

## GENERAL INTRODUCTION TO VOLUME IV

This Introduction deals in the abstract with the common law courts' virtual monopoly of statutory construction. Two questions are considered: (a) Why the common law's "monopoly" is open to doubt. (The historical setting for the doubts is the Reformation's integration of the ecclesiastical courts into the national judicial system, so that they became agencies of the monarch, like the common law courts, and addressees of the statutes. That contrasts with agencies of Rome, the activities of which could be regulated and inhibited by secular law, but not directly commanded by Parliamentary legislation or otherwise.) (b) Why, as I conclude, the common law monopoly almost had to prevail notwithstanding plausible doubts. There was a good deal of political controversy over these questions in the period of this study. In keeping with the policy explained in Vol. I, however, I do not deal with the literature of this controversy. Rather, I analyze the issues abstractly in the light of my treatment of the main lines of jurisdictional law in Vols. I-III. As in several comparable Introductions in those volumes, I stand back, not only from the specifics of out-of-court controversy, but from the case law itself. I am aiming at a focus on the issues that may help to make the cases understandable in a way that the surface of law reports usually cannot do. In fact, the deep questions about the common law monopoly rarely surface in the cases treated in Vol. IV. These are cases that show the common law courts dealing with concrete problems of statutory construction which concern the jurisdiction and powers of ecclesiastical courts. Vol. IV takes up groups of such cases, sizable ones, where the common law's authority to interpret statutes enabled them to define the law on several matters involving non-common law courts. Miscellaneous examples occur elsewhere in the study. The common law's authority itself—its "monopoly"—amounts to a massive legal fact; there was little occasion to stir it up in the cases that depend on it.

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In the range of types of Prohibitions, a distinct place needs to be reserved for those based on statutes. Such Prohibitions overlap with other types, but they involve a problem of their own. For present purposes, it is overlap with "ambit of remediable wrong" Prohibitions (Vol. III) that matters. Suppose A makes a claim in an ecclesiastical court against B and B seeks a Prohibition on the ground that A's claim is simply "unlawful", simply ought not to be listened to by any court. In other words, B does not contend that there is any "paradigmatic" infringement of the common law court's territory, nor that A's suit is misplaced as among "foreign" courts. We have seen that the bases for Prohibitions of the sort B is seeking could be somewhat variable and indeed somewhat hard to pin down. In some cases it could be said fairly straightforwardly that the common law—or standards so firmly embedded in traditional English law that they bind all courts in England—rendered the claim "unlawful". In other cases, one is perhaps best advised to translate "unlawful" into "unreasonable"—the ecclesiastical claim simply seeks to impose an unfair burden on the subject. In still others, the ecclesiastical law itself could be invoked with some specificity—as if to say, "This claim is bad by ecclesiastical law; the stakes are such that a common law court should make sure that the ecclesiastical

court does not violate its own rules.” Now let us consider another possibility: B says that A’s ecclesiastical claim is “unlawful” because of a statute.

From one point of view, invoking a statute may seem to make the *a fortiori* case: If common law courts may prohibit ecclesiastical suits where there is no “paradigmatic” infringement—on the relatively vague ground that peremptory common law standards, or reasonableness, are likely to be violated—then surely they may prohibit suits which a black-and-white statute renders unlawful. If there is some doubt about the common law’s title to control the “ambit of remediable wrong” in general—when the common law’s own direct interest is not threatened and the standards by which control is exercised are a little hard to specify—then surely there is at least less doubt about its title to enforce the “ambit” laid down in the statute book. From another point of view, however, bringing in a statute may seem to make the common law’s right to intervene more dubious, rather than more certain.

The reason for that possibility lies in the universal bindingness and notoriety of statutes. Ecclesiastical courts are just as obliged to obey statutory directives as common law courts. Should it not be presumed that they will obey them? If B thinks that A’s ecclesiastical suit is unlawful, should he not say so in the ecclesiastical court, instead of seeking a Prohibition? By contrast, it is questionable whether ecclesiastical courts are “obliged to obey” imperatives generated by English custom but without basis in their own legal sources. For example, if there were any validity in the argument that the common law concept of joint tenancy ought to prevail in all English contexts—so that both joint tenants should participate in an ecclesiastical suit for tithes—it would behoove the common law courts to enforce the requirement on the ecclesiastical courts, but would not necessarily behoove the latter to enforce it on themselves. On the one hand, there is the simple “obligation to obey”, and surely ecclesiastical courts are bound as instrumentalities of the King and the *respublica* to do as the statutes order; on the other hand, there is what might be called “liability to have a superior standard imposed on one”—carrying a duty not to complain if one is prevented from going by one’s own standard, but hardly the duty, or even the right, to look outside those standards for oneself..

