the class exempted by statute. This example is not strong in one sense, because exempt wood was simply exempt -- i.e. not recoverable by either ecclesiastical or common law suit. *Praemunire* was so vaguely defined that it could have been extended at least to one who knowingly sued for non-tithable products or deliberately misrepresented the nature of the product in question (e.g., knowing the trees cut by Parishioner to be aged oak, or so knowing and expressly saying in one's libel that they were trees in a tithable category.) It

² Brooke's New Cases, 150. Undated.

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would be manifestly unfair to treat a suit brought to test the tithability of a product, or to fight out a factual dispute over a product's nature, as a criminal act. The difficulty of sorting out deliberate abuse of one's parishioner by ecclesiastical process from *bona fide* litigation over tithability is sufficient reason to take suits for exempt products -- and perhaps all suits which should not be brought anywhere -- out of the scope of *Praemunire*. Virtually any suit which could have been brought at common law would be a better candidate for *Praemunire* than "great trees."

The other example in the early report reads "*vel pro decimis, de septima parte.*" I can only suppose this refers to customary tithes in excess of the *de jure* amount. The prohibitability of a suit for such tithes would depend on the idea that the common law is the judge of customs. Two alternative rules can be projected from that idea. (a) One may sue for customary tithes in an ecclesiastical court, just because that is the normal place for tithe suits, but if Parishioner-defendant wants to prohibit he may -- i.e. may in effect remove the case to the common law in order to dispute that there is such a custom and have that issue tried by a jury. Perhaps Parson-plaintiff *must* start in the ecclesiastical court and thus leave it up to defendant where the litigation is to take place. Assuming this sort of rule, it would be clearly unfair to punish a man for bringing an ecclesiastical suit. (b) Ecclesiastical courts are strictly confined to *de jure* tithes. A claim to more than 1/10th or to tithes of a normally exempt product is not a "spiritual" claim at all, but a temporal right analogous to a rent, recoverable only at common law. If this were the rule, it would be quite significant to say that an ecclesiastical suit is prohibitible but not *Praemunire*. As it were, suing in a Church court to recover a specialty debt must surely be *Praemunire*; to recover a tithe-like payment based on custom one could and should sue at common law, just as in the case of the debt, but an ecclesiastical suit is still not *Praemunire*.

Of his two examples, the reporter says, "the nature of the action belongs to the Spiritual Court, but not the cause in this form. But where 'tis of a lay thing which never appertained to the Spiritual Court, of this a *Praemunire* lies...." An example of a suit within danger of *Praemunire* then follows: Debt against executors on a simple contract. If we take the suit for custom-based extra "tithes" as pursuable at common law in the first instance, the comparison with Debt against executors suggests a distinction in degrees of excusability, as opposed to one between initially appropriate and inappropriate ecclesiastical suits. On the one hand are suits which ought not to have been brought in the ecclesiastical court, but whose "nature", or

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resemblance to valid spiritual suits, excuses them and makes the strong sanction of *Praemunire* excessive. On the other hand are suits which "never" belonged to Church courts -- suits notoriously temporal, which anyone with even a layman's presumed knowledge of English institutions would realize had no place in a Church court. (The "never" taken literally could be wishful history, overlooking the early involvement of ecclesiastical courts in contractual matters.) Referring back to the preceding examples, one could then say, "Granting that suits for so-called customary tithes are really for prescriptive temporal payments recoverable at common law, yet when a parson sues in the ecclesiastical court for such a payment, claiming it as what he conceives to be a sort of special tithe, *Praemunire* is too tough. Or take the worst instance of a suit for 'great trees' -- where plaintiff on the face of his own libel is seeking tithes of aged oaks, in direct contradiction of an old and well-known statute exempting that kind of tree. Even so, the suit is for tithes, and no degree of everyday inexcusability is quite grave enough to expose a parson who resorts to the Church courts seeking tithes, or something in the name of tithes, to the forfeitures of *Praemunire*."

The reporter's counter-example -- Debt by executors, exemplifying a suit which is both *Praemunire* and (presumably) prohibitible -- contrasts with my example of Debt on a specialty above, for it is what I call in the introductory section a "negative instance" of an exclusively common law matter. Executors were not liable at common law on the testator's simple contract, in most circumstances, because of their incapacity for wager of law, the method of proof on the general issue in that species of Debt. (That was the reason rather than *Actio personalis moritur cum persona*. But if executors free from common law liability on that principle were sued in a Church court -- say to compel them to pay damages for a personal tort out of the estate --, the suit would surely be in equal danger of *Praemunire*.) The justification for the reporter's point must be that ecclesiastical invasion of the notoriously lay field of contract or debt is *Praemunire*, albeit to enforce a duty for which a common law remedy was not available as against executors. Affinity with the valid ecclesiastical jurisdiction over testamentary matters, or the Church court's theoretical responsibility to look out for the testator's soul, made no difference. Ecclesiastical courts had no more business enforcing (in effect) equitable duties related to contracts against executors than they had enforcing a bargain to sell a horse between living contractors. At the time of this report, the Chancery was in practice compelling executors to satisfy simple-contract debts of the testator. Granting the Cokean proposition that courts of equity are capable of

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offending against the *Praemunire* statutes, I should be surprised to hear that one had so offended by entertaining a contractual claim which could not be pursued at common law, including proceedings against executors on simple contracts. Later than this report, when prohibiting courts of equity -- though not the Chancery itself -- became common practice, I would be less confident that the proceedings against executors would escape Prohibition, though they might. The subject could be complicated by the development of *Assumpsit* as a substitute for Debt in the later 16th century. There are no cases in point that I know about. In present terms: Contractual matters were radically out of bounds for Church courts; they were not by "nature" alien to courts of equity, though some suits in equity -- e.g. to enforce an entirely naked or inconsiderate promise -- would almost surely be prohibited when prohibiting courts of equity came into use. (For points of law in this paragraph, see A.W.B. Simpson, *A History of the Common Law of Contract*. Oxford, 1975. Ch. XI.)

In the Elizabethan Blackwell's Case,³ the Queen's Bench judges identified a suit which they prohibited as an apt candidate for *Praemunire*. (There is no indication of an actual prosecution. The chances are that the judges added enough minatory emphasis to their decision by saying "they are in danger of *Praemunire*.") The ecclesiastical suit in this case was initially quite legitimate, a legacy claim. The executor-defendant responded with the commonplace plea "No assets" -- i.e., insufficient funds in the estate to satisfy debts and still pay legacies. Thereupon, the plaintiffs took advantage of the flexibility of ecclesiastical procedure and amended their claim to an *Assumpsit*. There would seem to be two possible stories to explain or give color to the plaintiffs' move: (a) Plaintiffs claimed that the sum, which they had originally sought as a legacy, was owed to them by testator in virtue of a contract, so that they were committing *Praemunire* by trying to charge executors on a contract in an ecclesiastical court. Whether the executors would have been chargeable at common law makes a question (the capacity of claims amenable to *Assumpsit* to survive the testator was a vexed matter.) If so, we have the strongest possible case of a suit subject both to Prohibition and to *Praemunire*. If not, color of equity can be given to plaintiffs' probable position: Testator makes a perfectly good contract with A. Not having paid A, Testator on his deathbed devises the sum due to him. A sues Executor for his legacy and is confronted

³ T. 19 Eliz., Q.B. Harg. 11, f.34.

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with the plea that the estate will not support legacies after specialty debts, for which Executor is liable at common law, are satisfied. Believing he cannot rebut that plea as such, A amends his libel so as to allege the charge on Testator's conscience that lies behind the legacy. He does not contend that he should be satisfied ahead of specialty creditors or that persons entitled by a mere contractual undertaking may normally use ecclesiastical process to compel executors to pay them. Rather, he contends that his legacy should be preferred over other ones (pure gifts) if the estate will support some but not all, and that the legacy jurisdiction of the ecclesiastical court permits it to take account of contractual duties behind legacies for the purpose of ranking them. If this was plaintiffs' position, it got nowhere, for, besides prohibiting, the Court by dictum brought their claim within the scope of *Praemunire*. As the report above implies, color of equity is no help.

(b) The ecclesiastical plaintiffs claimed that the *executor* had made a promise to pay the particular legacy left to them, wherefore he should be chargeable out of his own pocket if testator's estate was insufficient. It is harder to give any color to an ecclesiastical suit of this nature than to one conceived as an attempt to confer priority on legacies intended to satisfy contractual duties that would die with the testator.

One Elizabethan case directly concerned with *Praemunire*⁴ sheds a little oblique light. The holding was that a private party who joins with the monarch in prosecuting for *Praemunire* may not continue if the monarch drops the suit. Leaving aside the problems surrounding this decision as such, one point should be noticed: It was possible for an offended private party to join with the Crown in prosecuting *Praemunire* in order to recover damages (as the case confirms), but he was at the Crown's mercy. At any rate when the Crown did join in the prosecution, it could by dropping the suit keep the private party from protecting himself through the *Praemunire* statutes. It is probably further implied in this decision that a *Praemunire* suit without the Crown's initial collaboration was impossible. (The case suggests considerable confusion over how the *rara avis*, *Praemunire*, was supposed to work. The decision was reached by ignoring or overturning some cited precedents.) Since the non—common law courts generally enjoyed government favor, the likelihood would be slight of those courts and their suitors being often bothered by public

⁴ The Queen and Dean of Christchurch's Case. M. 26/27 Eliz., Q.B. 1 Leonard, 292.

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prosecution. The Prohibition was all the more necessary for the subject's protection. The alleged violation of the statutes in this case was bringing what amounted to an action of Trespass to land in an ecclesiastical court, presumably as open-and-shut an instance as possible.

A *nota* from the Jacobean Common Pleas⁵ gives one firm example of *Praemunire*: Parishioner severs and sets out his tithes. A stranger takes them. Parson sues the stranger in an ecclesiastical court. The reason is that this ecclesiastical suit is indistinguishable from any action of Trespass for taking another's goods, because the effect of severance is to vest the property in the produce in Parson. The *nota* adds that a suit against Parishioner for exactly the same thing -- severing tithes and carrying off what is now Parson's property -- is not prohibitible, much less *Praemunire*. This rule, as to prohibitibility, is owing to modification of the common law by statute. (See Sub-sect. F below.) There is reason to doubt that such a suit against Parishioner would be *Praemunire* even if statute had not intervened to affect prohibitibility. (In the absence of statute, the suit against Parishioner would certainly be subject to Prohibition, because Trespass for taking Parson's goods would lie. The common law action continued to lie after the statute, which had the effect of creating concurrent remedies.) See Coke's observation on the scope of *Praemunire* just below.

A Jacobean report of Dr. Trevor's Case⁶ like *Blackwell* above, furnishes a dictum on when a prohibitible suit is also *Praemunire*. The case is almost certainly the same as that reported as *Roebottom v. Dr. Trevor*, where the merits of prohibiting are discussed (Sub-sect. D below), but the reports going to that say nothing about *Praemunire*. In brief, Trevor sued in the Court of audience seeking reinstatement in an ecclesiastical office which he claimed to hold for life and from which his superior, a bishop, had purported to expel him, as well as disturbing him in the office. The Common Pleas prohibited on the ground that an office for life is a temporal freehold whether its functions are ecclesiastical or lay, and therefore that the office—holder may and must sue at common law if he is disturbed (by Action on the Case) or put out (where an Assize would lie.) After giving the decision, the report continues as follows: "And it was said that it was a gracious time, otherwise Dr. Dunn

⁵ H. 6 Jac. 1 Brownlow and Goldesborough, 30.

⁶ H. 8 Jac. C.P. Add. 25,215, f.78b.

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[the judge of the Audience] would have incurred a *Praemunire* for holding plea of that which is temporal. And Lord Coke said that it was said in his ears that no *Praemunire* lies at this day, because the spiritual and temporal jurisdiction is in one sovereign, but he would advise all persons to know that the opinion of himself and all his brothers, Justices of England, is that *Praemunire* lies at this day as well as in any time before." The dictum as applied to the principal case tends to suggest that bringing any claim assertable at common law in an ecclesiastical court is *Praemunire*. For if one thinks of "degree of excusability", it seems harsh to regard suing for an ecclesiastical office in an ecclesiastical court as a crime (spared only by "grace".) Some kinds of contentions between ecclesiastical persons (e.g., parson and vicar) belonged in Church courts, as did claims to some pecuniary dues (so called spiritual pensions) easily confused with temporal annuities. Dr. Trevor and Dr. Dunn perhaps had some excuse for supposing that the archepiscopal Audience was a lawful place to sue a bishop for what might be construed as "administrative malfeasance" by ecclesiastical standards, as well as a common law disseisin or disturbance, subject to no greater threat than the bishop's non-acquiescence manifested by his seeking a Prohibition.

