CHAPTER 3—THE JURISDICTION AND POWERS OF THE COURT OF HIGH COMMISSION

Section 1: General Introduction

Questions about the jurisdiction and powers of the Court of High Commission were essentially questions about who should construe statutes and then about the meaning of a particular statute: the Elizabethan Supremacy Act, 1 Eliz., c. 1. To all practical intents, the statute created the High Commission. More precisely, having "reunited" ecclesiastical jurisdiction to the Crown, the act authorized the monarch to delegate his ecclesiastical jurisdiction to commissioners. That means the monarch was authorized to establish an ecclesiastical court of first instance over and above the regular structure. (The regular structure comprised at the first-instance level diocesan courts, peculiars, Archdeacons' jurisdictions, and archdiocesan courts to the limited degree that they had "prerogative" to take first-instance cases; over these, appellate jurisdiction was exercised by the archdioceses and ultimately by the statutory court of Delegates.) The monarch was not obliged to set up such an additional tribunal. The High Commission existed because he or she routinely exercised the statutory authority. This was done by successive patents or commissions, not by a once-and-for-all constitutive act. There was never any question but that the additional tribunal could be made a "high" or supreme court in the sense of a court from which there is no ordinary appeal—i.e., no appellate recourse except a petition for review addressed to the monarch. It was always constituted as a "high" court in that sense, though there is no apparent reason why it had to be—i.e., why its decisions could not have been made appealable to the Delegates or to a specially created standing review agency. The monarch would presumably have needed only so to specify in the patent.

The serious practical question about the High Commission was whether 1 Eliz. imposed any limits on the monarch's authority to constitute such an ecclesiastical court. I shall explain just below what was specifically involved in that problem. Let us first clear the ground of two other matters.

(1) We have by now in this study seen enough practice involving statutes to establish the following propositions as law, though they can be controverted by plausible theoretical arguments and were sometimes challenged: Ultimate authority to construe statutes belongs to the common law judges. Statutes are addressed to non-common law courts and should be obeyed by them voluntarily, but these courts are not finally trusted to interpret them. In this way, they are not the peers of common law courts, which do have authority to interpret statutes directing what common law courts shall or shall not do. In a few situations, a distinction is necessary between "ultimate" and "immediate" power to insist on non-common law obedience to statutes as construed by common law courts. I.e., occasionally Prohibition would be withheld until it was shown that a non-common law court had been urged to take note of a statute in a particular construction and had erroneously refused to. By and large, however, the power was "immediate": Plaintiff-in-Prohibition had only to surmise that a non-common law court had assumed jurisdiction or was asked to, or had acted within its jurisdiction, contrary to statute; Prohibition would be granted if the common law judges agreed with the interpretation implied in the surmise.

These principles are as applicable to the High Commission and 1 Eliz. as in other contexts. I.e., if we assume that 1 Eliz. limits the powers of the High Commission, then the common law courts, having decided that such-and-such are the limits, may prohibit the High Commission from exceeding them. The High Commission is no more privileged than any other non-common law court to determine for itself whether the statute limits it and, if so, how. This is at any rate true unless there is something special about the High Commission differentiating it from all other non-common law courts. I do not think such a difference was ever contended for. Rather, the general principle that the common law judges have a monopoly to construe statutes was most frequently challenged by or on behalf of the High Commission. That is no doubt because the Commission was a high-level agency with strong backing from the government. Its functions were regarded as important, so that its independence of outside judicial scrutiny seemed especially worth fighting for. Challenges to the common law monopoly were totally unsuccessful, however. I shall note them when they occur in the argument of cases about the High Commission, but it is just as well to anticipate what I think is clear from the cases: The idea that the Commission ought to construe 1 Eliz. for itself was not taken seriously by the only people who counted—the common law judges. They occasionally bothered to overrule that theory when it was occasionally advanced, but there is no sign that it gave them any real intellectual trouble. Whether the High Commission was limited by 1 Eliz. and, if so, what the limits were—these questions caused plenty of trouble and produced variances from judge to judge and court to court. They presume the judges' title to answer them authoritatively.

(2) I say above that "essentially" and "to all intents" the powers of the High Commission were a question of the meaning of 1 Eliz. The qualifying phrases are required by one consideration: If 1 Eliz., having restored the Crown's ecclesiastical jurisdiction, had not expressly authorized the monarch to delegate it to commissioners, could he do so anyway? "Yes" is a more than defensible answer. Caudrey's Case, discussed in detail in Section 2 below, is the best-known occasion on which a common law court said "Yes" judicially (if it actually did so in *Caudrey*, for which *vide infra*.) I do not think the answer to the question matters very much, however. If the High Commission clause of 1 Eliz. did not exist, and if we assume that the monarch "at common law" could establish a body equivalent to the High Commission, then it is hard to see how there could be limits on the monarch's commissioning power within the bounds of ecclesiastical law. If he set up such a body and instructed it to hold plea of murder, he would obviously violate what can only be called constitutional law. By any standard that belongs in the real world, the monarch manifestly could not without Parliament turn a temporal crime, wrong, or claim into a spiritual one, thereby depriving the subject of trial by jury and every other facet of due process of law. On the other hand, I can see no argument from inherent limits on the monarch's ecclesiastical supremacy that would constrict his power to give a "prerogative High Commission" any or all parts of ecclesiastical jurisdiction. If he set up such a tribunal and authorized it to deal with heresy, fornication, and tithe cases, there would be no basis for doubting it was duly authorized.

Now, this deduction may be sound, but it is based on an assumption contrary to fact. The High Commission clause of 1 Eliz. did exist; the monarch was expressly authorized to establish an extraordinary ecclesiastical tribunal if he saw fit. Let us

assume provisionally that the relevant clause in the statute puts, or purports to put, limits on the monarch's power to constitute a High Commission. Is there any doubt but that the statutory limits should be enforced, whatever view one takes of the monarch's power to set up such a body "at common law"? If the monarch had no such power without the statute, then obviously he has only such authority as the statute gives him. If without the statute he could have established a Commission and given it any and all parts of ecclesiastical jurisdiction, then in so far as the statute limits his power—directly or by implication of authorizing him to do less—then the statute cuts back his prior prerogative. One can move onto high royalist ground and maintain that the prerogative in all branches is beyond being restricted by statute (not just the most "absolute" part of the prerogative, which is almost logically illimitable because it amounts to a reserve of emergency powers.) But in my phrase above, that position does not belong in the real world. I do not think it had the least influence on judicial discussion of the Commission's powers.

When, however, it comes to construction of 1 Eliz.–granting that it could limit powers the monarch may have had before—, attitudes toward the prior powers might make a difference. If I believe that the monarch had no authority to establish a Commission apart from the statute, my only course is to figure out what powers the statute seems by its words, or was probably intended, to confer on him. But suppose I believe that without the statute the monarch could have set up a Commission and given it as much of ecclesiastical jurisdiction as he chose. I may be inclined—*ceteris paribus*, the language of the act permitting and any intentions of Parliament I feel historically certain about—to hold that the act was not meant to cut back the monarch's pre-existing powers. I may say that the act "declares the common law", as indeed it does in general. I. e., in the minds of the makers and their descendants in 16th-17th century England, Queen Elizabeth was not made Supreme Governor of the Church by the Supremacy Act, not merely restored to her father's statutory position, but repossessed of an immemorial and inseparable adjunct of the Crown, her rightful position "at common law." It does not automatically follow that every feature of the Supremacy Act, notably the High Commission clause, is also declaratory. There is nevertheless a natural and legitimate presumption that no part of a generally declaratory statute makes wholly new law, save when the contrary is manifest (e.g., when a specific punishment is created and there is no evidence that the "common law" offense declared in the act was previously punishable in just that way) or there is clear textual or historical reason to suppose the contrary. (That the Head of the Church before 1558 lacked power to constitute a High Commission is virtually indemonstrable, for the simple and comic reason that the "common law" Supreme Headship was not, speaking realistically, exercised during the long night of Popery. If one was looking for positive evidence that the power existed, the "pretended" and practiced authority of the Pope to delegate jurisdiction could be invoked, though in English discourse one had to be careful about assuming that what the Pope did was legitimate. It was nevertheless a good argument that specific powers claimed and used by the Pope, rather than intrinsically inappropriate to the Head of the Church, were usurped from the true Head, the English monarch.) Or, instead of emphasizing the declaratory character of the statute, I may simply argue that it is unlikely that Parliament, with Queen Elizabeth's assent, would have meant to curtail the existing ecclesiastical prerogative, or that statutes should always be construed to save the common law, or the royal prerogative, when at all possible.