(An analogue for this distinction can be found in federal-constitutional systems such as the American. Certainly courts of the subordinate states are “obliged to obey” the national constitution, but should they take its imperatives into account as federal courts should, or as they themselves should take account of state law? To what extent may they, or even ought they, settle the case as state law requires, merely accepting the liability of having the result overturned, or the case removed from their hands, if a party should seek to raise a national-constitutional question in a federal court? The distinction can perhaps also be reflected in moral experience. We perhaps perceive some situations as such that we simply ought to act in one specific way rather than another, as if commanded by a moral law one has no respectable choice but to obey. Are there other situations in which we see it as our right, or even our duty, to follow moral lights peculiar to ourselves and characteristically at odds with what we half suspect may ultimately have been “the right thing to do—to follow such lights, of course, “under correction”, not here of an external authority, but of experience itself, including experience of other people’s capacity to adjust to the moral order we create? We should accept the liabilities incumbent on fallible

and sociable creatures, but need we, or ought we, always to settle our problems moralistically?)

A similar point may be made in terms of “notoriety”, as opposed to “bindingness”. Statutes are open to all; they specify the law in black and white for all to see. By the familiar fiction, acts of Parliament are Everyman’s act, for Everyman is complicit in their making, having participated by representative if not in person. The fiction expresses “bindingness”—for being complicit I cannot disclaim the statute’s rightness and authority—but even more obviously it expresses “notoriety”: I am surely estopped to deny knowledge of what the law requires in so far as the law is “positive” in a statute of my own putative making—the more so when the metaphysical presumption, so to speak, is empirically reinforced (for statutes are frozen in writing, can always be referred to, are promulgated so that people have real warning of what they are in any case bound to know.) By contrast, *lex non scripta* is in some senses cut off from universal access—if ultimately knowable by everyone in the community, still requiring extraction with the help of appropriate skills. Despite the more inclusive presumption that Everyman has notice of *all* the law, there remains a shadow between the fiction and the reality when we assert the claims of specialized capacities to “find” the law. Such a claim is asserted if one joins the chorus, in which Coke’s was the strongest voice, hymning “artificial reason.” As against the “natural” rationalism that would maintain Everyman’s capacity to discover the law’s requirements by reflective application of his ordinary reason and common moral sense, the chorus insisted that intense training in a particular legal tradition was essential for finding the what and why and rational necessity of English legal rules, things that ‘artless’ reason was bound to misperceive. From another angle, one asserts a “specialized capacity” if one holds that the customary component of the law is only available to folk-memory, incapable of being found by the non-mystical procedure of taking evidence of usage, which is probably the reason why an ecclesiastical court should not try a *modus* even if it is perfectly willing to.

The application of these general ideas to our present concern is simply that “foreign” courts would seem to have access to statutory law as they do not to unwritten law. An ecclesiastical judge should be able to see his duty, in so far as that duty is prescribed by act of Parliament, by looking at the statute book. In an ultimate presumptive sense he may be said to “know” the unwritten law as well, and see his duty in so far as it is based thereon, but he cannot *really* be expected to have access to what is outside his specialized tradition. Only a common lawyer can strictly know the rules about English joint tenancy or the like, and, still more important, only he can understand the idea of which the rules are the expression—the rationale, virtue, and “weight” of a legal idea generated by English tradition, an idea which is quite possibly strange to other systems of law. To repeat the example, if one senses that an ecclesiastical claim violates the nature of joint tenancy and ought not to, the common law court should immediately decide to prohibit or not prohibit, according as it conceives or “weights” the idea of joint tenancy (i.e., as it considers that ecclesiastical courts are bound or not bound to imitate the common law with respect to such questions as one joint tenant’s standing to sue alone.) There is no point in waiting to see how the ecclesiastical court handles the claim before it, because the ecclesiastical judge cannot be expected to have access to the relevant lore. Even if he were to do the right thing, whatever that may be, it would be, as it were, by accident. *Per contra*, one may argue, the ecclesiastical judge has perfect

access to the statute book; therefore one should at least wait and see whether he follows the statutory directives in point—directives aimed as much at him as at any other court, and in a realistic sense as manifest to him as to others.

