

*The Writ of Prohibition:
Jurisdiction in Early Modern English Law*

**D.
Problems with Paradigmatic Prohibitions:
Ecclesiastical Offices**

Summary: The cases support the proposition that an ecclesiastical office for life (or longer, if there can be such offices) is a freehold, for dispossession from or disturbance in which common law actions will lie, wherefore ecclesiastical suits should be prohibited. Office-holders with such complaints would generally be well-advised to sue at common law unless they could count on the other party's acquiescence in ecclesiastical jurisdiction. None of the cases, however, presents an altogether simple instance. Complaints apparently of wrongful removal from such offices could contain other issues not necessarily inappropriate to ecclesiastical courts, raising questions about their classification and sometimes about their prohibitability on other grounds than head-on invasion of common law territory. The cases provide no clear authority on whether removal from an ecclesiastical office for term of years can be the basis of common law actions or would be inappropriate to an ecclesiastical court.

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It can be confidently said that an ecclesiastical suit simply and straightforwardly complaining of dispossession from a life office or disturbance in the enjoyment thereof should be prohibited on "paradigmatic" grounds. For a life office is a freehold, recoverable at common law by real action and protectable with respect to disturbance by Action on the Case. Its being an ecclesiastical office makes no difference. The nature of the duties and the incidents of the office (how one is appointed to it, under what conditions it might be forfeited, and the like) do not alter the fact that it is temporal property, although ecclesiastical law might be the source for defining such incidents.

The simplest case, providing the strongest authority for the principle just stated, is *Robotham v. Trevor* (1612).¹² The Bishop of Landaffe granted the Chancellorship of his diocese to Dr. Trevor and Griffith for their joint lives. According to Robotham's surmise, Trevor released his interest to Griffith for £ 350. Griffith then died, thus, if the surmise is

¹² H. 8 Jac. C.P. 2 Brownlow and Goldesborough, 11; Harl. 4817, f.231b.

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true, terminating the estate. The Bishop then granted the Chancellorship to Robotham for life. Trevor had meanwhile become a substitute judge in the Arches. Pretending that he had never validly released his joint interest and was therefore tenant by survivorship, Trevor appointed a deputy to exercise the Landaffe Chancellorship. Then he himself, in his Arches capacity, issued an order (an "inhibition" in ecclesiastical law) enjoining Robotham from disturbing the deputy. Robotham sought a Prohibition to stop (in effect to reverse) Trevor's proceedings as an ecclesiastical judge. His position was that Trevor should be suing at common law if he wanted to maintain that he was still tenant and that Robotham's attempting to exercise the office or his interference with Trevor's deputy constituted disseisin or unlawful disturbance. Trevor's counsel argued that the ecclesiastical nature of the office gave the ecclesiastical courts jurisdiction, but the Common Pleas judges unanimously rebuffed that contention, citing several precedents.

One should note that the outcome, clearly justified as it was in law, is also reinforced by the equities. For the effect of the Prohibition was to stop manifestly abusive behavior -- Trevor's acting as a judge to enforce his version of his own rights. So far as the reports indicate, no attention was paid to this consideration, and the case is too open-and-shut for that to be necessary, but it is likely to have added to the judges' enthusiasm for the Prohibition.

One procedural point in the case is worth noting: Robotham spelled out the merits of his claim against Trevor in his surmise (clearly, for the full facts are reported, and the source must be the surmise) -- that Trevor had released on good consideration, that Griffith was dead, etc. He did not confine himself to what in theory would seem enough: simply that a freehold office had been brought in question in an ecclesiastical court. Robotham's reasons for specifying could be various, including the absence of any reason against telling the full story straightforwardly. But what of the effect? Could Trevor now come and plead to the Prohibition, denying that he made a valid release, thereby permitting the substantive dispute to be tried -- at common law to be sure, but pursuant to the Prohibition? Theory would seem to suggest a negative answer: A man has proceeded in an ecclesiastical court when he can and should protect any valid interest he has by proceeding at common law. He has probably committed a crime and a tort in doing so, (See Sub-sect. B. above for Coke's dictum in this case that Trevor was in danger of *Praemunire*.) Apart from higher considerations, fees for regular common law process would be lost if the substantive dispute were to be tried

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pursuant to the Prohibition. Surely the ecclesiastical proceedings should be cut off without hope of revival. Being improper, they should not be revivable by Consultation upon a showing that they were just in substance -- i.e., that Trevor was in fact entitled to the Chancellorship and should win if he were to bring a common law action. *Quaere tamen*. It should be noted that the abused party, Robotham, though not the common law's own interest in fees and due process, would be better off if the substance could be tried under the Prohibition. If, on the bare determination that a life office was at issue, the ecclesiastical proceedings must be turned off without hope of revival, it might well be Robotham, rather than Trevor, who would be driven to the expense of a separate common law suit. "Turning off" would leave Robotham and Trevor's deputy at each other's throats. If Trevor's case was in fact too weak to defend by any other means than abuse of the ecclesiastical judgeship he happened to hold, he might not have sufficient motive to sue at common law. But he would have plenty of motive to sit back and let the deputy make difficulties for Robotham, until Robotham either gave up or took the litigative initiative. It is conceivable that Robotham specified the merits in his surmise in the hope of having the merits tried here and now, but since the reports end with the granting of the Prohibition there is no way of knowing whether anything further happened. If Trevor's case was in fact weak, he would have had no reason to attempt a substantive plea to the Prohibition and reason enough to "sit back and let the deputy make difficulties."

A briefly reported case from 1618¹³ appears to have a mixture of elements similar to that of *Robotham v. Trevor*. All we are told is that one Archdeacon of Exeter granted the office of Registrar to an infant, and that his successor as Archdeacon granted the same office to another person of full age. The second grantor proposed to determine the right as between the two grantees. A Prohibition was issued.

The report does not say that the grants were for life, but there is nothing to suggest they were not. Whether Church offices for term of years should be regarded as temporal like life-estates is a question on which I have found no evidence. That aside, there would seem to be clear occasion for a "paradigmatic" Prohibition, though a moment's hesitation may be in order inasmuch as the report tells nothing about the litigative situation. (Cf. the cases below

¹³ Anon. M. 15 Jac. K.B. Add. 26,213, f.20l.

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illustrating complexities in the application of the Robotham principle. In the present case, problems about the effect of a grant of an ecclesiastical office to an infant could be a complicating factor. Might the grant -- unlike a conveyance of ordinary property to a minor -- be such a nullity as to destroy the analogy between litigation over land and over offices on which the common law monopoly could perhaps be said to depend? It is pointless to speculate on this case without more information.)

As in *Robotham v. Trevor*, Prohibition could also possibly be justified on other grounds, viz. as a means of preventing the Archdeacon from sitting as judge in a case that cut close to his own interest. A Prohibition with that rationale would raise its own problems: Should the ecclesiastical system be trusted to correct improprieties on the part of its judges, as it should be left to correct legal errors by its own standards on appeal?

In *Dr. Barker v. Bishop of Oxford* (1624),¹⁴ the King's Bench found application of the doctrine of *Rotbotham v. Trevor* rather difficult. In this case, the Bishop granted the office of Vicar General and Commissary to Barker for life. Later, in his capacity as Ordinary, the Bishop issued an order forbidding the diocesan Registrar from recording any of Barker's acts and forbidding all persons from paying him fees, thereby effectually dispossessing him of his office. Barker sued the Bishop in an ecclesiastical court (unspecified -- confusion between the roles of judge and party is not a problem in this case) for dispossessing him by the allegedly unwarranted official act of "inhibiting" the Registrar and fee-payers. The Bishop sought a Prohibition because the litigation concerned freehold. From a remark by Justice Dodderidge, it appears that the underlying dispute was over whether Barker had forfeited the office or whether, in any event, the Bishop had observed proper form in claiming the forfeiture. (The office was granted by letters patent, but Barker was discharged without corresponding formality on grounds of forfeiture. The validity of a parol discharge to countervail the patent was in question. Nothing is reported about the reason for the claimed forfeiture. It seems likely that Barker would have been disputing the substance as well as the form, but that is uncertain.)

After two judicial remarks, both seemingly skeptical as to whether Prohibition would lie, the case was adjourned, and there are no direct reports of a subsequent hearing. (A reference

¹⁴ P. 21 Jac. K.B. 2 Rolle, 306.

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in a later case is discussed below.) Justice Dodderidge expressed doubt as to "whether there is any question in the common law on this discharge [by parol where the grant was by patent.]" I would suggest spelling out the thought as follows: Though it is true that a Church office for life is a temporal freehold, and as such protectable at common law, it does not follow that ecclesiastical courts are excluded from every kind of litigation concerned with such offices. Perhaps they are excluded only from the determination of certain kinds of issues on which the common law is notably competent or from issues which could arise in identical form in litigation over land or secular offices -- e.g., whether Dr. Trevor *supra* attempted to release his life-estate to his joint tenant (a jury issue), or whether he made an effectual conveyance (a mere question of property law, on which the ecclesiastical law can hardly be imagined to differ from the common law and would probably not be suffered to.) Questions about the incidents of ecclesiastical offices, such as whether they are subject to parol discharge upon forfeiture even though granted by patent (or perhaps -- cf. the last case above -- whether grant of such office to an infant has any legal effect) are not intrinsically inappropriate to ecclesiastical courts. If it appears that such incidents are in question, perhaps Prohibition should be denied, even though that would probably make for a degree of concurrent jurisdiction over life offices. (For, given the premise that the office is a temporal freehold, I see no basis for excluding common law jurisdiction. I.e.: If Barker had brought a common law suit for the alleged dispossession, I assume he would have had a good cause of action, even if the common law court had to inform itself about ecclesiastical rules in order to decide.) It should be noted that the underlying issue in this case as Dodderidge takes it -- the parol discharge -- is not one on which an automatic common law response, as it were, would be possible. Land law furnishes no help, since life-estates could be conveyed without so much as a deed and could be reclaimed for forfeiture by entry. Analogies could no doubt be found in the law of royal offices and patents, but would they be significant? Do the incidents of one type of office say anything about the incidents of others, and is there anything to prevent ecclesiastical offices, severally or generically, from having their own peculiarities?

Chief Justice Ley took another tack, saying that Dr. Barker could have a Prohibition for the very act of disturbance that his ecclesiastical suit complained of. I.e., when the Bishop, by judicial act, "inhibited" the Registrar and fee-payers, Barker was entitled to a Prohibition -- not only to a common law suit for the freehold, which he must surely have been entitled

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to. Such a Prohibition would stop the "inhibition" proceedings, or nullify them if they had reached a conclusion. Its rationale would presumably be that the Bishop *qua* ecclesiastical judge had no business calling Barker's freehold in question. His only course, I take it, would have been to oust Barker in some *de facto* way -- as by appointing a new Vicar General and leaving it to the rivals to litigate at common law. (*Quaere* whether the Bishop himself could frame a common law action against Barker for attempting to exercise the office after forfeiting it and being told he was discharged.)

Whereas Dodderidge's remark clearly indicates skepticism about the Prohibition, Ley's intent is not so clear. He could be saying, "Ecclesiastical meddling with life offices is so plainly unlawful that Barker could have stopped the earlier episode of such meddling -- the 'inhibition' proceedings. Surely this further stage of an *ultra vires* course of events should be stopped." I am inclined, however, to take Ley in the opposite sense, as saying, "Barker could, if he had chosen, have invoked the freehold character of his office to prevent the inhibition proceedings. He chose instead to assert his rights within the ecclesiastical system. At an earlier stage, the Bishop undertook to pass judgment on Barker's freehold in the indirect form of the inhibition proceedings, contrary to jurisdictional propriety. It does not befit the Bishop to complain now, when Barker has submitted the merits of the controversy to further, neutral ecclesiastical scrutiny, and when Barker, the party who is really entitled to the protection of a Prohibition and the benefits of common law process, is willing to forgo them." The justice of Ley's opinion so construed is evident. For "paradigmatic" Prohibitions, it would have the same implication as some Admiralty cases: Prohibitions to insure that litigation which ought to go to the common law does go there may be more plainly justifiable than any other kind, but it is not always fair or practical to give such Prohibitions maximum procedural privilege. A party seeking the simplest and most justifiable sort of Prohibition may have so far acquiesced in the "foreign" jurisdiction, or tried to use it for his own advantage, that the common law's interest in monopolizing some types of litigation must take second place to the private justice of estoppel.

The report of Dr. Barker's Case is indecisive. At most it shows two judges enough in doubt about prohibiting to adjourn the case for further discussion. A reference to *Dr. Barker*

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in the slightly later *Dr. Sutton's Case* (1628)¹⁵ suggests that a Prohibition was finally granted in the former, but the reference is confusing because it gives a different impression of the facts of *Dr. Barker* than the principal report, I shall return to this matter. First let us look at *Dr. Sutton* itself, for this case supplies an example of Prohibition denied in a dispute over a life office.

Sutton was made Chancellor of Gloucester for life by the Bishop. As we learn in Noy's report (Godbolt does not give this feature), a commission was set up to examine the competence of diocesan Chancellors -- in effect an *ad hoc* ecclesiastical court. The commission investigated Sutton and proposed to deprive him on the ground that he was insufficiently learned in civil and canon law. He sought a Prohibition, but the King's Bench denied it.

Sutton's position was that appointment by the Bishop of Gloucester, whose responsibility it was to determine the competence of his appointee, created a presumption of competence which could not be reexamined, and that the office was a freehold beyond the reach of ecclesiastical authorities. The contention is double-edged. On the one hand, ecclesiastical courts should not meddle with life offices. By implication, if there was any way of getting rid of an ill-qualified officer, it would not be by process of ecclesiastical law. The only means I can imagine would be for the Bishop to dismiss Sutton non-judicially and then try, either himself or through a new appointee, to get a common law determination that the office was forfeited for breach of an implicit condition of competence. On the other hand, it was argued that the Bishop's act of appointment *ipso facto* established the appointee's competence. It is hard to see, on that premise, how either a common law or an ecclesiastical tribunal could ever hold the office vacant on account of the holder's general incompetence (as opposed, perhaps, to specifiable malfeasance.)

Justices Dodderidge and Jones, presumably with the agreement of their brethren, escaped the argument from the freehold character of the office. (Godbolt's report gives the individual remarks of those two judges.) If an office requiring skill is granted for life, Dodderidge said, no freehold passes unless the grantee actually has the requisite skill. Ergo, an ecclesiastical life office is not beyond the reach of ecclesiastical jurisdiction in so far as it appears that the ecclesiastical court is examining the holder's skill. One might generalize as

¹⁵ P. 3 Car. K.B. Godbolt, 390; Noy, 91.

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follows: Ecclesiastical jurisdiction is inappropriate if there appears to be no question but that the office-holder was once vested with a life-estate (as in *Trevor*); it is not inappropriate if the question appears to be whether he was ever so vested. The latter sort of question might take the form, "Does the office-holder have the skill requisite for the office?" With reference to an earlier case above, might it not also take the form, "Is this office grantable to an infant?" (Note that this distinction, though related, is not the same as the one suggested above between questions concerning the "incidents" of an office and questions about mere property transactions involving life offices. Questions like, "Does this office carry certain conditions of forfeiture and certain requirements as to the form in which forfeiture is to be claimed?" concern "incidents" but presuppose a vested life-estate. To forfeit an office or a tenement you must have it, and perhaps someone who has an ecclesiastical office for life is untouchable by ecclesiastical courts even when the question concerns the conditions of forfeiture, as well as the fact of their breach.)

Justice Jones backed up Dodderidge's view that an unskilled Chancellor has no freehold by citing a case involving a herald: The Earl Marshall suspended a life herald "because he was ignorant of his profession, and full of error contrary to the records." The judges held that because he was ignorant he had no freehold in his position. (No specific citation is given.)

Taking it as agreed that Sutton never had a freehold, the nature of his claim to Prohibition shifts. He cannot claim one on the "paradigmatic" ground that any contest over the office must be at common law, but is driven to argue that the commission's depriving him was merely an unlawful act of a sort fit to be controlled by Prohibition. The commission's activity would be like an unwarranted extension of the "ambit of remediable wrong" with an element of intra-ecclesiastical jurisdictional conflict. (I.e.: If one appointed to an office of skill by a person who is trusted to examine his competence is simply immune from reexamination, the commission would be doing the same sort of thing, say, as an ecclesiastical court that holds me liable in defamation for words I should be free to speak. A more moderate position might concede the Bishop's power to proceed against his appointee for incompetence, while denying it to an extraordinary ecclesiastical authority such as the commission. Whether Prohibitions should be used to control lines of jurisdiction within the ecclesiastical system of course makes a question.) Justice Dodderidge recognized just this point -- that once the contention about jurisdiction over freeholds was exorcized, the claim to Prohibition shifted in nature without evaporating altogether. For immediately after stating

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the rule on freeholds in offices of skill he said, "A prohibition is for two causes: first to give to us jurisdiction of that which doth belong unto us; and secondly, when a thing is done against the law, and an breach of the law, then we use to grant a prohibition." In other words, Dodderidge distinguished between "paradigmatic" Prohibitions (together, perhaps, with those aimed at getting common law *issues* resolved at common law) from other varieties. Explicit recognition of the multiple functions of Prohibitions was rare in the 16th-17th centuries. In application to the present case, I take Dodderidge to be saying that there was no question of infringement of common law jurisdiction, because Sutton was not vested with a freehold, but that a Prohibition of the second type could still be considered, if it could be made out that the ecclesiastical authorities had done something "against the law."

With the case so clarified, the Court proceeded to deny a Prohibition. Godbolt's report states the bare result, but Noy's gives some explanation. On the residual issue, as I have analyzed it by following Dodderidge in Godbolt, the explanation is not worth much. The Court simply saw no illegality, having apparently ascertained that the commissioners were within the scope of their commission. That seems predictable. It would be hard to maintain that the Church may not constitute a special commission to oversee such of its personnel as have no temporal interest in their tenure. With respect to such personnel, whether the Bishop's presumed examination at the time of appointment precludes subsequent or independent reexamination is surely best regarded as a purely ecclesiastical issue.

Noy's report tells a little more, however. The Court is said to have distinguished the present case from "a sute in the Spiritual Court for the profits of that office, supposing the grant of that by the predecessor does not bind the successor, as it was in Dr. Barker's Case. There a prohibition shall be awarded because the profits are temporal. But we in the first case cannot try the sufficiency." This language is confusing with respect to *Barker*, because the direct report of that case does not suggest that the question was the bindingness of a predecessor's grant. Nor does it suggest that the ecclesiastical suit was for the profits of the office literally speaking -- i.e., for so much money claimed as profits taken by someone without title --, as opposed to possession of the office itself. Be the facts as they may, *Barker* is certainly distinguishable from Sutton. On any construction, there was no question of Barker's competence and no way in which his having a freehold in the first place was in the clouds -- whether the claim against him was that he had forfeited the office and been duly discharged, or that his estate terminated when a new Bishop succeeded.

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In general, the case evidence on ecclesiastical life offices does not permit very firm rules to be stated. In principle, Prohibitions could be used to keep litigation over such offices, being freeholds, in the common law sphere, but the complexities of the subject were such that application of the principle was not clearcut.

**E.
Problems of the Paradigmatic Prohibition:
Spiritual Pensions.**

Summary: Should an ecclesiastical suit for a pension be prohibited because the action of Annuity would lie at common law to recover the annual payment in question? "Why not?" seems a good question, inasmuch as the availability of an adequate or substantially equivalent common law remedy was generally the best reason for Prohibition. None of the three thoroughly argued cases in this Sub-section resulted in the granting of a Prohibition, however. One, Collier's Case in the Queen's Bench, gives by implication an affirmative answer to the question above, one judge dissenting. The Court was unanimous on the result because the judges did not think Annuity would lie -- whether it would was a difficult question in the circumstances. In *Sprat v. Nicholson*, by contrast, the Common Pleas answered the question explicitly with a qualified "No", thereby making an exception to the general rule that when there is a common law remedy it must be used. The first qualification is taken for granted in all discussion of ecclesiastical pension suits: They are appropriate to ecclesiastical courts only if between "spiritual persons" and only if the pension amounts to a charge on an ecclesiastical revenue. The second clear qualification is that if the party claiming the pension has once sued for it in Annuity he is barred from ecclesiastical suit in the future.

Authority from the pre-Reformation period was a larger factor in the pension cases than in most areas of Prohibition law. The exceptional step of permitting ecclesiastical suits to duplicate Annuity may have been taken by courts of an earlier generation. It was scarcely "settled law", however, since good authority *contra* could be and was invoked. What outcome is most faithful to the late-medieval law is an open question.

The third case in this section, *Dean and Chapter of Wells v. Goodwin*, is best construed as a situation in which Annuity would clearly not lie. It therefore presents, in a form peculiar to itself, the question whether ecclesiastical pension suits could be prohibitible on other

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grounds than overlap with Annuity. Prohibition was denied; the case confirms the courts' preference for leaving "spiritual pensions" to the ecclesiastical courts when reason could be found.

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The following looks as if it ought to be law: If a sum allegedly payable by A. to B., in the nature of an annuity, is recoverable at common law by writ of Annuity, an ecclesiastical suit to recover the same should be prohibited. It makes no difference that A. or B. or both of them are churchmen. If a payment of this sort is *not* recoverable in Annuity, there is at least no obvious reason why it should not be recoverable in an ecclesiastical court, or why its recoverability should not be left to the determination of the ecclesiastical judge, provided that both A. and B. are churchmen and the payment is to be drawn from ecclesiastical revenues. Obviously enough, Church law and Church courts cannot give pecuniary claims to laymen, or impose pecuniary liabilities on them, beyond those which the temporal law creates, or makes it possible for people to create, and provides the means to vindicate. That the Church may recognize further claims and liabilities among its own personnel, exclusively in ways that effect redistribution of the Church's income (that drawn from benefices-tithes, offerings, glebes, etc. --, as opposed to the private or temporal wealth of individual clergymen), seems a plausible proposition if not an irresistible one. At the least, prohibiting ecclesiastical suits for such payments by churchman against churchman would be much more problematic than prohibiting a suit that could just as well have been an action of Annuity.

What I have stated had its defenders. It is a spelled-out version of the argument made by counsel seeking Prohibitions in a couple of cases. It is repudiated by some judicial opinion in favor of the proposition that where churchman is suing churchman for an annual payment drawn from ecclesiastical incomes the ecclesiastical suit should not be prohibited even though Annuity would lie (wherefore inquiring into whether it would lie is unnecessary.) Of the few judges who got a chance to pronounce on this matter, some were not persuaded to accept that proposition, but in the actual circumstances of the cases they thought Annuity would not lie, or at least were too unsure whether it would lie to feel that Prohibition was justified. Nothing suggests any inclination to doubt that quasi-annuities outside the scope of the writ of Annuity could be recovered by churchman against churchman in ecclesiastical courts. I.e., the "spiritual pension" was recognized as a legitimate interest.

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In Collier's (Collyar's) Case (1600),¹⁶ the "pension or annual payment" (as the MS. report calls it) in question was created when a rectory was appropriated in Henry III's reign. Note at once one feature of the case: The pension could not be claimed on the basis of immemorial prescription, because it came into being at a specifiable time in the past. It was said in argument and affirmed by the Judges that Annuity would lie to recover an annual payment claimed by prescription (in the common law sense -- from time out of mind.) That, however, is irrelevant for this case. If the pension was recoverable in Annuity, it must be because the mode of its creation was equivalent to the *other* sure way of creating an annuity recoverable by the writ of that name -- viz. grant by deed. One must say "equivalent to" because the complicated ecclesiastical process of establishing an appropriation and distributing the income of the rectory was of course not literally the same as simply granting someone an annuity by deed. The main issue in *Collier* was whether the pension was as good as an annuity created by deed or whether it should be classed as an ecclesiastical interest without common law equivalent (and therefore, as no one questioned, pursuable in ecclesiastical courts without interference.)

The story of the pension's creation was as follows: The Bishop of Salisbury was the authority in charge of the appropriation process. In the standard way, he set up a vicarage to serve the cure and endowed the vicar with part of the rectory's income. In addition, he made what is called an "ordinance" (using the words "*statuimus et ordinamus*") requiring the vicar to pay £ 20 *per annum* to the Precentor of Salisbury cathedral to the use of the Vicars Choral. The substance of the arrangement is easy to understand and, so far as I know, perfectly within the discretion of the bishop overseeing an appropriation. (At any rate, the common law Judges would have no evident title to challenge that and show no inclination to.) The vicar's endowment (of unknown size both absolutely and relative to what the rector retained) was simply cut back by £ 20 p.a. for the benefit of another ecclesiastical institution. In other words, the arrangement for appropriation of the rectory was a three-way split instead of the ordinary two-way split between rector and vicar. The pension sued for in the instant case was the Precentor's £ 20. The central issue was whether an interest conferred by such an "ordinance" was an annuity within the scope of the writ, as it if had been conferred by deed.

¹⁶ T. 41 Eliz. Q.B. Croke Elizabeth, 675; Add. 25,203, f.74b (*sub. nom.* Collyar.)

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The case was argued more than once by counsel on both sides, and considerable medieval authority was cited. (See "Note on Authorities" at the end of this Sub-section.) Most significantly, Tanfield, arguing for Prohibition, claimed authority directly in point, viz. a holding that Annuity would lie on a quite similar, if not identical, "ordinance" made by a bishop at the time of an appropriation. In that case, the bishop had ordained that the vicar pay the Prior [= rector, i.e., the head of the monastic house being allowed to appropriate the church] 100/ per year "for" the Sunday offerings. The difference from the instant case is that this "ordinance" involved no third party. It was part of the settlement between rector and vicar and amounts to giving the rector a share of the offerings over and above the share of tithes he was allowed to retain. Of course the difference may be insignificant. Tanfield would no doubt have said that the identity of form was the significant point -- the fact that the annual payment was created by "ordinance" collateral to the principal transaction at an appropriation, viz. the rector's endowment of the vicar, the bishop approving, with a portion of the living.

In the end, the Court denied Prohibition unanimously (strictly, granted Consultation on motion.) There was, however, an important difference of opinion on the law. Justice Gawdy embraced a version of concurrent jurisdiction. He held that the pensioner was free to sue in the ecclesiastical court whether or not he could maintain Annuity. It is not clear whether Gawdy meant that the choice of courts is fully optional, or only that it is optional the first time suit is brought for the pension. I.e.: Having once brought Annuity, is one foreclosed from ever bringing an ecclesiastical suit? *Vice versa*, does bringing an ecclesiastical suit foreclose one from Annuity? Gawdy does not address these questions (for which see *Sprat v. Nicholson* below.) He would probably have said at least that bringing Annuity forecloses the ecclesiastical remedy, for that is endorsed by the authority he relied on (Fitzherbert -- see "Note") Gawdy did say expressly that Tanfield's strong precedent did not count against him. Of course it does not strictly, for the fact that Annuity will lie does not *entail* that an ecclesiastical suit will not. The trouble is that permitting election of an ecclesiastical tribunal when a common law remedy is available is anomalous judicial policy.

