

CHAPTER 2—ECCLESIASTICAL SUIT OUTSIDE DEFENDANT'S HOME DIOCESE

Introduction and Summary

23 Hen. VIII, c.9, essentially provides that people may not be cited into an ecclesiastical court outside the diocese (or peculiar jurisdiction) in which they live. There is some difference of opinion in the cases as to which of two purposes the statute was primarily made for, but it in any event serves both: (1) Protection of the subject against the inconvenience of travel to remote places and the like. (2) Preservation of order in the ecclesiastical system as a per se good. The practically important mischief behind the statute was plaintiffs' resorting to archdiocesan courts in preference to local ones and archepiscopal willingness to take first-instance cases. Among other effects, the practice deprived the defendant of one of the two appeals to which parties were entitled in ecclesiastical litigation.

23 Hen. VIII was virtually never enforced by Prohibition in the 16th century. (Note the parallel with 21 Hen. VIII, the statute discussed in Ch. 1 above.) The first major issue resolved in the 17th was that Prohibition would lie to stop a suit brought in violation of the statute. That was problematic because the statute appointed a penalty recoverable from the ecclesiastical judge who cited a defendant out of his home diocese. (Again, cf. 21 Hen. VIII.) It is uncertain whether earlier judicial opinion was firm that the availability of a penalty barred Prohibition. There may simply have been very few attempts to get Prohibitions, because the statute was rarely violated and because the penalty was perceived as adequate compensation by any parties who were inconvenienced by being sued away from home. Preference for archdiocesan courts on the part of plaintiffs may have increased in the 17th century, and those courts may have become more receptive, giving rise for the first time to serious demand for Prohibitions. A mixture of circumstances and motives may have entered into such a change; it is hard to see clues to them in reported cases. It would not be surprising if the upper echelons of the Church and the civil law profession came to favor more aggressive archdiocesan tribunals, not necessarily from aggrandizing motives alone, but equally from ambition for a more efficient and higher-quality legal system—avoidance of tedious appeals, more competent handling of complex cases at the first-instance level. On the side of the litigant, preference for specific enforcement of statutory rights via Prohibition could have a strategic motive. If the stakes in the litigation are high enough, there is an obvious advantage in challenging one's opponent to fight over a Prohibition; then, if he declines to fight or loses, to have two appeals still ahead. As the chance of the statute's being violated increased, so naturally did the chance of high-stakes cases occurring and of their involving determined, sophisticatedly advised, or "strategically" litigious defendants. The wider context of the statute's judicial history remains quite speculative. It is perfectly possible that pre-Jacobean professional opinion, though not much tested, was clearly unfavorable to Prohibitions; the penalty was a satisfactory-enough remedy for, and deterrent to, violation of the statute. Greater enthusiasm for Prohibitions as a remedy, or the conviction that there was a public interest in the specific enforcement of jurisdictional

lines despite alternatives and regardless of practicalities, may explain to a significant degree the high incidence of 17th century Prohibition cases on 23 Hen. VIII.

Breakthrough in any event came from a court in which those attitudes were especially strong—the Common Pleas during Coke’s Chief Justiceship. Throughout the first half of the 17th century, the great majority of cases on the statute were in the Common Pleas. The King’s Bench eventually had little choice but to follow the lines laid down by the Common Pleas, but the former court was visibly cool toward Prohibitions on 23 Hen. VIII. Left to itself, it would quite possibly have held that the penalty was the only remedy. Coke as Chief Justice of the King’s Bench was unable to turn it around completely.

Once Prohibitions to enforce the statute could clearly be sought, numerous issues concerning its exact meaning arose. (There is no sign that any of these had been explored earlier in penalty suits.) Some cases involve details of construction and hardly admit of summary. The major issues indicated here were not all decisively resolved. The judicial gloss on the statute had several loose ends at the time of the Civil War.

The following propositions were established beyond serious challengeability:

(1) Prohibition will lie to stop an ecclesiastical suit that violates 23 Hen, VIII. If, however, a party cited outside his home diocese waits until the improper ecclesiastical tribunal has given sentence against him Prohibition will be denied. This qualification is an exception to the general rule that delaying until after sentence is not a bar to Prohibition, save in case of very long or abusive delay. (See Vol. I, pp. 115 ff., for the general rule.)

(2) Archepiscopal courts do not have sweeping powers to take cases away from inferior courts. In a few cases, civilian counsel argued on behalf of the Archbishop of Canterbury that usage or the Archbishop’s inherent prerogative gave him as much first-instance jurisdiction, concurrent with that of lower courts, as he chose to assume. These claims were firmly repudiated. They tend to make a mockery of the statute. If in effect it did not apply to archdiocesan courts, its preamble, which calls attention exclusively to the problem of archepiscopal usurpation, would be in vain. The statute would be addressed to Bishops encroaching on other Bishops, which for practical purposes was not much of a problem, and to the protection of archdeacons and peculiars against Bishops, which was not an agreed-on object of the statute at all (see below.) As a corollary: There are a couple of decisions that the basic proposition still holds even though the defendant is not forced to travel beyond the physical bounds of his diocese—as if the Archbishop moves his court to a diocese where it does not normally sit, or a party living in the diocese of London is cited into the Arches (an archdiocesan court permanently located in London.)

(3) Among its several exceptions—which caused most of the problems of construction—statute saves the Archbishop of Canterbury’s prerogative to prove wills when the testator has goods located in several dioceses (the Prerogative Court of Canterbury.) This proviso was extended in one way and restricted in another. (a) Though the statute says nothing about it, the Archbishop has an analogous prerogative to handle intestates’ estates when the deceased had goods in more than one diocese. (b) Prerogative to prove the will does not carry with it jurisdiction over legacy suits arising from the will. The executor must be sued for legacies where he lives, except when there are several executors resident in different dioceses—then archdiocesan jurisdiction is appropriate.

In contrast to the issues above, the following ones were much less clearly resolved:

By far the most problematic feature of the statute was an exception for suits removed to a higher court by request of the lower court to which it would normally belong. The statute does not say that any suit may be removed by such request, but that any suit which ecclesiastical law permitted to be so removed may be. There were some small issues on the meaning of this proviso, such as whether the request can be made by a Bishop's deputy and whether it needs to be sealed. There are holdings on these matters of form, but they do not add up to certain resolution. The big questions were (a) what the ecclesiastical law does permit and how this is to be discovered; (b) whether the request must recite reasons for requesting removal and, if so, what reasons are sufficient. The second question in a sense falls under the first—Does ecclesiastical law require reasons to be stated, and does it have a restricted list of good reasons? It is arguable, however, that the statute barred indiscriminate removal even if ecclesiastical law did not, or could not be proved to.

These issues did not really arise in the Common Pleas when Coke was Chief Justice. In some ways the most important decision about 23 Hen. VIII was made by the Common Pleas under his successor, Hobart (*Jones v. Jones*.) It was held that reasons must be given and that not just any reason is valid, by force of the statute if not ecclesiastical law. (The reason actually given in the case at hand was ruled insufficient.) The logic of this decision is vulnerable, however. It was vigorously attacked from the Bar by William Noy in subsequent cases, but in the upshot neither confirmed nor reversed.

In the end, the most important issue remained *in nubibus*. It is a critical issue because if suits could be removed by the mere request of the lower court the statute would be in danger of subversion. Lower courts would probably have had motive enough to “unload” embarrassing or difficult cases on their own initiative; in addition, they would have been subject to pressure from archepiscopal courts when the latter chose to “request permission” to take a case. The underlying problem was establishing that ecclesiastical law put any restrictions on removal in the face of civilian testimony to the contrary and, failing that, finding any ascertainable restrictions in the statute itself. As with other statutes from the Reformation period with which later courts had to struggle, this one was a masterpiece of confusing draftsmanship at vital points.

(1) In less than perfectly clear language, the statute makes an exception for the situation where a resident of Diocese A offends, or does the act which gives rise to an ecclesiastical complaint, in Diocese B. In that general type of case, the court of B could proceed without violating the statute. One would expect legal problems from this provision, and they occur in a few cases. There are too few, however, and there is too little articulation of principle in those, to permit abstracting many rules. Clearly if an inhabitant of A came into B and committed an ecclesiastical crime he could be prosecuted in B so long as he remained there. Prediction would be less reliable for variants (returns to A, goes to C, leaves B but comes back after an interval, etc.) Clearly an inhabitant of A cultivating land in B could be sued for tithes there from in B. Defamatory words spoken in B by an inhabitant of A probably fall under the rule for crimes committed in B (owing to the mixture of criminal and civil elements in ecclesiastical defamation.) For the rest, prospective plaintiffs would be well-advised to sue where the defendant lived. Except for the duty to pay tithes, rates, and the like, and the duty to refrain from overt criminal acts, breach of ecclesiastical duties can usually not be very plausibly “located” elsewhere than where the party happens to be; the statute

plainly says he may not be sued where he “happens to be”, but where he lives. (The concept of residence is not really explored in the cases. It arises in only one, where an attorney who spent much of the year in London but had a “permanent address” elsewhere was sued in London. It was held that the suit was improper; his regular and durable “business address” did not count.)

(2) The statute expressly protects peculiar jurisdictions and their inhabitants. There was some question, however, as to whether they were protected against diocesan encroachment, or only archdiocesan. For good reason, some judges were disposed not to intervene when an inhabitant of a peculiar was cited into the Bishop’s court. (The party was not forced to travel beyond his home diocese and was not deprived of an appeal. The title of peculiars to exclude the Bishop from concurrent jurisdiction would sometimes not withstand scrutiny. Even if citation out of peculiars to the diocesan courts was a violation of the statute, it is arguably so petty a violation that the penalty would always be an adequate remedy.) Archdeacons commonly had first-instance jurisdiction, in practice or by custom, in sub-districts of the diocese. An Archdeacon might arguably have the privileges of a peculiar, but some judges would have said he could not, and in any event making out a title to exclude the Bishop from concurrency could be tricky. Best advice to a parson cited into the diocesan court from a peculiar or archdeaconry would be, “You have a chance for a Prohibition, but with the difficulties you are likely to encounter it is scarcely worth seeking one.”

Trends in the construction of the statute over the period 1600-1650 do not stand out strongly. There is a slight tilt away from willingness to grant Prohibitions on the part of the Caroline courts, but no real departure from earlier law to the degree it was settled.

Text—the Cases

A statute frequently enforced by Prohibition was 23 Hen. VIII, c.9. This act was made to preserve localism in ecclesiastical justice. Subject to a number of exceptions, it provided that people should not be sued for ecclesiastical causes outside the diocese in which they lived. Prohibition cases on the statute bring together several general and recurrent themes: The authority of the principal common law courts to interpret statutes and enforce their interpretation by Prohibition; the legitimacy of common law enforcement by Prohibition of intra-ecclesiastical lines of jurisdiction; whether provision for punitive damages or for a penalty in a statute should be taken to exclude its enforcement by Prohibition. Numerous cases on 23 Hen. VIII raise these questions explicitly or implicitly, along with detailed questions about the meaning of the act.

For whatever reason, the judicial gloss on 23 Hen. VIII was mainly written by the Common Pleas when Coke was Chief Justice there. I have found no reported Prohibition cases on the statute from Elizabeth’s reign. The manuscript version of Justice Hutton’s reports contains a list of practice precedents—i.e., Prohibitions granted on the basis of the statute, but without any indication as to whether the writ was contested or of judicial reasoning.²⁵ It is likely that all the precedents are from the Common Pleas, where Hutton

²⁵ Harl. 4831, among reports from H. 1 Car. The cases listed are as follows: (1) *Fowle*, H. 6 Jac—wrongful citation from diocese of Coventry and Lichfield to Court of Audience. (2) *Hurst*. H. 7 Jac.—Winchester to Arches, suit for tithes. (3) *Wells*. M. 7

practiced as a Serjeant from 1603 and served as a judge after Coke left that court. One precedent on the list comes from 43 Eliz., as compared to one from P. 2 Jac. (pre-Coke) and ten from 6-12 Jac. (the Cokean period.)

From M. 44/45 Eliz., I have a penalty or damage suit on 23 Hen. VIII—as opposed to a Prohibition suit.²⁶ One of the reports of this case (see note for the substance) gives the information that the statute was discontinued at one time but revived by the Supremacy Act of 1 Eliz. It was discontinued in the sense that it was repealed, along with several pieces of Henrician legislation concerning the Church, by 1 and 2 Philip and Mary, c.8. 1 Eliz. “revived” it (by that term, without revision) together with the other repealed statutes. The reporting of this fact suggests that 23 Hen. VII and suits based on it were not as familiar as they later became.

My earliest Jacobean report bearing on the statute comes from the King’s Bench in 1605.²⁷ It gives a remark by Justice Yelverton apparently connected with a case before

Jac.—Norwich to Arches, for scandalous words (4) *Powell*. T. 8 Jac.—“*consimile*”..(5) *Fitton*. H. 7 Jac,—to Archbishop of York. (6) *Foster*. P. 12 Jac.—“*consimile*”. (7) *Rudd et al.* 43 Eliz.—sole Elizabethan case, see text; from a peculiar in Rutland called Ledington; only case on the list about episcopal encroachment on peculiars. (8) *Brydges*. M. 9 Jac.—to Arches, defamation; close enough in date to the reported case of that name (Note 16 below) but substance does not look the same. (9) *White*. M. 9 Jac.—Oxford to Arches, legacy. (10) *Derby*. M/ 9 Jac.—matrimonial. (11)*Plombe*. P.2 Jac.—Norwich to Canterbury, the See of Norwich being vacant, a circumstance that occurs in none of the reported cases. (12) *Vincent*. M. 8 Jac.

For what bare precedents are worth, the 12 cases listed are significant evidence in addition to the cases following in the text for a brisk Jacobean trade in enforcing 23 Hen. VIII by Prohibition, since there is little or no overlap with reported cases. The list ends with one precedent of a penalty suit on the statute—same case as next note below; evidence of such suits is very sparse.

²⁶ M. 44/45 Eliz. C.P. Lansd. 1074, f. 405b; Lansd. 1058, f. 55 *sub. nom* Maghen v. Bakington. Bakington or Babongyon was Chanellor of the Bishop of Coventry and Lichfield, who cited Maghen or Mighen out of a peculiar—*quod nota—ex officio* for the offense of keeping a school without the Bishop’s license. The Chancellor denied that he had cited M. for that, but rather for publishing schismatical opinions; he also denied that plaintiff lived in a peculiar. M. demurred to this plea, which was held insufficient on two grounds of form: (a) the alleged schismatical opinions should have been specified; (b) B. should not have admitted citing M. and alleged affirmatively that he cited him for a different cause—rather, he should have simply confessed or denied what M. said, that he was cited for keeping an unlicensed school. The reporter thought, however, that judgment was stayed because M.’s declaration was also insufficient, for not showing whom the peculiar belonged to and “other defects.” (Lansd. 1074 gives these full facts; the other report says only that a penalty action was brought on the statute.)

²⁷ T. 3 Jac. K.B. Add. 25,209, f. 65 (Of the persons appearing in the report besides Yelverton, Harris is identified as “the old—or senior—serjeant”; Winckorne is identified as counsel in the case. The way in which the two lawyers are presented is what makes me think that Harris was probably not counsel in the case, but advising the court on his own—the point in question was certainly not a familiar one for the King’s Bench.)

the court (for the report says that one Winckorne, who was of counsel “in the case”, agreed with Yelverton, and that “the suit” concerned matrimony.) Yelverton’s opinion was that although 23 Hen. VIII appoints a penalty, “yet a man may not sue another out of the diocese although he agree to pay the penalty in the statute.” I take this as saying that a suit brought out of the proper diocese should be prohibited despite the alternative of the penalty; as it were, the statute says “Thou shalt not”, as opposed to merely putting a price-tag on suits in the wrong diocese, and “Thou shalt not” should be given effect by Prohibition. Yelverton’s formulation may, however, have a narrower meaning. In speaking of the ecclesiastical plaintiff’s “agreeing” to pay the statutory penalty, he could have had a literal agreement in mind. One might argue that whether or not suits contrary to the statute are generally prohibitable despite the availability of the penalty, they should in any event not be prohibited if the plaintiff expressly agrees to pay the defendant £5 and the King £5—the sum at which the statute may be said to value the offense, and which could conceivably be said to “liquidate” the double tort damages which the offended party is also entitled to recover. If that is arguable, Yelverton rejected the argument. Winckorne agreed with him, but Serjeant Harris, who may be speaking for himself rather than as counsel (see note) is reported as holding the contrary. He may have been addressing the special case of an explicit agreement, but may also have differed from Yelverton on the general effect of appending a penalty to a “Thou shalt not”. The latter point was soon to be resolved by the Common Pleas in favor of Prohibition.

In contrast with these faint beginnings, I have 15 reported cases plus 1 *nota*, which may or may not relate to a separate case, from the Common Pleas in the years 1608-1613, during Coke’s Chief Justiceship. For what bare precedents are worth, Hutton’s list above adds a few more. These figures compare with 5 from the King’s Bench in all of James I’s reign, 7 Common Pleas cases plus a *nota* from that reign after Coke left the court, 6 plus a *nota* from the Caroline Common Pleas, and only 1 from the Caroline King’s Bench. Because of the Common Pleas’ preponderance, I shall deal with all cases from that court before turning to the King’s Bench.

The first significant case, *Lewis and Rochester v. Proctor*,²⁸ is much the greatest. General questions—the common law judges’ authority to construe statutes concerned with the Church, the prohibibility of suits punishable by penalty action—were discussed explicitly, and there was thorough debate on the whole meaning of 23 Hen. VIII along the way to deciding the immediate issue. The decision to grant Prohibition in this deeply argued case probably opened the gates to the numerous subsequent Prohibitions based on the statute. The immediate issue of construction was whether the statute applied to inhabitants of the diocese of London sued in the archdiocesan court of Arches, which was located in the city of London. The act manifestly applies, for example, if an inhabitant of Bath and Wells is sued before the Bishop of Coventry and Lichfield in respect of a crime or tort in no way committed within the diocese of Coventry and Lichfield. *Lewis and Rochester*, however, lived in Essex within the diocese of London and were sued in the Arches for tithes grown in Essex. To answer in the Arches they would not have had to go physically out of their home diocese. Among other arguments

²⁸ 13 Coke, 4, *sub. nom.* Porter and Rochester’s Case, M. 6 Jac. C.P.; 2 Brownlow and Goldesborough, 1—undated, *sub. nom.* Lynche v. Porter; Lansd. 601, f.207; Harl. 4817, f. 192, *sub. nom.* Lewis and Rochester v. Proctor.

against a Prohibition, it was urged that 23 Hen. VIII did not apply in these circumstances. (The Arches was held in the church of St. Mary le Bowe, that parish, along with a dozen others, being part of the Archbishop of Canterbury's London peculiar. A peculiar is the ecclesiastical equivalent of a franchise: an area carved out from a diocese and not subject to the Bishop's courts. If Lewis and Rochester had lived in St. Mary le Bowe, or perhaps elsewhere in the Archbishop's peculiar, they would without question have been suable in the Arches; indeed, it would almost certainly violate 23 Hen. VIII to sue them before the Bishop of London. As it was, they claimed that they could only be sued in the diocesan courts, irrespective of the physical location of the Arches.)

The reports of this case are of two sorts. Harl. 4817 and Brownlow give narrative accounts, differing only in that each contributes details which the other lacks. Coke and Lansd. 601 give the court's resolutions with almost no narrative. The latter reports are the same except for small ways in which one supplies what the other omits. Both have the marks of authentic Cokean products. Lansd. 601 is a MS. version of 12 Coke, containing some material not included in the printed volume. *Lewis and Rochester* found its way to 13 Coke rather than 12 Coke. Neither of these posthumous volumes is of the quality of the 11 volumes published in Coke's lifetime. The report of *Lewis and Rochester*, however, in both versions, is typical of Coke's style. He preferred not to recount the unfolding of a case, with the separate arguments of counsel and the judges, but to gather what he thought was decided in the form of "resolutions." Aside from the omission of sometimes significant details, this method tends to make the "resolutions" look more deliberate and coherent than what the judges actually said in discussing and deciding the case. Coke was not inhibited about reordering what had been said and adding arguments or authorities. Sometimes material misrepresentation of the events in the courtroom resulted. In the present instance, however, there is no real conflict between Coke's "resolutions" and the "motion picture" of the case. He may have added some points that he did not express orally in court, but most of what he says was resolved did indeed come out in the discussion. I shall nevertheless, in view of the contrasting character of the reports, proceed by following and combining the narrative accounts, then add the further points that Coke's summary contributes.

