

### **III.**

## **Prohibitions to Control the Ambit of Remediable Wrong, or Merely to Prevent Imposition of Unwarranted Liability**

#### **A.**

### **Introductory**

In this final Section, we shall look at cases in which Prohibitions were sought, and sometimes obtained, on no further ground than that a suit in a non-common law court aimed at imposing a liability on someone when it should not be imposed on him. I.e.: In these cases, it could not be claimed that in granting Prohibition the common law court would be protecting its own jurisdiction either in the direct sense (non-common law plaintiff could just as well be bringing a common law suit) or in the less direct (e.g., a particular promise is not actionable at common law, but the field of contract belongs to the common law so that a "foreign" court purporting to extend the range of actionable promises would be encroaching on common law jurisdiction.) Nor could it be claimed that the non-common law court was violating statutory standards which the common law judges were responsible for interpreting and enforcing. Prohibition could not be justified as the means of insuring common law determination of an issue appropriate to such determination, but which happened to arise in an originally well-brought non-common lawsuit (e.g., jury trial of a customary *modus decimandi*, judicial exposition of a common law instrument such as a lease.) Neither could it be justified as necessary to keep interests protected by the common law from being accidentally prejudiced (e.g., by authentication or disauthentication of a contested will in an ecclesiastical court when the will, comprising both land and goods, was likely to be contested again in common law litigation.)

Finally, the cases in this Section cannot quite be brought within the principles that tend to justify using the Prohibition to regulate jurisdiction between non-common law courts. We have seen in Section II above that the judges hardly took on that regulatory function. They debated about it explicitly a few times; opposition to intervening between non-common law courts is if anything the predominant note. Jurisdictional conflict outside the common law system did, however, provide the context for the strongest articulation we have of a broad

***Prohibitions to Control the Ambit of Remediable Wrong,  
or Merely to Prevent Imposition of Unwarranted Liability***

negative principle: Prohibitions are not confined to protecting the common law's own interests -- not confined to the "paradigm" function and others that can be seen (though they do not all have to be, especially Prohibitions to enforce statutes) as relatively modest deviations from the "paradigm". This principle was not universally subscribed, but it was firmly stated and sturdily held by those who believed in it. It obviously extends to the kind of case considered in the present section: If self-protective interest or something resembling it need not be made out, Prohibitions *might* be used simply to prevent non-common law courts from enlarging "the ambit of remediable wrong" in ways the common law judges thought objectionable. Finding a reason why they *should* be so used is not, however, the same as finding one for preventing encroachment by one non-common law court on another's territory. The cases in Section II do not yield an affirmative principle as clear as the negative one. "Superintendancy" over the legal system beyond the common law's own borders was claimed (and disputed), but the character and rationale of that do not receive real discussion in the cases. Two theories can be constructed. The first is specific to the common law courts' title to regulate non-common law jurisdictional lines. It posits that "the law of the land" comprises a scheme of mixed jurisdiction -- besides the common law, there are courts of equity, ecclesiastical courts, Admiralty courts. The scheme includes a basic distribution of jurisdiction within the non-common law branches (for practical purposes, this is significant only for the ecclesiastical branch.) Although there can be argument about the modes and limits of this common law function, the theory insists that it is the right and duty of the common law courts, as "senior partner" in the mixed system, to see that the scheme is observed. The theory entails, e.g., that courts of equity should be compelled not to do what ecclesiastical courts are intended to do, and that ecclesiastical suits should be confined by Prohibition to the correct ecclesiastical court (within the basic or "common right" schema, if not the distribution of ecclesiastical jurisdiction as modified by prescriptive franchises.) The theory does not entail, e.g., that an ecclesiastical suit to which no other ecclesiastical court has a claim, and which cannot be appropriate to any other kind of court (common law, equity, or Admiralty), and which is not ruled out as a legitimate kind of suit by statute, might be prohibited. (The only assumption that could give the theory that entailment is unrealistically generous to equity for the period we are concerned with. It *could* be said that any complaint that falls outside the common law's own sphere, and that does not appear to be a customary or plausible ecclesiastical or Admiralty complaint, should be taken to equity.

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

Restraining the ecclesiastical or Admiralty court would then be protecting courts of equity. Equity would be conceived as the always-open residual resort and the ultimate judge of whether to give relief when no other court would do so, or be allowed to consider doing so. This line of thought would no doubt have appealed to some 17th century Chancellors. It would have been unacceptable to common law judges, who used Prohibitions to make sure that courts of equity did not have the last word as to whether the otherwise remediless should have relief, and who show little concern for whether equity was reserved to courts specialized in exercising it.)

The second theory of common law "superintendancy", which does reach the "ambit of remediable wrong", is perhaps best expressed in the metaphor of agency: Each type of non-common law court has been authorized to provide relief in listed and specifically described situations. These "agents" have a considerable discretion to judge whether facts called to their attention meet the descriptions. On the other hand (in principle, whatever the modalities), they have no discretion to extend the relief they provide to situations analogous to those specified in their authority. In that way, they are not quite "really courts". They are not assigned an area of human relationships and told they are the judges of the law's reach in that area; they are told "Do this and this and this". So long as there is no threat to the common law's own interest, they are left to do those things free of petty supervision that would imply distrust of their ability to understand their commission. But when a claim to relief comes along whose inclusion in a commission visualized as a list of specifics is dubious, it is not for the non-common law court to evaluate its merit. Rather, it is the common law courts' job to say, e.g., "Ecclesiastical courts are not authorized to listen to complaints like this (even though neither we ourselves nor any other court we know about would entertain them.)"

Where the specified and delimited "authorities" of non-common law courts come from is a metaphysical question to which no articulated answer can be found. One can only say from "the law", "the law of the land", "the common law, or common custom of the realm, in a sense that transcends 'common law' in the everyday operational sense -- viz. the rules and procedures of one set of courts". The common law in that "everyday operational sense" of course included the Prohibition and the power to use it at least self-protectively -- a power of self-protection not enjoyed by non-common law courts, and therefore at its most modest a badge of the common law courts' superiority. But does the power extend to controlling "the

***Prohibitions to Control the Ambit of Remediable Wrong,  
or Merely to Prevent Imposition of Unwarranted Liability***

ambit of remediable wrong" *throughout* the English legal order? Does "the law" in the wider, vaguer sense exist, save as it is embodied in the statutes? Does it delimit the authority of the non-common law courts in the way I have suggested? Is it uniquely accessible to the common law judges? Towards answering the questions, one can cite some judges' willingness to negate the view that protecting the common law in the narrower sense is the only proper use of Prohibitions. One cannot point to explicit elaborations of the second type of theory outlined above -- i.e., a theory stronger than is needed to justify policing non-common law jurisdictions in conflict or potential conflict with each other. Whether the stronger theory was implicitly held by many or some judges depends on the implications of the cases in this Section.

The cases are scrappy and miscellaneous. There are not many granted and sustained Prohibitions. Perhaps, therefore, the best conclusion will be that the judges did *not* subscribe to the view that "the ambit of remediable wrong" was within their control. In other words, when an unusual or dubious-looking complaint was made in an ecclesiastical court, and was more or less within its bailiwick, the chances were on the whole good that the ecclesiastical court would be left to decide whether the complaint was cause for granting relief. ("More or less within its bailiwick": Speculatively, one can imagine an attempt to use the ecclesiastical courts to impose liability for an activity previously unregulated by law when the activity has no visible affinity with ordinary ecclesiastical business -- say a modern tort, such as infringement of privacy, were complained of. Wrongs of that sort could conceivably be seen as breaches of the too-capacious duty of Christian neighborliness, and so the example is a little less than totally fantastic. It is still a long way from ecclesiastical routine, and there are of course no instances of anything so interesting. The shaky ecclesiastical claims which defendants occasionally tried to quash by Prohibition were plainly within the general purview of ecclesiastical law. To the degree that the attempts at Prohibition failed, one would have reason to speak of ecclesiastical courts *having* a "general purview", within which they were the judges of what is an actionable complaint -- a "general purview" as opposed to what I have described as a list-like authority to provide relief in predetermined actionable situations). As it happens, all the cases in this Section are ecclesiastical. (I shall say a further word below about the delicate bearing of equity on the present topic.)

Within the subject-matter categories to be taken up later in this study, some Prohibitions can be analyzed as regulating the mere "ambit of remediable wrong", but rarely

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

unambiguously. E.g., in some defamation cases, the common law courts seem to be asked to say to the ecclesiastical court nothing more than, "Liability simply must not be attached to this utterance (ordinarily a familiar scurrility) -- it is too foolish to use the law to restrain such unrestrainable everyday name-calling, and objectionable to put an undue bridle on people's right to speak." Defamation, as the inter-jurisdictional branch of the subject was developed, especially lends itself to what I have called the "agency" view of non-common law courts: The ecclesiastical courts are authorized to remedy one form of defamation -- viz. imputations of ecclesiastical offences, such as heresy or incontinency; beyond that they have no license to judge what is defamatory, or defamatory enough to merit spiritual sanctions; they are more severely limited than by the duty not to give relief when the common law would do so. On the other hand, defamation was a peculiar field in that it was shared between ecclesiastical and common law; what is shared is not preempted. Yet because it was shared there were special imperatives toward consistency in the handling of similar complaints in different tribunals. For this reason, it was arguable (see the cases on this in Vol. II of the study) that certain standards adopted by the common law in its part of the field were binding on ecclesiastical courts when their jurisdiction was unquestionable (e.g., truth is a defense to defamation.) It takes only a further step to argue that although common law courts do not have a monopoly to hear and assess complaints of defamation, they have preempted the fundamental question, "What utterances are defamatory?" (Just as it would arguably be intolerable for English law, taken as a single national system, to treat truth sometimes as a defense and sometimes not, so would be the spectacle of legal sub-systems under the same roof taking different views of the care people must take to avoid offensiveness in casual speech.) In sum, while questions can be asked about the common law courts' interest in checking ecclesiastical courts in defamation cases except when they were ready to give a remedy themselves, there are answers short of asserting a generalized control over "the ambit of remediable wrong."

One class of Prohibitions to the Admiralty may seem on the surface to imply that there are complaints the Admiralty simply lacks authority to entertain, though they are not entertainable anywhere else. I refer to attempts to stop the Admiralty from taking cases arising on foreign land (vs. at sea, where the Admiralty manifestly had jurisdiction, and in England, where it manifestly did not.) The appearance is misleading, however. Some judges were not comfortable with prohibiting the Admiralty in such cases simply for the reason that

***Prohibitions to Control the Ambit of Remediable Wrong,  
or Merely to Prevent Imposition of Unwarranted Liability***

a common law remedy was *de facto* available (by using a fiction.) Some of these managed to read the statutes as confining the Admiralty to the sea. They may have been expressing their sense that a "merely positive" statutory ban presented fewer problems than defending inherent common law powers to restrict other courts without self-protective interest. In addition, there were grounds of a sort for saying that in taking foreign cases the Admiralty was infringing the jurisdiction of another non-common law court, that of the Constable and Marshall. It is probably a fair conclusion that the Constable and Marshall were resurrected from the dead (principally by Coke) *in order* to make out that there was provision for determining foreign suits in England, so that the Admiralty's taking them was both unnecessary and usurpatious. Again, part of the impulse may have been to avoid hard questions about title to control the "ambit of remediable wrong" -- controlling lines of jurisdiction between non-common law courts seemed easier to justify, whether it really is or not. (Note the assumption behind this anticipation of matters to be discussed later in the study: Some judges wanted to cut the Admiralty out of foreign cases. That was not because anyone thought it undesirable to provide an English tribunal for such cases. The reason was that the modern common law, by fictionalizing away its venue requirements, was itself capable of handling them. It was awkward, however, to prohibit the Admiralty from "paradigmatic" encroachment on the common law when the latter did not truly have jurisdiction, only a fictitious way to avoid the consequences of lacking it. My suggestion here is that the search for a sounder basis for Prohibition may have evoked the thought that inherent common law power to keep inherently limited agents within their authorities was not a promising basis. One might be tempted to claim such inherent power when faced with a silly complaint in an ecclesiastical court; faced with a serious project -- eliminating as no longer necessary a once-useful and established activity of a popular mercantile court --, one might be led to wonder whether the "inherent power" can be seriously defended.)

As I have already intimated, Prohibitions to courts of equity are in a sense a tricky special case under the present topic. There is a way in which virtually every such Prohibition controls the "ambit of remediable wrong" -- i.e., expresses the common law view of what a court of equity should and should not be free to consider doing. Few Prohibitions can be brought under a simple self-protective function. I.e., although an equity suit could be objectionable for crudely duplicating a common law remedy, those objected to by parties seeking Prohibitions were almost never of that sort. Only very rarely was an equity suit

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

objected to because it encroached on ecclesiastical territory. The objection was almost always that the equitable relief sought simply ought not to be allowed, or that the national system of law was better off without the equitable remedy proposed. The implication of making that objection in Prohibition cases, and of the common law courts' weighing it on the merits, is that those courts, and not the courts of equity themselves, are the judge.

Accordingly, it is perfectly correct to say that *one* "ambit" was defined by the common law courts, whether or not they claimed power to define *all* non-common law ambits. A series of qualifications must at once be added: (a) Prohibitions to courts of equity are a drop in the sea of Prohibitions. They were so small a part of the practice that it would be unsurprising if they had little analogical or suggestive force in more familiar territory (as I think was the case.) (b) The equity tract of Prohibition law has the very peculiar feature that the major court of equity -- the Chancery -- was never prohibited. Whether in principle it could be was a speculative question; an affirmative answer was occasionally given, but the point was hardly beyond argument. Only minor equity courts were prohibited. One of those, the Requests, had a dubious title even to exist, and the others -- the Councils of Wales and the North -- were natural candidates for common law regulation because their mixed (only partly equitable) jurisdiction was dependent on and delimited by statute and royal commission. In restraining the discretion of those courts to evaluate equitable claims, the common law courts were guided by what they thought was Chancery practice. I.e., it is doubtful that the common law judges would have prohibited, say, a Requests suit if they thought the claim was already recognized by the Chancery as a good equitable complaint, whatever their own view of it. I do not think the judges always knew what the Chancery would do, and there is no sign that they habitually asked. In that sense, they in fact used their own judgment as to what is or is not a good equitable complaint. But they were in a position to say, and perhaps would have been willing to, "We are not *ultimately* the judge of equity -- if you think you have a good equitable claim you can go to the Chancery, and it is unlikely we will interfere -- in the meanwhile, we do not intend to let low-ranking courts consider equitable complaints which we do not think good and assume the Chancery would not." (c) In their actual evaluation of equitable suits, the judges were quite permissive toward the lesser equity courts, with one major exception: They were intolerant of proposed equitable mitigations of the common law of real property. They were not particularly disposed to regard fields such as contract as preempted by themselves as against courts of equity (in

***Prohibitions to Control the Ambit of Remediable Wrong,  
or Merely to Prevent Imposition of Unwarranted Liability***

contrast to ecclesiastical courts.) Real property was another matter. The judges probably saw the structure of property law as under their special protection and made little distinction between encroachment on that and encroachment on their jurisdiction *simpliciter* -- suing outside when one could sue at common law or, owing to preemption of a field or issue, should. The fusion is not entirely rational, but it is not surprising. The Chancellor's habit of deferring to the common law judges on property questions would have encouraged it. Confronted with my statement that they purported to regulate at least the ambit of equity, the judges might well have denied that they did -- "Look at our reluctance to prohibit courts of equity in most areas. We really do no more than insure that marginal courts of equity observe the understanding, to which the Chancellors themselves subscribe, that there is an equity-proof core of property rules." (See appendix for more on these points.)

When these peculiarities are taken into account, the equity Prohibitions do not count very strongly against my suggestion above that "ambit of remediable wrong" cases do not pervade the major subject-matter categories -- that they are instead a rather eccentric hodge-podge from which common law title to control that ambit can hardly be deduced. One important group of ecclesiastical Prohibitions cuts the other way: The common law courts certainly insisted on their power to decide what products are intrinsically subject to tithes. Most products were tithable, but some were pretty clearly not, apart from the timber trees exempt by statute -- notably minerals --, and sometimes -- e.g., in the case of new agricultural products -- tithability was open to argument. Besides the liability to tithes of the product as such, there were debates on such questions as whether tithes were due on a second crop of hay and whether the producer owed tithes of gleanings inevitably or non-fraudulently left behind at harvest. Without doubt, the courts prohibited when they thought tithes were demanded without *de jure* warrant or warrant of special custom.

Nothing could be less surprising. Obviously enough, the Church courts were unlikely to be trusted to write the Church's tax code in a way that was fair to lay interests. But what of the theoretical implications?

Tithes were the largest subject of ecclesiastical jurisdiction, but the ecclesiastical courts were not judges of the *general* question "What is the scope and nature of the Christian's duty to pay tithes?" The "agency" model seems to fit here: Ecclesiastical courts are authorized to award recovery of tithes of grain and hay and many other things, but the list eventually runs out. When its borders are uncertain, it is for the common law courts to say where it ends. It is

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

not for the ecclesiastical courts to deliberate as to whether justice and the realization of Christian duty require taxing the profits or some of the profits from, say, a coal mine. If the common law courts say coal is not on the list, it is not.

It is possible to argue that common law control over tithability is a special case because the duty to pay tithes -- unlike some other Christian duties embodied in the ecclesiastical law -- is ultimately secular. There have been famous debates on the moral source of that duty -- the law of God, the law of the Church, or the human law of particular countries? I shall not enter into those. It is sufficient here to note that control over tithability could have served as a practical model for more generalized control over "the ambit of remediable wrong." With philosophic and antiquarian effort, it might be explained away, but so long as it was the practice it was available to encourage the thought that in other areas of ecclesiastical law as well there must be some things Church courts "just can't do" -- can't be the judges of whether to do, even when those things are appropriate to their general line of business. The cases in this Section do not, however, suggest that the model was very efficacious towards putting flesh on the proposition (itself not universally endorsed) that Prohibitions are not exclusively for protecting the common law's own interests.

I do not want to imply that using Prohibitions to control "the ambit of remediable wrong" is less justifiable than using them to police non-common law lines of jurisdiction. There is a light in which the opposite is true. In one way, intra-ecclesiastical jurisdiction seems an apt subject for utter indifference on the common law's part. As it were, "If they don't care, why in the world should we?" (Assuring that courts of equity handle equitable complaints and ecclesiastic courts ecclesiastical complaints no doubt deserves more concern.) On the other hand, outrageous, frivolous, liberty-restricting ecclesiastical claims, if listened to by the ecclesiastical court, can bring real harm on people. Good manners in a mixed legal system certainly require hoping that the ecclesiastical courts can be relied on to weed out such claims, but if the hope is misplaced mischief ensues. Assumption by the common law judges of a "superintendent's" prerogative to cut off very dubious complaints might well be the part of wisdom. Cutting them off at once by Prohibition has advantages in efficiency over letting them linger in the ecclesiastical system and perhaps having to intervene later, if an attempt to impose a burdensome and unfair liability on the subject should survive. Trusting that the ecclesiastical authorities will not object to occasional quick surgery, which saves them trouble, is perhaps a truer expression of comity than straining to

***Prohibitions to Control the Ambit of Remediable Wrong,  
or Merely to Prevent Imposition of Unwarranted Liability***

trust when trust is not wholehearted. It is important to remember that one of the strengths of the ecclesiastical system was its generosity with appeals. But it makes for ambiguity in the situation we are thinking about. Though one trusts completely that justice will be done by the ecclesiastical courts in the long run, one may not want to run the risk that the first-instance judge, by a foolish and all but certainly reversible decision, will drive the loser to cumbersome appeals.

All in all, a reserve of common law power to control "the ambit of remediable wrong" seems to have so much in its favor that it is hard to doubt its existence. Had very many attempts been made to impose very dubious ecclesiastical liabilities on the subject, the common law judges would probably have taken on a bolder "superintendancy" than they can be said to have assumed. They would have debated the nature of their power more thoroughly than they did. As it was, opportunities were few, stakes were rarely very high. Under these conditions, the judges showed no positive zeal for stretching their powers over the non-common law courts to the farthest limit they could reach. The empirical basis for saying that common law authority extended beyond self-protection (and the numerous outcroppings that can be assimilated to it) is accordingly thin -- which is not to say wholly absent.

Among large issues in the law of Prohibitions, two have particular affinity: (a) Does control of "the ambit of remediable wrong" in all the non-common law systems belong to the common law judges? (b) To what extent, if any, should common law rules and standards be enforced on non-common law courts within their jurisdiction? The second question is the subject of the lengthy Vol. II of this study. It underlies many cases and numerous complex debates. That is not true of the first question. The two should still be considered side by side, for each asks about a problematic stretch of the Prohibition -- the uses farthest out from the "paradigm." The surest thing that can be said about the first question is that some judges would have answered "Yes" and others "No". Counting heads on the basis of the judges' pronouncements and deeds is difficult. Whether the question in its general terms (I do not, of course, mean in my invented terminology) was present in lawyers' minds is perhaps uncertain. What is best evidenced is an impulse in some to believe and in others to doubt that the "paradigmatic" use of the Prohibition *was* its proper use (not in a narrowly literal sense, but essentially.) It is not clear that the doubters had thought through how to describe and rationalize uses beyond the "paradigm". Hard-fought cases did not force them to. Given,

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

then, the clouds around the first of the two questions, are there ways of getting an indirect but useful focus on it through the second?

Suppose one were to argue that if common law standards can to some extent be imposed on non-common law courts, it is hard to deny that the "ambit" of the latter is subject to common law control. Spelled out, the argument would run: A picture of the English legal system as a diversity of "separate and equal" sub-systems, except that one of them -- the common law -- possesses unique self-protective powers, will not work. The picture implies that the non-common law sub-systems should be free to go their own way, provided their activities do not encroach on the common law's sphere. But they were not entirely free to go their own way. To a degree, they were required to avoid applying rules in conflict with the common law. The common law in the system as a whole is therefore not reducible to the rules and procedures of one sub-system, including the right and the means of self-protection. In addition, it is "national law", in the sense that its standards, while not comprehensively binding on the non-common law sub-systems, may not simply be ignored by them, as if they were part of the law of Rome or Russia. Besides their commission to do their own business and protect their own sphere, the common law courts have a "superintendancy" to see that a respectable degree of harmony prevails across the whole system. The harmony, moreover, is to be on the common law's terms. I.e., though variations from the "national law" can be justified by the purposes and traditions of non-common law tribunals, variation must not turn into contradiction, and the common law courts reserve authority -- necessarily somewhat discretionary -- to say when it has gone too far. "Superintendancy" being conceded, would there be any sense in confining it to assuring a decent degree of respect for common law standards in cases admittedly within non-common law jurisdiction? Is common law in its aspect of "national law" not likely to include limits on the liabilities *any* court in England can impose on the subject? If an imaginary legislator were to appoint one member of a set of generally independent courts "superintendent" of the rest, how narrow a "superintendancy" would he probably have in mind? (Or how specific? -- arguably, a "superintendent" not meant to be a detailed overseer or a tyrant must be left room, within intelligible but indefinite guidelines, to work out just what his role is going to be, and even to "play it by ear.")

I have no evidence that an argument along these lines was ever made, but I do not think it is unrealistic. Those who believed in common law "superintendancy" or sensed that self-

***Prohibitions to Control the Ambit of Remediable Wrong,  
or Merely to Prevent Imposition of Unwarranted Liability***

protection did not exhaust the uses of the Prohibition must have thought of the cases in which regulation of the non-common law courts inside their admitted sphere was proposed or imposed. The beholdenness of non-common law courts to common law standards may not have been very distinctly picked out among the motifs of those cases, but that something of the sort was sometimes under discussion is hard to miss. Reflection on such cases, however unconscious, must have suggested that "superintendancy" was a fact, and must have prompted the question "If we have it to some intents, why not to others?"

