Section 2—Cheinye v. Frankwell and Caudrey v. Atton: Two Cases on the High Commission Not Arising on Prohibition or *Habeas Corpus*

Summary

This Section is devoted to two special and intricate Elizabethan cases. (See the text just below for their peculiar characteristics and relevance.) With reference to straightforward issues about the High Commission's jurisdiction and powers, the two cases may be counted as authority for the propositions listed below. They can lay claim to more extensive implications, but for reasons that appear in the text that claim should be regarded with skepticism.

(1) The Commission may proceed against an incontinent clergyman. Whatever other sanctions it may or may not apply, it may deprive such clergyman of his living upon conviction—but this was not seriously controversial once the Commission's jurisdiction is conceded.

(2) Common law courts may not prevent the Commission from taking a suit on the ground that another suit about the same matter is already pending in a regular ecclesiastical court, assuming the suit is intrinsically appropriate to the Commission. Taking a suit in such circumstances is improper, but the remedy must be found within the ecclesiastical system. This is true despite the fact that there was no routine appeal from the High Commission.

(3) The Commission may proceed against a clergyman who speaks against the Book of Common Prayer or refuses to follow it. It may deprive him of his living upon conviction on the first offense as well as upon a subsequent one. These propositions were problematic because of hard-to-interpret provisions of the Uniformity Act (1 Eliz., c.2), by which the Prayer Book was established and acts of opposition to it defined as crimes. The problem is whether, under the statute, any ecclesiastical court could deprive a minister for his first offense against the Prayer Book. To hold that the Commission may do so is probably to hold that regular ecclesiastical courts also may and then, that there is no objection to the Commission's doing likewise.

The Cases

Two Elizabethan cases on the High Commission have a special character, for which reason they are treated in a separate Section. These cases, Cheinye v. Frankwell and Caudrey v. Atton, did not arise on Prohibition or *Habeas corpus*, but by way of special verdicts in common law actions. In both cases, the litigation was between a parson deprived by the High Commission and his successor—litigation to test which party was entitled to the property attached to the benefice. Although the specific issues were different, both cases turned on whether the Commission's sentence of deprivation was lawful. In both, a jury found the facts and left the validity of the deprivation to the judges. I.e., the schematic form of both verdicts was, "The High Commission purportedly deprived Parson A, after which Parson B was inducted into the living and entered on the property; whether A or B is entitled depends on whether A's deprivation was valid, which question of law we cannot speak to."

These cases raise questions about the jurisdiction and powers of the Commission. They therefore have implications for the normal contexts in which those questions came up—Prohibitions and *Habeas corpus*. At the same time, their special form affects the force of those implications. I.e., it does not automatically follow that analogous Prohibition cases must come out the same way as the special verdict cases. In both *Cheinye* and *Caudrey*, the High Commission "won"—the sentences of deprivation were held lawful as far as the common law courts are concerned. The decisions therefore arguably imply that the Commission should not be prohibited in analogous circumstances. But that argument can possibly be opposed by considerations of procedural context—in essence, by maintaining that the judges are freer to look into the propriety of ecclesiastical proceedings in Prohibition than upon a special verdict. The cases are accordingly discussed for their own sakes, though in the end attention is given to their implications for Prohibition law.

Discussing them for their own sakes has certain collateral advantages as well. Both were major cases of considerable difficulty. *Cheinye* was argued in the Queen's Bench and then upon a Writ of Error in the Exchequer Chamber, where the judgment below was probably upheld. It therefore represents an especially solemn decision. *Caudrey*, also a Queen's Bench case, was a protracted and intricately argued lawsuit. To one of its reporters, Coke, it seemed an outstandingly deliberate and far-reaching decision. Some exception can be taken to Coke's version of the case, but that does not detract from its importance as a challenge to the lawyers and judges concerned. It presents perhaps the most baffling set of issues ever faced by the courts in a case touching the High Commission, or indeed the general subject of relations between the temporal and spiritual legal systems. *Caudrey* is much more a case on the Uniformity Act than on the Supremacy Act. Although the former comes up in some Prohibition and *Habeas corpus* cases, it was never so thoroughly discussed. Giving *Caudrey* detailed attention is therefore partly justified by the picture it gives of lawyers struggling with another statute touching the Church courts, over and above the ones that were largely interpreted through Prohibition cases.