Authority aside, the situation represented by this case illustrates the practical advantages of Gawdy's position. Were it clear where Annuity would lie, were an immemorial prescription or an unmistakable grant absolute prerequisites for the writ, it would perhaps be hard not to insist that the common law action be used when available. In reality, in the kind

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of case most likely to be controverted, deciding whether Annuity would lie was not so easy. Authority perhaps supported extending the writ beyond the simple model "prescription or deed", but to decide from case to case whether extension was proper would require repeatedly going into the details of ill-understood medieval ecclesiastical proceedings. Better to indulge a minor degree of incursion on common law territory, in any event only open to clerics suing clerics over pensions taken out of ecclesiastical incomes.

The rest of the Court was more orthodox. According to the superior MS. report, Chief Justice Popham made the three points following in the course of hearing the case. The first and third are his final pronouncement. With respect to these, the report says that Justice Clench expressly agreed and Justice Fenner said nothing to the contrary. The second point was made by Popham and Fenner when the case was argued for the first time. Expounding the three points together is necessary to catch the rather subtle drift of the judges' thinking.

(1) (In Popham's language, MS. report, my italics added), "...every writ of annuity must be brought on prescription or on writing *or something of as high nature, which there is not here.*" This proposition accepts the extension of common law annuities beyond "prescription or deed." What would count as of equally "high nature" is not specified. Popham's statement does not necessarily overturn Tanfield's precedent, because it leaves open the possibility that the bishop's "ordinance" in the earlier case was "high" enough to count, but no way of distinguishing the earlier case from this one is specified.

(2) When *Collier* was argued the first time, Popham and Fenner made a distinction between different ways of creating pensions by intra-ecclesiastical proceedings, one of which would create an interest protectable by Annuity and the other of which would not. It is not clear, however, that it is the distinction needed to differentiate Tanfield's precedent. In the MS., Popham and Fenner say, "There is a difference where the Ordinary ordains such payment as judge, for there the suit will be in court Christian, and where the patron and Ordinary made a charge in respect of their interest in the Church, for there a writ of annuity lies." (Croke's report states this as a distinction between where the Ordinary ordains the payment as judge and where the patron and Ordinary make a grant in time of vacation, "for there they charge as an interest.") In its terms, the distinction is clear enough: If the duty to pay what amounts to a pension is imposed by the judicial act of a bishop *qua* ecclesiastical judge, the duty is not enforceable by Annuity; if it is created by a grant to which the bishop is a party -- albeit a grant of a special type peculiar to certain ecclesiastical transactions -- it

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is enforceable by Annuity and therefore not in Church courts. The application of the distinction is less clear. The most probable interpretation of Popham and Fenner is that they proposed to take the form of an "ordinance" as conclusive evidence of a judicial act. I.e., in the absence of certainty about just what the 13th century bishop was doing, the best guess is that when he "ordained" he was speaking as a judge. (Croke's formulation suggests that any act done in term-time would be presumptively judicial.) The inconvenience of this interpretation is that it would seem to overturn Tanfield's precedent, where an "ordinance" was also employed. In neither case does it seem very likely that the "ordinance" would have been a judicial act in the sense of the resolution of a litigated dispute. The one in Tanfield's precedent would be more likely to answer that description than the one in the instant case. (In the precedent, the parties were vicar and parson. They could have had litigation over the terms of their relationship, resulting in a judicial decision or court-imposed settlement requiring payment of the pension. In the instant case, it is hard to see how the Precentor and Vicars Choral could have had a claim against the vicar coming out of the appropriation, hence hard to imagine litigation resulting in a decree to pay the pension.) For labeling the "ordinance" judicial, however, it is not necessary that real litigation lay behind it. In both cases or either one, the bishop may have been doing no more than working out the details of the "property settlement" attendant on an appropriation. His main act would be giving his assent to, or joining as a party in, the patron's [=rector's] endowment of the vicar with certain tithes and other incomes -- the indispensable step for a valid appropriation. This act must be what Popham and Fenner had in mind as that which is as good as a grant by deed, that which "charges an interest" (encumbers the rectory, now made over to the patron without duty to exercise the patronage, with the vicar's rights.) (The act's merely being done in term-time would hardly seem to detract from its grant-like quality, though the anomalous form of an "ordinance" issued during vacation might -- since it cannot then be a judicial act -- be taken as a part of the act of endowment, a sort of amendment or "codicil".) If in both Tanfield's case and *Collier* itself the bishop was in practice only filling out the settlement by a supplementary "ordinance", he might still have employed a judicial form. There is nothing especially surprising about consciously using such a form, though whether the 13th century bishop actually thought he was may be doubtful. (Would 13th century bishops have supposed that they had mere "administrative" authority to decree supplementary features of an appropriation settlement?) In principle, resort to judicial form for non-judicial purposes is

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analogous to such common law practices as conveyancing by feigned recovery. The bishops, wishing to add to or vary the endowments proper, could perfectly well have resorted to a form designed to look like the final step of a lawsuit -- in Collier, to oblige the vicar to make the annual payment to the Precentor as if the latter had a judicially determined just cause to be paid. In formalistic terms, he could have preferred to charge the vicar "personally" rather than to "charge an interest " Whether doing one or the other would make a practical difference in other ways I cannot say, but there is one thing the bishop may quite imaginably have intended to do: viz. to create an interest subject only to spiritual sanctions -- a weaker interest than a common law annuity. If that is a legitimate intention -- and why not? --, the bishop would seem to have used the best formal means at his disposal, a judicial-looking "ordinance".

It seems to me fairly evident that all this was an elaborate means to the end Justice Gawdy was willing to reach more directly. The other judges, I would surmise, were no happier than Gawdy about having to spend time unscrambling the common law effect of ancient ecclesiastical arrangements. Their preference was to say, "If it isn't obviously a common law annuity, let the ecclesiastical courts take care of it." The judges were constrained by precedent, however, from quite saying that, and they were reluctant to violate general principles by holding that ecclesiastical jurisdiction was acceptable at the party's choice even over "obvious common law annuities". They saw as well as Gawdy did that driving a churchman to sue at common law when he was willing to use the ecclesiastical courts made no practical sense. Prohibiting would only give another churchman a chance to gamble on doing better at common law or on wearing out his pensioner by protracting litigation. They preferred, however, the more technically conservative course of narrowing the scope of Annuity as much as possible, thereby dissuading pensioner-clerics without obvious annuities from using the writ and their opponents from seeking Prohibitions. If what one really wants is for churchmen with dubious annuities to go to ecclesiastical courts in the first place and for the churchmen alleged to owe such pensions to stay there, signaling that in practice establishing a right to Annuity is likely to be difficult may have advantages over Gawdy's invitation to litigants to pick the court they prefer. Gawdy's way would cut off Prohibitions, but not Annuity suits in cases where the judges may have suspected that there was no intent, when the pension originated, to create an interest protected by temporal law.

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This said about the underlying currents, one must give Popham and Fenner credit for cogency. Even apart from precedents, it is pretty hard to say that the transactions surrounding an appropriation *could* not create a common law annuity. If an annual payment were made part of the act of endowment, with the probable intent of insuring payment by making temporal enforcement of the duty available, it is hard to consider the mode of creation less "high" than, or significantly different from, an ordinary deed. Not too much should be made of the phrase "charge an interest", because appropriation with endowment does not in itself particularly affect interests in the common law sphere. It just gives the vicar a right to take certain tithes and the like; this right he may enforce directly against parishioners, as opposed to depending on the rector in the manner of a pensioner; the tithes are his property, capable of being leased, converted into his chattels by severance, etc. -- in this sense the common law sphere is touched; but the basic rights the vicar gains must be enforced through the ecclesiastical courts, and even in the post-Reformation period common law courts were reluctant to get involved in quarrels between vicars and parsons over construction and observation of the arrangements made upon appropriation. Even so, an endowment is a kind of conveyancing act, and it has a claim to be taken notice of by the common law in the same way as compositions-real, a similar transaction. (In a composition-real, as in an act of appropriation, bishop, patron, and parson collaborate to extinguish an ecclesiastical right -- to tithes in kind -- and replace it with a money payment. An ecclesiastical suit for tithes in kind would be prohibited if it was alleged to contravene a composition-real, and whether it really did -- construction of the composition -- was a common law matter. The analogy is not exact, but it is not too strained to argue from it that the common law has a responsibility, to the degree that it lies in its power, to see that the terms of endowments are carried out -- e.g., by allowing the writ of Annuity to be used for annuities created by such an endowment. A variant form of composition-real could be used for the purpose of replacing an old appropriation with a new division of income between parson and vicar, though that end could also be accomplished by a court-imposed or "judicial" revision of the original settlement.) An episcopal "ordinance" is less solemn. It might as well be, or cannot with certainty be differentiated from, a judicial act of the bishop, which clearly has no claim to be noticed by the common law. The duty to carry out a sentence or decree or "ordinance" -- whether it is actually the end of a lawsuit or only might

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as well be, judging by its form -- is plainly a spiritual duty, as efficacious as people's responsiveness to spiritual sanctions.

It remains a problem that the Popham-Fenner view is hard to square with the black-letter cited by Tanfield. That the judges were sensitive to the problem and did not want to overrule the precedent comes out from their third point. (Since we are in the pre-*stare decisis* period, this is not so drastic a difficulty as it would have been under the later jurisprudence, but flatly rejecting a Year Book holding was still not easy.)

(3) Finally, Popham -- speaking for Clench and perhaps for Fenner -- gave a reason against Prohibition *conceding* that an episcopal "ordinance" is "high" enough to create a common law annuity. This is equivalent to conceding that Tanfield's precedent is correct and that it establishes the power of the "ordinance" form, notwithstanding the skepticism of Popham and Fenner. Remember that the second point above was made by Popham and Fenner on the first argument of the case. When Popham spoke his last word, he (though perhaps not Fenner) abandoned that specific line of reasoning in favor of studied vagueness -- the "ordinance" here was just not "high" enough to do duty for a deed. There can be little doubt that Popham's essential reason was what he had earlier expressed, but he did not at the end want to insist that an "ordinance" is *per se* ineffectual outside the ecclesiastical sphere.

Rather, Popham distinguished the instant case from Tanfield's by distinguishing an "ordinance" which adjusts interests between the parties to an act of appropriation from one which, even if connected with and contemporaneous with such an act, confers rights on strangers. Popham's words (MS.) are: "And though this ordinance were sufficient matter to maintain a writ of annuity, yet the precentor nor the vicars choral are parties." The meaning must be: If we are constrained by precedent to admit that an ordinance extraneous to the endowment can create a common law annuity, we are free to confine the rule of the earlier case to the narrowest possible space. It is not simply legal pedantry to draw the line proposed. For there is a difference in probable intent between "ordaining" a division of offerings -- perhaps where the act of endowment simply omitted them, perhaps inadvertently -- and "ordaining" a handsome share of the appropriated income to a party not included in the basic settlement. The first is so close to the settlement that it can with some color be treated as part of it; the second is a major revision of the whole appropriation. Its legality, if questionable, would be for ecclesiastical law to determine, which is a good reason for leaving it to ecclesiastical courts. (Were a writ of Annuity actually brought for the payment

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in question, I would not be surprised to see the legality of the "ordinance" challenged and civilian advice required.) Assuming the bishop was entitled to transfer a substantial slice of the vicarage to the Precentor and Vicars Choral by "ordinance", it is probably realistic to suppose he meant to give his beneficiaries a "merely spiritual" interest. In legal terms, one can say that if he meant to give them a common law annuity he had the means -- inclusion in the act of endowment. "Good construction" would hold that when he used the form best designed to insure that the interest would be "spiritual" that is what he meant to insure. The realism is that 13th century bishops, with their aspirations to an extensive and independent ecclesiastical "state", probably meant to monopolize jurisdiction over interests created by themselves and running between their own people.

Dean and Chapter of Wells v. Goodwin (1606-08)¹⁷ is another case of Prohibition denied because the pension sued for in an ecclesiastical court was classified as "spiritual." This case does not turn on the availability of a writ of Annuity, but on an unusual attempt to get a Prohibition, which can only be explained by expounding the case in full. The case does, however, contribute to understanding how the "spiritual pension" was conceived and the role the judges were willing to concede to ecclesiastical courts in the enforcement of some annuity-like interests.

The reports, which agree on the result, cover different parts of a protracted piece of litigation. Noy only gives the outcome. Add. 25,209 is dated earlier than Harl. 1631, and its content seems to relate it to an earlier stage of the litigation -- probably an attempt to get a Consultation on motion after Prohibition had been granted on slight consideration. Harl. 1631, is a thorough report, from which we learn that the case proceeded to formal pleading: Plaintiff-in-Prohibition declared upon his surmise, defendant-in-Prohibition demurred to the declaration. In Harl. 1631, the judges speak to the demurrer and hold for defendant-in-Prohibition. Speeches by Justices Williams, Yelverton, and Tanfield, who were essentially in agreement, are reported. They were almost certainly the only participating judges, since the last reported discussion of the case came only a month or two before Chief Justice Popham's death, when he was probably not well enough to appear in court regularly.

¹⁷ T.3 - M. 5 Jac. Q.B. Noy, 16 (undated); Add. 25,209, f.63b (T. 3 Jac.); Harl. 1631, f.302b (P. 4 Jac.).

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The facts as stated in the surmise and declaration (which the demurrer makes uncontroverted facts) were as follows: An abbot before the dissolution was seised of an appropriated rectory. In 28 Hen. VIII he leased it for seven years, rendering 40 marks rent to himself and a quantity of grain to the vicar. (I do not believe that the vicar's position under this lease would be any stronger than that of a third-party beneficiary of a contract. That would mean that the abbot-lessor would have an action -- Debt or Detinue -- against the lessee if the vicar did not receive his grain, but the vicar himself would be helpless at common law and dependent on the lessor's good graces. If *land* were leased to A., reserving £ 5 to the lessor, B., and £ 1 to a stranger, C., B. would have a right to distrain on A., but C., I think, would not have one of common right. He could probably be given the right of distrain by express provision in the lease. A lease of a *rectory*, however, -- which might include some glebe land, but mainly consists of the right to certain tithes -- would not carry any right of distrain and could not be made subject to such right. Nor, I think, was a rent issuing out of such things as tithes or rectories claimable as an annuity, either by the lessor or a stranger-beneficiary -- whereas at least some rents issuing out of land were so claimable if the party entitled lacked, or was willing to waive, the right of distrain. In short, the lease in our case probably generated only a contractual right of action for the rent, and that only in the lessor. Legal construction of the situation is somewhat tricky. Cf. *Coke on Littleton*, Bk. II, Ch. 12, especially Sect. 219. The lease in the instant case would of course not affect the vicar's rights under his endowment. He was simply made beneficiary of a lease of what the rector retained by the appropriation. For all that appears, the rector may just have been doing his vicar a gratuitous favor. If any consideration passed between the rector and the vicar -- as if, e.g., the vicar had agreed to give up part of his tithes to the rector's lessee in exchange for his share of the rent -- nothing on the record so indicated. Explanation of the unusual lease -- as opposed to its mere legal construction -- figures in the discussion of the case below.) In 30 Hen. VIII, the monastery was surrendered to the King. (Thus the rectory became the King's property subject to the outstanding lease -- the King was entitled to the 40 marks and the vicar's grain, as part of the rent; the vicar's exiguous interest would survive only as a charge on the King's conscience.) After expiration of the lease, Queen Mary conveyed the rectory permanently to the Dean and Chapter of Wells.

Upwards of half a century later, Goodwin, present holder of the vicarage that was benefited by the long-expired lease, sued the Dean and Chapter in an ecclesiastical court for

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the grain his predecessor was meant to be paid by the old lease. The reason the ecclesiastical suit was not simply outlandish is that Goodwin based it on a prescriptive claim. I.e.: He of course was not trying to recover rent due by a dead lease, which would in any event have been inappropriate to an ecclesiastical court. He was claiming a pension in the amount of the ancient rent on the ground that this was customarily paid to him by the rector.

There is no certainty that Goodwin mentioned the lease in his ecclesiastical libel, though for reasons that will appear below it is probable that he did. The Dean and Chapter, however, did put the story told here before the ecclesiastical court. They recite in their common law surmise and declaration that they had pleaded the same matter in the ecclesiastical court and been disallowed. For the present, it is sufficient to be clear about one point: Goodwin's suit for a prescriptive pension would not necessarily be destroyed by his admission that he had received nothing from the rector and his lessees before 28 Hen. VIII. If the rectors went on rendering the grain to the vicars after expiration of the lease -- perhaps because they took the lease as evidence of a prior duty in the rector --, the present vicar might have a good prescriptive title by ecclesiastical standards. This could be so even if prior duty were now shown or admitted not to exist -- if the fact before the court was that payment to the vicar out of the proceeds of the rectory was no older than 28 Hen. VIII. For ecclesiastical courts, to the degree that they were free not to conform to the common law, did not insist on immemorial prescription, to which admission or proof of commencement at a definite time is fatal. Whether there is any reason to impose the common law standard on them in the present type of situation is an issue in the case. "Why should there be?" is a good question. Why should long, but not immemorial, usage not generate rights in churchmen against churchmen to payments drawn from ecclesiastical incomes if ecclesiastical law sees fit so to hold?

Add. 25,209 says simply that Goodwin's claim was based on prescription. Harl. 1831 complicates things. It too informs us that his claim was prescriptive -- so the Dean and Chapter themselves say in their pleading. But they say more. First, the surmise/declaration recites that Goodwin was suing them for the grain "by color and pretext of the reservation aforesaid [of rent on the ancient lease]." This may be only allegation by plaintiff-in-Prohibition. I.e., it may be the plaintiffs who first said anything about the lease (originally in the ecclesiastical court.) They may have been saying: "This prescriptive claim cannot be good because it is no older than 28 Hen. VIII. Goodwin is suing us on the pretext that the lease is evidence of a prior duty in the rector, but such duty neither existed in fact nor is

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inferrable from the lease, which is perfectly explicable as a gratuitous favor done by one rector to one vicar long ago. Leaving aside as irrelevant anything the vicar took by virtue of the lease, the vicars never received a penny before 28 Hen. VIII. If they have received anything since the expiration of the lease, they have not received it for long enough to support a prescriptive title."

Alternatively, the recitation may be a clue that Goodwin set forth the full facts in his libel. The "pretext", after all, favors him. It cannot be ruled out that fairly regular receipt of the grain since expiration of the lease would be sufficient basis for a prescriptive title, by ecclesiastical standards left to themselves. It would nevertheless strengthen Goodwin's title if he could persuade the ecclesiastical court that the best explanation of the lease was a prior duty on the rector's part. Even a weak, otherwise unexplained, "moral duty" might help. (Mere acknowledgment by a rector decades ago that the vicarage was underendowed and that the services of the Church would be better provided for if the vicar were given a subvention out of the rectory's profits, if respected and continued in another form by subsequent rectors, themselves ecclesiastics except for a short period of royal ownership, could be persuasive. Assuming that ecclesiastical courts in these matters are free to write their own law of prescription, "reasonably long continuance and good reason for the practice" is in itself as sensible a standard as any. It bears a pleasantly ironic resemblance to the common law standard for establishing customs, which must be immemorial, but must also be reasonable in the Judges' eyes. "Reasonable" often meant "for good reason", "on good consideration", something a same person not indifferent to his own interests, but aware that benefiting others can commonly be of benefit to oneself, could once have agreed to.)

Secondly, *per* Harl. 1631, Goodwin is said to have claimed his grain in the ecclesiastical court "by lawful custom and by composition-real." It is the composition-real that seriously complicates the picture. The suggestion is that Goodwin's libel was two-pronged -- prescription on the one hand, composition-real on the other. What is to be made of this? In the discussion of the case by Bar and Bench, nothing is said about a composition-real save for one reference by Justice Yelverton. The working assumption of all the discussants seems to be that the ecclesiastical claim was prescriptive. The context is one in which a form of composition-real could occur -- the kind that rearranges, subsequent to original endowment, the income distribution for an appropriated parish (as opposed to a formal tithe commutation, the most familiar type of composition-real.) An imaginable composition close

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to our case would be: with the bishop and rector (who is both patron and parson) assenting, and in due form, the vicar gives up some of the tithes assigned to him by his endowment (restores them to the rector), in exchange for a fixed payment in money or produce by the rector.

If Goodwin actually had evidence of such a composition, one would expect him to rely on it, either forgetting about prescription or using it as a fall-back position. For a composition would clearly entitle him to his grain, obviating any need to prove prescription or to argue about how much prescription is enough. (It would, to be sure, raise problems of the sort we have seen in *Collier*. Entitlement by composition would very likely support a writ of Annuity. If that is so, one thing for Goodwin to do would be to bring Annuity, but if he preferred the ecclesiastical court, or wanted to keep the option of falling back on less-than-immemorial prescription open, he would face the possibility of being prohibited because a common law remedy was available. How serious that risk would be depends on judicial proclivity to follow Gawdy in *Collier* vs. reluctance to take the plunge into concurrency or choice of courts.) The most likely explanation of the mentioned-but-neglected composition-real is that Goodwin did not have a scrap of hard evidence of one. Rather, he argued that the lease was grounds for inferring a composition -- that it was difficult to account for otherwise, preferably not accounted for as a gratuitous favor, and preferably explained by the strongest explanation, a prior legal duty binding the lessor when he made the lease and his successors forever. In this version of it, Goodwin's claim could be described as three-leveled prescription: As it were, "I am entitled by usage alone sufficient to satisfy ecclesiastical standards, but I am all the more entitled because the lease shows I have been rendered the grain for good reason, and the most likely reason is a lost composition-real." The judges, however, took his claim as prescription to all intents. Mention of the composition-real is the strongest ground for inferring that Goodwin set out the story of the lease in his libel. The other side would have no motive to say in its common law pleading that Goodwin claimed by composition-real unless he had done so, and it is very unlikely that he so claimed except by inference through the lease.

Add. 25,209, besides giving the basic facts and the result, and saying that the case was not decided until M. 5 Jac. after several arguments, only reports two questions raised from the Bar by one Hughes of Gray's Inn.. Hughes may be Goodwin's counsel seeking Consultation on motion or counsel on the other side opposing that. In any event, the report

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states what he said in the form of questions rather than arguments. The first question is awkwardly formulated ("whether a suggestion that an action is not at common law will be cause to grant Consultation"), but I do not think what Hughes had in mind is mysterious. He seems to be asking whether Prohibition can lie when there is no suggestion that the ecclesiastical plaintiff ought to be suing at common law. The question is naive as a general question, for it must have been evident that Prohibitions were often granted for other reasons. But in the immediate context it is the right question: Could there be any basis for prohibiting a suit for a pension between churchmen except the availability of a common law remedy? The striking feature of *Dean and Chapter of Wells* is the apparent weakness of plaintiff-in-Prohibition's case and, in the light of that, the resort to formal pleading and the long time it took the Court to reach a decision. Although we do not have enough facts to be sure, Goodwin's suit looks pretty flimsy. (Had he been rendered the grain continually, or ever, since the rectory came into the hands of the Dean and Chapter? Or was he speculating, dubiously enough, on the ecclesiastical court's inferring an old prescriptive title from the lease?) But a flimsy ecclesiastical suit is arguably the farthest thing from a good reason for Prohibition, save when the suit seeks an unacceptable extension of "the ambit of remediable wrong" (as by imposing liability for activities with a strong claim to fall within "the liberty of the subject.") Why should an intra-Church suit for a pension or an augmentation of vicarial income at the rector's expense come within that exception? Why should the ecclesiastical court not be trusted to weed out farfetched claims by one ecclesiastic on the income of another? One suspects that the Dean and Chapter pursued a Prohibition, and persisted until they received a full-dress hearing, because they thought Goodwin's suit outrageous and because they were worried about tenderness to vicars on the ecclesiastical court's part. I.e., they were apprehensive lest the ecclesiastical court take advantage of a slim pretext to transfer income to the working clergyman, the characteristic "poor vicar." But understandable motives do not make a good legal claim. (There may be something to be said against this line of argument -- see below -- but it is persuasive.)

Secondly, Hughes states that "it appears that the vicar is relying on prescription" and asks, "Must that now be found at common law?" This is a harder question. In some contexts, prescriptive claims if disputed factually had to be tried at common law although they arose in ecclesiastical litigation. In those contexts, not only did common law standards necessarily apply to the factual issue; they would, I think -- though here a step of inference is required --

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have been insisted on as a matter of substantive law, as the only basis for a prescriptive title. Take the commonplace *modus* case: Parishioner's claim that he is entitled to pay money instead of tithes in kind must be tried at common law if the parishioner requests it, or, in principle, if any member of the public sees fit to bring a Prohibition. Parishioner's claim, being tried at common law, must of course meet the immemorialness standard. Then let us imagine what is unlikely to happen: Parishioner pleads his customary commutation in the ecclesiastical court and does not seek a Prohibition. Parson (or a stranger) seeks one, alleging that a custom whose existence he controverts has come in question and arguing that ecclesiastical standards are different. (I.e., plaintiff-in-Prohibition claims that the ecclesiastical law makes it too easy for Parishioner to establish his commutation. This is of course contrary to the expectations that in reality lay behind the practice of prohibiting on surmise of a *modus* -- the expectation that ecclesiastical courts would not recognize unqualifiedly the power of usage to commute tithes in kind, or else that compared to juries they would be too critical of the evidence for such customs, even though their standard was nominally more liberal than the common law's.) I do not think there is any chance that Prohibition would be denied. I think that result is implicit in the public-interest theory of Prohibitions. (It does not matter that Parishioner is willing to take his chances in the ecclesiastical court, and even if Parson -- having sued there and being a cleric -- were estopped to complain, the rule still holds: if the suit is prohibitable on the initiative of one or the other of the parties, it is prohibitable *tout court* and should be prohibited on "information" supplied by a stranger. Strains on this rule are examined in Vol. I of this study. I doubt that it would come under strain when trial of customs affecting tithes was in question.) If this is granted, what stands in the way of the proposition that the common law standard of prescription is binding throughout the legal system? (=Any suit turning on prescription should be prohibited unless application of the common law standard in the "foreign" court can be assured. It does not follow that every such suit should be prohibitable merely by pointing out that a claim based on prescription had been advanced, on the *modus* model, as opposed to surmising, at least *pro forma*, that the ecclesiastical court intended to or probably would employ a standard of prescription less rigorous than immemorialness. N.b. that in *Dean and Chapter of Wells* plaintiffs-in-Prohibition used a disallowance surmise. There are difficulties -- see below -- about pinning down the "error" they attributed to the ecclesiastical court. Their plea there does not clearly say more than that Goodwin's

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complaint was untrue as to fact. It may perhaps, however, be taken as insisting that Goodwin had no immemorial right and implying that the ecclesiastical court, in disallowing the plea, showed that it did not consider itself bound by the immemorialness standard. More direct assertion of the last point might have been better strategy.) I take it that Hughes was asking how free ecclesiastical courts are to understand prescriptive claims as they like. The reply would seem to be that common law standards apply only when lay interests are involved, as in most tithes cases. ("Lay interests" of course refers to something more and something different than the personal status of the parties. Duty to pay tithes was an encumbrance on "lay" property' -- no less "lay" if a particular piece belonged to a churchman or an ecclesiastical institution. An ecclesiastical income, from tithes or other sources, arguably contrasts: *a fortiori* when it is in the hands of a churchman -- i.e., someone other than an impropiator.)