The larger generalization in *Dr. Trevor*, that *Praemunire* is not obsolete, not solely appropriate to "popish times", occurs in richer form in another document. An entry in the posthumous miscellany published as Vol. XII of Coke's reports⁷ deals with the status and scope of *Praemunire*. This *nota* refers to particular cases but is not specifically tied to any one. *Dr. Trevor* could have been the occasion for Coke's writing the note. It starts by citing the two major ecclesiastical apologists, Dr. Cosin and Dr. Ridley, for the erroneous doctrine that vesting ecclesiastical jurisdiction in the Crown rendered *Praemunire* obsolete. Coke then adds the churchmen's further false contention that at least the High Commission cannot commit *Praemunire*, since that court was created by statute centuries after the *Praemunire* acts. Both propositions were resolved to be erroneous, Coke says, by "divers Justices", "this very term" (but there is no indication of what term he is talking about.) He goes on to state arguments against the ecclesiastics' theory: Supreme ecclesiastical jurisdiction was always in the Crown. The Pope only usurped the King's jurisdiction *de facto*. His usurpation did not bring any rights to the Pope or take any away from the King. A disseisor acquires some

⁷ 12 Coke, 37. Undated.

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rights and the disseisee stands to lose some when the former takes physical possession, but not so for the usurping Pope. For the Pope never acquired possession of ecclesiastical supremacy in the legal sense of "possession". This is so because the law holds that the King can never be dispossessed of anything he possesses in the right of the Crown. Ergo, there was never a time when the Pope held spiritual jurisdiction in England. The *Praemunire* statutes were not directed against the excesses of the Church in an age of divided sovereignty, because there was never such a time. There is no difference between the time when the statutes were made and the present, except in the legally insignificant *de facto* situation. The statutes were always directed against what they are still directed against -- encroachments on the common law by those exercising the King's ecclesiastical jurisdiction. If it be objected that there is nevertheless something disturbing about regarding the acts of one branch of the King's legal system as aggressions against the King -- about so regarding them when the King is actually in control of that branch -- well, the common law has a special relationship to the King. The Crown is "directed and descendible by the common law"; treason against the King is solely punishable at common law; other courts are the King's agents, but he does not depend on them to define his title and rights and to protect him against ultimate disloyalty; therefore an offense against the common law, alone among the authorities under the Crown, may be spoken of as aggression against the King; other authorities, though equally entitled to act in the King's name as his agents, are nevertheless capable of aggression against the King by way of encroachment on the jurisdiction of the common law. All Prohibitions at least nominally allege an act *contra coronam*; for the language of Prohibitions to make sense, some of the King's courts must be capable of offense against the King; if that is so there is at any rate no absurdity in treating them as capable of the grave offense of *Praemunire*; as it were, if they can do wrong *contra coronam* to the extent of meriting the civil check of Prohibition in the King's name, there is at least no formal reason why they cannot do worse wrong and merit prosecution for *Praemunire*.

For the proposition that encroachment on the common law is to be taken as *contra coronam*, Coke cites a unanimous judicial resolution of 4 Jac. The case is not named or described, and the point is too general to permit identification. The most useful kind of case for Coke's purpose would be one inviting assertion of the public theory of Prohibitions. E.g., it is argued that plaintiff-in-Prohibition is foreclosed by laches, should not be permitted to prohibit his own suit, or the like; the judges reply that the plaintiff's private standing is

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irrelevant because Prohibitions essentially protect the King's interest, the plaintiff merely supplying information of the offense. Projecting: Prohibitions really do protect a royal interest. They do not merely use ancient language suggesting such as a matter of form. If the Prohibition's charge of an act *contra coronam* were idle words, one would conclude that the real end of the writ is only to protect the subject from being sued where he has a right not to be, in which event his standing and conduct ought to be relevant. Treating them as irrelevant implies that the purported royal interest in the lines of jurisdiction is real, whence it follows that especially serious invasions of that interest are punishable by statutes manifestly directed at such offenses. The *de facto* relationship of offending courts to the King is as much beside the point as the private standing of an informer.

The High Erastian argument above was standard Cokean fare. (Cf. his "treatise", as he called it, on the ecclesiastical supremacy of the Crown appended to Cawdrey's Case, 5 Coke, 1 ff.) I have filled out the argument a little in paraphrasing it. Coke adds some technical points with reference to the High Commission -- ways in which the language of the *Praemunire* Acts and of the Elizabethan Supremacy Act supports including the Commission in the former. We need not bother with those here.

Having shown that the crime of *Praemunire* is very much alive, Coke proceeds to lay down rules for distinguishing the scope of *Praemunire* from the wider scope of Prohibitions: (a) If the cause originally belongs to the ecclesiastical court, *Praemunire* does not lie, "although in truth the cause, all circumstances being disclosed, belongs to the Court of the King", so that Prohibition does lie. Coke gives two examples of this principle in application. (1) A suit for wood tithes where the parson claims that the wood in question is in the tithable category. This suit is not *Praemunire*, but it is prohibitable on surmise that the wood is actually aged timber. If it is such timber -- i.e. the surmise is disputed and verified by verdict -- there is still no *Praemunire*. (2) A suit for tithes when in fact the tithes have been severed and carried away. I.e.: Parishioner performs his duty by cutting the crop and setting out a recognizable 1/10th for Parson in the field. The common law effect is to vest the property in the hay or whatever in Parson, so that he can maintain Trespass for it if either a stranger or Parishioner himself removes Parson's share before he can take physical possession of it; Parishioner has no insurer's responsibility if a stranger takes the hay. So suppose the hay, having been divided and exposed, disappears before Parson can carry it away. Parson sues in an ecclesiastical court for non-payment of the tithe. He and the ecclesiastical court have not

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committed *Praemunire* -- without regard, so far as appears, to their state of mind, i.e., whether they knew that Parishioner had satisfied his duty. As Coke in effect says, the law must presume to be true what in most such cases must really be: Parson simply finds no tithe produce in the field when he goes to look for it and supposes the tithes have not been set out. It is not his responsibility to investigate before suing.

Two differences should be noted between the last example and that of "great trees". Whereas the trees should not be sued for at all, the parson whose hay has been carried off can sue at common law and ought to if, without special effort, he knows that Parishioner has satisfied his ecclesiastical duty. (At any rate, if he knows that a stranger has carried off the tithes he ought to sue the stranger at common law. It was usually held that by virtue of statute a parishioner who set out tithes and himself carried them off could be sued in an ecclesiastical court for non-payment, though he was also liable in Trespass at common law -- (see Sub-sect. F below). The existence of concurrent remedies under some conditions might be given as an additional reason against holding an ecclesiastical suit *Praemunire*.)

Secondly, a suit for wood tithes is prohibitible on the surmise "ancient timber", whereas a suit against Parishioner for tithes is not clearly prohibitible on surmise that the tithes were set out and not retaken by Parishioner himself. The reason prohibitibility is doubtful in the latter case is that Parishioner can protect himself by pleading payment in the ecclesiastical court. It is arguable that the plea of payment is triable there, subject, perhaps, to common law control of over-strict evidentiary standards (requiring two witnesses to prove payment) and to control of legal error, as if Parishioner were held liable to insure Parson against strangers or natural damage. While there is no very good reason why ecclesiastical courts could not also try the age of trees, two factors tend to distinguish the cases: The exemption of "great trees" was statutory, and the common law arguably had a special responsibility for enforcing statutory rights and immunities. Secondly, there is a generic sense in which the surmise "I am sued for tithes in respect of a product that owes no tithes" merited a Prohibition *prima facie*, whereas "I am sued in respect of an admitted ecclesiastical duty which I have performed" did not. If a suit is not prohibitible, or if its prohibitibility is especially controversial, it would be hard to hold it *Praemunire*, except on the paradoxical and untenable theory that suits restrained by the threat of *Praemunire* should not be prohibited.

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(b) By way of qualification of rule (a): Even though a suit in a sense originally belongs in the ecclesiastical court, it is *Praemunire* to bring it there in a form which on its face declares the inappropriateness of doing so. Coke's most straightforward example of this is a version of the "great trees" case: If I sue for wood tithes and say in my very libel that the wood in question comes from timber trees over twenty years of age, it is *Praemunire*. Note the problem about this conclusion brought out in the discussion above. It would seem unfair to consider suits for *de jure* non-tithable products *Praemunire*, and there is no basis for supposing they were so considered. The reason is that there could easily be *bona fide* controversy over tithability. It was firmly established, for example, that extracted minerals owed no tithes; as a practical matter, it is hard to say that their tithability was disputable in good faith. Nevertheless, I know of no claim that suing for tithes of coal *de jure* was *Praemunire*. About other products -- e.g. new ones, such as hops -- there was genuine doubt. "Great trees" are only distinguishable by the fact that their exemption was statutory. Coke should probably be taken as embracing the distinction: To sue for a product exempt by common law is to incur Prohibition but not *Praemunire*; to sue in terms for a product exempt by statute is to incur both. The notoriety of statute, one would have to say, removes the excusability of flouting one.

Coke's second example is a mortuary delivered to a parson and taken back: If the parson sues for the object given as a mortuary and admits in his libel that it was put in his possession and later removed, *Praemunire* has been committed. If in fact the mortuary has been given and retaken, but the parson sues on pretense that the duty to render a mortuary was never performed, Prohibition lies but *Praemunire* does not. This example is close to the case of set-out tithes, to which Coke reverts in illustrating his second rule, except that the tithe case raises problems of its own. Coke says, rather vaguely, that *Praemunire* is incurred if a parson sues for tithes which have been set out and "matter apparent to the Ecclesiastical Court" shows that the suit should be at common law. When would the condition be met? Plainly it would be *Praemunire* to sue B. for hay which Parishioner A. had admittedly set out and B. had carried away. Coke's language might be taken to imply that is also *Praemunire* to sue A for tithe-hay admitting in the libel that it was set out and then taken, either by A. himself or by B., but *quaere*, as above, whether the suit is prohibitable, much less *Praemunire*.

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It should be noted that Coke cites authority for his examples, but I wonder whether he took full account of latent problems. Rule (a) is hardly questionable, but (b) can perhaps be challenged. How much weight should be given to the mere form of the ecclesiastical complaint? One parson knows perfectly well that all the wood Smith cut was aged oak but sues in terms for tithable wood, realizing that there is no danger of *Praemunire* and betting that Smith will settle or take his chances on ecclesiastical determination rather than push a Prohibition. Another parson is ignorant of the law but thinks it unfair that Jones should gain enormous profit by liquidating a timber forest without contributing a penny to the Church; he sues honestly for tithes of aged oak (as he heard his neighbor parson had once sued Robinson for tithes of a coal mine.) Admittedly, the two cases are different from the point of view of the ecclesiastical judge (at least until Smith in the first case pleads the truth), but parties were subject to *Praemunire* too, and it seems unfair to regard the second parson as more culpable than the first. There is perhaps something to be said for the looser "excusability" standard intimated above, by which any tithe suit, or suit with a strong savor of tithes (even, perhaps, against a stranger for, let us say, "obstructing the realization of tithe rights by removing exposed tithes from the original field" would be only prohibitable.

(c) Coke also articulates two fairly obvious further points. (1) Holding plea of an "incident" of a proper ecclesiastical suit is not *Praemunire*, though the "incident" belongs to the common law and is cause of Prohibition. No examples are given. With reference to the situations above, presumably it is not *Praemunire* if Parson sues for wood in general terms, Parishioner pleads "ancient oak", and the ecclesiastical court carries on with the suit until prohibited. That is presumably true if "carrying on" means trying a factual dispute about the wood's nature, and perhaps even if it means committing a blatant legal error -- i.e., disallowing the plea of "ancient oak" -- so long as no one bothers to get a Prohibition. *A fortiori* in cases where introduction of the "incident" could hardly be anticipated, where the ecclesiastical plaintiff and ecclesiastical court are probably entirely clean. (E.g., A. sues for a legacy of a horse and Executor pleads that the horse was conveyed to him -- Executor -- by *inter vivos* gift. The suit is probably prohibitable on the ground that any controversy about the gift should be tried at common law, but it is clearly not *Praemunire* for the ecclesiastical court to proceed with the case until prohibited.)

