II.
Prohibitions to Protect
One Non-Common Law Court Against Another

In Section I above, we have looked at Prohibition cases involving the principle that suits should not be brought in non-common law courts when a common law remedy was available to the complainant. We have seen that the principle is not altogether simple when it is analyzed in the abstract, and the cases have shown that it tended to hit snags when in was invoked in practice. It remains the "paradigmatic" ground for Prohibitions, in the sense that common law courts never had so clear an interest in stopping proceedings in other courts as when their own role was encroached on or threatened with duplication.

Their interest in stopping a suit in one non-common law court when it ought to have been brought in another is certainly less clear, perhaps non-existent. In this Section, I shall look at the handful of cases that touch on whether Prohibition will lie to police the lines of jurisdiction within and between non-common law systems. That problem does not really arise in the large subject-matter categories of cases taken up later in the study. To be sure, intra-ecclesiastical jurisdiction was frequently regulated by Prohibition in two contexts: (a) Prohibitions to prevent the High Commission from encroaching on the ordinary ecclesiastical courts: (b) Prohibitions to keep people from being sued in ecclesiastical courts outside their home dioceses. These Prohibitions, however, proceed essentially from the common law courts' claimed authority to enforce the statutes as construed by themselves on the non-common law courts, including statutory limitations on those courts' jurisdiction. The most one can say about those categories in relation to the present one is that strong agreement, pro or con, on the common law courts' title to regulate intra-ecclesiastical jurisdiction outside the role of enforcing statutes could have influenced the spirit in which cases on jurisdictional statutes were handled. In fact, the cases in this Section are too few and miscellaneous to have generated consensus through experience, and in the most significant of them it is disagreement that stands out. Owing to the paucity and variety of the cases, I shall simply discuss them one by one. The jurisdictional Statues are dealt with in later parts of the study.

(1) The Case of the Orphans of London. P. 35 Eliz. Q.B. 5 Coke's Reports, 73b.

It was resolved that Prohibition lies to prevent orphans under the "government" (guardianship) of the Lord Mayor by the custom of London from suing in ecclesiastical courts or the Court of Requests for various objects (money due by the custom of London, devises and accountings are specified.) Though the effect of this holding is to protect a customary or franchisal jurisdiction -- as opposed, say, to protecting one regular ecclesiastical court against another -- the distinction is not very important, because it is the quasi-ecclesiastical and equitable side of the Lord Mayor and Aldermen's jurisdiction that was protected. Ecclesiastical and equity courts were not trusted to deny themselves jurisdiction over matters generically appropriate to them, but delegated to the London franchise. There is perhaps no reason to trust them to stay out of each other's *de jure* -- i.e., non-franchisal --territory, but it is arguable that common law courts have more business protecting customary franchises than enforcing jurisdictional limits arising under "foreign" law.

No reasoning is given in the report of *Orphans of London*, but the decision was used as a precedent in later cases in this Section.

(2) Anon. T. 42 Eliz. C.P. Lansd. 1065, f. 56b.

This case presents a significant and divided discussion of common law title to regulate non-common law jurisdiction. A cleric was proceeded against for incontinency before the Bishop of Peterborough. A Prohibition was sought on the ground that this cleric ought to be under the jurisdiction of the Dean and Chapter of Lincoln. Prohibition was granted and then reconsidered, probably on motion for Consultation. Why it was claimed that jurisdiction belonged to the Dean and Chapter does not appear. There is nothing to suggest that the statute of 23 Hen. 8, c. 9, which required ecclesiastical suits to be brought in the diocese where defendant lived and was often enforced by Prohibition, was involved.