We may now turn to Harl. 1631 and the arguments on demurrer to plaintiff-in-Prohibition's declaration. From the Bar, Edwards argued for Goodwin, making two points: (a) The surmise and declaration appeared to say that Goodwin claimed by color of the ancient lease. But this was not and could not be Goodwin's claim, which was simply for a prescriptive pension. (This is, I believe, an objection to the form of the declaration over and above the substance. The Dean and Chapter, in pursuit of a Prohibition, were misrepresenting the libel they were objecting to. I doubt that from Edwards's point of view there would be any way of salvaging the surmise/declaration, but its formal incoherence as it stood was an objection to it. If the Dean and Chapter had said straightforwardly that Goodwin was claiming by prescription, denied his title, and argued that the prescription should be tried at common law, they would incur Edwards's second point, but not his first.) (b) Authority supports the proposition that intra-ecclesiastical pensions may be recovered in ecclesiastical courts. (I.e., the law is settled; there is no need to debate why some prescriptions must be tried at common law and others left to ecclesiastical courts, presumably without control over the standard of prescription.)

The three judges who speak all in essence accept Edwards's contention, but there are differences of nuance (and some difficulties about saying just what their reported language means.) Justice Williams confined himself to the formal objection to the surmise/declaration. Although he probably agreed with the inclination of all judicial opinion to leave "spiritual pensions" to the Church, at least when they could be cleared of duplicating Annuity, he does

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not commit himself to more than the defectiveness of the surmise/declaration. He reinforces the basic point -- that the Dean and Chapter have not spoken in a manner that responds to, or amounts to relevant controversion of, what Goodwin's libel claimed -- in two ways: (a) The surmise relied on a stranger's reservation of rent. I.e., the matter used to rebut Goodwin was the abbot's lease reserving part of the rent to the vicar, not that of the Dean and Chapter themselves. The suggestion is that their case would be better, though not necessarily good, if the lease had been their own. I would construe this as follows: The Dean and Chapter are in effect being criticized for "pleading their evidence." The most they could do with the ancient lease was to produce it as evidence in their attempt to defeat the prescription. It would not be conclusive, but at least relevant, in an effort to show that the lease was the commencement of payment, if not the whole explanation of any provable render of grain to the vicars, and to maintain that an older or different commencement must be made out to establish the prescription, even by ecclesiastical standards if those are not to be interfered with. An identical lease by the Dean and Chapter themselves would likewise be no more than evidence. It would not inevitably defeat a prescriptive claim governed by any possible standard of prescription, but it would be strong evidence, probably fatal by the immemorial standard. If pleaded in Prohibition, therefore, it would be a way of saying the prescription could not be immemorial and so raising the question whether ecclesiastical courts must insist on immemorialness. (A different question, pointing to a different rule of law, would be whether the prescription must have the *possibility* of being immemorial. One could hold that this possibility must appear and still leave ecclesiastical courts quite free to make prescription easy by their handling of evidence -- accepting recent practice as sufficient *prima facie* proof, making tenuous inferences of older practice from such evidence as the ancient lease in this case, etc. "Make easy" of course means "make nominally easier than at common law." The fundamental difference between the ecclesiastical and common law systems, it is important to remember, is that the former made factual determinations on evidence and the latter made them by jury. Juries were told to endorse prescriptions only if they were immemorial, but the trial judge's power to keep them to a respectably critical standard of proof is very doubtful. For the most part, "the common law demands immemorialness" means that if facts inconsistent with immemorial continuance were admitted in pleading or found by special verdict the prescription would fail.) Had the lease been the Dean and Chapter's own, it would show that for seven years not very long ago the

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vicar took his grain by virtue of the lease. The trier would want to be quite sure that the only evidence of actual payment did not fall in those seven years. Payment after expiration could be suspicious: Can we be sure the lessee did not remain in possession and continue to pay the rent? Or that the Dean and Chapter did not pay the vicar a time of two because they mistakenly inferred from the lease that they owed the grain, but afterwards discovered the mistake and ceased? Under a non-common law standard of prescription, none of this would absolutely destroy Goodwin's claim. The lease could still be used to infer a prior duty, and the vicar's being paid for seven years by virtue of the lease could only mean that for that period the Dean and Chapter chose to pay what they already owed in that form. Under the common law standard, *quaere* whether payment for seven years of an annuity due by prescription in the odd form of rent reserved on a lease to a stranger would not be a fatal interruption of the usage. (Suppose a person owing a prescriptive annuity of £ 10 charged his own land with a rent for term of years in favor of the annuitant and in the same amount. Suppose it a conceded fact that during the term the £10 and only that were paid. Suppose at least once in the term of years the party entitled to the money distrained on the charged land to force payment -- so that we are sure that what he collected during that time he claimed as a rent. Would the prescriptive annuity revive when the term of the rent expired? I assume that conversion of an annuity into a rent charge in fee would extinguish the *prescriptive* annuity. The party would have an annuity by deed if he chose to enforce it by writ of Annuity, or an interest solely enforceable by distraint, if by distraining once he waived his right to Annuity. [Cf. *Sprat v. Nicholson* below for this rule -- a rent charge may be recovered in Annuity only so long as the holder does not take advantage of his power to distrain.]) Williams, in any event, seems to suggest that an allegation of the same peculiar lease by the Dean and Chapter themselves, while still in strictness "pleading evidence", might come so close to mere denial of Goodwin's prescription that it would not, at any rate, obviously vitiate the pleading. As he puts it, "such foreign matter" as the abbot's lease is clearly vitiating. Whether pleading in better form would be of any avail to get a Prohibition remains an open question.

(b) Williams seems to say in addition that the reservation of rent to a stranger on the abbot's lease was a void reservation. I have given above the analysis of the lease which seems to me probably correct. Saying that the reservation of rent to the vicar was "void" can be taken as a blunt way of putting what I say -- the vicar was a legally impotent beneficiary

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of a contract; the lessee would owe the lessor what was purportedly reserved to the vicar, but the vicar would only have a claim on the lessor's conscience. (I am of course not sure that this is Williams's analysis. A more drastic position would be that property, including land itself, cannot be leased so as to charge the term of years with a rent payable to someone other than the lessor, even though the lease purports to give the stranger power of distraint. It is more likely to be law that tithes, rectories, and incorporeal property generally "cannot" be leased with reservation of rent to a stranger.) Even though the reservation of rent was "void", the evidentiary value of the abbot's lease is still not wiped out. If the abbot only meant to benefit the vicar -- and probably succeeded in practice, because the lessee, though without legal duty to pay the vicar, would have had no motive not to satisfy his lessor in the form stipulated in the lease --, the lease would still provide a basis for arguing for a prior duty, a lost composition-real, or a mere "good reason" for the customary pension. But these arguments, unlike claiming commencement by the lease, are on Goodwin's side. The foreignness of the lease from anything like meeting or refuting Goodwin's prescriptive claim is all the greater if Goodwin's predecessors took no valid interest under it. They could not have received their grain for seven years by virtue of the lease in a legal sense, whatever the effect on their prescriptive title would be if they had.

Justice Yelverton speaks to the same effect with a few additional twists. (a) He is the only judge to mention a composition-real, just in the form of saying indefinitely that Goodwin claimed either by composition or prescription, but whichever way, allegation of the lease was no way to meet his claim. (b) Like Williams, he attached significance to the fact that the reservation of rent was a stranger's act rather than the Dean and Chapter's. He calls it a "late" reservation, although it was nearly a century ago. The implication is that the same transaction at a much earlier date could be alleged with at least somewhat greater plausibility. I suppose the reason would be that commencement by the lease would be more convincing if it were more remote, and that payment by virtue of the lease for a brief latter-day period would not be harmful to the prescription. (c) Yelverton contributes a significant additional fact, viz. that Goodwin claimed a larger sum for his prescriptive pension than what was reserved to his predecessor in the lease. Again, the discrepancy does not undermine all possibility of arguing from the lease to the prescriptive title by way of prior duty or "good reason." The abbot could have arranged through the lease for payment of only part of what he owed the vicar, and his acknowledgment of in some sense owing something

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could conceivably strengthen the effect of regular payment of a larger sum by more recent rectors. But in the artificial world of pleading, "He was once paid £5 by reservation of rent" is perhaps more "foreign" to "I do not owe him £ 10 by prescription" than "He was once paid £ 10..."

(d) Finally, Yelverton goes to the substance and says "...the seisin of a pension will not make an issue here, for then all pensions would be tried outside the Court Christian." In other words, ecclesiastical pension suits are not to be prohibited on surmise that the ecclesiastical plaintiff was never seised, was not seised long enough ago to sustain a prescription (by whatever standard), or was not continuously seised (owing to an arguable interruption of the payment *qua* pension because an equivalent sum was received as rent or otherwise.) It is presumably implied that if such pension suits are prohibitible at all, it is because they duplicate common law Annuity. Yelverton would seem as unenthusiastic as other judges about diverting pension suits from the ecclesiastical courts. He was presumably right in saying that "all" pensions would be diverted if seisin of them were made a common law issue -- all, that is, which the ecclesiastical defendant wanted to divert. For merely denying that a pension is due by prescription is in one form or another denying that the pensioner was, in common law parlance, seised -- i.e, as a matter of logic, there can be no prescriptive right to be paid until one has been paid (rights to payment founded on grant are different, though their effectualness and procedures for protecting them can be affected by seisin. Seisin in this context means having been paid, vs. having a right to be.)

Justice Tanfield's opinion is the most substantive. He does not bother with the inelegance of the pleading, only says that its "force" is to deny that Goodwin was seised of the pension and that that is insufficient for a Prohibition in this case. He proceeds to speak about the effect of Reformation legislation, which is otherwise unmentioned in the reports. To understand Tanfield's position, it is necessary to look at what the legislation basically provided. Tanfield advances an interpretation of its detailed application. The reporter queries his construction at the end of the report, quite plausibly, as I shall show.

Sect. XV of 31 Hen. 8, c. 13 -- the fundamental statute for the dissolution of the monasteries -- saves in general terms the interests of strangers in the monastic property. Pensions charged on the monasteries and their possessions are mentioned among other interests. A pension charged on an appropriated living or rectory belonging to a monastery is obviously included. The statute of 34 Hen. 8, c. 19, refers to the general saving in the earlier

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act and recites that ecclesiastical persons holding such protected interests -- pensions expressly included -- were nevertheless having trouble collecting what they were owed from the present holders of former monastic possessions. It recites further that such ecclesiastical persons had no "direct" way to recover what they were entitled to from the present holders. Why they lacked a sufficient remedy and just what is meant by "direct" are puzzling points. The snag must have been that ecclesiastical courts were unsure of their title, or thought they had none, to entertain suits for such interests against lay holders of ex-monastic possessions. Perhaps also attempts to recover such things as pensions at common law had failed, when the interest was not one protectable at common law before 31 Hen. 8, such as a pension incapable of supporting Annuity. If the reference to a "direct" way implies the existence of indirect ones, the latter could possibly be proceedings in the Court of Augmentations or equitable remedies (which the Augmentations might be one vehicle for, with respect to claims on ex-monastic property.)

In any event, the enacting part of 34 Hen. 8 authorizes ecclesiastical persons with such interests charged on monastic property to sue for them as they would have before the dissolution, against whoever now holds the property charged. That means they are authorized to sue in ecclesiastical courts, whether the defendant is clerical or lay. (Except, of course, when the King himself still holds the property charged. He must be besought in the Court of Augmentations. An express proviso covers the case where the King has conveyed monastic property to X. free of encumbrance by pensions and the like: The King's alienee, if sued, is to be discharged on showing the document releasing him from the encumbrance, and the claimant of the pension or similar interest is to go to the Augmentations to seek satisfaction from the King.) The statute is express that the suits it authorizes are to be decided according to the ecclesiastical law. In a separate section (Sect. V), however, it covers the possibility that some of the interests in question may be protectable at common law: In that case it authorizes common law suit. No examples are given, but an annual payment amenable to Annuity would seem to be an obvious one. The statute certainly does *not* authorize an ecclesiastical remedy where the remedy before the dissolution would have been temporal.

(Could the confusion ensuing on the dissolution have extended even to the liability of present holders -- successors to the monasteries through the King -- for such things as common law annuities? Possibly, though doubt on that score is hard to square with 31 Hen.

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8. Could it be argued that the King undertook to satisfy the interests of ecclesiastics with claims on monasteries, but that his grants of monastic property to others should be taken as free of such claims even in the absence of express disencumbrance? The proviso in 34 Hen. 8 suggests that express disencumbrance may not have been unusual, which of course argues that it was necessary. An intention to turn all pensioners of the monasteries -- even common law annuitants -- into permanent royal pensioners is perhaps not incredible. Some of them became that in any case by the King's relieving his grantees of responsibility for them. Construing 31 Hen. 8 as having that effect would be to let it destroy vested legal rights. For however safely they could rely on the royal conscience and the Court of Augmentations, "permanent royal pensioners" would have lost remedial powers they had before, some of them at common law.)

34 Hen. 8's authorization of ecclesiastical suits contains an important qualification, however. It is on this that Tanfield's opinion in *Dean and Chapter of Wells* bears. The statute provides that the ex-monastic pensioners could sue the present holder *if* the claimant was "in possession" within ten years before the dissolution. Possession (the word of the statute, rather than seisin, but in this context which word makes no difference) of an interest consisting in a right to recurrent payments means receiving payment. Thus the statute clearly meant to bar ecclesiastical suits by, e.g., "spiritual pensioners" against the King's alienees when the pension had been in abeyance for ten years before the dissolution, however good the pensioner's right was in itself. Before the dissolution there was no such requirement, at least as far as the secular law was concerned; ecclesiastical courts were free to enforce a pension they thought was well-founded without regard to whether the pensioner had recent possession -- a prescriptive pension that had gone unpaid for longer than ten years, or a pension with another basis sufficient in the court's eyes though it had never been paid.

Where pensioners not in possession within ten years of the dissolution were meant to be left by this provision makes a question. That their interests were meant to perish for lack or lapse of possession seems hard and unlikely in the light of the saving in 31 Hen. 8; I would assume they were left as "permanent royal pensioners", *in potentia* at any rate. I.e., they were deprived of power to recover against the King's alienees, but they could try to make a case in the Augmentations that they had valid claims on the monastery which the King ought to satisfy. A more critical attitude toward claims unsupported by recent possession could probably be expected of the Augmentations than of ecclesiastical judges, had the latter been

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given a free hand to evaluate any churchman's claim against the successors of the monasteries, especially lay successors. (There is no reason to think that claims assertable against the monasteries, and hence their successors, at common law were subject to the recent possession rule. Those claims are dealt with in a separate section of the statute, where there is no language suggesting such a rule. Clearly the common law's normal rules on when seisin must be shown to make out a claim to a rent or annuity, and what lapses of enjoyment would destroy a prescriptive interest of such nature, would apply in those cases.)

In our case, Goodwin at best made no claim on the record that his predecessor was in possession of the pension within ten years of the dissolution. (At worst, he made no claim that he or any preceding vicar since the expiration of the ancient lease was possessed of it, but was merely pushing the contention that the lease was grounds for inferring a right.) The Dean and Chapter of Wells were successors through the monarch to the monastic property on which the alleged pension was originally charged. It would seem, therefore, that Goodwin was ineligible to maintain an ecclesiastical suit against the Dean and Chapter by 34 Hen. 8. Therefore his suit should be prohibited, unless defects in plaintiff-in-Prohibition's pleading were in themselves grounds for denying a writ. This is what the reporter thought, the basis for his skepticism about Tanfield's opinion.

Tanfield's view appears to be that the recent possession provision in 34 Hen. 8 applies only to ecclesiastical suits against a lay successor to the monastery, which the Dean and Chapter were not. He is explicit that where the litigation is between churchmen, not only recent seisin, but *any* seisin, is irrelevant. I.e., though Goodwin were suing (as he very likely was) without visible pretense that he or any specified predecessor ever received payment, save perhaps by virtue of the old lease (and that only because *de facto* the lessee paid the then-vicar, if he did), it is still up to the ecclesiastical court to make what it will of Goodwin's claim. The only basis for Prohibition would be contravention of the statute, and there was none as Tanfield read the statute.

Like the reporter, I find the reading hard to reconcile with the letter of the act. In broader terms, it makes sense. There is probably no reason to suppose that ecclesiastical courts between 31 and 34 Hen. 8 would have had any reluctance to entertain suits against clerical institutions that found themselves in possession of monastic property and, by the most straightforward construction of 31 Hen. 8, liable for charges on behalf of other clerics formerly borne by the monasteries. The "mischief" behind 34 Hen. 8 must have been that

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suits against laymen for pensions and the like were unprecedented and so of unclear legality, and 31 Hen. 8 was not understood to authorize them; suits against churchmen were not a problem, so 34 Hen. 8 has nothing to do with them. Secondly, if the intent of 34 Hen. 8 was not to destroy pensions unsupported by recent possession, only to protect the successors of the monasteries against flimsy claims and the danger of ecclesiastical courts' looking too kindly on them at the expense of lay defendants, there is no good reason to bring ecclesiastics within the recent possession rule. The Church courts could be expected, if anything, to be biased against dubious claimants of Goodwin's ilk seeking benefits out of the pockets of their brother churchmen. If they might sometimes lean the other way, say by seizing an opportunity to increase a vicar's livelihood from the resources of a Dean and Chapter who could afford it, can one really say that the makers of the statute were concerned about that, or meant to command the common law judges to concern themselves with such clerical affairs? Time and change would no doubt have wiped out most charges on the monasteries so uncertain that they could not meet the possession-within-ten-years test, though the Reformation statutes may not have contemplated their perishing utterly. The Court of Augmentations was long deceased. It is a safe guess that if a cleric in 1607 dug out a claim to a pension that had admittedly not been paid later than something like 1526 and, being debarred from suing the present lay successor of the monastery, petitioned the King as of right, his *de facto* chance of success would be slim even if ingenuity could paint his legal position as not hopeless. Survival of a few such pensions, or at least a shot at making a case for them, when fortune put an ecclesiastic in the position of the suable party, might be a modest fulfillment of what Parliament foresaw.

So far as the report shows, Tanfield did not argue the construction of the statutes in the elaborate manner of my reconstruction. His language only expresses his conclusion: "There are now two kinds of pensions. One, temporal, are only those that were appurtenant to certain dissolved religious houses or issuing out of them, so that he who is to have it or he who is to pay it is now a layman, where it derives under the title given to the King by the dissolution. Spiritual pensions are those which a spiritual man has from another by spiritual contract or composition. [Tanfield does not separately note prescription in a less-than-immemorial sense as a possible basis for such pensions. I assume, however, that he would regard it as the ecclesiastical courts' business if they wanted to uphold pensions so based, and only suggests that what they would infer from usage would ultimately be a "contract or

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composition". He may have thought that a pension allegedly based on immemorial prescription would support Annuity though running between churchmen. He may have thought the same of a pension claimed unmistakably to rest on a proper and directly provable composition real. So he argued as counsel in *Collier*. "Composition" here may be intentionally indefinite.] And he who sues for the first in Court Christian ought to prove that seisin was had within 10 years before the dissolution of the monastery...Otherwise Prohibition [will be] granted, and there the seisin is traversable, and that is by the statute of 34 H. 8. But if the pension is merely spiritual, then they shall sue in Court Christian for it, though no seisin was ever had of it. And it seems to me that this pension is merely spiritual, viz. between parson and vicar, and so the seisin is not material..."

Tanfield's opinion may be the best clue to the whole story of *Dean and Chapter of Wells*, a strange case. Tanfield showed the cleanest way to the result the whole Court agreed on, the correct result surely, and I believe the desired result of all judges in this case and others -- to leave the disputes over pension rights within the Church to ecclesiastical justice: If a churchman's ecclesiastical suit for a pension could not be an annuity suit, and if it cannot, being against a lay successor of a monastery, be faulted for failure to show possession within ten years of the dissolution, Prohibition does not lie. Why did the other judges not embrace this simple formula? Why did the Court take so long over the case? The answer must be that the other judges were at least uneasy with Tanfield's construction of 34 Hen. 8, which, although plausible as interpretation by intent, collides with the embarrassing fact that the statute does not *say* the recent possession requirement only applies when a lay defendant is sued. The other judges, by my hypothesis, did not want to repudiate Tanfield's construction explicitly, because then it might be incumbent on them to prohibit Goodwin's suit, and if that was avoidable, a declaration from the Bench that the possession-within-ten-years rule applied universally to suits against successors to the monasteries would encourage Prohibitions relying thereon in intra-Church cases. They therefore took advantage of the opportunity plaintiff-in-Prohibition gave them to evade talking about the statute.

The Dean and Chapter did not seek Prohibition by invoking the statute and claiming that Goodwin had not alleged possession within ten years of the dissolution. Perhaps not resting on that ground was a mistake, but it is also possible that it was an anticipation of Tanfield's position -- the result of a prediction that if push came to shove a majority of the Court would prefer Tanfield's construction of the statute to inviting Prohibitions and causing "spiritual

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pensions" that might survive ecclesiastical scrutiny to perish. It is hard to say just what theory plaintiff-in-Prohibition adopted instead, and that was most of what undid him. It was more than convincing to say that he had simply failed to state a coherent ground for Prohibition, though given the chance to do so in formal pleading. At that stage, if not earlier, a judge who thought Goodwin probably should have shown possession within ten years could at least plausibly feel obliged to respond to the claim to Prohibition strictly as pleaded. In a sense, of course, the Dean and Chapter were asserting "no seisin within ten years", in the form "no seisin at all" -- as it were, "The whole effect of this outrageous lawsuit against us is to claim a pension that has never been paid on the basis of an ancient lease which can only go to prove that anything Goodwin's predecessors ever took from us was *not* received as a pension, but by virtue of the lease." But, having said nothing about the statute, why should the Dean and Chapter have the advantage of it, even if Tanfield were wrong and they were entitled to? For the rest, what the Dean and Chapter urged to have a Prohibition was flawed in various ways pointed out by the judges. Most basically, plaintiff-in Prohibition simply did not state a reason why Goodwin's claim could not be good, if the ecclesiastical court interpreted the facts in his favor. Apart from the statute, lack of seisin need not be fatal, and the matter put forward to argue lack of seisin need not prove it. And were Goodwin's claim certainly hopeless by ecclesiastical standards, or any rational standard, that would be poor -- though perhaps tempting -- reason for Prohibition. In short, Consultation was justified so many ways that the Court was able to avoid commitment on the one point that may have been divisive. Formal pleading was probably allowed because plaintiff-in-Prohibition wanted it and because the judges needed time to figure out how best to approach the case. A unanimous disposition not to prohibit was probably offset in some of the judges' minds by two considerations *contra* -- the arguable applicability of the possession-within-ten-years rule even when the ecclesiastical defendant was a churchman and the *perhaps* arguable position that claims as radically weak as Goodwin's should not be entrusted to ecclesiastical discretion. The decision in effect rejects the second possibility while leaving the first in the clouds, probably with minimum practical consequences, since pension claims with pre-Reformation roots not so much as supported by possession close to the time of the Reformation must have been rare.

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In *Sprat v. Nicholson* (1612 or 1613)¹⁸ the Common Pleas under Coke decided unanimously to follow Fitzherbert and adopt what should probably be considered the optimum solution for "spiritual pension" cases. In effect, the Court refused to say that annual payments by spiritual person to spiritual person capable of supporting Annuity are intrinsically under the jurisdiction of either the common law or the ecclesiastical system. This was not to adopt concurrent jurisdiction in the sense that a party entitled to common law Annuity could on any occasion of non-receipt choose between Annuity and an ecclesiastical suit. Rather, the Court held that the party has a choice in the first place, but must make a once-and-for-all choice. Details and problems of this rule are discussed below. One thing it certainly means: Prohibition will not lie on surmise that the ecclesiastical plaintiff *could have* maintained Annuity. It will only lie on surmise that he or his predecessor in title *actually has* at some past time brought Annuity for the payment now claimed by ecclesiastical suit. The activity illustrated in *Collier* -- deliberation about whether the manner in which ecclesiastical pensions were created was sufficient to constitute a common law annuity -- is thereby finessed. Let us look at *Sprat* in full before going more deeply into the "election of jurisdictions" rule.

The reports agree that a sub-deacon or sub-dean of Exeter was suing a parson for a pension issuing out of the parsonage. Godbolt says that the libel claimed the pension "*tam per realem compositionem, quam per antictuam et laudabilem consuetudinem.*" The MS. says the ecclesiastical plaintiff libeled for a pension "on" a composition-real "from" time immemorial. The slight difference is that according to the MS. the ecclesiastical claim invoked the immemorialness standard, wherefore Annuity would probably lie. Godbolt's version leaves it in doubt whether an "ancient and laudable custom" must be taken, when invoked in ecclesiastical litigation, to mean an immemorial one, and hence whether *qua* prescriptive payment the pension would support Annuity. Combining composition-real and prescription probably means (cf. *Dean and Chapter of Wells*) that the ecclesiastical plaintiff had no evidence of the composition independent of the fact that he had been paid over a long period. He was inviting the ecclesiastical court to infer from the usage that his pension

¹⁸ T. 10 Jac. C.P. Godbolt, 196: Add. 25,210, f.4. (The MS. is *sub nom* Parson of St. Justus v. Brocke and is dated either M. 9 or M. 10 Jac. It is manifestly the same case, however.)