(2) If the cause originally belongs to the common law, proceeding in the forms of ecclesiastical law is no protection against *Praemunire*. In other words, *Praemunire* is not

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confined to ecclesiastical suits literally identical with the suit which ought to be brought at common law -- as if one were to make a libel indistinguishable from a writ of Trespass in all but the most superficially formal ways. The point seems obvious, but one can understand Coke's bothering to make it. A last-ditch ecclesiastical position is imaginable, which would concede that the *Praemunire* statutes are still alive, but maintain that they apply to competition so direct as to be nearly inconceivable. Differences of procedure, proof, incidental rules, and remedies would be called sufficient to take what amounts to concurrent activity outside the scope of *Praemunire*. Or at any rate, camouflaging claims as distinct in legal theory would be said to remove them from the class of unlawful incursions (as in my fanciful example above -- camouflaging a stranger's trespass against a parson's chattels, viz. tithes, as "disturbing the enjoyment of ecclesiastical rights." Although I suggest above that one might have some hesitation about labeling that particular camouflaged suit *Praemunire*, it will do to illustrate the easy plasticity of theories and causes of action, against which warning is appropriate.)

Let us now turn from *Praemunire* to civil actions for improper suits. The few cases on that subject recognize the legitimacy of such actions, but tend to restrict them to much narrower bounds than the Prohibition's, and even than *Praemunire*'s. In *Lady Waterhouse v. Bawde*,⁸ an Action on the Case was brought against one who sued for tithes of exempt timber. It is clear from the language of the Court's decision that the suit was not expressly for wood in the exempt class, but for wood tithes generally, whereas in truth the object was aged timber. That truth was firm, for the case was debated on demurrer -- i.e., plaintiff's claim that the wood sued for was really old timber was admitted in pleading. Plaintiff's counsel urged the generality that whenever a statute forbids suing (for a particular thing or, presumably, in a particular court), persons sued contrary to the statute have suffered a wrong remediable by Action on the Case. The King's Bench rejected that general rule, holding that a civil action will not lie for that offense unless the statute expressly authorizes it. On the other hand, the judges conceded that criminal liability (distinct from *Praemunire* -- liability for a misdemeanor, in other words) flows from such prohibitory statutes even when it is not conferred in terms and though no certain penalty is set. One is prosecutable on Crown

⁸ M. 4 Jac. K.B. Croke Jac., 133; Add. 25,205, f.48b *sub. nom.* *Lady Waterhouse v. Neady*.

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initiative, and a private party may sue for himself and the King, but an injured private person may not sue civilly. The dictum on criminal liability leaves open, however, what counts as violation of relevant statutes. The Court's further remarks in the instant case strongly suggest that no criminal liability would in fact be incurred under the circumstances at hand. For in addition to dealing with the fact that the ecclesiastical suit in this case went against a statute, the judges took up common law liability for bringing an improper suit. As to that, they held that Case will lie for a suit, which, on the face of the libel, ought to be brought at common law. *Quaere* whether the language should be taken literally, with the consequence that no action lies for a suit which ought not to be brought anywhere -- as for "great trees" in terms -- as opposed to a complaint pursuable at common law. The case at hand, in any event, would not support the action: the Court's generalization is that no action lies when the inappropriateness of the "foreign" suit is only brought out by the defendant's plea or "collateral matter." One's right to sue generically for wood tithes, and thereby to raise the question whether the wood was in fact exempt timber, is explicitly endorsed. The situation for which the Court does not specify a solution is a suit for a tithe-free product in terms, (a) where the exemption is at common law or (b) where the exemption is by statute. It would be surprising to find any remedy allowed in situation (a); the Court's position on prohibitory statutes implies that a criminal or penal remedy would lie in situation (b), but not a civil one. (A Year Book precedent was used directly in this case, according to the MS. report: 8 Edw. IV, 13b, for the point that a tort action will not lie for suing for tithes of a manor which is in fact tithe-free.)

Lady Waterhouse is briefly mentioned in the report of the earlier *Bray v. Partridge*⁹ -- presumably the reporter's notation of a later contrasting case, In *Bray v. Partridge*, Chief Justice Popham and Justice Gawdy held that a tort action will lie when a parson compounds by deed to take some payment in lieu of tithes and then brings an ecclesiastical suit for the tithes. (Unsurprisingly. The interesting question in that situation is whether Prohibition also lies.) After giving this result, the reporter cites *Lady Waterhouse* and by implication distinguishes it by saying that in that sort of case the ecclesiastical plaintiff may not know that no tithes are due. I.e., a man does no wrong by suing for wood tithes generically;

⁹ No reference provided.

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whatever the reality may be, it cannot be presumed that the parson knows that the wood in question falls in the exempt category. (For that matter -- if knowledge can be extended from factual to legal -- should one who sues for tithes of a non-tithable product, *de jure* or by statute, be held a wrongdoer until he is informed of the law, either by the ecclesiastical court's overruling his complaint or by the issuance of a Prohibition?) *Per contra*, it is a tort to make what amounts to a contract not to sue for tithes in kind and then to sue against one's own act, for there the ecclesiastical plaintiff must know that the tithes are not due. (The most interesting point about this way of distinguishing is its reliance on the language of estoppel. Alternatively, one might say that merely bringing a lawsuit which ought to be dismissed or prohibited is no tort, save perhaps in limiting cases of direct competition with the common law or unmistakable violation of a statute. By contrast, breach of contract is actionable in principle. "In principle", for whether one who promises not to sue and then sues gives his promisee a contractual action would seem to depend on whether the suit is prohibitable. If it is not, then to bring the ecclesiastical suit successfully is to deny the promisee the benefit of his bargain. But if the ecclesiastical suit is prohibitable, the person who brings it might still be held to have committed a tort, wrongful vexation, forcing the promisee to pursue his Prohibition. In delictual terms, the reporter's distinction between inappropriate but innocent non-common law suits and a suit "against his own deed" is the relevant one.)

In one further case on tort liability, *Eaton v. Sharrman*,¹⁰ the ecclesiastical suit was for drunkenness, on private complaint. (The report says a "bill" was preferred against Eaton in the spiritual court.) Sharrman's counsel moved to have Eaton's Action on the Case dismissed summarily, for manifest failure to state a cause of action. The Common Pleas refused to oblige him procedurally, but expressed agreement with his substantive point. I.e., the judges would not act until Sharrman put in a demurrer to Eaton's declaration, but they agreed that the tort action would not lie. (I would question whether much doubt about the substantive point, as opposed to a preference for regular procedure, is implied in the insistence on a demurrer, though there might be a shadow of a doubt.) The report is too brief to explain the theory of Eaton's unpromising tort action. I take it to be that ecclesiastical courts simply lack jurisdiction to punish for drunkenness, that offense belonging to such petty common law

¹⁰ No reference provided.

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agencies as courts leet. That may be a colorable proposition; the simplest construction of the Court's substantive position is to take it as contradicting the same -- i.e. as holding that an ecclesiastical suit for drunkenness is perfectly proper. Another interpretation of the judges' view would be that a suit for drunkenness or similar low-level disorder, though perhaps prohibitible, is close enough to the ecclesiastical sphere to be "excusable". Alternative or additional elements in Eaton's claim might be: (a) While an *ex officio* suit for drunkenness may be justifiable, a privately initiated suit is not. (b) The ecclesiastical suit was literally, and improperly, by bill -- i.e. an informal, equity-style complaint -- instead of by due ecclesiastical process requiring a libel. The significance of the Court's opinion would be altered if such elements were involved, but the report gives us nothing to go on.

Generally speaking, the scope for recovering damages or a penalty when one was improperly sued was limited. Prohibitions were the subject's main protection. It is worth noting further that that protection was not as a rule taken away when a statute expressly attached a penalty to an improper non-common law suit, or to acts by non-common law judges which Prohibitions could be used to prevent. This point is made through scattered cases in various contexts. Suffice it here to cite a fairly strong generalizing decision, with several examples, by the unanimous Jacobean Common Pleas.¹¹ In the principal case, an attempt was made to block Prohibition of an improper suit for a mortuary by the standard laid down for such suits in 21 Hen. VIII, c. 5, on the ground that the statute appointed a penalty for bringing such a suit. The Court held that by giving the penalty the statute did not take away the Prohibition. The same rule was said to hold for penalty suits against the Ordinary for granting administration to persons not eligible under 21 Hen. VIII, c. 5. Prohibitions may still be used to prevent such improper awards of administration. Same law for 23 Hen. VIII, c. 9: Suing in the wrong diocese was made penal, but prohibiting such suits remained open (and was commonplace, one might add.)

The report is unilluminating on the important question whether the remedies are alternatives for the party in one and the same case. May one prohibit the suit and then sue for the penalty? May one recover the penalty and then prohibit the suit? In most circumstances, the penal offense would presumably be committed by bringing the improper suit, though the

¹¹ No reference provided.

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suit were cut off later in its career by Prohibition. In such cases as the improper grant of administration, the same thing is in a way true -- the grant is the offense, even though a Prohibition is subsequently obtained to prevent its being given effect. The Prohibition in that case operates much like an injunction, however; it controls what the ecclesiastical court does within its jurisdiction. Especially there, but even more generally, there is something odd about arresting wrongful conduct before it can do any actual damage and then awarding penal damages against the wrongdoer, though of course it is within Parliament's discretion to superadd a punitive deterrent to the preventive remedy, and "penal damages" describes imperfectly the *Qui tam* statute giving the monarch a share of the recovery. The public interest theory of Prohibitions seems to militate in favor of allowing a Prohibition at any time, even after a penal recovery. On the other hand, supplying a motive not to get a Prohibition, or to delay getting one, hardly serves the policy behind the writ. It seems harder to justify allowing a penal recovery after "the King" has been served and the mischief cut off, though not prejudicing the penal suit is the way to encourage timely resort to Prohibitions. It is probably fortunate that the law was not often complicated by parties' attempting both to prohibit suits and to take advantage of penal statutes.

**C.
"Paradigmatic" Prohibition : Miscellaneous Instances**

"Paradigmatic" Prohibitions -- granted to prevent substantial duplication of common law remedies (or sought on the perhaps debatable claim that a common law remedy equivalent to the one pursued in a non-common law court was available) -- tend not to come in large groups. As I have noted, numerous Prohibitions to the Admiralty belong in this category (though about some of those there were differences going to their classification among the 16th-17th century lawyers themselves.) Some occur in such areas as defamation and equity. Three groups, with special problems of their own, are discussed below in this section (ecclesiastical livings, spiritual pensions, and severed tithes.) Gross violations of common law jurisdiction -- mere, unconcealed ecclesiastical suits for breach of contract, trespass, and the like -- of course did not often occur; if they occurred more frequently than law reports suggest, it would be either because defendants acquiesced or because the suits were prohibited so unquestioningly that they were not worth reporting (or not known to reporters,

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since they would probably have been granted out of open court.) For the rest, paradigmatic Prohibitions are inevitably miscellaneous. In this Sub-section, I shall just list and describe those singular cases which reduce to the paradigmatic type.

(a) Stebs v. Goodlock. P. 30 Eliz., Q.B. Moore, 913.

The form of this case, which makes a difference for how it is to be analyzed, is not clear from the report. The substance was as follows: By custom Parson was entitled to all the produce from every tenth "land" in lieu of tithes. Parson maintained that the parishioners fraudulently failed to cultivate these "lands", or did not cultivate them as carefully as their own land. He accordingly sued for his *de jure* tithes. His suit was prohibited on the ground that the fraud was remediable at common law by Action on the Case.