The judges went straight to the question of principle. Justice Walmesley led off by saying that Prohibition would not lie because the suit was "merely spiritual." Justice Glanville replied with a strong and explicit assertion of the common law's power to police all lines of jurisdiction: "...if one spiritual judge usurps the authority and jurisdiction of another spiritual judge, the Justices of the common law have supreme authority and superintendancy over them, and that by the common law. And this opinion he grounds on the book of 20 Edw. III, *Title Excommunication*, 9: where Prohibition issued against the Bishop of Norwich

since he summoned the abbot of E., who is exempt from every Ordinary jurisdiction." Justice Kingsmill spoke next, supporting Walmesley and distinguishing Glanville's case: "The wrong which the complaint is about is spiritual, *scil*. for incontinency, and so, whether the jurisdiction belongs to one or the other of them is all one to us, for it will be determined by their law. And the reason of the case in 20 Edw. III seems to be because the Abbey was of the King's foundation, so that prejudice might come to the King thereby."

The debate so far needs little comment. The weight of common sense on the Walmesley-Kingsmill side should not be underestimated. Why *should* it matter to the common law judges whether a purely ecclesiastical proceeding was in one Church court or another? If it matters to those who administer the ecclesiastical system, surely they have their own way of rectifying jurisdictional errors -- and as far as that goes, have they not a right to be insouciant about jurisdiction? (In defense of this intuition at its weakest point, the statutes regulating intra-ecclesiastical jurisdiction could be brought in, though they are not mentioned in the discussion: Arguably, Parliament had decided when it *did* matter that particular ecclesiastical courts stay in a delimited sphere, and the judges had no reason or right to go farther. The subject was specifically protected against being cited into a remote diocese and subjected to the extraordinary sanctions of the High Commission in inappropriate cases, beyond which it is hard to see how the subject had much interest in intra-ecclesiastical jurisdiction, especially the lay subject.) Glanville no doubt had a commendable vision of an orderly legal system under a single "superintendancy", but to make out that the common law was the superintendent *by* the common law he had to hold on pretty hard to the single medieval reed he had found. (In modern perspective, it can only seem fantastic to suggest that in the pre-Reformation period a common law court would have intervened in a case like the present one. The 14th century case *must* be explicable by collateral royal interest, as Kingsmill said it was. The 16th-l7th century lawyer's perspective was distorted by the propensity -- and for the sake of legal continuity the need -- to believe that the Reformation restored an ecclesiastical-legal order that was never really lost, never successfully usurped even "in possession." This view, classically embodied in Coke's treatise on the ecclesiastical law prefacing Vol. 5 of his *Reports*, is nicely illustrated by Glanville's bland assumption that a case from Edw. III could straightforwardly support common law policing of intra-ecclesiastical jurisdiction. Were his purpose theoretical, he might say that it is just this sort of precedent that shows the common law's continuous possession of its aboriginal powers, a

facet of the King's uninterrupted possession of his Headship of the Church. It would be dubious, however, to attribute any greater historical realism to Walmesley and Kingsmill. They just saw no reason to take on the policing role and saw through Glanville's precedent.)

The debate becomes more interesting at the next stage. Not having got very far with authority, Glanville shifted to analogy, pointing out that when the bounds of parishes come in question in ecclesiastical suits Prohibitions will be issued to permit trial of the bounds at common law. Walmesley responded by denying that this is true, but across the board the practice was as Glanville says it was. (Bounds-of-parishes cases have their history and complexities, which will be discussed systematically later in this study. I do not mean to suggest flatly that Glanville was right and Walmesley wrong as of the time of this case, only that Glanville could have found plenty of support at that time and that his position turned out to be the prevailing one. Walmesley was a generally conservative judge, who may well have continued to dissent on bounds of parishes when most opinion was on the other side.) Our immediate question is why bounds of parishes should seem a useful analogy for the problem at hand.