When Lewis and Rochester sought their Prohibition, they of course set out their basic claim: they lived in Essex; the tithes were grown there; suing them in the Arches instead of the diocese of London violated 23 Hen. VIII. But one further allegation is significant: they said expressly that the Bishop of London had not given his license for the suit to be in the Arches. Including this allegation was probably prudent pleading, rather than necessary. 23 Hen. VIII provides that when a Bishop or other inferior ecclesiastical judge requests a superior judge to take a case, the higher court may take it without violating the statute. As we shall see, the exact meaning of this provision was problematic. I doubt, in the light of other cases, that plaintiff-in-Prohibition had a "pleading burden" to say negatively that the inferior judge had made no request or given no license, but one might as well say so.

The court's first move was to assign a day to show cause against Prohibition. I.e., the judges did not grant a Prohibition at once, leaving defendant-in-Prohibition to move for Consultation or to plead formally if he had anything to say for himself. Neither did they withhold all commitment until arguments *for* Prohibition were developed. In this case, giving a day to hear argument against Prohibition had a special character. It seems

evident that what the judges expected and wanted to hear was *civilian* argument. According to Harl. 4817, the first thing the judges said was that they wanted to be informed by civilians of usage since the statute. The legal implication of that desire should not be taken too literally, but it is still significant. The judges apparently wanted to know whether the Arches had made a practice of entertaining cases throughout the diocese of London, outside the Archbishop's peculiar. I doubt that they would have held the usage conclusive—i.e., that if the Archbishop had regularly assumed jurisdiction he was entitled to—but they could still have been justified in thinking it relevant. Perhaps consistent usage in the Archbishop's favor would argue implied consent by the Bishop, thereby at least raising the question whether tacit assent to a general assumption of concurrent jurisdiction fell within the statutory exception for requests by inferior judges to superior. In any event, the judges wanted to know what had been going on in the ecclesiastical sphere. This confirms what negative evidence from the many years between 23 Hen. VIII and 1608 suggests: attempts to get Prohibitions based on the statute were very unfamiliar. So basic a point as standard ecclesiastical practice in London had apparently not been looked into judicially before.

Accordingly, three civilians appeared and argued—Dr. Farrand, Dr. Martin, and an anonymous third. As it turned out, they did a great deal more than inform the court of the ecclesiastical practice, indeed more than argue the narrow issue in the immediate case (whether a citation to appear within the physical borders of London diocese falls under the statute.) Rather, they made sweeping arguments against the enforcement of 23 Hen. VIII by Prohibition and in favor of virtually exempting the Archbishop of Canterbury from it. I wonder whether such argument is not what the court expected and invited. There is no indication that common law counsel spoke against the Prohibition, whereas Serjeant Dodderidge made a full-scale argument on the other side. Civilian counsel did not appear as adversaries on both sides. Rather, they seem to be speaking for the Archbishop and the ecclesiastical establishment, more than for the defendant-in-Prohibition. In sum, it looks to me as if the judges knew they had a novel issue on their hands, knew that routine handling of the case possibly eventuating in a Prohibition would offend the Church authorities and their political friends, and therefore opted for the grand manner—a full opportunity for the Archbishop to represent his interest and a fundamental treatment of the issues.

The civilians' basic theory was that the Archbishop had full concurrent jurisdiction throughout his province—i.e., that he could entertain any suit in any diocese if he chose to and if, in the case of civil litigation, the plaintiff chose to go to an archdiocesan rather than a diocesan court. As was shown on the other side to the point of over-kill, this theory comes close to reducing 23 Hen. VIII to unintelligibility. Among other objections, it involves the premise that the statute does not mean what it seems to say—that suits must be brought in the court of the diocese where the defendant lives, with certain specified exceptions—but rather that it confines suits to the defendant's home diocese *in so far as the ecclesiastical law already so confines them*. Because the Archbishop by ecclesiastical law has concurrent jurisdiction in every diocese, says the theory, he has it notwithstanding the statute. Construed by intent (though the civilians did not articulate this point), the statute does not mean to take away any jurisdiction that was previously valid by ecclesiastical standards. The civilians realized, however, that their theory tended to make the statute pointless and attempted to show that it would have

served some purpose even admitting their concurrency doctrine. For they conceded that the Archbishop could not take over suits *already commenced* in diocesan courts except by way of appeal (and they could of course have made the obvious point that there are other situations presumably covered by the statute, such as my imaginary case of a Bath and Wells suit pursued in Coventry and Lichfield.) In the abstract, without too much attention to the precise language, the act could be intended to reinforce such pre-existing ecclesiastical rules as that against archiepiscopal “disseisin” of a Bishop already possessed of a suit.

Secondly, the civilians claimed that all usage supported their concurrency doctrine. As we shall see, Dodderidge and the court came close to conceding this factual assertion, though they did not give legal weight to the usage. Dr. Martin made the curiously precise statement that in the period before the statute the Archbishop exercised concurrent jurisdiction for 427 years before any complaint was made, after which someone objected to the Pope and the Pope held that people from any diocese could be cited to the Arches. I know nothing of what Martin was referring to, but his figure is not senseless. It could say that the usage continued from William I’s establishment of separate ecclesiastical courts down to shortly before the Reformation, when the Pope settled the first controversy in the Archbishop’s favor. If that happened, the Archbishop would have been confidently and routinely exercising concurrent jurisdiction in 1531-32, when the statute was made and when the Pope, after all, was not yet excluded from the English ecclesiastical system. One can rationally ask whether the statute-makers are likely to have meant such established and recently confirmed practice to be henceforth illegal (without, incidentally, implying that the Papal judgment should have any force as such.)

The civilians next tried to argue that the Act in Restraint of Appeals—24 Hen. VIII, c.12—proved that concurrent jurisdiction in the Archbishop was recognized as lawful. If that was acknowledged a year after 23 Hen. VIII, it would of course be extremely difficult to say that the earlier statute had made such concurrency unlawful for the future. The language in question was wrenched out of context (as was pointed out in rebuttal), but the act does speak as follows (in Sect. iv): “every...cause now depending or that hereafter shall be commenced...before any of the said Archbishops...shall be before the same Archbishop where the said...cause...shall be so commenced definitively determined...without any other appeal...than is by this act limited.” The civilians took this to show that causes could be lawfully *commenced* before Archbishops, not just appealed or removed before them (which of course it does show) and then to imply that *any* ecclesiastical cause could be commenced there. The inference involves a *saltus*: Why should the act not be taken as acknowledging only that *some* suits can be commenced before the Archbishops—notably suits against persons living in the *dioceses* of Canterbury or York or in peculiars belonging to the Archbishops (reading 24 Hen.VIII in the light of 23 Hen. VIII) and probate suits falling within the Archbishops’ prerogative (which are expressly exempted in 23 Hen. VIII)? Even so, the civilians’ point is not unreasonable. 24 Hen. VIII speaks generally of suits commenced before the Archbishops and does not go out of its way to explain that it is referring only to certain limited categories. To say that 24 Hen.VIII was written on the assumption that suits may be commenced before the Archbishops at will—so long as they have not already been

commenced in a lower court—is only “favorable construction” of words which could have been, but were not, so drawn as to exclude such construction.

Besides their exposition of ecclesiastical law, usage, and understandings at the time of the statute, the civilians also spoke in their initial argument to the policy of the statute as applied to the immediate situation. Coke’s statement of resolutions helps fill out what was said to this intent. (He states the arguments that *were made* and proceeds to answer them. Brownlow puts the same point, less precisely, in the civilians’ lead-off speech.) The general point is that the statute only meant to protect people against being summoned to *remote* ecclesiastical courts and therefore did not apply when they were summoned to one place in London diocese rather than another. This comes to an argument by way of concession, because one could throw away the claim of general concurrent jurisdiction in the Archbishop and still maintain that the act was meant to take effect—or at least should be “specifically enforced” by Prohibition—only when the subject would be put to material inconvenience. More precisely, the civilians relied on two places: (a) The title of the act, “That no person shall be cited out of the diocese where he or she dwelleth.” I.e., the title expounds the strict meaning—no one shall be cited to appear outside the physical limits of the diocese where he lives, and the act has no force until someone is so cited, as had not happened in this case. (b) The opening words of the preamble—“Where great number of the King’s subjects...have been...called to appear...*far from and out of* the diocese where such men be inhabitant and dwelling...” (My italics indicate the language emphasized.)

After the civilians had made the above points, Chief Justice Coke interrupted with a counter-argument: Canon 94 among the canons made by Convocation and given the royal assent in 1604 expressly confirmed 23 Hen. VIII by providing that no one except inhabitants of the Archbishop of Canterbury’s *diocese* should be cited to the Arches. The civilians answered in two ways. Dr. Farrand argued that the Archbishopric of Canterbury was vacant when the canons were made (between the death of Whitgift and the appointment of Bancroft.) Under those circumstances, a canon deprivatory of the Archbishop’s jurisdiction was not binding, according to Farrand (“but it is a feeble response”, says the reporter of Harl. 4817.) Dr. Martin argued that the canon was void by virtue of 25 Hen. VIII, c. 19—the Act for the Submission of the Clergy, which provides that canons contrary to the laws and customs of the realm shall not be valid. Martin’s contention was that the long usage which he had just asserted was the sort of custom or prescription that the statute had in mind.

Before giving up the floor, the civilians added two further bricks to their edifice. First they argued that the exposition of the act, because it was an ecclesiastical statute, belonged to them. Translated into procedural context, the argument comes to the basic case against enforcing statutes governing ecclesiastical jurisdiction by Prohibition. The common law courts *could* not be excluded from dealing with 23 Hen. VIII altogether, because the statute gives damage and penalty actions, which must be brought at common law. Were its meaning to come in question in such an action, the common law courts must interpret the statute; the most they could do by way of self-denial would be to defer to known ecclesiastical opinion and consult civilians. But the self-denial of refusing Prohibition regardless of the merits—trusting the ecclesiastical court to deny *itself* if a statute so requires—can be practiced strictly. Secondly, the civilians argued that the Bishop of London had consented to the suit in the Arches by the tacit or passive means of

not protesting it. Dr. Martin said that the Bishop had notice; I suppose he meant constructive notice or notice of the Archbishop's general practice of taking cases in London and other dioceses, though it is remotely possible that he intended a factual statement—an unpleaded denial of plaintiff-in-Prohibitions's stated claim that the Bishop had not given notice. This argument depends for its force on the premise that an inferior judge's failure to protest falls within the statute's exception for cases in which such inferior judge requests a superior to take a suit. The statute expressly incorporates the ecclesiastical law on this point by exempting removals-by-request on condition that they are lawful by ecclesiastical standards. If by ecclesiastical law a superior judge may defeat the jurisdiction of an inferior simply by taking a case, provided the inferior judge has notice and registers no protest, it is plausible that there is no violation of the statute.

At this juncture, by the most likely construction of the sequence, the civilians left off and Serjeant Dodderidge made his detailed argument in favor of Prohibition. He started by simply denying the concurrency theory as a matter of law: the Archbishop has original jurisdiction in his own diocese and peculiars and nowhere else. Yet Dodderidge conceded that there was at least a good deal of usage to give color to concurrency. He rather explained this fact than denied it: In the Papist times the Archbishop exercised legatine authority derived from the Pope—as *legatus natus*, or possessor of legatine power without special appointment. Pursuant to that authority he could (by then-current ecclesiastical standards) and in fact did entertain suits in all the dioceses under him. Now, however, such legatine authority was abolished together with all other powers in or derived from the Pope. By the standard Anglican theory, it was usurped in its day, like all Papal power; in any event, the ecclesiastical law of that time and usage erected on it were now irrelevant. But obviously there was “at least a great deal of usage”, *de facto*. Dodderidge avoids saying that the usage changed with the law; perhaps he realized that it had not; but any usage of concurrent jurisdiction since the Reformation lacked such color of legitimacy as the same usage before the Reformation had and was therefore entitled to no legal force. Such was Dodderidge's general position. On the Arches specifically, however, he maintained that its authority did not extend beyond the parish of St. Mary le Bowe. Legally it never could reach, and factually it never had, beyond that parish. The Archbishop's Court of Audience was and remained the proper forum for such other original jurisdiction as he could lawfully exercise—at this day, the court to which inhabitants of the other London parishes in his peculiar should be cited.

Dodderidge next insisted that the 1604 canon was “great proof” of his position. On a general plane, he argued that an act of Convocation, involving the whole episcopal bench and various deans and Church-law experts, could hardly be based on ignorance of ecclesiastical law or indifference to the Archbishop's interests. More specifically, he went to the “legislative history”: The Bishops of London, Lincoln, and Winchester had “grudged” at citations of their diocesan subjects into the Arches, but had been reluctant to complain when the Archbishopric was occupied. (In practice, though Dodderidge does not put it so baldly, this probably means the Bishops were afraid to complain, or pessimistic about their chances of success, when Whitgift, with his strong personal backing from Queen Elizabeth, was in office. Note how this point amounts to a still more explicit concession on Dodderidge's part that the usage was as the civilians said it was.) The complaints were brought out in the open during the vacancy, *when Dr. Bancroft, now Archbishop of Canterbury, was the presiding office of Convocation*. (In Brownlow's

account, Coke, speaking later, reinforces this point by adding that the jurisdiction of Canterbury was temporarily committed to Bancroft at the time the canon was made, while Bancroft was still Bishop of London.) So much, Dodderidge thought, for Dr. Farrand's argument from the vacancy of the See in the actual circumstances, even assuming that something could be said for it in the abstract.

Dodderidge turned next to construction of 23 Hen. VIII itself—to showing that the act makes no sense if it is taken as contemplating that the Archbishops were perfectly entitled to exercise concurrent jurisdiction. He asserts the general intent of the statute to curb the Archbishops, without insisting as strongly as he might have on the way the preamble makes that intent very hard to doubt, and then focuses on the strongly persuasive effect of two provisos: The act expressly provides that the Archbishops may take heresy cases if the inferior judge consents (and here the language about assent is looser than in the exemption for cases removed by request) or if “he do not his duty in punishment of the same.” The act also expressly saves the Archbishop of Canterbury's prerogative jurisdiction in probate (i.e., his prerogative to supervise probate of wills when the decedent had goods in more than one diocese—the usual definition of the prerogative, later affirmed in cases on 23 Hen. VIII, though the statute refers to it without definition.) These savings, Dodderidge argues, would be purposeless if, in the eyes of the statute-makers, the Archbishop could take *any* diocesan case.

Finally, Dodderidge answered the civilians' argument from the Appeals Act. His point here is only what common sense and a sense of context must assert against the civilians' nicety: The Appeals Act has nothing to do with distributing ecclesiastical jurisdiction within England, but only with preventing appeals from being taken to Rome. It mentions suits commenced before the Archbishops because there is after all such a category—cases arising in their own dioceses—and to close all holes the Appeals Act had to provide that such suits be settled by the Archbishops and not appealed to Rome. (The act does of course provide for such cases to be appealed into the Chancery—or to the Delegates as the practice was worked out—in contradistinction to diocesan cases, which went to the archdiocese first and then to the Chancery/Delegates.)

Upon these arguments, the court gave its opinion, except that after Coke had spoken for the court the civilians were allowed to try one more approach, which proved as unsuccessful as their original ones. Prohibition was granted by a majority of Coke, Warburton, Foster, and Daniel, no one except the Chief Justice speaking individually. Justice Walmesley dissented (according to Brownlow—other reports leave his dissent to be inferred from the fact that he is not heard from) on a ground to which he was much devoted—viz. the position that the Common Pleas, unlike the King's Bench, could not prohibit unless a “foreign” court proposed to interfere in a case actually pending before the Common Pleas. (Brownlow says that the civilians urged this point too.) In other words, so far as the evidence shows, Walmesley did not dissent on the substance, though his position may have masked substantive disagreement, or at least distaste for the result.) Apart from his belief that the Common Pleas had no standing to prohibit without an action pending, Walmesley was especially reluctant to prohibit one ecclesiastical court from encroaching on another—a position he would probably, or at least could logically, have held if he had sat on the King's Bench rather than the Common Pleas. Covertly or overtly, Walmesley's generally conservative approach to Prohibitions may be reflected in

his dissent, whether or not he was persuaded by the civilians' dubious interpretation of 23 Hen. VIII.

Coke and the majority in effect adopted everything Dodderidge had argued as the court's opinion. It is clear, however, that Coke added further points, whether or not he said in open court all that he later formulated into resolutions. In giving Coke's opinion, I shall omit what only repeats Dodderidge and combine the resolutions with other sources in a composite picture of his contribution. To start with, Coke was explicit in asserting the common law judges' authority to expound statutes dealing with ecclesiastical matters. He cited cases in support of this proposition and explained one of them. (2 Hen. IV, c. 15, permitted ecclesiastical judges to imprison persons holding erroneous opinions. In Henry VII's reign, a man was committed for saying that he ought not to pay tithes to his curate. The man brought False Imprisonment, and in disposing of that case the common law judges debated what "erroneous opinions" the statute applied to.) Whether title to pass on ecclesiastical matters in the course of expounding a statute in order to dispose of a common law action entails that statutes should be enforced on Church courts by Prohibition may be doubted, but Coke clearly had no doubts. *Lewis and Rochester* was meant to settle that question for 23 Hen. VIII, and it can probably be regarded as having done so.

On the general meaning of the statute, Coke emphasized the preamble, as Dodderidge had not; from the preamble it appears that archiepiscopal infringement of diocesan jurisdiction was the center of the makers' concern. On the other hand, Coke went to some length to show that the preamble's reference to citation to far-distant courts should not be taken as restrictive. (Various other statutes called attention to the "greater mischief" in their preambles, but had been held to apply to lesser instances of the same mischief.) The benefit of the act for the subject, Coke said, was only in part to save people travel to remote places; the other benefit of localism—trial in the place where one is best known—was also intended, and another purpose was to insure people maximum appellate recourse. A few reinforcing points from minute linguistic features of the act may be omitted. They add up to a meaning that can scarcely be doubted and illustrate Coke's gift for taking a document apart.

On the immediate question, whether citation to an archdiocesan court within London is citation out of the home diocese as the statute means it, Coke argued that "diocese" refers to jurisdiction, not to a physical circumference. He thought that the etymology of "diocese" supported this interpretation and that precise language in the statute removed all doubt. (The penalty clause imposed the £10 forfeiture for citing men out of their home diocese "or other jurisdiction", thus showing that by "diocese" the makers meant a jurisdiction and not a place.) Coke also noted that the statute protects peculiars and people living in them against diocesan and archdiocesan courts; he thought it particularly absurd to suppose that the statute did not by the same token protect diocesan courts against peculiars, such as the Arches was. Finally, he pointed out how extendable the civilian position was even *without* the full concurrency doctrine, for the Archbishop had peculiars in several other dioceses besides London. If citation to any such peculiar geographically within the diocese did not violate the statute one might as well admit full concurrency for most practical purposes, despite the overwhelming objections to admitting it developed by Dodderidge with some additions by Coke himself.

After Coke had spoken, Dr. Martin shot his reserve arrow: The statute imposes a penalty, therefore it should not be enforced by Prohibition. This argument remains cogent even if one throws away the rest of the civilians' case; plainly they did not want to use it until the rest of their case had to be thrown away. Besides his bare theory, Martin had a prospectively embarrassing further fact to lean on: In this very case, earlier in the same term, Rochester had sought a Prohibition in the King's Bench and been turned down. Martin does not say that the King's Bench made the decision because it thought that the penalty was an adequate remedy and the only one intended by the statute-makers, but the context in which he introduces the decision suggests that that was the reason.