Two alternative scenarios for the case's form are possible: (a) Parson admitted the customary commutation of ordinary duty to pay tithes and alleged the fraud in his libel. Prohibition was sought and granted on the theory that Parson was in effect seeking by ecclesiastical suit an equitable substitute for the Action on the Case. I.e.: He conceded that he was not entitled to *de jure* tithes, but claimed that he should in justice have them because the parishioners had fraudulently practised to render the *modus* less valuable than it was intended to be. Were he successful, one should note, Parson might be better off than if he were driven to his common law remedy, for 1/10th of all the parishioners' produce might be worth more than the yield of the specific "lands" assigned to him even if those were honestly cultivated. (In an Action on the Case, the damages ought to be the difference between what Parson's "lands" properly tilled would have brought in and what they actually yielded, barring any proclivity on the jury's part to be more generous.) Whether this would be true of course depends on local circumstances. It goes without saying that Parson's *de facto* chances of being adequately compensated for his losses from the fraud would be better in the ecclesiastical court than at the hands of tithe-paying local jurors. On this construction, the Prohibition would fall straightforwardly in the paradigm class.

(b) Parson sued for *de jure* tithes in the common form. Parson as defendant-in-Prohibition then found a way, informally or by motion (perhaps with affidavit as to the facts), to put his story before the Queen's Bench. (It is pretty clear from the report that the Court was aware of the story before granting a Prohibition. It did not come out by way of formal pleading following the grant of a Prohibition.) On this construction, the Court would *itself* be refusing to do a kind of equity. It would be refusing to use its discretion to remedy

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the fraud by denying Prohibition, for the reason that the tort action was already an adequate remedy.

A further possibility to consider is that the fraud could be used defensively against the Prohibition at the formal pleading stage, just not as the basis for blocking the initial grant of Prohibition. I think this unlikely, because the Court sounds pretty convinced that the Action on the Case is Parson's only help, and, as I have suggested, confining him to that would probably be the way to insure that he would not come out better than under the customary arrangement honestly applied. However, the Court was faced with whether to grant Prohibition at all, not with the validity of a plea raising the fraud pursuant to the Prohibition. One cannot, therefore, absolutely rule out the possibility that in the latter circumstances the plea would be upheld. It might in any event be advantageous to Parson to attempt such a plea -- i.e., concede the *modus* and try to avoid it by alleging the fraud. Perhaps such a plea could be excepted to successfully. If not, Parson would either have to demur in law, conceding the fact of the fraud, or to deny the fact, conceding at least formally its legal sufficiency to undo the Prohibition. An admission on record might make it harder to controvert the fraud if Parson later brought an Action on the Case against this or other parishioners, and an honest jury trying the fact of the fraud might find for Parson, with the same effect. A traverse of the fact would at least be a "practice precedent" arguing in favor of the plea's legal sufficiency.

Quaere.

(b) Anon. H. 3 Jac. C.P. Add. 25,205, f.40b.

The profits of a parsonage were sequestered for dilapidations (in effect made over to trustees by ecclesiastical process, because the incumbent was letting the property of the living deteriorate to his successor's damage.) The incumbent presumably -- the report does not say so clearly, but it seems unlikely that anyone else would be interested -- sued the sequestrators (trustees) in the ecclesiastical court for an accounting. The rationale of the suit would presumably be that the incumbent was entitled to the income over and above what the sequestrators reasonably diverted to repairing the property. A Prohibition was granted, no doubt because it seemed plausible *prima facie* that the proper remedy was an action of Account at common law. The Prohibition was quickly reversed by Consultation on motion, however. Counsel for the sequestrators argued, and the Court agreed, that the accounting was an incident of the ecclesiastical procedure of sequestration.

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I take the decision to mean that Account would not lie at common law, rather than that concurrent remedies existed. For the Court invoked the analogy of ancient demesne: As one can stop a common law action to recover land by pleading and proving that the land lies in an ancient demesne manor, so one can stop an action of Account connected with land by so pleading. The analogy would be that one could stop an action of Account relating to the property and income of a parsonage by pleading that the rectory had been duly sequestered and that the defendant was being asked to answer in his capacity of sequestrator. The Court took care to note that a suit in general terms for the profits of a living -- and presumably, therefore, for an accounting concerning the same -- would be prohibitable. The Consultation in this case was solely justified by the circumstance that the ecclesiastical suit was against sequestrators, whose capacity was derived from ecclesiastical law and beyond the notice of the common law, not because the suit concerned ecclesiastical property. On this analysis, the case presents a simple instance of a Prohibition sought on the theory that a common law remedy was available and denied because, on consideration, the judges found that proposition false.

(c) Earl of Shrewsbury v. Roberts. P. 4 Jac. K.B. Harl. 1631, f.327.

Tithes were leased to the Earl and Roberts as tenants in common. The Earl sued Roberts in an ecclesiastical court for taking all the tithes instead of the half to which he was entitled. Prohibition was granted.

The report tells no more, but I think the case is open-and-shut. Either Roberts took the Earl's chattels (severed tithes converted to the tithe-recipient's chattels), for which the Earl ought to sue at common law, or else he took chattels which by common law standards he was entitled to take. The difference depends on how tenancy in common of tithes should be construed. If the Earl and Roberts had been joint tenants, the Earl would be helpless at common law, and his ecclesiastical suit would amount to seeking equitable relief against the rigors of joint tenancy. (Either joint tenant could take all profits from the interest jointly owned, or exploit or liquidate the property, without the other's assent, and the survivor took all on the other's death.) Courts of equity were sometimes prohibited from entertaining suits aimed at mitigating joint tenancy, and ecclesiastical courts surely would be *a fortiori*. Such a Prohibition would, however, be a "negative instance" of use of the writ to prevent outright encroachment on the common law -- writ granted, not because the common law provided a remedy, but because it reserved the right to determine the law in a particular field. As cases

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involving courts of equity show, property law was the most jealously guarded field, more so than contracts, for example.)

Tenancy in common of real estate was like joint tenancy except that either party (or their several heirs) could compell the other to make partition. I assume the same was true of tenancy in common of tithes -- either owner (necessarily of impropriated tithes, for presumably an ordinary rectorship or vicarage cannot be owned jointly or in common), or either lessee, may take all the tithes without doing legal wrong until such time as the interest is partitioned (by dividing the land of the parish into parts in which each has an exclusive interest in the tithes or by assigning tithes in alternate years or of different crops to each.) *Quaere tamen*. If the Earl in this case could enforce sharing prior to partition by common law proceedings, manifestly his ecclesiastical suit should be prohibited.

(d) The Widow Page's Case. T. 7 Jac. K.B. Add. 25,215, f.74.

In this case, a partial Prohibition was used, in effect, to make an ecclesiastical plaintiff drop one of two theories behind a mixed claim. The Queen leased an impropriate rectory for years by letters patent. The lessee covenanted to provide a curate and to keep the chancel of the church in repair. The covenant was incorporated in the letters patent. Now the lessee was sued in an ecclesiastical court to require him to repair the chancel. (By whom does not appear, but it would probably have been the churchwardens.) The ecclesiastical suit was expressly laid on two foundations: (1) *De jure*, the rector, and hence his lessee, should maintain the chancel. (An undoubtedly true proposition *quoad* the rector. Possibly it is more doubtful *quoad* his lessee for years, whence the second theory.) (2) The lessee was obliged to repair by force of the covenant and letters patent.

It was manifestly improper to sue on a covenant in an ecclesiastical court, for an action of Covenant would lie at common law. Accordingly, the King's Bench prohibited *quoad* the covenant. It did not, however, prohibit totally. The report suggests that this was a conscious choice, not a course regarded as entirely obvious, for the judges stated a justification: "...if the King does not want to bring an action on the covenant, the chancel could be ruined entirely before it is repaired." Perhaps it was argued that a suit so inappropriate in part, because it sought to take advantage of a duty solely enforceable at common law, should be stopped peremptorily, driving the ecclesiastical plaintiff to a new suit if he thought he had a good independent *de jure* claim. The Court sensibly avoided any such purism. Perhaps it also avoided a more substantive argument for total Prohibition: that where there are two

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duties to the same effect, one assertable at common law (albeit by someone other than the present ecclesiastical plaintiff) and one in the spiritual court, the former swallows up the latter.

Two points of law are implicit in the decision: (a) The parson's lessee is bound *de jure* to repair the chancel. (b) Only the covenantee (here the King) can enforce a covenant of the sort in question -- a covenant to perform an ecclesiastical duty incorporated in letters patent. If a non-party beneficiary, such as the churchwardens representing the parish, could maintain an action at common law, the danger the judges' spoke of -- that the upkeep of the chancel and others' interest therein would be at the King's mercy -- would not exist. The ecclesiastical complaint in so far as it refers to the covenant could be conceived as seeking equitable relief against the general incapacity of third-party beneficiaries of contracts to sue at common law. The decision tends to say that such an attempt should not be countenanced, but it is notable that the Court acknowledged the kind of good reason that might in some circumstances lie behind one and satisfied the demands of justice and convenience by another route -- upholding the lessee's duty to repair the chancel as implicit in the lease and independent of the covenant. There is a little evidence that third-party enforcement of contracts through proper courts of equity was not entirely frowned on.

(e) Sir Thomas Seymore's Case. M. 11 Jac. C.P. Godbolt, 215 (the better report); Moore, 874.

Lady Seymore libeled against her husband for threatening and beating her and concluded her libel by praying alimony. A Prohibition was sought on the ground that the gist of the complaint was assault and battery, not remediable in the ecclesiastical court. Although the reports are not fully explicit on this, it looks as if the claim to a Prohibition gained plausibility from the form of the libel. If the wife had made her libel "sound in divorce" (legal separation with alimony), alleging the violence solely and unmistakably as grounds, ecclesiastical jurisdiction would seem open-and-shut. As it was, she framed her libel so that it seemed to be primarily a complaint about the beating.

Prohibition was denied on two grounds: (a) The assault and battery were merely "inducement" to divorce, a perfectly proper object for an ecclesiastical suit. (b) The wife could not bring an action for the assault and battery, because wives are *sub virga viri* and lack standing to sue at common law. The first ground can scarcely be assessed without precise knowledge of the libel. It is not easily imaginable how the husband's counsel could

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have made out that the suit was essentially seeking damages for the abuse under color of seeking alimony, thereby invading common law territory. About all one can say is that the Court did not strain to construe the libel against the wife or ask searching questions as to just what the ecclesiastical court was urged to do and legally entitled to do. (It is possible to imagine a common law court insisting that the libel clearly seek, or that the ecclesiastical law be such as to insure, a decree forbidding cohabitation to both parties and ordering the husband to stay away from the wife, as well as to pay her alimony, until a reconciliation was arranged under the eyes of the court and the decree formally dissolved. So strict a court might see anything less than that -- say a simple decree requiring the husband to pay alimony until the pair was reconciled or resumed cohabitation -- as camouflaged damages for the abuse. The Court in the instant case -- Coke's Common Pleas -- appears to have taken the more permissive view that so long as the suit was within the ambit of marital affairs and its object was named alimony, the ecclesiastical court should be left alone to handle it.

The second ground is formally interesting because it appears to depart from the model: No action will lie at common law (say by the third-party beneficiary of a contract, or against executors on a simple contract), and *for that reason* an ecclesiastical suit is improper. One would expect the routine tort of battery to be a "preempted common law field", so that any attempt to use ecclesiastical courts to extend liability for it beyond the bounds set by the common law would be cut off. But the Common Pleas did not see it that way in this case, where liability at common law was bounded by the legal incapacity of married women. The Court did not need to get into this matter, for reading the ecclesiastical suit as a divorce case was a sufficient basis for denying Prohibition. It nevertheless gave the unavailability of a common law remedy to the wife as a separate reason, indeed the first reason as Godbolt's report states the holding. Why it did so makes a question.