Both *Cheinye* and *Caudrey* were triumphs for Coke's advocacy. (For *Caudrey*, this is knowable from manuscript evidence. Coke the reporter does not give himself credit for the victory, and the other printed report, Popham's, does not name the counsel.)

There is irony in the fact that Coke, who by reputation (and more qualifiedly in reality) became the High Commission's worst enemy, had succeeded as a practitioner in winning two pro-Commission decisions in notably tricky cases. The intrinsic difficulty of the two cases and the careful attention paid to them by Coke and other good lawyers meant that the debate reached beyond routine issues on the Commission's competence to the wider jurisprudential and constitutional bearings of those issues. For that reason, I consider the cases worth the space required to work them out—for *Caudrey* a process complicated by problems about the accuracy of Coke's report in the light of other partially conflicting ones. On the other hand, for the practical purpose of making out what the courts across the board thought the High Commission could and could not do, the contents of this Section are not particularly important. Neither case represents a commonplace situation. Such questions as whether the High Commission could proceed for adultery and whether it was entitled to use secular sanctions are the practical ones, on which the mass of Prohibition and *Habeas corpus* law bears, but on which *Cheinye* and *Caudrey* cast only oblique light. For the practical questions, the reader may go on Section 3 immediately following.

The facts of Cheinye v. Frankwell (1584-88)[64] as found by special verdict were as follows: Cheinye, a beneficed clergyman, was presented to the diocesan court for incontinence. He was given a day to clear himself by compurgation, made default, and was subsequently deprived of his living. On appeal to the Arches, the sentence of deprivation was reversed (why does not appear.) Cheinye was then presented again in the diocesan court for the same act of incontinence and again a day was assigned for making compurgation. Before that day he took a fresh appeal to the Arches (grounds not given.) Pending the appeal, the High Commission summoned Cheinye, again for the same incontinence, and deprived him. Frankwell was admitted to the benefice. Either he or Cheinye sued the other in Trespass for taking away tithes. Title to the tithes depended on whether Cheinye's deprivation by the High Commission was valid.

Cheinye's lawyer, Wroth, did not argue that the offense of incontinence in a clergyman was too minor for the High Commission. He did not have to, because another strong argument was available: viz. that the Commission may not take over suits pending in ordinary ecclesiastical courts. The Pope, according to Wroth, had no authority to do that, and the most that 1 Eliz. effected was to give the Queen and her commissioners what the Pope had before. This rule will stand with the proposition that the Commission, if so authorized by the monarch, may take any ecclesiastical case that is not already before another court. Towards showing that it may not steal away pending suits, however, Wroth made what became standard arguments for restricting the Commission: 1 Eliz. does not intend to deprive the ordinary ecclesiastical courts of their jurisdiction by permitting the Commission to be given a blank check. By re-enacting 23 Hen. VIII (cf. Ch. 2 above), 1 Eliz. endorses that statute's policy of localism. The effect of upholding the Commission in any given case is to deprive the party of the appeals he would have if the suit were in a regular Church court. At one point, Wroth says that lack of an appeal is especially inconvenient when the effect is to "disinherit a parson." With that he is not too far from suggesting that incontinence is simply not "enormous" enough to be a High Commission matter, even though he does not so argue explicitly. I.e., apart from the

[64] See the extended note to *Cheinye* at the end of this Section.

argument from the pending suit, it would be difficult to maintain that a clergyman could not be deprived for heresy, say, by the High Commission, appeal or no appeal. Saying that deprivation is too severe a penalty for the statute-makers to have permitted without appeal should probably be understood with the addition "save in the rarest and most serious cases, and incontinence is not one of them."

Wroth also tried to pick holes in the formal legality of the Commission's sentence as found by the special verdict. We may omit these arguments, for the court rejected them and they say nothing significant about the Commission's boundaries. (In effect, the judges held that the special verdict found the fact that the High Commission deprived Cheinye, notwithstanding various ways in which, by strict construction of the verdict, it was arguable that the body called the "High Commission" was not identified correctly and the act of deprivation was not so described as to be unmistakably identifiable as that body's official act. So holding does not imply that the Commission deprived Cheinye lawfully, the real question.)