The Common Pleas shows no sign of being moved by what the King's Bench had done, unless to be painstaking in refuting Martin's theory. The judges held "that when any judges of any court are prohibited to do anything, if they proceed against the statute Prohibition lies." (Harl. 4817. The words of the two reports in resolution form are virtually identical on this point.) Considerable support, direct and analogical, was adduced for the rule, some of it in open court, though Coke may have added more in formulating the resolutions. Various statutes limiting various courts in the common law sphere (the Steward and Marshall, the Constable of Dover, the Justices of Assize) were cited as acts which could be or had been enforced by Prohibition. I suspect the value of emphasizing these examples is that they point to the generality or neutrality of the rule: The Common Pleas was not insisting on its power to prohibit the oft-prohibited ecclesiastical courts even when Parliament had provided a penalty; it was insisting on its power to enforce by Prohibition *any* statute limiting the jurisdiction of *any* court, whatever features beyond the essential mandate, such as a penalty clause, the statute might have. But after the point is made in completely general form two specifically ecclesiastical instances are added. In the MS. version of Coke's resolutions, it is said that Prohibition would lie to the Chancellor if anyone lodged an appeal in the Chancery contrary to the Act in Restraint of Appeals (24 Hen. VIII, c. 12), even though the statute imposes penalties and even though the matter is purely spiritual. (I assume the contemplated offense would be trying to by-pass the archdiocesan level and go *directly* to the Chancery, where the statute provided ecclesiastical appeals should go *after* the archiepiscopal court had ruled on them, instead of to Rome as theretofore.) Harl. 4817 and the printed Coke both cite the Mortuaries Act (21 Hen. VIII, c. 6) as one that appoints a penalty, but on which prohibition nevertheless lies. In 13 Coke, 23 Hen. VIII is said to be stronger than 21 Hen. VIII because the former was made to maintain the jurisdiction of Ordinaries, as well as for the people's ease. In other words, it is plausible, though not valid, to argue that an act made solely for the protection of the subject will serve its purpose if the injured party can recover the appointed penalty; the Mortuaries Act, protecting people against excessive mortuary fees, is such a statute. 23 Hen. VIII, on the other hand, is meant to do more than make up for the injury a man might suffer in being forced to travel, say, from Cornwall to Canterbury; it is intended, in addition, to prevent one ecclesiastical court from doing what another ought to be doing, and that specific effect—the control of jurisdiction—is what Prohibitions exist to secure. (It is of course true that the double damages and penalty remedies in 23 Hen. VIII would *dissuade* from violation of the statute and thus of the lines of jurisdiction which the statute was meant to reinforce, but surely the interest of courts in their jurisdiction is both incalculable and important enough to protect by a specific remedy.) It is of some

significance for later cases, in which the question arose again, if *Lewis and Rochester* can be taken as deciding *inter alia* that 23 Hen. VIII had a double purpose—to protect both the subject and the ecclesiastical courts.

Exempla more analogical than directly in point enrich the meaning of the court's holding that Prohibition lies despite the penalty. The MS. Coke cites a provision of the Statute of Gloucester inflicting punishment on the sheriff if he fails to put his name on returns of writs and says that omission of his name is legal error notwithstanding the penal provision. In other words, statutes that penalize some form of feasant or non-feasant may generate other legal consequences than the penalty itself—whether award of a Prohibition or reversal of a judgment in Error. 13 Coke cites a Year Book holding that anyone who does something prohibited by a statute may be fined for “contempt of the law.” That is (I take it), a statute which in plain language *forbids* is to be taken seriously *as* forbidding. Such a statute makes it a criminal offense (sub-felonious of course) to do the thing forbidden, even though it does not do so expressly or appoint a definite penalty, and even though some other sanction or consequence (such as nullity in a transaction or error in legal proceedings) would be generated by the statute. By the same token, an act which forbids a court from doing something should be “taken seriously as forbidding”, and enforced by the available means of Prohibition, even though another consequence—such as liability to a penalty—is generated by the act.

Finally, the conclusion that the penalty did not close off Prohibition was reinforced in three ways, though the principle that any prohibitory statute addressed to courts may be given effect by Prohibition can support that conclusion unassisted. First, a *nota* at the end of Harl. 4817 (which may come from the reporter rather than the court) calls attention to the structure of 23 Hen. VIII: the statute first forbids suing people out of their diocese, then in a later clause gives the penalty, wherefore Prohibition clearly lies. This argument makes it possible to jettison the general principle or demote it to a rule of construction and still save the conclusion. I.e.: Maybe a statute which contains no distinct prohibitory language, or merely implies that something on the part of courts is forbidden in the very language that subjects it to a penalty, is meant not to be enforced by Prohibition—as if 23 Hen. VIII were to say nothing more than “Let suits outside the proper diocese be subject to a £10 penalty.” But if a statute, like the actual 23 Hen. VIII, says “Thou shalt not” and then, as it were after pausing and taking a new breath, adds “And if thou dost, thou shalt be subject to a £10 penalty”, the priority and independence of the direct imperative signifies an intent that it be directly enforced by Prohibition—or that it generate other consequences than the penalty, as in the analogical cases above. I say “maybe” to the concession, however: I do not think the decision in *Lewis and Rochester* has to be reduced to a constructive decision based on the way the prohibitory and penalty clauses are strung together in 23 Hen. VIII. The court might have held that Prohibition was appropriate in view of the act's purpose even if the negative imperative addressed to ecclesiastical tribunals had not been so clearly separate from the penal clause.

Secondly, in both versions of Coke, what amounts to a utilitarian argument is added to the formal principle that a penalty does not foreclose Prohibition. If everyone offended under the statute, it is said, is put to his action (for the penalty or punitive damages) “suits and vexation” will increase; Prohibition is the “shortest and more easy way.” A judicial attitude toward penalty statutes is indicated—a fairly drastic, though

perhaps not a surprising, attitude toward a commonplace mode of law-enforcement. Perhaps the feeling could be expressed by saying that the private or semi-private suit is a necessary evil, necessary to secure enforcement in the absence of an extensive state prosecutorial system but evil, among numerous other reasons because the device comes to a legislative invitation to litigate. Even when such litigation is not abusive—not the work of professional informers or a matter of exploiting obsolete or unimportant statutes for profit or vexation—it is likely to be expensive for the litigants and costly in the time of lawyers, judges, and jurors relative to the use of Prohibitions (especially in contexts like that of 23 Hen. VIII, where issues of fact are unlikely to arise on the Prohibition.) Enforcement by dissuasion exacts a cost; it is fortunate that sometimes—when Prohibitions are appropriate—more efficient enforcement of significant policies can be achieved at less cost, and simply without increasing the incidence of quasi-civil litigation (which at least in theory Prohibitions were not, but rather public proceedings, “for the King”. See the extensive documentation of this general point in Vol. I, *passim*.) If there were no other reason for enforcing 23 Hen. VIII by Prohibition notwithstanding the penalty, it would still be practical and socially healthy to do so.

Lastly, it is noted at the end of the printed Coke that the King could dispense with the penalty, but that the subject would still have the Prohibition. As a legal fact this is probably accurate enough. The King could undoubtedly dispense with the half of the £10 penalty going to himself, and I think there is little doubt that a *non obstante* would bar an informer from recovering his half except when a suit brought by an informer was already pending when the dispensation was granted. (It is much more doubtful whether the suit for double damages which 23 Hen. VIII also provides—a suit by the party who is cited out of his diocese and has suffered actual damage—could be cut off by a *non obstante*. None of the discussion in the reports is specific to that provision, however.) On the other hand, there is probably little doubt that 23 Hen. VIII as a whole, or *qua* an imperative distinct from the “price-tag” penalty clause, should be held beyond the dispensing power—as a general act for the public benefit and not concerned with the minutiae of economic and social regulation, but rather with the fair and orderly operation of the whole ecclesiastical legal system and with the preservation of jurisdictional lines regarded as correct by standards extraneous to the statute itself. As an argument for enforcement by Prohibition despite the penalty, the observation on the dispensing power goes to demonstrate the further inconvenience of the counter-position. To put the point in the form of a rhetorical question addressed to an objector: Do you really want to say that 23 Hen. VIII (leaving aside the double-damages clause) is a dispensable statute—that the King if he is so inclined may remove the statutory obstacle to making a man travel from one end of the realm to the other to answer ecclesiastical suits, or may permit a favored Archbishop to gobble up his diocesans’ jurisdiction? A not entirely trusting attitude toward imaginable royal preferences may be implied in Coke’s asking something like that question.

Lewis and Rochester v. Proctor opened a chapter in Prohibition law, for further cases on 23 Hen. VIII came quickly in the Common Pleas. Before taking up those cases we must note an immediate sequel, in the King’s Bench as it happened. A few years later (1611), Proctor sued Rochester there in Debt for the same tithes as he had earlier been

prohibited from recovering in the Arches.²⁹ I.e., instead of going to the diocesan courts of London, the parson sought to take advantage of the statute of 2 Edw. VI, c.XXX, which permitted an action of Debt to be brought for the value of unpaid tithes in some circumstances. Rochester pleaded that he had been sued for the same tithes in the Arches and that the suit there had been prohibited upon 23 Hen. VIII, but that sentence had been given against him in the Arches before the Prohibition. Upon this plea he demanded judgment—i.e., claimed that a new temporal action for the tithes could not be maintained when the tithes had already been awarded by an ecclesiastical court, even though real recovery, or execution of the Arches' sentence, had been cut off by Prohibition. The King's Bench was inclined to hold against Rochester—i.e., that the action of Debt was maintainable—, but the case was adjourned and not further reported, so that it is inconclusive on its rather interesting point. It does, however, introduce a further fact about the earlier *Lewis and Rochester*—the sentence in the Arches. If the sentence had been handed down at the time the Prohibition case was argued, there would have been good grounds against prohibiting. (There are good reasons for exempting Prohibitions on 23 Hen. VIII from the general rule that ecclesiastical sentence is no bar to Prohibition save in especially aggravated circumstances. This is noted in the discussion of the foreclosing effect of sentence in Vol. I, pp. 115 ff., and we shall see further evidence.) Leaving the sentence unmentioned in *Lewis and Rochester* may have been part of the price for having one side argued by civilians aiming at a comprehensive vindication of the Archbishop's jurisdiction. On the other hand, it is possible that the Arches' sentence came before Prohibition was finally granted, but not soon enough to put before the court. (It would have had to be introduced informally, but there is no necessary reason why it could not have been. The procedure adopted in *Lewis and Rochester*, probably in deference to archiepiscopal sensibilities, of allowing lengthy argument before granting Prohibition—as opposed to granting a writ for sufficient *prima facie* cause and letting the defense move for Consultation—of course permits the ecclesiastical suit to go on, and perhaps to produce a sentence, before a decision on the Prohibition is reached. An advantage of granting Prohibition quickly is that a genuinely prior sentence can be used by the defense and one hastily obtained at the last minute can be discounted.)

Turning now to the cases that came to Coke's Common Pleas in the wake of *Lewis and Rochester*: *Salmon v. Wilson* (1609)³⁰ first raises the problem of construction of 23 Hen. VIII that was to prove most persistent—the exact meaning of the provision that an inferior ecclesiastical judge may request a superior to take a case, *when and if* “the law civil or canon doth affirm execution of such request or instance of jurisdiction to be lawful or tolerable.” In *Salmon v. Wilson* the doubt was whether a request to an Archbishop to take a diocesan case is valid if it comes from the Bishop's Commissary instead of the Bishop himself. The language of the statute rather suggests that it is not valid, for it speaks of request being made by “any Bishop or any inferior judge having under him jurisdiction in his own right and title or by commission.” I think the natural reading is that the Bishop and only the Bishop may request removal of a diocesan case to the Archbishop, while an Archdeacon may request removal from his court to the diocesan level and the judge of a peculiar may make request to the Archbishop (more dubiously to

²⁹ T. 9 Jac. K.B. Add. 25,213, f.139, *sub. nom.* Porter v. Rochester.

³⁰ P. 7 Jac. C.P.. Harg. 52, f. 8b.

the Bishop, as will appear.) In other words, a mere officer under the Bishop, such as his Commissary, is not authorized by the statute to act for the Bishop. By this interpretation, the words “or by commission” at the end refer to a distinct jurisdiction constituted by commission, not to a mere deputizing commission enabling one to serve *vice* the Bishop in the diocesan court. Such was the conclusion of Coke and Justice Foster in *Salmon v. Wilson*. The report does not give their reasoning, but I think it must have been as I suggest. Justices Daniel and Warburton, however, said “*secretment*” that they held the contrary, because the Bishop has committed all his authority to the Commissary. (Whether they meant that he had so committed his authority in this particular case or that Bishops ordinarily worked through such general agents, as they did, is not clear.) The reporter’s “*secretment*” probably points to no dark mystery—just that when the case came up Coke and Foster expressed a decisive opinion, while Daniel and Warburton kept quiet and later said “off the record” in the reporter’s hearing that they were inclined the other way. The report gives no further information; the case was probably put off, and no outcome is known. Justice Walmesley is not heard from. If he, as the judge least disposed to interfere with the ecclesiastical system, participated later, or counsel figured on his participation, there would probably have been a majority against Prohibition. The Daniel-Warburton interpretation might have been based on the somewhat ambiguous words “or by Commission”; it might be based on nothing more than common-sense construction—that the statute can hardly intend to prevent removal requests from being made by the *de facto* presiding officer of a diocesan court, who is trusted with general authority by the Bishop and is in a better position than the Bishop himself to know whether removal would be reasonable and lawful in a given case. One might wonder, in view of the statute’s express incorporation of ecclesiastical law in the clause in question, whether civilian opinion should be taken on the legality of a Commissary’s removal request. I think that could be argued both ways—in the negative by urging that the statute strictly construed provides that the Bishop alone is competent to request removal, and then adds as a further requirement that his request must meet ecclesiastical standards of legality.

Smith’s Case³¹, from the same term as *Salmon v. Wilson*, involved another proviso in 23 Hen. VIII. The report gives only a holding, no context. Although the principal decision is not stated clearly, I believe it comes to saying that the saving of the Archbishop of Canterbury’s prerogative in probate extends to administration of intestates’ estates and entails that administrators appointed by the Prerogative Court should account there. The saving in question speaks only of the Archbishop’s prerogative “for calling any person out of the Diocese where he...inhabit[s]...for probate of any testament...” That is to say, the statute does not mention intestacy cases. That the court meant to hold that they are included when the circumstances are parallel to those in which the Archbishop had probate prerogative (when the testator—and now the intestate—had goods in several dioceses) appears from the one point that is entirely clear in the report. This is a remark by Coke that if the statute contained no saving for the Archbishop’s prerogative the common law would still make an exception for that. Reason: where the Bishop *cannot* determine a matter, the Archbishop must. Application: Bishops cannot deal with probate cases when the estate is not all in one diocese. The

³¹ P. 7 Jac. CP. Harg. 52, f.8b.

same reason holds when an intestate leaves property in several dioceses, and it follows that if the Archbishop may commit administration in such cases the administrators should account to him—which is the principal holding.

The statute's exception for suits removed to a higher court by request came in question in *Hawes's Case*.³² This case involved the Court of High Commission and is therefore discussed in the End Note following this chapter. High Commission cases are treated separately in the End Note because they touch the special question whether 23 Hen. VIII applied to the High Commission at all. The holding in *Hawes*, however, is probably not confined to the High Commission, but valid for any pair of ecclesiastical courts. Abstracting from procedural peculiarities of the High Commission case, that holding can be expressed as follows: Whatever the other exact rules about removal of suits from one ecclesiastical court to another at the request of the original judge—which 23 Hen. VIII certainly permits—one form of removal is not allowed by the statute, viz. removal of a suit *in medias res*, as opposed to when it is first brought, or before the original court has made any determinations of fact or law.

Hawes was prosecuted for adultery in an Ordinary's court and censured for the offense. Then, because he did not perform the censure (meaning presumably that he did not do a prescribed penitential act or, instead or in addition, disobeyed an instruction to "sin no more") the Ordinary "consented" that "the High Commission should have the punishment of him." The High Commission took the case. The report says that *Hawes* was "convicted" before that court and then punished (by imprisonment, which, unlike regular ecclesiastical courts, the Commission arguably had power to impose—see End Note.) The report's language suggests that the High Commission re-tried *Hawes*, instead of taking his previous conviction as sufficient and punishing him forthwith. If that is what happened, it suggests that the Commission doubted whether 23 Hen. VIII permitted regular ecclesiastical courts to turn over convicted offenders merely to have them punished by another ecclesiastical court more likely to be effective. (The High Commission would be the obvious candidate for greater effectuality, but other superior courts might find it might find it easier than a local one so much as to excommunicate an obstreperous and perhaps powerful local figure.) Re-trying the party, as if the case had been forwarded by the original court before any action taken, may have seemed to furnish an argument that the removal was within 23 Hen. VIII.

The Common Pleas, however, held *per curiam* that *Hawes* was not lawfully punished. If indeed re-trial in the High Commission took place and was intended to buttress the removal, the judges were unimpressed. Chief Justice Coke summed up the holding by saying the original court's consent must be "before the suit commenced", and the reporter notes that this was not denied. There may be some question as to whether Coke's rule overstates the result. If "before the suit commenced" means no more than "before the original court has taken any decisional steps" there is no problem. *Quaere* whether "commenced" could have a starker meaning than that. There is a hint in the language of the report that Justice Walmesley was a bit anxious lest the decision be taken to say more about the construction of 23 Hen. VIII than the immediate point it makes—no removal to the High Commission, or perhaps elsewhere, for punitive purposes only. (See the End Note for the probable purport of Walmesley's remark.)

³² T. 7 Jac. C.P. Harg. 52., f. 19b.

A case of 1610³³ reopened the general questions settled in *Lewis and Rochester*. All the report tells is that a Prohibition was sought and granted on 23 Hen. VIII to stop a suit in the Prerogative Court of Canterbury, and that usage in the reigns of Henry VIII and Queen Mary was urged against a Prohibition. In those reigns, it was argued, the Archbishop cited men from all dioceses in his province to the Prerogative Court without the Ordinary's consent. (It is notable that Elizabethan or other distinguishably post-Reformation usage—later Henrician or Edwardian—was *not* urged. Counsel's theory must have been that the Papist usage that could be discovered was relevant because it pointed to what would have been regarded as lawful at the time 23 Hen. VIII was made.) The court replied as it had in *Lewis and Rochester*: the usage cited was explicable by the Archbishop's legatine authority, now abolished.

In Langdale's Case, later the same year,³⁴ two points may have been decided. (The report states what was resolved in the sparest general terms.) (a) A Prohibition on 23 Hen. VIII need not be sought at the earliest possible moment, or before the improper court has taken any steps to deal with the suit. (b) The party who causes another to be cited out of the latter's home diocese may prohibit his own suit. The first point is not surprising; the second seems hard to justify and is contradicted by later holdings. Self-prohibition was generally permissible (see Vol I, pp. 161, ff.) but it seems doubtful whether Prohibitions on 23 Hen. VIII should fall within the general rule. If A has had B cited out of B's diocese, and B has no objection, why should A be allowed to have second thoughts and stop the suit? The rhetorical question loses its force, however, if the purpose of 23 Hen. VIII is as much to uphold proper jurisdictional lines and protect the lower courts as to save the subject trouble. That the first purpose is as clear and important as the second may have been held in *Lewis and Rochester*; *Langdale* says so indirectly.

In 1611³⁵, the court was first faced with the precise meaning of residency ("inhabiting and dwelling") in 23 Hen. VIII. A King's Bench attorney who ordinarily lived in the diocese of Peterborough was sued in the Arches (as executor, for a legacy) during term—i.e., when he was in London more than fleetingly, to practice his profession throughout the term (and presumably he came every term, therefore spending a substantial fraction of each year in London.) The suit was prohibited. Coke distinguished "remaining" ("*demurrant*" in Law French no doubt) from living/dwelling/inhabiting and said that a lawyer who stays at an Inn of Court, as well as an attorney who stays at an Inn of Chancery, may not be sued in the Arches. Presumably he cannot be sued in a London diocesan court either, if he has a regular "residence" elsewhere and only keeps premises in an Inn as a temporary "residence" *cum* "office" or "business address." (There is no 17th century vocabulary quite adequate to the distinctions.) A case could conceivably be made for archdiocesan courts such as the Arches, in contradistinction to London diocese, precisely for such situations of genuinely "divided residence"; the report does not tell whether that was argued. In so far as the purpose of the statute is to save people travel and the like, the suit in the instant case can hardly be considered against the policy of the

³³ T. 8 Jac. C.P. 2 Brownlow and Goldesborough, 38. This report contributes the information that the only *legatli nati* in Chistendom were the two English Archbishops and the Archbishops of Pisa and Rheims.

¹⁰ M. 8 Jac. C. P.. Harg. 15, f.236b.

³⁵ H. 8 Jac.. C.P. Brownlow and Goldesborough, 12.

statute. The decision does, of course, cut off a form of archdiocesan encroachment on diocesan jurisdiction which could be of more than trivial importance, in view of the number of people of substance who maintained “second residences” in London. A touch of 17th century sentiment may be seen in the decision—a tendency to think of a professional man’s real home as his “country”, however much time he spent in London earning the means of country life. It is worth noting that the plaintiff-in-Prohibition here came to the Common Pleas even though he was a King’s Bench attorney, an indication that enforcement and favorable construction of 23 Hen. VIII was more likely to be obtainable in the Common Pleas.

Another report from 1611³⁶ confirms the holding in *Lewis and Rochester* that the penalty given in 23 Hen. VIII is no bar to Prohibition. The report is not related to any specific case. Whatever the context, the judges gave several examples of situations in which the existence of a penalty is no obstacle to Prohibition and went on to assert the general prohibiting power of the Common Pleas over Walmesley’s usual dissent on that question.