This sort of disposition probably affected some judges. The monarch's power before the statute sometimes comes up in the cases. I suspect that asserting that the monarch had such prior or independent power was usually a step on the way to construing the statute in favor of the Commission. Yet those who adopted a less favorable construction would probably not have denied that the power existed. They would simply have said that there were good reasons to think that the statute curtailed it, that the High Commission clause in 1 Eliz. was not declaratory though most of the statute was, and that other principles of construction suggesting that the power remained unaltered must give way to the makers' clear contrary intention. Or, even more modestly, they might have said that there were in effect two powers to create a High Commission, one conferred by statute, one "at common law" and unaltered by statute. The latter could in theory be drawn on, but that would have to be done unmistakably, and in practice the monarch always quite clearly drew on the statutory power,

In the practical upshot, it was not necessary to worry much about the common law prerogative, even for those judges who took a broad view of the Commission's authority and might occasionally invoke the prerogative to help their cause. The statute was enough to worry about. Different judges saw different things in an act so drafted that one is hardly obliged to see anything in particular. Their sense for words, habits of statutory construction, historical beliefs, and policy preferences determined what they saw for the most part. For some, a strong belief that the monarch remained in full possession of the ancient prerogative may have been still another determinant.

In sum, the concrete problems that arose about the High Commission can be regarded simply as questions about the meaning of 1 Eliz. Even if that is not quite true in the most refined sense, the problems are still statutory in the first instance: If the statute means that the Commission may be authorized to do x, then it may do x. Only if the statute means that the Commission could not do x would one need to look for some other basis for permitting it. Only if one is baffled by whether the Commission may do x by the statute need one consider whether anything outside the statute could possibly be relevant.

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Two sorts of problem about the High Commission arose frequently: (a) its substantive jurisdiction; (b) its sanctions and procedural powers. Both problems are best formulated by conceding that the monarch has in his patent authorized a given activity. E.g., for (a), the monarch has said to the Commission "You may entertain complaints of adultery"; for (b), "You may fine anyone convicted of the offenses over which I have given you jurisdiction." In both cases, the issue is whether the monarch's authorization is valid under the statute. Very few cases turn on construction of the monarch's patent to the Commission. I infer that that was usually either out of doubt or a question that could be by-passed by courts that thought a given authorization would be invalid if conceded to have been made.

Taking substantive jurisdiction first: There was never any doubt that the High Commission could be authorized to proceed against very serious ecclesiastical crimes—e.g., heresy, the most indisputable example. Beyond extremely grave spiritual crimes, what parts of ecclesiastical jurisdiction could be assigned to the Commission was a wide-open question. I shall suggest here the main possibilities that I think can be called

realistic in the light of the cases, indicating the general line of argument that supports each. I shall of course state them in a more explicit and neater form than they usually assumed in contextual discussion.

(1) The monarch may give the Commission any or all parts of ecclesiastical jurisdiction. He is not obliged to set up a Commission at all, nor, if he does, to assign any particular ecclesiastical causes to it. But if he has undisputedly assigned it a given type of cause, then the Commission has jurisdiction (assuming always that it is an ecclesiastical cause, that no attempt has been made to smuggle temporal matters into the ecclesiastical sphere.) The words of the statute, which we shall look at below, are too vague to stand in the way of this conclusion. No contrary intention can be reliably established. As Supreme Governor, the monarch is responsible for seeing that the Church's legal system does its job effectively (which at some level of generality no one would deny.) It would be sensible to authorize him to assign causes to the Commission when, as the responsible and putatively best informed officer, he thinks it necessary. He would presumably do so when he deemed that the regular courts were not handling some category of business satisfactorily. Parliament cannot have anticipated, and is unlikely to have pretended to, what necessities might be perceived in the future. The common law judges have no competence to assess such necessities, but must assume that the monarch has done so with proper consideration. This construction has the further advantage of leaving the monarch with powers he would probably have in the absence of the High Commission clause of 1 Eliz.

(2) There is a good deal of sense in the first approach, but it has disturbing implications too. It permits the monarch to undermine the jurisdiction of regular ecclesiastical courts and the ordinary expectations of the subject, while, no doubt, assuming that he will not do so except on sober consideration of necessity. Flexibility to manage the ecclesiastical legal system in the interest of effective law enforcement under actual circumstances is valuable, and trusting the monarch to assess those circumstances is basically justifiable,. But is it likely that Parliament would have given the monarch an absolutely blank check? It is disturbing to suppose he had such absolute power "at common law", whether or not one can avoid so supposing. Since Parliament went to the trouble of legislating, it stands to reason that part of its purpose was to restrict the monarch to at least some extent, and the language of the statute encourages more than it discourages seeing some restrictive intention. The danger of relying absolutely on the monarch's discretion is in any event not to be taken lightly. Localism in the ecclesiastical system could be all-too easily subverted on perfectly honest, perfectly plausible perceptions of necessity. Invite anyone who so desires to start an ecclesiastical suit in a high-ranking, central, competently staffed court and all-too many people will take up the invitation. It may be that for any given matter providing the option will be quite justifiable, because diocesan courts are known by experience to handle some type of business inadequately. (For a realistic example, it might be clear that local courts too often defer to husbands, especially if they are important people, in "divorce" litigation, so that the policy of ecclesiastical law, which aims to enforce decent treatment of wives, is not fulfilled.) Nevertheless, the net effect of diverting a lot of litigation from local courts would be unfortunate. Apart from the interest of those courts in their jurisdiction, such diversion would contribute to the problem it was meant to solve. For if diocesan courts are sometimes not very good, diminishing their practice and sapping their morale will

probably make them worse. From the subject's point of view, being cited to a supra-local court is an inconvenience to be avoided if other things are equal, and ultimately more than an inconvenience. For there is a sense in which people—Bad Men if you like—have a "right" to fear only those tribunals and authorities that they have been accustomed to think of as over them, and which are represented to them as the "normal" channels. There may be good reasons for providing extraordinary alternatives, but they will have trouble staying extraordinary, and the people they afflict will be aggrieved in their sense of justice. Thus undermining localism, or making it possible to undermine it, would be an evil even without the serious complication of a strong statutory endorsement of ecclesiastical localism—namely, 23 Hen. VIII (revived by 1 Eliz. itself), the statute discussed in detail in Ch.2 above.

Another powerful consideration on the side of restriction is the absence of routine appeal from the High Commission. The right to a *de cursu* appeal cannot be regarded as absolute in the shadow of 1 Eliz. for in so far as any causes at all can be assigned to the Commission, losing parties can be deprived of appeals. But perhaps the necessity that overrides the expectation of appellate recourse ought to be stronger than the necessity that might be allowed to override localism. Parliament is unlikely to have been willing to risk the right of appeal so far as to entrust it to the monarch's discretion absolutely.