The husband's counsel, the report makes clear, relied on the argument that a vague appropriateness to ecclesiastical courts does not justify allowing those courts to duplicate common law remedies. Thus, a clergyman may not proceed in a Church court for assault any more than a layman, notwithstanding the arguable presence of an element of "insulting the cloth" (which was an accepted ecclesiastical *crime* -- "laying violent hands" on a cleric) over and above the bare civil wrong. (This point was supported by Year Book authority, though the reporter had some doubt of its certainty.) No more, by the argument as I would reconstruct it, may a wife sue a husband for assault in a Church court, though here too a

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"vague appropriateness" may arise from ecclesiastical courts' general responsibility for marital affairs, and the "bare civil wrong" is aggravated by "conduct unsuitable to the marital relationship", as it were. The Court in no way disputed the premise, was indeed emphatic that ecclesiastical courts are not a proper forum for tort claims that could be pursued at common law and are not competent to award damages. The Court took issue only with the implication that the unavailability of a common law remedy to the wife was irrelevant. I doubt that the judges meant to suggest that an overt award of damages to an abused wife by an ecclesiastical court would be free from objection, but even an overt award is hard to conceive except in the form of an augmentation of alimony. I.e., in the absence of separation and alimony, it would be meaningless to order a husband to pay a sum of money to his wife in the name of damages, for the wife cohabiting with her spouse or legally obliged to has no capacity to hold independent chattel property. What an ecclesiastical court could perfectly well do, whether or not legally, would be to award the wife £10 a month, say, as reasonable support in view of her expectations and the husband's resources and £50 extra explicitly as damages. The line is thin, however, between explicit damages and taking culpability into account in setting alimony -- simply making the alimony higher when a vicious husband has driven an innocent wife to seek divorce than when blameworthiness is less acute or more divided. I have no reason to think ecclesiastical courts would have been denied discretion to allow for culpability in fixing alimony. While it is not out of the question that the Common Pleas would indulge even an overt award of damages, so long as it was tied to or ostensibly part of alimony, emphasis on the wife's common law incapacity could have a milder use, as little more than reinforcement of an inclination to stay out of marital affairs if at all possible. If we imagine the case of a somewhat loose ecclesiastical decree -- the abusive husband ordered indefinitely to make such-and-such a payment to his estranged wife, how the sum was arrived at uncertain, no provision for when and how the duty to make the payment should be terminated -- the Court would be in a position to say, "There is no 'paradigmatic' encroachment on the common law because the woman is helpless at common law. Therefore we will not meddle." The attitude is quite enlightened. One should note how the *sub virga viri* doctrine could work to allow relief to abused wives.

Justice Warburton, in Godbolt's report, adds the comment that the wife should recover her litigative expenses against the husband. If this uncontradicted remark has any meaning beyond itself, it would make the point that monetary recoveries by married women against

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husbands, save for alimony in the strict sense of support payments, are not ruled out *per se*. Such a recovery may be in virtue of events prior to conferral of divorced status on the parties. If the wife can be compensated by the ecclesiastical court for her expenses in obtaining a divorce, why not also for the mistreatment providing grounds for divorce?

Godbolt's report registers some kind of disagreement between Chief Justice Coke and Justices Warburton and Nichols, but I find the reporting obscure. The disagreement clearly does not extend to the disposition of the case or the central reasons. The latter judges seem, in any event, to have been the ones to call attention to a further point of law: the existence of a writ in Fitzherbert's *Natura Brevium* by which a wife can compel her husband to give security against using unreasonable correction. How does this cut? It is a basis for saying that married women are not absolutely powerless at common law. If the ecclesiastical court is permitted to award a form of damages for mistreatment, it is not permitted to violate, but rather to fulfill, a policy of the common law itself. If the wife can exact the security bond, she can collect by common law process when it is broken -- and when, presumably, she has achieved separate status such that it is meaningful to speak of her husband as paying her money or under a legal duty to do so. (Does that require a formal ecclesiastical divorce, or only *de facto* cessation of cohabitation on the same grounds that would constitute forfeiture of the bond?) She is in any event entitled to be paid in virtue of what happened when she was cohabiting. If the common law itself will penalize the husband in the form of forfeiture of his bond, the ecclesiastical court is not contradicting the common law if it penalizes him as a discretionary incident of its divorce jurisdiction. In view of their opinion in this case, this seems the likely direction of the judges' thinking on the significance of the security bond. One could, however, think of it as a disturbing complication -- a basis for saying that the common law provides a protection against marital savagery, so that there is no justification for ecclesiastical law's providing another in the form of damages in effect, or, prospectively, by the threat thereof. By this reasoning, the ecclesiastical court should in principle confine itself to alimony in the narrow sense. A judge so thinking, however, need not in practice look too closely into how alimony is fixed, much less be particularly suspicious of divorce suits because they might, unless carefully drawn to insure the contrary, result in folding a compensatory or punitive element into the alimony.

It is noteworthy that in Godbolt, Coke cites an Abridgment precedent directly in point (31 Edw. 3, Fitzherbert, Attachment on Prohibition, 8: libel by wife against husband for

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beating and imprisoning her; Prohibition denied because these wrongs were interpreted as inducement to divorce.)

Moore's brief report of *Seymore* emphasizes that the wife could not have sued for alimony if she had been cohabiting. I take this for granted in my analysis above: The ecclesiastical court may in the upshot be left quite free to compound alimony and damages, but an end to cohabitation (either pursuant to divorce or before, for the reason that supplies good grounds for divorce) is the prerequisite for any ecclesiastical power to order payment of money. In other words, if an ecclesiastical court should purport to alter the common law status of married women by ordering a husband to pay a wife money while cohabitation continued, it would of course be out of bounds, and calling it "alimony" or "separate maintenance in the same household" would not help. Moore clarifies (Godbolt does not specify this) that Lady Seymore's libel alleged that Sir Thomas's cruelty had made it impossible for her to cohabit with him. I cannot see that omission of this allegation would necessarily alter the case -- the libel could still be read as a petition for divorce with "inducement." *Quaere tamen*. Perhaps a libel simply alleging cruelty and concluding with a request for alimony, not saying expressly either that plaintiff was not now living with her husband or that she wished not to henceforth, would be too suspicious. Moore also reports the court as affirming the legal existence of security bonds against marital misconduct.

A final observation on a possible "political" dimension of this case may not be amiss. Coke's Common Pleas was not friendly to the High Commission's taking marital cases. The legal grounds for that disapproval were excellent, but there was clearly demand for relief from the High Commission, especially on the part of abused wives. Ordinary ecclesiastical courts were presumably felt to be too attached to an old-fashioned, barbarous view of husbands' "corrective" powers, or else too timid about offending upper-class wife-abusers resistant to divorce and alimony. In the present case, we see the Common Pleas taking a basically self-restrained and generous position toward the marital jurisdiction of ordinary ecclesiastical courts. The implication could be, "We are not against humane relief for abused wives, nor disposed to curb the discretion of ecclesiastical courts in providing it. We are only solicitous that the proper ecclesiastical court do the job."

(f) *Bucksele v. -----*. T. 12 Jac. K.B. 1 Rolle, 57.

This was a simple case. Only a highly permissive attitude toward ecclesiastical jurisdiction could have justified denying Prohibition -- in effect, a theory that ecclesiastical

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courts should enjoy at least concurrent jurisdiction over trespasses against Church property. For the ecclesiastical suit was for taking organs out of a church. Chief Justice Coke and Justice Dodderidge granted a Prohibition on the surely correct ground that the churchwardens could maintain Trespass at common law for the taking of such parish property. To take the parish Bible, Coke said, is both felony and sacrilege, but nevertheless an ecclesiastical suit would be inappropriate. For the general proposition that Trespass lies for wrongs in and concerning churches, he cited a case in which it was held that a widow may maintain the action against a parson for removing her dead husband's banner from the church.

The best argument against Prohibition in such a case as this may be from a species of third-party or Church-corporate interest. (Cf. the Widow Page above.) Nothing in the report intimates such an argument, but one can imagine an undertone of parochial controversy. The report does not say who brought the ecclesiastical suit, though it does speak of a libel, which rules out *ex officio* prosecution. Imagine the following: Organs were not in favor with Puritans. Someone of the reformist party removes them. The churchwardens could bring Trespass, but they are of the anti-organ persuasion. Someone of the opposite party -- the parson, an individual parishioner -- brings an ecclesiastical suit. If we knew that the ecclesiastical suit in our actual case was not brought by the churchwardens, it would be arguable that though someone could sue at common law, the actual ecclesiastical plaintiff could not. One could go one to argue that in the case of communal property more people are interested than those who are adequately protected at common law, and that no interested party should be at the mercy of the churchwardens and the majority who elected them. After all, the churchwardens and their electors can hardly be said to have a right to strip the church of any equipment they think it ought not to have (as the parson who disapproved of a private banner was not free to remove it.) Once this general point were conceded, one could argue against prohibiting even though it was the churchwardens who brought the ecclesiastical suit: The character of the property is simply such that trespasses cannot be adequately guarded against without concurrent ecclesiastical authority, except by extending the right to sue at common law beyond the churchwardens (and perhaps even beyond the parson and individual parishioners -- to the bishop, say --, lest parochial autonomy undo the Church.) If any such argument was suggested, it got nowhere with Coke and Dodderidge.

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(g) *Bellamie v. ----*. M. 13 Jac. K.B. 1 Rolle, 255; Add. 25,213, f.178b.

A vicar sued the parson for cutting trees growing in the churchyard, and the libel expressly demanded damages. A Prohibition was granted and a motion for Consultation subsequently denied. From one angle, this seems quite a simple case, but it has a complicating twist. The report suggests that the theory behind the motion for Consultation was that the dispute was between parson and vicar, and therefore appropriate to ecclesiastical jurisdiction. As such, I think, the argument is specious and was seen to be by the Court. It is true that vicar-parson controversies were held to belong to the Church courts, but the context of that rule was litigation originally well-placed in the ecclesiastical court, normally over tithes. Tithe suits and the like ought not to be prohibited when their resolution depended on determining the parson-vicar split; it does not follow that ecclesiastical courts should be allowed to handle matters flagrantly inappropriate to themselves, or exclusively appropriate to the common law, merely because such a dispute was involved. In the case of a suit which could have been brought at common law, it does not follow that common law courts are incompetent to mediate between vicar and parson for the purpose of disposing of their own litigation (though civilian advice might conceivably be called for.)

The judges in *Bellamie* clearly thought that a suit expressly for damages was "flagrantly inappropriate" to the ecclesiastical court. Two points seem problematic, however: (1) Could a suit have been brought at common law in the actual circumstances? The problem arises because the trees in the churchyard were not simply the vicar's (or parson's) property, but rather, like the organs in the last case above, property of the Church or the parish. As Chief Justice Coke and Justice Dodderidge said in *Bellamie*, however, the clergyman had a limited right to cut such trees for the sole purpose of repairing the church. Assuming that the right belonged to the vicar rather than the parson in our case, could the vicar maintain an action against anyone who cut the trees? Is his right private and proprietary enough to support an action? Or should recovery for wrongfully cutting the trees belong to the churchwardens representing the parish? On these questions the taxonomy of the case depends. If the vicar could sue at common law, we have a simple instance of a misplaced suit. If the vicar could not sue, we have a "negative instance" -- i.e., a situation in which this plaintiff has no remedy at common law, but nevertheless may not make a claim of the type in question (to damages for cutting trees) in an ecclesiastical court. On the latter construction, the Prohibition would be rough on the vicar if he bore responsibility for repairing any part of the

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church (the clergyman was normally responsible for maintaining the chancel, parish rates covering the rest.) Coke and Dodderidge cited several examples for the point that was made about organs in *Bucksele* above: Trespass lies for offenses against common property of the church, such as chalices, surplices, and bells, and hence for churchyard trees. They did not, however, say that the vicar, as opposed to the churchwardens, could sue for such trespasses when he had as much of a private foothold as the right to cut the trees for repairs. My guess would be that the judges' intent was to say that the vicar himself could maintain an action (conceivably Case rather than Trespass?), *sed quaere*.

(2) How decisive were the damages? The judges' language as reported stresses the impropriety of suing for that object in an ecclesiastical court. (Coke, for example, makes the point that there can be an ecclesiastical suit of a criminal nature for laying violent hands on a clergyman, but not a suit for damages.) Suppose the vicar had sued to try his title to the trees relative to the parson's, or to enjoin the parson under pain of spiritual sanctions. Would the deterrence of liability to Trespass have been considered adequate protection?

(h) *Smith v. Pannel*. M. 16 Jac. C.P. Hobart, 246; Hetley, 132 (misdated H. 4 Car.); Harl. 5149, f.246.

In this case, a low-level criminal proceeding was prohibited mainly because the offense was punishable in courts leet, the humblest member of the common law family. At a visitation, the churchwardens presented a man as a railer and sower of discord among neighbors, and the ecclesiastical judge imposed purgation on him. A Prohibition having been granted, Serjeant Chibborne moved for Consultation. His arguments (indicated only by the MS. report) were: (1) "...The common law will not permit a common railer etc." -- as if that were a reason why ecclesiastical proceedings against such offenders should be suffered. It would be a good reason if there were no common law liability, a matter of saying, "The law has no regard for railers even though it does not itself punish them, no protective policy in their favor that could justify restraining ecclesiastical punishment." Is it a good reason if common law liability does exist? Is it arguable that at the pettiest criminal level concurrent jurisdiction has positive merit, because, on the one hand, offenders ought to be punished and, on the other, spiritual sanctions are both sufficient and symbolically appropriate to trouble-making and unneighborliness?