On the substance, the Court accepted Wroth's argument in its narrow sense, but used its very premise to conclude against his client. I.e.: The judges held that the Commission exceeded its authority in taking action against Cheinye when proceedings were pending against him in the regular courts. They so held because, as Wroth had argued, such intervention was contrary to the ecclesiastical law itself, and 1 Eliz. did not permit the Commission to be given powers without a pre-existing basis in the ecclesiastical law. On this premise, however, the court held against Cheinye. So far as this court was concerned, Cheinye was found deprived by ecclesiastical process and therefore not entitled to the tithes. His deprivation was erroneous by ecclesiastical standards, but the proper way to rectify that was by appeal, A common law court was not entitled to take note of an error in ecclesiastical law. Coke, of counsel with Frankwell, was responsible for persuading the court to take this course.

It seems clear from the reports that the majority of the court adopted the position above. Leonard's report, however, though it accords on that, gives a strong pro-High Commission speech by Chief Justice Wray, which amounts to a concurring opinion. Wray says that one who sues in the Arches may "for his own expedition, and for to procure due punishment against the offender" remove the case to the High Commission. (Why the Arches specifically I do not know. Wray's rule apparently includes under "one who sues in the Arches" an appellee there—in this case a Bishop or his deputy proceeding on presentment, rather than a private complainant. There appears to be no question of the judge of the Arches requesting removal to the High Commission pursuant to 23 Hen. VIII, as opposed to the party who is ultimately plaintiff, though he is immediately appellee.) It is clearly implied that in Wray's opinion there was no error. The strict formulation would be that whether there was ecclesiastical error was irrelevant, for it is extremely hard to say that ecclesiastical law generally permitted a party to remove a suit to another, or a higher, court except by appeal. Wray's position must therefore be that the High Commission had been created precisely in order to permit what ecclesiastical law did not—such removal, for the presumable end of seeing an offender punished by fine or imprisonment (the only very meaningful sense of a "due punishment" which could not just as well be imposed by an ordinary ecclesiastical court.) Again, there is no sign that the Court as a whole agreed with this.

Cheinye then brought a Writ of Error in the new Exchequer Chamber (created by statute in 1585 to review King's Bench judgments.) Two errors were laid: (a) The King's Bench was right in principle but wrong in application when it refused to act on its opinion that deprivation was erroneous. Rectification of such error ought to be left to ecclesiastical appeal if that were available, but there was no appeal from the High Commission. Therefore the only remedy was for the King's Bench to take note of the ecclesiastical law and hold for Cheinye. (b) A further reason why the Commission's sentence was erroneous was advanced, this one not dependent on ecclesiastical law. Viz.: If 1 Eliz. restricts the Commission in no other way, the statute only permits it to do as much as the monarch authorizes it to. As the Queen's agents, the Commissioners must pursue their authority, which is to say that their commission should be read as a set of instructions to proceed in such-and-such ways and only those ways. In the present case, going by what the special verdict explicitly or implicitly said about the proceedings, the Commissioners had not pursued their commission. That is because the commission empowered them to give judgment upon proof by witnesses or the party's confession. In the instant case, they gave judgment against Cheinye without establishing as a fact, by either of those two means, that he committed incontinence. Rather, they took it as a fact when he pleaded the suit in the Arches as a reason why the Commission lacked jurisdiction (as a common law court would take a demurrer on a plea in confession and avoidance of alleged facts.) By Cheinye's theory, the commission did not refer to a "confession" in this special legal sense, but only to a direct admission of the crime.

How the Writ of Error turned out is not reported, but two judges speak to the two exceptions, both tending to uphold the King's Bench. The best guess is that the judgment was affirmed. The argument that no appeal was available was made at the Bar by Fenner, now representing Cheinye. Coke, still representing the other side, replied that the *de facto* lack of an appeal did not interfere with the principle that an error within the ecclesiastical system is beyond the common law's cognizance. If the Delegates, the highest regular ecclesiastical court of appeal, gave a sentence which a common law court regarded as erroneous, Coke said, it would still be necessary to leave rectification to the ecclesiastical system. There would be no ordinary appeal from the Delegates, but still, in a manner of speaking, "the only remedy is ecclesiastical appeal." So with the High Commission.