Though this line of argument is most appropriate when straightforward knowledge of common law rules and their policy is demanded, it is not entirely inappropriate when the objection to a “foreign” claim is its vaguer unreasonableness. There are of course good grounds for assimilating “reason” to statutes, rather than to the common law: Everyone has equal access to “reason”, as—by my argument—to statutes. Therefore ecclesiastical claims should not be stopped at the first opportunity if there is nothing more to be said against them than that they are unreasonable. There are scraps of warrant for that proposition. If, however, one takes the elusive and expandable idea of “artificial reason” seriously, it may be possible to put “binding or pervasive common law standards” and “mere reasonableness” on one side of a line and statutes on the other. Granting that “natural reason” is universally accessible, it can still be argued that “natural reason” is never a sufficient basis for solving a legal problem—that in legal matters some specific tradition necessarily does, and ought to, shape the sense of reasonableness. It might be civil or ecclesiastical law, it might be English law, but one or another must and should mediate for the naked natural capacity. If this is granted, then perhaps within one community there is room for only one “artificial reason”. Perhaps the common law should never be readier to take over than when a “foreign” claim is challenged for reasonableness, because it is “the artificial reason of the law” that should assess that challenge. Otherwise it will be assessed by a competing “artificial reason”, and a fundamental, abstract discordance will be introduced into the legal system—more fundamental because more general or abstract than disharmony brought about by failure to dispose of closely analogous particular problems by a single rule. Again *per contra*, the definiteness of a written statute may differentiate it; ecclesiastical courts may lack access to the appropriate kind of “artificial reason” as and because they do not have access to specific legal lore; the statutes are there to see.

The only sort of objection to an ecclesiastical claim that seems, if anything less fit to move a common law court to immediate action than a statute-based objection, is the surmise that the claim is invalid by ecclesiastical law itself. Although we have seen (in Vol. III) a few signs of willingness to preserve ecclesiastical courts from the temptation to misapply their own law, there are much stronger signs of unwillingness to do that. Granting that it is utterly inappropriate for common law courts to hold ecclesiastical courts to responsible application of their own law, a rule for statute-based surmises might be projected: *Viz.*, to say a claim in an ecclesiastical court is bad by virtue of a statute amounts to saying it is bad by ecclesiastical law, for statute law is law in all courts. Therefore common law courts should no more intervene to block that claim than to block one that appears to be bad by other criteria of ecclesiastical law. At least they should not intervene until all remedies are exhausted within the ecclesiastical system.

The last sentence above, points to the next problem, for which I have made allowance by the way in spelling out the arguments above. One might maintain that ecclesiastical courts should have first crack, but *only* first crack, at statute-based objections to claims brought before them. I.e., B comes to a common law court and surmises that A’s ecclesiastical suit against him is unlawful by statute. The common law ought at this point to refuse Prohibition. But at a later point—upon a showing that the

statute-based objection was raised in the ecclesiastical court and incorrectly overruled—Prohibition lies. One alternative to that is to refuse Prohibition definitively, whatever happens: The objection should be made in the ecclesiastical court; what the ecclesiastical court says about the statute goes, subject to ecclesiastical appeal (which ultimately may mean appeal to the monarch, depending on whether the statute creating the Delegates preserved or cut off petitioning the monarch for review of that court’s decisions.) The other alternative is to debate the meaning of the statute at once, if there is anything to debate, and prohibit if the ecclesiastical claim is deemed invalid by the statute as construed. Let us now ask whether there is anything to be said for the first, or moderate, position as against both of the extreme options.