If, then, we admit values on both sides—the value of giving the monarch discretion to confer jurisdiction on the Commission as unforeseen necessity may require and the value of curbing his discretion so that it is not over-used for plausible but shortsighted reasons—, is there a compromise formula? There are two major candidates:

One is that the monarch may give the Commission any part of criminal jurisdiction appropriate to ecclesiastical courts, but no part of strictly civil. There are problems about discriminating criminal from civil, to some extent problems peculiar to ecclesiastical law. Let us defer those, however, until the cases touch on them. In general defense of this formula, one may urge a legitimate association between "necessity" and the criminal law. I.e., extraordinary measures are usually most justifiable when the ordinary means of enforcing the criminal law are defective. Ordinary channels may not work perfectly for civil purposes, but if they do not, only private interests, mainly pecuniary, will be affected. It must be presumed that everyone loses if the criminal law is not properly enforced. That the criminal part of ecclesiastical law was concerned with morality and respect for religion, rather than basic security in person and property, need not weaken the force of this point. Therefore let the monarch judge the necessity for an extraordinary tribunal in criminal cases, and let the risks be borne, but let his discretion stop there. If localism should be unfortunately subverted, there are some mitigations. A criminal suspect perhaps has less "right" to a particular tribunal than a civil defendant. Diocesan courts can perhaps be presumed less likely to be effective enforcers of criminal law, especially against bold and resistant offenders, than to be adequate settlers of disputes among people who take their troubles to court when they cannot resolve them outside. Perhaps it is worse to deprive a man of a private interest, with a pounds-and-shillings value, without right of appeal than to convict him of a crime without appeal. One can of course say the opposite, but here it is important to remember the peculiar character of ecclesiastical law. Waiving the question whether the High Commission can be authorized to use secular sanctions, ecclesiastical courts could not hurt a convicted "criminal" very seriously. A man erroneously condemned to pay tithes is out of pocket;

one erroneously convicted of fornication need only pay the price of a symbolic act of penitence. In any case, one convicted by the Commission of a grave offense, such as heresy, has no appeal. It is hard to worry about the erroneously convicted fornicator by comparison.

The second approach would say the trouble with the first is that it leaves the monarch free to give the High Commission jurisdiction over extremely petty misdemeanors. In the nature of things, ecclesiastical law covered a good deal that was trivial. Anti-social behavior of the sort that moderns call "criminal" was temporal; heretics are usually few; fornicators and adulterers are doubtless bad and doubtless many, if all-too human; a lot of profaneness and uncharitableness is left over—things a liberal society would consign to merely moral controls, but in which the Church was accorded a legalized interest. It may not matter very much if petty misdemeanors do fall into the High Commission's hands, just as it does not much matter if speakers of "irreverent words"—like, say, recipients of parking tickets in the modern world—may appeal their convictions. If the monarch sees fit to give the Commission authority over trivia, and if the Commission (if it has any choice when the complaint is privately initiated) consents to bother with them, so what? Yet the desirability of giving the monarch discretion to provide for necessities—the very argument that justifies not construing the statute too stringently against him—is mocked if it leads to an unlimited conveyance of criminal jurisdiction. It hardly can be necessary to supplement the regular courts in order to make sure that swearers and defamers are prosecuted; their escaping punishment altogether is hardly a sufficient evil to outweigh the disutility of violating regular channels. Localism, while dispensable for the sake of catching big offenders, is precisely valuable in the case of petty ones. Petty misbehavers should be punished at home, in front of their neighbors; the diocesan courts should be encouraged to prosecute routine misconduct, to worry about "moral tone" in the districts they are responsible for; they should be under some pressure not to lapse into the role of purely civil courts.

Can we than find a better approach, within the same guidelines, than merely splitting the civil and the criminal? Suppose we agree that the High Commission can be given jurisdiction only over serious matters. Perhaps it is best to say "serious crimes", but let us say it in a tone that allows for the difficulty of distinguishing civil from criminal in the ecclesiastical sphere—"serious matters with a criminal element", meaning situations in which it would be lawful to punish someone over and above ordering him to perform acts which mostly reduce to specific execution of a duty to pay money. (E.g., I take it that a tithe-payer can only be ordered to pay his tithes, an executor to pay so much to a legatee, etc. If these duties are contested in good faith, and after losing in litigation the tithe-payer or executor performs the order, there is no basis for considering these persons "criminals". If there is a penumbra—bad faith refusal to perform these duties before ordered to by a court, for which something like a "punishment" distinct from an order to perform now or face excommunication could be imposed—I have not encountered it through the Prohibition cases. By contrast, I take it that a man sued by his wife seeking alimony on grounds of cruelty and adultery may be punished for those offenses as crimes upon a finding that he committed them, whether or not the wife is awarded the alimony or legally may be in the particular circumstances.) Then let us not impose too rigid a meaning on "serious matters with a criminal element." Let us not suppose we can list such matters or recognize them by a mechanical criterion, nor suppose, improbably, that

the statute-makers had a definite or self-applying test in mind. The common law court must in the end simply look at the specific cases in which the Commission's jurisdiction is contested. They must use a little intuition to discriminate what is serious from what is not, what has a genuine criminal element from what does not, what cases necessity could plausibly justify giving over to an extraordinary tribunal from which there is no appeal. If intuition is shaky, then let the courts avoid it so far as they can and discuss general criteria, but let them acknowledge that there may be several criteria for seriousness, and that these neither were foreseen by Parliament nor can be by anyone *a priori*. Criteria must be suggested by cases that come up, assessed sometimes for their internal convincingness (Can adultery not be a serious offense when the Ten Commandments forbid it?) and sometimes with a certain judicial notice of the real problems of administering the Church.

This approach is particularly useful with respect to a special problem that recurs in the cases. The approach admits of saying that seriousness is not a kind of universal that inheres in some crimes and not in others, but a function of context. It also helps one keep in mind that what we are trying to do it is to uphold the Supreme Governor's discretion for use when it is necessary—perhaps even when its use is merely innocuous—, and when the monarch's discretion really is the best basis for determining how ecclesiastical jurisdiction should be distributed, Cases on intra-Church discipline, primarily the prosecution of clerical offenders, point up the advantages of such a position.

If the monarch gives the Commission authority over clergymen charged with certain offenses, is it not hard to object? It is of course legitimate to say that some crimes are simply worse in a clergyman than in a layman. One can put clerical fornication on the most rigid list of serious crimes, while leaving lay fornication off it. But as one shades off into lesser offenses, it will become unconvincing to call them serious even in a clergyman. Is there still not something odd about challenging the Supreme Governor's title to make clergymen answerable in the ecclesiastical court he thinks most effective in enforcing standards which it is in a sense his business to set? Contrary arguments can be conjured up, but there is a strong point to be made.

Something like "To be a clergyman is a privilege, not a right" seems an appropriate remark. Can a clergyman complain if the Church's administration is so arranged that he is liable to answer for his crimes where a layman would be spared answering for crimes of comparable gravity? We grant that the monarch is cut off from judging it "necessary" that lay swearers and defamers be liable to High Commission prosecution. His judgment could be plausible enough—there is simply too much such misconduct, and nothing is being done about it—, but we in effect presume that the judgment will undervalue the disutility of violating localism, etc. Is the monarch's judgment that it is necessary for the Church to be administered internally by a certain schema quite of the same order? Especially, is it not up to the Governor of the Church to say what standards Church personnel shall be held to? He may correctly think that profane laymen are not being punished sufficiently, but we foreclose him from doing anything about it by tampering with jurisdiction. That is in part because it is not the monarch but "the law" that makes swearing a crime and attaches a certain degree of seriousness to it. But surely the monarch has a more creative role as head of the Church to determine how serious profanity in a clergyman is and how much in need of the most effective suppression. His judgment there is a policy judgment about what kind of Church

to have—one that tolerates peccadilloes in its clergy so long as their neighbors and immediate superiors have no complaints or one that is vigilant for "counsels of perfection." What kind of Church to have is a different question from what kind of country, what incidence of enforcement against laymen who violate some of the lesser rules of ecclesiastical law is desirable. The former is much more clearly within the monarch's scope and outside the common lawyer's.

In sum, the vaguest, most flexible approach—"Only serious crimes, to be sure, but keep it open just what that means"—is the best basis for distinguishing laymen from clergymen, Church law as a branch of "the law" for everyone from Church law as an instrument for the internal control of an institution. The approach also admits of a category of aggravation and a regard for the problems of effective enforcement that the Church faced in the concrete circumstances of cases. It is possible that a given offense is too minor as such to be given to the High Commission, but that the monarch's purported assignment of it should be held valid *quoad* aggravated cases and multiple or incorrigible offenders? Or in so far as regular ecclesiastical courts are actually shown to have tried and failed to bring an offender to justice, or to have been frustrated by such circumstances as a number of offenders involved in a single crime who cannot be reached within a single jurisdiction? Drawing a line between civil and criminal will not yield an affirmative answer, nor will restriction of the Commission to a few specific crimes whose gravity is beyond question in all circumstances. The "vague and flexible" approach can: As it were, "Simply trivial or totally civil matters cannot be assigned to the Commission whatever the monarch purports, but what falls outside those classes cannot be specified until we have a concrete case before us. When we do, we may consider a variety of senses in which a crime can be serious, or in which the reasonableness of letting the Commission handle this case can be made convincing, within a general allegiance to the principle that only 'serious matters with a criminal element' may be diverted to the Commission."