Coke made his point in this high-and-dry way, but it does not have to come to a relentlessly hard rule. As Justice Periam observed, Cheinye was not really foreclosed from reversing the erroneous sentence. According to Periam, civilians had been consulted at an earlier stage of the present case and had certified as a matter of ecclesiastical law that an appeal lay from the High Commission to the monarch. The civilians' reason was that before the Reformation one could appeal from delegates of the Pope to the Pope himself. (There were grounds for doubting whether the monarch could review decisions by *the* Delegates, in the sense of the "ecclesiastical supreme court" established by the statute of 25 Hen. VIII, c.19. The question was whether the statute meant to forbid such reviews. A small amount of pre-Civil War litigation on that matter—discussed later in this study—tends to affirm the royal power to grant review commissions "of grace", though it is less than clearly decisive. Even, however, if the opposite conclusion were reached, I do not think Periam's point and the civilians' would be affected. Had the Pope set up a special first-instance court like the High Commission, it would necessarily have been a delegation of his plenary powers, and its decisions would have been appealable to

Rome as all ecclesiastical decisions were before the Reformation. Nothing in the language of 1 Eliz. authorizing the High Commission puts obstacles in the way of royal review of that court's decisions comparable to those that 25 Hen. VIII arguable, though improbably put in the way of review of the Court of Delegates' decisions.)

In response to Coke, Fenner cited a case from 16 Eliz.: One Foxe was deprived for incontinence on the last day of Parliament; Parliament pardoned the offense; the sentence of deprivation was held void. I suppose this was meant to say that common law courts will sometimes overrule sentences of deprivation without waiting on the ecclesiastical system. (I presume the ecclesiastical court could and should give effect to the pardon. If the first-instance court refused to, the party could presumably appeal the refusal as an error. The ecclesiastical rule that appeal suspends sentence would seem to remove the objection that the appellate court would be intervening to give effect to a pardon that did not exist when the original court gave sentence. *Quaere tamen*.) Chief Justice Anderson replied to Fenner that his precedent had little force because "it is against a general statute, of which everyone ought to take notice." I.e. (I take it): Of course common law courts may enforce statutes, and if an ecclesiastical sentence which comes before a common law court is deemed to violate a statute it should of course be treated as void. There is no obligation to take the sentence as valid until it is reversed by an ecclesiastical court. That situation is not like the present one, where the standard by which the ecclesiastical sentence may be deemed invalid is ecclesiastical law. (Anderson assumes that ecclesiastical error by the High Commission does not violate 1 Eliz.; it is no different from error on the part of any other ecclesiastical court. Can the assumption be questioned? Wroth and Fenner can perhaps be criticized for not maintaining the contrary explicitly enough, but allowing the vulnerable argument from appeals to carry too much weight. Is it likely that the statute-makers would have set up a court stringently limited in its subject-matter jurisdiction, confined to criminal cases—in which the Church has a collective interest—, not subject to ordinary appeal, and free to apply any unwarranted version of ecclesiastical law? Setting up such a court is arguably not the same as erecting a final court of appeal and giving it absolutely the last word. The latter of course could administer its law irresponsibly, but the context militates against it—a context of prior decisions submitted for review and of predominantly civil cases in which the court usually has no motive except to do legal justice by its best lights.)

To the second objection—lack of appropriate proof or confession of Cheinye's incontinence—Justice Periam replied simply that it did not matter whether the Commission had pursued its instructions. The sentence of deprivation was still void—meaning presumably "voidable", "erroneous" owing to the improper preemption of a suit pending elsewhere. (I do not think Periam could mean that failure to pursue the instructions would itself be an error uncontrollable by common law courts, for that would surely be head-on violation of the statute.) The position is unpersuasive, it seems to me. Why should the invalidity of the Commission's sentence by statutory standards not be taken note of, even though its invalidity in another sense cannot be reached? Chief Justice Anderson took the bull by the horns more firmly, holding in effect that the offense was sufficiently confessed, so that the instructions were not violated. He reached this via the proposition that a party who appears before the Commission and refuses to answer may be convicted as if he had confessed. Granting that the statute puts no obstacle in the way of treating silence as confession, it follows reasonably enough that a pleading confession,

or admission of guilt merely implied in taking exception to the Commission's jurisdiction before the Commission, is also as good as a direct confession. The underlying proposition obviously needs defense. Why should the instructions not be narrowly construed, and the statute construed as insisting that they be? There may of course be good answers, including standard canons of construction. The instructions could have been written to explain the sense of "confession" if the intent was to narrow the application of the term, and the statute could have both limited the monarch's power to instruct and commanded strict construction of any instructions given pursuant to it.