We need to ask, however, whether the argument in the last paragraph is really convincing. It may be suggestive, may have some *prima facie* force, but will it stand up to scrutiny? It seems to me that the argument can be faulted in the premises rather than the inferences. (I speak cursorily here of matters elaborately discussed in Vol. II.) When the upshot of many cases and a good deal of sophisticated debate is formulated, one can seriously doubt whether common law standards *were* regarded as binding on the non-common law systems (in the weak senses that no one would have proposed exceeding -- "residually binding", "binding when the common law judges see no reason to indulge departure from them, or see reason why in a particular instance jarring law in different 'national' tribunals is inconvenient or unfair to the subject.") "Superintendancy" in one context, inviting extension to others, may not have existed. That it must exist or ought to exist would no doubt have been asserted, but a lawyer skeptical of its existence could cite plenty of empirical evidence. Objections to non-common law holdings because they violated common law standards failed more often than they succeeded. When Prohibitions succeeded in cases where such objections were bruited, it was usually for another reason reducible to the self-protective function. Departure from common law standards was usually not *in itself* the reason for Prohibition; the reason was more likely to be that disposition of cases or issues by non-common law standards would prejudice potential common law litigation against the loser or otherwise weaken his position in secular affairs. Someone believing that common law "superintendancy" *must* be a reality *quoad* enforcement of some kind of duty to observe common law standards across all sub-systems might take it as the clinching argument that statute called for (again, some kind of) conformity or non-contradiction between common law and ecclesiastical law. His opponent could reply, first, that a statutory commission to do one thing is not extendable to another. (If statute insists that ecclesiastical courts must under some circumstances observe common law standards, and it is the common law's

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

responsibility to enforce the statutes on non-common law courts, then the common law courts must enforce this statute as they understand it. A larger "superintendancy", extending to control of the "ambit of remediable wrong", is in no way implied. ) He could add that the statute turned out to have virtually no applied meaning. (If it meant anything, it only meant that common law standards must not be violated with the possible effect of prejudicing common law interests. This is entirely different from saying they must be observed when only ecclesiastical interests would be affected. The position is reachable by modest extension of the "paradigmatic" role of Prohibitions without statutory assistance.)

Those are rough generalizations from tangled litigation discussed in Vol. II. I mean only to suggest that finding indirect support for common law authority over "the ambit of remediable wrong" (and for that matter over jurisdictional conflicts between non-common law courts) in the theories and results produced by that litigation is doubtful -- not impossible, but ambiguous. It is time now to inspect the cases which have direct implications for control over the "ambit."

The cases are so mixed in their substance that they can only be presented one-by-one. There is, however, one way of breaking them into larger groups, which I shall use. I shall first look at the cases in which Prohibition was sought because the very nature of the ecclesiastical claim was allegedly unreasonable or "just not a claim ecclesiastical courts are authorized to consider." In a second group of cases, the "matter" of the ecclesiastical suit is unobjectionable (it is a tithe suit or the like), but there is some objection to the "form" (e.g. a suit against A. for this object would be unexceptionable, but this one is brought against B.) The point being made in the application for Prohibition is essentially the same -- "*This* suit against *me* is *ultra vires*, though if it were to succeed there would be no invasion of common law or other non-ecclesiastical territory." A third small group of cases does not strictly belong to this topic, but is close enough (especially to the second group) to include. The topic as a whole is concerned with cases in which the ecclesiastical suit is objected to the moment it is brought. These contrast with cases in which there is initial admission of ecclesiastical jurisdiction and subsequent application for Prohibition, normally by disallowance surmise, in virtue of something the ecclesiastical court has done and ought not to have. The formal contrast is important, despite the jurisprudential common ground there may be between disallowance and "ambit" cases. There are a few reports, however, in which plaintiff-in-Prohibition's objection seems to depend on some step the ecclesiastical court has

***Prohibitions to Control the Ambit of Remediable Wrong,  
or Merely to Prevent Imposition of Unwarranted Liability***

taken beyond merely noticing the complaint, but there appears to be no disallowance surmise nor reason for dispensing with one. I place these cases in this Section because they come, like the others, to cries that the ecclesiastical court "just can't do this. " In so far as they are not attempts at Prohibition merely bad for want of a disallowance surmise (and adequate grounds for one -- violation of binding common law standards or prejudice to common law interests), they are perhaps complaints that the ecclesiastical court is outside its "ambit" which cheat a bit by referring to litigative events beyond ecclesiastical plaintiff's libel.

Although the cases are too miscellaneous to admit of summary, it may be useful to note before launching into them that they are as a group late cases. Of the 35 in the three Sub-sections, 31 are post-Elizabethan, 24 come from 1615 or later, and 15 are Caroline. Proposals to stretch the Prohibition to control of the "ambit of remediable wrong", successful or not, tended to be a 17th century phenomenon. Possibly a greater readiness to be innovative on the part of the ecclesiastical courts is reflected. When the proposals came, there was less earlier practice to guide the courts than in most areas of Prohibition law. In the grossest "score-keeping" terms -- Prohibition granted or denied -- , the cases come out close to 50-50. The denials, I think, have the greater weight. They show more clearly what they tend to show -- judicial disinclination to assume an extensive "superintendancy" over the ecclesiastical system -- than decisions to grant Prohibition show the opposite. Many, though not all, of the latter can be explained by some incidental consideration; quite a few of the former proceed from articulated principle.

**B.  
Complaints that the Ecclesiastical Complaint is  
Substantively Inappropriate**

(a) *Hackluyt v. Bishop*. M. 37/38 Eliz. C.P. Harl. , 3209. f. 5; Harl. 4817, f. 154 (Anon., but clearly the same case and the fuller report.)

Churchwardens sued in an ecclesiastical court for several kinds of fees -- for burials, marriages, and christenings in the parish church. They claimed entitlement to these fees by prescription and made out that the prescriptive right was reasonable by saying that the money was to be used for repair and ornamentation of the church.

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

Prohibition was in fact granted on the ground that the prescription should be tried at common law (following Harl. 4817.) The case was returned by Consultation when it was found that the prescription was as alleged. It is clearly implied that the custom, factually true by common law standards, also met the common law standard of reasonableness. *Per* Harl. 4817, however, Prohibition was not sought exclusively to secure common law trial of a controverted custom. Rather, the surmise took the position that the ecclesiastical claim was merely unlawful and should be cut off by Prohibition whether or not its prescriptive basis was sound. ("...by the law of this realm...no money for burying, marrying, and baptizing is payable to any ecclesiastical or lay person...") The Court gave no apparent countenance to this large proposition. It showed no interest in debarring ecclesiastical courts from a category of Church-related cases, only in assuring that a prescriptive claim against lay persons be verified as an immemorial custom by common law trial. (I do not think there could be any serious objection to the custom on ordinary grounds of reasonableness. It amounted to defraying by a "users' tax" part of the parish expenses which otherwise would be met out of general taxation. If there was any hope of Prohibition beyond denying the authenticity of the custom and demanding common law trial, it would have been on the basis put forward in the surmise -- a "right to be buried for nothing" which ecclesiastical courts are simply bound to respect.)

(b) *Baker v. Rogers*. M. 42/43 Eliz. C.P. Croke Eliz., 788.

This complex case was decided on formal pleading. It contains some further issues, but for present purposes it comes to refusal on the common law court's part to interfere with the ecclesiastical court's construction of the crime of simony. Plaintiff-in-Prohibition essentially maintained that he could not lawfully be proceeded against as a simoniac, and in consequence be deprived of his living, in the (uncontested) circumstances of the case. Generally, of course, ecclesiastical courts had authority to punish simony; plaintiff-in-Prohibition was in effect saying that it was unreasonable and unlawful to extend the concept of simony to someone in his position.

The facts were these: One T. Baker bought the next avoidance of a living from the owner of the advowson. The living was already vacant, however, at the time of this transaction. That circumstance had a curious double legal effect. On the one hand, it is what made the parties to the transaction guilty of simony. (There was nothing illegal about purchasing the right to present to an occupied living the next time it became vacant. Giving

***Prohibitions to Control the Ambit of Remediable Wrong,  
or Merely to Prevent Imposition of Unwarranted Liability***

money for the privilege of presenting here and now was simony -- virtually the same as agreeing to pay the patron if he will present a designated person.) On the other hand, the patron's purported grant of the avoidance was invalid. (I.e., a conveyance of the next avoidance presupposes that the living is filled when the conveyance is made. If one purports to grant the next avoidance when the living is vacant, there is no next avoidance to convey and the grant is a nullity.) T. Baker then proceeded to present his brother, W. Baker, who was admitted, instituted, and inducted into the living. Up to this point, W. Baker was ignorant of the transaction between the patron and T. Baker. (So the record showed. One may of course wonder whether W. Baker had no inkling of how the apparent right to present to the living got into his brother's hands. His ignorance of the details -- that the living was vacant when the avoidance was purportedly sold, the handsome consideration of £ 180 -- is credible enough.) Following W. Baker's induction, however, T. Baker informed him of what had gone on, including the price. ("...requiring him to have consideration thereof", the report says. Does that mean, "I am warning you that you may be tainted with simony" or only "I've paid very good money to put you here, so don't forget your benefactor"? I cannot say whether in the ecclesiastical court's eyes there could be any difference between someone's merely discovering the corrupt events behind his presentation and his being informed in a rather more pointed manner by the principal wrongdoer -- either warned of the danger of simony or made to understand that something was expected of him. A casuist might argue that obligation to resign the living is clearer in the second case than in the first.) W. Baker was then sued for simony in the High Commission (clearly by private complaint. The interest of the other party named in the report, Rogers, is not specified.)

W. Baker sought a Prohibition on a twofold theory. (1) He should not be pursued for simony because he did not acquire his living by simony. Rather, he acquired it by usurpation. That is so because he was presented by someone without title to present -- viz. the holder of a null and void grant purporting to convey the next avoidance. T. Baker might be liable to ecclesiastical censures for making a simoniacal contract, but an installed clergyman is not liable to deprivation for simony unless he is "in" by simony. W. Baker, as a usurper, no doubt stood to lose his living (certainly as against anyone with better title -- *quaere* whether ecclesiastical courts could oust a *de facto* but title-less incumbent without complaint by an entitled rival.) But losing the living because it was never lawfully his would

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

be much better than carrying the stigma of simony and its consequence -- disqualification for occupying any benefice in the future, over and above loss of the present one.

In any event, W. Baker should not be regarded as a simoniac, but as an accessory to T. Baker's simony. The immediate relevance of this contention is for a separate element in the case: A general pardon came between W. Baker's finding out about the simoniacal transaction and his being sued in the High Commission. Simony was excepted from the pardon. But if W. Baker was not a simoniac, only an accessory to simony, he would be covered by the pardon -- i.e., accessories to simony were not excepted. (Prohibitions were frequently used to make sure that ecclesiastical courts respected royal and statutory pardons as the common law courts understood them.)

It seem to me, however, that the second ground for Prohibition has some force, and might have been urged, even in the absence of the pardon. In the everyday sense of these legal terms, W. Baker pretty clearly *was* an accessory after the fact, rather than principal -- assuming that he was really ignorant of the simony until after he was installed in the living, and assuming that some degree of criminality attaches to continuing in a living one now knows to have been corruptly acquired. A complaint that the ecclesiastical court treated as a case of simony what by any reasonable standard should be treated as a lesser offense seems plausible enough to imagine. Can the ecclesiastical court's authority to deal with simony be stretched to sweep up related offenses as if they were no different? There is of course no telling what the practical effect would be if the ecclesiastical court were to distinguish principal from accessory in simony. It is hard to think of an effective sanction against an incumbent, whether he is guilty as principal or as accessory, except for deprivation. Deprivation without disqualification for holding future benefices would, however, be a perfectly possible and fair-seeming punishment for the accessory. Speaking in this case, Justice Warburton said that by the ecclesiastical law that very sanction was applicable to wholly innocent beneficiaries of simony. (I.e., one presented in consequence of a simoniacal bargain between two strangers, who is not privy to it, is deprivable, but not disqualified. "Not privy" presumably means ignorant or faultlessly ignorant of the simony until the facts come out in proceedings aimed at deprivation. "Privy" would include aware-after-the-fact, if we assume -- which plaintiff-in-Prohibition himself admits -- that he was at least an accessory.) Whether the accessory after the fact is more like the wholly innocent clergyman or the full participant in the simony is obviously a debatable question. My

***Prohibitions to Control the Ambit of Remediable Wrong,  
or Merely to Prevent Imposition of Unwarranted Liability***

suggestion here is that the ecclesiastical court might be open to criticism for not letting that question be raised, by amalgamating principal and accessory.

The report says that *Baker* was argued several times, which suggests that the judges did not find plaintiff-in-Prohibition's contention plainly meritless. In the end, however, they were unanimous in rejecting both his points. On the first, the Court admitted that W. Baker came in "*quasi per* usurpation." But since the "means" or "cause" of his coming in was a simoniacal contract, the Court saw no reason to distinguish this case from one in which the presenter has, in property-law terms, a valid title to present. I.e., the ecclesiastical court was quite free to treat W. Baker as a simoniacal incumbent, despite his separate liability to be dislodged as a usurper.

On the second point, the Court started off by saying that in simony, as in common law trespass, there simply is no distinction between principal and accessory -- everyone involved in such a way as to incur liability, or at any rate liability with any degree of fault, counts as a principal. The status of this remark is a little puzzling. It can only be a remark about the ecclesiastical law as the common law judges knew or assumed it to be. As such, it rather begs the implicit question whether ecclesiastical jurisdiction over simony *should* be allowed to operate without a distinction between degrees of guilt. (The analogy with trespass seems a rather frail reed, though perhaps reassuring: If the common law operates without the distinction in one context, at least the ecclesiastical rule does not offend against fundamental or deeply English standards of justice.)

Having in effect asserted that the ecclesiastical law was correctly applied (and less than bizarre), the Court fell back to general language: *whether* the ecclesiastical law and natural justice were properly observed is not a question we can ask, ecclesiastical jurisdiction being clear. The generality is hardly controversial as such, though the Court in this case devoted a certain amount of effort to defending it. (Arguing from common law practice: "...it sufficeth to plead a sentence out of the Spiritual Court briefly, without showing the manner thereof, or of their proceedings" because "...this Court cannot take conusance of their proceedings, whether they be lawful or not..."; "...if the Spiritual Court will certify the especial matter upon a certificate of matrimony, or bastardy, or the like, it is not good, but they ought to certify precisely one way or the other; for this Court cannot adjudge of that special matter, but it appertains to their law to determine it.") On the other hand, the Court felt no need to defend its view that ecclesiastical jurisdiction was clear. In the context of *Baker*, the judges

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

thought of the ecclesiastical courts as having a "general purview" within which they were free to shape the law. Although they may have been somewhat troubled by the implications of that perspective in this case, they did not swing to the contrasting one. I.e., they did not assume the "superintendancy" that would justify the question "Can authority to punish simony really include power to impose full liability for the offense in any marginal or ambiguous case the ecclesiastical court sees fit to assimilate to standard cases?"

The decision in *Baker* is all the stronger for the fact that the ecclesiastical proceedings had an impact on interests under common law protection. Finding W. Baker guilty of simony and depriving him had the effect of divesting his freehold in the benefice. The Court took express note of this basis for objecting to non-interference with ecclesiastical justice in the matter of simony and brushed it away. ("And although it were said that in the Spiritual Court they ought not to have intermeddled to divest the freehold, which is in the incumbent after the induction; true it is, they should not meddle to alter the freehold; but they meddled only with his manner of obtaining his presentment, which by consequence divested the freehold from him, by the dissolution of his estate, when his admission and institution is avoided.")

(c) Anon. M. 5 Jac. K.B. Harl. 1631, f. 368; Noy, 123 (undated).

This is one of the few cases in which a Prohibition was granted to cut off imposition of an ecclesiastical liability which the common law judges thought unprecedented and mischievous. There is no sign of painful deliberation or of consideration as to whether a modest innovation in a standard ecclesiastical activity might best be left to ecclesiastical scrutiny.

A Bishop's Commissary, at a visitation court, cited various parishioners to appear as presentment jurors in effect (to inform the court of ecclesiastical offenses in the locality.) For failure to appear, the parishioners were excommunicated. Justices Fenner, Williams, and Croke, alone in court, granted a Prohibition on the ground that a visitation official has only the power to cite churchwardens and sidemen for the purpose in question. "For otherwise," said the Court, "he can trouble all the people of the country."

(d) Anon. H.7 Jac. C.P. Add. 25,209, f. 180b.

In this briefly reported case, the Common Pleas refused to consider curtailing ecclesiastical power to punish speech expressing disrespect for the established order in the Church. A man was prosecuted for saying that he would not listen to sermons of those who were ministers by a Bishop. The theory on which he sought Prohibition, which is not stated,

***Prohibitions to Control the Ambit of Remediable Wrong,  
or Merely to Prevent Imposition of Unwarranted Liability***

must be that this sort of general and impersonal expression of Puritan sentiment was beyond the reach of whatever authority ecclesiastical courts had to punish irreligious or disruptive utterance. The only hint of an explanation of the Court's denial of Prohibition is Chief Justice Coke's unspecific citation of a case in which it was held that a High Commission prosecution for calling a parson "knave" was unobjectionable. The implication is that even the most minor aspersions, which ecclesiastical courts would almost certainly not be allowed to treat as defamatory if spoken of a lay person, constituted a serious ecclesiastical offense if directed at a cleric. One could obviously argue that expressions tending to bring a particular clergyman into disrespect are more serious than impersonal or hypothetical expressions of opinion. But it is perfectly possible that Coke would have said the opposite -- if it is not only an offense, but grave enough to be a High Commission matter, to toss the vaguest of scurrilities at an individual clergyman, surely it is worse to broadcast one's disapproval of the established system and its ministers.

(e) Reynold's Case. M. 13 Jac. K.B. Moore, 916; 1 Rolle, 259 (*sub. nom.* Churchwardens of Uffington v. ---); Add. 25,213, f. 178b.

Here, as in Case (c) above, Prohibition was granted. The effect was again to protect lay persons against annoying, though hardly grave, proliferation of ecclesiastical duties. Churchwardens sued a householder for failure to provide the parishioners with bread, beer, and a resting place in the course of their perambulation of the parish. (The amiable practice of a communal walk around the parish was ordinarily part of the observance of Rogation Days.) The basis of the ecclesiastical suit was custom -- the only possible basis for charging the occupant of a particular house with a duty to refresh the perambulators. Plaintiff-in-Prohibition did not challenge the custom as to fact, though if he had he would certainly have been entitled to common law trial of its authenticity. (Not only a lay person, but lay property as well, would be encumbered.) The Prohibition suit may, however, be construed as no more than a challenge of the reasonableness of a secular custom. One report (Moore) has the court saying the custom is unlawful. The others are indefinite, leaving room for ambiguity as between "The custom is unreasonable by the same standard as would be applied in any common law case on special customs" and "Whether or not the custom might hold up at common law, ecclesiastical courts will not be suffered to impose petty special duties on laymen under color of custom." In contrast to the custom in Case (a) above, the one in the present case is a good candidate for unreasonableness by ordinary common law standards.

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

One-sidedness -- the party burdened with an alleged customary duty receives no benefit peculiar to himself -- was the most commonplace objection to customs. There is no way of making out that the householder accustomed to give the parishioners refreshment enjoyed any benefit from the perambulation beyond that shared by all parishioners. The reasonable construction of any *de facto* usage is the one the Court adopted: "...it is a thing of courtesy, not of duty..." (MS.).

(f) *Topsall et al. v. Ferrers*. T.15 Jac. C.P. Hobart, 175.

In this case, where Prohibition was again obtained, the decision was squarely on the reasonableness of a custom by ordinary standards. The parson and churchwardens of a London parish sued in the ecclesiastical court on the basis of the following alleged custom: When someone died in the parish and was buried outside it, a sum equivalent to that customarily paid for burying in the parish church was due to the parson and churchwardens. Ferrers's wife died in the parish and was buried elsewhere. The report says the case was debated, which suggests that defendant-in-Prohibition found something to say either in favor of the custom or in favor of leaving it to ecclesiastical judgment. In the event, however, the Court held the custom unreasonable in terms and granted Prohibition. One should probably say that the flaw in the custom was excessive generality: The Court focused on the burden on sojourners -- someone merely passing through or staying at an inn would be forced either to be buried in the strange parish where he happened to die or to pay twice for his burial. Had the custom applied only to inhabitants, serving to prevent evasion of a normal parish fee, it might have held up.

(g) *Naper v. Seward*. M. 16 Jac. C.P. Hobart, 248; Harl. 1549, f. 243b; Hetley, 133 (dating unclear -- *sub. nom.* *Napper v. Steward*).

This case, though slightly reported, represents a fairly strong exercise of "superintendancy" over the activities of ecclesiastical courts. An innovative type of suit was prohibited, partly, perhaps, for the mere reason that, it was unheard of -- "a strange attempt", Hobart's report calls it --, though I shall argue that the decision also reflects solicitude for the perceived rights of lay people.

Following the somewhat fuller MS. report: The farmers of a parsonage sued a parishioner for tithes. The parishioner pleaded a *modus* in the ecclesiastical court. I.e., he did not seek a Prohibition to secure common law trial of his alleged *modus*, but was content (at least so far) to have the ecclesiastical court assess it. The parishioner then cited various other

***Prohibitions to Control the Ambit of Remediable Wrong,  
or Merely to Prevent Imposition of Unwarranted Liability***

parishioners into the ecclesiastical court to testify under oath concerning tithing customs *in perpetuum rei memoriam*. The farmers -- plaintiffs in the original suit -- then sought and obtained a Prohibition to stop the proceeding against the parishioners cited to testify.

Note first that it was not the persons cited who sought the Prohibition. Had they done so, they would have been protesting quite reasonably against an unwonted extension of ecclesiastical liability. Why, in the absence of an established practice, should personally unconcerned people be coerced to come into court and required to testify under oath to make a perpetual record of the customs? It seems likely that the litigant who cited them did so in hope of advantage to himself in the immediate lawsuit. He would probably not have been debarred under ecclesiastical law from compelling non-party testimony going specifically to the issues in that suit. The objection to his attempt would seem to be that he was trying to cast a wider net, to protect himself and other parishioners against the eventuality of future disputes.

Prohibiting at the behest of a litigant presumably interested in suppressing evidence of tithing customs unfavorable to him may seem doubtful. It was, however, accepted doctrine that Prohibition should be awarded when merited, whoever moved for Prohibition and however clean his hands. The Prohibition in this case was disadvantageous to a tithe-payer trying to establish a commutation, but common law trial of the *modus* was open to him for the asking -- a reason for not indulging new procedures designed to improve his position in an ecclesiastical trial.

Against these considerations favoring Prohibition, one can adduce the usefulness of the procedure that was prohibited and the general argument that the ecclesiastical system should be trusted to develop its own ways of doing its own business (subject to the control of its own appellate courts.) Troublesome to individual laity the procedure might be, but the offsetting gains in efficient dispatch of tithe litigation inside the ecclesiastical system and avoidance of litigation could be worth the cost. Those are in any event meritorious goals for a legal system to have, though perhaps ones that should be achieved by Parliamentary legislation rather than interstitially.

(h) *Bishopp's Case*. H. 16 Jac. K.B. 2 Rolle, 71.

The Prohibition granted in this case is explicable by the proposition that a churchwarden is strictly a temporal officer. I.e., as the King's Bench saw the case, the Court did not intervene to prevent imposition of an unwarranted liability within the general area of

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

ecclesiastical concern, but to stop ecclesiastical proceedings against a party regarded as simply immune from answerability in ecclesiastical courts. In the circumstances of the case, however, the line between those two things was thin. A strong argument was made against Prohibition, the underlying assumption of which is that the ecclesiastical court was within the "general area of its concern", and Prohibition could possibly have been justified even conceding that.

A churchwarden was sued *ex officio* (on the ecclesiastical court's initiative rather than a private party's) to account for money received and spent by reason of his office. He sought a Prohibition on surmise that "*per legem terrae*" he should account to the minister, the succeeding churchwarden, and a majority of the parishioners, and that he had so accounted. This surmise does not state the point that apparently turned out to be decisive: that the office is temporal, wherefore any demand that can be made on the holder to account for his conduct of the office must be in a temporal court. Rather, the theory of the surmise would seem to be that a churchwarden whose account has been accepted by the minister, etc., is discharged. This is represented as a general rule of law barring the ecclesiastical court or any other. Whether or not the ecclesiastical court has an arguably legitimate interest, and whether or not its reopening the accounting would encroach on common law territory, "the law of the land" requires discharged churchwardens to be left alone.