(3) The third approach has been intimated in discussing the alternatives: 1 Eliz. empowers the monarch to set up a High Commission only for a small and special segment of ecclesiastical criminal law. "Very serious crimes" is the correct generic description, but it is mistaken to apply that category in the manner of the approach above. The language of the act and especially the known historical circumstances under which it was passed permit Parliament's meaning to be specified much more exactly. The courts ought not to intuit what is serious enough as cases come before them or play around with a variety of plausible criteria, under the sway of the incorrect notion that the statute intends to leave room for the monarch to divert causes to the Commission as unforeseen necessities require. The statute enacts a criterion—one criterion—, perhaps not *per verba* simply but by clear intent. The only discretion given the monarch is to decide whether to have a High Commission at all (in effect—for the range of offenses he may assign to it is so narrow that setting it up and assigning it only part of that range is no more than a theoretical possibility.)

Specifically: Heresy and schism may be assigned to the Commission. The statute is express as to those two crimes. Being express, it shows what it has primarily or "paradigmatically" in mind—the most serious forms of religious misconduct. If there is any possibility of going beyond heresy and schism, the paradigm operates to say that it must be into other forms of religious misconduct only slightly less serious, or equally

serious but technically distinguishable—somewhat as one might slide on an analogous secular scale from treason to misprision of treason. Admittedly, however, construction of the statute cannot stop at this point, cannot rest on the conclusion that nothing in the moral section of ecclesiastical law is assignable to the Commission. For there is one, and only one, further important word in the statute: "enormity." This word points both beyond the species "heresy" and "schism" and beyond the genus "serious religious offenses." But it does not point in the wide-open direction of any crime that can plausibly be regarded as serious. Rather, the paradigm remains controlling even when it is transcended. "Enormity" admittedly indicates moral offenses and admittedly lacks the specificity of "heresy" and "schism." But it is to be understood as extending only to those crimes that can really be ranked with heresy and schism. To determine such ranking, one must look at the quality as well as the quantum of the gravity.

"Exorbitant" was sometimes offered as a more descriptive synonym for "enormous." Both words, I think, were understood by people of the persuasion we are talking about (as opposed to those to whom the words meant no more than "pretty serious") to touch such qualities as rarity in a world that is at all right-thinking and sociable; abandonment of the spirit to evil, as opposed to letting the flesh slip under temptation; violation of "nature", where social conformity and conformity to the fundamental institutions of society—Church and Family as well as State—are regarded as "natural", along with sexual orthodoxy, parental affection, children's obedience, and the like. The only non-religious offenses ever specifically suggested as eligible High Commission crimes squarely within the present framework were incest and polygamy; both meet the standards I have described. (A comparable secular derivation might go from treason to the misprision, then to petty treason, perhaps to murder, but not to the rest of the felonies, let alone misdemeanors. It is likely that such secular hierarchies influenced thinking about the hierarchy of spiritual crimes for purposes of construing 1 Eliz.)

The extent to which the statute's language permits or encourages this and alternative approaches will be considered in detail below. The present approach obviously gives greater value than others to the ends served by a restrictive interpretation—localism and preservation of appeals. The most distinctive argument for it, however, was historical construction of intent. The other approaches probably bespeak a certain skepticism about history, or at least unwillingness to base construction on an inevitably fallible version of the statute-makers' immediate situation. In behalf of the most restrictive reading, it was often urged that Elizabeth's first Parliament was faced with a special problem: a Catholic bench of Bishops left over from Queen Mary. Those Bishops could obviously not be expected to enforce religious orthodoxy by the restored true standards or conformity to the new Establishment. Least of all could they be expected to enforce orthodoxy and conformity on their clergy, to the end of depriving them of their livings, and on themselves. Therefore the monarch was enabled to set up an extraordinary tribunal. It was never argued that the power to establish a High Commission disappeared as soon as the special problem did; the words of the statute clearly forbade that. One could at most wish that the monarch had seen fit to desist using the power once the Marian Bishops were out of the way. (Some members of the community, notably Puritans, no doubt did so wish. I would be surprised if many judges participated in the wish, precisely because they show few signs of sympathy for Puritans.

Those who took the statute most narrowly still took it in a sense that would often catch Puritans, and most of them would probably have said a special instrument was necessary for that purpose.) What was argued was that the statute, having been made to meet a special problem, intended by its general terms only as much as was needful to meet that problem (with a small penumbra thrown in, and not quite accounted for historically, under the term "enormity.")

We may turn now to problems about the High Commission's procedures. The main question, though not the only one, can be stated for its practical upshot as "May the High Commission fine and imprison?" Several complications are concealed underneath that formulation, however.

In the first place, the question of course asks, properly speaking, whether under the statute the monarch may confer power to fine and imprison on the Commission. The problem is best discussed on the assumption that Queen Elizabeth and her successors have purported to grant such power (as they characteristically did.) We need not reach refinements of the question to see that two contradictory answers are possible:

(1) Power to use secular sanctions may not be conferred on the Commission. The statute does not say it may. Without express authorization, there is simply no reason why it should be possible to give the Commission secular sanctions. Whatever part of ecclesiastical jurisdiction may be conferred on it, up to the whole of that jurisdiction, it remains an ecclesiastical court—special or supplementary, "high" or unappealable, but still an ecclesiastical court. Ecclesiastical courts have certain procedures and sanctions—as for sanctions, excommunication; power to order (payments, acts of penitence and apology, behavior conformable to spiritual law and to non-pecuniary decrees in specific cases, "submission", satisfaction of litigative costs) under threat of excommunication; power to deprive clerics. On excommunication is built the secular arm's role pursuant to *De excommunicato capiendo*. That is all. Power to fine and imprison in no way belongs to ecclesiastical courts. If the monarch could create a High Commission without the statute and confer any or all parts of ecclesiastical jurisdiction on it, he still could not give it secular sanctions or otherwise empower it to proceed in any manner except that in which other ecclesiastical courts may proceed. He could no more give it secular sanctions than secular jurisdiction. Only an express statute could alter this, and that is lacking. The closer one is to saying that 1 Eliz. only confirms the monarch's common law authority, the clearer it is that he may not do more then relocate ecclesiastical jurisdiction with the attendant procedures.

(2) 1 Eliz. does not in unmistakable words allow secular sanctions to be conferred on the Commission. But its language, just by being unspecific, rather encourages than discourages the belief that that was meant to be permissible. Common sense construction by intent points the same way. The idea was to create a special court. It would not be special enough, not enough of a supplement for cases of extraordinary necessity, if it must be confined to ecclesiastical sanctions. Having an extra high-ranking court—jurisdictionally limited perhaps—would be more useful for the situations that justify having one at all if such a court could be given "teeth" that ordinary ecclesiastical courts lacked. If the Commission is only justifiable because the regular courts cannot be depended on to be effective, especially against serious and obstreperous offenders, then it makes sense for the Commission to have the means to be more effective in the way that counts most with the man in the street or the "criminal classes." So Parliament is likely to

have figured and once this is clear it becomes evident that Parliament chose its language to insure the monarch discretion to authorize secular sanctions. He could not have authorized them at common law, but the statute adds to his powers. Indeed, in order to add this power—rather than cut back the common law powers—might be the best explanation of why Parliament legislated. Of course there are limits. The monarch may no more allow the High Commission to hang people than to prosecute them for felony, but nothing follows as to fining and imprisoning in the various forms these sanctions admit of.

The last phrase, "the various forms", leads into complications. Power to fine and imprison is not one simple entity. To start with the obvious, fining and imprisoning are two operations. There is no case-authority for the flat proposition that the Commission may be given one of those powers but not the other. Yet they are manifestly not the same in people's experience, nor do they diverge in the same way from normal ecclesiastical sanctions.