Jones v. Boyer, later in 1611,³⁷ presents the first extensive technical debate on the removal-by-request proviso. It also led to extra-judicial discussion of other issues arising from 23 Hen. VIII. Boyer, an inhabitant of the diocese of Llandaff, was sued as executor in the Arches, for his testator’s dilapidations. I.e., Jones succeeded testator in an ecclesiastical living; he sued executor to be compensated out of the estate for deterioration of the permanent value of the living caused or suffered by testator. Boyer sought a Prohibition. Jones alleged (whether by a proper plea or informally does not appear) that the Bishop of Llandaff’s Commissary or Vicar General had transmitted the suit to the Archbishop by letters under seal.

The court asked civilians to appear and inform it as to the legality of the request by ecclesiastical standards. Drs. Talbot and Martin came and argued that it was lawful. From nothing that they or the judges said does it appear that the legality of a request by a Commissary, rather than the Bishop himself, was doubted. This is further evidence, in conjunction with the case on this point above, that the court, whether or not still split, was at least by a majority inclined to hold the Commissary competent to act for the Bishop. Instead, the issue was whether the letter of request needed to recite the reasons why the request was being made. Apparently there was no such recitation in the instant case; at least it was not alleged. Talbot and Martin maintained that the reasons did not need to be rehearsed. The rationale of this negative rule, as they represented it, was that there might be a number of reasons. (Not a terribly convincing rationale, but perhaps the point is that there were so many different sufficient reasons, several of which might apply in a given case, that it would be tedious to require them all to be rehearsed and a source of trouble to make the requester select one, which might not be the best.)

After making this general argument, Talbot and Martin went on to represent the case at hand as more complex than my statement and the report have it. It seems that the suit had originally been brought in an Archdeacon’s court and decided there, so that what the Bishop’s Commissary really requested was that the Archbishop take an *appeal* that

³⁶ P. 9 Jac. C. P. Harg. 15, f.242b

³⁷ T. 9 Jac. C.P. 2 Brownlow and Goldesborough, 27; Harl. 4817, f. 219, *sub. nom.* Bower v. Jones.

would ordinarily lie to the Bishop, rather than a first-instance case. According to the civilians, an appeal could legally go from Archdeacon to Archbishop; ergo (as I reconstruct the reasoning), the Bishop or his deputy may turn over an appellate case to the Archbishop. Even if the cause for transmitting a first-instance case must be recited, an appellate case can be transmitted without reason shown.

The court took no action immediately after the civilians had spoken. When the case was moved again, Coke said he had conferred with another civilian in the meantime and discovered that Talbot and Martin were wrong on one point: an Archdeacon may not transmit a case directly to the Archbishop for appellate hearing (he may make such a transmission to a Patriarch, but the Archbishop of Canterbury is not a Patriarch.) On this occasion, the judges agreed that a Bishop must transmit a case before it is “commenced” in his court, but there is nothing to suggest that that point had any relevance for *Boyer v. Jones*. No decision of that case is reported, nor is any further discussion of whether the reasons for a removal need to be rehearsed in the letter of request.

The MS. report (which may have been written by Justice Warburton) goes on, however: Afterwards a conference took place at Serjeants’ Inn between the Common Pleas judges (“us”) and three civilians, Sir John Bennet, Dr. Martin, and Dr. James. Several important questions about 23 Hen. VIII were discussed, but not, so far as appears, the issues in *Jones v. Boyer*. My guess would be that the case was still undecided when the conference was held, but that consensus on the case itself was a less important or more easily attained goal than working out wider disagreements and misunderstandings. As in *Lewis and Rochester*, so in *Jones v. Boyer*, civilians had represented the Church position. In the latter case, a combination of genuine doubt—far more likely on the technical ecclesiastical issue of what constitutes a sufficient letter of request than on the broad claims advanced for the Archbishop in *Lewis and Rochester*—and a desire for peace with the Church lawyers prompted the conference. Perhaps consensus was not hard to come by in *Jones v. Boyer* itself. Grounds for denying Prohibition were strong; it was in the event denied unless counsel, duly discouraged, dropped the attempt to get a writ. (At least a majority of the court probably had no quarrel with the Commissary’s request. One need not accept that the ecclesiastical law always sanctioned removal without reason shown to hold that forwarding an appeal to the normally-appellate archdiocesan level is perfectly reasonable and therefore probably lawful.) But more important matters were taken up at the conference, and these the report tells about.

First, the civilians proposed an interpretation of the saving for probate prerogative in 23 Hen. VIII: “By equity and construction” legacy suits based on wills proved in the Prerogative Court must be brought in that court. In other words, when the statute saves “the prerogative of the ...Archbishop...for calling any person...out of the diocese ...for probate of any testament”, it means to save testamentary jurisdiction generally in so far as the Archbishop is lawfully “possessed” of a will by virtue of its having been proved before him. The Archbishop may indisputably (assuming the testator had goods in several dioceses) summon Executor out of Bath and Wells to prove the will in the Prerogative Court. By the same token, *per* the civilians, Legatee may subsequently cause Executor to be cited into the Prerogative Court to demand payment of a legacy in the same will. (Cf. the analogous, though more convincing, point in the poorly reported case above—Note 7: Prerogative jurisdiction to appoint administrators of an intestate’s estate entails

jurisdiction to summon an administrator living in Bath and Wells for the purpose of accounting.)

No consensus was reached by the conference on this matter. All the judges held “*fortement contra*”: The statute saves only what it literally saves, the prerogative for probate. A legacy suit is as independent of the prior probate proceedings as an action of Debt brought by the executor to recover money due to the estate (for which probate was also a prerequisite.) In defense of the judges’ position, one should observe that there is a significant sense in which the Bishop of Winchester “cannot” conduct probate proceedings when part of the testator’s goods are in Bath and Wells. I.e.,—for the real sense of the “cannot”—there is no basis for choosing between the two Bishops, so that it is reasonable to assign the probate function to the Archbishop. (Again, cf. the case at Note 7.) Once probate has “activated” the executor’s capacity and made him liable to legacy suits, there is no difficulty about saying the executor should be sued where he lives, in accord with the statute. Working with this line of reasoning, the judges went on to make a concession: If there are several executors who live in different dioceses, a legacy suit must be brought against them jointly; since they cannot be sued in any diocese, they must be sued before the Archbishop. The civilians did not at once give up their claim to a wider legacy jurisdiction for the Archbishop, but resorted to their familiar litany: Usage supported the citation of inhabitants of London in any cause, and citation from anywhere in the archdiocese when a will had been proved in an archdiocesan court. The judges only replied. “that is the greater and longer tort”—I suppose the sense is “a worse mistake, and ‘older hat’, than the construction of the statute you just proposed.”

The rest of the report is a summary of three cases, presumably noted by the reporter just because they relate to the subject of the conference. One of them, Bridges’s Case, came a few months after Jones v. Boyer and is independently reported—see below. The other two are undated and are not reported separately. In the first, a man lived in a peculiar but occupied land in the diocese of London outside the peculiar. He was sued in the diocesan court for tithes produced by that land and sought a Prohibition on the ground that he should have been sued in the peculiar. Prohibition was refused because he “cannot” be sued in the peculiar in this case. Here as in other contexts, “cannot” is not literal—it all depends on the competence one ascribes to courts to reach beyond their ordinary ambit when in some sense they “have jurisdiction” (here because the peculiar was the proper court, following 23 Hen. VIII, in respect of the tithe-payer’s person.) I think, however, that the decision in fact accords with the verbal meaning of the statute, though the drafting is none too clear on this score. The act makes an exception “for any spiritual offence committed or done...or neglected to be done contrary to right or duty by the Bishop, Archdeacon, Commissary, Official, or other having spiritual jurisdiction...or by any other person...within the diocese or other jurisdiction whereunto he...shall be cited...” I take it that not paying tithes due from land in London diocese is committing a spiritual offense (or neglecting a spiritual duty) “within” London diocese, so that the offender may be cited into the diocesan courts of London even though his dwelling place is elsewhere. The statute is puzzling in that it recites the titles of various judicial officials and seems to contemplate primarily offenses committed by such persons. The meaning is presumably the reasonable one that a complaint against the Commissary of Bath and Wells can be taken to an archdiocesan court even though the Commissary lives in Bath and Wells. But the statute eventually gets to “any other person” and therefore seems to do

in effect what could have been done more straightforwardly—viz. make an exception for the situation where a man lives in X but does a criminal or tortious act whence an ecclesiastical cause arises in Y, in which case he may be sued in Y. This is plainly a large and important exception.

The other case, *Edmonds's*, on essentially the same issue, complicates the interpretation. It was reportedly held in this case that if a man who ordinarily lives in London goes to the diocese of Salisbury, commits adultery there, and then returns to London, he may not now be sued in Salisbury. 23 Hen. VIII requires that he be proceeded against again in London—no apparent problem about London's taking notice of acts committed in Salisbury. On the other hand, if the adulterer had been sued in Salisbury before returning to London, there would be no objection. He may not invoke his normal residence to stop the Salisbury suit. This result is contradicted by *Bridges's Case*, as the reporter notes. It seems to me unreachable by the verbal construction of the statute I give above. Therefore it must proceed from common-sense construction of intent. The latter sort of construction could reconcile the apparently inconsistent title case above by saying that Parliament might plausibly have meant that people ought to be sued for agricultural tithes where the land lies, but that for crimes and personal torts the ecclesiastical authorities were meant in all circumstances to refrain from what the act is directed against—e.g., making a man travel from London to Salisbury (even a bad man who has sinned in Salisbury.) Common law habits of mind could lead one to see a resemblance between suits for agricultural tithes and actions touching land—"local" actions at common law, meaning the jury must come from where the land lies, as opposed to "transitory" personal actions triable in any venue. The resemblance is quite misleading, because the common law distinction depends on the theory that issues touching land should not be decided by jurors without putative personal knowledge of the facts—i.e., should not be decided merely on evidence presented to the jury. Since all ecclesiastical causes involving factual disputes were decided on evidence (without jury) there is no true analogy. It is nevertheless conceivable that Parliament—reflecting "common law habits of mind"—could have intended a distinction, an exception all but exclusively for tithe cases.

Whether the tithe case is correct or not, there is a good common-sense argument for deciding the adultery case as it was decided in *Edmonds*. For if the statute does not insist that crimes and personal torts be tried where the defendant lives, and not where he allegedly did wrong, the statute seems in significant measure to be directed against something unlikely to occur often. The Bishop of X is unlikely to proceed against an inhabitant of Y for no reason at all, or merely because he is asked to by someone whose convenience it suits or who wants to vex the defendant. The foreseeable situation is that the Bishop of X will see fit to entertain a suit against an inhabitant of Y when the latter has done something giving rise to a cause of action within X. This does not, of course, speak to archiepiscopal encroachment, the main mischief behind the statute, but the act also applies to Bishop encroaching on Bishop, and it is reasonable to suppose that the intent was not to except away most realistic cases in that category. Nevertheless, this interpretation may go against the words of the statute.

Another case from 1611, *Hutton v. Grimball*,³⁸ has been dealt with in Vol., I, p. 170, as a special instance of refusal to prohibit after ecclesiastical sentence. A party was sued in the wrong diocese for defamation and found innocent of the offense. Costs were accordingly awarded to him. The losing plaintiff sought to prohibit recovery of the costs against him on the basis of 23 Hen. VIII. The court denied Prohibition with obvious justice, “because the statute of 23 Hen. VIII does not give any advantage to the party plaintiff who draws the other out of his jurisdiction, but solely to the defendant.”

Dasset v. Johnson, the same year,³⁹ touches on a matter discussed at the conference following *Jones v. Boyer*. What the litigation was about in this case is not specified, but it was probably a legacy suit. The question was which diocese a suit belongs in when one executor lives in X and the other in Y. The judges seem to have agreed on two points: (a) The place where the will was made does not decide the question, “for the statute is for the person solely.” I.e., the statute forbids bringing suit in Y against a single executor living in X, although the will was made in Y. As it were, not performing a will made in Y is not an ecclesiastical offense or neglect of duty committed in Y, like the Londoner’s act of adultery in Salisbury. One should not deviate from this principle in order to solve the problem of two executors with different residences. (b) If one of the two executors lives in the Archbishop’s diocese, the Archbishop should have jurisdiction by reason of his superior dignity. As to whether the Archbishop may take jurisdiction when neither executor lives in his diocese, the judges were inclined to say “Yes” in virtue of the impossibility of assigning jurisdiction on any other principle, but they were not so sure as on the occasion of the Serjeants’ Inn conference. The case was adjourned and does not reappear. (The only alternative to opting for the Archbishop or else attaching significance to where the will was made would presumably be to hold that suit may be brought in the diocese where either executor lives, and that citing the other executor into that diocese does not violate 23 Hen. VIII. This is on the assumption that suit must be brought against all executors jointly. Would there be any risk of common law interference in suing one executor singly, assuming that the ecclesiastical court was willing to permit that? I should think not.)

Bridges’ Case, at the beginning of 1612,⁴⁰ raises the question of ecclesiastical wrongs committed in a diocese other than that in which the wrongdoer lives. It resolves this contrary to *Edmonds* above. (The chronological order of these cases is unascertainable.) The case, like *Edmonds*, was adultery committed in Salisbury by one who normally lived in London and had returned there by the time he was cited into the Salisbury court. The holding that he could be proceeded against in Salisbury was posited on the words of 23 Hen. VIII in the way I indicate above, though the court also recited the maxims “*actor sequitur forum rei*” and “*ubi delinquit ibi punietur*.” The judges also pointed out that in ecclesiastical law the judge of the place where the offense is committed may punish it, as if to suggest that if the verbal meaning of the statute were in

³⁸ M. 9 Jac. C.P. Harg. 15, f. 255.

³⁹ M. 9 Jac. C.P. Harg. 15, f.261.

⁴⁰ H. 9 Jac. C.P. Harg. 15, f.261b. An anonymous and undated report at 1 Brownlow and Goldesborough, 45, may be this case or may be *Edmonds*, cited at the Serjeants’ Inn conference following *Jones v. Boyer*—Note 13 above. *Bridges* is also fully described in the report of that conference.

doubt ecclesiastical law would be relevant to expound it. (Incorporation of ecclesiastical law in the clause on removal might suggest the view that it has expository relevance otherwise.) The reports of *Bridges* are not particularly helpful on the limits of the principle it espouses. Adultery is a crime of some gravity; acts constituting it are necessarily done in definite places. Would, say, defamatory words spoken in Salisbury by a visiting Londoner be prosecutable in Salisbury? Could a divorce suit grounded in adultery be pursued there against someone resident elsewhere? A few hints in the Harg. 15 report rather stir up such questions than answer them. The report says “these offenses” are “local”—pointing, as it were, to such criminal offenses as adultery. But what would other examples be, and what acts in the ecclesiastical sphere are not “local”? (To the degree that common law analogies are at work—as they clearly seem to be, though perhaps with dubious relevance—: criminal cases were “local” at common law, perhaps with a doubtful penumbra for such semi-criminal ones as prosecutions on penal statutes. “Semi-criminality” characterizes such ecclesiastical causes as defamation. We have already seen tithing suits “localized”, perhaps by analogy with claims to and torts involving land. Obvious ecclesiastical equivalents to the “transitory” class at common law—suits for money owed and for damages arising from personal torts—are hard to find. Legacy suits perhaps have the clearest resemblance; we have already seen that those must be brought where the executor lived.) One other example given in *Bridges* is false doctrine preached at Paul’s Cross, which ought to be prosecuted in London rather than the preacher’s diocese of residence—another criminal example. In stating the instant case, the MS. report speaks of someone who is incontinent away from home “and detected in that flagrant crime in the diocese where it is committed.” Is there a hint of limitations in “detected” and “flagrant”—e.g., that *ex officio* prosecution of the Salisbury adulterer in Salisbury is lawful, but no prosecution on private complaint even though the matter is “criminal” in the sense that the party would be liable to spiritual punishment if convicted? In any event, *Bridges* is firm in its immediate holding; it was confirmed with exactly the same examples in the slightly later James’s Case.

The facts of *Stone (?) v. Grigg* (1612)⁴¹ are not given, but several resolutions on 23 Hen. VIII are reported. The judges agreed that the statute is violated if the Archbishop of Canterbury or any other Bishop cites a man living in his diocese into a peculiar belonging to such Archbishop or Bishop outside the diocese. This seems fairly obvious—inhabitants of the diocese of Canterbury, for example, are protected from having to travel to London to answer in the Arches. But perhaps there is a bit of a puzzle about the statute’s meaning when the effect of citing someone out of his home diocese is to cite him before the same judge as he would in any event have to answer before. (Nominally the same, because in practice the peculiar and the diocesan court would be presided over by different deputies of the Bishop.) More likely to be a real problem is the situation of which, so far as I know, the Arches was the only example: The peculiar belongs to the Archbishop and in practice operates as an archdiocesan court (i.e., does the legitimate appellate and prerogative work of the archdiocese, as opposed merely to serving as a first-instance court for inhabitants of the peculiar.) The removal-by-request provision of the statute must mean that the Archbishop could “request himself” to take in his archdiocesan court suits brought in his diocesan court and perhaps in his peculiar

⁴¹ P. 10 Jac. C.P. Harg. 15., f.263b.

(depending on whether he is entitled to skip over the Bishop of the diocese where the peculiar is located.) It is possibly arguable that no form of request is necessary in that situation—inhabitants of an Archbishop’s diocese (and perhaps his peculiars) are simply liable to citation into the archdiocesan courts, the citation implying that the Archbishop has “requested himself.” Applied to this special context, the holding would mean that whatever it does in practice the Arches is properly speaking only a peculiar. That was suggested in *Lewis and Rochester*, which the present holding modestly extends (an inhabitant of Canterbury diocese is as much within the statute as an inhabitant of London diocese.)

The second point in the report is not a resolution but a doubt, whether the reporter’s or the court’s is not clear. The premise for the doubt is that “it seems by the words of the statute that by license of the diocesan the Archbishop may cite in any diocese.” “Seems” is weak if the meaning is only that any Bishop may—in due form and provided that ecclesiastical law permits—request the Archbishop to take over a case, for the statute certainly provides that. Perhaps the word reflects uncertainty about what “due form” is—e.g., whether a Bishop may give his Archbishop a general license, as opposed to making request in each case. The unanswered question is whether this principle applies to a peculiar belonging to an Archbishop located in someone else’s diocese—e.g., the Arches, which the present case is in all probability about. The answer should probably be “no”, given the point above—the Arches is only a peculiar even though it functions as an archdiocesan court. For the statute permits removal-by-request only from inferior to superior judge, and peculiars are presumably not superior to dioceses even when they belong to a personal superior of the Bishop. This is a puzzling and practically inconvenient result, however, since the Bishop of London would be doing an inhabitant of his diocese a favor—saving him travel—if he licensed the Archbishop sitting in the Arches to take a case which he wanted to forward to the higher level. (Nominally, anyhow. The point would be realistic for an equivalent of the Arches located in Lincolnshire, since the regular archdiocesan courts commonly sat in greater London.)

The other intelligible resolution in the report restates a point we have already encountered: If 23 Hen. VIII did not contain an express proviso for probate prerogative, it would still be treated as an exception. It was “stated as a rule” that when the party “cannot” have a remedy in an inferior court a superior court may provide one. The report is garbled or incomplete at the end. There appears to be discussion of the jurisdictional consequences of a will’s being proved in the Prerogative Court—whether later proceedings connected with the will, such as legacy suits, may or must be in diocesan courts—but it is unclear.

Fraunces v. Powell, also 1612,⁴² indicates answers to a couple of questions raised in cases above: (a) A Bishop may give his Archbishop a general license to take diocesan cases, so far as the statute is concerned, provided that is warranted by ecclesiastical law. The instant case was adjourned until civilians could be heard on the point of ecclesiastical law. It was a case of alleged encroachment on London diocese by the Arches. The court’s action therefore implies that a general license could benefit an archiepiscopal peculiar as well as regular archdiocesan courts, ecclesiastical law permitting. In announcing the

⁴² P. 10 Jac. C.P. Godbolt, 190.

disposition, Coke said that Prohibition would lie in the instant case unless the general license existed and was valid in ecclesiastical law.

(b) It is reported as held that defamation, which the instant case was about, may be punished by the ecclesiastical court in whose precinct the words were spoken, although the speaker does not live there. (Note that this need not imply that the place where this semi-criminal wrong was committed has exclusive jurisdiction, as against the place where the defendant is resident. Whether it does would presumably be an intra-ecclesiastical matter.)