Henden, arguing as counsel against Prohibition, saw that the temporal character of the office was apt to weigh heavily against him. He began by conceding that to various intents the office is temporal: Churchwardens are a secular corporation, competent to sue and be sued in personal actions, which includes power to sue for goods belonging to the church. Henden then said that a sitting churchwarden may bring a common law action against his predecessor as a stranger, "but not as against an officer for things that he does *ratione officii*." Therefore, Henden concluded, if the ex-churchwarden cannot be forced to account in an ecclesiastical court, there is no remedy against him. I am not sure how to understand this argument, but would suggest the following: Once the retiring churchwarden has accounted to the satisfaction of the minister, etc., he is out of danger of an *action of Account* -- he cannot be questioned again strictly in respect of his official conduct. But he is not discharged of all liability for his acts in office. If, for example, he has retained property belonging to the church or money received on the church's behalf, his successor may sue him in Trespass. It makes no difference that such items were overlooked or misrepresented in his accounting to

***Prohibitions to Control the Ambit of Remediable Wrong,  
or Merely to Prevent Imposition of Unwarranted Liability***

the minister, etc. In a sense, therefore, the accounting can be reopened, but not *qua* accounting. The ex-churchwarden's liability to turn over any property or money he has failed to account for is not, however, different in principle from a stranger's liability -- *anyone* who in the time of the last churchwarden came into possession of the church's property is answerable to the present churchwarden for it. It is no doubt arguable that these common law arrangements are adequate protection for the Church against a former churchwarden who has managed to get his account accepted by the minister, etc., but is not actually square with the Church. *Per Henden*, however, it is desirable that ex-churchwardens be subject to *legal* accounting somewhere, over and above their *in pais* accounting to the minister, etc. At any rate, the ecclesiastical courts are within their rights if they see fit to insist on such a legal accounting, for they have a legitimate interest, and the common law has vacated the field.

Henden went on to argue that a churchwarden is *quodam modo* a spiritual officer and therefore can appropriately be proceeded against in an ecclesiastical court in respect of his office. In support of this, he said, citing the Register, that a parish clerk may sue for his fees in an ecclesiastical court. (This is perhaps not a powerful argument. The point is that a parish clerk was to some intents a temporal officer -- as some Prohibition cases confirm, mostly ones concerning the power to appoint to the office --, yet surely *quodam modo* spiritual if the fees are recoverable in the spiritual court.)

No argument by counsel on the other side is reported. Prohibition was granted. The only indication of the Court's thinking is a brief declaration by Chief Justice Montagu that a churchwarden is a temporal officer "employed in ecclesiastical business" (vs. a temporal but *quodam modo* spiritual one.) The apparent reason for decision was the sensible-enough idea that, whatever else is true, accounting for the conduct of a temporal office cannot be ecclesiastical business. Having failed to convince the Court that the office was in some sense spiritual, Henden got no hearing for his argument that the interest of the parish church was insufficiently protected without an ecclesiastical remedy.

At the end of the report, there is a *quaere* from the reporter: Suppose a retiring churchwarden is requested by the minister to render an account and refuses. Is the ecclesiastical court still powerless to cite him to account there? Montagu's position seems to imply an affirmative answer. "Can that be right?", the reporter is asking. The question would not be a good one if the minister and other parties entitled to an accounting could clearly bring Account at common law. I therefore take it that their common law position was at best

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

cloudy. (Particularly, where do the minister -- the reporter's example -- and the parishioners stand? The successor churchwardens had corporate status to sue at common law. At least if they had not themselves accepted the predecessor's account, they might not be helpless. But what of the other parties equally entitled to be satisfied?) In short, it looks as if the church's interests may *not* have been adequately protected without an ecclesiastical role, though Henden as reported did not quite put his finger on the reason why.

With this in mind, one can see how the theory of the surmise as I analyze it above might be a better basis for Prohibition than simply classifying the office as purely temporal. The common law court might insist that ecclesiastical courts not rescutinize accepted accounts, while permitting them to call ex-churchwardens to account before acceptance by minister, parishioners, and successors. This course requires, however, a willingness to concede generic jurisdiction and assume detailed control over its exercise. The Court's decision implies disapproval of that.

(i) Elizabeth Shipden v. Dr. Redmond. T. 20 Jac. K.B. Lansd. 1080, f. 148.

From the Bar in this case came the strongest assertion I have found of common law authority to regulate innovation in the ecclesiastical law. Moving for Prohibition, Serjeant Attoe claimed that his client was the victim of "a novel law of the Church of England" and said, "...it is the prerogative of this court to maintain the freedom of the subjects from foreign invasion and to enclose every court within bounds." The disposition of the case by the King's Bench can be described as a highly ambivalent endorsement of Attoe's proposition.

The Chancellor of Norwich, Redmond, made and published an ordinance that every woman coming for churching after childbirth "according to the law of the Church of England" should be covered with a white veil. Shipden, "being admonished," refused to conform, upon which contempt she was excommunicated, and upon certification to the Chancery a writ *De excommunicato capiendo* was awarded. (I follow the statement of the case in the report exactly. It presumably comes from the surmise, though the reporter may have supplemented what was admitted therein with further specification of the events picked up from oral interchange in court. The detail to note in that the Chancellor of Norwich seems to have been careful to avoid *procedural* irregularity. The ordinance was duly publicized. Shipden was admonished before she was punished -- she would presumably have had an opportunity to raise legal objections within the ecclesiastical system to the rule she was accused of violating. The phrase "according to the law of the Church of England" is

***Prohibitions to Control the Ambit of Remediable Wrong,  
or Merely to Prevent Imposition of Unwarranted Liability***

ambiguously placed. It may only recite the obvious -- that churching after childbirth was established practice. On the other hand, the phrase may indicate that the Chancellor of Norwich so drew his ordinance as to disown any claim to make new law or even to expound the old. I.e., he may have purported in terms merely to declare the indisputable rule that a white veil must be worn.)

The Court took neither of two possible courses: (1) It could have refused Prohibition on the ground that the precise rules about churching were purely ecclesiastical business -- if Shipden wanted to complain that she was punished under an unwarranted rule, she must do so through the ecclesiastical courts. (2) The Court could have prohibited on the basis of its impression that the veil requirement was at least dubious. (The judges were at least not confident that the requirement was good ecclesiastical law.) It would then have been necessary to take evidence of what the ecclesiastical law actually was -- either on a motion for Consultation or on formal pleading. The normal, or at any rate the most correct, means to that would be to hear civilian counsel on both sides. Alternatively, decision could simply be deferred until evidence of the ecclesiastical law was taken *in court and probably through the agency of the parties*. (As it were, "We can neither prohibit nor refuse to until we are informed of the ecclesiastical law. Now let the parties try to convince us one way or the other." This approach probably implies a presumption against Prohibition, in the absence of a strong inclination on the judges part to believe or their own knowledge that Shipden was in the right.) Definitive action without firm knowledge of the ecclesiastical law would be precluded because the requirement in question can hardly be called intrinsically oppressive. I.e., the King's Bench could surely not take the position in this case that *whatever* the correct ecclesiastical rule the Court would not suffer the Church to afflict the subject with petty regulations over and above its basic requirement that women participate in the churching ceremony. The burden of this Section is to ask whether that type of position was *ever* taken, and we have found precious little evidence that it was. (*Possibly* impanelment of random parishioners on visitation juries and some forms of compelling non-party testimony about tithing customs would have been banned even in the face of good evidence or strong ecclesiastical assurances that these practices were well-warranted in Church law. In the actual cases concerned with them, the common law judges probably believed to a moral certainty that no warrant could be made out.)

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

Instead of either of the courses above, the King's Bench referred the question of the ecclesiastical law to the Archbishop of Canterbury. He called together the six other bishops who happened to be in London, and this *ad hoc* committee resolved and certified that it was "the ancient custom of the Church of England" for women coming to be churched to wear a veil. Prohibition was thereupon denied.

The Court's way of proceeding can be seen as no more than a sensible short-cut in lieu of the second course I have outlined. Discovering the ecclesiastical law informally -- as opposed to inviting civilian argument -- was by no means unprecedented. I have suggested that discovering it promptly was essential if the Court was neither ready to rule out Prohibition on general principle nor so convinced that Shipden was right that it could responsibly drive the Chancellor of Norwich to his last resort (formal pleading, which would in the end require giving the Chancellor a chance to argue through civilian counsel that he was justified by ecclesiastical law.)

One hint in the report gives me pause about leaving the case at that. The judges are said to have consulted the Archbishop "because it was a novel case which would make a precedent." This suggests a perceived need to justify the reference to the Archbishop -- not as an informal device, because more solemn means to respond to a new and puzzling case are conceivable, but as an appropriate measure at all. How could it have looked possibly inappropriate to seek information about the ecclesiastical law, when there was no reasonable basis for prohibiting without it? For a further question: In what sense was the case novel and a potential precedent-setter?

The most significant reason for regarding the case as delicate would be the Court's realization that it was being asked to enforce the true ecclesiastical law by Prohibition. Being so asked was not exactly a new case, but it was certainly a rare one, especially in such blatant form. A decision to prohibit *would* be an important precedent -- an invitation to people who thought they were the victims of mistaken ecclesiastical law to seek Prohibitions. The easy way to express these qualms would have been to deny Prohibition. Could the judges have thought that a decision that way might be a dangerous precedent too -- an excessively clear repudiation of authority to use the Prohibition for more than self-protective purposes, a hobbling precedent if *serious* harm to someone in consequence of an ecclesiastical official's misconstruction of ecclesiastical law should be complained of?

***Prohibitions to Control the Ambit of Remediable Wrong,  
or Merely to Prevent Imposition of Unwarranted Liability***

If this catches the judges' state of mind, their reference to the Archbishop was an intelligent demonstration of judicial reserve. As it were: "We have no relish for meddling in this petty Church matter. We have no zeal for coming to the relief of a Puritan woman bent on making difficulties. [That surely describes Mrs. Shipden. She was ready to go to a lot of trouble to avoid wearing a veil or truckling to an episcopal official.] Yet we are reluctant to deny Prohibition so as to imply that we could *never* have interest to assume a supervisory role over irresponsible behavior in the ecclesiastical sphere. We would be much happier refusing Prohibition just because there is no reason to think Mrs. Shipden *is* the victim of misapplied ecclesiastical law, leaving deeper questions open. But we need grounds for believing what we are inclined to believe. Denying Prohibition without manifestly having them would carry just the general implication we are afraid of. We probably could find out what we need to seem to be sure of by more solemn means than taking the opinion of high-ranking churchmen. But that would take time and argument and would display us deliberating about the ecclesiastical law -- something common law courts should be discouraged from doing, though it might be unavoidable in case of more serious possible misconduct than we would face here in the unlikely event that there was any misconduct at all on Dr. Redmond's part. So let us simply ask the Archbishop."

For a final twist: Serjeant Attoe in effect challenged the judges to deny Prohibition if they found the ecclesiastical law against him. For, after his bold declaration of the theory on which Prohibition should be considered, he said (in the form of an offer -- "he offers to the court") that if there was any such custom in the Church of England as the veiling requirement his client would obey. The probable explanation of this move is Attoe's realization that he was representing a Puritan unlikely to enjoy much sympathy at best, and likely to enjoy less if she seemed to be asking for anything beyond her strict rights under the law of the established Church. Attoe presumably wanted to draw real debate about the ecclesiastical law. He may well have had reason to believe that if put to proving that white veils were *de rigueur* Dr. Redmond would have trouble. The Court's device of taking the Archbishop's word for it was a clever response to Attoe's challenge. (The Archbishop, one might add, played his part intelligently by presenting the Court with the resolution of a unanimous committee of experts.)

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

(j) *Hitchcocke v. Hoskins*. M. 10 Car. C.P. Harl. 4813, f. 100.

Prohibition was denied in this case. It is not clear that the ecclesiastical suit was objected to as inherently unreasonable or abusive, though a procedurally interesting twist in the case suggests that that may have been a basis for seeking Prohibition over and above the principal one. The main basis, unsuccessful in the event, was a claim that the suit contravened statute.

A rectory was appropriated in the reign of Edw. II. The instrument of appropriation contained an express clause empowering the Bishop to augment the vicar's endowment whenever he judged it necessary. At some time in the past (unspecified except as long ago, clearly before the Reformation), the appropriated rectory became part of a prebend belonging to the "Custos of Choristers" of Salisbury Cathedral. The vicar's endowment had once been increased (again at an unspecified past time) from £ 8 to 20 mks. *Hitchcocke*, the present vicar, sued *Hoskins*, farmer of the rectory, for an augmentation. The libel recited that the parish was large and that *Hoskins* held the rectory by a lease for three lives, rendering £ 36 rent as against an annual value of £ 300. (Note the fact, which proved material, that the farmer alone was ecclesiastical defendant; the prebendary-reversioner was not joined.)

Prohibition was sought at least primarily on the ground that the value of the rectory was guaranteed by one or more of the Reformation statutes, so that cutting into it by an augmentation of the vicarage was now forbidden. The Court flatly rejected this contention. The merits of the point of statutory construction need not concern us here. In essence: The rectory in question was continuously in the hands of an undissolved ecclesiastical body, never came to the King's hands, and was never turned into lay fee in the way most appropriated livings were; it was simply untouched by the statutes, in the Court's opinion. The report does not indicate that any other ground for Prohibition was put forward. The Court mentioned the authorization of augmentations in the original endowment and the fact that the power to augment had once been exercised. Pointing to these circumstances seems only to underscore the obvious -- that once the statutes were ruled irrelevant there could be no basic objection to the ecclesiastical suit. The Court's language at most suggests that in the same case without the authorization clause and evidence that the authority to augment had not gone unused over a very long time the judges might have been tempted to intervene. I.e., they might have considered an augmentation suit without such warrant beyond the ecclesiastical court's powers, whatever that court's view of the matter or whatever the ecclesiastical law. I do not think it is at all certain that they would have.

***Prohibitions to Control the Ambit of Remediable Wrong,  
or Merely to Prevent Imposition of Unwarranted Liability***

Prohibition was accordingly denied. But in fact the Common Pleas was not happy with the ecclesiastical suit as it stood. While denying Prohibition, the Court "directed" the vicar to proceed *against the rector/reversioner as well as the farmer*. This is a most unusual procedural step. The ecclesiastical suit could have been prohibited as formally improper though substantively unexceptionable, leaving the vicar to start a new suit. It could have been prohibited conditionally -- unless the vicar recast his present suit to make the reversioner co-defendant. What does resorting to the milder measure, the "direction", signify? Scrupulosity about assuming "superintendancy" over ecclesiastical business, I should think. I.e.: The judges considered the suit against the farmer alone plainly improper. They thought the ecclesiastical court should have seen this and required the suit to be recast. But they were unwilling to use the Prohibition to straighten out proceedings which in the end were the ecclesiastical court's affair. Foreclosed from mandatory action, they could do no more than say in effect to the ecclesiastical plaintiff, "Look, your suit in its present form makes no sense -- revise it, get the question whether you are entitled to an augmentation settled in proper form and everyone concerned, including ourselves, can be at peace." We shall soon see the sequel of the Court's so acting.

First we need to ask what was wrong with suing the farmer alone. On one level, the answer seems fairly obvious. How could it have occurred to the vicar suing for augmentation *not* to make the ultimate owner of the rectory a party? Surely he would have wanted a judgment that would encumber the rectory with a larger endowment for the indefinite future. It must surely be more than doubtful that a judgment against a lessee for three lives would bind the reversion after termination of the lessee's estate. Could the suit in its present form be anything but a mistake -- or, alternatively, the product of motives either whimsical or disreputable? (For personal reasons the vicar did not want to engage the prebendary/reversioner in a lawsuit. He calculated that the farmer would put up a weaker defense than the reversioner or enjoy less sympathy from the ecclesiastical court than a clerical defendant. He hoped for a judgment against the farmer in full realization that it would not bind the reversioner, but calculated that future rectors -- when the lease expired -- would acquiesce in the augmentation *de facto* or would in any event have trouble winning a future lawsuit in the face of an earlier judicial determination that an augmentation was necessary.) If the situation is seen in this way, the Court in "directing" the vicar would have been partly advising him of his long-run interest and partly reminding him of his obligation

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

to the Church and his rector. (As it were, "It certainly looks as if you have a good claim to an augmentation, but it is irresponsible not to pursue one in a form that will give a hearing to all interested parties and produce a clear legal settlement. If pursuing your purpose properly goes against your preference or exposes you to some litigative risks you'd rather avoid -- well, if we were the ecclesiastical court we would say 'too bad.' ' Anyhow, your preferences are dubiously in your interest, or that of your successors in the vicarage, whom you should also be thinking about.")

Thus clean law administration and fairness to the rector recommend suing particular tenant and reversioner jointly. Can suing the farmer alone be considered unfair to him, apart from the possibility of mere bias on the ecclesiastical court's part? I think it can, but the sense is subtle.

The farmer in this case held a "beneficial" lease. He was paying as rent only about 12% of what he received in income. He had for the most part paid for his temporary interest in income-yielding property in the form of a fine (lump sum to the lessor at the beginning of the lease.) He clearly took his estate subject to the power of augmentation. I.e., there is no suggestion in the case that the farmer was immune from the risk that the vicar's endowment would be increased during his term. If he did not contract with the lessor to secure him against this risk, it would presumptively be discounted in the amount of the fine together with other factors (the uncertainty of how long a lease for three lives will last and mere futurity -- any fine will be reduced to account for the value to the lessor of cash in hand now against rental income in the future.) So the farmer would have no complaint if he were sued jointly with the reversioner and lost income in the event of the vicar's winning his augmentation.

Against being sued singly, however, he can complain that non-representation of the rector's putative interest in preventing an augmentation would increase the odds of the augmentation's being granted. This is not quite the same as saying that the ecclesiastical court might be tempted to grant the augmentation when it saw the situation in this case: about 83% of the income from the living going to no ecclesiastical purpose whatever for an indefinite period of three lives. The temptation would probably be real enough. Of course it should be resisted by bearing in mind that the rector had already reaped in the form of his fine -- the ecclesiastical purposes he was responsible for had already been fulfilled. (There is no cynicism here. The power of appropriating institutions to grant beneficial leases -- in

***Prohibitions to Control the Ambit of Remediable Wrong,  
or Merely to Prevent Imposition of Unwarranted Liability***

effect to borrow money -- could be an essential means to their accomplishing the Church's ends, such as building.) But this does not mean that the temptation would not be felt. It would be all the greater if the suit were clearly understood as I have suggested it must be -- as a suit for a temporary augmentation in effect, since the rector could hardly be bound legally by a judgment against the farmer. It does not extend great faith and credit to the ecclesiastical court to suspect it of willingness to soak the lay farmer here and now without necessary prejudice to the rector, but it would not be surprising if the suspicion crossed the judges' minds. Aside from that, however, there remains the following argument:

The justification for appropriations was that some of the income normally tapped by the parish clergy would be better spent for the benefit of the Church as a whole by other ecclesiastical institutions. (That the justification was reduced to absurdity by the laicization of most appropriated livings at the Reformation -- for the benefit of the Crown and its grantees -- is irrelevant for the case at hand.) Vicarial augmentations should clearly not be awarded *only* because the value of the living had increased in such a way that the vicar's share of the income had diminished in proportion to the rector's. The ecclesiastical court should of course consider purchasing power, changes in the magnitude of the vicar's job, and similar circumstances (e.g., clerical marriage.) But once those are allowed for, the controlling criterion should be whether the present income under present conditions is better devoted to one ecclesiastical use or another. Can it really weigh that when the *particular* ecclesiastical institution to which disposal of the rectorial share of the income is entrusted is not party to the suit? Let us give every benefit of the doubt to the ecclesiastical court on the scores of fair intentions and its own competence to judge the Church's best interest -- the court has no inclination to be hard on the farmer; it understands that he has presumptively paid fair value for his expectations and should not have them reduced unless as a necessary incident of a long-term readjustment in the allotment of an item of Church income; it will be fully judicious in exercising its authority to decide how the Church's general interest can best be served. Even so, can the court -- can *any* court -- do the best possible job without formally hearing all concerned? Try as it may, can it be sure that it has not been unduly swayed by the perhaps patent needs of the vicar when it has not actually heard what the rector (speaking in part as a private party, but also in a sense as a fiduciary for the Church) would say in favor of leaving the lion's share of the income to him for the foreseeable future? In short, it would

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

simply be better judicial practice -- better insurance against even the aspersion of bias -- for the ecclesiastical court to insist on a suit against both the lessee and the reversioner.

The report does not indicate firmly which of the various (not mutually exclusive) reasons for objecting to the ecclesiastical suit most influenced the Common Pleas to "direct" its recasting. The vicar is said to have been told to sue the rector as well as the tenant "who has paid a fine and who now has an estate of freehold." Perhaps there is a hint in the emphasis that unfairness to the farmer in one sense or another was central.

Now for the sequel to the original denial of Prohibition *cum* "direction." The vicar did not change his suit as instructed, and the ecclesiastical court proceeded with it in the original form. The vicar was awarded all the tithes from one village, worth £40, plus a few miscellaneous revenues -- a very substantial augmentation. Prohibition was moved for anew.

The report does not give a clear account of the arguments on the second round. The statutes were relied on again and again held inapplicable by the Court. Plaintiff-in-Prohibition must have hoped that the judges would take stronger action than before when they saw their "direction" disregarded and contemplated the outcome of the suit with the reversioner unjoined. There is no firm basis for saying whether the non-statutory objections to the form of the suit were urged more vigorously than on the first try. The second surmise does appear to have called attention to the flouted "direction." The result is clearly reported: Prohibition was again denied. In the upshot, *Hitchcocke v. Hoskins* is a pretty emphatic demonstration of judicial reluctance to supervise the handling of litigation substantively proper to the ecclesiastical courts. Disapproving of what they saw happening in the ecclesiastical sphere, they first tried an "off the record" way of rectifying it, and when their attempt failed they still declined to set a precedent of active "superintendancy."

Note: It will be evident that *Hitchcocke* as it unfolded properly belongs in Sub-section C below, because apart from statute the form (failure to join an appropriate co-defendant) was the objection to the ecclesiastical suit rather than the substance of the claim. I have placed it here owing to affinity with the next case following, which shows that the very legitimacy of suits for vicarial augmentations could be attacked. It was not attacked in *Hitchcocke*, and probably could not have been because of the express authorization of episcopal augmentations in the instrument of appropriation. The social importance and legal intricacy of the problems common to the two cases, however, make it desirable to look at them together.

***Prohibitions to Control the Ambit of Remediable Wrong,  
or Merely to Prevent Imposition of Unwarranted Liability***

(k) King v. Sutton and Ruth his Wife. H. 13 - T. 14 Car. K.B. Harg. 378, f. 79b and (second argument) f. 89b.

This case, like the last, concerns augmentation of vicarial endowments. I shall discuss only one of its elements here. The principal issue is whether the Reformation statutes should be construed as destroying ecclesiastical authority to increase a vicar's endowment as against a lay impropiator. So stated, this issue presupposes that before the statutes the authority existed. Counsel argued, however, about whether it did exist in the days when there were no lay impropiators. I.e., it was urged in favor of Prohibition that even if statute had not intervened, the vicar's suit to have his endowment augmented would have been beyond the scope of ecclesiastical courts; the contrary was urged against Prohibition. I shall deal only with this debate here, leaving aside the intricate arguments over the interpretation of the statutes.

In his ecclesiastical suit, the vicar alleged that he was the minister of a large and populous parish; that it was general ecclesiastical law in the realm that vicars should have a "congruent" portion of tithes and other profits; that the annual income of the impropriated parish was £ 150 as against his income of £ 9.6s. 8d.; that the original license to appropriate the living contained a proviso "*quod vicaria perpetua ibidem sufficienter dotata sit*"; that the vicar's income was not a "congruent" portion; and that the vicar had unsuccessfully requested the lay rector to increase his portion voluntarily. (In contrast to the last case above, note two points. First, in the previous case the act of appropriation contained express authorization for the Bishop to increase the vicarial endowment, whereas here the closest equivalent at the vicar's disposal was language in the license making it conditional on the endowment's sufficiency. Secondly, the conception of a "congruent" endowment put forward here may be slightly at odds with my argument above that a substantial increase in the disproportion between rectorial and vicarial income is not ipso facto grounds for augmentation. That of course depends on the precise meaning to be given to a vague term. The vicar in the instant case may have taken the position that less than 7% of the income was too little no matter what. If that were accepted, it would from one point of view not matter in *Hitchcocke v. Hoskins* whether the suit was brought against the farmer alone or the farmer and the reversioner -- the proportions are exclusively relevant, whatever ecclesiastical purposes are being fulfilled by the rival sharers.)