A fine can be little else than a punishment, unless it is a commutation of a punishment. The "unless" could be important. Suppose the Commission were expressly authorized (by its patent) to impose a spiritual sanction or a fine—never both and never imprisonment. (Although this is not a realistic supposition, the first part is not really misleading. An express choice between spiritual punishment and fine was not offered, but I have no reason to doubt that in practice the High Commission did not otherwise afflict those whom it fined, except by imprisonment, which for the moment we omit.) The Commission would then purportedly have a power not enjoyed by other ecclesiastical courts, but the difference can be made to look fairly small. I do not know to what extent, if ever, regular ecclesiastical courts accepted payment of money—to a victim or a charity—in lieu of penitential acts. They professedly did not award damages (only ordered payment of money due in the form of the value of tithes no longer renderable in kind, legacies, and the like.) The power of a complainant to settle with a defendant for money was at least open to question when the complaint had a criminal element—e.g., defamation. Even so, I wonder whether ordinary Church courts were debarred from agreeing to absolve or to forgo any other expression of penitence in consideration of an appropriate payment. Perhaps any such transaction can be represented as volunteered by the party and merely accepted by the court as evidence of a repentant state of mind, with the understanding that the court's so much as making a suggestion would be improper, let alone telling the party "Either make a payment or go unabsolved." Power simply to impose a fine payable to the monarch and collectable by Exchequer process (as High Commission fines were) is certainly a significant step beyond any nebulous power to "work out" a monetary satisfaction. The argument is only that it is not a "morally gigantic" step: A special court needing extra "teeth" is allowed to "commute" the spiritual penalty into a payment the party is coercible to make, whether he would prefer the spiritual penalty or not. Though the payment is pretty hard to distinguish from a secular fine, call it a "charitable contribution to the Supreme Governor" to put a better face on it—the notion is not merely risible, for it is intrinsically seemly enough for one who has offended the Church to make peace with it by doing something tangible for the institution. Are these moderate thoughts not as imputable to Parliament as others?

In any event, once the possibility of conceiving a fine as a commutation is considered, compromise paths are opened to the common law courts provided they do not

hold a patent, authorizing fines, invalid on its face. A court could adopt the policy of looking at the size of a fine in relation to the possible spiritual punishment due for the offense in question. The reasonableness of a "commutation" could perhaps come under common law scrutiny more easily than that of a mere secular fine imposed by a body authorized to fine without any discernible limit on its discretion to set the amount.

Imprisonment can be a punishment, a worse one than a fine in most people's eyes, though of course that depends on quantities. In principle, it can be imposed—indeed chosen by the party—in lieu of something else thought of as the primary punishment—, just as a fine can, and imprisonment *inter alia* can be in lieu of a fine. One can imagine a staunch Puritan who would much rather spend a reasonably determinate martyrdom in jail than make some hypocritical gesture of penitence or submission at the behest of a High Commission whose legitimacy he does not accept, or indeed than pay a fine he regards as illegal. A good deal turns on "reasonably determinate", to be sure. But is it conceivable that the common law courts, however favorable to the High Commission's powers, could permit punitive imprisonment without ever looking at the length of the sentence in relation to the offense? Could they possibly permit a man to be imprisoned as long as the Commission pleased, without at least considering after a certain time whether he has paid as full a price as can reasonably be demanded? Perhaps it is conceivable, but it would take a hard man—or one very trusting that the monarch would surely relieve any victim of real abuse. It would take a judge willing to say that an act of Parliament permits the monarch and the High Commission to do anything to certain spiritual offenders short of death and maiming. That is quite different from saying that Parliament meant to allow secular sanctions in reasonable manner and amount.

Besides a punishment, imprisonment can be a means of coercion—"civil" coercion of the sort used by courts of equity, whereby a man is committed only until he performs an order; as the saying has it, he is "handed the keys of the jail." Various possible positions on the High Commission's powers open out when one is mindful of this. E.g.: The Commission may neither fine nor imprison punitively, but it may imprison to coerce performance of a spiritual sentence. Or let us try a slightly different formulation: The Commission may if it sees fit imprison a convicted person until he performs a specified spiritual sentence instead of excommunicating him. Leaving aside the pious pretense that it is better to be in jail than out of communion with the Church, there is a sense in which the step from ordinary ecclesiastical process to High Commission process in the form imagined is a modest one. Excommunication was translatable into jail via *De excommunicato capiendo*. What we propose for the Commission is not much more than a short-cut to the kind of coercion most effective with most sinners. Of course there is some loss, for necessity's sake, in "due process of law." *De excomminicato* would not lie every time someone was excommunicated *de facto*; the process insured the common law courts a look at the circumstances and legality of the excommunication. The availability of *Habeas corpus*, however, insures that at least as well. A person imprisoned but not excommunicated is in fact better off than someone imprisoned by virtue of *De excommunicato*, because the latter is almost surely warrantably imprisoned—i.e., a return on *Habeas corpus* stating that the prisoner was taken on a *De excommunicato* would be very hard to fault. Imprisonment of an ecclesiastical defendant without the warrant of that writ must be adequately justified by the return on *Habeas corpus*; any way in which the particular imprisonment was

unlawful—conceding the Commission's generic power to imprison—would show up and the prisoner be delivered. (Realistically, there was nothing *de facto* to prevent the Commission from both excommunicating and imprisoning a man, simultaneously or sequentially. I cannot say whether the usual practice was to do so. Legally, the question at present under discussion is whether it might not have been plausible to hold that the Commission may imprison if it is willing to forgo excommunication, or at least that if it is to excommunicate at all it must excommunicate first and imprison without the *De excommunicato* process only after a reasonable lapse of time.)

Permutations can then be generated: E.g.: The Commission may fine as a punishment, but it may not imprison as a punishment. It may imprison to coerce performance of a spiritual sentence, but not to coerce payment of fines, which must be recovered like other debts to the Crown. (As I have already intimated, this latter rule has good support from the cases.) Further complications come in with further procedural resources, ones which were used in practice. E.g.: Suppose the Commission orders a party to perform a spiritual duty (say it orders a man not to abuse his wife); suppose it imposes no secular punishment for past breaches of that duty, but orders the party to enter into a bond payable to the King upon future breach. Is that lawful, assuming it to be explicitly or by implication authorized by the patent? If so, does it represent a step into secular powers notably more modest than all forms of fining or imprisoning? If ordering someone to enter a performance bond is not objectionable as such, how about imprisoning him until he is willing to enter the bond? Imprisoning him to coerce performance of the primary duty after he has breached it, in lieu of suing on the bond? Imprisoning only those who have both refused the option of a bond and violated the court's order? Fining them?

These observations will suffice to make the following point: "May the High Commission be authorized to fine and imprison?" does not have to be answered "Yes" or "No." Indeed a radical "Yes" is a nearly untenable position, since it would open the way to perpetual imprisonment and confiscatory fines. Short of a radical "No", there are numerous moderate positions. Moderation in general can be defended as a reasonable construction of Parliament's intent: Parliament meant neither to allow the Commission to be given a full set of secular "teeth" nor to keep it from having any at all, thereby failing to supplement the regular ecclesiastical system very significantly. Rather, it intended to let such "teeth" be added as might make a difference in effective law enforcement, without pulling the Commission away from the standard ecclesiastical model more than was necessary to make a difference. A moderate spirit could be implemented by adopting definite rules. An example, only one among various possibilities, would be: "The High Commission may in effect operate like a court of equity. It may order penitential acts, or other fully performable acts in obedience to the law or particular decrees, and coerce performance by imprisonment. It may also imprison when orders reaching into the indefinite future are broken, such as 'Stop abusing your wife, stay away from her, and pay her so much alimony every month.' In the latter case, brief punitive imprisonment is justified by the 'contempt', but it must be brief. The party must be offered the option of a performance bond if the court is unwilling to assume that 'brief punitive imprisonment' will be enough to motivate his amendment, and he may be held for any length of time only if he refuses the bond. That is all. Fines cannot be justified when by this limited power to imprison the Commission has an effective means to see that the essentially

injunctive remedies proper to any ecclesiastical court actually work. If sinners' indifference to excommunication and the tediousness of translating it into imprisonment via *De excommunicato* are the trouble with regular ecclesiastical justice—and what else on the remedial front could be?—the problem has been solved."