Save for dicta below, one cannot say more about *Fraunces v. Powell*. Full facts are not reported. We are not told exactly where plaintiff-in-Prohibition lived, nor whether and how an episcopal license to the Archbishop to take any diocesan case he liked in the Arches was asserted as a fact. We are informed that the alleged defamatory words were spoken in St. Sepulcher's parish, London. There may be a lurking question as to whether that parish was part of the Archbishop's peculiar. In *Lewis and Rochester*, we encountered the judicial opinion that the Arches as a peculiar court was confined to St. Mary le Bowe, where the words in question here were not spoken. It is reported as "said" in *Fraunces* (but by whom does not appear) that the peculiar covered thirteen parishes, which is the traditional view. It is possible that once the outstanding question of ecclesiastical law was settled the court would have to come back to the extent of the peculiar and whether St. Sepulcher's belonged to it. There is no report of the case beyond the adjournment.

In addition to these points directly bearing on the case, Coke made two further observations in *Fraunces*. (1) He affirmed that 23 Hen. VIII was made to protect inferior ecclesiastical jurisdictions—as opposed merely to saving the subject inconvenience. Indeed, he said that that was the "principal cause" of the statute. (2) He said that the act was made "in affirmance of the common law." In support of this, he cited two Year Book cases in which it was said that excommunication in a "foreign" diocese is void. Assuming the position is tenable, I am not sure that it would have any implications after the statute, *sed quaere*. The point that the statute may be enforced by Prohibition, not only by penalty suit, is at least assisted by the theory that the act is declaratory, if in the absence of the statute Prohibition would lie to stop a suit in a jurisdiction counting as "foreign" (whatever the criteria of foreignness.) For then the penalty would clearly be a superadded remedy, since the statute does not expressly take away any pre-existing power to prohibit. The prohibitability of "foreign" suits at common law does not automatically follow from decisions on the validity of excommunications in the contexts where the common law had occasion to pass on that—to decide whether a person had incurred the civil disabilities entailed by excommunication or whether *De excommunicato capiendo* would lie. We have seen in Vol. III, pp. 155 ff., that the courts were reluctant to use Prohibition to keep one ecclesiastical court from infringing on another in the unusual cases where that was complained of but where 23 Hen. VIII was not involved.

James's Case, from the next term,⁴³ is not reported factually, but in the form of propositions on which the judges agreed, none of them new. (a) *Bridges* was affirmed. (b) The probate proviso, being designed to uphold archdiocesan jurisdiction where diocesan will not work, does not carry the power to entertain legacy suits with it. (c) Exceptions

⁴³ M. 10 Jac. C. P. Add. 25,210, f.9.

not express in the statute may be construed in for cases in the “equal mischief” and where justice cannot be done otherwise. The example given is the Archbishop’s power to grant administration in intestacy cases parallel to those covered by the probate prerogative—when the intestate has goods in several dioceses. The last point, probably the specific example of intestacy, was said to have been adjudged in Edward VI’s time and by divers precedents since.

Goruen v. Pym, the same term,⁴⁴ in a sense adds little beyond the obvious to the gloss on 23 Hen. VIII. The statute makes a plain and unqualified exception for appeals. In this case, citation out of the home diocese was apparently alleged as one reason for Prohibition, but the citation was in consequence of an appeal to the Archbishop. 23 Hen. VIII is not actually mentioned in the report, but I think it must certainly have been invoked. Assuming it was, the court said that there was no violation of the statute. The only point of interest is how it could have occurred to plaintiff-in-Prohibition to rely on 23 Hen. VIII.

His doing so can be made intelligible, though the attempt was not successful. Pym sued for a pew in the diocesan court. The Bishop made the equivalent of an order to quiet possession in Pym’s favor—i.e., awarded him possession of the pew pending trial of the right at common law. This step is explained by the fact that in some circumstances a man could have a temporal right to a pew. The Bishop’s court in this case apparently held that Pym might or might not have such a right, a question that only common law litigation could determine, and that meanwhile, from an ecclesiastical point of view and by tentative appearances, Pym was entitled to possession. (I say “from an ecclesiastical point of view” because it was probably law that if Pym lacked a common law title to the pew the Bishop was free to settle the right to use it by ecclesiastical standards, or perhaps by standardless discretion. In other words, the diocesan court was probably not doing exactly what a court of equity does when it awards temporary possession—acting merely on “tentative appearances”—though the distinction is a thin one.

Goruen then appealed to the archdiocese. Pym sought to prohibit the appellate suit partly as a violation of 23 Hen. VIII and partly because the matter was temporal. I construe his claim, comprising these two elements, as arguing that the suit to the Archbishop was not a *bona fide* appeal, such as 23 Hen. VIII excepts. I.e: A definitive sentence in an inferior ecclesiastical court is appealable, and citation of appellee out of his home diocese is perfectly legal. The same is no doubt true of a normal interlocutory appeal—when a non-dispositive point of ecclesiastical law has allegedly been misdecided. Here, however, the diocesan court had only made an order based on the proposition that the real issue was determinable at common law. Goruen’s proper move was to sue at common law if he wanted to assert a right to the pew against Pym. If he was not willing to take that step, it is at least arguable that he should be stuck with the Bishop’s disposition—on the theory that where temporal right to a pew does not exist in either disputant the Bishop has a mere discretion to assign the seat and end the quarrel, and therefore cannot commit an appealable error. When Goruen appealed to the Archbishop, he violated the policy of 23 Hen. VIII, though it may be hard to maintain that he violated the letter. He caused Pym to be cited into an archdiocesan court when there was no excuse for so vexing him.

⁴⁴ M. 10 Jac. C.P. Add. 25,210, f.9b.

The Common Pleas was probably well-advised in going by the surface of 23 Hen. VIII—i.e., in holding that an appeal in form is an appeal so far as the statute is concerned. In denying a Prohibition, I doubt that the judges committed themselves to more than that. They laid down some rules about title to pews (in brief, that a donor who has always paid for the upkeep of a seat and used it exclusively has a right protectable at common law, and otherwise that the settlement of disputes about pews belongs to the Bishop, subject to power in the parson and churchwardens to assign them if they can agree.) I see no commitment one way or the other as to whether the Archbishop may interfere with the Bishop's disposition once it is established that there is no temporal interest. The decision seems only to say that there was no objection at the present stage to asking the Archbishop to review the Bishop's order for any flaws in the application of the ecclesiastical law or in the finding of facts. An archiepiscopal order reversing a definitive episcopal decision about the use of a pew—temporal interest having been ruled out—could conceivably be an ecclesiastical error, but it would be a very feeble candidate for Prohibition. The holding in *Goruen* says that an attempt to get the Archbishop to reverse a tentative order intended to invite common law litigation is at least an equally feeble candidate, whether or not the Archbishop ought to entertain such an application.

We now leave Coke's Common Pleas for later cases in the same court, which continued to handle many more Prohibitions on 23 Hen. VIII than the King's Bench. *Jones v. Jones* (1618)⁴⁵ is an elaborately argued case on the exact meaning of the statute's exception for suits removed to a higher court at the request of a lower. The suit in this case, concerning tithes, was transmitted from the diocese of Llandaff to Sir Daniel Dunn, Chancellor of the Arches. There is an unclarity in the reports as to who requested the transmission, an Archdeacon, with jurisdiction subordinate to the Bishop's, or the Bishop's Commissary. In the MS. report, Chief Justice Hobart speaks to both issues—whether an Archdeacon may transmit a first-instance case to the Archbishop, by-passing the Bishop, and whether a Bishop's Commissary, as opposed to the Bishop in person, may transmit. It is likely that both things happened, in a sense: I.e., the suit was brought in an Archdeacon's court, but the request, instead of simply by-passing the diocesan level, was forwarded over the Commissary's name. The initiative may have come from the Archdeacon, but the Commissary was willing to comply. There was no merely formal objection to the request. It was by letter, and reasons were recited—viz. that no civilians were available in the locality to argue the case, and the requester, whoever should be counted as such, did not understand its issues.

Prohibition was granted, but the court permitted the case to be argued at length subsequently. First, in keeping with the statute's incorporation of ecclesiastical law in the section on removal, civilians were heard. On two occasions, Dr. Talbot, Dr. Duck, and another appeared. Typically, they stated an extreme case, claiming that there were no limits in ecclesiastical law on an inferior judge's power to request removal, instead of maintaining only that the request in this case was by a competent person and for good cause. The sincerity of their position—and so far as I know its correctness in ecclesiastical law—appears from the fact that Duck, who seems to have been retained to argue for plaintiff-in-Prohibition against Talbot, in some sense conceded this point. (What he said for his client is not reported. He may have argued that the request must

⁴⁵ H. 15 Jac. C.P. Hobart, 185 (undated); Harl. 5149, f. 46.

come from the Bishop himself, conceding only that no reasons need be given.) It is possible that in the end the civilians did not insist on an absolute *carte blanche* to request removal, since Hobart says later in the report that they had recited twenty-one good causes for removal. It seems surprising that the reasons alleged in this case were not, according to Hobart, among the twenty-one, since the absence of learned counsel and a learned judge in a remote Welsh diocese seems on its face a reasonable ground. If the civilians listed twenty-one separate grounds, their contention may have been the one we encountered above—that grounds were so numerous that none need be rehearsed, and so none that are rehearsed can be called insufficient.

After the civilians, Serjeant Bawtrie spoke in favor of Prohibition, making three arguments: (a) The letter in this case was addressed to Dunn specifically. Dunn was now dead. Therefore there was not a sufficient request to the Arches, or a request which other officers of that court, or Dunn's successor, could act on. (b) The Bishop is required by the words of the statute to make removal requests himself. Besides the immediate words, which taken literally seem to say this, Bawtrie argued from the language directly following: The act says that the inferior judge (not the inferior judge or his deputy) may make request to have the suit examined by the Archbishop "or his substitute." The omission of "or his substitute/deputy" in the first clause cannot be taken as an accident or elision of an understood term when the next clause is careful to include "or his substitute." (c) Complete freedom on the Bishop's part to transmit suits, as maintained by the civilians, would undermine the statute. (Nothing said about the ecclesiastical sufficiency or intrinsic reasonableness of the causes shown in the instant case.)

Hobart spoke first from the Bench, holding that the request was made by a competent person, because the Bishop's Chancellor or Commissary holds his office by commission, and the act allows transmittal by an inferior judge "in his own right...or by commission." Justice Winch disagreed, holding that a special commission would be valid to this intent, but not a general one. I.e., I take it, one deputized to handle a particular case may request its removal, and presumably a commission to do the specific act of requesting removal of a suit would be good, but a deputy with general authority to perform judicial acts in the Bishop's stead may not request removal. It would be unreasonable, Winch thought, if Commissaries—the agents who did most of the Bishop's judicial work in every diocese—could give away their principals' jurisdiction at will. (Surely a good point. One hardly makes a general agent to exercise one's jurisdiction with the intent that he may remit its exercise and enjoy an easy life.) Hobart replied with reinforcement of his position: The Bishop and his Chancellor/Commissary are a single office. The Chancellor may act generally in the Bishop's name and may only so act—i.e., has no competence to act in his own name. The statute speaks of the Bishop or other officer and must by the "or other" mean the Chancellor. (On the last point, it should be observed that the removal clause itself does not speak of "other officer." Hobart probably meant that the expression is used elsewhere in the statute, implying that the makers assumed, and in some places showed they assumed, the commonplace fact that most episcopal jurisdiction was exercised through deputies.)

Hobart also held that an Archdeacon may not transmit a suit directly to the Archbishop, but he speaks in such a way as to confirm my supposition that the immediate issue was a Chancellor's request. (The power of an Archdeacon to by-pass the Bishop is not irrelevant, because if the Chancellor's competence to make request is denied, as by

Winch, it might still be argued that the transmission in the instant case was lawful since it really came from the Archdeacon and was only forwarded by the Chancellor—or forwarded with a notation of “No objection”, which, though an understandable precaution, would be superfluous if the Archdeacon was a competent requester. Hobart cut off this possibility, however.)

Finally, Hobart made a couple of remarks on the sufficiency of the reasons for removal. Those I shall subsume under his lengthier opinion on that point. For after the exchange between Hobart and Winch the case was adjourned. When it was moved again, later in the same term, the court (except for Winch, who was absent but would presumably have gone along) upheld the Prohibition, Hobart delivering a careful construction of the statute. The decision should be taken as holding that the reasons for removal alleged in this case were insufficient and as repudiating the civilian theory that any reasons or none would do. The Chancellor’s competence to make request therefore becomes a moot point. In any event, no judge spoke to that except Hobart and Winch, who differed.

In his own report of the case, Hobart may have elaborated what he said in open court, but the MS. suggests too that his speech at the final hearing was based on a close study of the statute. It is a curious feature of both reports that Hobart never says why the reasons for removal in the instant case were invalid, except that they were not on the list of twenty-one reasons recited by the civilians. The only more positive theory I can construct is that an ecclesiastical court’s disclaimer of intellectual adequacy, in itself and its counsel, is too easy for a court that wants to be “off the hook” to make, too hard to challenge as a statement of fact, and in itself a scandal to the King’s ecclesiastical justice.

What Hobart does is to argue carefully that the statute must in general have a restrictive intent—that it aims at cutting down ecclesiastical litigation outside the defendant’s home diocese, by removal on request or otherwise, and does not intend to open a loophole in the request clause. It may have seemed evident enough to him that an essentially restrictive act could not mean to tolerate removal by “disclaimer of intellectual adequacy.”

Towards making out a generally restrictive intent, Hobart put the subject’s ease back in the place of honor as the statute’s main end, relative to the preservation of diocesan jurisdiction. He supported this ranking of purposes by pointing out that the subject—not the Ordinary bereft of jurisdiction—is given a penalty action. (He is given double damages and would no doubt be the usual beneficiary of suits for the set penalty, but the latter was open to the public and could be brought by the offended ecclesiastical judge as a stranger-informer. It would be a nice point on estoppel whether a judge who requested removal could sue as an informer and argue that his request was invalid!) Emphasizing the subject’s predominant interest is especially useful in connection with the removal clause. If primacy were given to the Ordinary’s interest, it would be pointless to restrict the grounds of removal or the form of request, except for the bare purpose of making sure that a deliberate or “considerate” request was transmitted. There is no compelling reason why inferior ecclesiastical judges should not be free to throw away their statutory rights; throwing away the subject’s rights is something else.

In further reinforcement of the same emphasis, Hobart said that the statute greatly contracted Archbishops’ power to take cases from inferior jurisdictions without their consent compared to what canon law permitted. In other words, Parliament, thinking

primarily of the subject, set out to make things more convenient for him than they would have been if canon law had been allowed to take its course. If this was admittedly done in one respect—for non-consensual intervention by Archbishops—why should one not suppose it was done in another—to restrict removal by consent to a greater degree than it had been restricted before? (In the MS. report, Hobart says that there were twenty-one sufficient reasons in canon law and ten at most under the statute. How he got to the figure, and how he thought the statute might be a guide to which ten, does not appear.)

Next, Hobart argued from the form of the removal exemption itself: That clause begins by making a general exception for suits removed by request and then adds a qualification—only in so far as such removal is lawful or tolerable by ecclesiastical law. The qualification would be a “vain correction” if it took nothing away from what the general language gives. This argument goes to say that the extreme civilian position is incompatible with the statute. The more moderate position—that there are twenty-one good reasons in canon law—is compatible enough. (The weakness in Hobart’s position is that he has no basis for saying that any finite list of valid grounds for removal certified as ecclesiastical law is ruled out by a “restrictive” intent, at least if the grounds are all coherent and rational enough to be believable.) Perhaps it is arguable that the statute-makers would not have added the qualifying language if what they deemed to be the canon law really authorized removal of a large number of cases, even so large as twenty-one. Hobart said further that the statute must have been made with the knowledge and advice of canonists and therefore “cannot be supposed to be ignorantly penned.” I.e., the statute-makers did not say “suits may be removed by request in so far as it is lawful by ecclesiastical standards” on the mistaken belief—necessarily mistaken if their putting in the qualification made any sense—that those standards placed no, or very few, or only the most narrowly formal, restrictions on removal. Meaningful restrictions must exist. The present business, as it were—and one might say the assignment for civilians invited to argue in cases such as this—is to specify a plausible, and plausibly narrow, list.

One further argument (MS. report only) is that the extreme civilian position violated a maxim of civil law itself, viz. “*forum debet sequi personam*”. I.e. : If it were true that any suit may be removed on request, the rational relationship between “forum” and “person” which the maxim endorses would not obtain. One such relationship—by implication the most obvious and important one—has reference to where the “person” lives, where he can appear with minimum inconvenience and can answer to those with direct spiritual supervision over him. (The same maxim was used to argue that the statute excepts cases in which a man commits a spiritual offense outside his home diocese. In that event, there is another “rational relationship”, and it is to be preferred—the “forum’s” responsibility for enforcement of ecclesiastical law when the “person” comes into its ambit and violates the law.

A final note in Hobart’s own report confirms that the existence of a penalty is no bar to Prohibition. There is no sign that this was controverted in *Jones*. The addition is probably Hobart’s afterthought. (His report, in contrast to the narrative MS., consists largely of the writer’s observations on the case and omits the decision.) Hobart posits his view of the penalty’s effect on the form of the statute: Prohibition may be used because there is prohibitory language independent of the penalty clause; if the statute merely said “if anyone cites another out of his diocese, he shall forfeit £10”, Prohibition would not lie.

Gastlande's Case, from the same term as *Jones v. Jones*,⁴⁶ holds that Prohibitions on 23 Hen. VIII should not be granted after sentence. The substance is not reported. An opinion by Hobart, dated the same term,⁴⁷ makes the same point in general language; it may well relate to the same case.

Westborowe v. Packman, later in 1618,⁴⁸ only exemplifies another Prohibition based on the statute, probably implementing the principle that Prerogative probate does not carry with it jurisdiction over ensuing legacy suits. (An executor resident in Colchester was sued in the Arches for a small legacy of 40/. The court gave a day to show cause against prohibition, rather than granting a writ at once. Whether or not this was standard practice in the Common Pleas at the time of the case, it probably makes especially good sense when violation of 23 Hen. VIII was complained of, owing to the likelihood of factually incontrovertible defenses, such as removal-request or sentence. Properly, of course, defenses requiring assertions of fact should be pleaded. It was sometimes convenient to let them be raised by motion for Consultation, and an even shorter route is simply to delay grant of a writ until the court sees what defendant-in-Prohibition has to say for himself. If what he has to say is matter of fact, but fact that probably cannot be disputed save for its legal effect, evading procedural steps beyond the initial application for Prohibition is eminently sane. *A propos* of sentence, it is of course true that putting off Prohibition gives the ecclesiastical court time to rush to judgment, at any rate if plaintiff-in-Prohibition has appeared there and attempted a defense, and then, foreseeing failure, invoked the statute. Excommunication for non-appearance, rather than default judgment, would, I think, be the normal ecclesiastical sanction if the wrongfully cited party did not show up. It would probably be invalid excommunication for common law purposes, and would perhaps be reversible by Prohibition. Even so, presumably not every inhabitant of Colchester would be tough enough to be indifferent to excommunication in a foreign diocese, and archiepiscopal excommunication could be a greater nuisance. The most prudent thing to do, if one were cited contrary to 23 Hen. VIII, would be to seek a Prohibition at once, but it is not the cheapest thing or in all circumstances the most convenient—as it were, one might as well take now the short trip to London one was planning anyway, appear in the Arches, and hope that the matter can be cleared up to one's satisfaction there. That is not wholly unbenign. It would be just as well for the executor to pay the small legacy or else convince the Arches it should not be paid now—defenses such as “No assets” or release would normally be listened to by ecclesiastical courts, and if they were not Prohibition could be obtained on the substance.)

Kinge v. Merrial and Anstre (?) (1619)⁴⁹ adds a new point to the statutory gloss: Held *per curiam* that if a man expressly consents to be sued in the Arches when he lives in another diocese, he will be bound by his consent and may not have a Prohibition. “*Volenti non fit iniuria*”, said Justice Warburton. Chief Justice Hobart stated an important caveat: Merely appearing and pleading in an improper ecclesiastical court will not estop

⁴⁶ H. 15 Jac. C.P. Harl. 5149, f.82b.

⁴⁷ H. 15 Jac. C.P. Harl. 5149, f.93b.

⁴⁸ M. 16 Jac. C.P. Harl 5149, f. 141.

⁴⁹ H. 16 Jac. C.P. Harl 5149, f. 263.

one from having a Prohibition; the consent implied in such conduct does not count; consent must be express.

Dr. James's Case (1621)⁵⁰ represents another attempt to assert the wide claims for the Archbishop that had been repudiated in *Lewis and Rochester*. The attempt failed. Some details of the case are singular, but nothing basically new was claimed or held. Dr. James was judge of the Archbishop's Court of Audience. He was accustomed to hold court sometimes in Southwark, within the diocese of Winchester. He cited people there from remote places in Winchester, and if they did not appear he allegedly excommunicated them and would not absolve them until they consented to transmit their cases to the Archbishop's court. Thereby 23 Hen. VIII was "utterly illuded." Surmising these facts, Serjeant More sought a Prohibition on behalf of the parties so cited and also, expressly, on behalf of the Bishop of Winchester.