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

Prohibition was granted in *King v. Sutton*, in all probability because on first sight the ecclesiastical suit seemed to contravene the statutes protecting lay impropriators. The very well-reported arguments of counsel are on motion for Consultation. The report does not tell whether the motion was granted and contains no indications of judicial opinion.

A good deal of medieval authority was vouched on both sides of the question whether augmentation suits are intrinsically lawful. (See note below.) Counsel maintaining the affirmative conceded that the very nature of an appropriation did not entail the endowment of a vicarage. By the primal ecclesiastical law, unrevised by legislation, the rector of an appropriated living could have the functions of parochial minister performed by a mere hired curate. This was changed by international Church legislation in the middle ages (Council of Vienne, 1311-12.) Bishops were authorized to assign a portion to a vicar in default of the patron-rector's doing so voluntarily. Per counsel opposed to Prohibition, this legislation had been "received" in England and had been the operative law. (By the post-Reformation orthodoxy, that means not only that the legislation had been recognized by the English ecclesiastical courts, but also that it had been countenanced by the secular law.) Counsel favoring Prohibition disputed the reception of the legislation.

Episcopal power to augment endowments does not automatically follow from acceptance of the legislation in some sense. By-passing finer points of interpretation (see note), it was argued in favor of Prohibition that the patron-rector's assent was required to augment an endowment. It was also argued that the monarch's assent was necessary. The reason for that was that at least since the mid-14th century vicars had characteristically been bodies politic. Their existence as such was dependent on royal license. *Per* the argument, when the King has created a corporation endowed with such-and-such income-producing rights, the ecclesiastical authorities may not on their own cause it to be endowed with more.

Unfortunately, we have no information as to what the judges thought about these matters. They would have been avoidable if the Court was of the opinion that lay impropriators were protected against augmentations by statute. My guess is that they would have come to that conclusion. The meaning of the Reformation statutes was discussed by counsel with much greater care in this case than elsewhere, however, so that guessing is hazardous. In the dimension that is independent of statute, the arguments on both sides assume the common law court's title or responsibility to decide the legitimacy of vicarial augmentation suits *per se*. The presence of lay interests seems to me to make this inevitable.

***Prohibitions to Control the Ambit of Remediable Wrong,  
or Merely to Prevent Imposition of Unwarranted Liability***

If lay impropiators were unheard of, there might be some basis for claiming that *whether* such suits are legitimate -- a question turning on the meaning of the medieval Church legislation and the implications of English ecclesiastical practice in the light of it -- should be left to the ecclesiastical system. One could then argue that generic ecclesiastical responsibility for the distribution of Church income among clerics implies jurisdiction to determine whether a particular type of suit affecting that is warranted by law. Even if the Reformation statutes did not have the direct effect of protecting lay impropiators against vicarial augmentations, they gave the common law courts an interest in making sure that loss was not unwarrantably imposed on impropiators. They effected this merely by making it possible for laymen to have an economic stake in the value of rectories. Disinterested control of the "ambit of remediable wrong" goes farther.

**Note on Authorities**

Medieval authority cited in this case is not very decisive for the central non-statutory question: May a vicar sue in an ecclesiastical court for an augmentation of his endowment? There are no examples of attempts, successful or unsuccessful, to prohibit such suits. The evidence consists in collateral remarks in a few Year Book cases. Some tend to support "reception" in England of the international Church's legislation. I.e., they provide reasonable grounds for supposing that not only ecclesiastical officials, but common lawyers and judges as well, acknowledged the Ordinary's power to increase vicarial endowments whether the rector-patron was willing or not (and whether or not such power was expressly conferred on the Ordinary in the original instrument of endowment, as in *Hitchcocke v. Hoskins*.) Only one piece of comparable evidence was produced on the other side, but it is quite possibly the strongest of these inherently oblique exhibits.

In *King v. Sutton*, three cases were relied on by counsel urging that the Ordinary *did* have power to augment:

(1) 2 Hen. 4, 9-10. At the time a vicarage was created, the vicar was made to take an oath not to try to increase his endowment or claim as part of it more than certain specified property. He was also made to enter a bond, payable into the Papal Chamber on forfeiture, guaranteeing that he would not do so. The vicar later brought suit claiming further endowment. The rector-patron thereupon sued the vicar before the Pope's Collector in England, claiming breach of faith or perjury and also forfeiture of the bond. The rector's suit

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

was prohibited, and subsequently Consultation was sought. The principal issues were whether the Collector had any jurisdiction in England, whether it was in any event the business of a secular court to inquire into intra-ecclesiastical jurisdiction, and incidentally whether the rector's suit would have been unexceptionable in a regular English ecclesiastical court. (The last question was only taken up after the case had been referred to the King's Council and that body had decided against Consultation, probably on the ground that the Collector lacked status as an ecclesiastical judge in England and was preventable from acting as one *de facto* upon complaint made.)

For the matter we are concerned with, the case only shows that no question was raised about the legality of the vicar's augmentation suit. The ecclesiastical authorities assumed he was entitled to sue, for otherwise they would not have exacted the oath and bond to prevent him from actually bringing suit. Nothing was said by the common lawyers and judges speaking in the Year Book to suggest that they thought the assumption unwarranted, but that is not powerful evidence of their acquiescence -- they were not called upon to decide the point. That the rector did not seek to prohibit the vicar's suit is a basis for inferring that Prohibition would not lie. The inference is at best not overwhelming, and it is weakened by the fact that in the instant case the rector had and used other resources. (The objection to any form of ecclesiastical jurisdiction over the rector's suit, when that is discussed at the end of the report, was fear lest a finding that the vicar had broken his oath would lead in effect to specific enforcement of it. I.e., he would be ordered to do what he had sworn to, which would mean abandoning his augmentation suit. While Prohibition, if available, might have been the surest remedy, the rector was perhaps in a position to achieve the same result without stepping outside the ecclesiastical sphere.)

(2) 40 Edw. 3, 28. This is a long and deep case on whether a vicar may maintain *Juris utrum* against his rector-patron. (In effect: May the vicar litigate with his rector over title to real property comprised in the former's endowment -- and by extension, explicitly discussed in the report, over real-estate interests of the sort protected by assizes, short of ultimate title?) At several points in the discussion of this problem, it is mentioned that Ordinaries have power to rearrange the distribution of property and incomes between parson and vicar, either by increasing the vicar's share or by doing away with vicarages when the combined value of parsonage and vicarage becomes too little to support both. This is relevant, though not dispositive, for the question of *Utrum's* availability to vicars. There is a certain oddity in

***Prohibitions to Control the Ambit of Remediable Wrong,  
or Merely to Prevent Imposition of Unwarranted Liability***

thinking of the vicar as fully owner of his endowment-property as against the parson, and therefore competent to engage him in a real action, when all he has could be taken away if a third party -- the Ordinary -- holds that changed circumstances require it. (Power to augment by itself, without the counterpart power to disendow, hardly seems to militate in favor of downgrading the vicar's property interest. It is hard to imagine the former power existing by itself, however, and all the observations in the Year Book envisage the counterpart. It would be strange law to hold that the vicar's position may be improved, or at least be kept constant in a relative sense, if the parsonage prospers, but that the vicarage must be left untouched if the parsonage dwindles, or if both livings shrink so far that a merger is the only way to maintain one viable benefice.)

Counsel in *King v. Sutton* seem to make no more of the case than that it is evidence that common lawyers in the 14th century took the Ordinary's power to augment for granted. I am not sure it is quite as strong as they pretend even for that. One of the speakers in the Year Book, though not others who touch on the point, says that Ordinaries may recast vicarages *with the patron's concurrence*. No doubt he is speaking casually enough; from his point of view, even if the Ordinary cannot impose a rearrangement when the patron is unwilling, the vicar's interest is still too precarious to be protectable against the parson by real action; that is well-taken in so far as one is thinking about disendowment rather than augmentation. (A patron-rector -- the normal case -- would have no conceivable motive to resist disendowment. The matter is altered if the parsonage and the patronage were severed, which was possible -- see the next case below. Insistence on the patron's assent could refer only to the latter situation, but it is unlikely.) In short, there is a shadow of ambiguity as to whether the Year Book speakers were contemplating episcopal power to *force* a redistribution of shares between parson and vicar. (There was no question but that the bishop's assent was required to any change the rector-patron is willing to make.)

(3) 31 Hen. 6, 14. This case presents another discussion of whether vicarages can be regarded as sufficiently independent and durable interests to count for certain legal purposes. The Ordinary's power to augment and to disendow is again brought up as a reason for not so regarding them -- for taking them as precarious dependencies of the parsonages over them. The context is the meaning of a statutory rule. *Circumspecte Agatis*, tracked by another dubious statute, *De Regia Prohibitione*, provided that ecclesiastical courts should not be prohibited when a rector was suing for tithes amounting to no more than 1/4th of the total

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

value of his living. The instant case involved a rector's suit for tithes, and one of the issues a propos of whether it should be prohibited was how "1/4th of the value of the living" should be calculated. When a rectory has a dependent vicarage, does this mean 1/4th of the *combined* value of the parsonage and the vicarage, or 1/4th of the value of the parsonage alone?

Serjeant Yelverton, arguing for the "combined value" theory and to that end for the legal precariousness of vicarages, says that if either the parsonage or the vicarage decays the arrangement between them can be altered. The vicarage may be done away with if the combined value shrinks drastically, and if the vicarage becomes impoverished its share of the combined value may be increased at the parsonage's expense. Yelverton does not say in so many words that these readjustments are merely within the Ordinary's power, but nothing suggests the contrary. He emphasizes the power to augment as much as the power to disendow, and the bishop's power to do the former without the patron's consent is more relevant in the context of this case than for the debate over *Utrum* above. (If the vicar were *only* liable under changed conditions to lose all his endowment, there would be some reason to think of the endowment as "less than property in a full sense." If the parson were *only* liable to have some of his income transferred to the vicar, his capacity to sue without fear of Prohibition would be unstable. Last year he could safely sue for £ 20 because his parsonage was worth £ 100; this year, because the vicar has won a £ 30 augmentation and the parsonage is worth only £ 70, parson's £ 20 suit is over the limit and in danger of Prohibition. Arguably, that is an inconvenience. It is fairer and a better guess at statutory intent to suppose that the parson is entitled to count on the combined value -- a figure which may of course rise or fall from "natural" causes, but which is at least not variable whenever the bishop sees fit to revise the terms of appropriation.)

Ecclesiastical lawyers were present on the occasion reported in the Year Book. (One of them, a Dr. Newton, speaks to a separate technical point of Church law concerning which the common lawyers needed to be informed.) These "Doctors" are reported as concurring with Yelverton. From the Bench, Chief Justice Fortescue takes issue with Yelverton's *conclusion*. I.e., he takes vicarages to be autonomous and presumptively perpetual entities, rather than precarious dependencies, and for that reason concludes that "1/4th of the value of the living" refers to the value of the parsonage alone. His ground is that the parson, originally patron, may convey the patronage of the vicarage to someone else while retaining

***Prohibitions to Control the Ambit of Remediable Wrong,  
or Merely to Prevent Imposition of Unwarranted Liability***

the property and income-rights of the parsonage. Fortescue admits expressly, however, that "the vicarage or parsonage can be in such decay that all the vicarage will be rejoined to the parsonage." He does not in so many words make the further concession that if the vicarage decays, or even shrinks in proportion to the value of the parsonage, it may be augmented. He makes no distinction between disendowment and augmentation, however, and leaves it to be understood that he has no quarrel with Yelverton's premises as to episcopal power, only with his inference therefrom. There is no other expression of judicial opinion.

Though hardly head-on, 31 Hen. 6 is the best evidence proffered for pre-Reformation consensus that episcopal power to augment vicarial endowments existed in England. This seems to have been acknowledged by the lawyers on the other side in *King v. Sutton* -- i.e., those arguing that power of augmentation without the rector-patron's assent was *not* accepted in England. For they proposed a way around that Year Book (while saying nothing about their opponents' weaker citations.)

Their argument is that the discussion in 31 Hen. 6 has reference to conditions before the statute of 14 Edw. 3, c. 17, which they take as decisive for conferring corporate status on vicars. (This is part of counsel's larger contention, which I have indicated in the text above, that vicars are bodies politic, bodies politic cannot be created without royal license, and therefore at least royal assent -- over and above the bishop's judgment -- is necessary for any alteration of vicars' endowments. These counsel were willing to concede as a possibility, though not a certainty, that pre-corporate vicarages could be augmented or abolished by Ordinaries acting alone.) It makes legalistic sense to argue that the discussion in 31 Hen. 6 was about that "pre-corporate" period, because at issue in the Year Book was the meaning of statutes from the time before 14 Edw. 3 (*Circumspecte Agatis* was a reputed statute of 13 Edw. 1, and *De Regia Prohibitione* was recorded among statutes of uncertain date from the time of Hen. 3 and the first two Edwards.) Realistically, there can surely be no doubt that Yelverton and Fortescue thought they were talking about the law of the 1450s. If complications arising from vicars' corporate status occurred to them, they would probably have said what perfectly well can be: corporate status and the need for royal license to appropriate a parish in the first place do not necessarily imply that bishops may not revise the terms of appropriations under changed conditions.

With or without fancy footwork, counsel opposed to augmentations could well say that that the other side had not proved its case. Did they have good evidence to prove their own?

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

They put heavy reliance on 22 Edw. 4. 24, claiming that Year Book as "express authority that at common law he [the Ordinary] may not increase [a vicar's endowment] without the assent of the patron." I have discussed this Year Book case extensively above ("Note on Authorities" following "Spiritual Pensions" -- I-E -- Case #9.) All that is relevant for present purposes is the exchange between Pigot and Catesby at the end of that report.

Pigot, from the Bar, takes the position that the terms of a vicarial augmentation *with the patron's assent* may be tried at common law if they come in question there in due course (as if, by analogy with the instant case in the Year Book -- which did not involve an augmentation --, an action of Trespass between parson and vicar turns out to depend on which one is entitled to certain tithes.) Pigot says nothing about augmentations on the authority of the bishop alone. It would be nothing to his purpose to do so -- if those were lawful, which Pigot says nothing about, they might well be considered so "purely spiritual" that the terms would be untriable at common law, whereas the patron's involvement in a resettlement lends it temporal flavor.

Justice Catesby, with the apparent concurrence of the other judges, disagrees with Pigot. His position is that an augmentation with the patron's assent may not be tried at common law because notwithstanding the patron's involvement it is a strictly "spiritual" act, tantamount to a judgment in an *infra vires* ecclesiastical suit. No more than Pigot did Catesby have direct occasion to comment on whether an augmentation may be imposed without the patron's assent. His words do, however, seem to express an opinion on that. Whereas Pigot simply puts the perfectly possible case of a consensual augmentation and proceeds with his point that factual issues about its terms are triable at common law, Catesby begins his reply as follows: "That case cannot be law for this cause: for there is no augmentation unless it is by the parson, by the patron, and by the Ordinary, and by their assent, and also, none will be made unless for insufficiency of the vicar's previous endowment. And when such augmentation is made, a spiritual act is made [etc. -- to the conclusion that a jury may not say what the 'spiritual act' provided.]" Although Catesby in the case at hand was not called on to say whether every lawful augmentation is with the patron's assent, he certainly appears to say that it is. Even if his opinion is wholly incidental, it is a rather sharper position on the question than anything shown *contra*. As the opinion is stated, moreover, "wholly incidental" seems too strong. Catesby does not say: "An augmentation with the patron's assent is a spiritual act -- one on the Ordinary's authority alone (if that were possible, as it is

*Prohibitions to Control the Ambit of Remediable Wrong,  
or Merely to Prevent Imposition of Unwarranted Liability*

not) would be a spiritual act even more obviously." Rather, he says: "An augmentation with the patron's assent is a spiritual act because it is the only kind there is." The thought would seem to be that when the ecclesiastical authorities have no choice but to involve the patron, and so to give a "temporal flavor" to their act, it is improper to classify it as any the less spiritual. If the option of imposing an augmentation by mere episcopal authority existed, there might be somewhat more basis for Pigot's position -- some reason to say that when the less "pure" option is taken, augmentation with the patron's agreement, there is enough of a temporal foothold to justify common law trial of the terms when they are controverted in common law litigation. The Ordinary could have insured his act against being scrutinized by a jury by leaving the patron out, but he did not. (Of course Catesby's line of reasoning reflects pre-Reformation sensitivity toward the integrity of the spiritual sphere.)

Thus, though Catesby's and his brothers' opinion is hardly "a judicial precedent directly in point", and although it hardly outweighs contrary evidence of the historical reality -- what most lawyers, secular and ecclesiastical, thought before the Reformation legislation and the laicization of impropriations complicated the law on vicarial augmentations -- it is probably the strongest authority put forward in the highly artificial game being played in *King v. Sutton*. The game required tortuous exploitation of straws in the Year Books, because there was no better evidence as to whether episcopal power to augment was ever countenanced by the common law. From the point of view of the 17th century lawyers, that countenancing was crucial. It was not enough for the international Church to have endorsed such power and for the ecclesiastical courts in England to have assumed they had it. 22 Edw. 4 is the only authority adverse to the episcopal power, but it is both later and sharper than the contrary authority. The lawyers who relied on it knew what they were doing.

There are several more citations in *King v. Sutton*, some in the margin probably additions by the reporter. I do not think it is necessary to review these. Some go to show that appropriation required the King's license, at least in "modern times" (but "modern times" -- since 14 Edw. 3 -- were only a few decades short of the period during which the international Church concerned itself with seeing that adequately endowed vicarages were provided when livings were appropriated.) I do not think the license requirement was disputed in itself. The question about that was whether it implied a need for royal assent when the terms of an appropriation were altered, with or without the patron's assent. Counsel arguing for the episcopal power conceded that bishops did not have power to create new

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

appropriations simply on their own, but maintained that this said nothing about their power to readjust the vicar's share of existing appropriations. Counsel *contra* argued that "readjusting" was as good as creating anew. Various citations are given in the margin to support the rule that bishops may not appropriate a living *de novo* without involving either the rector-patron or the King. Again, I do not think the rule was itself disputed, only its bearing on augmentations.

(1) Anon. T. 13 Car. C.P. Harg. 23, f. 12b.

The Common Pleas in this case was inclined to prohibit a criminal prosecution, but had enough hesitation to assign a day for further consideration. No final result is reported.

A parishioner was sued *ex officio* on the presentation of churchwardens, "because he opens his windows and doors of his house next adjoining to the cemetery there." The man sought a Prohibition on surmise (1) that his house was ancient and the windows and doors thereof ancient too and (2) that he had no other windows and doors. The Court expressed its inclination to prohibit by saying that one may not make new windows and doors opening on a cemetery, but the ecclesiastical court may not restrain the use of ancient ones.

Whatever belief the regulation in question arose from, the judges seem not to have doubted the Church's power to regulate the character and use of private property adjacent to graveyards. It would be unsurprising to hold that a strict prescriptive title will prevail against the ecclesiastical power and is triable at common law. Whether the protection the Court was inclined to extend to "ancient" houses as "anciently" used would require a proper prescriptive title is uncertain. This could be the source of the Court's hesitation to prohibit. The judges may have thought that the ecclesiastical law surely made allowance for old houses and the reasonable convenience of their occupants. They may have been reluctant to prohibit without some evidence that the parishioner could not help himself in the ecclesiastical court by pleading the circumstances. At the same time, they may have been ready to enforce common sense and fairness by Prohibition without demanding that the parishioner claim immemorial usage. (The case calls to mind the doctrine of "ancient lights" in the common law of nuisance: The owner of a house was entitled not to have his light impaired by new building close by, although many other commodities or value-enhancing features of property were not similarly protected. This right was contingent on the "ancientness" of the house and its mode of access to light, but the owner was not, I believe,

***Prohibitions to Control the Ambit of Remediable Wrong,  
or Merely to Prevent Imposition of Unwarranted Liability***

required to make out that his house had stood in its present form from time immemorial, so that evidence, say, that it was built a hundred years ago would be fatal to the right.)

**C.  
Objection to the Form of the Ecclesiastical Suit, where the Type or  
Substantive Purpose of the Suit is Unobjectionable**

(a) *Withy v. Saunders*. T. 26 Eliz. Q.B. 1 Leonard, 23.

Parishioner being sued for tithes of grass sought a Prohibition on the ground that the person suing him did not have valid title to the grass-tithes. (He had allegedly been granted them without deed, which was insufficient in law to pass title). The surmise contained a claim of disallowance. Whether plaintiff-in-Prohibition had actually tried to dispute his opponent's title and been rebuffed by the ecclesiastical court, or was asserting that disputing a tithe-claimant's title was notoriously no plea in ecclesiastical law, is unclear.

I doubt that at a later date Prohibition would have been seriously considered in this case. In the mid-1580s, plaintiff-in-Prohibition enjoyed only a brief success. The Court originally granted a writ. All the report suggests about the judges' thinking is that they were worried about encroaching on the ecclesiastical territory of tithe law, but were reassured by the consideration that tithes were to some intents secular property (e.g., amenable to recovery in a real action.)

On a later day, however, the Court granted Consultation. On thinking it over, the judges had come to what was to be standard law: From the point of view of the tithe-payer, it does not matter whether the party suing in the ecclesiastical court is entitled to the tithes or not, for the tithe-paying duty is satisfied by severing the tithes. If he severed, he should plead payment; if he did not, he has no claim on anyone's protection. (Complications can of course arise. If Parishioner is sued by A., who is not entitled to the tithes, and cannot plead severance, he may be ordered to pay A the value of the tithes and may carry out the order. If he is then sued by the entitled person, B., it is obviously the ecclesiastical court's responsibility to see that Parishioner is not charged again. But surely the common law courts should not concern themselves until they see disregard for this elementary demand of justice. It would not be *irrational* to go the way the Court was first inclined to in the instant case, just because of the possibility of complications. I.e., there is something to be said for the

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

common law court's insisting that the ecclesiastical court look into entitlement to the tithes on the first opportunity in order to avoid the risk that the truly entitled person will turn up later, perhaps claiming that the compensation awarded or paid to the wrong person was under-assessed. It is much more an expression of comity toward the ecclesiastical system, however, go the way the Queen's Bench finally went -- to trust the ecclesiastical court to find a sensible means to avoid future imbroglios. It is also better, surely, to encourage parishioners to sever their tithes -- not to withhold them on the calculation that they will be sued by a disentitled party and, by disputing his right, can enlist common law assistance to gain time before they are forced to pay the person entitled.)

While in the end denying Prohibition, the judges gave two examples of good surmises contrasting with the present one. The first is only a *modus*, a too-obvious example were the case not relatively early, before it was quite settled that surmising a *modus* without pretense that one had tried to establish the commutation in the ecclesiastical court was sufficient grounds for Prohibition. The second example is a variant on surmising that one is sued by a party without title: Parishioner surmises that he is sued by A., whereas B. is actually entitled *and* he has contracted with B. to pay money instead of tithes in kind. It seems arguable that Prohibition should not be granted here unless Parishioner shows that he has tried to plead this defense in the ecclesiastical court, but otherwise the example is convincing. It does not seem to collide with the widely held position that a suit for tithes in the face of one's *own* bargain is not prohibitible, because Parishioner can sue for breach of contract if he is forced to pay in kind (or, realistically, to pay an assessed equivalent of the tithes in kind that is higher than the sum bargained for.) When the entitled party has not sued, he has not broken his contract, and one cannot say, as in the principal case, that Parishioner should have severed.

(b) Mortimer's Case. M.9 Jac. C.P. Harg. 15, f. 256.