(2) The churchwardens made their presentment under oath (having been charged to present railers and sowers of discord.) Chibborne presumably meant to distinguish the

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instant case from private prosecution or *ex officio* proceedings without known accusers. I take his point to be that going after something as petty as railing might be objectionable if the accusation were not pretty well guaranteed to be responsible by the oath and the official setting. Again, the argument seems stronger on the assumption that the offense was not punishable at common law -- a matter of saying that ecclesiastical courts should not be allowed to extend the ambit of petty crime except by procedural forms designed to keep down malicious harassment. On the other hand, one might argue that concurrent jurisdiction is defensible only if the ecclesiastical form imitates the common law. A court leet was only a presentment jury for some misdemeanors; there is no practical difference between swearing churchwardens to present railers and charging a leet to do the same thing, only a difference of forum and sanctions.

Chief Justice Hobart replied to Chibborne simply by saying that railers are punishable in leets, wherefore the Prohibition should be upheld. He conceded that ecclesiastical courts might have jurisdiction if the railing occurred in a cemetery or similar church precinct. Justice Hutton said that the offense had been made temporal by statute (2 Edw. 6). Justice Winch cited a *Falwood's Case*, in which an ecclesiastical court had been prohibited from proceeding against a man for irreverent remarks about excommunication (the well-worn comment "that though he was excommunicated, still his corn grew as well as other men's.")

Winch's citation points to the most interesting feature of this case: the proximity of this type of "paradigm" or "common law monopoly" case to "ambit of remediable wrong" situations. If the reason for prohibiting in the instant case was the offense's punishability in a leet, *Falwood* is irrelevant. That is the clearest sort of "libertarian" decision: People should not be pursued anywhere for mere scoffing, even though the object is an ecclesiastical institution and there is a flavor of blasphemy. Winch's apparent thought was, "Neither should they be pursued for mere railing." Yet he did not deny Hobart's view (which the printed reports give as the sole reason for the decision) that railing was not immune, but was an exclusively temporal offense. In practice, the "libertarian" interest would probably be equally well-served either way. The chances of railers' actually being presented in leets was probably slighter than their being presented by churchwardens at the urging of an archdeacon officiously interested in repressing un-Christian conduct. It is unlikely that the judges gave much thought to the conflict of theory implicit in the comparison of Winch's remarks with Hobart's. (Hetley's report has the Court saying that "perhaps" the case would be

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more appropriate to a leet, as if the judges were less than sure that anything could be done about railers, only convinced that one way or another the Church authorities must be restrained from bothering them.)

(i) Three reports concerning access-ways to churches can best be discussed together: (1) Brokesby's Case. M. 16 Jac. C.P. Harl. 5149, f.260; (2) Braine's [?] Case. P. 12 Car. C.P. Lansd. 1082, f.54b; (3) Anon. T. 15 Car. K.B. March, 45.

All three of these reports are extremely slight, and one (*Braine*) is partly illegible. They offer a glimpse, however, of a tricky inter-jurisdictional problem. Let us first summarize the results reported. (1) *Brokesby*: The report only states a *per Curiam* opinion that churchwardens who libel against a parishioner for a way to the church should be prohibited, "because the way will be questioned in the Court Christian." (2) *Braine*: A man was presented in an ecclesiastical court (proceeded against in criminal form) for failure to repair a way leading to the church. (Failure to repair is distinguishable from obstructing the way or actively excluding persons entitled to use it from doing so. Obviously disrepair can come in many degrees and vary in its effects from rendering the way unusable to mildly reducing its convenience or merely making serious deterioration in the future more likely.) Prohibition having been sought and argued for by Serjeant Whittfield, the Court assigned a day to show cause against Prohibition. This move indicates an inclination to prohibit, but enough doubt to recommend listening to argument *contra* if defendant-in-Prohibition should want to make it. When the case was taken up again, Justice Hutton spoke against Prohibition. His opinion is all that is reported, except for a citation by Justice Vernon (for which see "Note on the Common Law" below.) Hutton thought the ecclesiastical proceeding was not objectionable, because "the way itself is not in question." The rest of his brief speech is hard to make out. He appears to say that a common law action would lie for stopping the way altogether (leaving the implication that one would not lie for failure to repair.) It is not clear that he thought presentment for total obstruction in an ecclesiastical court would be objectionable; a civil suit might be another matter. (3) Anon. *March, 45*: This report gives in brief the opinions of Justices Berkeley and Croke. They said that a *libel* (civil suit) in an ecclesiastical court for *not repairing a way* leading to a church is unobjectionable, but that this is not true of failure to repair a *highway*. A Prohibition was granted in the instant case, the report adds, because the surmise claimed that the libel was for failure to repair a highway. (A highway is usually defined as a way by which all the world is entitled to pass. It can be an easement on

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private land as well as royal property with the status of a highway. Private persons could have a prescriptive duty to repair royal highways. Proprietors should probably be said to have a *de jure* duty to maintain highways, in the sense of rights of way over their own property open to all the public, up to the standard of normal or customary convenience. Obviously a highway can be the way to get to a church, but ways to church need not be highways. Other possible forms cover a considerable range. At one end of the spectrum is the strictly private easement: Owners of Blackacre are entitled to pass by a certain route over Whiteacre, wherever they are going or only for the purpose of going to the church, as the case may be. At the other end is a customary right for all parishioners of St. Mary's in the Vale, but only inhabitants of that parish, to pass over Blackacre, on their way to church or without regard to destination.)

From the three scant reports it is impossible to give a satisfactory statement of the inter-jurisdictional law. We can only catch a few hints and pronounce the law unsettled. It is possible to say something about the shape of the problem. On two points the common law was clear: (a) The holder of what I call a strictly private easement -- i.e., holder "by reason of estate" -- was amply protected. He had real actions and powers of self-help at his disposal in the event of obstruction or exclusion, and the Action on the Case for nuisance was available to him in the event of less radical disturbance of his right, including failure to repair. If he wanted to bring the lesser action for damages when wholly "dispossessed" he was free to. There can be accordingly be little doubt that an ecclesiastical suit by an individual parishioner claiming a right of way to the church for himself and his predecessors in estate would be prohibited. It is not surprising that there are no cases to confirm this.

One of the peculiarities of the access-to-church situation is that most landowners in the parish (and their tenants through them) would probably have been able to prescribe for the right of way in "reason of estate" form. Persons with no interest in land would for the most part be included as family members and servants of the owners and lessees. This could be a reason for denying the ecclesiastical courts any role at all in enforcing prescriptive access to churches. I.e.: It is arguably not a necessary role. There is a high probability that rights of way to a place everyone must go will not be closed off or left in disrepair for long, because there are likely to be numerous people with the grounds and the motive to insist on their private rights. Insistence by even a single person is likely to redound to the general benefit. The remedial upshot of some procedures was abatement of the nuisance -- physical removal

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of the obstruction or whatever. Actions on the Case would yield only damages, but the damages are certain to be largely punitive (actual damage to a particular easement-holder forced on a limited number of occasions to take a roundabout way to church is apt to be small and incalculable), and they are likely to grow more punitive if the defendant persists in his misbehavior so that the original plaintiff is driven to sue again or other persons with the same right are forced to bring suit.

There are quite good reasons to prefer keeping ecclesiastical courts out of enforcing access to churches. One reason is the dependence of most rights of way on prescription and the judges' general disposition to say that most prescriptive claims must be tried by jury if disputed. If, on grounds of convenience, one were to allow ecclesiastical courts to enforce prescriptive duties to keep access ways open and in repair, one would have to face the problem of what to do when and if the ecclesiastical defendant comes and surmises that he has no duty. Prohibit and return by Consultation if the jury upholds the duty (in accord with the *modus* model)? Or turn the ecclesiastical courts loose -- let them write the rules about when the running of time obliges landowners in a parish to keep ways open and in repair so that the parishioners can get to church? There is some simplifying virtue in avoiding that problem by holding that claims originally based on prescription, save for a few asserted by churchman against churchman (spiritual pensions), may only be asserted at common law. The probability that any real prescriptive rights of value to all parishioners will be substantially protected by private initiative is reinforcing.

A second reason is that claims to easements "concern the freehold" (as Serjeant Whittfield says in *Braine*. Although they are not spelled out in the report, both this and the preceding argument seem to be made by Whittfield.) Grave question must surely arise about letting ecclesiastical courts give judgments which affect the definition and value of interests in land. Even if disputed prescriptive claims were held triable at common law, there is a principled objection to countenancing such judgments. What is the ultimate difference between telling A. his freehold is encumbered with a "spiritual" easement in B,'s favor and telling C. that D. is the owner of Blackacre "spiritually speaking" (=threatening C. with spiritual sanctions unless he treats D. as the owner.)? An ecclesiastical court that purported to do the latter would be deep within the danger of *Praemunire* and of course would be prohibited.

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On the other hand, there are grounds of convenience for not being utterly unwelcoming to ecclesiastical jurisdiction. The common law itself [see (b) below] recognized the inconvenience of enforcing rights belonging to numerous people by individual suit. If it is true *de facto* that relying on the assertion of private rights would usually assure access to church to all parishioners, it is also true that the method is clumsy and dependent on the threat of multiple suits. As it were, "A. had better keep the way across his land open and repaired -- having been sued by B. --, for if he doesn't, or if he buys B. off, C., D., etc., can sue him, probably adding to the punishment each time." The same effect can be expected from allowing any subject to sue for common nuisances, e.g., obstruction of a highway, but that is just what the common law did not allow [(b) below]. Of course the efficient solution is enjoining the nuisance. Injunctions by courts of equity to prevent the commission, continuation, or repetition of torts, nuisance-creating activities, and infringement of easements were rare in the 17th century, however. The "spiritual injunction" can be seen as a substitute or anticipation.

(b) Individuals could not maintain civil actions for the infringement of easements and other rights belonging to the public generally. The person encumbered with the corresponding duties was presentable (in the 17th century in a court leet) for such breaches of duty as obstructing or failing to repair a highway. The rationale was that reliance on the criminal law was preferable to multiple suits.

Is one who has customarily allowed all inhabitants of a particular parish going to church, but not other wayfarers, to pass over his land presentable for failing to repair the road? In other words, is the criminal remedy available only when the right belongs to all the world, or is it available when smaller but sizable groups of people have used the way? If it is not available in the latter situation, may individual members of the group bring civil actions without regard to capacity to prescribe "by reason of estate"?

To the first question, the fragmentary evidence of our Prohibition cases suggests a negative answer -- the criminal remedy applies only when the right is universal. I have not found other evidence to the contrary. (Of course in practice making out that a common way is open only to a particular class is apt to be difficult. Someone presented for obstructing or not repairing a common way would probably be best advised to pay his fine and open or repair the road. Establishing by legal process that he should not have been presented, because the right of way was confined to too narrow a class of beneficiaries, would usually

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have been more trouble than it was worth. On the second question, there is a little evidence that when the encumbered person is not presentable private suits may be brought without prescription "by reason of estate" and notwithstanding the objection to multiple suits.

We are now in a position to say what our three reports seem to suggest about the judicial view of an ecclesiastical role in enforcing access-rights:

The last report, March 45, clearly assumes the rule that failure to repair a highway is presentable at common law, wherefore any ecclesiastical involvement is objectionable. That the highway is a way to the church makes no difference. The report implies, on the other hand, that failure to repair a road not classifiable as a highway is not presentable, wherefore ecclesiastical proceedings are unobjectionable (in civil form in the instant case, but presumably criminal form would be equally acceptable.)

Ecclesiastical remedies, where acceptable, would clearly be concurrent with the power of individual parishioners to sue "by reason of estate." Whether they would be concurrent with individual common law suits by parishioners merely *qua* parishioners is less clear. Suits by individual beneficiaries of rights to some degree public, but not broad enough to be enforced by secular criminal law -- suits *qua* beneficiary and not "by reason of estate" -- cannot be ruled out of the common law panoply. Suppose, however, an individual parishioner, or a group of parishioners as co-plaintiffs, were to appear at common law seeking to maintain an Action on the Case in the "*qua* parishioner" form for failure to repair, or to keep open, a way to church not qualifying as a highway. The best prediction is that the attempt would fail on the ground that an ecclesiastical remedy was available and made better sense than a common law remedy -- *given* the position of the report in March that ecclesiastical jurisdiction is unobjectionable where the secular criminal law does not protect the right. In other words, concurrency would probably not be allowed when it was avoidable.