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originated from a composition. One could presumably invite a common law court and jury in Annuity to make the same inference, provided the usage was unmistakably immemorial. It is perhaps arguable that if one is going to claim an annual payment on the basis of a composition-real, one must bring Annuity, and if the only way of establishing the composition is prescription, one must assert immemorial prescription. I.e., if one is appealing to a lower ecclesiastical standard of prescription, one must avoid claiming a composition-real, though an ecclesiastical suit so appealing is not as such prohibitable. But this case rejects that argument.

The reports agree that Serjeant Dodderidge sought a Prohibition for the ecclesiastical defendant. Godbolt has Dodderidge saying somewhat vaguely that both elements of the libel -- prescription and composition-real -- are "temporal grounds." The MS. has Dodderidge saying specifically that Annuity lies and citing Year Book authority. (See "Note".)

The basic resolution of the unanimous Court is the same in both reports: Prohibition should be denied because when both parties are spiritual persons the plaintiff may choose whether to sue in the ecclesiastical court or at common law. There is no declaration as to whether Annuity would lie in the instant case, for there was no need for one.

The reports go on to qualify the holding. The first qualification is common to both of them, except that it is given in garbled form in Godbolt. That report says that Prohibition would lie "if the parson had been party to the suit." That makes no sense, since the ecclesiastical defendant *was* a parson. The MS. shows beyond doubt that "parson" is a mistake for "patron". It is hard to imagine the patron's being made party to a pension suit, but here again the MS. brings out what the judges were in all probability talking about -- the composition, not the suit.

The MS. says that the holding (choice of courts) would not apply if the patron were party to the composition "or there is [or he has] a deed of it" ["*ou que ad fait de ceo*"]. The meaning would seem to be that an annual payment founded on a proper composition real (requiring the patron's assent), for which there is the evidence of a deed, must be claimed as a common law annuity. A prescriptive pension, on the other hand, may be claimed as a common law annuity (and asserted as an immemorial right), but may also be claimed as a mere "spiritual pension" (and, presumably, be recovered if it passes whatever standard of prescription the ecclesiastical court sees fit to enforce.)

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Discriminating the two kinds of claim would seem to pose a problem. Obviously in the instant case the claim was classified as essentially prescriptive despite the allegation of a composition-real (in slightly different forms in the two versions of the libel.) Presumably if ecclesiastical defendant came forward and showed that ecclesiastical plaintiff had put a deed in evidence, or some other documentation of the patron's involvement in the transaction from which the pension sprang, he could have a Prohibition, and so if the libel specified such a transaction or asserted the existence of documents embodying a proper composition-real. But ecclesiastical defendant would have little motive to get a Prohibition, with the effect of driving the other party to Annuity, unless he had realistic hope of defeating an Annuity suit by showing that the documents or transaction claimed by the other side to constitute a composition-real failed to, owing to inauthenticity or legal insufficiency. Ecclesiastical plaintiff would seem to be safe from Prohibition grounded on his libel alone if he was vague about the basis of his claim or if he wrote the libel to suggest that usage was the only evidence of a composition-real. He could perhaps be exposed to Prohibition at a later stage, if he undertook to prove a composition-real directly, but language in the libel merely consistent with the *possibility* that he might make such an attempt would not expose him. (There is no logical incompatibility between having been paid long enough to confer a right *by ecclesiastical standards* and being able to prove a composition directly. Immemorial prescription and proof of commencement are, of course, incompatible.) In short, the Court's exception for a composition to which the patron was party is not likely to catch many cases. A churchman with a good composition-real in his pocket might as well sue in the ecclesiastical court, if he finds it cheaper or more convenient and has confidence in the power of ecclesiastical sanctions to compel a fellow churchman, for Prohibition is unlikely to be sought. One with no more than hope of making out a composition-real, perhaps with some usage to count on, perhaps some other evidence short of a hard and fast deed or a patron's confirmation, perhaps a remote inference such as Goodwin in *Dean and Chapter of Wells* was probably banking on, can almost certainly frame a libel to avoid Prohibition.

The reason for distinguishing transactions involving the patron from other bases for pensions, including immemorial prescription, seems to me essentially formalistic. The interest of the patron would be affected by any decision upholding a pension -- a common law decision, direct or in a Prohibition case, that Annuity would lie for the payment in question or an ecclesiastical decision. If the parsonage is encumbered with a pension, it is

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worth less, and so is the right to present to the living. To hold, therefore, that ecclesiastical courts *must* not enforce pensions founded on a composition-real is more to insist on "the principle of the thing" than to show solicitude for the patron's interest. The principle is just that patronage rights were indisputably lay interests, whether they happened to be held by a layman or a cleric. They were the most ancient of things affecting the Church and *its* interests which Church courts must nevertheless not touch. (The Constitutions of Clarendon from Hen. II's reign affirm the point.) Derivatively, a transaction involving the patron has a lay flavor such that it must not be put in question in ecclesiastical courts or be the foundation of purely ecclesiastical rights. Though formalistic, the position is consistent with the practice of prohibiting tithes suits if Parishioner surmised that a composition-real entitled him to pay a commutation. (By contrast, tithes suits were not usually prohibited if a mere contract to take money instead of tithes was surmised. In the latter case, Parishioner was told, "Pay your tithes in kind if the ecclesiastical court makes you, and sue Parson for breach of contract if you've suffered loss." He could have been told the same thing in the case of the composition-real, but was not because of the peculiarity of the transaction. Note the irony that a patron who agreed to a commutation at some time in the past would *qua* patron share the parson's interest at a later time of price inflation in breaking the commutation. Interests were served by prohibiting tithes suits brought in the face of a composition-real, but they were the parishioner's interest, not the patron's.)

In Godbolt's report (the MS. omits this), the Court next announces the critical "once and-for-all-choice" rule: Once the party has sued for his pension at common law, Prohibition will lie if he sues for it later in an ecclesiastical court, "because by the first suit he hath determined his election." Several points of interpretation arise on this rule, which, as we have already noted in *Collier*, enjoyed Fitzherbert's imprimatur. Is one foreclosed from an ecclesiastical suit, even in a later year, whether one wins or loses at common law? Does one foreclose one's successors -- future vicars, sub-deans, or whatever -- or only oneself? Does the rule work in reverse? I.e., would Annuity be barred by showing that plaintiff or his predecessor in title had previously sued for the pension in an ecclesiastical court? What is the rationale of the rule? On the answer to the last question, the answer to the others would largely depend. The "because" clause in the report rather reiterates the rule than justifies it.

Making the pensioner "determine his election" has a clearly benign tendency to discourage shopping and vexation -- taking a shot at the common law on pretense that your

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pension is founded on a provable composition-real or on immemorial prescription, resorting to the ecclesiastical court when you fail, perhaps coming back to the common law in another year in hope of a friendlier jury (combined with hope that an earlier verdict will not be used to estop you, if you did not drop your suit before verdict.) Although the rule is not stated to work in reverse, there are also possibilities of abuse the other way around, though less acute ones -- failing in the ecclesiastical court one year, putting your opponent to the trouble of common law litigation the next, though your prospects there may be even more forlorn; succeeding in the ecclesiastical court on a prescription claimed as immemorial with such heartening effect that the next time you're not paid you try to convert the pension into a common law annuity, hoping the favorable ecclesiastical judgment can be used to help persuade the jury your claim is true. If, as I suspect, the judges fundamentally wanted to be rid of churchmen's pension suits, having the rule work both ways would be efficacious. It would give the particular pensioner, at least, one and only one chance to choose. Another step in stringency would be to hold a predecessor's choice in either direction against the present claimant.

Thus, the "election" rule makes practical sense, especially if it works in both directions, but to some extent if it works in only one. Besides its practical advantages, a common law analogy may have suggested it: Rents enforceable by distraint could also be enforced by writ of Annuity, but tenant of the rent must choose once and for all -- resorting to Annuity bars one from ever distraining, and *vice versa* (see *Coke on Littleton*, Sect. 219.) Following out the analogy would lead to giving the temporal/spiritual election rule maximum extent. (It works both ways; bringing suit in one place forecloses suing in the other whether one wins or loses; suit in one place bars one's successors in title, as well as oneself, from suing in the other.) It seems fairly strong, however, to imagine a common law court refusing Annuity on a showing that plaintiff's predecessor in title had once brought an ecclesiastical suit. (The form of that would normally be holding it a good plea for defendant in Annuity to allege the earlier ecclesiastical suit.) This involves giving a kind of notice or kind of parity to the ecclesiastical system that seems a little surprising. It is here the analogy with choosing between Annuity and distraint fails, for both of those are common law remedies. (Looked at procedurally, the analogy perhaps fails a little further: If an earlier ecclesiastical suit is a good plea to bar Annuity, it must be issuable. The ecclesiastical suit would be a fact presumptively within the notice of common law jurors. I.e., it would not be a fact triable by

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record. Is there a problem about that *per se* -- about asking a jury whether plaintiff or his predecessor "went into the spiritual realm", so to speak, and sought in one of its tribunals recovery of the payment he is now suing for at common law? If not, there remains the difference that distraint alleged to bar Annuity would sometimes be triable by record -- if the distraint led to a Replevin. If the party charged simply paid the rent on being distrained, and assuming that the *in pais* fact of distraint is as good a bar to Annuity as a Replevin, there would be a jury question in the wholly temporal case, as in the temporal-spiritual one. It would, however, be a straightforward jury question -- what happens *in pais* is just what jurors are supposed to know. Litigative events in the ecclesiastical sphere are at least a special class of fact.) On the other hand, interpreting the election rule as two-directional gets to the result the judges probably wanted, and the common law analogy makes it easier to overcome the scruple I express. In any event, I see no reason to doubt that a single try at Annuity, successful or not, would bar ecclesiastical suit forever (=justify Prohibition.) Were the surmise in Prohibition to be disputed factually, the issue would be triable by record.

There is certainly an oddity in saying that an interest is not on its face either temporal or spiritual, but only becomes one or the other according as the first entitled person to resort to litigation decides to take it. But the oddity is a better one to put up with than concurrency persisting beyond the first election -- the alternative if the common law courts were to avoid case-by-case debate over whether pensions were amenable to recovery by Annuity or not. The election rule in all probability would work toward the result of keeping "spiritual pension" cases in the ecclesiastical courts. Taken in the stronger sense (ecclesiastical suit bars Annuity), the rule should discourage plaintiffs from resorting to Annuity. The chance that an ecclesiastical suit was brought at some time in the past would be too good to risk (or prior ecclesiastical suit might be claimed successfully on slim evidence -- jurors as well as judges might be unenthusiastic about enforcing pensions between ecclesiastical persons.) If the rule is taken in the weaker sense (Annuity bars ecclesiastical suits), claimants would be well-advised to use the ecclesiastical court. Being prohibited and driven to Annuity is all they would have to fear. (*Praemunire* would be at most an outside reason for anxiety.) Ecclesiastical defendant would have no motive to seek Prohibition by surmising a *successful* Annuity suit, with probable *res judicata* effect, against himself or his predecessor.

Remaining points in the reports shed some light on the matters above. In Godbolt, Coke cites a Year Book case (22 Edw. 4. 24) in which Trespass at common law was not allowed

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because an ecclesiastical remedy was appropriate in the circumstances. Parson sued Vicar in Trespass for taking wood claimed as tithes by both parties. The action was denied because the parties were spiritual persons and the right of tithes was in question. This decision is consistent with the courts' usual policy of not prohibiting ecclesiastical suits when the dispute was about which tithes Vicar and Parson were respectively entitled to under the act of appropriation. In application to the present case, the citation at least makes the point that there are subjects intrinsically suitable to ecclesiastical courts, which common law courts ought at any rate to prefer seeing handled there and to stay away from themselves so far as possible -- Parson-Vicar disputes over the right to tithes on the one hand, "spiritual pensions" on the other. But the Year Book case may have more interesting implications for expounding the choice-of-jurisdictions rule. The decision is strong in the sense that it involves refusal of a common law remedy where the formal elements of a good cause of action were present. I.e., Vicar was complaining that Parson took secular property (severed tithes converted to chattels) belonging to him; Parson was asserting the standard defense that the goods he took were his own. The common law nevertheless declined jurisdiction because the underlying property dispute turned on an ecclesiastical question and because the parties were spiritual. There would be a certain analogy, and comparable "strength", in declining jurisdiction over an Annuity claim perfectly sufficient in itself on the combined grounds that the payment in question had been sued for in an ecclesiastical court and that there is no intrinsic objection to ecclesiastical jurisdiction over pension claims by spiritual person against spiritual person. In other words, Coke's case might argue for taking the choice-of-jurisdiction rule as two-directional -- Annuity is forever barred once the pensioner has declared that he understands or prefers his interest to be ecclesiastical, even though he could have chosen the other way.

In contrast to his Year Book citation, Coke states the rule that whether a chapel is presentative or donative is a common law issue triable by jury. That issue means whether the minister of a chapel is merely an appointee of someone with the right of appointment, or whether his position is like that of a parish incumbent, viz. someone has the right to *present* a candidate to the bishop, who has the duty to scrutinize the nominee, the right to reject for cause, and the ultimate power to do the appointive act. In general, mention of this rule only makes the point that some issues which may superficially look appropriate to ecclesiastical courts in fact belong to the common law, whereas some claims that look appropriate to the common law -- a pension that might support Annuity, simple damages for taking chattels --

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either may or must be pursued in ecclesiastical courts. The distinction nicely illustrates Coke's affection for subtle differences in the law which the lay mind is apt to miss. More specifically, Coke's reference goes to reinforce the point in *Sprat* that the common law has a particular interest in litigation concerning the Church and churchmen when rights of presentation come in question. Not only is a dispute about the ownership of a right of presentation exclusively a common law issue; so is a dispute about whether there is any right of presentation with respect to a particular ecclesiastical position. (If a chapel were admitted to be donative, I take it that disputes among churchmen -- which of rival churchmen has the donation, whether a clergyman was in fact given the chaplaincy by a clerical donor, etc. -- would be entirely appropriate to ecclesiastical jurisdiction.) If the common law's sensitivity to interests in the right of presentment extends beyond the paradigm case -- disputes over who owns the right -- to the preliminary question whether there is any right of presentation to be sensitive about, one should be alert to other possibilities of extension also. It might be implied that any suit for a pension unmistakably based on a proper composition real must be a common law Annuity suit, because the patron's interest in the living is touched.

The last piece of information from Godbolt is that it was said in the case that the statute of 34 Hen. 8, c. 19, authorized ecclesiastical suits against laymen for pensions, but that it had been held that this authorization did not extend to the High Commission. 34 Hen. 8, discussed under *Dean and Chapter of Wells* above, certainly so provides. For the point on the High Commission, Sir Anthony Roper's Case was cited (it is also recounted, without context, in the MS.) *Roper* is discussed in this study with other cases on the jurisdiction of the High Commission. Its mention in *Sprat* is incidental. For the present context, only two points are worth noting: (a) By effect of the statute, otherwise unobjectionable ecclesiastical suits for pensions are not vitiated by the personal lay status of one party, (b) *Roper* serves as a judicial precedent showing that the statute was so taken: In holding that Roper could not be sued for a pension in the High Commission (owing to the statutory restriction of that court, by 1 Eliz., c.1, to serious ecclesiastical crimes), the judges affirmed that despite being a layman he could, as successor to monastic property, be sued in an ordinary ecclesiastical court.

The MS. contributes one further detail. It mentions that it was said in this case that ecclesiastical courts regarded ten years as sufficient time to establish prescriptive rights for the Church and forty years to establish them against the Church. I do not know how accurate

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this is, or how uniform the rules were across time and the ecclesiastical system. The ten-year/forty-year rule is uninformative as to how long the usage must be to generate a right to a spiritual pension, which is not evidently for or against "the Church", but only for one churchman against another. That the ecclesiastical law of prescription was different from the common law is undoubtedly true; the practical meaning of that depends on how free ecclesiastical courts were left to entertain claims based on prescription and to apply their own standards in such cases. Mention of the ecclesiastical law, sharply divergent from the common law as it was, in the course of discussion of *Sprat* underscores a point of importance: In considering what to do about spiritual pension cases, the judges knew they were considering whether to turn them over in large measure to a system in which prescriptive rights were much easier to establish, at least formally, than at common law. It would not be surprising if this gave some judges pause. There is no indication, however, that in the end they blinked at this effect. Having written off to the ecclesiastical courts as much spiritual pension business as possible, the judges show no sign of proposing to curb ecclesiastical law.

Note on Authorities

(1) The clearest authority against prohibiting in spiritual pension cases, even though Annuity would lie, is Fitzherbert's *Natura Brevium*, 51b. This is relied on by Hyde, moving for Consultation from the Bar, and by Justice Gawdy in *Collier* and by the Court speaking through Coke in *Sprat*. Under the topic "Consultation", Fitzherbert simply states the rule in general terms -- suits for such pensions should not be prohibited, including ones based on prescription which would support Annuity. (Only those based on prescription are mentioned. Fitzherbert is thus consistent with the probable holding in *Sprat* that pensions based on a directly provable or documented composition real can only be recovered in Annuity.) Fitzherbert does not justify the rule by authority or reason. Therefore, although he clearly had influence, it is not surprising that lawyers who thought they had better authority *contra* (Tanfield in *Collier*, Dodderidge in *Sprat*) paid no attention to him so far as the reports indicate. I.e., there was no particular reason to spend time refuting or explaining away Fitzherbert. He was a recognized "sage", and he would no doubt have been given credit for having some sort of case-law grounds for his opinion, but he is not very formidable authority against definite case law of an older vintage than his early-16th century treatise.

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Fitzherbert adds that ecclesiastical suits will be prohibited if the pensioner has previously sued Annuity. I.e., he embraces the choice-of-jurisdiction rule affirmed in *Sprat*, stating it in its most conservative form (Annuity bars ecclesiastical suit, but not *vice versa* so far as appears.)

(2) In addition to Fitzherbert, Hyde in *Collier* opposing Prohibition, cites Y.B. 11 Hen. 4. 84b-85. This complex case does not support Fitzherbert's position that a party entitled to Annuity on a prescriptive basis, if he is a clerical person, and if he has not previously resorted to Annuity, may bring an ecclesiastical suit without danger of Prohibition. Rather, it supports the Popham-Fenner position in *Collier* that a pension ordered by a bishop in judicial form or capacity is exclusively recoverable in ecclesiastical courts (=will not support Annuity.) It supports that position quite well, though not simply.

Behind the Y.B. case, there had been earlier ecclesiastical litigation between an abbot and a prebendary of Chichester cathedral over the right to certain tithes. That litigation ended in a settlement, a feature of which was that the prebend should be charged with an annual payment to the abbot and that the prebendary should be liable to a penalty if that sum was unpaid. The Y.B. case is an action of Debt for the penalty. There were issues apart from Jurisdiction, mainly whether the penalty clause was binding on the successors of the party originally obliged to pay the pension. One issue, however, was whether the penalty should be sued for in an ecclesiastical court rather than at common law.

The common law Court had before it an indenture embodying the settlement, a deed of the Dean and Chapter of Chichester (a party in interest though not a principal party, because the prebend was held of Chichester cathedral), and a "ratification" by the Bishop. These documents do not add up to an unmistakable grant of an annuity *cum* penalty. One might, I suppose, stop there and say, in the language of *Collier*, that the mode of creation was not "high" enough to make a common law annuity. There was plenty of written evidence, and the transaction resembles a composition-real. (The Dean and Chapter's position with respect to the prebend is substantially like that of the patron of a parochial living. Both they and the Bishop confirmed the pension.) Even so, what was evidenced as actually conferring the annual payment comes to a contract. Therefore, one might argue, the payment is insufficiently based to be more than a spiritual pension. It is not necessary to worry about whether the duty to pay the money is of "judicial" origin and consequently enforceable only in the tribunal whose judicial act it implements. Enough to say it is not a temporal duty. It

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may be a spiritual one, if the ecclesiastical courts choose to take note of it, but it cannot be enforced at common law.

The next question, on the assumption that the pension is recoverable only in the ecclesiastical court, is whether the penalty also must be recovered there if at all. At least one judge, Hankford, says "Yes" to that -- the penalty is an "incident" of the pension and accordingly under the same jurisdiction. That conclusion may not be inevitable. One of the puzzling things about the case is that the abbot and prebendary would seem to have made a good temporal contract, subject to problems about the original parties' power to bind their successors, which are discussed in the report. Waiving those, I think there would be no way in medieval temporal law to enforce the contract from year to year. An agreement to pay so much a year over a certain period was not enforceable until the period ended. In other words, as basis for a right to be paid in a given year, the agreement in our case must stand as an annuity or fail. But a penalty stipulated to be recoverable if the payment in any given year is not made is, I think, enforceable in principle: e.g., if the penalty were embodied in a bond conditioned on payee's receipt of his yearly payment. A temporal bond conditioned on payment from year to year of an admittedly spiritual pension would be perfectly good, I should think. The same may not be true of a penalty embodied in an indenture, but the discussion in this case hardly suggests that. I.e., there is no evident disposition to say that there is simply no foundation for an action of Debt for the penalty, even if the indenture and supporting documents were interpreted as creating a temporal annuity and successors were bound.

As to the status of the pension, however: Some remarks in the case suggest, that it could be considered to fall short of a temporal annuity whether created by "judicial" act or not. But the two speakers I can identify as judges use the judicial/non-judicial distinction. One of them, Hill, says clearly that *if* the penalty arises out of a judgment before an ecclesiastical court "by way of plea" the penalty must be enforced in the ecclesiastical court; if it arises from an accord "taken out of court" it may be pleaded at common law. This is close to Popham and Fenner in *Collier*. Hill appears to be uncommitted as to which class the penalty in the instant case should be put in. Hankford, on the other hand, seems to assume, without explanation, that the penalty and the pension on which it depends are "judicial", for he speaks of "such a penal sum adjudged by judges spiritual", and says it cannot be demanded except in the Court Christian.

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It is somewhat mysterious, as it is in *Collier*, just how the pension *cum* penalty was conceived as "judicial". In the Y.B. case it is at least clear, as it is not in *Collier*, that there was in fact a lawsuit, which ended in one of the parties' agreeing to pay the pension and to give it teeth by stipulating the penalty. I think the peculiar institutional setting may explain why such an ending to a lawsuit very nearly must be taken as a judicial act rather than a mere agreement of the parties: How could the parties validly settle their dispute by agreeing to the pension and penalty without involving the Bishop -- the same person as the judge -- as a confirming party? It is true that his capacities as judge and as party-in-interest are distinguishable, but it is surely probable, when a lawsuit ends in an accord which the judge could deny effect by withholding his ratification, that the settlement comes to his decision as to the proper resolution of the case, even if it is originally suggested by the principal parties. Perhaps such litigation, if it does not end in a judgment or sentence or judicial order, can only end in a "consent decree." I.e., from an ecclesiastical point of view, owing to the judge's interest, it cannot be simply settled between the parties. Perhaps it can be settled in the form of a temporal contract, but then it can have no ecclesiastical effect. And *quoad* the annuity, if not necessarily *quoad* the penalty, they could not create a temporal interest merely by contract. Their only hope of creating a temporal annuity lay in doing more than agreeing -- in approximating the solemnity of a grant. That would require the consent of the bishop and the patron, and could be the consequence of the bishop's willingness in his judicial capacity to see the lawsuit end in the creation of a temporal interest. Its creation would be none the less efficacious for that. An agreement by itself, though with the concurrence of bishop and patron sufficient to raise an ecclesiastical interest, could not raise a temporal one.

(3) Fitzherbert's Abridgment. 19 Edw. 3. Jurisdiction, 28. Cited by Tanfield from the Bar in *Collier*.

This case is a clear holding by two judges (Hillary and Wilughby), over objection, that Annuity will lie for a churchman-to-churchman pension alleged to rest on immemorial prescription only. That is what Tanfield used it for, but he also takes advantage of the further implication in this case that an ecclesiastical suit for such a pension is *not* appropriate.

Counsel for defendant made two objections when Annuity was brought and plaintiff counted on prescription: (a) Defendant, alleged to owe the pension to a bishop, was an archdeacon [? -- I have trouble reading the word, but his title does not matter.] Counsel maintained that this "official who has only spiritual correction by reason of office" was

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incapable of being charged with such a payment. (I think the point is that the office did not by its nature carry a property endowment out of which a charge on all successive holders could issue.) (b) Prohibition does not lie if a rector is sued for a pension, by provision of the so-called statute *Circumspecte agatis*. (Counsel clearly imply that the present churchman v. churchman suit is indistinguishable though not actually against a rector.)

Hillary and Wilughby rejected both arguments. As to the second, they said that *Circumspecte agatis* is not an authentic statute. (That is certainly true historically. The degree to which the proposition would have been accepted in the 17th century I cannot say.) Tanfield takes up the point. Rejection of the authority of *Circumspecte agatis* and absence of any other evidence that an ecclesiastical suit for a prescriptive pension would escape Prohibition implies that Prohibition *would* lie to stop such a suit -- a stronger proposition and more useful to Tanfield than the proposition that such a pension would support Annuity.

(4) The words of *Circumspecte agatis* are: ". . . *si Prelatus alicujus ecclesie petet pensionem a Rectore sibi debitam omnes hujus pensiones Faciende sunt in foro ecclesiastico.*"

Edwards, arguing for Consultation in *Dean and Chapter of Wells*, cites the statute of *Articuli cleri* for the proposition that pensions of the sort in that case were exclusively recoverable in ecclesiastical courts. I think he meant *Circumspecte agatis*. *Circumspecte agatis* is also cited in the MS. report of *Sprat* as agreeing with the decision there. It does agree with it in a general way. But even if it was cited from the Bench, which is unclear, the reference does not amount to a very significant endorsement of the authority of the pseudo-statute. Since there was other authority behind the decision (Fitzherbert), as well as oblique reasons from other features of the law, and uncertainty as to whether Annuity would lie, the force of the citation could be only to say, "Any effect that can be given to *Circumspecte agatis* supports the decision -- peremptorily if it is actually a statute, but even if it is something else it represents an ancient opinion that Prohibition will not lie." As to what it is if not a statute, in Godbolt's report of *Collier*, Tanfield calls it "only an ordinance" (which, while not peremptory, would still express a deliberate royal judgment a long time ago.) In the MS., he calls it "an ordinance of the prelates" (which would be highly discountable, as an expression of an interested view of the law.) It is the MS. that reflects what Justice Wilughby says in the Abridgment: "...the prelates made it themselves." Justice Hillary only says generally that it is not a statute.

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(5) Y.B. 3 Edw. 4. 12b. Also cited by Tanfield in *Collier*.