In the event, bounds of parishes became a "common law issue." Various reasons can be given for that -- where the boundary runs is a matter of custom appropriately triable by jury; more people than the parties to a particular ecclesiastical suit have an interest in where the boundary is, and it is better to get the matter settled and the strangers bound by a verdict than to leave them unbound but possibly prejudiced by an ecclesiastical decision; the boundaries can come in issue in common law litigation and for purposes other than determining such ecclesiastical questions as whether tithes from a certain place should go to Parson of A or Parson of B, for which reason it is better to have a single decision-maker than possibly contradictory decisions from different tribunals. If one thinks of bounds of parishes as a "common law issue", there does not seem to be much mileage in Glanville's analogy. Granting that there are good reasons why some issues arising in ecclesiastical suits, including this one, should be tried at common law, the last thing that seems to follow is that common law courts should set up as controllers of intra-ecclesiastical jurisdiction (insisting on lines of jurisdiction which may not even *be* an issue from the ecclesiastical point of view,) Clearly, then, Glanville's way of seeing what he regards as the rule on bounds of parishes must be different.

At the lowest level, his argument may only be that Prohibitions beyond the "paradigmatic" type are possible. I.e., in order to grant Prohibitions, the common law court need not have a self-protective interest (the concept of which may be expandable from the strict paradigm to, e.g., the statute-enforcing Prohibition or the Prohibition meant to keep interests protected by the common law from being collaterally prejudiced by ecclesiastical determinations.) When one surveys the law of Prohibitions as a whole, it seems obvious that the writ was not confined to the "paradigmatic" use and its nearest relatives, but how evident that was at given moments in the history we are looking at is always an open question. If Justice Walmesley would have acknowledged that extensions were working their way into the practice, he would have condemned them as unsound. Arguing with Walmesley as Glanville was, it is something even to make out the generality that narrow "interest." in the common law court is not necessary to justify Prohibition (though Glanville's bounds-of-parishes example failed royally with Walmesley.)

It is something, but still not much. Actually, the bounds-of-parishes example has better potential than merely for sustaining the generality. Prohibition to insure common law trial of the boundaries issue usually came when Parson of A sued Parishioner for tithes and the latter claimed he had paid or should pay his tithes to Parson of B because the land lay in B. The issue arose as an incident of a distinctly ecclesiastical question, right of tithes as between two clerics. It is highly arguable that the underlying question is of interest to the Church and a matter of indifference to the temporal order and the common law (as Walmesley expressly argues in this case, concluding that Prohibition will not lie merely because parish boundaries are incidentally in question too.) In another formally similar situation Prohibitions were regularly refused -- where Parishioner is sued for tithes by Parson and claims that the tithes have been or should be paid to Vicar. "Right of tithes concerns only the Church" was always invoked to justify such refusals. If, therefore, for the kinds of reasons I suggest above, common law courts were ready to intrude in right-of-tithes cases -- viz. when settlement of parish boundaries was necessary to decide them --, it argues fairly strongly for common law intervention in matters of predominant, and ultimately exclusive, ecclesiastical interest. There remains a substantial step from bounds-of-parishes to intra-ecclesiastical jurisdiction with respect to an incontinent clergyman, but Glanville's argument cuts the step down to reasonable size, as it were. He could not sell his premise to Walmesley (and presumably

Kingsmill, who does not comment on the bounds-of-parishes analogy, but sticks with Walmesley at the end); he may have had some effect on Chief Justice Anderson.

Anderson, speaking after the exchanges above, takes a middle position. All he says is: "I would like to know what remedy there is in their law if one spiritual court usurps on another." The implication is that Anderson would at least consider Prohibition, but was unwilling to act in ignorance of how the ecclesiastical system dealt with internal jurisdictional controversies. He would presumably be at least tempted by Glanville's "superintendancy" if it turned out that ecclesiastical law was truly indifferent to which court a complaint like the present, one was in, or if it made no provision or inadequate provision for letting someone in plaintiff-in-Prohibition's position except to the jurisdiction. If it turned out that jurisdictional rules and procedure for taking advantage of them existed, Prohibition would be unjustifiable, unless perhaps -- dubiously, for the remedy ought to be by ecclesiastical appeal -- on specific complaint that the particular ecclesiastical court had disregarded the rules it was bound by.