The Prohibition granted in this case may only illustrate the usefulness of the writ for "traffic control" purposes between the common law and ecclesiastical spheres. An incumbent clergyman leased his glebe for rent. He was then deprived of his benefice on grounds of drunkenness. The Ordinary proceeded to sequester the profits of the glebe. (This move was in its general nature routine and unexceptionable. When a living was vacant, the Ordinary usually "sequestered" its property, which only means that he in effect assigned it to trustees or administrators for the period of vacancy.) The late parson's lessee was then cited into the

***Prohibitions to Control the Ambit of Remediable Wrong,  
or Merely to Prevent Imposition of Unwarranted Liability***

ecclesiastical court to respond concerning the profits of the glebe. (That is as much as the report says. I.e., just what view of the lessee's position the ecclesiastical authorities took, and what they wanted to find out from him or expected to require him to do, is not specified. There are only two possible constructions of his position, however: either his lease was terminated by the deprivation of his lessor so that he should stay off the property and return any profits taken since the deprivation, or he should pay his rent covering the time since the deprivation to the sequestrators. Either way, there does not seem to be anything obviously inappropriate about citing him into the ecclesiastical court.) In the meantime, however, the lessee had started an action of Trespass in the Common Pleas against servants of the Ordinary for taking profits from the glebe. (The lessee's view of his position was obviously at minimum that his lease remained in force. See below for a sense in which it could go beyond that.)

Prohibition was granted until the common law suit was discussed. I.e., the judges committed themselves to no opinion of the ecclesiastical proceedings against the lessee, except that they should be delayed until common law litigation involving the same cluster of issues was resolved and their own view of the lessee's situation was worked out. For the rest, the report gives some hints of the Court's thinking about the substance, but only in a tentative tone. The judges said that the lessor's deprivation "perhaps" destroyed the lease, but added, "it may be that the cause of deprivation is remitted, for there may be a pardon by Act of Parliament of which they will not take notice." Since there is nothing to suggest that the lessee actually relied on a Parliamentary pardon, I take this language as only clearing the temporary Prohibition of lingering doubt. I.e., if the judges almost definitely thought the lease had perished, they could be criticized for holding up even for the time being ecclesiastical proceedings that are hard to fault on that premise. They would only be saying, so to speak, "You never know -- if this Prohibition were sought squarely on the substance, without the complication of the simultaneous common law suit, other factors justifying our intervention might be pointed to, though from what we know now we would probably conclude that the ecclesiastical court was within its rights." Secondly, the judges "doubted" whether the Church authorities could sequester the rent on the lease "because it is lay fee." I would construe this as speaking to the alternative assumption that the lease remained in force. The lessee would still owe the rent, but it would make a question whether the right to the rent could be assigned to the sequestrators in the same way as physical property in the

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

hands of the deprived parson. If not, I suppose payment of the rent could not be enforced until installation of a new parson, who would have an action for back rent if he was not satisfied voluntarily. The ecclesiastical court would have no business calling the lessee to account. (This is what I refer to above as the most favorable view of the lessee's position: he is still lessee and he owes nothing to the sequestrators. If he did owe them the rent, the ecclesiastical court might have a foothold to cite him for purposes of accounting, even though their remedy for actual unpaid rent would be at common law. E.g., the ecclesiastical court might be entitled to find out whether the lessee had paid the deprived parson rent covering a period in the midst of which the deprivation took place. The point would only be to discover information on the basis of which the deprivee might be pursued for profits in effect taken after the deprivation.)

(c) Sir W. Dethick and Stoke's Case. T. 9 Jac. C.P. Godbolt, 181.

This looks suspiciously like a High Commission case, except that there is no positive indication that it is -- neither express designation as such nor discussion of the peculiar powers of the High Commission and their warrant. If it is an ordinary ecclesiastical case, then a regular ecclesiastical court was told it could not do what the High Commission often claimed power to -- sometimes successfully, sometimes not, amid a great deal of debate: punish a person convicted of an ecclesiastical crime by fine and imprisonment. The ecclesiastical suit was unexceptionable in substance (certainly as a suit in a regular court, and probably as a High Commission suit, though the location of the line between offenses serious enough for the Commission and ones too minor was controverted): A clergyman sued for defamation ("bald priest, rascally priest") and for striking him. Apart from the special claims of the High Commission, the case is open-and-shut as a matter of acceptable procedure; whatever can be said in this context or that for leaving the ecclesiastical courts to find their own way, nothing can be said for allowing them to use secular sanctions. I do not mean there could be no rational or political argument for that, just no legal one. The best evidence of the firmness of the rule stated in the present case -- excommunication is the Church's ultimate sanction -- is the tortured debate in the courts as to whether the High Commission was exempted by statute and royal patent. Godbolt's report of *Dethick* does not say it was a Prohibition case (it could have been a *Habeas Corpus*); if it was, Prohibition would of course have been granted.

***Prohibitions to Control the Ambit of Remediable Wrong,  
or Merely to Prevent Imposition of Unwarranted Liability***

(d) *Childe v. Caninge*. 16 Jac. Two reports labeled K. B.: Lansd. 1080, f. 58 (M.16) and 2 Rolle, 78 (H.16, *sub. nom.* *Cannen's Case*); one labeled C.P. -- Harl. 5149, f. 263 (T. 16- the earliest term.) Clearly Prohibition was sought first in the C.P. and after failure there in the K.B.

A man mowed his hay and set it in a rick on the land. I.e., he did not satisfy his tithe-paying duty by severing 1/10th, and Parson did not get possession of his tithes *de facto* by removing them from the rick (if that is something he could have done with legal impunity.) The grower then leased the land to X. and sold him the ricked hay. If X. knew the tithes had not been paid, he could have detached Parson's share or otherwise arranged for Parson to get it, but he evidently did not -- either he hauled off ail the hay or it still stood in the rick untouched. In any event, Parson sued X. for his tithes. X. sought a Prohibition on the ground that he could not be made answerable for tithes owed by the original producer. A suit against that producer would obviously be unexceptionable. The issue was whether in circumstances like these the ecclesiastical court could if it saw fit extend liability to the lessee-vendee.

When the case came up in the Common Pleas, Chief Justice Hobart was inclined to think Prohibition should be denied. He said in so many words that Parson ought to be suing the original producer rather than the vendee, but he thought -- probably a little less than decisively -- that owing to the "merely spiritual" character of a straight suit for tithes the vendee's only remedy was to plead the facts in the ecclesiastical court and persuade it that the suit was inappropriate. If the suit had been for double damages on the statute of 2/3 Edw. 6, Hobart said, Prohibition would certainly lie, but not clearly so for a simple suit.

Justice Hutton, the only other judge heard from, said it was a "good question" whether Prohibition would lie, showing that he too was less than sure his inclination was right. He leaned the other way, however, towards Prohibition. Hutton put a slightly variant case: Suppose A. contracts to cut his hay or grain, shock it, and sell it to B., *and that A. tells B, Parson is satisfied for his tithes*. In this case, *per* Hutton, B. will certainly have a Prohibition if Parson sues him. In application to the case as it was, I take Hutton to be saying, as it were, "If we leave the present suit against a vendee to the ecclesiastical court's discretion, we shall soon have another in which we would find it very difficult to do so -- a case where the vendee unmistakably acted in good faith, in reliance on what the person with the primary duty to pay tithes told him or even warranted by contract."

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

In the event, the Common Pleas denied Prohibition. But this, the report says, was "because [on a later day] the case appeared in another manner." There is no specification of how the case was restated so as to make refusing Prohibition easier. Hobart is said to have given the same sort of reason he had given before.

The King's Bench granted a Prohibition in the same case, *per* Rolle's brief report. The MS., from one term earlier, has the Court assigning a day to show cause why Prohibition should not be granted and reports the words of one, judge, Dodderidge: "No one must pay tithe except the proprietor, and if I house my corn and sell it in the barn, the parson shall not have tithes from the vendee, and that is in effect this case." Like Hutton in the Common Pleas, Dodderidge was warning against temptation: In the instant case, there might be no great harm if the ecclesiastical court were to compel the vendee to pay the value of the tithes. When he took over the land as lessee and found the harvested hay ricked in the field, he should probably have taken the initiative to ascertain whether the tithes were satisfied, and if they were not it would have been easy for him to render them in kind. Hutton imagined the clearest case in which it is impossible to say this -- when the vendee has been assured that the tithes were taken care of (either paid in kind or satisfied by an agreed money payment.) Dodderidge imagined the case in which the equities are less clearly in the vendee's favor, but where it is still hard to put any of the blame for Parson's disappointment in him. How can a man who buys grain sitting in the producer's barn, perhaps some time after harvest, be expected not to assume that the tithe or an equivalent has been paid?

It seems to me that overcoming Hobart's scruples about respect for ecclesiastical jurisdiction was well-advised. To go a step beyond what Hutton and Dodderidge articulated: Should one not be pretty wary about trusting ecclesiastical courts to discharge the vendee, at least when he is not clearly blameworthy or complicit in the evasion of tithes? In most cases, at any rate, tithe suits must have been brought after in-kind payment had ceased to be practicable. Usually Parson would be suing to compel payment of the value of the lost tithes. If he sues a vendee instead of the producer, it must ordinarily be because of legal reachability -- the vendee is easier to find, or his financial capacity to carry out an order to pay money is greater. The Church's principal interest is in seeing that Parson gets his due. It would not be entirely unrespectable for the ecclesiastical court to lean toward making the vendee pay -- the here-and-now defendant whom Parson has picked as the more promising party to sue. Trusting the ecclesiastical court to avoid indulging this leaning at the cost of

***Prohibitions to Control the Ambit of Remediable Wrong,  
or Merely to Prevent Imposition of Unwarranted Liability***

serious unfairness to the vendee might be justified, but that does not mean it would not be indulged in ambiguous circumstances -- at the cost of tempting vendee-defendants to seek Prohibitions and in the end driving the common law courts to split hairs as to just when holding the vendee liable is and is not tolerable. "No tithe suits against vendees" has the advantages of a simplifying rule. An exception for the case in which Parson alleges fraudulent complicity in terms would be reasonable.

Moreover, to run the risk that if left alone ecclesiastical courts will be tender toward suits against vendees is to invite contract disputes. A vendee forced to pay tithes is apt to claim that the vendor implicitly or explicitly insured him against this liability. Unnecessary common law suits would be generated. In addition, the vendee ordered to pay would be put in an awkward position: Should he pay and hope to recoup from the producer? Should he bear the spiritual sanctions while he tries to persuade the vendor that the latter assumed responsibility for the tithes? Is there any legal means of determining who is contractually responsible except paying and bringing a common law action? One could go on with permutations. The firm rule "Producer alone is liable" would simplify contracting. If there is some reason to shift the responsibility (e.g., sale of a standing crop where it is agreed that the vendee will cut it), the parties can make an explicit arrangement which ecclesiastical courts need never hear about (vendee undertakes or gives a bond to compensate vendor if the former should fail to sever the tithes and the latter should he compelled to pay.)

(e) Anon. H. 16 Jac. C.P. Harl. 5149, f. 263.

This report is close to *Childe v. Caninge* in date and in subject, but the judicial statements it contains would not seem to have been made in that case. No context is reported, only pronouncements by Chief Justice Hobart and Justice Hutton on the liability of vendees of crops for parish rates, rather than tithes. Hobart puts the case where A. sells his hay to B. and then the parish is rated for repairing the church. (A sale of standing or future hay must be contemplated to allow for a gap in time between the sale and the levying of the tax.) In the Chief Justice's opinion, A. will be liable for the rate if he is an inhabitant of the parish, but if he is not B. will be liable. (I am not sure that this assumes B. *is* an inhabitant. I do not think non-resident owners or tenants of land were necessarily exempt from rates. *Quaere* whether there would be any point in preferring the vendee over the vendor as between two non-residents.) In support of this opinion, Hobart said it had been decided in "this court" that if A. cuts his grass and sells it to B., A. is liable for *tithes*, "for otherwise the

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

6th or 7th vendee could be charged for the tithes, and it was due at the 1st cutting." Going by the evidence we have, this is misrecollection of *Childe v. Caninge*. It was the King's Bench rather than the Common Pleas that stood firm for vendor's liability, and in his initial comment on the recent case *Hobart* does not seem to have thought of the strong reason for that rule which he now stated -- the problem that would be raised by subsequent purchasers if the ecclesiastical court was allowed to impose liability on the first vendee in tempting circumstances. He may of course have come around on further consideration.

Hutton, who in *Childe* was at least skeptical of allowing vendees to be sued for tithes at all, drew a fine distinction *quoad* rates: "If I sell my corn crop...before it is cut, the vendee shall not pay for the repair of the Church [so far as appears, not even if the vendor is non-resident and the vendee resident]; the same law if it is the grass of my meadow. But if I grant the crop of my meadow to someone, it is otherwise. For here the grantee has some interest in the land." I am not sure of the property-law basis for this distinction. Saying "I *grant* you the crop of my meadow" conveys a right of entry to cut the hay and relieves me of any duty to cut it, whereas saying "I [agree to] *sell* you the [growing] grass of my meadow [in exchange for so much]" only makes a contract? (The construction of the contract, with respect to who should cut the hay or what counts as delivery to the vendee, does not matter -- it remains a mere contract, and the realty is untouched. Hutton's view was clearly that liability for parish rates cannot be imposed on anyone who is not in at least a minimal sense a landholder in the parish.)

Since there is no indication of litigative context in the report, one can only say that an ecclesiastical suit against a vendee for rates would probably be prohibited in the simplest situation (the churchwardens -- normal plaintiffs in a suit for rates -- just elect to sue the vendee), but not in all circumstances. The two judges do not seem in perfect agreement on the exceptions.

(f) *Wrothmeal v. Gill*. M. 1 Car. K.B. 3 Bulstrode, 310.

In this case, Parishioner being sued for tithes wanted in effect to invoke the defense that the parish he lived in was an impropriation without a vicar, and that the suit was brought by a mere stipendiary curate lacking any title to tithes. This would all but certainly have been a good ecclesiastical defense. (Barring special custom, tithes were due to the rector or, in an appropriated parish with vicarage, partly to rector and partly to vicar. A curate who was simply paid a salary by the incumbent to perform the ministerial duties had no right to

***Prohibitions to Control the Ambit of Remediable Wrong,  
or Merely to Prevent Imposition of Unwarranted Liability***

tithes.) So the Court thought. In the event, it refused Prohibition and told Parishioner to plead his defense in the ecclesiastical court (with, however, the significant addition that Prohibition would be granted if the defense were disallowed.)

Parishioner's counsel clearly anticipated this response. They tried to draw the surmise in such a way that cutting off the suit at once by Prohibition could be justified. Although they apparently stated their basic point more or less as I have, they put their initial emphasis on a technicality of form: ecclesiastical plaintiff in his libel failed to say expressly that he was admitted, instituted, and inducted into a living. I.e., the libel did not make out unmistakably that plaintiff was a benefice-holder so as to be entitled to tithes in virtue of the position he held. By Parishioner's theory, a tithe suit that leaves the plaintiff's title unstated or ambiguous is prohibitible without further ado -- as it were, *just anybody* cannot be suffered to claim tithes; a completely absurd or unwarranted tithe suit, as far as the claimant's title is concerned, should be cut off without waiting on the ecclesiastical court; it does not matter how likely it is that such a suit would not survive ecclesiastical scrutiny.

I do not think the Court flatly rejected this theory. Rather, speaking through Justice Dodderidge, it held that ecclesiastical plaintiff in the instant case had said enough -- had adequately stated his title to be a tithe-recipient, or had at least probably made a formally sufficient libel by ecclesiastical standards. (He had said he was *curatus*, which Dodderidge thought implied a claim to be a vicar, and for that matter had said that he was "*rite & legitime admissus & legitime investitus*." All he omitted to say was that he was inducted, and Dodderidge said that in canon law -- though in English law it would not count as an equivalent expression -- the word "*investitus*" comprehends "*inductus*.") Accordingly, the Court denied Prohibition and told Parishioner that if he wanted to claim that *in fact* he was being sued by a stipendiary curate he should so plead in the ecclesiastical court.

Parishioner's counsel, Banks, having failed with his principal contention, then said that his real claim was that there was no vicar in the impropriated parish and that he had so indicated in his surmise. As Banks must have expected, the Court told him that he could not have a Prohibition on that suggestion because it was inconsistent with the libel. (The libel as read by the Court substantially claimed that plaintiff was a vicar. Parishioner could not have a Prohibition on surmise that he was being sued by someone who was neither vicar nor parson when so surmising came only to controverting the factual truth of the libel. It is implied that there is no reason why its factual truth should be tried at common law. It is also

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

probably implied that Prohibition would lie if the libel failed to state -- substantially enough by ecclesiastical standards if not with ideal tightness -- any title to receive tithes. I.e., it would probably not be assumed that the ecclesiastical court would dismiss such a defective complaint, or would not be thought necessary in comity to give it a chance to.)

Both after rejecting Banks's first argument and after rebuffing his attempt to save the Prohibition by admitting his real contention, the Court said that disallowance of the plea -- that there was no vicar, and ecclesiastical plaintiff was actually a stipendiary curate -- would be grounds for Prohibition. This seems less than self-evident. Would such an act of disallowance not arguably be so clear an error in ecclesiastical law that it ought to be left to appeal? The Court's position is still unsurprising. The judges may not have much expected that the plea would be disallowed. If it were, the need to protect impropiators against any ecclesiastical temptation to divert revenue to the working clergyman would outweigh considerations of comity.

(g) *Dr. Clea v. his Chaplain*. H.2 Car. C.P. Littleton, 19; Harl. 5148, f. 113 (identical report.)

The Prohibition granted in this case is probably best seen as the quick way to put an end to litigation when nicety about principle would only have caused it to drag on unnecessarily. Dr. Clea was Vicar of Halifax, in whose parish there were several chapels of ease. One of the chaplains sued Clea for arrears of salary, claiming that the Vicar customarily paid each chaplain £ 4 a year. The report is not at all clear as to the theory on which Clea sought a Prohibition. It could have been that the salary must be claimed as a common law prescriptive right or not at all. The real dispute between the parties turned out to be over the method of choosing the chaplain: Clea's original argument for Prohibition may have been that he was sued by a pretender to, or unlawful *de facto* occupant of, the chaplaincy whom he had no duty to pay. Neither of these arguments is very convincing.

The report gives an argument against Prohibition from the Bar. Counsel said first that the chaplain was elected and paid his basic keep ("as much as suffices to his livelihood") by the inhabitants (presumably of the district served by the chapel.) He then said that the chaplain lacked corporate capacity to prescribe at common law for the further stipend payable by the Vicar, wherefore he appropriately sued in the ecclesiastical court. This may be a good reason, *sed quaere* -- I would not take it for granted that an "ancient" chaplain could not make out a prescriptive title to his stipend, even if he does not count as a

*Prohibitions to Control the Ambit of Remediable Wrong,  
or Merely to Prevent Imposition of Unwarranted Liability*

corporation sole in the manner of a parson or vicar. Perhaps the chaplain here was just not ancient enough. There is no obvious reason why that should preclude him from trying to take advantage of shorter usage in the ecclesiastical court. It is not evident that the argument from want of corporate capacity depends in any way on the previous point. I.e., if the chaplain was appointable otherwise and received all his income from the Vicar, would his status not still make him be helpless at common law, if indeed he was helpless?

The next remark from the Bar brings out the underlying dispute and explains why the chaplain's lawyer asserted his version of the inhabitants' role. Henden, presumably representing the Vicar, said, "The matter is to try the title with the vicar, whether the inhabitants ought to elect." This hardly amounts to an argument for Prohibition. (Why should the Vicar not plead in the ecclesiastical court that he was sued by an improperly elected chaplain, and why should one doubt the ecclesiastical court's competence to decide the rights of that? Prohibitions were sometimes granted to protect laymen's customary right to elect to Church offices, but here the alleged beneficiary of lay electoral powers was the ecclesiastical plaintiff, and it was the Vicar disputing those powers who sought common law assistance.) The Court, however, was prepared to speak to "the matter." It declared that the Vicar was entitled to choose his chaplains "of mere right" because he held the parish cure and paid them salaries. The inhabitants' contribution to the chaplain's upkeep, said the judges, was "only a benevolence."

The report then concludes with: "And because the chaplain who sued for the 4 £ was removed and another chosen by the vicar, a Prohibition was granted." This generally puzzling case is no less so at the end. The Prohibition seems to rest on the fact of the chaplain's removal (however that came to the Court's attention) rather than any reason why the ecclesiastical suit should be considered out of place. I wonder whether the judges did not simply think the chaplain's suit so sure to go nowhere in the ecclesiastical court that they might as well put an end to it. (One would expect the ecclesiastical court to share the opinion that control over the chaplaincies belonged to the incumbent clergyman. When the Common Pleas judges so opined, they must have been saying what they thought the ecclesiastical law indisputably was, for the secular law could hardly have a rule on the subject. The judges seem to have attached some importance to the Vicar's payment of a salary to the chaplains, suggesting that if they had been wholly dependent on the inhabitants there might be better reason to deny Prohibition -- i.e., to let the ecclesiastical court decide whether usage had

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

modified common right. I can see no reason to prevent it from considering that in so intra-Church a controversy. Whether or not the chaplains could claim their salaries by prescription at common law, what objection could there be to their trying to claim them by looser ecclesiastical standards of prescription?)

(h) Anon. M. 3 Car. C.P. Littleton, 72.

This brief report presents a simple instance of the problem that arose in more complex form in *Wrothmeal v. Gill* above: a tithe suit by a party without title as a tithe-recipient. Here the ecclesiastical plaintiff was chaplain of a chapel of ease. The report describes his office as neither presentative nor donative. (Some chaplaincies were quasi-benefices with a patron -- "presentative." Some were regular positions to which someone had a vested right to appoint without going through the process of presentation -- "donative." I take it that the residue, represented by this case, would be positions to which the incumbent might appoint if he wanted to have services in the chapel and preferred not to attend to them himself, but with no status beyond that of a hired assistant paid what the parties agreed on.) Prohibition was granted. This result accords with the intimations in *Wrothmeal* that tithe suits by someone incompetent to receive tithes should not be left to ecclesiastical disposal, even if there was no particular reason to suppose they would succeed there.

(i) Tomson's Case. M. 3 Car. C.P. Littleton, 60.

Tomson, supposing himself an incumbent clergyman, sued his predecessor's executors for dilapidations. As a type of ecclesiastical claim, this was unexceptionable. (Succeeding holder of the benefice sues predecessor or his estate for the ecclesiastical equivalent of waste committed by a temporary tenant at common law -- neglect of the property causing diminution of value or repair-expenses to the successor.) Prohibition was sought on the ground that Tomson was not *lawfully* incumbent. The reason for this was that Tomson had been presented by the King owing to the minority of the regular patron, and the King allegedly had no title to present. The defect in his title was mistake of fact. I.e., the patron was not a minor, but was mistakenly supposed to be. (The monarch's prerogative to exercise the presentment rights of patrons within age was as such clear.) Plaintiff-in-Prohibition's (the executors') counsel argued that when the King mistakes his title to present to a living the presentation is void, and that the question of whether someone is an incumbent should be determined at common law.

***Prohibitions to Control the Ambit of Remediable Wrong,  
or Merely to Prevent Imposition of Unwarranted Liability***

Prohibition was denied. The judges said that whether or not he ultimately ought to be, Tomson was now incumbent and entitled to sue as such. They said that they could not take notice of the King's bad presentment -- meaning, clearly, that they could not, pursuant to a Prohibition, go into whether it was bad or not. For they added that if someone brought an action of *Quaere Impedit* challenging Tomson's incumbency, and it appeared that the King did not have cause to present, then the instant ecclesiastical suit or a similar one could be prohibited.