In this case, the annual payment was based on what should probably on its face be construed as a tight composition-real. The judicial holding, by Chief Justice Danby alone, is that Annuity will lie and an ecclesiastical remedy will not (which clearly implies that an ecclesiastical suit should be Prohibited.) The composition may have come out of litigation, however, so that in a sense the case militates against distinguishing pensions founded on the "judicial" act of an ecclesiastical judge. But it does not dispose of *Collier* or the Popham-Fenner position there, because the pension in *Collier*, originating from a bishop's "ordinance", can be distinguished from, and regarded as more properly judicial than, the pension in the Y.B. case. Though not used in *Sprat*, the Y.B. supports the apparent opinion of the Court in that case that pensions arising from a composition-real directly provable, vs. inferable from usage, are exclusively recoverable by Annuity.

The Y.B. case was Annuity by a prior v. a parson. The prior's count said that there was debate between the parties' predecessors over a portion of tithes. (It is not express that the "debate" reached the stage of a lawsuit.) In consequence of the debate, there was a composition, whereby the parson got the tithes and the prior an annuity out of the parson's church. Plaintiff alleged, that the parson's patron and the Ordinary were parties and showed a deed. (It is this allegation with documentation that makes the composition properly "real.") Finally, plaintiff alleged that defendant was seised of the tithes. (I.e., the composition was put into effect and was still in effect- -- "fulfilled on plaintiff's side", one would say, if plaintiff were suing on a contract. I am somewhat surprised to see this last allegation in an action of Annuity. *Quaere* as to the law. If an annuity is granted with recitation that it is in consideration of continuing services on the grantee's part, is it unrecoverable if the services were (a) never performed or (b) discontinued though once performed? The case suggests an affirmative answer, but can it be generalized beyond circumstances like those of the case itself -- where the annuity is distinctly alleged to have come out of a settlement or other contract and its "considerateness" does not have to be gathered from the language of the grant itself?)

Defendant's counsel, Littleton, denied that his client was seised of the tithes (presumably meaning now seised), and plaintiff was willing to take issue on that. Littleton then objected that the Court lacked jurisdiction to try that issue because right of tithes would come into debate. He does not say directly that the suit should not be brought at common law (= the

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interest sued for is not a common law annuity owing to its mode of creation, viz. an ecclesiastical transaction, possibly the outcome of ecclesiastical litigation in the form of a "consent decree.") Nor could he very well say that, having already denied a presumably material part of plaintiff's claim, as opposed to demanding judgment on the count. Littleton's approach is more indirect. But has it any merit? In what sense would the *right* of tithes come in question if the common law were to try whether defendant was *seised* of them, now or at any other time? Littleton's strategy seems to me to come closest to making sense if the composition is indeed assumed to be a "consent decree", tantamount to a judgment by the ecclesiastical court. If it is taken that way, then the common law would be asked by the pleading to decide whether the "judicial act" of the ecclesiastical judge was executed on one side and therefore ought to be executed on the other. The common law would not in strictness be deciding the right of tithes, but it would arguably be cutting very close to a normal "incident" of ecclesiastical jurisdiction over the right of tithes (the subject of the litigation behind the "consent decree.")

In any event, Littleton was firmly rebuffed by Danby: "The plaintiff may not have remedy for his annuity in the Court Christian, because the annuity is a temporal thing, and you cannot give another court jurisdiction..."

(6) Fitzherbert's Abridgment. 20 Edw. 3. Annuity, 32.

This case was Tanfield's Exhibit A -- "our very case in effect" -- in *Collier*. As described by him, it is discussed in the text above. His description is not challenged so far as the reports show. It is possible that the judges knew the Abridgment case and saw that it was not quite as close to *Collier* as Tanfield would have it. But I argue in the text that they more probably thought 20 Edw. 3 was embarrassingly indistinguishable in its main point (effect of an episcopal "ordinance") and therefore found another way of distinguishing (involvement of a third party in *Collier*, vs. parson and vicar alone.)

Tanfield's representation of the Abridgment case is not seriously misleading, but two details make it somewhat less perfect for his purposes than he would have it. (a) The "ordinance" was embodied in a deed of the bishop, which was proffered. The deed was in some way evidence of the patron's complicity. (I put it this was because I find it hard to imagine just what the deed said. The words of the Abridgment are ". . . put forward a deed witnessing that he ?had received in the presence of the patron by the hand. . ." [. . . *tesm que il ?au resceu al pres. le patron par le man*]. My best guess is that the deed recited that the

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patron -- in this case the same person as the prior/parson/annuitant -- had received payment of that which was ordained, and that the deed said "patron" on purpose to catch all the elements of a composition-real. His receipt of payment would give him seisin as payee, but it would also show his "complicity" in the arrangement as patron. In sum, the "ordinance" in *Collier* was more "naked" than in 20 Edw. 3; the question was whether it was as "high" as a deed, whereas in 20 Edw. 3 there was a deed, though its being essentially evidence of an "ordinance" could be urged as a reason for saying the two cases really raised the same question -- an "ordinance's" efficacy.

(b) The holding in 20 Edw. 3 is the opinion of one judge, Wilughby. He clearly thought, as against counsel's objection that the duty to pay a pension "for" offerings was spiritual, that the Annuity suit was perfectly well-brought, or that the duty was temporal. He does not, however, say that an "ordinance" is as good a foundation for a temporal annuity as anything, but rather emphasizes the deed ("...the ordinance of the Ordinary *by deed* is a temporal contract" -- my italics). Wilughby adds a further thought, which is puzzling and perhaps enlightening: "... and though he has no more than 3d. [in] offerings, he will have his 100 [shillings]."

This sounds like familiar contract-law talk -- "price doesn't affect the validity of the contract", "so long as there is some consideration, we will not concern ourselves with whether there is a fair or 'equal' exchange", or the like. What is the point in our context? The annuity was created as part of an officially supervised apportionment of incomes and was clearly conceived as an exchange, not of course a merely voluntary one, but in the sense that the aim of the arrangement was a distribution of risks such as the parties might under some conditions agree on voluntarily. The vicar got the offerings, the rector 100/ per year. The arrangement is only intelligible as an attempt to give some advantages and disadvantages to each party -- the rector a secure 100/, which he might not realize if the offerings were simply assigned to him, the vicar a chance at some income from offerings, if he was successful in stirring up his parishioners to be generous, offset by the risk that he might be worse off than if the offerings had simply been made part of the rectorial income. (Structuring incentives would, seem to have entered into the medieval bishop's calculations.) Now, it might be argued that it is the nature of such an arrangement to be somewhat experimental or open-ended. I.e., the "ordaining" bishop intended that it should be subject to revision, and even *ad hoc* non-enforcement, if it failed to work out more or less as a "fair exchange." The rector

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was not meant to be assured of 100/ forever, irrespective of whether the particular parochial income it was related to was in a net way capable of supporting it. If experience showed over a number of years that the offerings consistently fell short of 100/, the bishop would cease to enforce the pension, or "ordain" a figure better approximating something like the average value of the offerings, perhaps minus enough to stimulate the vicar by hope of profit as well as fear of loss. (The kind of figure an average or "reasonable" farmer of a tax or similar income would consider.) Even in a given year, the bishop might want to reserve the right not to enforce, or to mitigate, the pension, should the vicar be exposed to serious loss without fault.

This interpretation of the "ordinance" of course amounts to a good reason for treating the pension it created as spiritual, or preserving exclusive ecclesiastical jurisdiction. In proclaiming the indifference or near-indifference of whether the pension approximated the value of the offerings, Justice Wilughby was presumably reinforcing his contrary view that the ecclesiastical transaction created a temporal annuity solely recoverable at common law. The existence of the deed seems central to his so concluding. He may, therefore, have been saying, "While the ordinance by itself could reasonably be taken as creating a flexible ecclesiastical interest, once there is a deed flexibility is out of the question. The bishop has, so to speak, stepped into the temporal sphere, where he has granted a 100/ annuity -- "for" the offerings, to be sure, but he has cut off any basis for arguing that the annuity in fact bears no relation to the offerings." This line of reasoning, by highlighting the deed still more, has a tendency to dissociate 20 Edw. 3 still further. ("Indifference or near-indifference": To be literal, Wilughby does not say that the annuity would be good if there were no offerings, but if the offerings were drastically short of 100/. Cf. the last case above. If an annuity is known, from its face or otherwise, to have been granted "for" something/for a reason/on some consideration/in exchange for something, and it is known that the grantor has not received that "for" which the annuity was granted, or that the purpose behind the annuity is impossible, or has not been accomplished in fact, can recovery of the annuity be stopped? An annuity not bestowed by a private person, but "administratively" [or "judicially"] imposed as part of such proceedings as appropriation of a rectory, is a special case within the general question. All Wilughby is firm on is that *realistic* accomplishment of the purpose, or receipt of the benefit, "for" which the annuity was granted is irrelevant. Perhaps an annuity granted "for" something that does not exist, or turns out not to exist, would be in trouble.

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E.g, suppose an appropriation gave tithes of a certain product to Vicar or Rector and required the other to pay a pension "for" those tithes, and the product either never was, or ceased to be, grown in the parish.)

For the rest, the Abridgment report of 20 Edw. 3 contains only a little sparring over technicalities of the deed (properly dated? parties properly named?). If a valid deed was essential for the proposition that Annuity would lie, invalidation of the deed on technicalities could change the case, but attempts so to invalidate it got nowhere. (Those attempts by defendant's counsel are rebuffed by "Sharde", who sounds as if he is speaking as a judge rather than as counsel for the other side, but the only judge he could plausibly be, Shardelowe, is said by Foss to have died in 18 Edw. III, two years before this case as dated.)

(7) Fitzherbert's Abridgment. 16 Edw. 3. Annuity, 23. Cited by Dodderidge, arguing for Prohibition in *Sprat*.

At a few points, I find the Abridgment impossible to read and to translate into visualizable events. The case certainly shows Annuity by churchman against churchman, on a prescriptive title, sustained in the face of various objections by counsel. Only Justice Hillary speaks from the Bench, but he speaks for the Court, for counsel accept his dismissal of their points and move on. This much is enough for Dodderidge's minimum purpose of showing that Annuity would lie in circumstances like those of *Sprat* (from which it does not automatically follow that an ecclesiastical suit should be prohibited.)

Whether further details of the Abridgment case make it more useful for Dodderidge or reduce its similarity to *Sprat* I hesitate to say. The initial objection to the Annuity suit seems to be that an annuity cannot be claimed by churchman against churchman purely by prescription -- by prescription unexplained, so to speak. That makes sense when one considers that intra-Church pensions were not owed by natural person to natural person, but by the representative of one spiritual corporation to that of another. Natural A. may become legally bound to confer some benefit on Natural B. just by repeatedly conferring it for long enough. If one wants to say the (immemorial) usage points ultimately to a grant, very well -- there is no reason A. could not have granted B. such an interest as an annuity "before the time of memory. " Obviously the *pro tempore* holder of, say, Parsonage C cannot grant a permanent benefit to the holders of Vicarage D or Bishopric E "just like that" -- cannot subject all successive holders of C to a detriment just because it is the present holder's whim. By the same token, it would seem that the present holder of C cannot, by *de facto* benefiting

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the holders of D or E, start a course of usage which will end in subjecting all successors in C to a detriment. Must there not be some -- well -- "consideration", something visible to show that what has *ex hypothesi* been going on forever is reasonable, serves some interest of the corporation subject to the detriment, or at least the larger interest of the Church, or at any rate had the assent of those officially responsible for that larger interest? (In the case of presentative livings, making out that the interest of the patron was not harmed without his assent would seem to be a further necessity.) To this query, it may be possible to reply with the standard defense of prescriptive rights: if it has been going on *that* long (preferably forever), it must be reasonable, it must be assumed that all relevant consents were obtained, that all relevant interests harmed were somehow compensated. (It is worth remembering that the "standard defense" did not work for special local customs, as opposed to private prescriptions, for they were subject to a judicial test for reasonableness.)

In the Abridgment case, plaintiff's standing on prescription alone is not defended as such. Instead, his counsel put forward deeds meant in some way to explain the annuity. It is here that the report loses me -- as to just what ancient transactions were shown to the Court and how they tended to clothe the naked prescription. Plaintiff's move does, however, suggest that objection to its nakedness was well-taken. Application to *Sprat* is tantalizing. Should one say that the formula used there ("*tam per realem compositionem, quam per antiquam et laudabilem consuetudinem*" or "on a composition-real paid from time immemorial", depending on which report one follows) is pretty much what should be used in an Annuity suit: a *pro forma* suggestion in one's count that what one intended the usage to show was a composition-real, implying that one could produce some kind of evidence of a composition (though not head-on evidence, which would remove the need for relying on prescription)? If Dodderidge paid full attention to the case he cited, it would be in his interest to say that Annuity would lie if plaintiff counted pretty much in the same terms as those he libeled in, even though it might not if he rested on "naked" prescription.

The rest of the Abridgment case is on whether the deed put forward by plaintiff was the right kind of deed for his purpose and whether, having started out with pure prescription, he contradicted his claim by relying on the deed. On the latter point, I am not sure whether defendant was in the end willing to concede that pure prescription is sufficient (but plaintiff must stick to it) or whether he was arguing that plaintiff should not be allowed to substitute a good claim for the bad one he started with. In any event, objection to plaintiff's pleading on

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these scores was overruled. Justice Hillary thought everything plaintiff had said after the first objection to his count was "pursuant" to his original claim and did not amount to claiming the annuity on two separate and incompatible grounds at the same time. Hillary clearly thought that "pursuing" the prescriptive claim was commendable -- as he says, "[it was] only to show commencement because they are people of Holy Church" -- but I am not sure enough of the reading of his remaining words to say whether he thought it was necessary.

(8) Fitzherbert's Abridgment. 16 Edw. 3. Annuity, 24. Also cited by Dodderidge in *Sprat*.

This case does not seem to me to prove more than that Annuity would lie on a composition somewhat short of a perfect composition-real. Plaintiff claimed that the annuity was created by episcopal "ordinance" in the context of "debate" between predecessors of the present parties. There is not enough information to tell what the trouble and the process leading up to the "ordinance" were, but (a) deeds were shown and (b) what was ordained was a two-way compromise or settlement. Plaintiff's predecessor "gave" certain tithes to defendant's predecessor, and the latter "granted" the annuity to the former. Defendant's only objection to plaintiff's claim was that nothing showed the patron's assent, defendant being a parson. Plaintiff replied by admitting that the patron's assent was not made out, but maintaining that it did not need to be. For, *per* plaintiff, defendant was seised of the tithes and therefore had *quid pro quo*. Note the implication: The annuity, coming out of a settlement arrived at through ecclesiastical processes, would not stand on its own, but only if the payer was actually enjoying that in consideration of which the duty to pay the annuity was imposed on him. The Court agreed with plaintiff and gave judgment for him when defendant did not deny seisin of the tithes.

The case seems more specifically useful to Tanfield in *Collier*, or as ammunition against the view that pensions created by "judicial" act are not common law annuities, than to Dodderidge in *Sprat*. A close look at authorities in the manner of this note points up the hit-and-miss character of "legal research" in the 17th century (to which, even so, the appearance of the 16th century Abridgments was a considerable aid.) It is salutary to reflect on how difficult to obey *stare decisis* would have been if it had been the rule, and how its not being the rule permitted pretty casual use of the technology available.

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(9) Y.B. 22 Edw. 4. 24. Cited by Coke in collateral support of the decision in *Sprat*.

The case certainly says in essence what Coke vouches it for. The complexities are not caught in a summary statement, however, and the case is a good illustration of the problems of jurisdictional law as they were seen in the Year Book period.

Defendant in Trespass, a parson, pleaded a prescriptive title to tithes of "underwood" in his appropriated parish. He alleged that the wood in question was severed (=his chattel property) when plaintiff, the vicar, came and claimed it as *his* tithes. Defendant took the wood, as he was entitled to, and therefore was not liable in Trespass for taking plaintiff's wood.

Plaintiff's first objection to this plea was the technical one that defendant failed to give color to plaintiff's claim because he did not say plaintiff ever had possession of the wood. (This means in effect that defendant should have pleaded "Not guilty". One was not supposed to plead specially unless one, so to speak, admitted the plausibility of the other side's claim. Normally, for A. to say that he did no wrong in taking chattels from B. because they belonged to A., A. ought to make it clear that he *did* take the goods out of B.'s possession. Otherwise, he would leave it implied that he did not do the act alleged to be a trespass at all, or that B.'s suit had no *prima facie* plausibility -- which "Not guilty" is the correct way to assert.) All the judges present agreed in overruling this objection. (In their opinion, plaintiff's coming and claiming the wood as his tithes gave him not only the property but the possession as well -- no further physical act was necessary to gain possession. By saying that plaintiff came and claimed as tithes, therefore, defendant *did* "give color" -- i.e., admitted plaintiff had possession to be rightfully infringed by himself.) All this is of course never-never-land pleading logic. Plaintiff had property and possession *if* the tithes belonged to him, and defendant committed no trespass *if* they belonged to him. The real issue, and the source of a jurisdictional problem, was to whom they belonged.

The Court reached the jurisdictional problem by a route that is itself significant. The parties did not raise it. Justice Choke asked defendant's counsel why they had not objected to the jurisdiction. Counsel said they thought they were barred by a technicality. (A rule that one could not plead to the jurisdiction after an imparlance.) Thereupon Justice Catesby said the Court was free to follow its discretion even though defendant had foreclosed himself, and that it ought not to entertain this case because the issue -- right of tithes between Parson and Vicar -- was an ecclesiastical one. For an important article of Prohibition law -- that there is

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a public stake in keeping the lines of jurisdiction straight, which should prevail over the mistakes and accidents by which litigants can sometimes cut themselves off from complaining about jurisdiction -- this episode of judicial insistence that jurisdiction be discussed may be counted an ancestor.

The jurisdictional question was then argued in some depth. Plaintiff's counsel found several ways of maintaining that common law jurisdiction was appropriate despite the *sense* in which the issue was "As between Parson and Vicar, which is entitled to these particular tithes?" It was argued that if the issue in a suit in form like the present one were the bounds of parishes, the common law would have jurisdiction. (I.e.: Parson A sues Parson B for trespass, viz. taking A's chattels in the form of severed tithes due to him. B pleads that the place where he took the produce is in his parish, not A's, and he took it as his own property, viz. severed tithes.) In the days of developed Prohibition law, this example would hardly carry weight as a model for disposing of the present case, because parish boundaries came to be a well-recognized common law issue. Tithe suits properly brought in ecclesiastical courts were prohibited *because* parish boundaries had come in question, and the common law was regarded as the exclusive tribunal for trying them. Right of tithes between Parson and Vicar, by contrast, was close to the leading example of an issue that ought, at the least, to be left to the ecclesiastical court when it arose there. In the 15th century, it would seem, the two issues did not have the look of polar opposites. In either case, cleric was contending with cleric over "Whose tithes are these?", and that looked like an ecclesiastical question, whatever sub-question -- bounds of parishes or some other -- it depended on. And yet, *per* counsel, which was confirmed from the Bench, when the larger question came up in the bounds-of-parishes form through the ordinary channel of an action of Trespass, the common law would dispose of it. Why not when the larger question arose through the same channel in another form, as in the instant case?

Next it was argued that the issue in this case was not right of tithes between Parson and Vicar in the abstract, but whether plaintiff or defendant had a *prescriptive* title to the particular tithes in dispute. Serjeant Townshend, making this point, hovers a bit between implying that determination of prescriptive title is exclusively, or at least especially, appropriate to the common law and the milder proposition that the issue, having arisen in a common law suit and not being *inappropriate* to common law trial, should be disposed of there. (His generalization of the milder version is that the common law should retain

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jurisdiction "when the Court is lawfully seised, and lay people can as well have notice as the people of Holy Church, whether he and his predecessors have continued to have, etc. , there is good reason to try [it] here.") I.e., suitability to jury trial is the test, given that the case was properly in the common law court in the first place. Whether the parson or vicar has customarily taken a certain product as tithes is as open to neighborhood observation as anything else juries are asked to try. The issue depends neither on ecclesiastical expertise -- as, e.g., the terms or construction of an appropriation would -- nor on the observation of facts to which only clerics would normally have access.

This argument was answered from the Bar with the argument that though the case turned on prescriptive title, the prescription was spiritual and therefore triable only in an ecclesiastical court. Serjeant Tremaile, so arguing, does not take up the difference between ecclesiastical law and common law with respect to the time requisite to establish a prescriptive title. Rather, his argument goes as follows: Every prescription has a commencement. Every commencement is either temporal or spiritual. The prescriptive right to tithes in question in this case must have had a spiritual commencement. If the commencement is spiritual so is the continuance, and *vice versa*. Ergo everything about the prescription in this case is spiritual and exclusively appropriate to ecclesiastical evaluation.

This rather slickly formalistic argument is pregnant with deep problems about the theory of prescription and the coordination of two legal systems in both of which prescription figured prominently. The very notion that every prescription has a commencement presents problems on the common law side, where the immemorialness standard obtained, that do not arise on the ecclesiastical side. (The common law's problems are soluble by the theory that usage is ultimately evidence of a grant lost to memory, but that theory will not work for local customs sanctioned by time. The doctrine that such customs must be reasonable as well as immemorial was a problem-laden epicycle to cover that embarrassment. Applying it often led to argument as to whether usages in principle extending through infinite time could be imagined originating "reasonably" -- usually meaning as an arrangement to which all those affected might agree without coercion, in "reasonable" hope of advantage to themselves. There is a perfectly serious sense in which accounting for some prescriptive rights compelled invention of the social contract.) But let us not worry about the depths. Tremaile's meaning in application to the present situation is clear enough.

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The reason why the prescriptive right to tithes in question in this case must have a spiritual commencement, as Tremaile's words show, is subtler than the bare conventional truth that tithes are "spiritual things." It is that the vicar or parson could only have a prescriptive right to the tithes if he commenced by *claiming* the wood as tithes. It is the claiming-as-tithes that is an inherently spiritual act, not the bare taking or receiving of the produce. The latter could conceivably generate, over sufficient time, a temporal right to the produce in the nature of a rent, but it would not be a right to tithes. Claiming-as-tithes is presumably inherently spiritual because it could only be colorably done by a spiritual man, or because the claim would not have been listened to by the parishioners -- who must after all have habitually paid the claimant if he has a prescriptive right -- unless it drew on the lore of churchmen, unless it made a case in terms of that "foreign" law or transactions within that "foreign" realm. The claim or case need not be ultimately correct or warranted, but whether it is manifestly a question for ecclesiastical courts.

Tremaile speaks abstractly and thereby suggests problems that go beyond the case at hand. (E.g., what if a clergyman prescribes to take as tithes a product that is not, or is not indisputably, tithable *de jure*? Must his prescription be supposed to start with the spiritual act of claiming-as-tithes? Or, because it goes "against common right", should it be taken, not as a pretense to have exceptional tithes, but a merely temporal interest resembling a rent?) For the purposes of the present case, however, there is a simple, and cogent, reason why the prescription must have had a "spiritual commencement." The contest was between Vicar and Parson. How could a prescriptive right in either of them to particular tithes be anything other than a basis for inferring the terms of original appropriation (which *ex hypothesi* must be "lost" or unamenable to direct proof, for otherwise there would be no need for prescription)? Commencement must have taken the form of the clergyman's claiming, rightly or wrongly, that the act of appropriation entitled him to the tithes in question. That must surely be a "spiritual act", referring as it does to official proceedings in the ecclesiastical sphere. (The only alternative is to imagine Vicar or Parson prescribing *against* the terms of the appropriation -- Vicar claiming to have taken what was assigned to Parson or *vice versa*. But that is inconceivable under the common law standard of prescription: Admission that an assignment was made and *then* Vicar started collecting what had been assigned to Parson would on its face say that the practice did not extend into immemorial time. On the ecclesiastical side, prescription against the appropriation is perfectly conceivable -- Vicar

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could concede that wood tithes were retained by Parson at the time of appropriation, but that he had actually received those tithes for the last forty years, say. Whether this is a *good* reason, if true, to permit Vicar to go on taking them, however, is surely an ecclesiastical question.)

The next speaker, Justice Catesby, rejects Townshend's argument -- that common law jurisdiction is at least unobjectionable because the issue is a prescriptive title -- squarely on the ground that ecclesiastical standards of prescription differ from the common law's. He is quite emphatic about the "mischief" that would be done if the common law invalidated a title that would be upheld under ecclesiastical standards. Today the common law says that Vicar may not recover damages against Parson because Vicar has been taking tithes of wood long enough to be entitled; tomorrow Vicar can go into an ecclesiastical court and compell a parishioner to pay him wood tithes; he can probably also enjoin Parson from taking such tithes in the future, and for that matter to compensate him for wrongfully taking the ones that were the subject of the common law suit. This, Catesby clearly suggests, is an intolerable state of uncoordination between the two legal systems.

Chief Justice Brian agreed with Catesby (and the other judge present, Choke, who first brought up the matter of jurisdiction, says nothing to the contrary.) Brian's own words are addressed to distinguishing the bounds-of-parishes case, which he concedes, and annuity cases from the instant case. The bounds case, he says, does not "directly" put the right of tithes in question, because if the land where produce was taken as tithes is in Parish X, there *is* no question but that Parson of X is entitled to any tithes from that land as against Parson of Y. (The opposite of "directly" in Brian's language is "inclusively" -- determination of the bounds question includes determining the right of tithes, but there is no controvertible issue about the right of tithes from Blackacre, given the proposition that Blackacre is in Parish X. It does not necessarily follow that ecclesiastical courts must accept the proposition as true for their purposes -- e.g., are barred from deciding Blackacre is in Y when Parson of X sues the occupant of Blackacre for his tithes. It is an open question what Brian would say to that. "Barred" would mean compellable by Prohibition not to reopen the bounds issue, as ecclesiastical courts would certainly be in later times, when they were prohibitable from taking it up in the first instance.)

On annuities, Brian puts the two standard cases: (a) Writ of Annuity by churchman against churchman, where plaintiff claims by defendant's grant; (b) Same case, but plaintiff

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claims the annuity by immemorial prescription. His point is that common law determination of those suits -- which he obviously thinks well-brought at common law -- avoids "direct" infringement of ecclesiastical territory. The annuity cases are like the bounds case and unlike the instant case, which is "directly" about who is entitled to tithes.