Alternatively, one might be an *ad hoc* moderate, setting no rules as to how far the Commission may draw on its secular armoury, but inspecting each controverted case to see if the use of secular sanctions seems justified by the circumstances—e.g., whether there is evidence that a party has been, or is likely to be, unresponsive to spiritual sanctions. The formal position behind this approach would be that the monarch's authorization of secular sanctions is valid only with an understood proviso: so far as using such sanctions can be justified as a necessity in particular cases.

The three basic positions suggested so far (no secular sanctions—full power to fine and imprison at least up to the limit of abusive excess—some secular powers, but well short of that limit, variously specified) unfortunately do not exhaust the possibilities. A further complication is introduced by the fact that ecclesiastical courts did not utterly lack the power to imprison before 1 Eliz. They lacked such power "at common law", but a few statutes before 1 Eliz. enabled them to imprison in specific cases, notably heresy and clerical incontinence. Omitting the details of the reasoning until we reach the cases, it was arguable that 1 Eliz. intended to preserve these exceptional ecclesiastical powers in the High Commission, but not in the other ecclesiastical courts. Various positions can be generated if one grants this. E.g.: The High Commission may imprison for heresy, because regular ecclesiastical courts once had statutory authority to imprison for that offense, but it may not imprison for anything else (unless clerical incontinence, for the same reason, granting that to be within the Commission's substantive jurisdiction.) Alternatively: Since the Commission may imprison heretics for the reason stated, it may imprison generally for the narrow range of offenses within its substantive jurisdiction, since those are like heresy and are only assignable to the Commission because they are; it may fine in the same narrow range, since fining is the lesser punishment. Both of these positions can be reached without taking a stand on whether the Commission could be given secular sanctions in the absence of earlier statutes extending such sanctions to ordinary ecclesiastical courts in specific cases. But one can grant the relevance of the earlier statutes and still take one or another position on the other question.

Secular sanctions were the heart of the problem of what procedural powers could be given to the High Commission, but not quite all of it. We have already noted the question whether the Commission may order parties to enter bonds, even if there is no attempt to back up the order by more than spiritual sanctions. The question may be variably answerable according to the condition in the bond. (Besides bonds guaranteeing performance of penance or good behavior in the future, we may instance general bonds to abide by the award of the court and bonds to reply truthfully to interrogatories. One should not assume that bonds of all types were equally legal or illegal.)

Another real-life problem is connected with the power to imprison, but not quite the same: May the Commission be authorized to arrest defendants in the first instance—i.e., to bring them before the court by attaching their bodies? If one utterly denies that the Commission can be given imprisoning powers, the answer must be "No"—the Commission may no more take a man prisoner in order to bring him before the court and charge or question him than it may sentence him to jail after conviction. But the converse

need not hold. One may grant that imprisonment is lawful after conviction, either as a punishment or to coerce performance of another sentence, but still say that attachment of the body at the commencement of a suit or prosecution is unlawful. At that stage, arguably, the Commission must proceed like any other ecclesiastical court—cite the party to appear and excommunicate him if he fails to. In so far as the Commission has any title to use secular sanctions, it must, so to speak, have earned it—by convicting someone of a crime within its jurisdiction. It is much less tolerable to permit an ecclesiastical court to wield secular power over mere suspects or accusees, the more so because those courts could lawfully cite people to appear in criminal cases without telling them why they were cited before their appearance. To permit the High Commission to arrest without revealing its reason is to let it exercise temporal power over people when it may lack any jurisdiction. That is surely deplorable even if such abuse of arresting power would be actionable false imprisonment, though it is of course possible that liability for false imprisonment is a sufficient check on abuse.

The last important procedural power has already been discussed in Vol. II of this study: power to conduct self-incriminatory examination. Suffice it here to say that the Commission could be said to have such examining power where other ecclesiastical courts did or might lack it. We have seen in Vol. II, however, that this theoretical possibility did not come to much in practice. On the whole, the Commission was allowed to use inquisitorial procedure within the same fairly generous limits as other ecclesiastical courts and prevented from using it when other ecclesiastical courts clearly could not—mainly when the tendency of the examination was to expose to temporal detriment and when the articles of examination were not so revealed as to permit the examinee and the common law courts to judge whether they related to an *infra vires* matter. Here we should note that the Commission's uncontested power, *qua* ecclesiastical court, to use inquisition sometimes is capable of involvement with other issues. E.g.: If the Commission proposes to conduct an intrinsically lawful examination and the examinee refuses to respond, may he be imprisoned? Of course not if the Commission may never imprison. But granting that it may do so sometimes, is this case more or less strong than others? Might one argue, for instance, that the Commission really needs imprisoning power to make recalcitrant parties cooperate with its due procedure for discovering the truth within a narrow range of serious offenses—excommunication will do for commonplace offenses and regular courts, but power to get at the truth of suspected heresy must exist somewhere? If we grant that argument, then (by one line) power to imprison cannot be excluded altogether, so it might as well be admitted for other reasonable uses as well—especially, perhaps, if the Commission is confined to heresy and the like. By another line, admitting imprisonment to compel cooperation in discovery procedure entails nothing beyond itself. Because it is necessary to find out heretics, it does not follow that it is necessary to punish even heretics, or to keep them in line in the future. Order them to recant and excommunicate them if they refuse to; if they relapse, prosecute them again or excommunicate them automatically. Once they are routed out, are these spiritual sanctions, with the follow-up of *De excommunicato capiendo*, not what the law appoints for heretics?

As the examining power is involved with other issues, so the High Commission's substantive jurisdiction is involved with its procedural powers. They are analytically separable, but how one resolves the issues about each is bound up with how one resolves

those about the other. I shall not spell out here the ways in which this is so. The general type of question to keep in mind is: If one is convinced that the Commission is confined to a few specifiable grave crimes, ought one to be generous in conceding secular sanctions? Conversely, if one thinks that there would have been little sense in setting up a High Commission without permitting it to be given secular sanctions for at least some purposes, ought one to conclude that it was meant to be restricted to a few definite grave crimes? E.g., does deprivation of appeals not weigh a great deal heavier when a man stands to be fined or imprisoned without appeal than when he is only threatened by spiritual sanctions? On the other hand, quite opposite correlations are possible: Parliament authorized a High Commission when its horizons were dominated by the Marian Bishops. All that was required was a tribunal with jurisdiction over the religious offenses of which those Bishops were guilty, and the ecclesiastical power to deprive was quite sufficient for dealing with them. Therefore no intention either to extend the Commission's jurisdiction beyond a narrow range of crimes or to give it secular sanctions can be imputed to the legislature. Antithetically: The whole point about 1 Eliz. is that it puts royal discretion to manage the Church and meet unforeseen necessities on a firm statutory basis. The design is to let the monarch relocate ecclesiastical jurisdiction, within very broad if any limits, when he judges that the regular system is not working effectively. The effectiveness that is the end of the design would surely be better served by authorizing the monarch to confer secular powers on the Commission at least for a fairly broad range of possible uses, because merely shifting jurisdiction without any increment of sanctions is not an obviously sufficient way to increase effectiveness when it is putatively urgent to do so.

It will be evident from what has been said that issues about 1 Eliz. and the High Commission were complex and criss-crossing. One ought not to be surprised by what the cases will show: There was a lot of litigation; disentangling the issues and settling them coherently came hard. A relatively super-charged political atmosphere—the government and Church hierarchy strongly committed to the High Commission, loath to accept adverse decisions—added to the judges' already difficult task of construing baffling legislation and sorting out the plausible policies that one or another interpretation would serve. A further obstacle to the courts' getting a clear focus on the issues and resolving them decisively was the high incidence of *Habeas corpus* cases occasioned by the Commission's purported power to imprison.