In the first place, we have in Vol. II encountered one context in which common law courts were disposed to give ecclesiastical courts “first crack” at statutes, yet willing to prohibit if a statute was in fact misconstrued or ignored: X sues Y in an ecclesiastical court, perfectly properly *prima facie*. Y pleads facts which, if true, should allegedly defeat X’s claim by virtue of a statute. Y seeks a Prohibition on the ground that the common law should protect him in his statutory rights and therefore should try the facts which, if found in his favor, would make those rights accrue. In other words, he seeks a Prohibition without disallowance surmise. We have seen that the courts were disinclined to prohibit in such cases. That is to say, they were especially inclined to insist on a disallowance surmise—to make plaintiff-in-Prohibition show that he had brought the statute to the ecclesiastical court’s attention and been improperly denied its benefit. There may seem to be no difficulty about applying such precedents to the situation we are now focusing on: A sues B in an ecclesiastical court. B does not want to introduce defensive facts to whose benefit he thinks a statute entitles him, but merely to maintain that A’s claim as stated is bad by statute. Why not proceed in the same way as when defensive pleas are involved—refuse Prohibition now, grant Prohibition when and if it appears that the ecclesiastical court was given a chance to dismiss the claim and improperly failed to do so?

One answer to the “Why not?” is economy. It will save a step if the common law court blocks the claim now, assuming it believes such a claim is forbidden by statute and would have to be blocked if the ecclesiastical court were to misconstrue or ignore the statute. Comity is worth only so much in diseconomy. In the case of defensive pleas, considerations of economy tilt the other way. The quickest way to dispose of the suit is to see whether the ecclesiastical court will take note of the statute and understands it correctly—as one would expect it usually to do, especially when Prohibition remains a threat—for if it does the facts can be tried where the suit is. The protection of statutory rights (which may not be in the least danger) should perhaps not be allowed to serve as pretext for what is likely to be the party’s real motive in such a case—delaying the game and getting a jury trial. Nevertheless, something can be said for the “first crack” approach in both situations. It would make sense to accept the argument above from the “universal bindingness and notoriety” of statutes up to a point, but without drawing the extreme conclusion that “foreign” courts have as absolute a title to interpret statutes as the common law courts. There is arguably a sense in which a “first crack” is simply owed to non-common law jurisdictions under the King and Parliament—a chance to show obedience to law addressed to them, and known to them as other components of English law could not be. Comity is worth something; if the common law reserves the

last word, in the event that the “foreign “ court fails to apply the statute correctly, there will be reason to expect a minimum of conflict—to expect that care and advice will be taken to interpret the statute as the common law courts probably would in order to avoid Prohibition. In that way economy would not necessarily be disserved.

On the other hand, good reasons can be given for reserving the *last* word to the common law. It is not a bad argument to say, as I do above, that statutory requirements are as much part of the ecclesiastical law as any imperative fetched from the peculiar sources of ecclesiastical law, wherefore ecclesiastical courts should be free to interpret statutes without threat of Prohibition, just as, by the best opinion, they are free of that threat however egregiously they misapply the non-statutory part of ecclesiastical law. I think that extreme position was perfectly accessible to ecclesiastical partisans in the 17<sup>th</sup> century. But in reply one can say several things.

(a) The “notoriety” of statutes can be turned in favor of at least ultimate common law control. There is an obvious sense in which common law judges are not competent by training and experience, however carefully they inform themselves, to judge questions of ordinary ecclesiastical law, wherefore ecclesiastical appeal, and ultimately Parliament’s legislative correction, are the proper checks, rather than Prohibition. But the common law judges *do* know the statutes, even if they do not know or understand them *better* than anyone else; their competence to say what the statutes require is at least equal to others’, presumptively even in the case of statutes whose primary reference is to ecclesiastical matters.

(b) The common law judges were in reality the practiced interpreters of statutes. The vast majority of statutes affected matters only appropriate to common law adjudication; the vast number of common law cases requiring statutory interpretation, over a long time, had led to accepted canons of construction, so that “how to interpret a statute” could be regarded as a branch of common law expertise comparable to “how to construe a conveyancing deed”.