This decision does not really concede any territory to ecclesiastical judgment. I would expect to see the suit prohibited on Tomson's initiative if the ecclesiastical court purported to examine the validity of the King's presentation! The Court's position was just that a proper ecclesiastical suit should not be stopped, and the fulfillment of ecclesiastical duties be evaded or delayed, because someone interested in the advowson *might* attempt to void the King's presentation and dislodge Tomson. If such an attempt were actually made, with apparent good grounds, there might be some point in holding off settlement of dilapidation claims until a clearly lawful incumbent was installed to pursue them. Going into title to the living now, and perhaps concluding that Tomson was improperly presented, would confer a windfall on those with an interest in invalidating his title while increasing the chances that the dilapidations would never be paid for. (Even if Tomson was found to be without right, the patron would have to make up his mind to present -- where acquiescing in the King's mistake and avoiding possible litigation with the Crown might be the better part of valor --, the bishop's acceptance of his nominee would have to be secured, and the ceremonies of installation performed, before a dilapidations suit could be brought. In the meantime, the predecessor's estate might be exhausted, his executors dead, and their executors untraceable or asset-less.) Moreover, it makes little difference who receives any sum recovered for dilapidations, since the purpose of the recovery is to restore the living to its former condition. No doubt someone in precarious possession of a benefice might be tempted to "pocket the cash", but surely he would do so subject to the risk of suit for dilapidations by his successor. Surely also the predecessor -- the executors in the instant case -- would be quits when he satisfied one judgment, albeit by paying a possessor without title, and would be protected by Prohibition if an ecclesiastical court by any chance purported to charge him twice.

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

It should be noted that all the reasoning against Prohibition here would apply equally in a tithes suit. I.e., if an apparent incumbent in Tomson's position sued for tithes and Parishioner sought a Prohibition by taking the same sort of exception to his title, it would be folly to grant a writ. That people pay their tithes is more important than that they pay them to someone with a clear title, and by paying -- i.e., severing -- Parishioner can insure himself against any future vexation. Plainly the tithes-payer should not be allowed to put off doing his duty against some future time when a clearly entitled incumbent might sue him for the value of back tithes, by which time non-payment might be hard to prove and the value hard to establish. It would not be surprising, though the report does not suggest it, if the judges had the parallel with tithes in mind when they refused to prohibit the present suit for dilapidations -- i.e., if they foresaw the prospect of attempts to prohibit tithes suits by disputing Parson's incumbency once a precedent was set in the other situation.

Finally, the Court was obliged to distinguish one related case, which was very likely urged in favor of Prohibition. The judges conceded that a tithes suit (and no doubt a dilapidations suit as well) would be prohibited on surmise that the ecclesiastical plaintiff, an apparent incumbent, came in by simony. The difference was that installation of a simonist in a living was void *ipso facto* by statute. Whether the difference is significant can perhaps be questioned. It is probably best made so by saying that public policy, expressed in the statute, wants the simonist out of the living as soon as possible and wants him to enjoy none of the perquisites of a lawful incumbent. When the accusation of simony is made, its truth should be determined at once; if it is true, the way should be promptly cleared for the wrongdoer's replacement. By contrast, the beneficiary of the King's mistake (by presumption of law made in good faith) is under no personal cloud, and whether or not he serves out his life in the benefice is an indifferent matter from a public point of view. The Court's reasoning on the distinction from simony cases is not spelled out in the report, however.

(j) *Hasnet v. Parks*. P. 3 Car. K.B. Benloe, 204.

The report does not permit wholly confident analysis of this case, but it is worth noting for the odd route to Prohibition taken. We are told that one person claiming to be parish clerk sued another so claiming, and that they differed over the method of election (vestry v. whole parish.) Electoral disputes were a common source of Prohibitions. In this case, unfortunately, the report does not specify the object of the ecclesiastical suit, which makes the ensuing attempt to prohibit it hard to interpret. A standard model for parish electoral

***Prohibitions to Control the Ambit of Remediable Wrong,  
or Merely to Prevent Imposition of Unwarranted Liability***

disputes leading to Prohibitions would be: Churchwarden elected by one method sues a parishioner for rates, who claims that his opponent lacks standing to sue as a lawful officer because the customary mode of election is something else; Prohibition lies to insure common law trial of what the custom is, and if it favors the parishioner, to protect him and his fellows in their prescriptive rights. In *Hasnet*, however, one rival officer was suing the other. The plaintiff could have been seeking a declaration of who was the lawful clerk or an order that his rival refrain from exercising the office. Or he could have had a pecuniary object, as if he sought recovery of fees or stipend paid *de facto* to the other man.

I dwell on this uncertainty because ecclesiastical defendant did not obtain a Prohibition quite straightforwardly. The report suggests that the King's Bench saw the need for common law trial -- because the electoral custom was in dispute, and the lay parishioners' interest as well as the rival clerks' was concerned -- but found it hard to justify Prohibition as the case was framed. Could the judges have thought, "We cannot very well prevent the ecclesiastical court from expressing itself on how this Church office is to be filled -- in order to prohibit, we need a showing that someone purporting to hold the office in violation of the custom has attempted to use legal coercion *qua* officer to collect fees due for its exercise or the like"?

In any event, the report says that Prohibition "was to be granted" to stop the original ecclesiastical suit, but that the Court decided to take a different course. It ordered the ecclesiastical defendant, *Hasnet*, to bring an Action on the Case at common law (presumably for disturbance in an office lawfully held by him -- there is, I think, no question but that a parish clerkship was a secular office in the sense "protectable against dispossession or disturbance at common law", though that need not entail, as I put it above, that an ecclesiastical court would be debarred from "expressing itself" on the incidents of the office from the point of view of Church law.) The action was accordingly brought, issue was joined on the custom, and the verdict went for *Hasnet*. Then the rival clerk, *Parks*, persisted in his ecclesiastical suit, *Hasnet* sought Prohibition again, and a writ was granted, "because it is a matter of custom determinable at common law and this will tend to subvert the verdict." That is to say, the basis for Prohibition finally found, and supported by various citations (not specific enough to recount), was that ecclesiastical courts may be prevented from reopening questions already settled by common law verdict, even though their discussion of such questions would not as such be prohibitable. The Court's need to find such a basis bespeaks scruples about free-and-easy interference in ecclesiastical proceedings. It was probably

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

tempting in *Hasnet* to intervene merely because it was evident that sooner or later the electoral custom would have to be determined at common law, but the judges preferred not to determine it pursuant to a formally questionable Prohibition.

(k) *Wife of Cloborn v. her Husband*. M. 5? Car. C.P. Hetley, 149.

Only one point in this confusedly reported case is directly relevant for this Sub-section. Mrs. Cloborn sued her husband for marital cruelty ("...he gave her a box on the ear, and spat in her face, and whirled her about and called her a damned whore.") The ecclesiastical court gave her an *a mensa et thoro* divorce and sentenced Cloborn to pay her £ 4 a week [*sic* -- a large sum] partly as alimony and partly as compensation for litigative costs. Among the grounds apparently alleged for Prohibition was the fact that Mrs. Cloborn had started her suit by oral complaint rather than by libel, although the complaint was later reduced to writing. The Court, speaking through Chief Justice Richardson, held that Prohibition could not be granted on the ground that the ecclesiastical court proceeded in the first instance without libel -- if that was an irregularity at all, it was not reason for the Common Pleas to stop an otherwise unobjectionable ecclesiastical suit ("...we are not Judges of their form.")

Cloborn's counsel urged substantive grounds for Prohibition as well, but the theory or theories on which they were going are not clear from the report. They may have tried to argue that the mistreatment specifically alleged was insufficient to constitute cruelty, at least serious enough cruelty to justify divorce. This contention would put the case among the proper "ambit of remediable wrong" cases discussed in the last Sub-section. I.e., counsel would have been urging that the ecclesiastical courts' generic jurisdiction over marital misconduct and divorce did not leave the definition of cruelty wholly to their judgment. The best reason for supposing this argument was made is Richardson's apparent rejection of it in the words "we cannot examine what is cruelty and what not." It is more evident that Cloborn's lawyers were *inter alia* proposing a disallowance surmise: a defense had been advanced in his behalf and improperly ruled out by the ecclesiastical court -- viz. that he was within his rights, having chastised his wife for sufficient cause (and possibly also that the pair had in any event been reconciled.) The judges were not in principle opposed to a Prohibition of that form. They did not commit themselves, but said that a Prohibition would be considered if a good justification for the chastisement were put forward in the ecclesiastical court and rejected. Just how this had *not* been done, in the case as it was, is unclear. Perhaps the surmise was badly drawn, perhaps it was apparent that although

***Prohibitions to Control the Ambit of Remediable Wrong,  
or Merely to Prevent Imposition of Unwarranted Liability***

Cloborn tried somehow to explain himself in the ecclesiastical court, he had not put in a justifying plea in due form. (I do not think the Court's substantive inclination is surprising. It would come to: "'We cannot examine what is cruelty', but neither can we permit ecclesiastical courts to take the implied position that husbands have no corrective powers over their wives." A well-formulated case on disallowance surmise would be interesting. It is unlikely that ecclesiastical courts would flatly reject the husband's power to justify conduct which, if gratuitous, might be considered cruelty. But what particular justifications would the common law courts consider sufficient and by what rationale would they draw lines?)

(l) *Facy v. Longe*. H. 7 Car. K. B. Jones, 254.

In this briefly reported case, the King's Bench refused to supervise ecclesiastical courts in the generally sensitive area of tithe law. Cattle belonging to A. were pastured for hire on B.'s land. So-called tithe of "agistment" was unquestionably due in this situation. It was conceived as 1/10th of the value of the grass eaten by the cattle, or perhaps alternatively as 1/10th of the cattle's "increase" (If there was a conceptual ambiguity about the tax-base, I do not think it made any practical difference. First, assessment of the amount due would not be more difficult one way or the other. Prohibition cases supply no evidence of the processes by which ecclesiastical courts put a money value on tithes that could not by nature, or could no longer, be paid in kind. This is one aspect of tithe law in which parties do not seem to have reached for common law help, though there must have been disputes. Valuing agistment tithes at 1/10th of the price paid for the pasturage is the easy way, which I would expect to be taken however the base was conceived. Secondly, assuming that method, I can figure no economic difference, for the parties to an agistment contract or the Church, between putting the burden on the cattle-owner or on the landholder.)

In the instant case, Parson sued B. (holder of the land.) Prohibition was sought on the ground that the suit should be against A. (owner of the cattle.) A writ was apparently granted without consideration, but the Court (except for Richardson, now Chief Justice of the King's Bench, who was absent) awarded a Consultation. The report is a bit ambiguous on the judges' view of which party it made better sense to hold liable, but I think their opinion was that the suit as it stood -- against the landholder -- was more reasonable than the alternative. The judges were in any event emphatic that "however that may be" it was the ecclesiastical court's exclusive business to determine who was answerable. Plaintiff-in- Prohibition's

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

theory must have been that the "true" base for the tax was the cattle-owner's gain, but if the point is defensible it is an empty formalism.

The only requirement of justice is consistency -- that the ecclesiastical courts always hold the same party liable, so that contractors for agistment can figure the tithe liability into the amount of the hire. There is no sign of argument in the instant case that the cattle-owner was usually held liable or that Parson had a choice. (If he was always free to pick either party, contractors could agree that one would save the other harmless in the event of his being held for tithes, but there is no point in making contracting more cumbersome than it need be. Coming down firmly one way or the other would cost the Church nothing, save for the risk that whoever is liable will be insolvent. As the cases above on vendees of tithes show, it is always convenient for the potential plaintiff to have multiple possible targets for a given type of suit, but it is rarely convenient for society.) Before denying Prohibition in the circumstances of *Facy v. Longe*, one might want to be informed as to whether there was accepted ecclesiastical law and consistent practice with respect to the assignment of liability. How well-informed the Court was, and how well-argued the case, does not come out from the cursory report. Unwillingness to interfere with the resolution of an indifferent question in a standard ecclesiastical area is eminently sensible as such, but other things need to be equal before it can clearly be called a wise decision.

(m) Anon. T. 9 Car. K.B. Harl. 1631. f. 404b.

This case presents the singular spectacle of an *ex officio* suit for tithes. It produced a judicial clash on the propriety of that, but the point was not pushed by counsel seeking Prohibition, and the legality of such a suit was not resolved. The case bears the marks of the Laudian period in the Church: The Chancellor of the diocese of London took it upon himself to see that tithes were paid in a City parish. There is no telling what his motive was. He may have meant to save a poor incumbent the trouble and expense of a civil suit; he may have thought it his business to stand up for the interests of the Church when the incumbent had his own reasons for not suing (was lazy, indifferent to a small item of income, in cahoots with the tithe-payer, or pessimistic -- with apparent reason as the case was -- about the prospect of recovery); or he may have been mainly concerned to assert for its own sake officialdom's right to represent normally "private" ecclesiastical interests, and perhaps he hoped to set a legitimating precedent.

***Prohibitions to Control the Ambit of Remediable Wrong,  
or Merely to Prevent Imposition of Unwarranted Liability***

Prohibition was sought on the standard grounds that the suit put the bounds of parishes in question and that the tithe was commuted by composition real. These alleged grounds may of course not have been true as to fact, but they are a virtually open-and-shut basis for grant of a writ. It is accordingly unsurprising that the report contains no discussion of those grounds and that plaintiff-in-Prohibition took no exception to the *ex officio* suit. It was Chief Justice Richardson who called attention to it: "Can the spiritual court proceed *ex officio* for tithes, being a civil cause? For I conceive that their proceeding *ex officio* was limited solely to criminal causes or matters. By this way they will give tithes to a parson who never sues for them."

Richardson drew two ripostes. One came from Noy, the Attorney General, who was in fact representing plaintiff-in-Prohibition. His going out of his way to support the form of the ecclesiastical suit surely reflects his Attorney Generalship and confirms that the Chancellor of London was experimenting with the newfangledness in favor. No disloyalty to his client on Noy's part is implied -- it would if anything disserve the client's cause to mix up his claim to an easy Prohibition with a high-level and divisive issue. Noy simply asserted: "They may proceed there *ex officio* or at the instance of the party, at their election." Justice Berkeley gave a more pointed, or more "ideological", response: "It is criminal to violate the Canons and rights of the Church."

There the exchange ends. I think it is very unlikely that *ex officio* tithe suits would have survived judicial deliberation, at any rate earlier than the 1630s. They obviously open deep issues about the theory of ecclesiastical justice. Perhaps there are good speculative arguments for Berkeley's view -- in effect that every or nearly every act that gives rise to a cause of action in the ecclesiastical system is a crime if the ecclesiastical judge chooses to treat it as one. There were certainly areas of ecclesiastical law in which the civil-criminal line was ambiguous, notably defamation and marital law. Somewhat toned down from Berkeley would be the position that many acts occasioning just ecclesiastical claims are not crimes in the sense "subject to punishment", but that the Church collectively is a co-party in interest with the offended private party when any such act is committed and may accordingly assume the role of plaintiff. Some countenance can be given to that -- there are certainly senses in which neglect of their interests by individuals with ecclesiastical rights could over time be harmful to successors in those rights and ultimately to the Church as an institution. When all is said, however, I do not think the common law judges, if really forced to consider

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

it, would have allowed such lay parties as the tithe-payer to be vexed with claims which the individual entitled to them was willing to forgo. The difficulty of drawing lines, or the easiness of reducing the proliferation of *ex officio* suits to absurdity, would militate in favor of unyielding insistence on the boundary between civil and criminal: If a clergyman, perhaps out of charity toward an unfortunate neighbor, cannot with absolute assurance decide to do without some tithes, should a legatee -- who is perfectly free to release his legacy -- feel he is not strictly free to give it up informally by not suing? Moreover, ecclesiastical judges would be given a free hand for arbitrariness, for they would inevitably pick and choose those claims whose vindication they thought necessary or whose private owners they thought worthy of assistance. Nor can the specter of the *ex officio* oath be conjured away: Though the judges were on the whole willing to concede a place to self-incriminatory examination in criminal cases, they could not have welcomed expansion of opportunities to use it and multiplication of problematic cases about it. While the cases in this and the last Sub-section do not bespeak a very strong proclivity to curtail ecclesiastical judgment, those in which Prohibitions were granted are both consistent with and less obviously justified than controlling innovative use of *ex officio* procedure.

(n) Anon. P. 15 - T. 15 Car. K. B. March 25 and 47.

These two short reports are probably about the same case. The first (P.15) states the rule that a suit for tithes by one of two joint-tenants of a rectory should not be prohibited. It adds that Prohibition will not lie to stop an ecclesiastical suit for defamation brought by a married woman without making her husband co-plaintiff. The second report (T.15) states a specific case: Two joint-tenants of a rectory agreed with certain parishioners to take a sum of money in lieu of tithes. One of the joint-tenants then brought a tithe suit alone. Prohibition was sought on the ground that one ought not to sue without the other. A writ was denied, for the reason that although one of the joint tenants could not sue alone at common law, it might be permissible by ecclesiastical law. The judges did not say the suit was unexceptionable by ecclesiastical standards, but that whether it was did not concern the Court. Such a suit's exceptionability by common law standards made no difference.

Prohibition was presumably sought on the theory that discord between the temporal and spiritual spheres with respect to the implications of joint tenancy was intolerable, or that people were entitled to the expectation that their liability to suit by such tenants was the same in both spheres. It might have been argued that it was especially jarring for joint

***Prohibitions to Control the Ambit of Remediable Wrong,  
or Merely to Prevent Imposition of Unwarranted Liability***

tenants of so thoroughly secular an interest as an impropriate rectory to have privileges as ecclesiastical litigants which they would not enjoy in most transactions and lawsuits affecting their interest. (An ordinary rectory, in the hands of a clerical incumbent, could presumably never be held jointly. The interest's dependence for its very existence on temporal law could be urged as a reason for subjecting it uniformly to common law rules.)

Like the judges, I can see no particular cost in tolerating diversity in this respect and some virtue in permitting it. As in other contexts, the tithe-payer who has not taken the simple step to clear himself of liability to suit -- severing the tithes -- is in a weak position when, having incurred a suit, he tries to take advantage of a legalism (a point of jurisprudential principle or a technicality, as one prefers to see it.) It is worth noting in the present context that if the tithe-payer severs and one joint-tenant carries off all the tithes, not only is it no concern of the payer's -- he has no responsibility to make sure that each joint-tenant gets half --; in addition, the partner left without any produce would be helpless at common law -- a single joint tenant could not convey the interest or bring a lawsuit complaining of dispossession from or trespass against it, but if he took all the profits his partner could not compel him to share. This peculiarity makes it the odder to say that in litigation the tithe-payer is in effect entitled to insist that he not be required to pay to a single joint-tenant the monetary equivalent of tithes due. A further benefit of leaving the ecclesiastical court to its own devices is that while letting the single joint-tenant sue might lead to his recovering the full value, it would not have to -- the court would presumably be free to award him only half.

The rule on a married woman suing singly, stated in the first report, can seem to have more substantive depth than the one on tithe suits by a single joint-tenant. In the former case, non-interference with the ecclesiastical court seems to entail accepting its right to confer legal personality on married women beyond what was accorded them at common law: The woman can *be* defamed, even though, so to speak, her husband does not feel pinched enough by *her* loss of fame to bother to sue. One should remember, however, that a married woman can be hit too. No one denied that the pain and indignity were hers, whether or not the husband "felt the pinch." Her incapacity to maintain an action for battery without her husband is essentially a function of the common law remedy, damages, which is to say, of the wife's incapacity to receive to her own use, or to dispose of, chattel property. A strength, indeed the great strength, of ecclesiastical defamation was the place it had for non-pecuniary

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

remedies -- a forced apology or some form of "spiritual" punishment. Given the remedial difference, it makes little sense to stand in the way of a suit by the woman alone -- I should say neither more nor less than standing in the way of a tithes suit by one joint-tenant. Objecting to either suit involves a preference for uniform rules for the sake of uniformity, or else the feeling that one has a right to depend, regardless of context, on familiar rules encountered in the mainstream of the law. That feeling is most likely to be entertained by such "bad men" as the parishioner who sees an opening to evade his tithes (perhaps because one joint-tenant is known to be out of the country, so that a joint suit is unlikely in the foreseeable future) or the villain who thinks he can get away with defaming a lady (perhaps because her estranged husband would be all too glad to see her defamed.)

My comments so far speak to the general propositions in the first report. We need now to ask whether the specific case in the second report calls for any qualification of the conclusion that prohibiting a tithes suit by a single joint-tenant would never be defensible. The possible difference in that case is the fact that the two joint-tenants jointly agreed to accept money and forgo the tithes in kind, and only one sued in the face of the agreement. Parishioner's being sued by only one would clearly not prevent his having any benefit of the agreement the ecclesiastical court was willing to allow him. Prohibitions were ordinarily not granted to stop tithes suits brought in violation of such agreements -- Parishioner was left to his remedy for breach of contract. But that does not mean the agreement could not be pleaded in the ecclesiastical court or that the court could not take note of it -- discharge Parishioner if he had already paid the agreed sum or order him to pay only that. Could proving the agreement be harder for the parishioner when his adversary was only one of the parties who made it? Possibly -- the plaintiff will probably deny it, the absence of his co-tenant as co-plaintiff may mean that he is out of the court's reach, so that he cannot easily be examined to see whether he would deny the agreement with equal boldness or by testimony consistent with his fellow's. But other contingencies would cut the opposite way: The missing co-plaintiff is an honorable man who will not sue against his own contract, or he is the one whom Parishioner has paid (and now he has quarreled with his co-tenant and will not share the money, driving the latter to sue Parishioner since he cannot enforce sharing at common law) -- honorable or dishonorable, the missing co-plaintiff will be glad to testify in Parishioner's behalf. Disadvantage to Parishioner on this score is too uncertain to count significantly in favor of prohibiting the single, joint-tenant's suit. What about Parishioner's

***Prohibitions to Control the Ambit of Remediable Wrong,  
or Merely to Prevent Imposition of Unwarranted Liability***

common law position in the event that the ecclesiastical court orders him to pay the value of the tithes? If he has paid the bargain sum and now is forced to pay another, or if he has not paid it and the tithes are valued at more than the bargain sum, he is entitled to recover his loss by suit for breach of contract. Must he sue both joint-tenants jointly? If so, his right to recoup could be frustrated by the unreachability of one. But if he can reach both, it is to his advantage to have the resources of two people at his disposal to satisfy the judgment. If he can sue either singly, and both are responsible for breach of the joint contract (i.e., including the partner who is personally blameless), he is so much the better off. I do not know how to answer the common law questions in this corner of the doctrine of joint-tenancy, but on the whole there seems little reason to worry about Parishioner's interest.

There is admittedly something odd about a tithe suit by a single joint-tenant. In a sense, allowing it is like countenancing an *ex officio* suit for tithes (last case above.) For the absence of one of the co-tenants can be taken to imply that the will of the entitled party (a single person in law consisting of two natural persons) is to forgo the tithes -- and yet the ecclesiastical court is permitted to enforce their payment. This is especially true when the single joint-tenant's suit is in the face of an actual expression of that will in a joint commutation agreement, which weakens the possibility that the absent co-tenant is as desirous as the other that the tithes be collected, but is merely prevented by some contingency from participating in the suit. But it is perhaps equally arguable that any act of either joint-tenant expresses the will of the partnership. I can in the end see nothing in the metaphysics of joint-tenancy -- an inherently strange institution -- firm enough to countervail against the common sense grounds for allowing ecclesiastical courts to entertain a single co-tenant's suit if they want to.

(o) Couch v. Toll. T. 17 Car. C.P. March, 38.

Toll was prosecuted *ex officio* for incontinency, in itself a perfectly lawful proceeding. He sought a Prohibition on the ground that he was neither cited nor presented, but had nevertheless been excommunicated. Prohibition was denied by the two judges present, Reeve and Crawley. Reeve said that citation was not necessary in *ex officio* proceedings, but that even if it were a requirement of ecclesiastical law, its omission would be remediable only by appeal. Crawley observed that if the party should be returned as cited when in fact he was not, he would have an Action on the Case.

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

What does the failure to cite Toll mean? Was he convicted without being notified that he was accused and summoned to defend himself? Or was he given informal notice, so that his complaint was only the omission of a technically proper citation? If the latter, refusal of a Prohibition is unremarkable. If the former, the two judges' decision was a strenuous act of self-denial. It is not impossible that they meant to imply a strong position: Ecclesiastical law permits, and should not be kept from permitting, excommunication for a crime when the court is satisfied of its own knowledge that the party is guilty -- it does not matter that he does not find out he is suspected until he learns he is excommunicated -- he must come before the ecclesiastical judge to signify repentance if he wants to purge his excommunication, and perhaps on that occasion he may protest his innocence and secure a hearing on whether he in fact committed the offense -- he can presumably appeal if he then claims the original court mishandled his case, either by a mistaken finding of fact or by denying him a chance to vindicate himself -- but he is not entitled to secular assistance in the name of due process of law -- rather, the Church in its disciplinary jurisdiction is entitled to its own ideas of what process is due.