Walmesley and Kingsmill replied to Anderson; "They undoubtedly have a course for that." This is ambiguous as between "We must presume that as a civilized legal system they have the rules and procedures in question, but even if they do not it is no concern of ours" and "Inquiring into anything so obvious is a waste of time, but if someone actually claimed before us that he was a victim of jurisdictional chaos we should perhaps in spite of everything have to consider intervening." The case was, however, adjourned until civilians could be consulted, in accordance with Anderson's wishes. Walmesley and Kingsmill had no choice but to go along, because they did not have the votes to reverse the granted Prohibition.

(3) Cartwright's Case. P. 12 Jac. K.B. Godbolt, 246.

I may not be justified in putting this case in this Section, since it is not clear that it was perceived as presenting a problem between jurisdictions outside the common law system. I place it here because the question can be seen, and possibly was, as whether courts of equity should be protected by Prohibition against ecclesiastical courts (or whether ecclesiastical courts should be prevented from doing their own equity where relief from a court of equity would probably be obtainable and, if sought or provided there, would probably be free of common law interference.)

A man in his last illness made a will. Later, he said to his executor, "I will, that B. shall have 20 pounds more, if you can spare it." The executor said, "Yes forsooth." No codicil was added to the will. B. sued for the £ 20 as for a legacy in an ecclesiastical court. The executor sought a Prohibition.

The Court first asserted the principle "…that although this Court hath not power to hold plea of the thing libelled for there in the Spiritual Court, yet it hath power to limit the jurisdiction of other Courts; and if they abuse their authority, to grant a prohibition." As late as 1615, this may seem so evidently true that it need hardly be stated. One should be careful about so supposing, however. Although no arguments from the Bar are reported, it is not unlikely to have been urged that the Court lacked interest because there was no encroachment on its own jurisdiction. Instances of Prohibitions unmistakably used to prevent "abuse of authority" by non-common law courts were relatively rare and anomalous. Most of them are collected in Section III below, under the rubric of Prohibitions issued to keep non-common law courts from extending "the ambit of remediable wrong" excessively. Some Prohibitions in other categories can be assimilated to that type, but there are often ambiguities. What is too crude is using language that suggests that the "paradigmatic" Prohibition is the only legitimate kind, other varieties being at least problematic enough to require apology or insistence that the scope of Prohibition is *not* so narrow. The Court's language in this case is guilty of that crudity in seeming to say, as it were, "Prohibitions *are too* grantable when the common law court has no power to 'hold plea of the thing libelled for there in the Spiritual Court. '" It would be more accurate to say that after the range of clearly legitimate Prohibitions is added up (the "paradigmatic" type, "negative instances" of that where the common law has preempted a field, statute-enforcing Prohibitions, Prohibitions to prevent non-common law courts from contradicting the common law at a fundamental level or endangering secular interests collaterally, Prohibitions to insure that certain issues were tried or judicially determined at common law) there remains a residue, which *is* problematic. The King's Bench in this case, like Justice Glanville in the last one, was ready to venture into the residual territory. It was properly express about its authority to.

In the event, the Court adjourned the instant case to advise on what it perceived as the problem: Is it appropriate for the ecclesiastical court, if it sees fit, to enforce as a legacy in effect what is not properly a legacy because it is not incorporated into the will? In my vocabulary, may an ecclesiastical court, having undoubted jurisdiction to enforce legacies,

extend "the ambit of remediable wrong" in its testamentary field to include non-payment of the sum in question -- testator's oral addition to his will to which the executor has assented? Is there any reason not to leave that to the ecclesiastical court's discretion and to control by appeal within the ecclesiastical system? Is it sufficient reason that the ecclesiastical suit is unusual? It is interesting that the King's Bench (under Coke) was uncertain about that, rather than ready to say that ecclesiastical courts have been given authority to compel payment of proper legacies but only that, and they should be confined to their authority.