To summarize the Exchequer Chamber stage: Both exceptions to the judgment below were rejected, each on somewhat different grounds, by both judges heard from in the report. No other judge contradicted Periam and Anderson or spoke in favor of Fenner's objections, so far as the report shows. We may take it as highly probable that the Queen's Bench decision was upheld and treat it as authority.

Does the Trespass case of Cheinye v. Frankwell have implications for Prohibition cases? I suggest the following: (a) One certainly could use *Cheinye* as authority for refusing to prohibit if it were complained that the High Commission had taken over a case pending in a regular ecclesiastical court, but I am not sure one would be constrained to. There is a difference between deciding whether to cut off improper ecclesiastical proceedings by Prohibition and dealing with a special verdict in an action between party and party. It makes conservative sense to hold that a verdict finding deprivation goes against the deprivee, even though the common law court believes the deprivation erroneous. There is a way in which the deprivee is at fault for not helping himself within the ecclesiastical system, while his successor in the living cannot be blamed for assuming the benefice was vacant. Prohibitions to keep one ecclesiastical court from infringing on another were always problematic; such infringement could always be represented as error in ecclesiastical law subject to appeal (cf. Vol. III, p.155 ff.) It was not unanimously considered beyond the range of Prohibition, however, and the High Commission is surely a special case—a court whose errors were at least not straightforwardly appealable and the creation of a statute very specifically intended, according to almost all interpretations, not to destroy the vested interests of regular ecclesiastical tribunals.

(b) It was held that the High Commission erred in depriving Cheinye because it was bound by ecclesiastical law and failed to observe it. So holding discountenances the theory that the Commission was not strictly an ecclesiastical court, but a statutory tribunal on which the monarch was authorized to confer powers which ecclesiastical courts did not have *de jure*. Most controversy was about power to fine and imprison. One could of course, consistently with *Cheiny*e, believe that the unexpressed intent of the statute was to permit conferral of those specific powers—essentially because creating an extraordinary court for a few "enormous" offenses would not have made much sense if the intent was to leave the suppression of enormity to ordinary spiritual sanctions. It is a more general license to the monarch that *Cheinye* stands in the way of—license in effect to authorize a special variant brand of ecclesiastical law to be administered in the High Commission alone. For example—the direct application of *Cheinye*—, the statute cannot permit the monarch to give the Commission authority to take over suits already pending in other ecclesiastical courts. At any rate, to see such permission it would be necessary to find common sense or contextual reasons for it comparable to the possibly good grounds for the secular sanctions; they would surely be hard to find.

(c) The case may be counted, but not too strongly, in favor of the proposition that clerical incontinence and power to deprive for that offense are within the High Commission's jurisdiction. Although the contrary was not directly urged, the judges could have could have decided for Cheinye if they thought the subject matter was *ultra vires* for the Commission; the sentence would not then have been an ecclesiastical error, but simple contravention of the statute.

The second case in this Section, Caudrey (or Cawdry) v. Atton (Acton, or Hatton) [65] , is one of the best known on the High Commission. The reason for this is that Coke not only reported the case, but took it as the occasion for what he called his "Treatise on the King's Ecclesiastical Law." The "Treatise", appended to *Caudrey*, is inserted as a special section at the beginning of Vol. 5 of Coke's Reports. It is a historical demonstration that ecclesiastical supremacy had attached to the English Crown from the remotest time and had been recognized or asserted in one way or another in all ages, so as to keep the title alive even at the nadir of Papal usurpation. The "Treatise" is the classical statement of the lawyer's version of Anglican Erastianism. In considering Coke's multifarious and stormy dealings with the ecclesiastical authorities, it is important to remember how implicitly he believed that the Royal Supremacy was an immemorial feature of the law and an inseparable part of the constitution—a belief, be it said, that can cut several ways. It is not the "Treatise" that concerns us here, however, but Caudrey's Case.