This position amounts to treating the ecclesiastical judge's private determination, on whatever information he has, that a crime has been committed as equivalent to presentation. Plaintiff-in-Prohibition here complained that he had been neither cited nor presented. I take that as an admission that he would have no basis for disputing his excommunication here and now if he had been named as an incontinent by persons officially impaneled to present ecclesiastical crimes (normally if not always churchwardens at a visitation.) That, I believe, is correct: Such presentation was not mere accusation, like presentment or indictment by a grand jury, but tantamount to conviction, like presentment in a leet or manorial court; sanctions could be imposed at once, subject, in the ecclesiastical case, to any right the party might be allowed to show his innocence in the process of removing the excommunication. There is an obvious basis for arguing that it is less unfair to condemn on presentment than on the mere judgment of an ecclesiastical official. Neither way does the party have an opportunity to defend himself before a sanction is imposed, but at least presentation is a public act, notice of which is perhaps imputable to all, and there are known accusers whose malice could be attacked in the party's effort to clear himself of excommunication (if not otherwise, e.g., by suit for defamation.) Obliterating the distinction is strong. That does not mean that it is indefensible, but less radically questionable ecclesiastical behavior than

***Prohibitions to Control the Ambit of Remediable Wrong,  
or Merely to Prevent Imposition of Unwarranted Liability***

allowing *ex officio* imposition of sanctions without a hearing was sometimes controlled by Prohibition.

**D.**

**Related Cases: Complaints about the Handling of Initially  
Unobjectionable Ecclesiastical Suits without Disallowance Surmise.**

(a) Collier's Case. P. 37 Eliz. C.P. Add. 25,211, f. 106.

A woman brought an ecclesiastical defamation suit (for calling her "whore".) Judgment was given in the court of first instance (which way is not specified), and the loser appealed. Now a Prohibition was sought on the ground that "arbitrament was made" between the parties. The report gives no chronology -- i.e., does not tell at what stage the parties agreed to arbitrate their differences and the arbitrator made his award. Nor is there information on what the award was or on which party sought Prohibition. Plaintiff-in-Prohibition was in any event presumably trying to stop any further ecclesiastical proceedings (and enforcement of the unreversed original judgment if it was for the ecclesiastical plaintiff.) There is no indication that an effort was made to plead the arbitrament in the ecclesiastical court.

A Prohibition was granted, but clearly without consideration. For the Court (except Chief Justice Anderson, who was absent) expressed opposition to a writ in a tone suggesting that the case seemed pretty obvious; "The matter is clear enough, that the Prohibition does not lie, for the judges in the spiritual court ought to adjudge whether these matters are a good plea or not, and that according to their own laws." If there is a note of impatience in that, the cause may have been that Serjeant Gawdy had consumed more time than the judges thought necessary arguing from a precedent that Prohibition should not lie.

Gawdy claimed to know about a Queen's Bench case from 14 Eliz., which was as follows: A married woman sued for ecclesiastical defamation and recovered damages. (So the report says -- the ecclesiastical court gave essentially the same remedy as one recovering for common law defamation would get, except, of course, that payment of the damages could only be enforced by spiritual sanctions. Such an award is irregular and should probably be regarded as against the ecclesiastical law -- non-monetary remedies in defamation were standard. That does not mean monetary ones could not occur. When and if they did, the case for common law intervention by Prohibition is probably not strong -- the

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

award would probably be seen as ecclesiastical error correctable by appeal, and the risk of its surviving appeal would not necessarily be regarded as unacceptable. Be that as it may, however, it is possible that Gawdy's statement of his case was inaccurate. It may have been costs, rather than proper damages, that were awarded to the successful plaintiff. One cannot always count on the two forms of compensation being nicely discriminated, and for that matter I am not sure that covert "damages" were not sometimes given under the name of "costs" in ecclesiastical defamation. The principle of Gawdy's case is unaffected by the exact nature of the monetary judgment.) The losing ecclesiastical defendant subsequently sought a Prohibition because "the [successful plaintiff's] husband had released it, yet the judge in Court Christian did not regard the release (for they hold that the husband may not release such matter, which touches his wife in her name) [and] gave judgment..." According to Gawdy, the Queen's Bench granted a Consultation because "...their law ought to try whether it is a good plea or not." (Note that it looks as if there was a disallowance surmise in Gawdy's case, whereas the instant case has the opposite appearance. It is often difficult to be sure either way from reports, and so here. I.e., it is not always unmistakable whether plaintiff-in-Prohibition had actually put in a plea and been rejected, or was claiming that the unacceptability of the proposed plea in ecclesiastical law was notorious, or was taking the position that Prohibition should be granted regardless of whether his defense, or alternatively his reason for release from liability by virtue of events subsequent to incurring it, actually had been ruled out or almost certainly would be.)

As far as *Collier* is concerned, denial of Prohibition is hard to fault. How far the decision can be generalized is more of a problem. The lack of a disallowance surmise could be a reason for denying a writ. Nothing suggests that it was considered as a reason, however, and it may be arguable that a case like the present one is not the most appropriate place to insist on a disallowance surmise. (The argument: Generally, with certain well-established exceptions, ecclesiastical defendant ought to be made to plead a defense which is available to him from the start, which has a reasonable chance of being allowed, and which, if allowed and if true, will save him from liability. It is a waste of legal machinery to let such a defendant run for help from the common law courts when he can quite likely help himself where he is. On the other hand, when something supervenes after the ecclesiastical suit is under way, in virtue of which the suit is mooted, or judgment for plaintiff should not be enforced, or the case should not be pursued on appeal, there is less clear reason to insist that

***Prohibitions to Control the Ambit of Remediable Wrong,  
or Merely to Prevent Imposition of Unwarranted Liability***

the party make his point to the ecclesiastical court before trying for a Prohibition. A nice regard for comity might recommend so insisting. But as a practical matter, when the party must make a new move that could not be anticipated at the beginning of the litigation -- when, so to speak, he must go somewhere -- it makes sense to indulge him when he has gone to the common law court. Now it would waste motion to make the party go back to the ecclesiastical court, though it might have been superior form for him to have gone there first. Better to take on the merits and get things settled -- prohibit if one would have done so on disallowance surmise, refuse Prohibition if not.)

These considerations are not very important for the instant case, since the outcome would probably be the same with a disallowance surmise. Requiring the ecclesiastical court to recognize arbitrament in defamation cannot be squared with the partly criminal character of ecclesiastical defamation. I.e., it would be highly reasonable for ecclesiastical courts to take the position that the parties to a defamation suit are not free to drop the suit and arbitrate their difference. The reason is that once an act of defamation is called to the attention of an ecclesiastical court the Church has an interest in the offender's correction over and above the complainant's interest in satisfaction. (The ecclesiastical court's right to disregard arbitrament if it sees fit would seem to be more doubtful if quarrelling parties were to agree to arbitrate before the launching of a suit. For the strongest case, suppose someone called "whore" threatens suit; the defamer offers arbitration and the offer is accepted; the arbitrator finds either that the aspersion was unjustified or that it was in any event loose-tongued and uncharitable to cast it and orders the payment of money to the woman [The arbitrator in so ordering would be doing what ecclesiastical courts themselves would not do in defamation cases -- giving damages --, but what is to prevent him?]; the money is paid [assume that the woman is single, to avoid complications arising from the status of married women] -- if the woman now breaks her agreement and sues, may the ecclesiastical court still ignore the arbitration, leaving the defamer to get his money back by common law suit for breach of contract? The answer is not obvious. The ecclesiastical law may still be within its rights to insist that defamation is simply not arbitrable, whether in the form of an agreement not to sue or an agreement to drop a suit. But the case is harder. Since the present, case does not seem to have given the Court much trouble, the best guess is that arbitration, if actually resorted to at all, came after commencement of the suit, or for that matter when the appeal

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

from the original decision was pending. There is no certainty about the sequence of events, however.)

I doubt that the Common Pleas meant to imply that ecclesiastical courts may disregard arbitrament in *any* kind of case if they are so disposed. It may be that arbitrament must be pleaded and Prohibition sought only on disallowance surmise (at least when the agreement to arbitrate is antecedent to bringing suit.) A good reason for that rule would be the variety of ecclesiastical suits. In some of those arbitrament has no claim to be a good plea in principle (but might still be allowed by discretion -- e.g., in defamation it turns out that the defamer admitted his error before the arbitrator, apologized, perhaps even offered a compensatory payment, which was accepted; the defamee appears to be suing in the face of the arbitration from implacability or in the hope of getting the other party to offer more compensation than the defamee was originally content with.) In other kinds of suit, it is hard to imagine disallowance of the plea of arbitrament, and therefore wise to insist that it be alleged before intervention will be considered. Be that as it may, it is also hard to imagine common law courts always tolerating disregard of the plea, or endorsing the position that it is always within the ecclesiastical courts' discretion whether to recognize the parties' desire to arbitrate disputes amenable to ecclesiastical justice. For a cautionary note, however: Disputes over whether money is due, and if so how much, are the place where standing in the way of arbitration is least rational. For practical purposes, most ecclesiastical disputes over that were about tithes ("for practical purposes" because though a tithe suit claims tithes in kind, not money, a suit will rarely be brought and completed before the produce is consumed and only its money value can be recovered.) But there is a serious obstacle to insisting on recognition of arbitrament in tithe cases: viz., suits in the face of commutation agreements were ordinarily not prohibited, on the ground that Parishioner's contractual rights were protectable at common law. The same can be said about the rights of either party under an arbitration agreement -- if one party violates the agreement and sues or persists in a suit, and the ecclesiastical court rebuffs the plea of arbitrament, the other party can presumably recover any loss, including litigative costs. If, then, insisting that arbitrament be respected in tithe cases is dubious, what about, say, legacy cases? A distinction can be drawn -- it was never, I think, suggested that executors, if sued in the face of a release or the like, must pay the legacy if the ecclesiastical court insists and recoup at common law. But the scope for demanding that arbitrament be regarded as a good ecclesiastical plea has shrunk. It might be

***Prohibitions to Control the Ambit of Remediable Wrong,  
or Merely to Prevent Imposition of Unwarranted Liability***

simpler never to demand it than to get into the question when one should and when one should not. It is not impossible that the Court in the instant case so thought.

I have suggested that the Court may not have been enthusiastic about embracing the precedent introduced by Serjeant Gawdy. If that case is accepted as good law, it is certainly a strong precedent. It makes the point that ecclesiastical defamation had a distinctive character and could not be reduced to perfect parallelism with common law defamation. If a husband's release of his wife's pecuniary recovery does not have to be acknowledged, *a fortiori* (I think one naturally says) ecclesiastical courts are free to regard disputes over defamation as non-arbitrable owing to the criminal or "corrective" element. But is the decision in Gawdy's case defensible? Can it be right to keep the defamer under spiritual pressure to pay money to the wife when any money she receives is the husband's, when the effect is to thrust money on the husband after he has disclaimed it? One may acknowledge the ecclesiastical system's title to its (indeed admirable) theory of defamation and of women's rights thereunder. There is no evident reason why the husband should be able to release non-monetary forms of satisfaction to the wife (apology, public retraction.) But one should still, it seems to me, be worried about telling the defamer that if he wants to avoid or undo excommunication he had better confer enrichment on the husband who has renounced it. There is of course no certainty that the Court shared these doubts about Gawdy's precedent. The point is just that the instant case is probably easier and the result reachable without accepting the precedent.

(b) *Coke v. Lambert*. M. 2 Jac. K.B. Lansd. 1111, f. 32b.

This case raises issues similar to those in the preceding one, but it was handled very differently. After starting a defamation suit, the plaintiff, Coke, agreed that if Lambert, defendant, would pay Coke's proctor a certain sum Coke would drop the suit. I.e., the parties made a simple form of settlement: Having, presumably, cooled off from the quarrel that produced the (unspecified) insult, they agreed to retire from the field; defendant admitted responsibility for the trouble to the extent of agreeing to pay plaintiff's litigative expenses to date. (The proctor's bill was a modest 12d.) Lambert sought a Prohibition on the ground that Coke was proceeding with the suit despite the agreement and despite the fact that the proctor had been paid his 12d. A writ was granted, and Serjeant Houghton, representing Coke, moved for Consultation.

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

Houghton did not make a general argument along the lines of the last case above -- that owing to the criminal aspect of defamation the ecclesiastical court should not be compelled to recognize the parties' private settlement. (The case seems to me one in which it would be folly *not* to recognize the settlement -- it was reached very early in the course of litigation; the man accused of defaming his neighbor acknowledged wrongdoing in a way and was the poorer for it by 12d. plus any litigative expenses of his own. In principle, however, what basis is there for distinguishing arbitrament, which in *Collier* above the Elizabethan Common Pleas held should be left to ecclesiastical discretion?) Nor did Houghton complain about the absence of a disallowance surmise, of which there is no sign. Rather, he relied on a point of contract law: The parties' agreement, as Houghton put it, was "executory", meaning that it could be and was executed on Lambert's side, but on Coke's could *never* be said to be fulfilled. I.e., if up to the present Coke had not proceeded, he would not have performed his side of the contract because he might still proceed in the future. (Some assumptions are obviously necessary in order to say that an undertaking not to proceed with a lawsuit is perpetually executory. There must be no formal step by which plaintiff can drop the suit and no rule that the suit dies automatically if he does not actively prosecute it for a certain time. This assumption is at any rate necessary unless the contract is construed so narrowly that it does not impose an affirmative obligation to take any available step to terminate the suit, and then to refrain from starting a new suit for the same cause if the old one is ended either by formal act or by neglect. I.e., an undertaking not to attempt or purport to continue or renew a suit, whether effectually or not, would remain executory forever whatever the law. If the contract is construed as including a duty not to sue again for the same cause, and "sue again" does not mean "purport to", but "actually put defendant in danger of liability", a statute of limitations would render the plaintiff's undertaking performable within a definite time. So, probably, in the specific case of ecclesiastical defamation with its criminal element, would a pardon prior to the second suit. I spell out these complexities because it is possible that Houghton's approach to the case assumes more than can quite safely be assumed. The discussion does not reach those assumptions, however. I have no reason to doubt that what seems to be taken for granted was true at least in the main point -- viz. ecclesiastical law did not evidently or notoriously provide for the termination of a suit once started; the courts might, even if they had some discretion not to, treat suits as indefinitely revivable until disposed of by sentence. There was no relevant statute of limitations. A pardon applying to

***Prohibitions to Control the Ambit of Remediable Wrong,  
or Merely to Prevent Imposition of Unwarranted Liability***

Lambert's offense is perhaps the most likely eventuality to undercut the argument that Coke's side of the bargain could never be called performed.)

*Per* Houghton, a contract "executory" in the sense explained could not be "a bar at common law." I would propose the following reconstruction of his argument (which is not elaborated in the report): If X. and Y. exchange mutual promises, Y. cannot sue X. for non-performance until he has performed himself. (While this is not good modern contract law, it is probably correct enough for the early 17th century.) If Y.'s promise is such that it can never be pronounced fulfilled, Y. will never be in a position to complain of non-performance on X.'s side. X. -- assuming his promise to be definitively performable, as Lambert's was in the instant case -- may presumably complain of a breach on Y.'s part and recover anything X. has actually paid by way of performing his side. (I.e., the contract is not such a nullity that X. performs at his peril. I presume his action would be Debt.) But even granting that, the contract is so "out of balance" that it cannot be invoked collaterally against Y. I am not sure of the range of common law applications of this idea. I should suppose Houghton had the following in mind: In consideration of X.'s agreeing to pay him a sum of money, Y. promises never to bring a lawsuit against X., should a cause of action accrue to him. Y. thinks a cause of action has accrued and brings suit. While (I am assuming) X. may subsequently recover the money if he has paid it, he may not plead the contract to bar Y.'s suit. If, by contrast, Y.'s promise is not to sue for a particular, specified cause of action (at any rate one that has already accrued -- the form of the basic settlement), X. may bar the suit by pleading the contract and performance on his side. In application to the present case: Is it not anomalous to let Lambert enforce the contract specifically in effect -- by stopping the ecclesiastical suit -- when, in an analogous situation at common law, he would be powerless to bar Coke from suing him? If its premises (and my construction of it) are correct, the argument has considerable force.

(There is surely no implication that the ecclesiastical court would be obliged to imitate the common law. I.e., if it saw fit to let Lambert plead his contract and to treat it as a bar to further proceedings by Coke, it would be perfectly free to do so. One should simply say that the ecclesiastical law may be different, and that whatever it is it should prevail in an ecclesiastical case. Houghton's point was that the common law court had no business telling the ecclesiastical court that it may *not* do what the former would do itself in an analogous case. It is also important to note the concession implied in Houghton's position: If an

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

ecclesiastical suit, including defamation, was settled by a contract that was not perpetually executory on one side, enforcing the contract by Prohibition would be unobjectionable. A settlement before commencement of litigation ["If you will pay me so much I will not start an ecclesiastical suit for these words you spoke of me"] would clearly be enforceable by that means. It is only a promise to desist from a suit already begun that would present problems, if indeed the ecclesiastical position was that suits are indefinitely revivable. One in Lambert's position would be best-advised to protect himself by bond forfeitable on the other side's renewing proceedings. Even assuming that Lambert could recover his 12d. once Coke broke the contract, he would not be very adequately protected against what he was presumably interested in avoiding -- the expense and embarrassment of a lawsuit for his hot words.)

Besides Houghton's argument, all that is reported of *Coke v. Lambert* is the opinion of Justice Gawdy, who thought the Prohibition properly granted and Houghton in error. Gawdy started by saying: "For though the first cause is spiritual, yet the concord is a temporal thing." This seems directed against the general argument that by and large what ecclesiastical courts do with cases in their jurisdiction should be left to them, that to justify intervention common law courts need an interest solidier than the bare fact that parties have attempted to settle a dispute within that jurisdiction. Perhaps, however, Gawdy would not have controverted this proposition just as I state it. The strength of Houghton's position is the way it drains "the concord is a temporal thing" of significance: Of course the act of contracting is "temporal", but when the act is largely inert in the temporal sphere, it is perverse to insist on its being given force in the spiritual. *Per Houghton*, it is "largely inert" because it does not produce a "true contract" in the sense of a pair of obligations either side could enforce on the other; at most, the act in question would generate a temporal right in one party to restitution of money paid in consideration of a promise subsequently broken by an act in the spiritual sphere, and that is too tenuous a foothold for telling the ecclesiastical courts what they must do.

Gawdy *could* have held that the foothold was not too tenuous, that so long as the "temporal act" had any effect at all (was not a mere nullity in the manner of a "naked promise") the common law court had interest enough to use the means it had (power to prohibit) to see that the parties' intention was carried out. I.e., he could concede that an analogous act would not be a common law bar, but write that off as a perhaps unfortunate

***Prohibitions to Control the Ambit of Remediable Wrong,  
or Merely to Prevent Imposition of Unwarranted Liability***

technicality and maintain that the Court should use its opportunity to insure substantial justice. I doubt that he did so hold or so concede, however. For he went on to take apparent issue with Houghton's analysis of the common law. His reported words are: "...[besides being temporal the concord] is also executed on the defendant's part. He may plead it at common law though it is executory on the plaintiff's part." I am constrained to say "apparent issue" because Gawdy does not tell enough to make it altogether clear whether he is disputing Houghton's fundamental claim that someone in a position analogous to Lambert's could not invoke the contract to bar a common law suit in breach thereof. "He may plead it at common law" does not have to mean he may plead it in bar, as opposed to "use it in any way at all, if only for the purpose of recovering his money after Coke's breach." From the tone and context, however, and because it notably strengthens the case for Prohibition, I am inclined to suppose that Gawdy did think Houghton wrong on the common law effect of a settlement like the one in question. (One should probably not be surprised to see differences on basic points of contract law at the time of this case. That the field was agitated and in flux is best known from the history of *Assumpsit* before Slade's Case. I do not pretend to know how unsettled the particular question between Gawdy and Houghton was.) If Gawdy's stand on the common law was as I suppose, his defense of Prohibition would come to arguing that discord between the temporal and spiritual systems on the expectations a man is entitled to when he settles a lawsuit is intolerable -- perhaps as convincing an instance of an intolerable discord as any.

Gawdy's finished by saying: "And so if one sues an executor in Court Christian for a horse devised to him, [and] the defendant comes and surmises that the testator gave it to him in his life he will have prohibition." The "and so" is the interesting part of this statement. The proposition stated is itself good enough law, except that perhaps it should read "...defendant comes and surmises *that he tried to plead [such inter vivos gift of the horse] and was disallowed.*" The proposition was in any event conceded by the others present in court, the reporter says. Does a solution to the present case follow as clearly as Gawdy seems to have thought? In the legacy case, Prohibition serves to insure that the ecclesiastical court does not award to the legatee a horse that was not testator's to bequeath, and that whether ownership of the horse was conveyed by testator in his lifetime -- a property question -- be resolved at common law. Common law interest in protecting secular property is firmer, though not

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

necessarily more desirable, than interest to prevent such anomalies as conflicting temporal and spiritual rules on the barring effect of a settlement-contract.

Save for their agreement with Gawdy's case of the executor, nothing of the other judges' views is reported. To summarize, two principal issues remain in the clouds: (1) Is Houghton's analysis of the analogous common law correct, and if so does it unmistakably follow that Prohibition should be denied? (2) Granting, contrary to Houghton, that an agreement analogous to the one in the instant case could be used to bar a common law suit, does it follow that Prohibition should be awarded?

(c) Barton's Case. H. 7 Jac. K.B. 2 Brownlow and Goldesborough, 215.

In this case, the two churchwardens of a parish sued an inhabitant to collect a tax levied for repair of the church. Pending the suit, one churchwarden released and the other persisted in suing. Prohibition was granted, and the case proceeded to formal pleading. The Court decided for Consultation on demurrer (with so little apparent doubt that the case's reaching that stage is surprising.)

Davenport, opposing Prohibition from the Bar, argued primarily that churchwardens are a corporation for the parish church's benefit. He cited authority for this proposition, which there is no reason to consider controversial. The question is what it implies for the case at hand. Davenport's reasoning is not fully articulated, but I think it would clearly be the following: The problem is what to count as an act of the corporation. Its being a "beneficial" corporation does not mean its acts, to be deemed its acts, must in fact benefit the church. I.e.: If the two churchwardens had joined in releasing the tax suit in the present case, it would be released, and Prohibition would presumably lie (perhaps only on disallowance surmise) to insure that the ecclesiastical court treated it as released. It would not matter whether the release was on good consideration or a proper thing for the churchwardens to have done by "fiduciary standards." The rate-payer would be off the hook, whether or not there was a remedy against the churchwardens for careless or corrupt discharge of their office.

Davenport's argument must rather be that the "beneficial" character of the corporation entails a conservative interpretation of the power of a single churchwarden to act for it: Perhaps not every act of the "artificial person" must be the joint act of its two "members." But at the least, to count as a corporate act, the act of only one must be manifestly to the church's benefit. A release is *prima facie* disadvantageous to the church and therefore requires the participation of both churchwardens. This is true regardless of whether a

***Prohibitions to Control the Ambit of Remediable Wrong,  
or Merely to Prevent Imposition of Unwarranted Liability***

particular release, being the act of both churchwardens, would be defensible, as I put it, by "fiduciary standards" -- granted for some reason of equity or charity that might be considered in the church's moral interest, to secure or reward some other service to the church by the releasee justly regarded as equal in value to the tax, or the like.

At the end of his speech, Davenport seems to flirt with the broader proposition that *every* corporate act of churchwardens must be the joint act of both, for he says generally that the two churchwardens are one "corps" and half of a "corps" cannot release. Even if he meant to suggest the possibility that that should be the rule, however, I suspect he was banking more seriously on the narrower argument I have stated.