In terms, the Court treats the case as an "ambit of remediable wrong" case. Nothing is said to suggest that the trouble with the ecclesiastical suit was that it should be in a court of equity (or, conversely, that the best reason for not rushing to Prohibition might be that the testator's beneficiary could turn to a court of equity if he failed in the ecclesiastical court -- as it were, "Nothing *more* is at stake than jurisdiction outside the common law system, and perhaps that is no concern of ours.") The Court does, however, venture a classification of the interest being pursued in the ecclesiastical court. The judges say they are in doubt as to whether the ecclesiastical court should be allowed to treat the object of the suit as a legacy or as good as a legacy because what it really is a *fidei commissum*. That is in effect "Latin for a trust", and indeed a trust seems the correct analysis: Testator charged the residue of his estate after debts and satisfaction of legacies in his will -- the residue which would go to the executor: -- with a trust to pay £20 to B. if there was enough left to permit it; the executor acknowledged that he took the estate so charged. Since the enforcement of trusts was the central activity of courts of equity, it seems likely that it would have crossed the Court's mind that the issue might be "Should we restrain the ecclesiastical court from setting up its own branch of the trust business at the expense of courts of equity?" (Alternatively: "Should we let ecclesiastical courts go ahead and enforce some trusts connected with their testamentary business, when, whether we altogether approve of it or not, we cannot prevent people from going to courts of equity claiming the benefit of trusts?") Convenience would recommend indulging ecclesiastical courts. That is where people who thought they were owed legacies went. Arguably there is nothing gained by chasing them to equity. (In suggesting that the common law courts, whatever their ultimate attitude, would not have interfered with breach of trust suits in courts of equity, I am judging by the Prohibition cases in which minor courts of equity, though not the Chancery itself, were kept from entertaining some kinds of suits which the judges thought inappropriate equitable claims.) Absence of

mention of courts of equity is not terribly surprising if I am right in my impression (from such evidence as the writings of Coke, Chief Justice of the Court discussing *Cartwright*) that common lawyers had trouble recognizing equity in their intellectual scheme of the legal system. That is not the same thing as inability to accept its everyday utility and importance and even to respect its rights, despite tensions reflected in such episodes as Coke's dispute with Lord Ellesmere over equitable intervention after common law judgment, at its height around the time of this case. I would suspect, however, that solicitousness for courts of equity was not so much a motive behind the Court's considering a Prohibition in *Cartwright* as indifference to where equity was done was a motive behind holding back from Prohibition.

(4) P. 1 Car. Court uncertain. Harg. 30, f. 208.

This report, a brief note, is not of a Prohibition case, but it is worth observing in connection with the line between courts of equity and ecclesiastical courts. A parson sued a number of his parishioners for tithes in a court of equity (whether the Chancery or a lesser one does not appear.) The parson's purpose in this irregular proceeding was to avoid multiple litigation. The idea is perfectly sensible. There was probably a squabble in the parish about tithing customs. Parson believed that he could get the matter settled by the ecclesiastical courts (perhaps with the assistance of the common law, if Prohibitions based on *modi* would be a predictable consequence of suing there) only by bringing a number of suits against separate parishioners or for different products. He hoped to avoid expense, loss of time, and the risk of inconsistent results from suit to suit by seeking a comprehensive equity decree. His hope was in vain, however, for the equity court dismissed the bill on the ground that the ecclesiastical courts should not be deprived of their lawful jurisdiction.

For Prohibition law it is of some interest to speculate whether the equity suit should be prohibited if the court of equity had not restrained itself. (If it was a Chancery suit it almost certainly would not he, but if brought in one of the lesser equity courts Prohibition would just as certainly be considered, whatever the result.) Readiness to protect ecclesiastical courts against equitable encroachment is probably more predictable than the reverse. On the other hand, reasonable resort to equity to overcome procedural inconveniences of ecclesiastical law, without threat to the substantive law, is at least as justifiable as the same thing with respect to the common law. The outcome could depend on how inflexible ecclesiastical courts were deemed actually to be and on whether in the judges' view they

should be encouraged to "do their own equity" in situations like that of the present case. Would there be any objection to an ecclesiastical court's allowing a parson to sue his parishioners collectively to the end of settling tithing disputes by a comprehensive decree? would it be preferable, in view of the subject matter, to have such a decree backed by spiritual sanctions rather than temporal liability for contempt of a court of equity?