(c) The common law courts were the prescriptive interpreters of statutes by virtue of historical facts which post-Reformation defenders of ecclesiastical parity were all-too awkwardly stuck with. Before the Reformation, when the ecclesiastical courts were meaningfully “foreign”, of course the common law courts exclusively interpreted the English statutes. So long as the ecclesiastical courts served the Roman “usurper”, they could clearly not be granted the least competence to enforce statutes designed to fight back against the “usurpation”—as any statute limiting ecclesiastical jurisdiction must be taken to be when England’s one rightful Supreme Head was engaged in resistance to the Roman yoke. Now—as everyone swept up on the Anglican version, or myth, of the past must agree, common lawyer and churchman alike—the right was restored where the right should be; the adversary relationship between the realm and the Church belonged to the past; the Church courts were in a respectable position to claim equal beholdenness to the statute book and hence parity as its interpreters. But meanwhile the common law courts had rather staked out the statutes for themselves! Prohibiting ecclesiastical suits which the statutes made unlawful was old common law practice; perhaps latter-day theory should not prevail against that, even though the practice was grounded in the conditions of a happily forgotten past.

(d) For all that can be said about the equal beholdenness of ecclesiastical courts to statute law, those courts cannot be considered unbiased with respect to the kinds of

statutes they could have been given equal freedom to interpret and enforce. If A sues B and B says that A's claim is bad by statute, the *tendency* of what he says is that ecclesiastical jurisdiction is narrower rather than broader. I put it that way because not every statute-based objection to an ecclesiastical claim need go to the boundaries of the jurisdiction. For example, B might confess that he owed an ecclesiastical duty of the sort A was suing to enforce but contend that C rather than A was entitled to that due. In that event, B would not be disputing the "size" of ecclesiastical jurisdiction; no greed for jurisdiction should motivate the ecclesiastical court to construe the statute for or against A's claim. To make the same point with reference to typical ecclesiastical interests: if B confesses his duty to pay tithes but relies on a statute to argue that C rather than A is entitled to them, no putative bias in favor of tithe-receivers should vitiate the ecclesiastical court's construction of the statute. All that can be said is that *some* statutes—actual or conceivable—will restrict the bounds of ecclesiastical jurisdiction or be deleterious to typical ecclesiastical interests and that with respect to those the ecclesiastical courts will not be indifferent interpreters. Perhaps the net tendency of statutes affecting rights asserted in ecclesiastical courts can be expected to be thus restrictive or deleterious, if only because some such statutes date back to the time of "usurpation" and hostility between realm and Church. Moreover, the line between restrictions on ecclesiastical jurisdiction or interests and rules merely identifying the beneficiary of ecclesiastical duties is harder to draw in practice than in theory. Ecclesiastical courts may be suspected of a tendency to require unsatisfied ecclesiastical duties, such as tithe payment, to be satisfied even if the wrong party is suing, for the good practical reason that if a duty to the Church is escaped now by way of a legalism it may be escaped forever in fact. A statute allegedly disqualifying A to sue for something admittedly due to someone else might for that reason tend to receive a biased construction even in the absence of any obvious bar to indifference. In any event, the need for common law control to prevent biased interpretation in *some* cases may be urged as a reason why *all* claims invalidated by statute should be prohibited, after the ecclesiastical court has had "first crack" if not before. It is simply too burdensome to try to distinguish cases in which a bias is probable from those in which it is not.

It should be observed incidentally that there is no very good reason to dispute the common law courts' indifference as interpreters of statutes affecting ecclesiastical claims. Here as elsewhere it is possible to be deceived by the "paradigmatic" function of Prohibitions distinguished and analyzed in Vol. III. If in fact every statute limiting ecclesiastical jurisdiction gave jurisdiction to the common law, then ecclesiastical and common law courts would be equally biased interpreters. But such is not the case. We are focusing on statutes which allegedly say that a claim of a certain sort, or a claim brought by a given claimant, is valid nowhere—merely unlawful. Common law courts have no interest in interpreting the statute so as to uphold or deny such a contention (unless a mischievous prejudice against ecclesiastical tribunals and interests, something that can exist but cannot be imputed to courts of law.) Unless motivated by such unreachable private prejudices, why should the judges care about anything but the words and intent of the statute, considering that their own jurisdiction has nothing to gain? Of course a statute *might* flatly take jurisdiction away from the ecclesiastical court and give it to the common law. In that event, a common law court interpreting and enforcing the statute would be acting as judge in its own cause. But that is unpreventable. The right of the

common law courts to protect their own jurisdictional monopoly—and serve the socially desirable goal of restricting one type of remediable claim to one place, where consistent lines of cases can develop—is indisputable. The common law courts could not avoid deciding controverted cases as to whether a common law remedy is available and hence, barring exceptions for concurrency, not pursuable elsewhere. They are judges in their own cause whether or not a statute bears on the question. The only cure for that would be to erect a special tribunal for the sole purpose of settling jurisdictional questions.