It was answered on behalf of the Archbishop that no such "art" of transmitting suits had been used. The "art" or trick being denied, the Archbishop went on to claim that he was entitled to sit in any diocese for the purpose of hearing cases arising there. That is to say—as was said—that he had concurrent jurisdiction with the Bishop by prerogative, subject to the expressly conceded limit that he could not cite people to appear outside the physical bounds of their home diocese. For the court held in Southwark, established usage, though not prescription by common law standards, was alleged to back up the Archbishop's *de jure* claim—the court had so operated for more than forty years. (This argument is consistent with admitting that a mere ruse to coerce ostensible consent is unlawful, though the ruse was denied as to fact in the instant case.)

The court's answer to the Archbishop's contention is reported by Hobart. We are not told that a Prohibition was granted, but the answer leaves no doubt but that the court was prepared to issue one. The judges said first that transmission of cases in the manner alleged directly violated 23 Hen. VIII: If suits were being captured for the Archbishop by sharp practice, unfairly exacted consent would bar no one from Prohibition. (Cf. the insistence on express consent in *Kinge* above.) But the court held that the Archbishop lacked the right claimed even if no sharp practice was being used. The judges addressed the Archbishop's contention that no harm occurred to the subject from the claimed archepiscopal prerogative, because no one was compelled to appear outside his physical diocese. They made the point, which we have encountered before, that in so far as the Archbishop takes diocesan cases the subject loses an appeal. A somewhat confused sentence seems to make the point that the Bishop of Winchester himself could not summon people from every place in the diocese (presumably owing to its division into archdeaconries with customary, if not *de jure*, exclusive right to first-instance jurisdiction in their localities.) The Archbishop would deprive inhabitants of this advantage if he had the authority he claimed. The court went on to enunciate the general doctrine that "the King is the indifferent arbitrator in all jurisdictions, as well spiritual as temporal, and that it is a right of the Crown to distribute them, that is, to declare their bounds." This is a grandiose way of saying that the common law courts have authority to enforce intra-ecclesiastical lines of jurisdiction. Possibly the counter-generalization was urged in this case. It is apposite enough when the statute is not involved, but of dubious relevance when it is—at most a ground for resolving real doubts about the statute's detailed

⁵⁰ M. 19 Jac. C.P. Hobart, 17.

meaning in favor of non-interference with Church courts. Finally, the judges repeated the explanation given in *Lewis and Rochester* and elsewhere of the appearances that gave some color to the archepiscopal claim to concurrent jurisdiction: such jurisdiction was once exercised by virtue of legatine authority, now “abrogated with the Pope.”

Puckford v. Jessopp, not dated but clearly from Hobart’s Common Pleas,⁵¹ produced one new holding and confirmation of another point. It was held that if a bishopric becomes void, so that the diocesan jurisdiction devolves on the Archbishop, the Archbishop must hold court for diocesan cases within the vacant diocese; citation outside the diocese violates 23 Hen. VIII as much as if the bishopric were occupied. In the instant case, however, Prohibition was sought after sentence and therefore denied, in accord with other decisions.

We now turn to Common Pleas cases from Charles I’s reign. The earliest report⁵² is only a statement by Chief Justice Richardson that one who “submits” to a suit in the wrong diocese may not have a Prohibition on 23 Hen. VIII. If “submit” means “expressly and voluntarily consents”, this confirms *Kinge* and *Dr. James*.

A second case⁵³ has novel features. An executor, being sued for a legacy in the Prerogative Court, surmised that he lived in the precinct of the Tower, which he claimed was a peculiar. Counsel opposing Prohibition (Henden) maintained that legacy suits pursuant to wills proved in the archdiocesan courts were within the statute’s saving of the probate prerogative. The contention goes against firm earlier opinion. Henden argued, however, that legacies could not be recovered in courts other than the one where the will was proved, because diocesan tribunals would not meddle with legacies arising from wills proved in the Prerogative Court. Secondly, Henden claimed that the Tower was not a proper ecclesiastical peculiar such as 23 Hen. VIII protected. It was rather a “particular” jurisdiction—meaning the equivalent of a secular franchise where the lord of the manor happens to have the privilege of proving wills in lieu of the Church authorities. By Henden’s theory, a peculiar within the statute must be in effect a diocese cut out from a diocese, where an ecclesiastical judge exercises the full equivalent of the Ordinary’s jurisdiction. And even apart from the law, Henden said, spiritual jurisdiction was not at present being exercised in the place; the Archbishop was not displacing an active lower court. (Might the jurisdiction of the inoperative Tower court not, however, devolve on the Bishop, whom the Archbishop would be displacing? There is no sign that this was argued against Henden.)

Davenport, counsel on the other side, took exception to Henden’s last point. He admitted that ecclesiastical jurisdiction was not being exercised in the Tower at the moment, but represented this as a temporary and legally insignificant phenomenon: The person entitled to exercise it (one report calls him the “lord”, the other the “Commissary”) had recently died and was unreplaced. Also, *per* Davenport, true ecclesiastical jurisdiction was normally exercised there, so that the precinct was a peculiar within the statute. Finally, it may have been argued (the report is unclear at one

⁵¹ Lansd. 1172; Hobart, 178, *sub nom.* Pickaver’s Case. Hobart speaks in his own report; in the MS. Serjeant Harvey is counsel seeking Prohibition—Harvey became a Serjeant in 1614 and was promoted to the Bench in 1624.

⁵² P. 3 Car. C.P. Harl. 5148, f. 144b; Hetley, 19 (undated).

⁵³ M. 3 Car. C.P. Littleton, 54; Hetley, 47 (undated).

point) that the statute made no distinction between proper peculiar jurisdiction and such ecclesiastical functions as a lay franchise holder might be entitled to perform.

No decision is reported, but three judges are heard from. Justice Hutton recited the familiar rules for when the Archbishop has probate prerogative, then said it “stands to reason” that legacy suits founded on wills proved in the Prerogative Court should be brought in that court. Offhand, at least, Hutton was inclined to agree with Henden, rejecting earlier authority if he was aware of it. Justice Harvey said that if a will was lawfully proved in the Prerogative Court an inferior court would compel the party to prove it over again. I suppose that cuts in favor of the Prerogative Court’s jurisdiction in the legacy case and comes to qualified agreement with Henden’s statement that without it legacies would go unrecovered: *Per* Harvey, that is too drastic, but it is true that diocesan courts make it awkward to recover legacies bequeathed in Prerogative-proved wills by insisting that the will be proved again. (Such refusal of faith and credit to the perfectly lawful acts of archdiocesan courts seems quite incredible. It is more so than Henden’s claim that diocesan courts were reluctant to “meddle” with Prerogative-proved wills, a practice which would presumably express the mistaken belief that doing so would infringe the Archbishop’s jurisdiction, or at least be taken by him to do so. Remember he was not only a superior entitled to respect, but the appellate court as well. Indeed, the belief may not be mistaken as ecclesiastical law. Should the diocesan judge “meddle” where the law he is beholden to says he should not, just because he knows—if he knows—that the common law judges think he should, and might frustrate recovery of the legacy altogether by prohibiting the Archbishop? Such are the conundrums of a mixed legal system!) To Harvey, Hutton and Justice Croke replied only “*Minus juste*”. I.e., they deplored the practice, but did not deny it. There is no judicial comment on other points in the case.

*Smith v. Executors of Poyndreil*⁵⁴ comes in the upshot only to another decision to deny Prohibition on 23 Hen. VIII because sentence had already been given (and in this case affirmed on appeal.) Prohibition was not literally denied, however, but reversed by Consultation on motion. A writ was originally granted to stop a legacy suit in the Prerogative Court where the will had been proved there and the executor lived in another diocese. This grant represents the position established in Coke’s time, notwithstanding Hutton’s and probably Harvey’s flirtation with the contrary in the case above. (The two cases come from the same term. There is no telling which was discussed earlier.) There is, however, a slight sign of wavering in *Smith*: Among the reasons given for allowing Consultation on motion—besides the sentence and long delay in seeking Prohibition—is the fact that the will had been proved in the Prerogative Court. The judges seem to have thought that letting the Prerogative Court’s affirmed sentence stand, though reasonable in itself, was the more reasonable because that court’s improper exercise of jurisdiction at least had a certain color or excusability. It is almost as if they rather wished the precedents did not require enforcing 23 Hen. VIII *quoad* legacy suits on Prerogative-proved wills (though nothing is said about being bound by precedents.)

In the Case of Luckin’s Wife (1629)⁵⁵, a suit for marital abuse and alimony brought in the Bishop of London’s court was prohibited because defendant lived in a

⁵⁴ M 3 Car.. C.P. Croke Car., 97.

⁵⁵ T. 5 Car. C.P. Littleton, 277.

peculiar in Essex, within the territorial bounds of London diocese. There is not room for serious doubt that the statute protects proper peculiars and their inhabitants against the most obvious threat—the courts of the diocese where the peculiar is located. The Common Pleas seems to show some hesitation in this case before granting Prohibition, but that is probably owing to the special character of the peculiar. It originally belonged to a monastery, came to the King by the dissolution, was granted over, and now belonged to the Earl of Warwick. Serjeant Brampton, arguing for Prohibition, was careful to point out that the Earl maintained a *bona fide* ecclesiastical court, not a “shelter” for people seeking to evade ecclesiastical justice: He had an Ordinary (judge exercising all the judicial functions of a Bishop) and other officers. Brampton also argued that the circumstances of the peculiar cut in favor of respecting its jurisdiction, because it rested on a Parliamentary title (the Statute of Monasteries.) The thought there is probably just that the place’s title to be counted as a peculiar was clear, not that peculiars held by the successors of the monasteries enjoyed any special protection under the statute. There are not many reported cases in which inhabitants of peculiars sought Prohibitions based on 23 Hen. VIII. If there were a lot, there would almost certainly be disputes about whether the alleged peculiar really was one. Prescriptions and medieval grants of privilege would come in question. I am not sure that a peculiar that passed through the King’s hands at the dissolution would be absolutely immune to such disputes (going to whether the monastery really had the jurisdiction which the King thought he took over.) But at the least a peculiar granted in terms by the King on the assumption at the monastery held it would be hard to break.

Otherwise, Brampton cited two precedents only going to show that Prohibitions on 23 Hen. VIII had been used to protect peculiars. Justice Hutton tried to distinguish one of them, assigned to 42 Eliz., from the present case. The reason for the Elizabethan Prohibition, Hutton said, was to preserve the party’s appeal from peculiar to Bishop. Here, on the other hand, because the peculiar was lay fee—i.e., an ecclesiastical jurisdiction laicized by the dissolution, analogous to an impropriation—no appeal would lie to the Bishop, but only to the King “as Ordinary” (in his ecclesiastical capacity.) Therefore refusing Prohibition would not deprive the party of one appeal. There is no sign, however, that this nicety led Hutton to dissent from the decision to prohibit, which the words of the statute surely support. It seems obvious enough that preservation of appeals is only one purpose of the statute. Brampton’s other citation is *Jones v. Jones*, which from date and description must be the major case so-called discussed above. From the direct reports of *Jones* it does not appear to have involved a peculiar, but transmittal from Archdeacon to Archbishop on the recommendation of the Bishop’s Chancellor. The direct reports are not very clear on the facts, however, and it is possible that the case was appropriate for Brampton’s bare purpose—a precedent of Prohibition on the statute with the effect of protecting a peculiar. The notable point is that he hardly had a flood of precedents; though that did not, as it should not, stand in the way of Prohibition. Chief Justice Richardson made a remark which signifies nothing except that ecclesiastical peculiars were a subject he had given little thought to before. (He suggests that they originated by some sort of arrangement among the Ordinaries and mentions one he happened to know about—probably mere rumination.)

We turn now to King’s Bench cases on 23 Hen. VIII. Save for one mentioned above because it antedates *Lewis and Rochester*, the earliest is *Foster v. Blackburne*

(1611).⁵⁶ Plaintiff-in-Prohibition was cited out of the peculiar of the Arches—to what court we are not told—and sought a Prohibition on 23 Hen. VIII. The brief report contains opposed opinions from Justices Williams and Yelverton, the information that Prohibition was granted, an indication of why it was granted, and a skeptical observation about Prohibitions on 23 Hen. VIII notwithstanding the grant of one in the instant case. Since only the two judges are mentioned, my guess would be that they were alone in court and that Williams, who was against Prohibition, gave way to Yelverton, who was at least inclined to favor one, with the thought that the whole court should resolve the issue and could most conveniently do so on motion for Consultation, if the prohibited party chose to press his case. It is not impossible, however, that other judges were present and that Prohibition was granted by a majority over Williams' dissent.

In any event, Justice Williams opposed Prohibition because “the statute inflicts punishment on the offender”—i.e., appoints a penalty. Justice Yelverton replied “there are many precedents in the Common Pleas for this.” The report then says that Prohibition was granted and suggests, by a mere “wherefore”, that this was done because of what Yelverton had said about the Common Pleas practice. I.e., either the two judges agreed that a tentative Prohibition to draw full discussion was desirable because whether divergence between the principal courts should be suffered was a serious question or (if the decision was definitive) because the court thought it best to acquiesce in the position of the Common Pleas, which had more experience with the jurisprudence of 23 Hen. VIII. The report then concludes with the remark “...but the surest way is to take the remedy of the statute.” There is no telling whether the explanation of the grant of Prohibition and the final observation reflect what anyone on the Bench said, or only the reporter's impression of what the judges were thinking (or, with respect to the final observation, the reporter's own opinion that even if Prohibitions on 23 Hen. VIII had to be accepted for the sake of inter-court harmony they were not a very good idea, and that clients should usually be advised to sue for the penalty. This could of course also be what the judges, including Yelverton, thought and may have indicated.)

Despite the skimpiness of the evidence, *Foster* is a significant case. It is as explicit an instance as we have—though there are others less explicit—of one principal court's feeling constrained to follow the other, or at any rate worrying about whether it ought to feel constrained, notwithstanding misgivings. It is most unlikely that the other King's Bench judges were unaware of the Common Pleas practice until Yelverton pointed it out. Williams had practiced in the Common Pleas as a Serjeant for about a decade before he was elevated to the Bench. It is thus likely that at least he was simply convinced by the respectable theory that the penalty in the statute barred Prohibition and disposed to doubt—again with greater explicitness than cases usually reflect—that one court owes anything to the precedents of the other if they seem mistaken. Indeed, one is tempted to speculate that resisting Coke's influence—and overlooking the Cokean “leading case”, *Lewis and Rochester*—could have had its positive attraction to some King's Bench judges. The suggestion, whoever made it, that suing for the penalty was in any event the “surest way” to take advantage of 23 Hen. VIII makes good sense as advice to lawyers advising clients. Recovering the penalty would probably as a rule cover the

⁵⁶ T. 9 Jac. K.B. Harg. 32, f.72b.

costs of being sued outside one's home diocese or peculiar. Why not seek the compensation even if Prohibition were available?

The next King's Bench case, *Pit v. Welby* (1613)⁵⁷, echoes *Foster* in the sense that doubt is again expressed as to whether Prohibition will ever lie to enforce 23 Hen. VIII. The case is complicated by the circumstance that it involves an attempt to prohibit the Court of High Commission, as well as by the unusual character of the proceedings against plaintiff-in-Prohibition. For these aspects, see the End Note following this chapter, which deals with the special problem whether the High Commission specifically could be prohibited on the basis of 23 Hen. VIII.

The facts of *Pit* are not entirely clear as reported, but they seem to have been as follows: A man was arrested by an official identified as "the serjeant of the mace" when he was leaving church after a sermon. The arrestee sued the officer in the High Commission on the ground that such an arrest was unlawful by virtue of a medieval statute (See the End Note for the details of this claim.) The High Commission held that the arrest (for what does not appear) was in itself justified, but that the officer had still violated the statute by making it when the party was coming from church. Accordingly, the Commission awarded the arrestee £6 as what are called "costs" (though they sound more like damages, actual or punitive) "for the contempt" (i.e., I take it, violation of the statute.) The officer sought a Prohibition to halt exaction of the £6, relying on 23 Hen. VIII. The only particular reported is that he was cited out of an unspecified peculiar. It does not seem to be disputed in general that an arrest made in church, or of someone going to or coming from church, was an ecclesiastical offense, though questions were raised in this case about the precise circumstances of the arrest. (See End Note.)

Bulstrode's report starts with some skirmishing over the substance of the case (the legality of the arrest.) That discussion was cut off when the judges noticed, or someone pointed out to them, that Prohibition was sought on 23 Hen. VIII, not on the substance. The judges then asked whether Prohibitions had been granted on that statute. A clerk of the court—the "Secondary", whose name was Man—replied that he had never known of any. The question and the answer are appropriate and unsurprising so long as the frame of reference is King's Bench practice alone. (*Foster* is an exiguous counter-example that could easily have been forgotten, and the sole Elizabethan case touching 23 Hen VIII probably would have been, even if it were stronger than left-handed recognition that Prohibition on the statute might sometimes be possible.) There is no sign in *Pit* of any consideration of Common Pleas precedents and what the King's Bench should do about them. There hardly could have been, since plaintiff-in-Prohibition's lawyer (Henry Yelverton, son of Justice Sir Christopher Yelverton and later a judge himself) immediately said that his side would not rely on 23 Hen. VIII, but on the merits of the claim against the arresting officer. Later, counsel formally dropped the surmise invoking 23 Hen. VIII and framed a new one going to the merits. It seems probable that the original surmise was hastily drawn, perhaps by an attorney; when the case became the responsibility of a competent barrister, he very reasonably concluded that there was no point in plunging the court into the interpretation of 23 Hen. VIII and the problem of concord with the Common Pleas. The calculation was correct, for Yelverton eventually got his Prohibition on his version of the substance. (See End Note.)

⁵⁷ P. 11 Jac. K. B. 2 Bulstrode.72.

In a case of 1615⁵⁸, the King's Bench refused to prohibit when a man was cited out of a peculiar to the court of the Archbishop of York. The reason given is that the peculiar was in the diocese of York, so that the Archbishop was acting by force of his episcopal, rather than his metropolitan, power. I do not see how this holding can be squared with the words of the statute (“...no person shall be...cited...before any Ordinary...or any other Judge spiritual out of the diocese or peculiar jurisdiction where [he lives]”) It may be reasonable construction by intent against the words to lean on the preamble and say that the purpose of the statute is to protect dioceses and peculiars against archdiocesan tribunals, but not peculiars against the diocese. We have seen that there were few Common Pleas Prohibitions based on citation out of a peculiar to the Bishop's court—no flood of precedents across the street. I cannot see, however, why anyone would want to escape the “plain words” on this matter, except someone generally hostile to Prohibitions on the statute. (As it were: “Why don't these people bring penalty suits? If their grievances are righteous they could put more good money in their pockets than they are likely to have lost. Most of all, I am not disposed to spend my time on Prohibition cases to the end of protecting petty and sometimes questionable ecclesiastical jurisdictions, the inhabitants of which have not even been forced to venture beyond their own diocese. Archebiscopal encroachment on the whole structure of local justice might be a problem worth the courts' attention.”) This may be close to the attitude of the King's Bench judges, except for one of them—Coke, now Chief Justice of that court. He is significantly reported absent when this decision was made and is unlikely to have agreed with it, though it does not contradict head-on anything in his Common Pleas record.

Coke did take part in *Moore v. Cockein and Saunderson* early in 1616⁵⁹. Prohibition was denied in this case, but there is no conflict with Coke's Common Pleas opinions. The ecclesiastical suit was in the Arches against two co-executors. One of them lived in the peculiar of the Arches and the other did not. Coke and the court held that the suit was not proper to the Arches as a peculiar. I.e.: If one co-executor lives in X and the other in Y, neither X nor Y has jurisdiction, or power under the statute to cite the stranger. For that very reason, however, the suit was within the Archbishop's prerogative—not the probate prerogative expressly saved by 23 Hen. VIII, but the like case—and outside the statute. Citation into the Arches, so far as the statute is concerned, was as good as citation to any other archdiocesan court. (I do not think there is any conflict between this and vague doubts in *Lewis and Rochester* about the Arches' legitimacy as anything but a peculiar. So long as the Archbishop had jurisdiction and was in conformity with the statute, it would be foolish to worry about where he sat—or, realistically, about how he distributed his archiepiscopal jurisdiction among his various deputies. Only when he tried to use the Arches' location in London as an excuse for usurping jurisdiction was there reason for concern about exactly what that court was. The executor in *Moore* who did not live in the peculiar lived in London, so the Arches was the most convenient archiepiscopal court for him.)