By later lights, the argument seems odd. When interests that meet the criteria for common law annuities are claimed, why should they not be sued for at common law? There may be similar interests that fail to meet those criteria for which an ecclesiastical remedy is available, provided of course that they run between churchmen. But surely there is no need to apologize for entertaining suits to recover common law annuities at common law, no need to suggest that to do so is somehow to take on what really belongs to ecclesiastical courts, though in so "indirect" a way that there is no harm in it. Brian's opinion shows that these are not his lights. "Is Churchman A entitled to a pension from Churchman B?" looks as inherently ecclesiastical to him as "Which of two clerics is entitled to such-and-such tithes?" The reason must be that under the pre-Reformation regime "the people of Holy Church" had the aspect of foreign nationals. For all their inevitable involvement with secular law, affairs between them that could be of no concern one way or the other to laymen belonged to the Church in a deeper sense than when the Church's legal system had become just another jurisdiction under the Crown. The practical reality that Annuity would lie for some annual payments between churchmen had a flavor of anomaly and needed justification. Brian's way of justifying it seems a little tenuous, but perhaps the best way there is. The argument would seem to be that the questions "directly" responded to at common law -- "Is this a valid deed?", "Has A. paid B. £ 10 a year from time immemorial?" -- just happen to sweep up, as it were, questions of entitlement between clerics. If the answer is "No", nothing in the ecclesiastical sphere is altered -- the loser at common law may well have rights assertable in the ecclesiastical system, either on a different basis (such as less-than- immemorial prescription) or because the ecclesiastical court would evaluate the same claim differently. If the answer is "Yes" -- the tricky case -- , one must argue that ecclesiastical interests are no more affected than when the common law says Blackacre is in Parish X. In all probability, the ecclesiastical courts would have no reason not to accept the duly established temporal realities -- to let Parson of X recover tithes from Blackacre, to regard Churchman B as entitled to an annuity from Churchman A and enforce it themselves if so requested in the future. But who is to say that the Church *cannot* prevent its people from taking advantage of

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their secular rights against each other -- at strongest enjoining them, like a court of equity, from doing so, at least declining to enforce those rights themselves? Later, Prohibitions would almost certainly be used to block non-recognition or frustration of common law determinations. As I say above, Parson of X would be protected in his right to tithes from any place determined at common law to be in Parish X, and more than that, would be assured common law determination of the boundaries if anyone challenged his view of them. Ecclesiastical suit for an annuity once recovered at common law would be prohibited so far as the Fitzherbert-*Sprat* view prevailed (if that position does not extend farther and bar ecclesiastical suit when the pension has been unsuccessfully claimed as a common law annuity.) The most extreme case would be unlikely to occur, but I should be surprised to find any ecclesiastical attempt to prevent churchmen from suing for their pensions as common law annuities tolerated. I.e., I should expect Prohibition to be used to prevent spiritual sanctions from being visited on a cleric for so doing. It is of course speculative to wonder whether by Brian's lights these later results would be questionable, but his approach seems to me to invite the speculation.

Ironically, at the same time, Brian's opinion can be seen as in a way a medieval foothold for the anomalous choice-of-jurisdictions position in Fitzherbert and *Sprat*. Brian's view that churchmen's claims on churchmen essentially belong to ecclesiastical jurisdiction, so that temporal handling of them needs to be conceived as "indirect" to be permissible, provides a certain warrant for holding that if clerics prefer to sue in an ecclesiastical court they are free to, even though Annuity would lie. Practical considerations may be the main explanation for the rule, but the tenderness toward ecclesiastical jurisdiction it implies can be connected with the outlook of the Year Book period. When Tanfield in *Collier* and Dodderidge in *Sprat* opposed the rule, they were in a sense advocating an approach consistent with modern assumptions and would have been entitled to say that there were echoes of the old order in the other side's position. Whether Coke, citing 22 Edw., caught the possible implication in the only words actually about annuities in the Y.B. case is uncertain. One should not put such things past Coke, nor assume that the "modern approach" to inter-jurisdictional questions would necessarily have appealed to him at the cost of breaking with tradition.

The Y.B. case ends with a last effort by plaintiff's counsel to save the Court's jurisdiction. Serjeant Pigot asserts that when a vicar's endowment is augmented by composition-real and "part of that augmentation comes in debate" it would be tried at

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common law. I think he must be visualizing a case like the present one -- Trespass ultimately turning on a Parson-Vicar controversy, except that Vicar expressly claims the tithe-produce in debate by such composition rather than by prescription. Pigot presumably means the Trespass case would be disposed of at common law, either on "Not guilty" pleaded or on a plea specifically denying the existence or the alleged terms of the composition-in-augmentation. It is not obvious why Pigot should think that case clear and therefore a model for the present one. As usual in the Year Books, it is hard to tell whether an assertion of this sort might be based on recollection of an actual case; at least there is no sign of that. On the reason alone, I suppose the concurrence of the patron in the composition could be said to make it a "temporal act" (which is very much in line with later law, including that on annuities in so far as it insists that a pension founded on a proper and directly provable composition-real is exclusively, or even optionally, amenable to writ of Annuity.)

Pigot's argument, however, is vigorously rebuffed by Justice Catesby (clearly with the agreement of the other judges, for the report ends with the notation "And then the Court was ousted of jurisdiction.") Catesby says in effect that an augmentation by composition is *par excellence* an ecclesiastical act, though of course it requires the assent of the patron (who, we should remember, is also the parson when the living is appropriated.) "For that to be defeated in this Court by matter of fact", he says, "scil, by verdict, can in no way be."

**F.
Severed Tithes Converted to Chattels**

Summary: Numerous attempts were made to get Prohibitions by taking advantage of the rule that severance of predial tithes (separation of 1/10th of the crop from the rest in the field) converts the severed tithes into Parson's chattels, so that he may maintain an action of Trespass against anyone who takes or damages them. In the abstract, it might seem that the rule would provide a "paradigmatic" ground for Prohibition: If Parson is in a position to protect himself at common law after severance, what business has he resorting to the ecclesiastical court? Practical application of this idea presented difficulties, however, and the cases involving it yield a messy picture. The cases overwhelmingly imply that when Parson sues Parishioner in the ecclesiastical court merely for not paying his tithes, Parishioner may not have a Prohibition on the bare

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surmise that he had severed the tithes, wherefore Parson was now in a position to sue him in Trespass. The reason is that such a surmise amounts to no more than a claim that Parishioner had paid his tithes, or satisfied the ecclesiastical duty he was sued for failure to perform. It made no sense to say that ecclesiastical courts could not try that question, or to transfer trial of "Were the tithes paid or not?" to the common law on Parishioner's request. That would be, among other things, to differentiate that question from analogous ones arising in ecclesiastical suits, such as "Was the legacy paid or not?". In addition, assuming the undeniable legitimacy of ecclesiastical jurisdiction over claims to tithes, Prohibition on bare surmise of severance would permit Parishioner to defraud Parson of his ecclesiastical remedy by severing the tithes and quickly retaking them. Some judges, however, seem to have been unsure even on these points, and they are not very firmly articulated in the reports. If, on the other hand, an ecclesiastical suit was brought for *admittedly* severed tithes, it would have been agreed that in principle Prohibition lay in most cases. The principle could rarely be given effect, however, owing to the intervention of statutes made at the time of the Reformation. Suffice it to say that the statutes gave ecclesiastical courts a considerable measure of power to proceed against tithe-payers who had severed but then prevented Parson from realising physical possession of his tithes (as by severing nominally and hastily retaking or by cutting off Parson's access.) The cases contain a good deal of exposition of this poorly drafted legislation. A clearly stated and agreed-on interpretation of the statutes at their problematic points and a firm understanding of exactly how they altered the common law does not emerge.

* * *

1. Introductory

It was a firm rule of the common law that "severance" of tithes makes them the property of Parson (or Vicar where the living was appropriated and the particular tithes in question were part of Vicar's endowment.) Another formulation would be that the act of "severing" was the act of paying. With reference to the most important class of tithes -- hay, grain, and similar crops -- to "sever" was to set out 1/10th visibly apart from the other 9/10ths in the field where the crop grew. (What constituted the act of payment in the case of products not harvested all at once annually and easily divisible then and there was necessarily more problematic.)

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Some consequences of this rule are obvious: The tithe-payer, once he had done his duty by severing the tithes, was not the tithe-recipient's insurer against mishap. If the weather or an extraordinary act of God should destroy or damage the produce before Parson could or did carry it off, it was Parson's bad luck. If the tithes were taken or tortiously damaged by a stranger, Parson could bring an action of Trespass against the taker or tortfeasor. The tithe-payer had no liability for Parson's loss and no rights against the stranger as if his goods had been taken, for the goods were no longer his.

Questions will begin to arise with the next steps in the logic. It seems clear that if the severed tithes are taken or damaged by the same person who severed them, Trespass will lie against him as well as against a stranger. For torts by A. against B.'s property are such whether the property was only just transferred from A. to B. or not. But is it so clear that Parishioner has paid his tithes if he retakes what he has severed? Perhaps one would be inclined to say, "Yes, he has *paid*, has satisfied his *tithe-paying* duty, whatever liabilities his subsequent behavior has brought upon him", were it not for the obvious possibility of fraud. (Parishioner makes the required severance, but almost instantly carries off Parson's share. Or, assuming that Parson is responsible for keeping abreast of the harvest and Parishioner has no duty to give him notice when his tithes are ready, suppose that Parishioner "practises" to take advantage of Parson's ignorance -- severs and quickly retakes when Parson is known to be briefly absent from the parish or occupied in carrying off other people's tithes. Or Parishioner deliberately misinforms Parson. Or he shuts off the usual access-way to the field, so that Parson cannot promptly collect the duly severed tithes sitting in the field.)

Fraud would not be a problem, however, were it not for the larger problem of coordinating ecclesiastical and common law jurisdictions. In one sense, fraudulent behavior would do Parishioner no good. He is liable at common law if he retakes the tithes (=takes Parson's property), and it would not be surprising to find bad faith rewarded with punitive damages in common law litigation. In another sense, the fraud would be harmful, for its effect is to deprive Parson of the tribunal of his choice and ecclesiastical courts of their normal function of enforcing payment of tithes. I.e., if the ecclesiastical court must treat the tithe as paid once severance is shown, however nominal or guileful the act of severance was, Parson is driven to the common law. However adequately he is protected there, he is almost certainly driven to trouble and expense greater than that of an ecclesiastical suit, and he incurs such risk as there is of anti-clerical juries. So -- Is there room for any exception from

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the principle that severed tithes are Parson's chattels and as such within the exclusive protection of the common law?

This is necessarily a question of Prohibition law. It admits of several forms: (a) Suppose Parson simply sues Parishioner in an ecclesiastical court for unpaid tithes. Parishioner seeks a Prohibition by surmising that he severed the tithes and retook them himself, wherefore Parson should be suing him in Trespass. Merely surmising severance is probably an unsound basis for Prohibition, because the surmise says in essence "I paid my tithes", which seems *par excellence* to raise an ecclesiastical issue. Can the additional language -- as it were, "I 'paid', but only in the sense that I went through the motions of severing and retook" -- arguably be regarded as surplusage? (b) Being sued for tithes *simpliciter*, Parishioner surmises that he alleged severance and retaking in the ecclesiastical court, but his plea was disallowed. I.e., his complaint is that the ecclesiastical court improperly refused to treat severance-and-retaking as satisfaction of his tithe-paying duty, (c) Parson suing in the ecclesiastical court admits on the face of his libel that Parishioner severed, but claims he retook. (Variations: The libel specifies the character of the retaking in a sense unfavorable to Parishioner -- his behavior was designedly fraudulent; the retaking was at least suspiciously hasty; whether or not with deliberate intent to keep Parson from removing his tithes, Parishioner obstructed the usual or best access-way, and being thus at fault himself retook the tithes when they were not promptly fetched.) In the third procedural situation, the case for Prohibition seems strong, indeed "paradigmatic." On his own showing, and as evidenced by the libel (a copy of which in a tithe suit must be appended to the surmise -- see Vol. I of the study for this requirement), Parson has sued in an ecclesiastical court for the secular wrong of taking chattels, where an action of Trespass is available to him. In the second procedural situation, the same basic argument for Prohibition can be made, subject to problems inherent in disallowance surmises. I.e.: Plaintiff-in-Prohibition surmises that on the facts as they are ecclesiastical plaintiff could have had an action of Trespass, and that the ecclesiastical court has refused to deny itself jurisdiction on that account. Is it, however, apparent that the ecclesiastical court has so refused, or would refuse if the severance were already proved to its satisfaction? Should the surmise not say specifically that the severance was admitted by Parson in his ecclesiastical pleading or that the ecclesiastical court had ruled in terms that severance-and-retaking does not constitute payment? Without such specific allegation, does the second procedural situation not reduce to the first? It seems,

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then, that the only occasion for taking advantage of the undoubted rule that severance converts tithes to chattels would probably be the one unlikely to occur: when Parson complains in terms about a retaking. For if well-advised, Parson should complain of non-payment simply, making it difficult, though perhaps not impossible under all circumstances, for Parishioner to pursue a Prohibition.

Statute arguably cut off the possibility of Prohibition in the residual situation -- where retaking after severance is expressly complained of in the ecclesiastical court or is otherwise before the common law court as an established fact. I.e., Reformation legislation may have conferred jurisdiction on ecclesiastical courts in some or all severance-and-retaking cases. "Arguably" and "may have" are necessary expressions, because the language of the statutes hardly indicates an unmistakable Parliamentary intent. Three connected statutes, all basically addressed to making it clear that lay impropiators could and should sue in ecclesiastical courts for the tithes they were entitled to, are mentioned in the cases: 27 Hen. 8, c. 20; 32 Hen. 8, c. 7; 2/3 Edw. 6, c. 13. It is very hard to see how the first two of these statutes could be thought to alter the common law with respect to retaken tithes. 32 Hen. 8 goes slightly beyond declaring the duty to pay tithes (and then providing that they may be sued for in ecclesiastical courts whatever the status of the entitled tithe-recipient), for it says that payers must "fully, truly, and effectually divide, set out, yield, or pay" the tithes. The adverbs may provide a slim basis for arguing that at least some instances of severance followed by retaking should be construed as falling short of "full, true, and effectual" payment -- notably where there is expressly alleged fraudulent intent or the retaking is so immediate as to imply such intent, or at least to permit the inference that there was no distinct and completed act of severing. 2/3 Edw. 6 supplies rather more ammunition of the same sort. The language in this statute essentially saying that those who owe tithes should pay them expresses this as a duty "truly and justly, *without Fraud or Guile*" to "divide, set out, yield and pay", and it provides that no person shall carry away tithe produce "before ha hath *justly* divided or set forth for the Tithe thereof the Tenth part." The words I have italicized provide some ground for arguing that a nominal or dishonestly intended severance, while presumably effective to convert the produce into Parson's chattels, is not a fulfillment of the duty the ecclesiastical courts are authorized by the statute to enforce and hence no basis for Prohibition. Sect. II of the act authorizes double damages (i.e., twice the value of the tithes) if any person "carry away his Corn or Hay or his other predial Tithes, before the tithe thereof be set forth; or

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willingly withdraw his Tithes of the same or of such other things whereof predial tithes ought to be paid; or do stop or let the Parson...to view or carry away [his tithes];by Reason whereof the said Tithe or Tenth is lost, impaired or hurt..." The "or willingly withdraw" clause seems to contrast with the preceding "carry away...before the tithe ..be set forth" -- thus to contemplate carrying away *after* a setting forth, which accords with the ordinary use of "withdraw." But bringing the latter form of misconduct within the double damages provision seems indecisive as to the power of ecclesiastical courts to proceed with open eyes against one who severs and retakes, as well as against one who fails to sever. One could reasonably argue that Parson's remedy against a retaker is Trespass and that the statute directs the common law court to award double damages to the successful plaintiff. It in fact says that the double damages are due if the offense is duly proved "before the Spiritual Judge or any other Judge to whom heretofore he might have made complaint." Sect. II does clearly bring within the concept of not paying one's tithes -- and hence within the power of ecclesiastical courts to proceed as for non-payment and to award double damages -- the act of denying Parson access to the place where the tithes are grown, provided the denial results in loss or "hurt" or "impairment" of the tithes (vs. mere delay or inconvenience in carrying them away, presumably.) The best argument for relaxation of the common law effect of severing tithes probably derives from this provision. The statute makes it a good cause of action in the ecclesiastical court to come and say one has been denied access and so has not received one's tithes (or not received them in as good condition as they would have been in if Parishioner had not kept them from being fetched.) It is logically possible to hold that a suit on such a claim, though good *prima facie*, should be prohibited on surmise that the tithes in question were severed. But that is an odd intent to attribute to Parliament. If, pursuant to the Prohibition, it were found that the tithes were indeed severed, what would Parson's remedy be? He does not obviously have an action for taking his chattels, for Parishioner did not necessarily retake the tithes. Of course that is probably what he would have done, but for all we know "on the record", he may have left the severed tithes to rot. Possibly it would be a common law wrong (remediable by Action on the Case?) for A. to keep Parson away from his chattels lying in A.'s field until they perished or were taken by a stranger. I.e., the tithe-payer's usual non-liability as an insurer does not apply when his wrongful act is the cause of the loss. But is that the law? In any event, the action would only be for single damages. The statute could be taken to authorize a common law action for double damages specific to the

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case where Parson's tithes, now in the form of chattels, have been lost to him without an act of retaking, at least so far as Parson knows. But no such action is given expressly, and the whole emphasis of the statute is on reinforcing ecclesiastical jurisdiction. It is therefore unlikely that Parliament intended for suits claiming loss or "impairment" of tithes owing to denial of access to be prohibited. If, after the statute, severance is not fatal to ecclesiastical jurisdiction in one case, it is a small, though not an inevitable, step to conclude that the effect of the statute is to make it non-fatal henceforth in the remaining case as well -- the case of severance and retaking, at least when it is aggravated by apparent fraud or such haste in the retaking as to render the severance nominal.

Furthermore, and confusingly, the main body of 2/3 Edw. 6 (Sect. I) provides for the award of *treble* damages in some circumstances. The language is: "...no Person shall from henceforth take or carry away any such or like Tithes, which have been yielded or paid within the [last] forty years or of Right ought to have been paid...before he hath *justly* [my emphasis] divided or set forth for the Tithe thereof the tenth Part of the same, or otherwise agreed for the same Tithes with the Parson, Vicar, or other Owner, Proprietary, or Fermor of the same Tithes; under the Pain of Forfeiture of the treble value of the Tithes so taken or carried away." Whereas Sect. II unmistakably authorizes ecclesiastical courts to award double damages, it is not clear that Sect. I contemplates ecclesiastical courts at all (as opposed to common law suits for treble damages founded on the statute.) Whereas Sect. II refers in part to acts after severance, Sect. I can be read as referring only to taking away produce that ought to be rendered as tithes before it is severed. The word "justly" interferes with that, however. If at least egregious or fraudulent forms of severance and retaking can be construed as failure to sever at all, or to effect a "just" severance within the statute's intent, there is a basis for arguing that parishioners who have in a literal or nominal sense "severed" may be liable for the treble damages of Sect. I and not only the double damages of Sect. II. Coordination of the two sections gave the courts trouble.

All in all, there is a reasonable argument that the statutes, at any rate 2/3 Edw. 6, modified the law in several ways, though it can certainly be objected that the statute-makers gave no explicit attention to the maxim "severance converts tithes to chattels" and how problems predictably arising from that maxim were to be dealt with. More detailed problems concerning the statutes will appear in the cases.

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2. The Cases

We may now turn to the cases in which attempts were made to get Prohibitions by invoking the principle that severed tithes are the recipient's chattels and as such protectable at common law. *Gerrard's Case* (1584)¹⁹ holds that a simple tithe suit cannot be Prohibited on surmise that Parishioner severed the tithes and a stranger carried them away. The stated reason is that Parishioner could plead the same matter in the ecclesiastical court. I.e., all he is really saying is that he paid his tithes, which raises an issue manifestly within ecclesiastical jurisdiction. The same reason would hold if the tithes had been retaken by the payer himself, as opposed to taken by a stranger. There is a practical difference, however: One might expect a retaker to get short shrift in the ecclesiastical court on the factual issue of severance, whereas Parishioner who had done his duty could not without gross impropriety be made to insure Parson against a stranger's intrusion. The "gross impropriety" would surely be controllable on disallowance surmise, but that procedure should just as surely be demanded. What I call "short shrift on the factual issue" -- a mere tendency on the ecclesiastical court's part to overlook evidence of severance when it appeared that the severance, if any, was quickly followed by a retaking -- is unlikely to be much disapproved by common law judges. That does not necessarily exclude Prohibition on explicit surmise that the ecclesiastical court has treated severance-and-retaking as no-severance, but again it seems that explicitness should be required, lest the plea of payment be turned into an issue triable at common law. I speak here without reference to the statutes, which may well remove any tincture of error from treating most cases of retaking as instances of non -- payment. The statutes clearly do not affect the circumstances of *Gerrard* itself. Nothing in them suggests shifting the risk of a stranger's intrusion from Parson to Parishioner.

Subsequent cases from the Elizabethan Queen's Bench reflect some uncertainty and division of opinion. An anonymous report from 1590²⁰ has the Court saying that after severance there can never be an ecclesiastical suit because the tithes are converted to chattels and Trespass lies. A decision to grant Prohibition is not unmistakably reported, but the opinion points that way -- contrary to my suggestion that a mere surmise of severance should

¹⁹ 26 Eliz. Q.B. 4 Leonard, 7.

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not be grounds for prohibiting a tithes suit. The surmise in the instant case appears to have done no more than assert the severance. The reported words of counsel arguing against Prohibition fail to state what seems the obvious point: that a surmise of severance amounts only to a claim of payment. Rather, counsel says that Prohibition should not lie because his client -- Parson -- had not "accepted" the severed tithes. That presumably means that Parson did not regard the severed produce as an honest 1/10th and therefore did not carry away what was severed. The implication would be that if he had carried away less than a full 1/10th, at any rate without protestation that he was accepting this as partial payment only, his suit for the residue should be prohibited. That is a separate point of some interest, and *quaere* as to its correctness. The fact remains that counsel does not dispute the Court's apparent view that surmise of severance is grounds for Prohibition. It may, however, be significant that Parson *de facto* conceded the severance -- i.e., claimed that he was entitled to sue for the tithes in full when he had refused to accept the admittedly severed produce as an honest 1/10th. The report unfortunately does not give enough procedural detail to make it clear whether this concession was in some way "on the record." In principle, at least, there is a distinction between seeking a Prohibition simply by saying "The tithes were severed" ("I have paid my tithes") and seeking one on the ground that Parson is suing for tithes which he admits to have been severed -- here in the special sense of "partially paid but refused because Parson is entitled to hold out for full payment." (Whether he is in fact so entitled makes a separate question.)

The Court's opinion in this case adds a feature to the statement of the basic rules about the effects of severance. *Per* the Court, if the party severs his tithes *and gives the parson notice*, Parson is henceforth barred from ecclesiastical suit. I do not specify a notice requirement in my own statement of the rules above because I have not found it consistently said to be part of the law. This case supports an active duty on Parishioner's part to give notice (and leaves the question whether Parson may sue for his tithes when the duty has not been performed even though he was aware of the severance from his own knowledge.) For all that appears from other discussions, it was Parson's responsibility to inform himself. Justice Fenner in this case cited *Articuli cleri* (9 Edw. 2., c. 1) for the proposition that

²⁰ Anon. M. 32/33 Eliz. Q.B. Add. 25,200, f.25.

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severance converts tithes to chattels. The citation is dubious, however, for the chapter referred to is about the effect of a sale of tithes (a cleric who has sold his tithes may not sue for the purchase price in an ecclesiastical court because the sale converts the tithes to chattels), rather than about the effect of severance. Modern statutes are not mentioned in this case.

A brief note on *Leigh v. Wood* (1597)²¹ reports agreement on two propositions in an otherwise undescribed Prohibition case: (a) If tithes are set out and a stranger takes them, there will be no suit in the ecclesiastical court. Construed in one sense, this states the indisputable: Parson has no ecclesiastical claim against the stranger, but must pursue him in Trespass. Construed another way, it contradicts *Gerrard* above and is disputable: Prohibition lies on surmise that Parishioner is being sued for tithes when he has severed, at any rate if the surmise says that Parson's failure to realize his tithes is owing to a stranger's intrusion. Granting the correctness of this, it remains arguable that Prohibition should not lie on a surmise of severance without any explanation, or without an admission that Parson's suit is colorable because the tithes never reached his hands. A further step would be to argue that an admission of Parishioner's wrong -- i.e. a retaking by him -- does not count; Parishioner may not take advantage of his own tort to frustrate Parson's ecclesiastical suit, even though he is not in all circumstances confined to pleading payment in the ecclesiastical court, at least in the first instance. This is a possible route to the next point below. (b) An ecclesiastical suit is appropriate if Parishioner has not set out his tithes (obviously) *or if he sets them out and takes them back himself*. It does not appear from this report whether the important (italicized) point was reached with the help of the statutes or not. As I have already suggested, I do not think it absolutely requires the statutes. (Cf. just above and under *Gerrard*.)

A case of 1598²² is better evidence than the last two reports, and what it principally shows is a serious split in the Queen's Bench. Here the surmise alleged severance and went on to say that Parishioner detained what he had severed for reasonable cause (but the cause was not specified.) In effect, plaintiff-in-Prohibition said that he converted the tithes into

²¹ M. 39/40 Eliz. Q.B. Moore, 912.

²² Anon. P. 40 Eliz. Q.B. Croke Eliz., 607.

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Parson's chattels and lawfully took those chattels, as he might have done with other property belonging to Parson that happened to be in his physical control (presumably by way of satisfying a debt.) Parishioner did *not* rely on a bare surmise of severance, amounting to a claim of payment. The case is therefore indirect evidence that such a surmise by itself would not have been even arguable grounds for Prohibition. Rather, the surmise is analogous to alleging severance and taking by a stranger -- admission that Parson did not gain physical possession of the tithes accompanied by a purportedly reasonable explanation of why he failed to. ("Purportedly reasonable" in contrast to a confession that Parishioner simply retook the severed produce without right. It may have been ill-advised for Parishioner in this case to omit specifying by what right the produce was detained after conversion to chattels -- an omission in the surmise which the reporter found interesting enough to note explicitly. Plaintiff-in-Prohibition's theory was presumably that specification was unnecessary -- that it was enough to make the ecclesiastical suit colorable by admitting that Parson never realized his tithes and to claim generally that the retaking was not fraudulent or arbitrary.) The case proceeded to formal pleading and was argued on demurrer to the surmise/declaration.