Although they have their special problems in the present field, Prohibitions are at least relatively capable of raising issues cleanly and comprehensively. In Prohibition, the aggrieved party has the floor. A man might come and say, e.g., that he was ordered to pay alimony by the Commission and imprisoned for refusal to enter a performance bond. He at least has the opportunity to allege and argue that the Commission may not be given jurisdiction in marital cases, may not imprison at all, may not demand a performance bond, and even if it may sometimes imprison and if demanding the bond is not illegal, imprisonment may not be used to enforce this sort of order. The judges may find one ground for prohibiting in all that and prefer to leave other questions unresolved, but at least they have been told, in whatever detail plaintiff-in-Prohibition elects, about what has gone on in the High Commission, and they have been invited to consider several issues at once and as they bear on each other.

In *Habeas corpus*, on the other hand, the jailer—and behind him the committing authority—has the floor. He is challenged to justify the imprisonment without saying a word more than will satisfy that purpose. In *Habeas corpus* cases, therefore, the issues about the High Commission tend to occur without the accompaniment of detailed information. They are also overlaid with independent questions about *Habeas corpus* policy. These questions concern how much detail is required in the justificatory statement as a matter of form, how much benefit of the doubt should be given to a statement that is sufficient for some, but not all, circumstances, and—subsuming the other questions—what the *Habeas corpus* is essentially for and whether it ought in general to be administered with a bias against the prisoner (leaving him to other remedies—Prohibition or False Imprisonment—if, on a fuller showing of circumstances, he can make out the commitment to be unlawful.) In addition, *Habeas corpus* admitted of three results—discharge, bail, and remand. The middle option, bail, could be the basis for compromise or inconclusive dispositions—bailing a man whose commitment might be lawful but where holding him further seemed unnecessary, or bailing one whose commitment was probably not lawful, but where keeping an eye on him seemed a tolerable qualification on his not-quite-clear right to liberty. In sum, though issues about the High Commission's jurisdiction and procedures could be and often were decided straightforwardly on *Habeas corpus*, the writ had the potentiality of diverting the courts to narrow grounds, technicalities, and discretionary indecision. A practice exclusively based on Prohibition might have conduced to easier settlement of the issues.

The overriding reason why the High Commission issues were hard to resolve is that it is close to anybody's guess what the relevant clause in 1 Eliz. provides by its very language. I have thought it best to outline the possible paths down which policy preferences and the sense of probable intention might lead a judge before looking at the text of the act. Let us conclude with an inspection of the text and the hints in the language that give some sort of countenance to the different possible positions.

The High Commission clause of 1 Eliz. follows immediately on the heart of the act—viz. The clause which "unites and annexes" to the Crown all jurisdiction and authority which had "heretofore been, or may lawfully be exercised for the visitation of the ecclesiastical state and persons and for reformation, order, and correction of the same, and all manner of errors, heresies, schisms, abuses, offences, contempts, and enormities." Following thereupon, the act empowers the monarch "by letters patent…to assign…when and as often as your highness…shall think meet and convenient, and for such and so long time as shall please your highness…such person or persons being natural-born subjects…as your majesty shall think meet…to exercise, use, occupy, and execute under your highness…all manner of jurisdictions, privileges, and preeminences, in any wise touching or concerning any spiritual or ecclesiastical jurisdiction, within these your realms…;and to visit, reform, redress, order, correct, and amend all such errors, heresies, schisms, abuses, offences, contempts, and enormities whatsoever, which by any manner spiritual or ecclesiastical power, authority, or jurisdiction, can or may lawfully be reformed, ordered, redressed, corrected restrained or amended, to the pleasure of Almighty God, and the increase of virtue, and the conservation of the peace and unity of this realm, and that such person or persons so to be…assigned…, after the said letters patent to him or them made and delivered…shall have full power and authority, by virtue of this Act, and the said letters patent, under your highness…to exercise, use, and execute

all the premises, according to the tenor and effect of the said letters patent…" I think it is obvious that this language encourages the proposition that the patentees may be given any or all parts of ecclesiastical subject-matter jurisdiction. It is hard to see off-hand how any other conclusion is possible. Note especially (my italics) "to exercise…*all manner* of jurisdictions…*in any wise* touching…*any* spiritual or ecclesiastical jurisdiction…"

On the other hand, there is nothing in the language obviously encouraging to the notion that the Commission may be given secular sanctions. One can try to get mileage in support of that from "…shall have full power and authority, by virtue of this Act,, and the said letters patent…" and from "…according to the tenor and effect of the said letters patent…" The straightforward reading of this language is that the Commission has authority by virtue of the statute to the extent that the patent, pursuing the statute, gives it authority. Since the statute says nothing whatsoever about secular sanctions, a patent purporting to confer them would seem not to pursue the statute. It may be arguable, however, that the statutory language calls attention to the patent so as to suggest that it is to be an independent source of authority, as opposed to a mere implementation of the statute. Would Parliament have added the "according to the tenor and effect" phrase unless it meant to concede something to the monarch beyond mere power to do what the statute manifestly authorizes (for without the added phrase it would manifestly authorize him to give some or all parts of ecclesiastical jurisdiction *cum* ecclesiastical sanctions)? I do not find this line convincing, but I believe it had some influence.

More persuasively, one may come down on language seemingly designed not to exclude any powers which by any stretch of the imagination can be regarded as ecclesiastical. If that is what Parliament was trying to say, then there is a case of sorts for the proposition that imprisonment does not utterly and in every sense fail to qualify as an ecclesiastical power. The phrases "All manner of jurisdictions, privileges, and preeminences" and "in any wise touching" are critical for this theory, but especially important is the language of the preceding clause. That clause defines what the monarch has in his hands to convey to the Commission as any powers which have "heretofore been" exercised. It is legitimate to take these words as covering not only the traditional or "common law" ecclesiastical powers, but also any powers ever exercised in the past by virtue of statutes. I have already noted that statutes no longer on the books had once enabled ecclesiastical courts to imprison for heresy and clerical incontinence.

Once the former statutory powers are in the door, they can be generalized with at least some tenuous plausibility. I.e., one can say the powers "heretofore" used to enforce the ecclesiastical law included "power to imprison" or even "power to impose secular sanctions", as opposed to the mere power to imprison for a couple of specific crimes.

If we switch to the other tack and try to use the words of the act to restrict the Commission's substantive jurisdiction, there is language that must be got around. One can perhaps argue that the broadest expressions ("all manner", "in any wise") are so suspiciously broad that they can be discounted as careless, or as intended only to convey the general idea that ecclesiastical jurisdiction can be delegated to special commissioners. I say "suspiciously broad" partly because comparably vague and inclusive language is not used in the preceding "annexation" clause. One cannot doubt that "all" spiritual jurisdiction was annexed to the Crown in so far as that is a synonymous way of saying the monarch was Supreme Governor—meaning *inter alia* sole titular head of, and embodiment of the authority of, the entire ecclesiastical legal system. In actually

describing what the monarch has, however, the "annexation" clause does not give a picture of ecclesiastical jurisdiction in every dimension. Rather, it specifies what may be taken as only one dimension of that jurisdiction—"power…for the visitation of the ecclesiastical state and persons [etc.] of errors [etc]." Ecclesiastical jurisdiction so specified is unmistakably made transferable to patentees by the High Commission clause; part of the language is repeated almost exactly. The specified jurisdiction seems to be made transferable over and above what amounts to "all jurisdiction" (note the "and"), but that does not make much sense. For if the copulative is taken literally, the act would read in effect, "The High Commission may be given any and all ecclesiastical jurisdiction and also one part of it—viz. power to 'visit, reform, [etc.]…heresies [etc.].' "Is it not better to construe the relation between the vague preceding words and the more specific subsequent ones as follows: "The monarch's ecclesiastical jurisdiction may in general principle be transferred to patentees, but what specifically may be transferred is his ecclesiastical jurisdiction in the sense that the basic 'annexation' clause above singles out and emphasizes as what is notably repossessed by the Crown from the usurping Pope—viz. power to 'visit [etc.]'"?

To reach this construction, one perhaps needs to be convinced that Parliament could not have intended to subvert localism or appeals, or that historically it had no purpose in view that would justify risking those consequences. Nevertheless, there is a verbal problem—a problem of making sense of language which on close inspection is rather odd, rather hard to make out as deliberately chosen to give the monarch the freest possible hand. In any event, while attention is focused on the words "to visit [etc.]…heresies [etc.]", restrictive possibilities are opened.