Incidental features of *Moore* confirm that Prohibitions on 23 Hen. VIII were rare in the King's Bench and apt to meet fundamental opposition. Prohibition was originally

⁵⁸ H. 12 Jac. K.B. 1 Rolle, 13.

⁵⁹ H. 13 Jac. K.B. 1 Rolle, 328; Harg. 47, f. 107b, *sub nom.* *Moore v. Coekine and Sanderson*, Executors of Ivy.

granted in this case, to be reversed on motion for Consultation later. The original step was apparently taken on Coke's urging, over the objection that the statute provided a penalty. Coke said that the matter was resolved in the Common Pleas—meaning, presumably, the general enforceability of the statute by Prohibition—, for which he cited a Carlisle's Case (not independently reported, though it could possibly be an earlier stage of *Bishop of Carlisle*, just below.) The original grant of Prohibition is explained by the fact that the residence of both executors was not at that point before the court. I.e., the executor who lived in London diocese complained of being cited into the Arches and was clearly entitled to a Prohibition if the King's Bench was willing to follow *Lewis and Rochester*. Coke apparently persuaded it to. The existence of a second executor not co-resident with the first came out when Consultation was moved for. Remarks by the puisne judges on the ultimate issue—the appropriateness of archepiscopal jurisdiction when co-executors live in different precincts—perhaps give hints of unfamiliarity with issues concerning the statute, although there is no disagreement on the solution.

The next case, the Bishop of Carlisle's,⁶⁰ came in 1617 or 1618, after Coke's dismissal. There is no sign of general objection to Prohibitions on 23 Hen. VIII, although a writ was denied in the instant case for very sensible reasons. The Bishop held a living in his own diocese *in commendam*. He brought a suit for tithes of that benefice in the Archbishop of York's court. I.e., the Bishop quite properly sued in his superior's court because as party-plaintiff he ought not to sue in his own. Citing the defendant out of his home diocese was unquestionably lawful under 23 Hen. VIII, for the statute excepts cases in which the otherwise correct judge is himself a party. The complication, however, was that the Bishop of Carlisle had died before the litigation was concluded. His executors revived the tithe suit in the Archbishop's court, whereupon the defendant there sought a Prohibition, claiming that the circumstances justifying the archepiscopal suit had ceased to obtain. The King's Bench denied Prohibition on the ground that there is no violation of the statute when a suit has been lawfully commenced in a given jurisdiction and circumstances change later. Justice Dodderidge spoke learnedly for the court. He produced common law parallels designed to say in effect that the ecclesiastical system of permitting a suit to be revived by a litigant's representatives—i.e., not requiring them to start a new suit—had temporal analogues. The common law would sometimes do what the ecclesiastical law sanctioned—deny a party's abstract rights in order to bring on-going litigation to a conclusion. Dodderidge also made the practical argument that the archdiocesan suit might have been fully tried and ripe for judgment when the Bishop died. If the executors had to start over in the diocesan court, their testator's expenses for a virtually complete lawsuit would go down the drain. In sum: While an argument for Prohibition could be made in *Bishop of Carlisle* on the narrowest verbal construction of 23 Hen. VIII, the judges were surely right to hold that the statute did not intend to interfere with the ecclesiastical system for reviving litigation and to cause a waste of time and money in circumstances like those of this case.

A decision is not reported in *Gastrell v. Jones* (1623)⁶¹, but the judicial remarks incline against Prohibition. A writ was sought to stop a tithe suit in the Bishop's court on the ground that the suit should have been brought before an Archdeacon with peculiar

⁶⁰ Croke Jac., 483, dated P. 16 Jac.; Lansd. 1080, f. 25b, dated P. 15.

⁶¹ T. 21 Jac. K.B. 2 Rolle, 357 (plaintiff's name spelled Gastrill); 2 Rolle, 446.

jurisdiction. It is probable, though not explicit in the reports, that defendant resided in the alleged peculiar, since 23 Hen. VIII was invoked. The alternative would be that the land where the tithes were produced was within that district. In any event, the Prohibition case was pleaded to a demurrer. Details of the pleading are not given: indeed, the reports are generally sketchy. But the judicial remarks suggest that two issues were perceived: (a) Conceding that what the Archdeacon had should count as a proper peculiar, does the statute protect his jurisdiction against the Bishop? On the second discussion of the case, Chief Justice Ley seems to say “No” to this, on the ground I have argued is dubious—that the statute is directed only against archiepiscopal incursion and forcing people to answer outside the diocese in which they live. In other words, Ley’s opinion appears to apply to any peculiar in the Diocese of X as against the Bishop of X. Possibly, however, his point is narrower—only that it is a contradiction in terms to say that one is an Archdeacon of the Diocese of X and to claim peculiar jurisdiction at the expense of the Bishop of X. At least this Ley clearly held, for he said that even if the Archdeacon’s claim to exclude the Bishop was based on prescription the statute would not protect his jurisdiction. I.e., an Archdeacon who throughout the period of prescription had been sole first-instance judge in a given district had no rights against the Bishop as far as the statute was concerned. The reason is that an Archdeacon by the nature of the office does not have an interest adverse to the Bishop’s. In the beginning, he was presumptively made Archdeacon by the Bishop—in effect, made his agent or delegate—and being in that position he cannot prescribe against the Bishop.

(b) Was it actually made out in this case that the Archdeacon held his position in such a way that he could have peculiar jurisdiction? He does not seem to have shown a prescriptive title. Counsel opposing Prohibition said as much at the second discussion, with the implication, contrary to Ley, that he at least might be within the statute if he had claimed prescription. (At the first discussion, someone—but who is unclear—said more positively that he could take away the Bishop’s jurisdiction by prescription, though the speaker did not think he had set up a prescriptive title.) Rather, it was pleaded that the Archdeacon held his authority “by commission.” The unidentified speaker at the first discussion said that it was not shown by what commission he was authorized. Implication: there might be such a thing as a commission that would give an Archdeacon jurisdiction on such terms that the Bishop would be excluded from concurrent jurisdiction in the district. But as it was, *per* the speaker, a commission of the requisite sort was not shown. The vaguely pleaded commission might be, as it was put, “by composition”, and that sort would not exclude the Bishop from concurrency. I cannot say just what these terms mean. It sounds as if the commission’s origin in some sort of agreement between the Bishop and the Archdeacon would be fatal to the Archdeacon’s pretensions regardless of what it said. In any event, Justice Dodderidge accepted this line of reasoning and said that he would favor Consultation unless plaintiff-in-Prohibition showed better cause “tomorrow.” Counsel opposing Prohibition at the second discussion stated a somewhat different theory: The Archdeacon’s court must exist either by the Bishop’s “institution” or by prescription; since prescription was not shown, the Archdeacon’s court must have the alternative basis; that being the case, it is “in the Ordinary’s right”, and hence suits may be taken away by the Ordinary. The implications seem to be: (1) One cannot be made—“instituted” or “commissioned”—an Archdeacon by anyone except the Bishop, not even by the King or the Pope. Such higher authorities can perhaps give a peculiar

jurisdiction in the Diocese of X, but they cannot at the same time make the holder Archdeacon. The office by its nature is in the Bishop's appointment. (2) Whatever the Bishop purports to do, he cannot exclude himself from concurrent jurisdiction in the Archdeacon's district. Or rather, contrary to Ley, he cannot do so by any other means than not interfering in the Archdeacon's suits for long enough to generate a prescriptive title in the Archdeacon.

Although the reports of *Gastrell* are unsatisfactory, the case is of some importance as the only one on 23 Hen. VIII that relates to archdeaconries, a commonplace feature of the ecclesiastical judicial structure. Assuming the rest of the court would have agreed to deny Prohibition, either for Dodderidge's reason or for Ley's, the case is at least discouraging to the proposition that people who would ordinarily expect to be sued in Archdeacons' courts could invoke the statute if cited into the diocesan court. There are too many loose ends, including the difference between the two judges, for it to be fatal for that proposition in all circumstances, but litigants using the case for guidance would be well-advised to obey the Bishop's citation and not bother with pursuing Prohibitions. A cleaner rule than the case produces—that Archdeacons are not directly within the statute and cannot bring themselves within the protection accorded (verbally at any rate) to peculiars—would make sense. When a reason could be found, the burden of protecting petty jurisdictions and saving the subject only minor inconvenience is something the common law courts could do without.

In two Caroline King's Bench cases, 23 Hen. VIII is discussed more thoroughly than ever before, principally by William Noy as counsel. Like several cases above in this study, these testify to Noy's exceptional ability as a lawyer. The first, *Arundell and Wife v. Willis and Wife* (1628)⁶², does not strictly add to the gloss on the statute, because no judicial opinions are reported and decision of an issue apart from 23 Hen. VIII could have determined the case, but some of the most important reflection on the statute occurs in counsel's arguments.

The ecclesiastical suit, in an archepiscopal court, was for defamation. Arundell's wife, Joyce, allegedly said that Willis had committed adultery and incest. Arundell *et ux.* sought a Prohibition, and the case proceeded to formal pleading. Plaintiffs-in-Prohibition pleaded that Joyce lived in the diocese of Exeter when she was summoned to the archdiocesan court, so that 23 Hen. VIII was violated. (The declaration did not say that the words were spoken in Exeter, though nothing to the contrary appears and nothing was made of this.) For the rest, plaintiffs in Prohibition claimed an applicable pardon. Defendants-in-Prohibition (Willis and his wife, Susan) pleaded that the Vicar General of Exeter, under the Bishop's seal, had requested the archiepiscopal judge Sir Henry Martin to determine the case. Apparently the only reason given in the request-letter was that the Willises prayed that they might sue outside the diocese. The plea went on to aver, in completely general language, that the canon law allowed such a request for removal. For the rest, the Willises pleaded facts concerning the pardon, intending to make out that it was not applicable. To this plea the Arundells demurred.

Counsel for the Arundells declined to "trouble the court" with arguments going to 23 Hen. VIII. He took this course because he regarded his demurrer as confessing what was pleaded—viz. not only the fact that a request for removal in the form described had

⁶² H. 3 Car. K.B. Harg. 38, f. 198.

been made, but also that such request was allowable by ecclesiastical law. Accordingly, counsel devoted himself entirely to arguing that the plea going to the pardon, though confessing as to fact, failed to make out that the pardon applied. Counsel on the other side—Noy—did not take the opportunity offered him to omit discussion of 23 Hen.VIII, but spoke at length about it. The bearing of the case on the statute mostly lies in the implications of the lawyers' strategies.

The Arundells' counsel would appear to have thrown away a good thing. The removal request had two strikes against it: (a) The Bishop did not make it in person—not necessarily a flaw, but arguably so in the light of several cases. (b) No real reason for removal was recited. Did counsel by demurring to the statement that the canon law allowed “such request or instance” really debar himself from attacking the removal? In a general formulation: When a plea expresses an erroneous legal conclusion (if the one expressed here can be regarded as erroneous), does one confess that the conclusion is true by demurring, as one admits a “fact”? The question is tricky. It would probably not be hopeless to argue that the removal remained attackable as to legality despite the demurrer, whether or not the argument would be successful.

What then was the lawyer's game? I should suppose he thought he had a winning case, or at least a very promising one, on the matter of the pardon. He may simply have considered it unnecessary to complicate things with a deep pleading question, may have doubted his capacity to develop the necessary arguments, may have sincerely preferred to spare the court. On the other hand, I suspect him of craftiness. He may have hoped to lure the other side into concentrating entirely on the pardon, figuring he was likely to win on that, and if he didn't, to hold the removal and the effect of the demurrer in reserve. After all, waiving an argument is not the same as demurring. The court would probably be willing to listen if later on the Arundells—perhaps more gracefully through another lawyer—went back to objections to the removal and claimed the demurrer was not concessionary in the crucial respect. Prohibition proceedings were ostensibly in the public interest—a reason both for hearing a waived argument and for at least trying to give the demurrer minimum effect. The meaning of an important statute is also of interest to the public. Even if they were unable to prevent it in the end, the judges could not be entirely happy with statutory interpretation imposed by demurrer, so to speak. Of course a case in which that happened would not be a precedent for cases in which the statute's meaning was directly at issue, but precedents erode; just why a decision some years ago was made gets forgotten (as we have not infrequently seen happen in Prohibition law.)

My main reason for suspecting art on the side of the Arundells' counsel is that the opposing lawyer acted as if he knew he was being lured away from the hardest issues—the most important ones from a public point of view—and invited to stake his case on the pardon. He refused to be lured. Declaring that he wanted to speak about the statute, he showed why, in his opinion, the demurrer did indeed confess the legality of the removal. I think he also argued by implication that it was in fact legal, whether the demurrer confessed it or not, though this is less evident.

The opposing counsel was William Noy. His approach admits of two explanations, which are not mutually exclusive. He may have seen, as I suggest, that the other side was trying to maneuver him into saying nothing for the moment about the removal and the demurrer, intending to come back to those issues only in a pinch. He preferred not to be maneuvered and thought it good tactics to impress the court right now with what he

considered strong arguments for the view of the ostensibly waived issues that served his side. Noy may also have had motives of politics or conviction to use the opportunity the case gave him—use it to prove that the interpretation of 23 Hen. VIII favored by the ecclesiastical establishment was correct with respect to at least one section of the act. The section is vital, for if causes could be removed virtually at will, or upon the mere petition of a party who preferred to sue a man outside his home diocese, the establishment would have little more to win. The rule would be that suing in an archdiocesan court—the significant example—requires only the permission of the diocesan in the individual case. This limits what the archdiocesan interest would have liked ideally, but not very much in practice. Permission would probably not be hard to get, especially if the archdiocesan authorities made their desire to take the suit known or “requested permission.” Good advice to a litigant who chose an archdiocesan tribunal would be “Go ahead, but be sure to remind the judge to ask for a letter of permission from the Bishop.” Again, it is important to remember that the archdiocese was the appellate court and that ecclesiastical appeals were wide-open—i.e., all determinations below, including fact-finding, were reviewable. If an appellate court says to the court of first instance, “We want to decide this case ourselves now and obviate the need to decide it later on appeal”, it takes an inferior judge stubbornly insistent on his rights and eager for work to say “No”. Operated in good faith, such a system is not nonsense. Appellate courts could be expected to claim only hard and high-stakes cases likely to be appealed however decided, or less likely than “small potatoes” to be expertly handled at the local level. Good faith may be an idealistic hope for the early 17th century, and even if it obtained the subject would be victimized, contrary to the manifest intent of 23 Hen. VIII. In a sense, Noy may have aspired to do competently what several eminent civilians arguing in Prohibition cases had botched. The judges did not try to prevent him from having his say.

The report of Noy’s argument is not all easy to follow. It would be my guess that the reporter did not catch every articulation in a rather intricate speech. I am reasonably confident of the following reconstruction, however:

For the concessionary effect of the demurrer, Noy cited a Year Book case holding that demurrer to a claim that a living was void by ecclesiastical law confessed that it was void—i.e., bound the court so to take it. The generalization is that pleaded statements about ecclesiastical law must be taken as true if the other party demurs. Note that this is a narrower rule than that “legal conclusions” can be confessed in pleading. The problem in Noy’s argument is whether the narrow rule is sufficient to the needs of the present case. It is of course literally true that defendants-in-Prohibition here made a statement “about ecclesiastical law.” But does the statement not carry an implicit conclusion about the statute? Applying the language of Chief Justice Hobart in *Jones v. Jones*, is it not implied that the removal section has no “restrictive” effect? I.e., if removal for no reason or virtually any was permissible by ecclesiastical law when the statute was made—and so remained as a pure matter of ecclesiastical law, in abstraction from the statute—the statute altered nothing. Indeed, it endorsed removal to the degree ecclesiastical law permitted. Hobart showed why this reading is implausible, though he was unable to show what limits the statute put on the removal power, if in fact it was previously so broad as to defeat the purpose of the act. I think the following point in Noy’s argument is his answer to this objection.

After Noy's argument, the judges held *per curiam* for defendant-in-Prohibition, saying only that the plea was good despite the objections to it. The reporter notes in effect that the decision in this form leaves us in suspense as to what was decided. All that can be said is that a Prohibition on 23 Hen. VIII failed when it almost certainly should not have succeeded. When we cut through the elaborate arguments on a fully pleaded case, we get a removal request from a peculiar to a Bishop, so that the parties were not forced to go outside their home diocese. We get a removal upwards of a criminal prosecution of persons too refractory for the peculiar judge to handle—probably a good enough reason if reasons should be shown. The joint declaration is probably a nearly clinching ground for Prohibition. The denial of Prohibition is not a setback for the policy of the statute, and there was no judicial endorsement of Noy's strong arguments on the pleading level.

Gobbet's Case,⁶³ the last on 23 Hen. VIII before the Civil War, turned in part, and in the upshot decisively, on the statute's removal-by-request provision. The ecclesiastical suit was for defamation, viz. the words "He is a cuckoldy knave." Counsel seeking Prohibition, Bulstrode, started out arguing that the words simply did not constitute ecclesiastical defamation. In support of this, he relied on the precedent of a Prohibition granted for the words "He is a knave and a cheating knave." In the instant case, the King's Bench denied Prohibition on this alleged ground because the precedent and this case were different. The judges were clearly right in making a distinction. To find ecclesiastical defamation in the precedent-case is close to impossible. If the words were defamatory at all, they would be actionable at common law by virtue of the aspersion "cheating." The only basis for claiming ecclesiastical defamation would have been the theory that vague scurrilities could be prosecuted in ecclesiastical courts, as uncharitable or unneighborly, precisely when and because the common law would not touch them. Most authority, however, held that ecclesiastical defamation required imputation of an ecclesiastical offense. The court in *Gobbet* took a decidedly liberal, perhaps questionable, view of this requirement of a specific "ecclesiastical interest." After all, the ecclesiastical plaintiff was not said to have committed an ecclesiastical (sexual) offense, but to have been the victim of his wife's unchastity. Nevertheless, in denying Prohibition the court said "it is a disgrace to the husband as well as to the wife, because he suffers and connives at it." This language implies that to be defamed the husband himself must be charged with some kind of wrongdoing within ecclesiastical cognizance—i.e., he should not be taken as simply suing on behalf of his wife. Was the word "cuckoldy" construed as meaning that the husband was cuckolded repeatedly, whence his connivance, or at least unwillingness to discipline his wife—conduct with the flavor of pimping, which in a few cases was treated as an ecclesiastical offense—should be inferred? Or did the judges think the words no more than *prima facie* defamatory as an imputation of something like pimping, conviction depending on actual proof of the husband's complicity in his cuckoldry? In any event, the court, except for Chief Justice Richadson, who was absent, denied Prohibition.

Having lost on his first argument, Bulstrode moved for Prohibition on the ground that his client was being sued in the Arches, contrary to 23 Hen. VIII, because it appeared

⁶³ H. 9 Car.K.B. Croke Car., 339.

by the libel that he spoke the words in London diocese (i.e., not within the peculiar of the Arches.) Note Bulstrode's assumption that the jurisdictionally decisive fact was where the words were spoken, not where the speaker lived, about which nothing is said. Note also that the appearance of the allegedly decisive fact on the face of the libel is emphasized (but it seems doubtful that a bare, controvertible surmise of that fact would be an inadequate basis for Prohibition. *Quaere*.) The report introduces Bulstrode's second motion by a mere "secondly". It is not clear whether both claims—no actionable ecclesiastical defamation and violation of 23 Hen. VIII—were in the original surmise, or whether the surmise was amended after failing on the first claim. Since, however, Richardson's absence is not mentioned when the court's unanimous decision on the second claim is reported, it seems likely that the discussion of that claim was at any rate on a later occasion.

The case for Prohibition now resting solely on 23 Hen. VIII, Justice Jones spoke to say that he was informed by Dr. Duck, the Chancellor of London diocese, that the Archbishop of Canterbury had the Bishop of London's standing permission to proceed in any London suit begun in an archdiocesan court. (The report's formulation would seem to preclude removal of a suit already begun in a diocesan court to an archdiocesan one, even if the diocesan judge requested or consented to the removal.) Instead of a more formal mode of consulting civilians, Jones was apparently delegated by the court to confer with Duck, or else he did so on his own initiative. Having reported that Duck told him of a long-existing "composition" between the Bishop and the Archbishop, Jones concluded that the Archbishop enjoyed "*quasi* a general license." Satisfied of this fact, he seems to have thought that 23 Henry VIII posed no problem—as far as the statute is concerned, a general permission based on an agreement is as good as *ad hoc* permission or request to take a particular suit. (The legality of such an arrangement by ecclesiastical law appears to be taken for granted. Duck may of course have assured Jones on this score as well as on the factual score of the "composition" and practice. Whether he did or not, the report gives no indication of concern over the possibly relevant distinction between "What have the ecclesiastical authorities been doing?" and "Is the practice clearly lawful by ecclesiastical standards?") Jones adds one supporting consideration, whether speaking for himself or passing on an argument made by Duck: "for this reason", the Archbishop never makes visitation of London diocese. How this cuts is not self-evident. I suppose it goes to show the two-sidedness and therefore genuineness of the "composition": The Bishop gave up as much of his diocesan jurisdiction as the Archbishop chose to assume; in return, the Archbishop gave up his inherent power to hold visitations of the diocese. I take it that the power of visitation would consist primarily in power to proceed on presentment against offenders normally subject to episcopal jurisdiction. Thus, in exchange for giving up one mode of invading diocesan territory, the Archbishop gained another. *Quaere tamen*.