The reason the ecclesiastical remedy makes better sense is that it is injunctive relief in effect. The earliest of our reports, however, *Brokesby*, rejects the ecclesiastical remedy in the most sensible of forms -- a suit on behalf of the parish generally, brought by the churchwardens. *A fortiori*, an ecclesiastical suit by parishioners without the representative capacity of churchwardens would be prohibited, and there is no reason to suppose that ecclesiastical criminal proceedings would be indulged. Thus there are grounds for seeing a shift in judicial attitude between *Brokesby* and the late report in March. Given the *Brokesby* position, a court faced with whether to allow an Action on the Case in the "*qua* parishioner"

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form would not be able to rely on the availability of an ecclesiastical remedy as grounds for disallowing a common law one. Whether it would see any need for "*qua* parishioner" actions over and above actions by local landowners to whose estates the right of way was attached is another matter. A further question for such a court might be whether a common law suit by the churchwardens, with the damages recoverable to the use of the parish, should be treated as the only common law resource besides criminal presentment and private suit "by reason of estate."

In its terms, the report in *March* is about repairs, not total obstruction. It is compatible with supposing the distinction matters -- i.e., with the rule that ecclesiastical proceedings *must* be for failure to repair and would be prohibited if drawn to suggest a total denial of access. Justice Hutton in *Braine* may be taken as supporting that rule, though it is not certainly his meaning. The report in *March* is too brief to indicate whether the judges would really have limited ecclesiastical suits to failure to repair. The strongest reason for the possible rule would be that common law remedies, except for the criminal one to insure repair of highways, would lie only for full denial of access. That is unlikely to be true of Actions on the Case by persons claiming "by reason of estate." It could be true of the more dubious "*qua* parishioner" form. Looked at in one way, it would hardly seem to make sense to permit such damage actions for failure to repair, but not for full obstruction. It could conceivably be argued, however, that any complaint of full obstruction, even in the form of a damage suit, has a flavor of property about it. A landowner with a right of way attached to his estate could have a real action in the event of total stoppage. If he preferred, he could bring an Action on the Case, but his complaint remains deprivation of property. Arguably people without a property interest -- parishioners *qua* parishioners -- should not be suffered to make complaints sounding in deprivation of property. Allowing them to complain of mere failure to repair, though anomalous, may be justifiable because they are in a position very like that of the larger public enjoying the right to have a highway maintained, but lack the criminal-law protection accorded to the latter.

The next question on this line of reasoning is the implications for ecclesiastical jurisdiction. One way to go would be to say that the Action on the Case for failure to repair is available to everyone who can be injured, parishioners generally as well as landowners, so that ecclesiastical courts should stay away. Alternatively, one could say that concurrency is tolerable when the complaint is only failure to repair, just because property interests are not

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so closely touched. A somewhat cynical formulation would be, "If you're going to allow people without a property interest to enforce repairs by Action on the Case, you might as well let them use the more efficient ecclesiastical remedy as well -- two anomalies for the price of one, so to speak." A more conservative version of the last alternative would be to permit only criminal proceedings on the ecclesiastical side, which would have the advantage of duplicating nothing at common law. A measure of concurrency would still be accepted -- ecclesiastical proceedings would be allowed where the common law could do the job, but could do it only in civil form. (There is no real practical difference between ecclesiastical-civil and ecclesiastical-criminal. Either way, the defendant would only be put under spiritual pressure to make the repairs. This is a possible reason for insisting that the proceedings be criminal to avoid the appearance of duplication.) The position is more conservative than that of Berkeley and Croke in *March*, not necessarily more so than that of Hutton in *Braine*. Where among a considerable variety of possibilities to put Hutton is not worth speculating about when his words are so poorly reported. At any rate, he was willing to concede some role to ecclesiastical jurisdiction in the face of fairly strong argument from the Bar against any such role and contrary to the implications of *Brokesby*. The evidence is poor, and perhaps the issue is not momentous, but from what is visible, access-ways to church may be one of the subjects on which there was a shift in the pro-ecclesiastical direction by the Caroline Bench.

Note on the Common Law

Blackstone states the basic law I use in the text above. (3 *Commentaries*, 218 ff.; 4 *Comm.*, 167.) He in turn relies on *Coke on Littleton*, 56, though without full attention to the details of that passage.

I do not believe there was any uncertainty about the fundamental points. (Landowner with an easement attached to his estate has a range of remedies. "Common" ways are generally protected by criminal law -- presentment -- only. Avoidance of multiple suits is the rationale. An exception is made for members of the public who suffer "particular damage" -- e.g., A. wrongly digs a ditch across a highway and B. falls in; B. may maintain Case for his damage, but C., who is merely prevented from going where he is going via the highway, may not. So much for the crude distinction. There is no need to go into more sophisticated forms of "particular damage.")

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The nicer point is whether there are any circumstances besides "particular damage" in which an individual member of the public, or of a part of the public entitled to use, may maintain Case even though he is not a landowner with easement attached. (Or, one should add, beneficiary of a *de jure* right of access in virtue of a relationship to land. Coke's note at *Co. Litt.*, 56, is immediately about the right of a tenant at will who has been expelled to access for the purpose of harvesting a crop he sowed before his expulsion. The ex-tenant at will can bring Case for obstructing his way.) Coke in the passage cited seems to say "Yes." He describes a case in which inhabitants of a particular place customarily used A.'s land for the purpose of watering their cattle. An Action on the Case was allowed to inhabitants *qua* inhabitants because A. was not presentable for denying access to the watering-place, so that without the civil action the inhabitants would have been unprotected. Why A was not presentable is not explained.

In the *Co. Litt.* passage, Coke relies centrally on Williams' Case, which he reports independently (5 Coke's Reports, 72. M. 34/35 Eliz. Q.B.). It was firmly said in that case, by a unanimous Court, that rights which are common in the sense of widely shared (though not necessarily universal) cannot as a rule be the basis for Actions on the Case of the "*qua* inhabitant/parishioner" sort. The proposition is supported by earlier authority. Its rationale, avoidance of multiple suits, is also firmly stated. People entitled to such rights are said to be protected by presentment in leets, with the implication that some or most widely-but-not-universally shared rights are so protected. But that does not mean they are all so protected or that Case will not sometimes lie exceptionally. The principal case, indeed, suggests indirectly that the need for occasionally making an exception would be recognized. Less indirectly, it has interesting implications for inter-jurisdictional problems.

In *Williams*, the lord of a manor tried to maintain Case against a clergyman for failing to say divine service in plaintiff's chapel. The clergyman was alleged to have the duty by prescription. Plaintiff prescribed that the duty was to perform service for plaintiff *and the tenants of his manor* I.e., as pleaded, the prescriptive duty had multiple beneficiaries---the tenants as well as the lord. The Court held that the action would not lie. If plaintiff had prescribed for himself and his family only, the action would lie. As it was, the right to have service performed belonged to the tenants too, any of whom could maintain an action if the lord could. Therefore, owing to the inconvenience of multiple suits, none of the beneficiaries could sue.

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There is not the least suggestion that the clergyman could be presented in a leet for neglecting to perform service. Rather, the judges told the plaintiff that his remedy was in the ecclesiastical court. From the point of view of the law of Prohibitions, an ecclesiastical suit would be about as unproblematic as possible: No common law remedy, including criminal proceedings. (N.b.--assuming there can be no criminal proceedings clears the recommended ecclesiastical suit.) Customary duty in a clerical person and related to religion, which surely, in the absence of any common law interest in the duty, ecclesiastical courts are free to enforce if they see fit. The only imaginable problem would arise if the clergyman, being sued in the ecclesiastical court, claimed not to owe the duty and claimed legally that whether he owed it should be tried at common law (or at least that the common law -- immemorial -- standard of prescription must be applied.) I would be surprised to see an ecclesiastical suit against the clergyman prohibited in that event. The Court's assuring plaintiff in *Williams* that he had an ecclesiastical remedy and therefore did not need a secular one should perhaps be taken as assurance against Prohibition, no matter what. I.e., should be taken as a way of saying, "We must leave this to ecclesiastical justice, which we have confidence will result in justice's being done. We cannot guarantee that the ecclesiastical court will allow you a remedy, but we will certainly not interfere with it if it does, e.g., by intervening to prevent application of a standard of prescription different from ours (and more favorable to you, in that our immemorial standard is nominally the most stringent.)"

The Court's confidence that an ecclesiastical remedy is an adequate alternative is the most interesting feature of *Williams*. The report has the judges being explicit -- emphasizing that to turn plaintiff down is *not* to leave him and his co-beneficiaries remediless. This is what I take to suggest indirectly that if he *were* left remediless he would not be turned down. I.e., in a pinch, the policy against civil suits by individual beneficiaries of widely shared customary rights admits of exceptions. In *Williams*, the Church courts are accepted as, so to speak, "after all part of the legal system" -- a resource the common law courts can fall back on to avoid making an exception from a sensible general policy.

Is there a moral for the access-to-church cases? *Williams* is not mentioned in the meager reports. I can imagine its being used as follows: "We cannot allow suits which duplicate the common law -- when plaintiff is in terms suing for an easement attached to his freehold. Nor will we allow ecclesiastical suits where the secular criminal law would clearly protect the interest in question -- where the suit is in terms for obstructing a highway [or there is some

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other basis for saying with certainty that the obstruction is presentable in a leet -- I do not know what this would be.] We would not, however, allow an Action on the Case to individual parishioners *qua* parishioners or to churchwardens. For in so far as these people are not protected by the secular criminal law they are protected by the ecclesiastical law, as *Williams* says. They are not remediless, for if they were we would go against our usual policy and give them a remedy. It follows that ecclesiastical suits not unmistakably infringing common law territory should not be prohibited. Ambiguities should perhaps be resolved against the ecclesiastical plaintiff. Best procedure might be to prohibit when there is any doubt, but to entertain motions for Consultation, allowing the ecclesiastical plaintiff to make out definitely that he is not in a position to sue for the easement as a landowner and to convince us that the obstruction is not presentable in a leet. But *Williams* sustains the principle: In matters of interest to the Church, as access to parish churches is, and where there is no common law remedy, resort to the Church courts is to be encouraged. It is the preferable alternative both to stretching common law remedies and to leaving the party without remedy. When resort to Church courts is to be so encouraged, those courts should be given a free hand, so that their handling prescriptions by their own lights and making judgments touching property are not grounds for Prohibition independent of the ground here rejected -- the bare fact that *some* rights of access to churches are protected at common law. Of course the fact that, say, only some contracts are enforceable at common law does not mean that ecclesiastical courts should be allowed to enforce others. The common law has preempted the field and decided what contracts are enforceable. In the case of customary easements and public rights, the common law's fundamental decision is that they should all, if intrinsically valid, be enforced. It will make exceptions from its general policy as to the *mode* of enforcement if necessary, but it prefers to recognize the ecclesiastical system as a supplementary resource when that is possible."

In *Braine*, the one judicial remark besides Hutton's comes from Justice Vernon in the form of a Year Book citation and an unspecific reference to a statute of Edw. 6. The Year Book (18 Edw. 4, 2) is relevant, but how it cuts is not clear. The case is amusing: A. sued B. for trespass. B. pleaded that the place where the trespass occurred was by local custom a burying-ground, and that the acts alleged to be trespasses against A.'s property consisted in burying a corpse there as the custom permitted. In this lawsuit, B. prayed aid of C. -- an inhabitant of the parish that was the ambit of the custom -- to give evidence that the custom

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was as B. claimed, which C. did. A. then sued C. for maintenance. The Year Book holds that it was not maintenance, because C.'s status as an inhabitant of the parish gave him an interest in the custom such that his coming forward to defend it in a lawsuit against someone else was not the kind of gratuitous intervention in others' litigation that counted as maintenance.