Take it, as the paraphrase constructed above requires, that the monarch is only authorized to give the Commission power to "visit [etc.]." What does that mean? It is not self-evident that those words describe anything narrower than the whole of ecclesiastical jurisdiction. Let us then proceed by picking out the "weaker" or more general expressions: The Commission may be given power to "redress, order, correct and amend…all offences…which by any manner spiritual or ecclesiastical…jurisdiction…may lawfully be…ordered, redressed, corrected, restrained, or amended [so as to please God and promote virtue, peace, and unity.]" Arguably, an "offence" could be any breach of ecclesiastical law, including breach of such duties as the cultivator's obligation to pay tithes or an executor's to fulfill the desires of the testator. Breach of the latter sort of duty may not be punishable, but it is surely subject to "ordering", "redressing", or "amending" by ecclesiastical courts. God is presumably pleased if tithes and legacies are paid when they are due, and something like the "general welfare" of a Christian country—if that is not too loose a translation of "peace and unity" plus "virtue"—is presumably served. On the other hand, it is surely fair, and on balance more convincing, to take the words in question as referring exclusively to the criminal side of ecclesiastical law. It is at least legitimate "strict construction" to say that "offences" refers to crimes. If the statute-makers meant all breaches of duty remediable in ecclesiastical courts they could have said so. The surrounding words either refer to specific crimes, such as heresy, or to kinds of activity associable with crime in either legal usage ("contempts") or popular ("enormities", "abuses"). "Reform" is also a pointer to criminal law, especially because ecclesiastical law itself spoke of its criminal-penal-penitential side as "*pro reformatione morum*." On the whole, it is sensible to discount a

degree of statutory pleonasm in the act's string of words and to follow the more manageable ones to the conclusion that only criminal jurisdiction is meant.

Beyond this point, it is unnecessary to elaborate the possibilities of verbal construction for the most important purposes. The resolution that confines the Commission to heresy, schism, and maybe some allied religious offenses covered by "errors", plus those moral offenses that can be seriously considered equally "enormous", can obviously be criticized for sloughing "abuses", "contempts", and "offences." It takes some discounting for pleonasm plus construction by intent to conclude for only a very narrow slice of criminal jurisdiction. A looser standard of seriousness is easier to see: Heresy is high-powered company for utterly trivial "offences"; "abuse" can perhaps be associated with such all-inclusive expressions as "misbehavior", but its main affinities are probably more with "pernicious examples" than with the occasional peccadillo or excess of spirits; "contempt" may have a degree of specific content—deliberate disrespect for the Church, which is more serious than "peccadilloes", however it is manifested, and is faintly redolent of religious error. (As will appear from the cases, there were special problems about the more technical sense of that word—"contempt of court.") As "peace and unity" may be taken to point to criminal jurisdiction by association with the secular "*contra pacem*", so may the expression go to imply some restraint on foolishly aggrandizing the High Commission: Peace and fellowship are hardly to be served, even if "virtue" is, by making it possible for high officialdom to harass extremely minor sinners.

A final problem of verbal construction requires notice. The "annexation" clause singles out, in addition to what is perhaps best identified as criminal jurisdiction generally, power "for the visitation of the ecclesiastical state and persons, and for reformation, order, and correction of the same." The High Commission clause says nothing about "the ecclesiastical state and persons," but it does use the word "visit" in addition to "reform [etc.]." If the High Commission clause stood alone, I do not think "visit" would cause any difficulty. It would probably go only to reinforce the conclusion that the act is talking about criminal jurisdiction, for it alludes to an ecclesiastical procedure that fell on the criminal side: Bishops' visitations of the localities in their dioceses, at which presentments of a wide range of offenses were taken. Visitations, like some secular inquests, had a broader information-gathering function than merely bringing criminal offences to light and furnishing a basis for prosecution, but their form and content are primarily associable with the enforcement of criminal law. (Minor enough aspects of it, one must grant, so that "visit" conceivably militates against a seriousness standard.) The "annexation" clause, however, connects "visitation" with "the ecclesiastical state and persons." It seems to call attention to the Crown's supervisory power over what I call above "infra-Church affairs" and over Church personnel. Only after that does it move on to what looks like criminal jurisdiction in general.

From these observations, two contradictory arguments can be developed. Both require the premise that *quoad* laymen the High Commission is largely restricted to serious crimes. Upon that premise, the question arises whether the same standard applies to clergymen and to some kinds of "intra-Church affairs" even when they involve laymen. The first argument is that the word "visit" in the High Commission clause is a link with the "annexation" clause: The Commission may be given what is mentioned in the preceding clause—not all ecclesiastical jurisdiction, because the preceding clause does not speak as generally as that, but criminal jurisdiction, or some part thereof, over

everyone, plus further powers over "the ecclesiastical state and persons." The latter comprise all criminal offenses by clergy, even if the same crime in a layman would be too minor for the Commission; sanctions only appropriate to clergy, notably deprivation; in so far as ecclesiastical law admits of it, power to punish, deprive, or enjoin clergy and other full-time Church personnel, such as officers of ecclesiastical courts, even without charging them with an offense classified as criminal; more controversially, but perhaps, non-criminal jurisdiction over laymen when they are directly involved in the internal management of the Church or hold Church offices—e.g., churchwardens, parishioners *qua* electors of churchwardens and parish clerks, lay rectors with respect to some duties.

The contrary argument would exploit the difference between the "annexation" clause and the High Commission clause: Whereas the former seems to speak of a supervisory function in the Supreme Governor, the latter does not repeat that language; all it repeats is the word "visit", inclusion of which is much less significant than omission of "the ecclesiastical state and persons"; the slight change of language in the later clause should be taken as deliberate—i.e., as signifying that supervision of the clergy and "intra-Church affairs", while worth singling out as a right and responsibility of the monarch, is not intended to be delegable except as it is comprised in the part of criminal jurisdiction that is made delegable.

With this much guidance to the major issues on the High Commission, we may proceed to the cases. Lesser issues will occasionally arise, but what I have outlined covers nearly all that was problematic. In view of the complexity of this field, it may be helpful if I express a view as to the "best bet"—the position on the main issues that seems to me most recommended by a mixture of verbal construction and policy considerations. In brief: The High Commission ought to be restricted for the most part to serious crimes. There is good warrant for not taking "serious crimes" in the narrowest possible sense—i.e., for letting the High Commission proceed in criminal cases if the monarch seems to have intended it to do so without restriction, and if contextual consideration and defensible general criteria can be invoked to make out that a particular situation is serious enough to justify resort to an extraordinary tribunal. Loosening the standard for clerical offenders is justifiable; one should be shy of letting the Commission take over "intra-Church affairs" to any larger extent than that. Use of secular sanctions is hard to justify except by (a) the argument that Parliament intended to preserve, for the High Commission alone, imprisoning power formerly given to ecclesiastical courts by statute and (b) the argument that coercive imprisonment is a useful short-cut for making an extraordinary tribunal more effective than regular Church courts. I would not think it unreasonable to permit imprisonment in the situations literally covered by earlier repealed statutes and to permit coercive detention subject to safeguards. (Insist on a showing that penitential acts have been prescribed or a course of behavior enjoined and that the party has refused to perform the penance or violated the injunction—in the latter case, perhaps that he has been cited and warned of his danger before commitment; make sure that people are not punished under color of coercive detention—i.e., that they are not held when they express willingness to obey, and that they are given a hearing when it is claimed that they have not done what they agreed to; recognize that coercive imprisonment cannot go on forever—i.e., see that the obdurately disobedient are released when they have paid in substitute form all that their conformity could be worth to the Church in view of the offense in question.) Beyond this I would not go, Power to

fine and to demand performance bonds can only be defended by sophistical arguments. No secular punishments aside from the cases covered by earlier statutes can be found in the words of 1 Eliz. Intent to make the Commission more effective than ordinary ecclesiastical courts is reasonable construction outside the words. It is a sufficient concession to that policy to let the Commission operate by rough analogy to courts of equity—to detain coercively within reason and thereby to get quicker and surer results than "the course of the law" sometimes produced.

End of Section 1