Justices Fenner and Clench favored upholding the Prohibition on the ground that severance converted the produce to Parson's chattels, so that actions of both Trespass and Detinue were available to Parson if he wanted to complain about Parishioner's detainer of the goods. Justice Gawdy and Chief Justice Popham took the opposite view. They held that although Parson could sue at common law, an ecclesiastical suit was also appropriate because the taker of the severed tithes was the severer himself. They said expressly that Parson's only remedy would be at common law if a stranger had taken the produce (leaving the ambiguity discussed under the last report above -- Do they mean only that the stranger could not be sued in an ecclesiastical court, or that a suit against Parishioner would be prohibited on surmise that the tithes were severed and taken by a stranger, without a claim that plaintiff-in-Prohibition was prevented from taking advantage of the facts in his favor in the ecclesiastical court? Probably the latter.) Gawdy and Popham relied on statute, specifically on 32 Hen. 8 rather than 2/3 Edw. 6. (32 Hen. 8 commands all persons owing tithes to "divide, set out, yield or pay" them and proceeds to say that anyone who "detains or withholds" the same may be sued in an ecclesiastical court. Gawdy and Popham interpreted "detains or withholds" as referring to acts after severance as well as mere failure to sever -- reasonably enough perhaps, but as I have suggested, the policy of the statute with respect to

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events after severance is less than clear.) The judges on neither side go into niceties. Fenner and Clench were clearly not bothered by the generality of plaintiff—in—Prohibition's claim that he retook the tithes with justification. Gawdy and Popham were unmoved by his claiming a justification, albeit generally. The latter argue for their position by pointing out the danger of fraud if Parishioner by "secretly" severing can cut off Parson's ecclesiastical remedy. They make nothing of the present Parishioner's denial of fraud in his surmise by claiming a just retention of Parson's property. The report ends in an adjournment. If the deadlock was not broken, the demurrer would not be upheld and the Prohibition would stand.

The two reports of *Brooke v. Parson of D.* (1600)²³ differ in small ways. I shall go by the MS. and indicate the differences in Noy at the end -- only one is of possible significance. Brooke agreed with the Parson to pay a sum of money in lieu of tithes. Despite the agreement, Parson came at harvest time and took 1/10th of Brooke's hay. Brooke stopped him while he was hauling off the hay and took it out of his possession. Parson then sued Brooke in the ecclesiastical court on 2/3 Edw. 6. I.e. he sued for multiple damages, but his resting his ecclesiastical suit on the statute may also have been meant to clear it of any substantive doubt. Justices Gawdy and Fenner, alone in court, both favored. Prohibition and apparently granted one without participation by the other judges. The only indication of their thinking is Fenner's general invocation of the rule that severance converts tithes to chattels. (The possibly material way in which Noy's report differs is that it says that despite the commutation agreement "...the due tithes were sever'd, and exposed, and the parson takes them and carries them may..." I.e., Noy has Parishioner rather unaccountably severing the tithes even though he thought he had no duty to do so, whereas the MS. suggests that Parson simply helped himself to what looked like 1/10th of the undifferentiated crop. Noy's version makes Fenner's invocation of the conversion-to-chattels maxim in the MS. more plausible. The other scenario requires a different rule -- not an unreasonable rule, but one that cannot be considered law with equal assurance: If Parishioner fails to sever, but Parson acquires physical possession of as much produce as ought in normal circumstances to have been severed, the produce is Parson's secular property. *Quaere*. For the rest, the MS. is the better

²³ M. 42/43 Eliz. Q.B. Add. 25,203, f.387b; Noy, 40 (undated, *sub. nom.* Brooks' Case.)

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report. Noy does not specify that Parson's ecclesiastical suit relied on 2/3 Edw. 6. It has Prohibition granted without indicating that this was the act of only two judges and without a hint of the reasoning.)

The reports of *Brooke* are spare, but the issues are interesting- Let us assume that one way or another the tithe-produce in Parson's hands was his secular property, protectable against any taker, payer included, by action of Trespass. Is there any argument for denying Prohibition on the facts of this case? It seems to me there are two possibilities,

(a) Brooke, one might argue, is in the same position as any Parishioner who severs and retakes. It does not matter that he took Parson's chattels out of his physical possession, as opposed to taking them before physical possession was gained. But ecclesiastical jurisdiction is not destroyed when the payer himself retakes, at any rate not since the statutes. Ergo Parson's ecclesiastical claim against Brooke is not destroyed.

Judging by the last case above, Justice Gawdy, though not Fenner, subscribed to the proposition that an ecclesiastical suit is appropriate against a retaker. How then might Gawdy distinguish the instant case? In one way, retaking out of Parson's physical possession seems a worse wrong or a more blatant trespass than retaking before physical possession is gained. On the other hand, it is a more unmistakable taking, more like any other trespass (justified or not.) It is not construable as non-payment in effect, as a guileful way of paying which, though in strictness of law it perhaps *is* paying, is really a ruse to avoid payment and at the same time to debar parson from his normal ecclesiastical remedy. If we take the statutes as the basis, or at least the sure basis, for keeping the ecclesiastical remedy alive beyond the birth of the secular remedy, it is reasonable to construe the statutes as extending, at most, only to retakings prior to the produce's passing out of Parishioner's physical control (retakings which in the nature of things, even if innocent or justified, must follow on severance fairly promptly.) After all, Parliament cannot have intended to keep the ecclesiastical remedy alive forever.

(b) The second possible argument against Prohibition takes into account the circumstance that Parson allegedly acted against his agreement. That may seem hardly to cut in his favor, but in a curious way it perhaps does. If instead of taking the produce as tithes, Parson had sued for it notwithstanding his agreement, the ecclesiastical court would not by the normal rule be prohibited. Parishioner could plead his bargain in the ecclesiastical court, but if that court refused to recognize its validity, or to believe evidence of its reality, and

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ordered payment of the tithes in kind, Parishioner would be driven to his common law suit for breach of contract. If Parson had successfully made off with the produce in violation of his agreement, Parishioner again would have no recourse except a contract suit. Having been lucky or vigorous enough to get the goods back in his possession by self-help, Parishioner is better off than he would be under the alternative scenarios. Parson can sue him in Trespass, but his chance of success would not be good. (Parishioner could perhaps not justify the taking by a special plea, but the chance of his being acquitted on the general issue would probably be good when the jury saw that Parishioner was only helping himself to what his deal entitled him to.) One might, I think, have some doubt about leaving Parishioner sitting prettier than if events had been slightly different -- in effect, Parishioner would have enforced specifically, with a touch of violence, a kind of contract that could not normally be so enforced. Keeping the ecclesiastical remedy open, as if this were a case of simple severance-and-retaking, would be a way of preserving consistency in the principle that tithe-payers who make commutation bargains can only expect contract damages if Parson chooses to disregard the agreement. There is no sign, however, that this line of argument occurred to the judges, and it should perhaps not prevail over the point that the instant case was *not* one of simple severance-and-retaking.

Webb v. Petts,²⁴ undated but from the same Court as the cases above, reiterates the rule that Prohibition will lie on surmise that the tithes were severed but taken by a stranger before Parson gained physical possession. The report is explicit to that effect. I.e., the meaning is clearly that Parishioner may not be sued in an ecclesiastical court and is not driven to plead the severance there before seeking Prohibition. *Gerrard* is more clearly overruled than in earlier cases that suggest the same propensity to overrule it.

The last major case from the Elizabethan Queen's Bench, Heale v. Spratt (1602),²⁵ is reported by Coke, but better reported in a MS., which I shall principally use. Chief Justice Popham, now in his last days, did not participate. Division among the puisne justices still

²⁴ Noy, 44. Approximate dating based on mention of Chief Justice Popham and Justices Fenner and Yelverton by name. See Part I for their differences over a procedural point.

²⁵ T.44 Eliz. Q.B. Add. 25,203, f.505b; 13 Coke's Reports, 23 (Sprat v. Heal.)

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appears, but in the rather complicated circumstances of the case they agreed to uphold a Prohibition on motion for Consultation.

Spratt sued Heale in the ecclesiastical court for non-payment of tithes *in the sense of not severing*. I.e., the libel was explicit that there was no severance. Heale pleaded that he had severed -- i.e., in common law parlance, traversed plaintiff's claim. Ecclesiastical procedure, however, did not require the pleading to stop there with issue joined. Plaintiff was allowed to make a further plea, wherein, without conceding that the tithes were severed, he alleged that Heale had carried off the tithes after the "pretensed" severance. I.e., in its final form, plaintiff's pleading was in effect "He did not sever, but if he did, he himself carried off the severed produce." That is of course bad pleading by common law standards, but not so in the ecclesiastical system. The context is a good one for noting the realism of the looser ecclesiastical canons of pleading, for Parson who arrived and found no tithes waiting for him in the field might be genuinely unsure which had occurred, no severance or nominal severance and hasty retaking. On this pleading, the ecclesiastical court proceeded to give sentence for *treble* damages against Heale.

Heale now obtained a Prohibition on a surmise with two elements: (a) He stated as a fact that he severed and concluded that the tithes were lay chattels which should be sued for at common law. (b) He alleged that 2/3 Edw. 6 gave only double, not treble, damages. The theory of this surmise is rather hard to make out. The first element taken independently is a dubious ground for Prohibition. We have not seen it ruled out, but have noted intimations in the cases that some explanation of the tithes' disappearance needed to be surmised, as opposed to the bare fact of severance/payment. As to the second element: It is not true that 2/3 Edw. 6 "does not give" treble damages. It "gives" both treble and double damages, depending on circumstances. It possibly leaves some doubt as to whether ecclesiastical courts are empowered to give treble damages or confined to double. The best reading of the surmise is probably that it is directed essentially at the award of treble damages, with the first element doing duty as a semi-independent ground. (We shall see that in the end the Court upheld the Prohibition on a version of that "semi-independent ground", by-passing the damage award as such.)

I would propose the following as a spelled out translation of the surmise as a whole: The award of treble damages was clearly unlawful. The reason is that if 2/3 Edw. 6 authorizes ecclesiastical courts to award, treble damages at all, it does so only when defendant is

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convicted of evading his tithe-paying duty in the most extreme sense, viz. failing to sever (without the excuse of a commutation agreement or the like.) Lesser derelictions, such as denying Parson access to the severed tithes, are subject only to double damages. This case as finally pleaded must be construed as a case of "lesser dereliction", viz. retaking after severance. Therefore execution of the sentence should be prohibited (minimally *quoad* 1/3rd, but preferably *simpliciter*, because the ecclesiastical court violated its statute-based authority by misconceiving the nature of the claim before it. I.e., it was not free, as the pleading shaped the case, to proceed as if the complaint were of non-severance rather than severance-and-retaking.) Plaintiff-in-Prohibition reserves, however, the right to argue that the ecclesiastical suit was prohibitable before sentence -- if not when it was first brought, on bare surmise of severance, at least after severance was pleaded and the ecclesiastical court declined to try the issue raised thereby -- "Severed or not?" The underlying rule -- severance converts tithes to chattels -- must at least mean that when Parishioner pleads severance the ecclesiastical court is obliged to establish straightforwardly whether severance took place. If it did, defendant would be discharged with respect to the present litigation. Then, arguably, Parson's only recourse would be a common law suit if he believed someone -- present Parishioner included -- had taken what are now indisputably his chattels. (Having tried and failed to sue for non-severance of tithes, Parson has lost any option he may have had before, by statute or otherwise, to bring an ecclesiastical suit for the distinct offense of severance-and-retaking.) Even if he has not lost that option, Parson at least *might* prefer to proceed at common law against the taker or retaker of his chattels. From his point of view, the prospect of damages enforced by secular sanctions would be open to him (and as against a retaker statutory multiple damages at common law need not be ruled out.) If Parson took the common law option, the person charged with taking the chattels -- this Parishioner if he is to be accused of retaking -- would enjoy the temporal process *he* might prefer.

Consultation being moved for, Shirley argued first for defendant-in-Prohibition. He defended the award of treble damages on the ground that by the statute if Parishioner severs and immediately carries away what he has severed no legal severance has taken place. ["Immediately": The word in the MS. is "*maintenant*." The force is probably "immediately". I.e., Shirley was probably willing to concede that only some instances of severance-and-retaking amount to non-severance, viz. when the retaking is so immediate that the severance must be taken as nominal and fraudulent.] Spelled out, Shirley's theory is: (a) The statute

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distinguishes mere non-payment, subject to treble damages, from "lesser derelictions" subject to double. (b) Ecclesiastical courts are empowered to award treble damages in the first case. (c) The statute counts at least the most flagrant cases of severance-and-retaking as non-severance. (d) The complaint in this case, as finally pleaded, was either flagrant severance-and-retaking or non-severance. Which one makes no difference. Treble damages were appropriate to either. Therefore there is no basis for objecting to the way the ecclesiastical court allowed the case to be framed.

Justices Gawdy and Yelverton agreed with Shirley. (I shall not pause to argue for and against the construction of 2/3 Edw. 6 they and he adopted. I have said enough to suggest that the drafting of the statute virtually required the courts to rewrite it along the lines they considered reasonable and in accord with its general intent. It is hard to find express language for distinguishing two kinds of severance-and-retaking, but common sense rather recommends it. I.e., it makes sense to regard extremely nominal severance, almost certainly done with fraudulent purpose, as non-severance; the statute gives ecclesiastical courts jurisdiction and power to award double damages for acts clearly less flagrant than merely not paying one's tithes -- e.g., obstructing access, an act which *might* have the same flavor as instantaneous retaking but need not.) Predictably in view of his earlier opinions, Justice Fenner disagreed with Shirley. Here again, Fenner did no more than reiterate the rule that severance converts to chattels and say generally that the statute was not intended to help Parson "in such case," The application of his opinion to the complicated circumstances of this case is not clear -- it need go no farther than support for the theory of the surmise which I reconstruct above.

Despite the 2-1 majority of those present, Consultation was not granted. (Unsurprisingly. I think reversal of a Prohibition on motion without a majority of the full Court would have been improper if not unlawful, even if Gawdy and Yelverton had been firmly convinced that Consultation was appropriate. The sequel shows they were not, despite their agreement with Shirley's argument as far as it went.) Rather, the Court proceeded to hear argument in favor of Consultation from Spratt's other lawyer, Tanfield.

The best way to expound the rest of the case will be to look to the outcome and return to Tanfield, for his argument was designed to head off the result that in the end came about. The essential point about the outcome is that although two of the judges agreed with Shirley, none of them thought his main contention cut in favor of Consultation, at least not clearly

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enough to justify granting one on motion. As the Court came down, its opinion can be expressed as follows (with the qualification that the precise reasoning is that of Gawdy and Yelverton, but Fenner concurred in the result and with the crucial step in the argument):

Covinous severance with immediate retaking is equivalent to non-severance, as Shirley said. Therefore Parson's ecclesiastical claim as finally pleaded amounts to a claim of non-severance, (=Parson did not really change his claim when he added "but if the tithes were severed they were retaken." He complained of non-severance in two forms, having started out complaining of it in only one, but he was still complaining about the same thing.) The state of the case, then, is this: Ecclesiastical suit for non-severance; defendant comes and surmises (a) that he severed, (b) that he pleaded the severance in the ecclesiastical court, and (c) *that the plea was disallowed*. Surely this is sufficient basis for Prohibition.

Now, the surprising thing in this analysis is the statement that the plea was disallowed, or that the foundation of the Prohibition was in effect a disallowance surmise. The statement is express in the Court's opinion. [... *quant le partye surmist icy queil avoit devide et sett oute les dismes et que il avoit pleade ceo en lespirituall Courts queux noil allowe le plea est reson de graunt prohibicion.*] In describing the surmise, however, the report does not mention disallowance, and it is not evident from the facts (which were of course recited in the surmise) that the ecclesiastical court *did* disallow defendant's plea. It is possible that the surmise used the language of disallowance, and that this simply does not appear from the reporter's summary. But that does not solve the problem: What did the ecclesiastical court do that could be considered disallowance of a plea?

I think the answer must be: The ecclesiastical court did not allow defendant simply to deny non-severance and to have trial on the issue raised by the first head-on clash in the parties' pleading. This it was obliged to do and failed to. In a sense, it was bound by common law standards of pleading, not because that is a general rule, but in fairness to Parishioner in the exercise of powers which were, after all, statutory. Parishioner is sued for not severing his tithes; he is exposed, by statute, to heavy damages if he loses; he throws down the gauntlet and says he did sever; he is entitled to have the question he has raised answered -- to be discharged if he is telling the truth and to incur the liability he has risked if he is not. The ecclesiastical court's error was permitting Parson to go on pleading. It is true that his additional pleading was in a sense harmless, because he did no more than restate his complaint of non-severance in other terms. Parishioner might (I assume) lose on *evidence*

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that he severed and immediately retook. (Justice Gawdy says in so many words that Parishioner would lose on stipulated evidence *at common law* if, pursuant to the Prohibition, issue were taken on whether he severed or not.) But this is irrelevant. The present point is a formal one: The ecclesiastical court as good as disallowed Parishioner's original plea because it did not treat it as the final step in the pleading process and move to trial. The formal grounds for Prohibition are sufficient, wherefore if defendant-in-Prohibition wants a Consultation he must plead to the Prohibition (as the Court expressly orders him to do at the end of the report.) I take it that he would retain the option to challenge the Prohibition legally, as well as to deny plaintiff-in-Prohibition's factual surmise that he severed the tithes. I.e., defendant-in-Prohibition might by demurrer to the declaration as the declaration turns out to be, or by some form of special pleading, controvert the proposition that the ecclesiastical court *did* in effect disallow Parishioner's original plea. But if he is to do that it must be in formal pleading. Defendant-in-Prohibition has not shaken plaintiff-in-Prohibition's *prima facie* claim to a Prohibition so as to merit Consultation on motion, which is the only question before the Court.

My analysis comes to saying that "disallowance" is used a little loosely by the Court. The ecclesiastical judge did not literally say, "You may not plead thus-and-so." Not giving defendant's plea its ordinary and straightforward legal effect (whether or not this would make any practical difference for the outcome of the ecclesiastical litigation) is, however, legitimately assimilable to simply keeping defendant from making a plea he is entitled to make. At the least, the assimilation is plausible enough to disrecommend Consultation on motion. Given classification of the case as based on disallowance surmise, Prohibition should surely lie. While it is hard to imagine literal disallowance of a plea saying only "I severed (= paid) my tithes", it is not impossible. An ecclesiastical court could conceivably take the position that some further allegation is necessary for a good defensive plea ("I severed and did not retake myself", "I severed and gave Parson notice", etc.) Prohibition should surely lie on surmise of a disallowance implying any such position. This is not because such imaginable positions are necessarily unreasonable or even incorrect by common law standards. (We have seen it said on one occasion that tithes are not converted to chattels until Parson has been given notice.) The reason is the maxim -- severance converts to chattels. For this entails that any question as to just when the conversion takes place --before or after Parson has notice, always or only if the severance is not nominal and

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fraudulent, etc. -- is a common law question. If statute has in any way altered the common law, just how it has altered it is equally a common law question (by the usual, though theoretically controvertible, rule that the statutes mean what the *common law* judges say they mean.) One might say that the common law issue "When exactly does conversion to chattels occur?" preempts what in abstract theory should be considered an ecclesiastical question, "When has the duty to pay tithes been satisfied?"

Tanfield's argument for Consultation anticipates and attempts to meet the position that finally prevailed with the Court. The argument is that Parson's ecclesiastical claim in final form was both of non-severance and severance-with-retaking, whereas Parishioner's surmise (construed as "I severed -- I pleaded the severance -- I was disallowed") speaks only to the first claim. Therefore, Prohibition ought preferably to be denied altogether (it takes a double surmise to stop a suit based on a double libel), but if not altogether at least *quoad* the second claim. So to argue, Tanfield must produce a theory of the ecclesiastical proceedings, for which there is no good common law analogue. He does so by maintaining that the pleadings in the ecclesiastical court amount to revising the original libel. The premise of this contention is that a "double" claim of the sort in question (Parishioner did not sever, but if he did he retook) is in itself acceptable in ecclesiastical law. This granted, the next step is that if the libel had originally so said it would have had to be met by a "double" surmise. Next -- although the original libel was not "double", and although there was a process in the nature of pleading (defendant spoke, plaintiff spoke again and only at that point inserted his alternative claim), in the upshot the case was as if the libel had been "double" in the first place.

Before the Court announced, and Justice Gawdy elaborated, the general grounds for denying Consultation, which I reconstruct above, it answered Tanfield's formalism with its own counter-version: Parson's insertion of his alternative claim in the process of pleading does *not* count as revision of the original libel, so that the surmise is open to the objection that it responded "singly" to a "double" libel. Rather, "that which comes in later as an addition to the libel is only in the manner of a replication to the answer which the defendant made to the libel", and "the force and substance of the suit consists in the first libel" (which was "single" and therefore adequately met by a "single" surmise.) One should probably say that Tanfield had the better formal interpretation of the goings on in the ecclesiastical court, for it is not very convincing to call the addition of an alternative claim a "replication" in

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anything like the common law sense. Realistically, I suspect, the Court was unwilling to look very hard at reasons for putting the best face on ecclesiastical proceedings which from a common law point of view were bizarre in more ways than one, especially to the end of granting Consultation on motion.

Coke's report of this case is in general accord with the MS. I have used, but it does not render the close texture of the discussion. Without so much as saying the context was motion for Consultation and without making it clear in terms that the motion was denied, Coke gives two "resolutions" of the court: (a) Where there is fraudulent intent, severing-and-retaking does not count as severing within 2/3 Edw. 6. (b) Parson could not sue for treble damages in the ecclesiastical court. The first point was undoubtedly the Court's opinion. The second may have been, though Gawdy and Yelverton in response to Shirley seem not so to hold. It would serve as a separate reason for Prohibition post sentence for treble damages, but it was not central to the disposition of the case. Just what it means makes a question: The statute simply does not authorize the award of treble damages by ecclesiastical courts (but requires a common law suit based on the statute if treble damages are to be sought), or the statute confines treble damages to mere non-severance, as opposed to fraudulent severance-and-retaking whether claimed *simpliciter* or in the alternative?

Two further Queen's Bench are not reported independently, but cited by Coke in a Common Pleas report from 6 Jac.²⁶ (a) Parson of Frettenden, 43 Eliz. This is briefly stated as a holding that severing "privately" and immediately taking back does not count as severing at all, because 2/3 Edw. 6 speaks of severing "truly" and "without fraud." (b) Baker's Case, 44 Eliz. Coke's one-sentence summary does not tell enough to permit much analysis of what looks like an interesting case. The summarized rule is: If the producer sells growing grain to X., then cuts the grain and severs the tenth part, then by X.'s command takes the severed grain, Parson may maintain an action "on the statute" against the producer and is not confined to suing the vendee, X. What would the legal construction be? Before or after the statute, Parson could maintain Trespass against X. for taking through his agent, the vendor-producer, what the severance makes Parson's property. Were there no statute, Parson

²⁶ M. 6 Jac. C.P. Add. 25,215, f.68b. The citations in this report are very likely those given in *Forde v. Pomroy* (Note 29 below), which are dated 43 and 45 Eliz. and 1 Jac.

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could not maintain Trespass against the producer, because he acted only as the agent for the owner of 9/10ths of the crop, who in taking the other 1/10th as well counts as a stranger-taker. Ecclesiastical suit against X. would clearly be ruled out. What if Parson brought an ecclesiastical suit against the producer? It should not be prohibited on mere surmise of severance, but should be on surmise explaining that the producer had divested himself of interest in the grain and acted only as a stranger's agent? The statute authorizes suit against the producer, presumably for double damages, as severer and retaker. Does that mean an ecclesiastical suit would resist Prohibition, or that a special common law suit on the statute is given, or both. *Quaere* generally.

Turning now to the Common Pleas: In the only Elizabethan case (1601)²⁷ division appears as to the extent to which the statute of 2/3 Edw. 6 changed the common law. Parishioner was sued for locking a gate so that Parson could not get at the severed tithes. A Prohibition was obtained on the ground that the severance turned the tithes into chattels for taking which Trespass would lie. There is nothing in this case to suggest that Parson's complaint was not straightforwardly and from the start of denial of access, admitting the severance. I.e., Prohibition was not granted to stop a simple tithe suit on mere surmise of severance, but to stop a suit which by Parson's own admission was redundant with Trespass. Almost without question (save for the possibility that some forms of "severance" patently designed to make sure that Parson has no chance of gaining physical possession do not count as severance even at common law), the Prohibition would be clear-cut in the absence of statutory intervention. The issue was whether the statute made a difference. That seems to have given the Court some trouble, for we are told that Consultation was granted only after several motions. Granted it was, however, 3-1. (The briefest of the reports adds the qualification that one would expect: Though the ecclesiastical court has jurisdiction to proceed as for unpaid tithes, Parson must take the tithes within a "reasonable" time or Parishioner is justified in stopping the gate or pasturing the land.)

²⁷ T. 43 Eliz. C.P. Lansd. 1058, f.22b; Add. 25,202, f.22b (slightly briefer but substantially in agreement with Lansd. 1058, f. 22b; gives plaintiff's name as Blackwell); Lansd. 1058, f.4b (dated H.43, brief note clearly of the same case from an earlier term.)

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The trouble may have come from reluctance to undo a Prohibition on motion, when at common law the Prohibition was almost certainly well-granted and the Court was not unanimous, rather than from particular doubt on the merits on the part of the majority (Chief Justice Anderson and Justices Walmesley and Warburton.) The best of the reports gives individual speeches by Anderson and Walmesley, the former of which reflects a slightly surprising way of thinking about the problem and therefore suggests that the Chief Justice may have had some difficulty reaching the conclusion that Prohibition would not lie *post* the statute. Walmesley takes the straightforward position that the statute gives the ecclesiastical court jurisdiction over the type of complaint in question (severance with exclusion -- though the case gives no occasion for refining the concept, perhaps severance with immediate exclusion arguing fraudulent purpose would be the correct description) and therefore, surely, over the "proof" as well. I.e., as Walmesley says, given the statute, there is no basis for contending that whether the gate was in fact locked should be tried at common law. Andersen, on the other hand, invokes the common (though indeterminately applicable) principle that jurisdiction over the "principal" carries jurisdiction over the "incidents." He puts the case of an ecclesiastical suit for a legacy of a horse where defendant-executor pleads that the testator gave him the horse by *inter vivos* gift. *Per* Anderson (soundly enough, I think, in that sort of case), the ecclesiastical court has jurisdiction to try whether the horse was in fact given to the executor, but will be prohibited if it disallows the gift (rules by implication that the legacy should prevail over the gift, and probably also if the ecclesiastical court purports to determine any controversy about the validity of the gift or proposes to insist on two witnesses to prove it.) Applied to the present case, the principle would seem to mean that since the ecclesiastical court has jurisdiction over the denial of access to tithes, it may, so to speak, step into common law territory and deal with a case involving chattels -- as its foothold in a legacy case enables it to "step into common law territory" and try whether A. during his life made a gift to B. That is true enough, but, one is tempted to say, a somewhat fancy way of coming to the result when, as Walmesley suggests, you need only say that the statute has made it possible to complain in the ecclesiastical court that tithes, even though severed, have in effect not been paid owing to denial of access. It looks as if Anderson was worried about the "step into common law territory", notwithstanding the statute, and needed to look for a parallel to justify what he perceived as anomalous.