(5) Archdeacon of Richmond's Case. T.3 Car. C.P. Littleton, 42.

The report of this case as a whole is unclear, but it contains a firm resolution that for Prohibition to lie it is not necessary that the common law itself be in a position to provide a remedy. The context for the generality was clearly protection of one ecclesiastical court against another. For one thing, *Orphans of London*, above, was cited as authority. So far as one can tell from the garbled report, the dispute seems to have been over whether the Archdeacon had peculiar jurisdiction as against the Archbishop of York. It looks as if Prohibition may have been denied in the event, despite the general principle that it would be appropriate to enforce intra-ecclesiastical lines of jurisdiction, on the ground that the Archdeacon's prescriptive title to jurisdiction was mere "matter of fact" determinable within the ecclesiastical system. If that is correct, the implication would be that only *some* intra-ecclesiastical lines of jurisdiction are enforceable by Prohibition, presumably those based on grant and those so notorious and well-established that they can be considered part of "the law of the land" (e.g., the Bishop's basic first-instance jurisdiction as against the Archbishop.) This comes to saying, reasonably, that trial by a lay jury of whether usage gave one churchman the right to exercise jurisdiction at the expense of another churchman entitled to it *de jure* is hardly defensible.

(6) Read *et. al*. v. Rands. Undated. Harl. 4817, f. 204. (Probably C.P., from which most of the reports in this MS. come.)

Prohibition was sought jointly by a prebendary and parishioners of L. The prebendary claimed peculiar jurisdiction over the parish of L. for probate, administration of intestate estates, and punishment of ecclesiastical offenses. The ground for Prohibition was that the Official of the Dean and Chapter of Lincoln, who had general ecclesiastical jurisdiction over the county of Rutland, where L. was located, had tried to draw parishioners of L. into the Dean and Chapter's court to the disherison of the prebend. Prohibition was apparently granted, but it was reversed by a *per Curiam* opinion. The Court called the matter "merely

spiritual" and compared it to a spiritual pension and to a case in which "..a Bishop usurps jurisdiction in a place which is not in his diocese."

At the end of the report, *Orphans of London* is cited (barely cited with a *vide*.) Since that case hardly cuts in favor of the decision (though it is not inconsistent), the citation is probably the reporter's addition. *Read* counts against the general proposition that the common law courts have a responsibility to enforce jurisdictional lines within the ecclesiastical system, but how strongly makes a question. Although this does not appear from the report, it seems likely that the prebendary's claim would have been prescriptive. At any rate, the contrary does not appear. The surmise said that the prebendary was "seised in fee in the right of his prebend" of the peculiar jurisdiction. It was evidently written to suggest that he was being deprived of his property, which the common law had an interest or a duty to prevent. (The suggestion has some weight. One could distinguish between protecting jurisdiction as such -- say a bishop's against an archbishop -- from protecting someone's secular property in an interest such as a prebend from damage by deprivation of jurisdiction -- which of course means income -- constituting part of the interest. To the argument that the latter is more legitimate than the former, the reply is available that the property holder should be suing at common law for the deprivation, not trying to prevent it by Prohibition.) The surmise does not, however, appear to have alleged any ultimate basis of the prebendary's title to jurisdiction, leaving it to be inferred that when it came to making out his title usage is all he would have to show. As the last case above may hold, and as I argue there, it is one thing to say that Prohibitions may be used to protect Church courts against each other and something else to impose common law trial and common law standards of prescription whenever a churchman claims special jurisdictional privileges by reason of usage. It is possible to embrace general "superintendancy" over the ecclesiastical system and at the same time to hold that whether exceptions are to be allowed to the fundamental distribution of ecclesiastical jurisdiction by virtue of the running of time is only the Church's business.