The other judges agreed with Jones. At least no discussion after his speech is reported, and Prohibition was denied.

End Note: 23 Hen. VIII and the High Commission

A word needs to be said on the intersection of the law on 23 Hen. VIII and that on the Court of High Commission. That court and its statutory foundation, 1 Eliz. c. 1 (the

Elizabethan Supremacy Act), are treated in detail in Ch. 3 of this Volume. The point to be emphasized while our focus is still on 23 Hen. VIII is twofold: (1) Almost obviously, 23 Hen. VIII did not and could not apply directly to the High Commission. (2) On the other hand, the existence of 23 Hen. VIII had significant influence on the interpretation of 1 Eliz., a highly problematic subject.

The High Commission was an extraordinary ecclesiastical court of first instance. As will appear in Ch. 3, there was extensive judicial debate over whether the Commission could proceed in any recognized ecclesiastical cause if it saw fit, or only in a defined part of the whole territory of ecclesiastical jurisdiction. Granting the latter position, there were many problems as to how the restricted portion appropriate to the High Commission should be defined. If, however, the Commission was to operate at all as a first-instance court with a national, or at least archdiocesan, scope, it could not be banned from summoning people out of their home dioceses. The simplest route to saying that 23 Hen. VIII can never be the basis for objecting to a High Commission prosecution is to say that when 23 Hen. VIII was made the High Commission did not exist. Surely, this argument runs, that statute operates to prevent abuses that could have occurred when it was passed—primarily encroachment by archdiocesan courts on diocesan ones, plus invasion of one Bishop’s jurisdiction by another or encroachment—archepiscopal or episcopal—on smaller entities, peculiars and perhaps archdeaconries. The Henrician statute simply had nothing to do with a new ecclesiastical court created nearly thirty years later.

I have found one brief report that appears to embrace straightforwardly this way of ruling out all relevance of 23 Hen. VIII for High Commission cases: *Ballinger v. Salter* (P. 13 Jac. K.B. 1 Rolle, 174, and the nearly identical Harg. 45, f. 29.) No context is reported, only a *per curiam* holding that 23 Hen. VIII does not extend to the High Commission because that tribunal was erected by 1 Eliz.; as it was put, the intent of 23 Hen. VIII was not to provide for a court that “simply did not exist” (“*ne fuit dunque in esse*”—MS.)

Hawes, above in this chapter (Note 8), is discussed in the text for a general holding plausibly attributable to it: 23 Hen. VIII does not permit removal of suits from the defendant’s home diocese by request of the original court after that court has taken steps to decide the case. (So in the abstract; specifically, the original court may not convict a man of an offense and then request another ecclesiastical court to take over his punishment.) The court requested to handle *Hawes*’s punishment, however, was the High Commission. The Commission obliged by imprisoning him. Whether it had any power to imprison—not generally, of course, a power of ecclesiastical courts—, and if so, the extent of such authority, were highly controverted questions (see Ch. 3, *passim*.) But *de facto* the High Commission imprisoned, and consequently its right to do so—whether in general or in the particular case—was often challenged by *Habeas corpus*, rather than Prohibition. *Hawes*, being imprisoned, brought a *Habeas corpus*. That writ demands that the jailer justify holding the prisoner. In *Hawes*, the return on the *Habeas corpus* (jailer’s justificatory statement) told the story spelled out in the text (remission to the High Commission for punishment at the original judge’s request after the party’s conviction.) The question before the Common Pleas was the adequacy of the justification; it was held inadequate *per curiam*.

Although the report does not tell much about the judges’ thinking, it seems to me clear that the imprisonment was considered unjustified because 23 Hen. VIII did not

permit the original judge to request removal from the diocese for punishment, or for retrial and punishment, after conviction. Coke stated that rule in generalized form without opposition. The decision in *Habeas corpus* does not, however, support the rule as sharply as a Prohibition stopping the High Commission from accepting the case would have done. Returns on *Habeas corpus* were sometimes held inadequate for not saying enough to permit the common law court to judge the legality of the imprisonment. Of course they were held inadequate if the common law court thought either that the High Commission lacked jurisdiction over the sort of case in question or that its imprisoning power, if it had any, did not extend to such a case. A bare *per curiam* statement that the return in *Hawes* was insufficient could be based on such formal or substantive grounds without necessarily implying the rule that removals by request must be confined to suits which have not yet been “commenced” in the original court. Faced with the holding alone, one could plausibly imagine that the return failed to spell out the reasons for removal in enough detail. (Is mere non-performance of a sentence sufficient reason without some further explanation of why the regular process of excommunication backed by *De excommunicato capiendo* could not be used effectively to reduce the party to conformity?) On the substantive side, it would have been more than plausible—probably correct—in 7 Jac. to say that the High Commission lacked jurisdiction in adultery. Presumably—though this is a separate and significant question—a court with neither first-instance nor appellate jurisdiction over a given offense cannot take over a case involving that offense by request of the original judge. In short, the *per curiam* holding in *Hawes*—reduced to an unexplained “this return is insufficient”—is not strong as a strict precedent, even though it is indicative of judicial thinking on the interpretation of 23 Hen. VIII.

We do, however, have a bit of information beyond the bare holding. The report says that the court also held “that this is not against the clause of the statute [of] 23 H[en.] 8 c. 9, that a superior ordinary by request and consent of the inferior may determine matters out of the proper diocese.” Justice Walmesley then adds “that is another case.” I can only take this further language as saying that the holding is not inconsistent with or subversive of the statute’s conferral of power to remove by request. It does not, obviously enough, deny that the statute affirms such a power in general; nor does it imply that removal to the High Commission is ruled out; nor imply so much as that Prohibition should be granted on a surmise identical with the return on *Hawes*’s *Habeas corpus* (remember that a Prohibition would be challengeable by Attachment and subject to validation or invalidation on formal pleading.) From Coke’s point of view, such guardedness may tend to understate what *Hawes* could at least arguably be taken to mean. Walmesley at any rate (who was less inclined than Coke to restrict the High Commission’s ecclesiastical jurisdiction and more inclined to restrict its use of secular sanctions—see Ch. 3) wanted to be sure that the court’s hands were free to engage anew with practically any questions on the removal provision of 23 Hen. VIII that might arise in the future. *Quaere*, however, for I do not think the report’s language beyond the bare holding that *Hawes*’s detention was not sufficiently justified is easy to interpret.

Pit v. Webly is discussed in the text (Note 34) for the significant evidence it provides on the King’s Bench view of whether Prohibitions based on 23 Hen. VIII should be granted at all. The suit in which Prohibition was sought in that case was in the High Commission. The Prohibition was in the event, however, not sought on 23 Hen. VIII.

Plaintiff-in-Prohibition started out on that basis, but with the court's encouragement dropped his claim resting thereon. Instead, he claimed that he had simply committed no offense pursuable in an ecclesiastical court, the High Commission or any other. The complaint against him was an interesting and unusual one—that a public official had committed an ecclesiastical offense by making an arrest in violation of medieval statutes. Plaintiff-in-Prohibition having abandoned his surmise based on 23 Hen. VIII, there was of course no occasion to discuss whether the statute applied to the High Commission. (In the upshot, the Common Pleas was inclined to prohibit, but put off decision pending further consideration. The parties settled, however, before any decision was made. The case is noted again in Ch. 3.)

23 Hen. VIII was frequently mentioned in cases on the jurisdiction of the High Commission (Ch. 3.) These references are noted in Ch. 3 when they occur. I shall not discuss them here in so far as they relate to the Commission's basic or original jurisdiction for the reason stated at the beginning of this Note: Obviously 23 Hen. VIII could not, properly speaking, "apply" to the High Commission without undermining that tribunal and the special purpose it was meant to serve by the statute constituting it, 1 Eliz., c. 1. Therefore when 23 Hen. VIII was invoked by way of claiming that a suit originally brought before the Commission should not have been, 23 Hen. VIII was necessarily being used in an indirect argumentative way, as opposed to taken as actually mandating that the Commission may not touch that sort of suit. The argument from 23 Hen VIII with respect to original High Commission jurisdiction is intelligible and sound. It comes to saying that the policy of 23 Hen. VIII should be taken into account in construing 1 Eliz. The later statute should not be read as undermining the policy of the earlier one more than could be helped, or more than allowing the Commission reasonable scope to accomplish its purposes required. This was all the more true, it was argued, because 1 Eliz., among its many provisions (the section of the act that authorized the High Commission is only a small part of the whole), re-enacted 23 Hen. VIII. The upshot of the argument for the powerful collateral relevance of 23 Hen. VIII is that the High Commission's jurisdiction was meant to be relatively limited. By this argument, it was not coterminous with ecclesiastical jurisdiction, though one vein of judicial opinion held it to be. Granting some limitation, my "relatively narrow" covers an extensive range of debate about *how* narrow, a question on which numerous considerations were brought to bear other than upholding the policy of 23 Hen. VIII.

We shall see in Ch. 3 that lawyers relying on 23 Hen, VIII in High Commission cases could sometimes sound as if they thought the act mandated restricting the Commission's scope with the normal force of statutes. On the delicate score of historic distance, I am not sure that the distinction between an "argument from powerful collateral relevance" and a true "statutory mandate" was quite available to 17th century lawyers. There is indeed one way of taking 1 Eliz. that obviates the need for the distinction: viz. holding that 1 Eliz. positively confers on the Commission jurisdiction over a couple of specified ecclesiastical crimes—probably only heresy and schism—and positively denies it anything else by re-enacting 23 Hen. VIII. Although this position was taken seriously, it demands narrower limits on the Commission than could plausibly, or at least actually, be sustained. The Commission certainly was limited by the common law courts, in part owing to a perceived need to save 23 Hen. VIII from subversion, but it was not kept within the most extreme possible limits, nor probably—cf. Ch. 3—within less narrow

ones reducible to a clear and largely agreed-on general rule. I therefore think the analytic distinction between “applying” 23 Hen. VIII to the High Commission and trying to construe 1 Eliz. in a manner reasonably compatible with the policy of 23 Hen. VIII is ineluctable, whether or not it was recognized by contemporaries in something like my terms.

There remains one topic to be addressed here: how the process for removal of suits by request or permission of the diocesan court relates to the High Commission. Abstractly, two questions about removal arise:

(a) May the original judge *ever* request or permit removal to the High Commission, as opposed to another regular ecclesiastical court? Saying “No” makes sense via the argument that 23 Hen. VIII can hardly be taken as either limiting or empowering a court that did not yet exist. As bringing a suit originally in the High Commission could not be objected to as a violation of 23 Hen. VIII, so removing a suit to the Commission with the diocesan judge’s consent cannot be considered authorized by 23 Hen. VIII. This argument is complicated by the re-enactment of 23 Hen. VIII by 1 Eliz. itself, but not fatally. It remains arguable that a statute revived without revision still means what it meant when it was made, and there is no reason to say 23 Hen. VIII meant that diocesan suits could be moved with consent, not only to then-existing tribunals, but to any new ones that might be created in the future.

On the other hand, the mere non-reference of 23 Hen. VIII to the High Commission or any other later-created ecclesiastical court can be used to reach the opposite conclusion: If suits commenced in a new court cannot violate a statute antedating that court, why should such a court’s entertainment of a suit removed to it violate the statute? Removing suits begun elsewhere to the High Commission might be ruled out—either flatly or unless duly requested by the original court—by construction of 1 Eliz., but not by the merely irrelevant 23 Hen. VIII.

(b) If we grant that there is no in-principle objection to removing suits to the High Commission, must they, to be so removable, at least fall within substantive High Commission jurisdiction—i.e., must they be suits which, if brought originally before the Commission, would be unobjectionable? If, among the various possibilities, 23 Hen. VIII were taken to have an implied reference to courts created after its enactment so as to authorize removal to them (subject to the statutory requirement of request in due form), would any ecclesiastical suit be removable, or only those that could have been pursued originally in the High Commission? Would a heresy prosecution be clearly removable, but not a commonplace suit for tithes (a standard example of business inappropriate for the Commission)?

On these questions, I have found little in the reports. *Hawes* implies faintly that removal to the High Commission is *per se* lawful, but that was not, so far as the report indicates, held expressly, nor need it have been to justify the decision in that *Habeas corpus* case. The most that can be said is that if the judges all thought removal to the High Commission flatly unlawful they would have had an easy route to liberating the prisoner. It was not difficult, however, to liberate him unanimously on other grounds, not all of which were necessarily shared by all the judges. The case furnished a good opportunity *not* to have a debate on the tricky and possibly divisive issue whether removal to the High Commission was lawful at all.

That the issue was divisive in the Caroline Common Pleas appears from the one piece of significant evidence I know of, the case of Coventry and Stamford. The case is discussed at length in Ch. 3. Here I shall summarize it separately only as it bears on the removal power and 23 Hen. VIII. This aspect comes out only in Littleton's report (M. 4 Car. C.P. Littleton, 194. See Ch. 3 for the full reportorial picture.)

In the course of discussion of whether the suit in question belonged in the High Commission—a discussion one would suppose concerned a suit originally brought there—Justice Hutton observed that it was actually before the Commission by way of removal: The alleged offense (essentially laying violent hands on a clergyman in the course of arresting him unlawfully) was first presented to an Ordinary conducting a visitation. The Ordinary then “certified” this presentment to the High Commission and “prayed in aid.” At this point, Hutton's only comment on the fact he brought to the court's attention is that the procedure (referring a presented offense to the High Commission) “may be” and “is usual.” “May be” would seem to mean “is lawful”, though it is perhaps less strong than saying so outright. The thought might be closer to “...is commonly done and so far as I know has not been questioned legally.”

Chief Justice Richardson speaks next, probably with the intent of saying that in his opinion too there is no objection to removal. All he actually says is that the High Commission may “*donque*” proceed by ecclesiastical censure. I think the force of the “*donque*” is probably: “Since the suit is properly before the Commission by removal, that court may clearly proceed with the case, but it must confine itself to using regular ecclesiastical sanctions (as punishment if it convicts and for any interlocutory purpose)—i.e., it may not use the secular sanctions which would be available to it in circumstances that do not obtain in this case.” Earlier in the discussion, before the judges were reminded of the removal, Richardson had expressed the same view—i.e., the Commission's jurisdiction is clear enough, but only ecclesiastical sanctions may be employed.

Justice Yelverton then intervened with a somewhat cryptically stated opinion, but I think the purport is clear: Contrary to Richardson, Prohibition (which was being sought in the case) should not be delayed until the Commission had actually employed secular sanctions. Rather, it should be presumed that the Commission would proceed by fine and imprisonment. There is no point in withholding Prohibition on the off-chance that the Commission will confine itself to spiritual sanctions in a case such that Prohibition would certainly lie if it used secular sanctions. For the merits of this position, see Ch. 3. It has no firm implication for removability as such, but would be compatible with a rule that suits in which secular sanctions are usable may reach the Commission by removal. (It would not be senseless to hold that other courts in the ecclesiastical system may send suits to the High Commission in order take advantage of the temporal procedures uniquely available to it. By contrast, forwarding a suit in which the Commission must use only spiritual sanctions, while not necessarily purposeless in all circumstances, could arguably not have advantages sufficient to compensate for the costs of depriving the losing party of appeals—for there was no regular ecclesiastical appeal from the Commission—and forcing the defendant out of his home diocese. Yelverton's approach, projected to such a rule, would, however, leave dangling the awkward question whether a suit originally brought in the Commission and not amenable to secular sanctions should be prohibited at once on presumption, or only after secular sanctions are imposed.) In reply to Yelverton, Richardson repeated his opinion, this time straightforwardly: The

Commission should be prohibited if it proceeded otherwise than by ecclesiastical censure, but not before it had actually done so.

The report of *Coventry* ends, not with a decision to grant or deny Prohibition, but with the court deadlocked on the issue. There is no evidence of the case's being taken up again. That is unsurprising, because plaintiff-in-Prohibition's obvious move would have been to drop his effort to get a writ until the High Commission exceeded spiritual sanctions, in which event he could certainly have a Prohibition, and the Commission's obvious move would have been not to exceed those sanctions, if indeed it chose to carry on with the case at all. The split in the court was Yelverton and Harvey (the latter of whom is not heard from individually) in favor of immediate Prohibition versus Richardson, who of course opposed Prohibition until a sentence was given and secular sanctions were used, and Hutton, who at the end said he was in doubt. Leading up to this outcome, the judges had a final round of discussion on the removability question.

In this last discussion, Richardson asserts Ordinaries' unlimited power to remit suits to the High Commission if they choose to. (This of course carries no implication that the Commission is free to handle any removed case as it likes, which the Chief Justice clearly did not believe.) Yelverton replies flatly that Ordinaries may not remit to the Commission at will, because doing so is against 23 Hen. VIII. (This is most straightforwardly read as saying that any removal to the Commission is *ipso facto* unlawful, but it is not absolutely incompatible with the possibility suggested above that removal of a suit amenable to secular sanctions might be countenanced.) Richardson then tries a further argument for removal power, the intent of which I can do little more than guess at. He brings up language in 23 Hen. VIII that gives some indication of circumstances in which removal would be appropriate. The statute does not, as a good deal of litigation in this chapter shows, give exhaustive rules as to what those circumstances are, but it does expressly say that the Ordinary may remit when some of the parties are fugitives who cannot all be found in a single diocese. The evident meaning is that such suits may be remitted to the regular archdiocesan courts; there is no textual reason to include the as yet non-existent High Commission. One might, however, conjecture that Richardson brought up the fugitives case because there could be special reasons for remitting to the High Commission rather than the regular archiepiscopal authorities in that case. Some of the prospective defendants might have fled beyond the bounds of a single archdiocese. It was sometimes argued (see Ch. 3) that aggravations could render a case prosecutable in the Commission even though it did not involve an offense intrinsically pursuable there; plural offenders who scatter in order not to be triable together in one diocese can plausibly be seen as aggravated offenders. In short, if the High Commission's non-existence in 23 Hen. VIII is not assumed to stand fatally in the way of removal of suits to the Commission—or perhaps if its re-enactment by 1 Eliz. is considered to overcome that problem—there is an argument from convenience for including the Commission in the provision for removal.

Justice Hutton speaks next, now apparently taking the position that 23 Hen. VIII simply does not permit removal to the High Commission, but only to the original judge's immediate superior. This is at variance with his earlier suggestion that at least criminal presentments at visitations could lawfully be removed to the Commission, but of course he might have changed his mind after hearing argument and thinking more intently about the problem. It tends, however, to make a mystery of his ultimate doubt. Why was Hutton

now not at one with Yelverton and Harvey, yielding a 3-1 majority for Prohibition? When he expresses his remaining doubt, he explains it by saying that the Commission is proceeding for *reformatio morum*, by which he must certainly mean “criminally” and may mean he was satisfied that the proceedings were actually aimed at spiritual sanctions only. He could possibly have wondered—and he professes no more than uncertainty—whether, even though 23 Hen. VIII does not confer power to remove to the Commission, usage and utility were sufficient to justify it in the case of a criminal presentment so long as there is no reason to suppose secular sanctions will be used. This position is close to the spirit of his first remark on removal, and it might primarily express objection to Yelverton’s surely dubitable belief that the Commission’s intent to resort to secular sanctions should be merely presumed. *Quaere tamen*.

After Hutton, Richardson makes an obscurely reported observation, which seems only to say that the present case is an important one on the High Commission. I suppose he is essentially saying to his brethren, apparently united against him, “Be careful of the practical consequences of ruling out removal of any form of ecclesiastical criminal proceeding to the Commission for handling by purely ecclesiastical methods. Is that really in the interest of efficient law enforcement?” Hutton may have been touched by the warning. Then Yelverton intervenes once more, this time to invoke the re-enactment of 23 Hen, VIII by 1 Eliz. on the side of his approach: The re-enactment shows that Parliament was rigorously protective of Ordinaries’ jurisdiction. Why should there be any exceptions? Then the inconclusive final result is reported. I have no evidence that the removal issue was taken up again in the brief remainder of the High Commission’s career (before the Long Parliament’s abolition of the court.) Although the outcome was inconclusive, the weight of opinion in *Coventry* does not augur well for attempts to remove suits to the Commission.