Yelverton next spoke from the Bar in favor of Prohibition. He did not dispute Davenport's basic theory, but attempted to make a distinction. Yelverton conceded that one sort of release by a single churchwarden would be ineffectual: Viz. if the churchwardens, as corporate possessors of the goods of the local church, have a trespass claim against someone for taking or damaging those goods, they can only release the claim jointly. (At the least, this is true when the churchwardens have commenced a joint action of Trespass -- it is not completely clear whether Yelverton intended the broader or only the narrower proposition.) On the other hand, *per* Yelverton, a tax is releasable by a single churchwarden. He first explains this distinction by saying the tax is a "mere thing in action", but justifies it more materially by arguing that one churchwarden cannot sue for the tax and therefore one cannot go on suing after the other has released. This assumes that the release is of *some* effect: If the two churchwardens start a tax suit, then Churchwarden A releases, *he* would be barred from carrying on as co-plaintiff -- releasee would be entitled to plead the release, and the ecclesiastical court would be constrainable by Prohibition to exclude him from further participation; by collateral effect, according to Yelverton's argument, Churchwarden B is also barred, because a suit for the tax must be prosecuted at all stages by both. The assumption is not compelling: If the issue is "What counts as a corporate act?", and the release of one member does not, why should the releasor himself, in his corporate capacity, be prevented from continuing with the suit in the face of the release? Why should the release not be considered a mere nullity, which it was the releasee's folly to take? (Or, if the releasee has any pretense to a just grievance, why should he not be left to do what he can for himself at common law against the releasor as an individual? Perhaps under some circumstances, if he paid for the release -- even if what he paid came to the use of the church -- he could claim

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

deceit.) It may remain arguable, and Yelverton may have wanted to argue, that it is a mere formalistic requirement that suits for parish taxes be commenced and prosecuted throughout by both churchwardens. (So to speak, whatever else they may do singly so as to bind the corporation, both churchwardens must participate in exercises of "prosecutorial discretion.") In the instant case, even if the release were a nullity, the releasor was in fact honoring it by refusing to prosecute further, wherefore the suit is unlawful and should be prohibited. It seems to me, however, that the "formalistic requirement", if it exists, is an awfully weak candidate for enforcement by Prohibition. On the assumption (contrary to Yelverton's) that the releasor himself is not excluded, the common law court could with better grace insist that the ecclesiastical court use its spiritual sanctions to compel the releasor to participate than be the agent of the church's loss for the sake of a formalism.

As for Yelverton's distinguishing churchwardens' claim to be paid a tax, as a "mere thing in action", from their claim to compensation for a tort against the church's property: I find it hard to give this any plausible substance. Of course a tax is a more ghostly "thing" than a piece of property. It does not exist as a duty or an interest until it is voted and assessed against individuals; the taxpayer is free to claim that he owes nothing, or less than is demanded, because the tax was improperly voted or assessed; he in a sense does no wrong in withholding the tax until an ecclesiastical court -- having avoided the pitfalls that often led to Prohibitions in parish-rate cases, notably alleged offenses against customary rights -- tells him he must pay it. To release a claim to a solid chattel is in a sense to convey it; to release a claim to a tax is a lesser act because there is nothing solid enough to be conveyable (wherefore, Yelverton would have it, the latter but not the former is within the competence of a single churchwarden.) But surely these are trifling legalisms. There is no practical difference between doing the church out of a shilling's worth of vested property and a shilling's worth of rates. Permitting a single churchwarden to act for the corporation is neither necessarily right nor necessarily wrong in itself -- that is a question of what the positive law is and whose positive law (secular or ecclesiastical) should prevail, and behind the positive law is a question of prudence in the church's interest. But if the single churchwarden lacks power to do the one "non-beneficial" act, he should lack it to do the other as well.

The report says expressly that the judges interrupted Yelverton and announced that they thought a Consultation should clearly be granted. Chief Justice Fleming proceeded to speak

***Prohibitions to Control the Ambit of Remediable Wrong,  
or Merely to Prevent Imposition of Unwarranted Liability***

to the case, so far as appears with the full concurrence of his brethren. His opinion is an important one for the doctrine of Prohibitions. I have amply suggested that Yelverton was going nowhere promising and deserved to be cut off in mid-argument. The significant feature of Fleming's speech is that it repudiates the approach of counsel on both sides, the winner, Davenport, as well as Yelverton. Per Fleming, the whole dispute over the validity and effect of the release was irrelevant. In a common law suit -- e.g., in an action of Trespass for taking property belonging to the church --, he said, the Court might have to debate what to do about a single churchwarden's release. In the instant case, because the suit was in an ecclesiastical court, and that was proper place to sue for a parish tax, the release was of no concern to the King's Bench -- it was simply up to the ecclesiastical court to handle it as ecclesiastical law required.

To formulate the difference of approach: Davenport (and Yelverton as well, in the premise of his argument) took it that there was a "law of the land" on the capacity of churchwardens to act as representatives of a corporation -- a rule that would be applied at common law and should be imposed on ecclesiastical courts. The essential arguments in defense of this point would be: (1) It is unfair to the subject to expose him to the possibility that he cannot always have the same expectations as to the effect of a release by a churchwarden. The unfairness is arguably the greater in a situation where there is no sharp practical demarcation between "spiritual" and "temporal" affairs. I.e., if a man takes a release of a tax from a churchwarden on Monday and a release of a trespass on Tuesday, how is he supposed to know that his legal position may be different in respect of these two transactions? (2) Although churchwardens are for some purposes obliged to sue in ecclesiastical courts (the same can after all be said of lay natural persons), they are in law a secular corporation. Therefore they should be subject to a uniform body of common law rules, to which ecclesiastical courts ought to defer. (The proposition that churchwardens are a secular corporation is more than well-warranted -- it is simply true, though it need not follow from their status as such that the secular law must be the source of all rules concerning them.)

Fleming, on the other hand, saw no inconvenience in the possibility that ecclesiastical and common law might differ on the point in question, each applying its own rule in its own cases. The burden on this position of "high deference" to ecclesiastical independence is to make out in the face of other decisions either that *no* conflict of rules is as such intolerable or

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

that conflicting rules on the capacities of churchwardens would not be hard to tolerate compared to other imaginable conflicts. I do not imply that the burden is unsustainable; cases in point (mostly the disallowance cases in Vol. II) are tangled and unclear in their net meaning. In the immediate case, I strongly suspect that Fleming had no fear of serious conflict. I.e.: He agreed with Davenport -- the single churchwarden's release would not bar the other from suing for the corporation at common law. If that is right, Fleming and the rest of the judges could be criticized for asserting the principle of ecclesiastical independence -- a principle the government would smile on -- when doing so was virtually cost-free. But they can also be defended. To say what the judges declined to, and Davenport thought he could persuade them to -- "The ecclesiastical court should obviously not be prohibited because it does not threaten to do anything different from what we would do in an all-but indistinguishable case before us" -- carries the implication, or adds to any impression that might be accumulating from case to case, that conformity with the common law was expected *prima facie* of ecclesiastical law. It is better, Fleming might say, to signal that the presumption runs in the other direction: Usually rule-conflicts between the two systems will be harmless, adjustable-to, or acceptable because the purposes and procedures of ecclesiastical law are just different from those of the common law in the most nearly comparable situations. Sometimes the common law courts may be presented with clear conflicts and strong arguments that injustice would result from them. When nothing of the sort is before the Court -- when there probably is no conflict, and if there were the ecclesiastical rule would be eminently reasonable (as can surely be said of a rule limiting the harm one churchwarden acting alone can do to the corporate interest he is supposed to represent) -- it is best not to speculate and complicate. "What the ecclesiastical courts do with their own cases is their own affair" does not state a foolproof policy, but a simple one with the virtues of simplicity -- the best policy until a real case for an exception is made. It is rather to the credit of the King's Bench in *Barton* that the judges insisted on the simple policy when they could have reached the same result otherwise. The cost of the alternative way would only have been pronouncing on the law, probably not very controversially, beyond the bounds of the case at hand; that may not always be a negligible cost.

(d) Anon. P. 9 Jac. K.B. 1 Bulstrode, 122.

This report is only notable for an incidental point. The principal case was a *Habeas corpus* turning on whether a person imprisoned on a *De excommunicato capiendo* was

***Prohibitions to Control the Ambit of Remediable Wrong,  
or Merely to Prevent Imposition of Unwarranted Liability***

bailable, a question of statutory interpretation. In the course of discussion, it was said by the way that ecclesiastical courts would not discharge from excommunication persons handed over to the secular arm by *De excommunicato* unless they would pay a sum of money and give a bond (presumably insuring future good behavior.) In other words, ecclesiastical courts were being especially tough on excommunicates obdurate enough to require proceeding as far as a *De excommunicato*. The judges expressed the unanimous opinion that this procedure was unlawful: The excommunicate should be absolved like any other, and if he failed to behave as he undertook to -- without a bond -- in consideration of his absolution, he should be retaken on *De excommunicato*. (That presumably means without *de novo* prosecution for the offense he had repeated.) This opinion is in line with others, usually involving the High Commission, restricting ecclesiastical courts to ordinary "spiritual" remedies and sanctions (save for the limited use of fines and imprisonment permitted exclusively to the Commission.) There was no question of a Prohibition in the case at hand, but there can be no doubt that the writ would have been used if called for to prevent extraordinary measures against a special class of ecclesiastical defendants. The report contributes an instance of procedure the common law courts would not tolerate within ecclesiastical jurisdiction.

(e) Thomas Hyat's Case. H. 12 Jac. K.B. Croke Jac., 364.

An ecclesiastical court granted Hyat's wife a separation and alimony on grounds of cruelty. Hyat tried in effect to quash that sentence by Prohibition. His position was that the sentence should not have been given because he had "offered reconciliation, and desired cohabitation, and proffered caution [security] to use her fitly." Prohibition was denied, the judges saying only that the ecclesiastical court was the proper tribunal for separation and alimony and cruelty was a proper basis for ordering them. I should say that Hyat was badly advised to seek a Prohibition, for the case is all but open-and-shut against him. It is extremely hard to find any common law foothold for second-guessing the ecclesiastical judgment that an abusive husband's professions of amendment are unreliable and that a good-behavior bond would not be adequate protection for the wife if she were required to live with him again. (In the related marital case above -- Sub-sect. C, Case [k] --, the husband's claim to Prohibition, though made in a confused way, was strong by comparison, for he was complaining that he was denied a chance to justify the behavior adjudged cruelty. The common law could be said to have a standard of justifiable husbandly "correction", so

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

that at least a legitimate question arose as to whether ecclesiastical courts must apply the same standard for their purposes.)

In form, *Hyat* is the next thing to a regular disallowance case. I.e., plaintiff-in-Prohibition clearly had made his point in the ecclesiastical court unsuccessfully and said so, whereas in most of the other cases in this Sub-section the absence of a disallowance surmise is a potential formal ground for denying Prohibition. The only difference is that in an ordinary disallowance case rejection of a defense is complained of; *Hyat* did not claim to have a defense against his wife's basic contention that she was abused and entitled to a divorce, only grounds for arguing that the sentence of divorce was excessive under the circumstances, including his willingness to guarantee that he would not repeat his misbehavior.

(f) *Lloid v. Maddox*. P. 14 Jac, K.B. Moore, 917.

This report deals with a situation encountered in several cases arising on disallowance surmise. Here, however, that surmise could not be used because the ecclesiastical court did not disallow defendant's plea. It permitted him to plead as he liked, whereupon plaintiff put in a counterplea. Defendant then sought a Prohibition on the ground (one had better say, a bit indefinitely) that the common law court was the appropriate place to unscramble the issues. The ground was shaky, and Prohibition was denied.

The ecclesiastical suit was against an executor for a legacy. The executor pleaded a common law recovery against him in Debt and alleged that after satisfying that judgment he would lack assets from the estate to pay legacies. The legatee replied (1) that the common law recovery was obtained by covin and (2) that the plaintiff in the common law suit against executor had offered to discharge the covinous judgment, but executor refused to have that done. The report only tells us that the question for the Court was whether Prohibition would lie on these facts, and that the Court said "No", the judges noting that the legacy suit could only be brought in an ecclesiastical court and that the covin was perfectly examinable there.

The interesting question is whether any plausible theory in support of Prohibition can be formulated. In so far as plaintiff-in-Prohibition was claiming in general terms that the facts relevant for disposing of an accepted plea of "No assets" should be tried at common law, he clearly had no case for Prohibition. Merely by denying Prohibition, the King's Bench resolved the legal question obviously latent: May an ecclesiastical court, in the process of determining whether in fact an estate is sufficient to pay legacies, refuse to count as a debit a

***Prohibitions to Control the Ambit of Remediable Wrong,  
or Merely to Prevent Imposition of Unwarranted Liability***

standing common law judgment against the executor when the judgment was obtained by fraud *in which the executor himself was complicit*? The judges said "Yes."

The italicized words are important. Were it claimed by legatee that the estate lacked assets only because the executor was the *victim* of a fraudulent judgment, there would seem to be good reason to stop the ecclesiastical proceedings. This is not because the ecclesiastical court would be particularly incompetent to try the truth of the allegation, but because of the risk -- implied in its allowing legatee so to plead -- that upon verification of the plea it would order payment of the legacy. In other words, the implied ecclesiastical legal position would be that when executor does not "really" owe a creditor as much as the estate can support -- but could if he busied himself reverse or otherwise escape the fraudulent judgment -- he may be ordered to pay the legacy under threat of spiritual sanctions. That is not a position the common law courts could be expected to tolerate. It is not nonsensical, for the executor would obviously have a moral duty to do his best to free the estate of liabilities that could be defeated. It is nevertheless oppressive to subject him to sanctions before he has had a chance, as it were, to go back into the temporal sphere, where his duty must be done. I do not think one can confidently say, at least without the details of a particular fraud, what his resources in the temporal law would be and how certainly he would be able to escape the judgment. One would have to consider among his "resources" equitable remedies as well as common law ones, informal means as well as formal. (The perpetrator of a fraud, confronted by the victim threatening exposure and legal action, may after all be induced to release his ill-won judgment -- a phenomenon illustrated in a variant form by the instant case.) One approach for a common law court faced with an application for Prohibition in this situation would be to deny a writ until it was shown that the ecclesiastical court actually had ordered payment of the legacy while it remained speculative whether the executor would try to undo the fraudulent judgment and whether with the best effort he would succeed. That contrasts with acting on "implied legal position." There is no necessary reason why the ecclesiastical court could not in such a case resort to a milder remedy -- order executor to take the measures the court thought reasonable to disencumber the estate of a liability it ought not to bear and "report back." Probably, however, given the uncertainties, "prohibit now" would be the better course. The executor would be insured against being unwarrantably charged until the common law court itself had examined questions which it is best qualified to judge. I.e.: Pursuant to the Prohibition, it could try the truth of legatee's claim that the judgment was

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

obtained by fraud. Having ascertained that the claim was true, it could presumably find a way to pronounce on whether the liability used to sustain executor's plea of "No assets" was defeasible by common law means. If so, Consultation would be appropriate. (Some tangles remain. One court's saying a judgment is defeasible is not the same as its being reversed in the court that awarded it. Procedural flexibility is imaginable -- let the Prohibition stand for the moment, instruct the executor to take measures to undo the judgment, invite the legatee to move for Consultation after a time if nothing has happened.) If the judgment is not defeasible by common law means, the Prohibition would stand. Equitable and informal means for the executor to overcome the liability remain, but I do not suppose the common law court could take note of those. The best advice to the legatee in this pass would be to go to a court of equity. (This hypothetical case may illustrate why the Chancery eventually, though I believe to no great extent in the early 17th century, took over a good deal of testamentary litigation. The Chancery was much better equipped than ecclesiastical courts to deal with incidental issues of fraud and the like. Among other merits, the Chancery had settled habits of consultation with the common law judges on points of common law -- was less condemned to speculate about them and less likely to mistake them than ecclesiastical courts.)

Now, in our actual case, the executor's complicity in the fraudulent judgment on which he tried to rely was sufficiently made out. I.e.; Assuming legatee's plea was true, the judgment-creditor whose claim executor said would consume the estate had admitted that the testator owed him nothing, but that he had been party to a fraudulent judgment designed to make it appear that the estate was encumbered. He is likely so to have admitted on being confronted by the legatee. There is no telling whether he was a witting participant in a fraud, shamed or frightened into admitting it, or someone who did a friend a favor by bringing a feigned action of Debt against him without understanding or inquiring into his friend's purpose. (I can imagine gray areas of semi-fraud in testamentary affairs. Might an executor legitimately worried about undiscovered debts not think of getting a large feigned judgment against himself in order to put off legatees and keep them from suing, intending to have the judgment released when and if it became clear that there was enough to pay legacies?) In any event, when his eyes were opened, the judgment creditor wanted no part of the scheme and offered to release. The executor refused to accept. Although the pleadings as reported do not quite say so in terms, it is an inescapable inference that the executor was party to the

***Prohibitions to Control the Ambit of Remediable Wrong,  
or Merely to Prevent Imposition of Unwarranted Liability***

fraud and probably its contriver. The King's Bench was therefore quite justified in denying Prohibition. There was no reason to doubt the ecclesiastical court's competence to try the mere truth of legatee's story and no reason to object to its ordering payment of the legacy if it found the story true.

I would suggest, however, that the hypothetical case discussed above provides the most plausible basis for at least considering Prohibition. The argument would be simply that when fraud in temporal transactions is introduced into an ecclesiastical controversy over the assets of an estate, the common law is *generally* the best tribunal. Substantively, there is no reason to prohibit if there is a clearly drawn issue in the ecclesiastical court as to whether the executor's own fraud explains the indebtedness he claims for the estate. Formally, it is better to prohibit across the board on executor's showing that fraud has been alleged against him. It may not always be clear from the ecclesiastical pleadings or the account given of them in a surmise whether the executor is represented as a victim of the fraud or a party to it. If executor can as a rule have a Prohibition by surmising generally that fraud in the obtaining of a common law judgment has come in question (which is all he can allege if the legatee has pleaded the fraud generally in the ecclesiastical court), it is in a sense unfair to hold that an executor who has shown the full truth about the ecclesiastical pleadings will lose his Prohibition because facts which he has revealed are against him. Of two equally guilty executors, one would get a Prohibition and the other not, depending on how specifically the other side did or could plead. (Suppose in the instant case that legatee suspected executor of complicity but did not know the strong fact in his favor -- judgment-creditor's offer to release -- and neglected to allege the complicity in terms.) Moreover, executors would be given a motive to suppress the "full truth" in order to get a Prohibition, which can hardly be desirable in itself, and which only throws the burden of bringing the truth out onto the legatee. While it would be possible to evolve more refined rules (Prohibition will lie only if executor surmises expressly that the fraud alleged against him is not a fraud to which he was party), the complexities and variables in the type of situation we are concerned with are such that a simple rule -- "So long as a fraudulent judgment at common law is in question, Prohibition will be granted, and the merits worked out thereafter" -- has advantages.

I do not say that this line of argument is overwhelming, or that on balance the King's Bench was wrong in *Lloid v. Maddox* to go at once to the merits on the information before

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

it, denying Prohibition. The case against Prohibition may be less than open-and-shut, however.

(g) Fowler's Case. Undated -- probably 3 -- 7 Car. C.P. Hetley, 116.

This case is not very clearly reported and is worth noting only for an unusual angle on a fairly common problem. Parishioner being sued for tithes sought a Prohibition merely by surmising the fact that Parson came to the living by simony. The Court's initial opinion that Prohibition would not lie is in line with other cases. (At bottom, the reason for this position was that, simony being an ecclesiastical offense, it was up to the ecclesiastical court to decide what to do when Parishioner asserted in a tithe suit that Parson was a simoniac -- admit the plea and relieve the Parishioner of the duty to pay if the allegation was true or insist that he pay the incumbent in possession until the latter was convicted and removed in separate proceedings. An Elizabethan statute encroached on the ecclesiastical courts' original freedom in this matter, but it was usually held that one wanting to take advantage of the statute must plead it in the ecclesiastical court and use a disallowance surmise to complain of failure to apply it correctly.) In *Fowler*, however, after the Court expressed its unwillingness to prohibit, counsel came and showed a King's Bench verdict finding that Parson came in by simony and a decree in the Court of Wards "accordingly." Nothing is reported about the context of the verdict and decree. But upon being informed of them the Common Pleas expressed itself as now inclined to prohibit. If the Court acted on its inclination, the case illustrates an anomalous exception to a general policy: Prohibition granted where it would ordinarily not be because it was matter of record at common law that Parson was a simoniac. I think this probably depends on the statute to make sense: The statute made the living void *ipso facto* if the person occupying it came in by simony, the record made it incontrovertible that the party suing for tithes so came in, therefore plaintiff in the suit could not be a qualified claimant of tithes ("could not be" vs. "might not be, if by one path or another he was found to be a simoniac.")

(h) Anon. M. 15 Car. K.B. March, 73.

Parson and parishioners sued churchwardens for an accounting, won some sort of sentence in their favor, and were awarded their litigative costs. Parson released the costs, but parishioners sued for them. Churchwardens sought a Prohibition on the ground that the costs were jointly assessed, wherefore parishioners were barred by parson's release.

***Prohibitions to Control the Ambit of Remediable Wrong,  
or Merely to Prevent Imposition of Unwarranted Liability***

Prohibition was unanimously denied, straightforwardly for the reason that the ecclesiastical law need not conform with the common law on the effect of a release by one of two co-parties, ("...although that in our law, the release of one shall bar the others; yet the action being sued there, and they having conusance thereof, the same is directed according to their law.") In support of the decision, the Court said it had been adjudged that if husband and wife sue for defamation of the wife, sentence is given for plaintiffs, and costs are awarded, if then the husband releases the costs the wife is not bound. This judgment is said to have been "for the reasons given before" -- i.e., presumably, the mere reason that what the ecclesiastical courts do in this matter with their own cases is no concern of the common law courts.

The husband-wife case is stronger than the present case in that there is a distinct oddity about putting the releasee under spiritual pressure to pay money to the wife when it will come to the use of the husband who disclaimed it, and when the litigative costs the money is compensation for must be considered his. Arguably, perhaps, the common law court would have a foothold for intervention when the ecclesiastical law displays a kind of disregard for the "legal reality" of married women's status at common law. (The virtue of the ecclesiastical rule is that the woman after being widowed or divorced would not be debarred from recovering costs incurred in vindicating *her* honor. If during the coverture the husband in effect contrived to evade his release by putting his wife up to suing alone for the costs, and if -- which is not certain -- the ecclesiastical law would permit that, is it possible that the releasee could maintain an Action on the Case against the husband? If so, there is all the more reason not to interfere with the ecclesiastical law. We are not, it should be noted, told enough about the precedent to know whether the wife sued while the husband or the marriage was still alive. If she did, Prohibition would perhaps have been more tempting.)

In the instant case, it is hard to see any harm in letting the parishioners recover the costs awarded to them and the parson without differentiation. One would suppose that the litigation against the churchwardens was paid for by contributions of the parson and some parishioners, or, perhaps more probably, by parish funds (administered by the present churchwardens -- probably the successors of the churchwardens being sued) plus anything the parson put up. I have no reason to suppose that the ecclesiastical court could not scale down the costs, when the parishioners alone sued for them, to see that individual contributors recovered only what they had put up. If, alternatively, the costs went to the

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

collective funds of the parish, any amount shown to have been contributed by the parson personally could be deducted. If the ecclesiastical court failed to make such adjustments, the parson would only have succeeded in diverting to the parish or to parishioners willing to incur expenses for the good of the church what he could have had for himself. It makes no sense to let him do others or the church out of their actual costs.

The decision in this case is in line with *Barton* above, except that the instant case is easier. In refusing to prohibit in *Barton* for the reason chosen (the mere right of ecclesiastical courts to go their own way within their jurisdiction), the Court had to get past the objection that churchwardens are a secular corporation and that the capacity of a single churchwarden to release corporate claims could come in question in common law litigation; if it came in question there, the common law for a directly analogous situation might turn out to conflict with the law the ecclesiastical court proposed to apply. There was no comparable foothold to make Prohibition plausible in the instant case. The litigation in question -- parson and parishioners suing churchwardens for an accounting -- could not be significantly analogized with litigation in the temporal sphere, in the way churchwardens suing for rates in an ecclesiastical court can be set alongside churchwardens suing for a trespass at common law. The most that could be said for Prohibition in the present case was that leaving the ecclesiastical court alone would result in an abstract, decontextualized disharmony between the two systems with respect to the capacity of co-parties to release joint costs.