The Court's example of a bishop who "usurps" jurisdiction outside his diocese seems to exemplify no more than a peculiar jurisdiction good by prescription if it is good at all. If the instant case was seen as like that, then the Court's idea of the "merely spiritual" may be confined to prescriptive peculiars and not extend to all intra-ecclesiastical jurisdictional issues unaffected by statute. It cannot be ruled out, however, that the Court took the full

"hands off" position of Justice Walmesley in Case #2 above. Even though they can be distinguished, this case and the last expose a danger in the contrary "superintendancy" position of Justice Glanville: Once into the exercise of that role, the Courts would be obliged to decide whether to limit it. If prescriptive peculiars seemed the place to draw the line, reasons would have to be found for why the holders of such ecclesiastical franchises were less entitled to common law protection than other jurisdictional interests inside the Church. It seems to me easier to intuit that that is the line to draw than to find satisfactory reasons. As for the intuition: Does it not smack almost of indecorum for secular judges to tell the Church it *must* accept a patchwork of petty jurisdictions and irregularities? Insisting that the Church adhere to its basic and well-known distribution of jurisdiction, as an almost "constitutional" feature of the national legal system, seems much more defensible. But was there any real risk of the Church's not adhering to it, at any rate in ways that were not already regulated by statute?

(7) Archbishop of Canterbury v. Roberts. H. 16 Jac. C.P. Harl. 4813, f. 21b.

I have left this case until the end, because it has only an oblique relation to the other cases in this Section. It is not a complaint by the party sued in one non-common law court that he ought to be sued in another, but an instance of Prohibition sought to assure determination at common law of issues arising in an ecclesiastical suit. I place it here because it invites reflection on what is "merely spiritual" and what is of interest to the common law in a context close to jurisdiction.

The Archbishop of Canterbury sued Roberts, a prebendary of Norwich, for procurations (a fee due to an episcopal Visitor from the clerics subject to visitation.) The suit was in the archdiocesan Court of Audience, but there was no objection to that nor, so far as I know, any ground on which the jurisdiction could be objected to. (The Archbishop's suing in a court that was nominally his is of course no more remarkable than the King's suing in any royal court.) Roberts's defense in substance was that the Archbishop had improperly exercised visitation powers in the diocese of Norwich when the bishopric was vacant. He was therefore not entitled to procurations appurtenant to the unlawful visitation. *Per* Roberts, the proper method of visitation during an episcopal vacancy was set up by a composition between the Archbishop and what was then the Prior and Convent of Norwich, settling a longstanding dispute, in the year 1200. (The Prior and Convent were to nominate three persons as Visitors, of which the Archbishop was to choose two to perform the office; the Archbishop

was to have only half of the profits from the visitation.) By Roberts's legal theory, this ancient composition was still in force despite the "translation" of the Prior and Convent of Norwich into the Dean and Chapter of Norwich by letters patent of Henry VIII. The Archbishop in the instant case had allegedly disregarded this long-established arrangement and performed the visitation himself. He was improperly suing for procurations dependent on the improper visitation.

The case is in its way about "Which of two ecclesiastics should exercise jurisdiction?', since visitation was essentially a judicial function (the main role of the Visitor was to take presentments of misconduct under the ecclesiastical law and to punish the malfeasors.) As a Prohibition case, it involves the problem "To what extent and for what reasons do common law courts have interest to intervene in such controversies, rather than leave them to be fought out in the ecclesiastical courts?"

Through his lawyers, Serjeants Hitcham and Richardson, Roberts sought a Prohibition on three grounds. As the argument phrases it, there are three "matters in law" justifying and recommending common law intervention, viz.: (a) whether the ancient composition, being embodied in an indenture and ratified by the Dean and Chapter of Canterbury, was "good" -- i.e., a valid and conclusive settlement of the method of visitation for at least the period when one of the parties, the Prior and Convent of Norwich, was in existence; (b) whether the power of visitation during episcopal vacancies belongs "of common right" to the Dean and Chapter of Norwich or whether instead the Archbishop has that power throughout his province: (c) whether the composition between the Archbishop and the Prior and Convent is still in force or terminated as of the "translation" of the old corporation into a new one.