(e) Some risk of conflicting interpretations of one and the same statute would be incurred if “foreign” courts were conceded full parity as interpreters. “Some risk” is the proper expression, rather than “high risk” or “certainty”, because the chance that a statute regulating ecclesiastical rights and remedies would come before a common law court except by way of Prohibition cannot be regarded as very great. I.e.: If we imagine a statute defining, say, the duty to pay tithes, and if we assume that common law courts should never prohibit solely on the ground that an ecclesiastical claim is invalidated by that statute, there is no obvious likelihood that common law courts will ever have occasion to look at the statute, and therefore an opportunity to construe it differently than ecclesiastical courts have come to do. But there remains a risk simply because the relationship between the temporal and spiritual systems of law was so complex. Collateral ways can be imagined in which a statute affecting ecclesiastical rights, and therefore on our assumption normally left to the ecclesiastical courts, would still be thrust upon the common law judges. Given high standards of comity—full-blooded recognition of ecclesiastical parity in the interpretation of statutes—common law courts in that imaginary situation might adopt the policy of following the ecclesiastical interpretation, or at least allowing it high persuasive authority. But while that is not asking the impossible it is asking quite a lot. To demand that judges who are expert in statutory construction sit back and accept a reading with which they disagree is to demand that they repress a highly respectable sense of superior competence, if not that they violate a sheer duty to apply the supreme law of the land as they understand it. Therefore parity in interpreting statutes would almost surely make for some degree of conflicting interpretation. Would that not be the most scandalous kind of discord within the national legal system—acts of “the whole body of the realm” taken to mean different things by “members” of equal authority?

(f) The above reasons seem to me sufficient for the conclusion that the common law courts must keep ultimate control over the applied meaning of statutes, whether or not exercise of that control should be restrained by allowing non-common law courts “first crack.” We may add vaguer considerations without relying on them—which is not to say that they were not historically operative: the mere “seniority” of the common law judiciary, hence its predominant claim to perform so obviously important a function as interpreting the *suprema lex* in the statute book and protecting the subject in rights which “the whole body of the realm” has assured to him; the sense in which the common law judges can be thought of as “chief counsel” to the government in all branches, including Parliament, so that to their straightforward experience in statutory construction may be joined the special competence that comes from intimacy with the legislative process—with the kinds of problems that tend to lead to legislation or the actual ones that have in particular cases, with the difficulties and conventions of draftsmanship which an interpreter should be aware of: the sense in which a statute is a “temporal” act even if it

affects “spiritual” matters, hence within the range of the judges’ supreme “temporal” punditry—an ambiguous sense to be sure, if one takes the post-Reformation fusion of temporal and spiritual altogether seriously, but one engrained in habits of thought which were necessary for many practical purposes.

The reasons I have specified against allowing “foreign” courts parity in relation to statutes are compatible with allowing them “first crack”—with holding that the peculiar bindingness and notoriety of statutes justifies a certain generosity toward those courts, a degree of concession to the sense in which statutes affecting ecclesiastical rights *are* part of the ecclesiastical law. But if the moderate position is excluded, as for the sake of expeditiousness it perhaps should be—if the contest is between the extreme positions—the same reasons count in favor of immediate common law preemption of statutory issues: If an ecclesiastical claim is surmised to be invalid by statute, and the legal proposition of the surmise is true, prohibit at once. In practice that was to all intents the rule. It was not unopposed by partisans of the other extreme, but there is little indication that the opposition got a serious hearing from common lawyers. The moderate position has the attraction of a compromise, but as a practical matter that was not considered either, even though it was in effect adopted in cases of defensive pleas combining a factual allegation with invocation of a statute. In the end, a common law near-monopoly of statutory construction was a legal fact, as it probably should have been or had to be. It is taken for granted in the groups of cases to which the rest of Vol. IV is devoted, groups of cases where the judicial gloss on important statutes was largely written through Prohibition law (and sometimes, when the powers of the High Commission were in question, the law of *Habeas corpus*.)

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