Generalized, the Year Book case seems to say that being a member of such a unit as a parish and one of the beneficiaries of a custom applicable to that unit has legal significance. Or better, such status as an inhabitant has legal meaning beyond the obvious and undisputed one: capacity to use the custom defensively -- i.e., to invoke it, as B. did in the Trespass suit behind the Year Book case, when charged with what would be a tort if the custom did not exist and the person relying on it did not belong to the locally-defined class of beneficiaries. Beyond that defensive capacity, the Year Book shows, the inhabitant/beneficiary "has interest" such that litigation about the custom concerns him, even though he is not himself relying on it and may never have occasion to.

What then? One could use the Year Book case as the basis for arguing that if inhabitants "have interest" to that extent, their interest is under the protection of the common law and will confer standing to sue at common law if necessary. I.e.: Though it is no doubt better policy to protect the interest of inhabitants by criminal law, in so far as the criminal law fails to reach all instances of valid (defensively usable) local customs, any inhabitant may bring an Action on the Case when the person owing the duty fails to perform it. Therefore ecclesiastical courts have no role, even when the Inhabitants' interest is also a collective interest of the Church. Alternatively, having said that the inhabitants' interest must be taken seriously because it does not reduce to the right of individual inhabitants to use the custom defensively, one might go on to say that the ecclesiastical system is a handy resource, which should be allowed to do as much of the job of protecting inhabitants' interest as it reasonably can. I.e.: The common law cannot, in the light of such authority as the Year Book case, simply leave local customary rights to be ignored when the criminal law will not protect them. If necessary, "*qua* inhabitant" Actions on the Case would be allowed (cf. *Co. Litt.*, 56.) But it is not necessary when, owing to the simultaneous institutional interest of the Church, an ecclesiastical remedy is available and is not a matter of the ecclesiastical courts' engaging in inappropriate activities. (This position accords perfectly with *Williams*.)

Justice Vernon's allusion to legislation of Edw. 6 almost certainly refers to the statute enabling tithe-recipients to complain in ecclesiastical courts that they had been denied

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reasonable access to the land producing tithable crops for the purpose of viewing and removing their tithes. I defer discussing that legislation and the common law surrounding it to the section of this study concerned with the main body of title law. Access to tithes has affinities with access to churches, but there are also major differences. (Basically, access to church depended on customary rights *cum* private easements. The tithe-recipient was entitled to access as a *de jure* incident of his right to tithes. Problems of some complexity could arise from this situation. E.g.: Does the recipient have a common law action if denied access, and therefore not an ecclesiastical one save by operation of the statute? Is he confined, in the ecclesiastical court, to complaining of non-payment of tithes when his real complaint is not that the tithes were never set out, but that the payer closed off the most convenient or customary way to get at them? How does the legislation relate to the prior common law?) In alluding to the Edwardian legislation, Vernon might be suggesting something like this: "Ecclesiastical courts may now, at any rate, lawfully enforce one kind of access-right of interest to the Church, so perhaps there would be no harm in letting them enforce another kind. To say 'the equity of the statute' gives them this further power would no doubt be too strong, but at least one can claim a vague Parliamentary encouragement." Alternatively, Vernon could be saying that it took legislation to create clear ecclesiastical jurisdiction over access to tithes and so should it to give them power to meddle in access to churches.

A final point for nicety's sake: In the text above, I have used the term "easement" loosely to include customary rights extending to all parishioners and the like. In proper modern usage, one should confine the word to what I call the "strictly private easement" -- where the owner of a "dominant" tenement has rights over a "subservient" one. In the 17th century, the looser usage was standard. See 6 Coke's Reports, 59b, Gateward's Case, H. 4 Jac. C.P. -- a good case for the general and not very controversial point that customary rights of way and the like are valid in at least the sense "usable defensively." "Easement" signified a mere right to use, of any category, vs. a profit out of someone else's estate.

(j) Vicar of Halifax's Case. M.3 Car. C.P. Littleton, 51; Hetley, 32.

A chaplain under the Vicar sued the Vicar for a salary, claiming a prescriptive title to be paid £ 4 a year. The Vicar sought a Prohibition on two grounds: (a) He alleged that he was entitled to appoint to the chaplaincy and had not appointed the person suing him. (b) He maintained that the prescriptive salary was triable at common law.

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There is a difficulty about putting this case in the class of Prohibitions seeking to assure that those who can sue at common law do so. Plaintiff-in-Prohibition's second ground (I shall return to the first) does not say that the ecclesiastical suit was inappropriate *ab initio*, only that the prescription should be tried at common law. The Vicar's position *quatenus* the second ground could be that he was entitled to jury trial on the fact of the usage, but that if the jury upheld it Consultation should issue and the ecclesiastical court be free to enforce payment by spiritual sanctions (and free not to as well, if it found any reason in Church law against requiring payment to be made to the person seeking it.) (Cf. Parishioner sued for tithes allegedly due by custom but not *de jure*. It is probably quite plausible to argue, though I am not sure it is ultimately correct, that the ecclesiastical suit is appropriate as such, that it should be prohibited on Parishioner's surmise of "No such custom", and returned by Consultation if the jury upholds the custom.) It is, however, also possible that the Vicar's second ground was meant to say, "If this salary is recoverable at all, it must be by common law suit."

The only judicial comment reported is by Yelverton, in whose opinion the salary should be classified as spiritual, like the chaplaincy to which it was attached. This view accords with standard opinion on so-called spiritual pensions: Payments due from churchman to churchman and based on prescription were generally recoverable in ecclesiastical courts, save when special circumstances required classifying them as annuities recoverable by the common law writ of Annuity. There is no apparent reason for differentiating a salary for an ecclesiastical office (presumably conditional on performance of services) from a pension, and no basis apparent in this case for taking the salary as an annuity. Yelverton's opinion replies equally well to either construction of the vicar's second ground for Prohibition: If the Vicar meant the chaplain should be suing him at common law, that is wrong with respect to this sort of intra-Church payment -- a common law action will not lie, but there is no objection to an ecclesiastical suit. If the Vicar meant the prescription should be tried at common law and the suit returned by Consultation if it was upheld, that is wrong too, again by analogy with spiritual pensions. For in the case of pensions, once it was clear that Annuity would not lie, there was never any suggestion that the fact of a prescriptive right was not determinable by the ecclesiastical court, by the law on prescription prevailing there.

The rest of the Court clearly accepted Yelverton's opinion as such, for it granted Prohibition only provisionally, until it was determined who had the power of appointment to

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the chaplaincy. I.e., the Court showed no disposition to prohibit on the Vicar's second ground, understood either way. What is to be made of the first ground? It is at first sight puzzling. There is no obvious reason why the ecclesiastical court should not decide a dispute about the right to choose the chaplain, since the office was surely spiritual. (The Vicar's most likely rival would be his rector.) The basis for deciding would presumably be prescription, but there seems to be no more objection to the ecclesiastical court's determining that question about prescriptive rights in intra-Church matters than the other one, the existence and amount of the salary. I should expect at the least that Prohibition would only be considered on disallowance surmise -- i.e., on some kind of showing that the ecclesiastical court had mishandled the issues raised by the Vicar's plea in the ecclesiastical court that he was not being sued by a lawful holder of the chaplaincy. Furthermore, the Court's disposition is puzzling. How was it to be determined to whom the appointment belonged? I doubt that the Court meant that a factual dispute about the method of appointment should be tried by jury, for there seems to be no better reason for that than for common law trial of the chaplain's entitlement to the salary. I am therefore inclined to think that the Court was merely putting off definitive denial of a Prohibition until it got a surer sense of the situation by informal means. Most probably, it wanted to see a motion for Consultation by the chaplain clarifying the nature of his ecclesiastical claim.

The plausibility of this move will come out if we look at details of what the report tells about the Vicar's surmise. The Vicar did not simply say that he was being sued for the chaplain's salary by a non-holder of the chaplaincy, since appointment by the Vicar defined a holder. In addition, he admitted that the chaplain was "in *de son tort*". I take this to be an admission that the chaplain had been performing the office. The obscurity about the ecclesiastical suit, making definitive resolution difficult, would therefore be this: Was the chaplain suing on the assumption or pretense that he was the lawful holder of the office (because he claimed that the appointment belonged to someone else who had appointed him, or claimed that he was the Vicar's appointee)? Or was he admittedly suing as *de facto* chaplain, claiming the salary whether or not he was lawful chaplain, or even though he was not, on the theory that it was the Vicar's duty to pay him so long as he performed the office and no effort was made to remove him? If the chaplain's claim was of the first type, denial of Prohibition seems clearly the right course. If it was of the second type, we might quite possibly have a hard case. Who should say whether someone not lawfully installed in an

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ecclesiastical office is entitled to remuneration if he is suffered to perform it, an ecclesiastical judge or the common law judges? If he is entitled, what is the nature of the payment? Arguably, at any rate, it would not count as one of those intra-Church payments, analogous to spiritual pensions, that were left to the Church to evaluate and enforce, but as money due for "temporal" reasons, analogous to quasi-contractual duties to pay for valuable services received, or services done in reasonable expectation that they will be paid for. On that analysis, the suit should be at common law. (*Quaere* by what action.)

(k) Coper's (or Cope's) Case. P. 14 Car. C.P. Harg. 23, f.38 and f.39 (second notation of same case.)

The report of this case is obscure, but the point is dimly visible. The ecclesiastical proceeding is described as a suit to make a building into a parochial chapel. This has the look, not of an ordinary lawsuit, but of a quasi-administrative procedure. The presumable object was to get the building declared a parochial chapel, which would have legal consequences. (The building would come under the control of the parish authorities -- the clergyman to some intents, the churchwardens and vestry to others. It would be dedicated to religious uses and therefore fall under ecclesiastical law in the sense that the conduct of services there would be subject to the Church's rules, it would be a place protected by laws against sacrilege, etc. Attendance at services there would presumably satisfy the compulsory attendance laws, which were enforceable by both lay and ecclesiastical agencies.) The objection to this suit (which was probably prohibited, though the report is not clear) was that the building, originally a chapel belonging to a chantry, was confiscated by the Crown in Edward VI's reign, thereby becoming, like other chantry property "lay fee." It had subsequently been granted by the King to an individual layman and by him to the parishioners. I.e., at the time of the suit it was collective property of the parish. There is no indication of what it was being used for. Plaintiff-in-Prohibition is not identified, but it seems likely that a parish squabble was behind the litigation, some of the parishioners in favor of turning the edifice into a parochial chapel, others opposed. It is tempting to imagine the High Church party in the first role and an alliance of the Puritans and the seculars in the latter, but there is no evidence on the local situation.

I cannot imagine how the parishioners, or part of them, would go about getting the building recognized as a parochial chapel otherwise than in the way they proceeded. If the ecclesiastical proceeding was stopped by Prohibition, it was surely not because the common

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law furnished a way to the same end. The Prohibition, or at any rate the claim to Prohibition urged by Serjeant Henden, seems to be based on the idea that an effort to appropriate ordinary property, which the former possessions of chantries undoubtedly were, to Church purposes by ecclesiastical process was somehow like asking a Church court to determine a dispute about property. The analogy seems strained.

(1) Anon. Undated. Harl. 4817, f.223.

Churchwardens lent a sum of money belonging to the parish and received payment when the borrower's obligation fell due. They were sued in an ecclesiastical court for concealing the receipt when they rendered their account to the parish. The ecclesiastical suit was prohibited because an action of Account would lie at common law. The Court distinguished two other cases in which an ecclesiastical suit would be appropriate owing to the unavailability of a common law action in some accounting situations: (1) If churchwardens levy a parish rate to repair the church, parishioners may sue in the ecclesiastical court, but not at common law, to require a true accounting. (2) Executors may be sued to account for the estate in ecclesiastical courts because common law Account does not lie against them.

Owing to a hiatus in the MS., it does not appear who brought the ecclesiastical suit. Here, as in some other cases we have seen, there might conceivably be a discrepancy between the common law and ecclesiastical remedies with respect to standing to sue. I take it that any one or more parishioners could maintain the action of Account which the Court saw as the proper remedy. If by any chance the ecclesiastical plaintiff was someone without standing to sue at common law (the minister? higher Church authorities?) it made no difference: the parish's right to have its property honestly accounted for was adequately protected by temporal law. The report contains a firm statement of familiar grounds against indulging concurrency or near-concurrency: "...[an ecclesiastical suit] is not to be suffered, for by the common law the matter is to be tried by jury, but in the spiritual court matters are to be tried by the course of the ecclesiastical law, viz. by witnesses and the like, and so *ad aliud examen trahere*."