In the event, no decision was made as to whether to grant Prohibition. Serjeant Hendon (whether speaking as the Archbishop's counsel or for himself does not appear) informed the Court that the case had been referred by the King's direction to the assize justices in Norfolk ("the Lord Chief Justice", presumably Montagu of the King's Bench, and Justice Dodderidge.) According to Hendon, they had heard counsel for both parties and certified their opinion that the old composition and the old corporation were terminated, that the present corporation -- Dean and Chapter -- was in fact founded by Edward VI, and therefore that the visitation power now belonged to the King. The Court accordingly adjourned the instant case, assigning a day to hear the report of the Chief Justice and Dodderidge and to hear counsel on both sides. (The status of the assize justices' report was of course only that

of an advisory opinion informing the King of his rights, but it was obviously entitled to respectful attention.)

For the purposes of the present topic, the three proffered reasons for Prohibition are worth scrutiny. The third seems to me an open-and-shut and sufficient basis for prohibiting. A question of the law of corporations arising in an ecclesiastical case, involved with the construction and effect of royal letters patent and with deep general issues concerning the status of successor organizations to bodies dissolved at the Reformation, is about as good a candidate for a "common law issue" as one could imagine. The first reason is probably good grounds for Prohibition. That depends, however, on how one is prepared to deal with the inherently nebulous and difficult subject of ancient compositions. (Cf. spiritual pensions above.) Rights in themselves ecclesiastical but arising from a "composition-real" were certainly in some circumstances and perhaps in all regarded as under common law protection. The composition in the present case may qualify as a "composition-real". Whether it does is no doubt a common law question, but one that can be debated in the process of deciding whether to grant a Prohibition.

The second reason for Prohibition is the most interesting. Is it the business of common law courts to decide whether "of common right" power of visitation in the diocese of Norwich during vacancies belongs to the Archbishop or the Dean and Chapter? In claiming that it is, Serjeants Hitcham and Richardson seem to me to embrace a version of the theory that the common law has a "superintendancy" over the ecclesiastical system. There *is* a "common right" as to who performs the functions of the Church -- surely the fully judicial function of deciding ecclesiastical cases, if this is true of the relatively minor and occasional function of visiting when there is no one in the office normally charged with that. In some sense, who performs these functions is not a matter of ecclesiastical law dismissable to ecclesiastical justice, but a matter of "the law", or the order of government in the realm as a whole, for which the common law courts are ultimately responsible. Just what that sense is, just what "common right" means in this context, demands exploration at the theoretical level which it never really got. Full-dress debate of the present case might have produced such discussion, had the case not been sidetracked by (perfectly proper) royal intervention. I have at any rate found no report of a sequel. My guess would be that the original ecclesiastical suit was dropped, since the assize justices had already gone into the matter with apparent care and concluded that the Archbishop had no right to visit.

It may bear repeating, in the light of a clearer assertion than heretofore that there is a "common right" distribution of ecclesiastical functions to be "superintended" by the common law courts, what I have argued above: This doctrine is compatible with a modified version of the "superintendancy", which its very vocabulary assists. Viz.: The common law courts are responsible to determine what the "common right" distribution is and to see that it is observed, but they should not intervene to enforce prescriptive derogations from "common right" jurisdiction (nor, presumably, to prevent ecclesiastical courts from upholding them by their own standards of prescription.)

A detail of the MS. of this case may be telling: In the margin there is a citation to what must be *Orphans of London*. (The volume of Coke's *Reports* is miscited, but the page is right.) This shows that someone, probably the reporter, saw that the common law's title to reach beyond a self-protective function was relevant in the case.