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This is to say that Anderson may have been somewhat drawn to the position of the dissenter, Justice Kingsmill. Kingsmill sounds like Fenner in the Queen's Bench cases. He says simply, "My brothers' opinion is against me, since after severance the parson will have trespass, and they are as his own chattels." The applied meaning is a little puzzling, since it is hard to deny that 2/3 Edw. 6 in *some* way enables ecclesiastical courts to proceed against, so to speak, non-literal forms of not paying one's tithes, or ways of seeing that Parson does not get them even if they are technically "paid" -- severance and retaking, blocking access. The narrowest construction of the statute would be that ecclesiastical courts may entertain only suits for mere non-payment, but may count as such some "non-literal" forms. I.e., they may not be prohibited by surmising severance-and-retaking, or-and-denial-of-access (no more than by surmising bare severance), or by claiming that the evidence showed severance-and-retaking-or-denial. A suit founded on *admission* of severance, however, is not within the statute. This is the position I am inclined to attribute to Kingsmill, and to suppose that Anderson did not find clearly wrong.

After the three-judge majority came down for Consultation, Parishioner's counsel tried to save his Prohibition by asserting that "they in the spiritual court will not allow our proof." The Chief Justice replied: "This is matter not contained in your Prohibition. But admitting it, yet inasmuch as the proof is given to them by the statute, if they will not allow the proof, appeal lies to a superior court there, and not a Prohibition." Warburton and Walmesley agreed. It would of course be irregular, though perhaps not always out of the question, to reconsider granting Consultation on motion on the basis of new information now supplied by plaintiff-in-Prohibition but not included in his surmise. It is not evident what disallowance of proof would mean in such a case as this. If it were specifically alleged that Parishioner claimed he did not lock the gate and that two witnesses were demanded to prove this negative fact, the case for Prohibition would probably be strong. One would have a peculiar form of two-witness-rule case -- insistence on two witnesses would not have a deleterious collateral effect on common law interests (the strongest case for Prohibition to bar application of the rule), but it would raise the question whether ecclesiastical courts are as free to employ the rule when exercising statutory jurisdiction as when they are operating in their own inherent sphere in ways that do not touch the common law sphere. Perhaps also an allegation of proof-disallowance specific enough to imply abuse or legal mistake -- as if the ecclesiastical court seemed to be holding Parishioner bound to do more than not obstruct

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access deliberately, say to insure Parson against accidental or third-party impediments to his carrying off his tithes -- would sustain a Prohibition. On the other hand, a bare allegation that the ecclesiastical court overruled Parishioner's evidence, or thought he failed to prove that the gate was not locked, is surely no grounds for Prohibition. In short, on their premises, the majority judges were clearly right to say that any complaint about the ecclesiastical court's handling of Parishioner's proof should be made by ecclesiastical appeal. Kingsmill, dissenting on the main point, may have thought that a nominal disallowance surmise would support Prohibition, even conceding contrary to his opinion that Prohibition would not lie without one.

A final small touch in this case is Justice Walmesley's citation of a rule from 13 Edw. 3 that "chasing a tithe lamb" is spiritual. I am not sure exactly what situation this contemplates, but it has a tantalizing implication: that some forms of interference with the realization of tithes, as opposed to flatly "not paying" them, are within ecclesiastical cognizance even apart from modern statutes. Though he does not develop the idea, nor need to, I would suppose that that is what he meant to suggest -- that it is not totally clear that an ecclesiastical suit for, e.g., egregious forms of denial of access to paid or "chattelized" tithes, would be prohibitable even if the statute had not been made.

Starke v. Phillips (1605)²⁸ in the upshot yields no more for the purposes of this topic than a holding that Prohibition will not lie on mere surmise of severance. The chief point of interest is the use of two Year Book cases to assert that severance does not by itself convert tithes to chattels, but only sale of the produce. Out of context, that is a misleading way of stating what the Year Book cases (30 Edw. 3., 5; and 38 Edw. 3, 6) say, but they are perfectly relevant in the special circumstances of *Starke*.

In the principal case, Prohibition was sought to stop an ecclesiastical suit on two grounds: (a) The suit was between adjoining parsons and the issue was to which parish the tithes in question belonged; (b) The tithes were severed. Counsel opposing Prohibition cited the Year Book cases *quoad* the second ground. The Court "clearly held accordingly" that Prohibition should not be granted for that reason, though it proceeded to grant a writ on the first ground (because parish boundaries were put in question, Justice Warburton expressing

²⁸ M. 3 Jac. C.P. Add. 25,205, f.40.

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doubt as to whether Prohibition was appropriate without an allegation that the parties were actually at issue on the parish bounds in the ecclesiastical court.)

There is no need to discuss all features of the rather complex Year Book cases. Both were actions of Trespass between clerics in which the right to the tithes being sued for as chattels was controverted. The question was whether the common law court should refuse jurisdiction because the issue -- right of tithes between clerics -- was appropriate to an ecclesiastical court. In one case jurisdiction was refused definitively, and in the other there is at least judicial opinion that way. Whether a common law court in the post-Reformation period would literally follow this precedent -- deny itself jurisdiction in an action of Trespass already launched for chattels in the form of admittedly severed tithes -- I do not know. It is a virtual certainty that it would not in one right-of-tithes situation, which one of the Year Book cases represents -- viz. where the right depends on the bounds of parishes. But at least for the purposes of a Prohibition case (abstracting from the fact that *Starke* itself was disposable under modern law as a bounds-of-parishes situation), the precedents have some force. They say that the bare fact of severance, and consequent availability of Trespass as a rule, is not *always* reason for excluding ecclesiastical courts. The trouble with making much of these 14th century cases in the 17th is that the *bare* fact of severance was in practice *never* grounds for prohibiting ecclesiastical suits. In so far as uncertainty about this practice survived, the Year Book cases were reason to have no doubt about denying Prohibition on bare surmise of severance in the specific circumstances of *Starke*. Those cases do *not* deny the rule that severance converts to chattels or claim that conversion takes place only if the produce is sold. They assume the rule, but argue that in some intra-Church cases ecclesiastical jurisdiction over the underlying issue preempts the common law jurisdiction that is normally the consequence of the rule. Sale is relevant only in the sense that if the litigation were not between Parson A and Parson B but between one of them and the other's lay vendee common law jurisdiction would presumably be clear.

A case of 1608 (when Coke was Chief Justice),²⁹ again, comes in the upshot only to a grant of Consultation where the Prohibition was awarded for no further reason than that Parishioner said he had severed his tithes. Like Chief Justice Anderson above, the Court

²⁹ Anon. M. 6 Jac. C.P. Add. 25,215, f.66.

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used the language of "principal and incident" to express a point that seems too obvious to require the language: "...the payment is accessory to the principal plea"; if one is sued for a legacy one may plead that the legacy was paid or released, and the ecclesiastical court may determine whether it was, and likewise when one is sued for tithes; tithe suits are prohibitable on surmise of a *modus*, because (*per* this Court) a *modus* is not an allowable plea in the ecclesiastical court (but -- obviously, I should say -- payment is an allowable plea); tithe suits are prohibitable when the bounds of parishes are in question, "because that will prejudice the inheritance of various men" (but obviously a determination that A. has or has not paid his tithes will affect no one's interest but the parties'.)

Like *Starke v. Phillips*, this case testifies to the persistence of the idea that Prohibition would lie on bare surmise of severance even though the idea enjoyed no success. The present report gives a couple of hints as to why. In the first place, it tells us that plaintiff-in-Prohibition surmised that he had paid "according to" the statute of Edw. 6. There may have been speculation that the statute gave the tithe-payer some rights he would not have had before, as well as the tithe-recipient. I.e., although without the statute it would not make much sense to keep ecclesiastical courts from determining whether duties enforceable there had been satisfied (assuming the definition of the duty to be either acceptable to or beyond the scrutiny of common law courts), one might argue that an express claim to have satisfied a duty now declared and insisted on by statute should be determined at common law. I do not think this is a good argument; it is at odds with the general purpose of the statute to insure and even mildly expand ecclesiastical jurisdiction; but it may have helped keep hope of getting Prohibitions on mere surmise of severance alive.

More significantly, the report tells us that one judge, Foster, had doubts about the decision (though it is not clear that he finally dissented.) The words in the MS. that express his doubts are: "*car il dit que leur ley ne voile adjudge que les dismes sont bien settout si ne mitt pur le Parson & avoyer ceo.*" This is not perfectly lucid, but I think the translation would be: "for he said that their law will not adjudge that the tithes are well set out unless [Parishioner] sends for the parson and [the latter is permitted or has an opportunity] to see it." The idea comes through: Foster was not confident that ecclesiastical courts would judge pleas of payment fairly, because he suspected they would not adhere to the rule that the act of severing is the act of payment (i.e., would put some further burden on Parishioner -- to give Parson notice or, one step further, to say in claiming payment not only that Parson was

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notified but that he actually saw the 1/10th severed from the 9/10ths.) The rest of the Court is reported as saying in reply to Foster "that it will be such a setting out as the spiritual law requires [*que serra tiel setting out le quel le spiritual ley require &c.*"]

This language too is somewhat cryptic. The words suggest, however: "What counts as severance in an ecclesiastical case is a matter of ecclesiastical law. An ecclesiastical court could not, for its own purposes, mistake what it means to sever or set out tithes, except by standards internal to the ecclesiastical system enforceable by appeal." This is much stronger than suggesting to Foster that we not cross bridges until we come to them -- i.e., withhold Prohibition until Parishioner actually complains by disallowance surmise that an excessive burden has been put on him. The stronger position is cogent. It is not inconsistent with saying that the common law is exclusively entitled to say what constitutes severance so as to vest property in Parson -- i.e., entitled so to say in an action of Trespass or other common law proceeding in which it comes in question whether or just when Parson X became the owner of certain goods. From one point of view, it would be an embarrassing anomaly for ecclesiastical courts to have one standard for "when tithes are deemed paid" and common law courts to have another for "when produce rendered as tithes ceases to be Parishioner's property and becomes Parson's." From another point of view, the discrepancy makes little practical difference, and the principle -- when an ecclesiastical duty is satisfied is a matter of ecclesiastical law -- may be worth conserving. Whether or not the majority actually took the strong position, one can appreciate Foster's worries -- about the "embarrassing anomaly", but more to the point, about mistreatment of tithe-payers without *real* warrant in ecclesiastical law, though ecclesiastical courts, original and appellate, might find warrant if it suited their convenience. The short route to avoiding those arguable evils would be using the principle severance-converts-to-chattels as the basis for prohibiting on bare surmise of severance. The longer route would be to enforce on disallowance surmise a common standard for what constitutes satisfaction of the tithe-paying duty *and* for what "severance" means. The cost of the latter approach would be imposing standards on ecclesiastical courts in circumstances where that is probably less justifiable than in the limited range of cases (discussed in Vol. II of the study) in which their operations in their own sphere were subjected to common law control. Different degrees of trust of ecclesiastical courts and different degrees of willingness to put up with what they did, trustworthy or not, in the interest of the principle of a mixed

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legal system -- deep tensions in jurisdictional law -- may be reflected in the exchange between Foster and the majority in this case.

A final point in the case is the Court's statement that an ecclesiastical suit for treble value would be prohibited (among the various kinds of prohibitible tithe suits mentioned in contrast to the kind in question here.) This could mean that the treble damages section of 2/3 Edw. 6 simply does not refer to ecclesiastical courts, but contemplates a temporal action on the statute. The next case below, however, suggests that this was not the Court's opinion. Could it be argued that the statutory treble damages (but not double) are so punitive that any controversy as to whether they have been incurred (=any claim that the tithes were severed) must by the intent of the statute be tried at common law? In any event, the statement of facts in the instant case says that the ecclesiastical suit was "to have the value of them [the tithes] according to the ecclesiastical law." I.e., the suit was apparently for single damages, not even the double damages ecclesiastical courts undoubtedly had power to award. The explanation for giving up the possibility of double damages, unless it was a desire to offend parishioners as little as possible, must be apprehension of Prohibition on the ground I suggest above: the argument that Parson's right to double damages is statutory, wherefore common law courts have a title to try a claim of payment which they lack in the case of a *de jure* ecclesiastical suit for the mere value of the tithes. It is not, however, clear that a suit for double damages would be any more prohibitible than one for single damages.

In Forde v. Pomroy, undated but probably from Coke's Common Pleas,³⁰ the husband of a female impropiator sued for treble damages on 2/3 Edw. 6 without joining his wife. The suit was ecclesiastical, for the report says that the debated points were "moved on Prohibition." There is no sign of objection to the treble damages suit as such (cf. the last case above.) Radical non-payment was not complained of, but immediate retaking after severance. Two questions were discussed. First, whether severance-and-immediate-retaking counts as severance at all. To this the Court said "No", citing several cases as so adjudging (by date only.) As we have seen, liability for treble damages follows from that. The second question was whether the husband could sue for the treble damages without making his wife co-plaintiff. On this, the Court did not give a definitive ruling, but took the question under

³⁰ 2 Brownlow and Goldesborough, 9. (Cf. Note 25 above.)

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advisement. It was, however, inclined to think that the wife must be joined. The reason was that the statute gave the suit to the "proprietor" of the tithes. Although a husband could admittedly bring a personal action without his wife, it seemed doubtful that he could be regarded as "proprietor" entitled to the statutory suit -- the wife should be considered the "proprietor" and the husband as entitled to sue only jointly with her, as in the case of a real action for land which the husband claims in the right of his wife. Not enough litigative context is reported in this case to shed light on the question raised under the last one: whether, granting that an ecclesiastical suit for treble damages is unobjectionable as such, any factual controversy arising therein should be tried at common law. In the present case, there is likely to have been no factual controversy. I.e., the two critical facts -- that the tithes were severed and retaken and that the suit was by the husband *solus* -- were clear on the record. The legal questions could have arisen on motion for Prohibition, the surmise reciting those facts, on motion for Consultation, or on formal pleading to a Prohibition.

Quilope's Case (1613 -- after Coke left the Common Pleas)³¹ contains several rulings. It is not well-reported or indicative of context. One ruling is that Prohibition lies on a showing that tithes were severed and retaken. That presumably means that Prohibition lies (a) if, being sued merely for non-payment, Parishioner surmises severance and admits retaking (but if he surmises severance alone Prohibition does not lie); and (b) if the libel admits severance and asserts retaking, no matter what. For the report goes on to qualify: if the tithes are severed and *immediately* retaken, no title vests in Parson because it is covin. This is unsurprising in substance, but the accent in this report is different than in others. It is one thing to say that Prohibition will not lie if the ecclesiastical suit claims immediate retaking or unless the surmise, in admitting the retaking, recites that it was not immediate or fraudulent. This report seems rather to suggest that there will be a Prohibition in every case in which there appears to have been a retaking. Pursuant to the Prohibition (which must mean on formal pleading), Parson can try to show that there was fraud and therefore no proper severance and no conversion to chattels. If he succeeds, of course the case will return to the ecclesiastical court on Consultation -- there was no reason for Prohibition because it has turned out that the alleged reason (Parson could have maintained Trespass for his chattels)

³¹ M. 11 Jac. C. P. Add. 25,210, f.22b.

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was based on an untruth. *Quaere*. More clearly than other reports, this one states as a rule of the common law, which could be invoked in an action of Trespass or other proceeding concerned with the ownership of the tithe produce, that covinous severance is no severance. A rule of the common law contrasts to a right in ecclesiastical courts, protected against Prohibition by statute if not originating from statute, to proceed as for non-payment of tithes when they think a technical severance was not *bona fide*.

Secondly, the report of *Quilope* says that by 2/3 Edw. 6 Parson may recover double damages in the ecclesiastical court if he is "disturbed" in taking tithes which have admittedly been severed, and treble damages at common law. The first part of the proposition is certainly true; I find the second part -- treble damages are recoverable for "disturbance", as opposed to radical non-payment -- hard to reconcile with the terms of the statute. Where this leaves treble damages in other circumstances is uncertain. The report goes on to add that against a stranger, as opposed to the payer, Parson's only remedy is common law Trespass -- clearly true if it means that the "disturbing" or tithe-taking stranger cannot be sued in an ecclesiastical court, but in itself indecisive as to whether Prohibition will lie on "I severed but a stranger took." The first point in *Quilope* above certainly suggests an affirmative answer. (A curious speculation might be whether a stranger, sued by Parson at common law, could conceivably take advantage of the rule announced here that covinous severance vests no property. Suppose Parishioner and the stranger conspired for the former to do the act of severance and the stranger to rush in *eo instante* and carry off the produce.)

A third point in *Quilope* seems to be that conversion to chattels would override the usual rule that disputes about the right of tithes between clerics belong to the ecclesiastical courts. As the report puts it, if the ecclesiastical defendant claims as Parson of A and plaintiff as Parson of B, the action must still be at common law because after severance the dispute is about secular property. I am not quite sure what situation to visualise for the application of this idea. The only likely one I can think of would be: Parishioner severs and A takes; Parson sues A; A, a clergyman, pleads that he is entitled to the tithes and took them accordingly, either because Parishioner's land is in his parish or because he is Vicar endowed with the particular tithes in question. I should think the suit rather obviously prohibitable as a suit against a stranger (and, in one version, because the bounds of parishes are brought in question.) Perhaps an attempt was made to invoke right-of-tithes-is-an-ecclesiastical-matter to the contrary, surely inappropriately. As legal evidence, the report of *Quilope* is nearly

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valueless for want of explanation of the thinking behind the points on the surface, but as historical evidence it adds something to the sense I have that into the 17th century how to handle severed tithes cases was still unsettled.

A very brief note of Spencer's Case (1617)³² gives only a statement by Justice Hutton that ecclesiastical law required Parishioner to give Parson notice of severance and some sort of affirmation by the Court that the common law was contrary. The meaning of Hutton's point must be that a plea of payment cannot be sustained by proving severance alone, but only by showing severance and notice. Noy's report has the Court "adjudging" that the common law did not oblige Parishioner to give notice. The MS. has it "saying" "at common law there may not [or cannot] be such a custom". The suggestion in this odd formulation is that not only is there no notice requirement in the common law itself, but any alleged customary variant making notice necessary to vest the property in Parson would be unreasonable. In any event, though we have seen notice mentioned inconclusively in a few reports, there is no reason to think it was essential to effect the property transfer. It is Hutton's statement about the ecclesiastical law in *Spencer* that has disturbing implications. Were it clear and notorious that ecclesiastical courts would insist on making out notice to establish payment, Prohibition on bare surmise of severance would gain justifiability, though it remains possible to hold that one must complain of insistence on notice in the specific case by disallowance surmise. My guess would be that even if giving notice was an ideal part of the tithe-payer's duty by ecclesiastical law, judges would not in practice demand it and so bring on inevitable Prohibitions -- by one path or the other.

My final Common Pleas case is late (1642).³³ Parson's libel recited that Parishioner severed his tithes, but complained that he so arranged things that the tithes could only be carried away through Parishioner's yard. When Parson was carrying them by that route, Parishioner, being an officer, attached the tithes for an assessment to the poor (and converted them to his own use, the report says -- i.e., apparently, having got ahold of the produce by pretense of attaching it, he abused his office and converted it, instead of holding it as security for payment of the poor-rate.) Prohibition was sought on the ground that Parson's

³² Noy, 20 (undated); Harl. 5149, f. 37, dated M. 15 Jac.

³³ Anon. H. 17 Car. C. P. March, 157.

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action for the severed tithes was Trespass. Counsel for Parson argued to the contrary that the libel was based on 2/3 Edw. 6 as an instance of stopping Parson from carrying off his tithes. The Court granted Prohibition on the ground that if Parson wanted to sue on the statute he should have mentioned it in his libel. This narrow-grounds basis for resolving the case is unanticipated in earlier decisions. It is reasonable, but hardly inevitable. I.e., is it clear that notice should not be taken of the statute, even though it is not expressly relied on by the ecclesiastical plaintiff? Whether the ecclesiastical suit in this case actually falls within the statute seems open to argument. It is hardly a complaint of denial of access, though the libel was apparently written to suggest contrivance to insure that Parson could not slip away with his tithes without falling into Parishioner's trap. It is a case of retaking, but not immediate retaking, and in the first instance not an ordinary case of retaking by the payer, since he acted in his capacity as an officer. Yet he converted the tithes to his own use, and the whole scheme looks no less like a fraud to cut off Parson's ecclesiastical remedy than does a simple case of nominal severance and hasty retaking. Decision on a procedural point has the advantage of avoiding a struggle with these oddities, or perhaps postponing it until there was formal pleading on the Prohibition. The case may be sufficiently puzzling for formal disposition to be desirable, should the parties feel strongly enough to press for it.

One case, *Reynolls v. Hayes*,³⁴ comes from the King's Bench during Coke's Chief Justiceship there (1614). The effect of severance is only touched on incidentally. There was an ecclesiastical suit for simple failure to pay tithes. Parishioner pleaded arbitrament and obtained a Prohibition on surmise of the same. Consultation was sought on the ground that plaintiff-in-Prohibition was required to prove his suggestion within six months and had not done so. Three judges -- Coke, Croke, and Dodderidge -- thought Consultation should be granted for that reason. (The procedural requirement of *prima facie* proof of surmises, and the present case as a problematic one under that rule, are discussed in Vol. I of the study.) Coke then went on to say that Consultation should be granted on the merits as well, because the pleading of arbitrament is not sufficient cause for Prohibition. I.e.: like "I have paid the tithes I am sued for", "My dispute with Parson over the tithes I am sued for was submitted to arbitration" is, if contradicted, perfectly triable by an ecclesiastical court. Though Coke does

³⁴ T. 12 Jac. K. B. 1 Rolle, 55.

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not spell out the point, I should think there is no doubt that mishandling of a plea of arbitrament by the ecclesiastical court could be complained about by disallowance surmise. The argument is only that arbitrament is an acceptable plea in ecclesiastical law and that mere factual questions -- Did the parties agree to go to arbitration? Did the arbitrator make such-and-such an award? --, being as triable by one court as another, ought to be tried by the court with jurisdiction over the controversy in which they arise. Justice Houghton, who apparently dissented on the applicability of the proof-within-six-months rule, agreed with Coke that a mere claim of arbitrament is not reason for Prohibition. Croke and Dodderidge disagreed or at least were skeptical, for without elaborating objections they insisted that Consultation should be granted on the procedural point alone. Reasons for skepticism are not hard to imagine. Apart from mere distrust of ecclesiastical courts' willingness to judge the tithe-payer's defense fairly, it is arguable that to plead arbitrament is to plead a secular contract and that that gives the common law a *per se* interest in a way that pleading no more than satisfaction of an ecclesiastical duty (payment) does not. (To this one may reply that pleading another form of secular contract in the ecclesiastical court -- a commutation agreement not embodied in a composition-real -- was ordinarily not a basis for Prohibition.) Note that in this case as in others it was Coke who was relatively respectful of ecclesiastical courts or solicitous for "good manners" in a mixed legal system.

At this stage of the discussion, Justice Dodderidge remarked that because severance converts tithes to chattels Parson may not sue for severed tithes in the ecclesiastical court. Why in the context it occurred to him to make this observation is not self-evident, for there is no sign that severance was admitted or claimed in the principal case. I can only suppose he was thinking of possible parallels to support his view that Prohibition will lie if Parishioner surmises arbitrament. It does not seem to me a powerful argument, but one could perhaps suggest that if Prohibition will lie because Parson could sue in Trespass for the produce he is seeking to recover as tithes it will also lie when the parties have in effect substituted a secular agreement for their ecclesiastical rights and duties (an agreement on which either party could sue at common law if the other failed to carry it out.) In any event, Coke immediately spoke to straighten Dodderidge out: The general principle is correct -- severance/conversion-to-chattels bars ecclesiastical suit for the produce as tithes. But the question *whether* severance has occurred is triable in the ecclesiastical court. In other words, Prohibition will not lie on bare surmise of severance when one is simply sued for non-

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payment of tithes; it will lie if admittedly severed tithes are sued for (and presumably on disallowance surmise if the ecclesiastical court puts some kind of improper obstacle in the way of Parishioner's making out there that he indeed severed.) The point must be understood as leaving aside statutory emendation of the common law, on which Coke does not comment. Dodderidge at once conceded that Coke was right. Coke's point about severance is the relevant one for the present case: Whether Parishioner severed so as to confer common law rights on Parson is determinable by the ecclesiastical court, and so is whether an arbitration agreement was made with the effect of giving Parishioner a defense against the tithe claim (and common law rights to both parties.)

It may be helpful to note that exploration of the possibility of granting Consultation on the merits in this case was motivated by a problem as to whether defendant-in-Prohibition should be awarded double costs. Statutory double costs would probably have been awardable if the cause of Consultation was failure to prove the surmise within six months, but not if Consultation was appropriate on the merits. Despite Dodderidge's concession to Coke on the matter of severed tithes, there is no indication that he and Croke were converted to Coke's view of the principal case, and the report ends with the Court's taking the question of double costs under advisement.

Two undated reports remain to be mentioned. One is a brief note of a King's Bench judgment:³⁵ If Parishioner severs tithes, and before Parson comes Parishioner takes them into his barn with the rest of the corn, he is liable for treble damages under 2/3 Edw. 6 because such severance and retaking does not count as severance. What this does not say clearly is that ecclesiastical courts may award the treble damages and that immediate, unexplained, or fraudulent retaking must be made out for the treble damages to be actually awardable. Exactly how the generality expressed in this report should be qualified remains uncertain from the cases above.

Birkenden v. Denwood³⁶ is uncertain as to court as well as undated. Agreement is reported on the proposition that severing and retaking *on the same day approximately six hours after the severance* is non-severance within 2/3 Edw. 6. The fact that this case was on

³⁵ Harl. 4817, f.217.

³⁶ Add. 25,215, f.74b.

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special verdict probably explains the occurrence, at last, of a specific holding as to when retaking is immediate enough to mean that an apparent or literal severance was no severance in law. How the point on severance fits *Birkenden* as a whole is not clear. The main issue in the case is whether Parson's collector of tithes could license Parishioner to take away his crop without severing the tithes. (The Court said "No", by analogy with the rule that a rent collector may not discharge the rent.)