One of the several resolutions in the case, as Coke represents it, suggested the large themes of the "Treatise." That was the court's holding, in connection with one of a number of debated points, that the monarch could have created a High Commission without the authorization of 1 Eliz.–could have created it, that is, by virtue of the "common law" ecclesiastical supremacy which the "Treatise" proceeds to prove. *Caudrey* as reported by Coke is the clearest holding to that effect. Publication of the report made this "resolution" widely available knowledge. I have no reason to think the proposition was much doubted in the legal community. The interesting question is what it implies. I have suggested in the Introduction to this Section that the answer is probably "Not much." There is no sign that Coke himself ever repudiated the "resolution" in *Caudrey* that begot his "Treatise", but when he was a judge he certainly did not take it to mean that the monarch could confer unlimited jurisdiction on the Commission by prerogative. What may have been implied by asserting the prerogative in *Caudrey* itself will be considered below.

Another question is prior to that one: Did the court in *Caudrey* actually resolve all Coke says it did? Skepticism is permitted by other reports, especially a good MS. (Add 25,211). The MS. does not quarrel with Coke on the basic shape and outcome of the case. The only question, here as on quite a few other occasions, is whether Coke "improved" the case retrospectively, reformulating what was argued and held so as to bring it a little closer than reality to what ought to have been. By stating the question I do not imply an affirmative answer. I shall, however, first discuss the case as it appears in the MS. and then come back to whether Coke's version is significantly at odds.

About the facts of the case, the reports do not differ in any way that matters for the substance. (There are some discrepancies with collateral implications, principally for the

[65] See the extended note on *Cheinye* and *Caudrey* at the end of this Section.

accuracy of Coke's report—see the Note.) Like *Cheinye* above, *Caudrey* arose on a special verdict in a common law action (Trespass according to Coke and the other printed report, Popham; Ejectment according to the major MS., the other MS. saying nothing on this point; the difference does not matter for the legal issues.) Again as in *Cheinye*, a deprived parson (Caudrey) sued his successor in the living to try the validity of the deprivation. The jury found the manner and cause of Caudrey's deprivation by special verdict, leaving it to the court to judge its validity. In substance, he was deprived by the High Commission for preaching against the Book of Common Prayer and not using it in the required way in conducting services (which means almost certainly that he was a Puritan.) There were reasons unique to the particular offense and the circumstances for doubting that Caudrey was deprivable (a) by any ecclesiastical court and (b) by the High Commission in any event. (I must let these reasons come out as they arise in argument, instead of summarizing them in advance, in order not to distort the case as argued.) Besides putting the substantive legality of the deprivation in question, the special verdict raised some technical problems—essentially how strictly the verdict should be construed, or whether some arguable flaws or ambiguities should be taken for or against Caudrey.

Going by the MS., Caudrey's counsel. Finch, led off with the technical points: (1) The special verdict found that Caudrey was deprived by the High Commission, but it did not find expressly that the members of the Commission were natural-born English subjects, as 1 Eliz. required them to be. Therefore, by Finch's theory, whether or not the deprivation was substantively lawful, it was not a fact before the court that a lawfully constituted body had pronounced the sentence. Finch maintained that although the judges might know of their own knowledge that the Commissioners were native subjects, they were not entitled to act on that knowledge, but were bound by the record. He argued further that although the special verdict implied that the native-birth requirement was satisfied (by saying that the Commission was appointed "*secundum tenorem actus*" this was insufficient—strict insistence on explicit findings was required in construing special verdicts. For both of these points he cited various authorities on judicial notice and on going by implication in the matter of special verdicts and related contexts. (2) The special verdict stated that Caudrey was deprived by the Bishop of London (a member of the Commission) "with the assent" of several other named members. Finch maintained that this language failed as a finding that a formally lawful sentence had been given. His reason was that High Commission sentences must (by the terms of the patent presumably, for 1 Eliz. imposes no such requirement) be the joint act of at least three members—whereas the verdict represented the sentence as the act of only one, to which others merely assented. If I understand his drift, Finch argued in support of this point that it is especially important to insist on the formal correctness of ecclesiastical acts, because once their formal correctness is granted their validity by ecclesiastical law may be (though he did not think it was in this case) beyond common law scrutiny.

From these matters, Finch moves on to the substantive validity of the deprivation. He starts off by urging that the offense of speaking against the Prayer Book is not *malum in se* as a matter of ecclesiastical law or otherwise. It was admittedly an illegal and punishable act in the sense of a *malum prohibitum*. That is because it was made unlawful and subjected to punishment by the Uniformity Act (1 Eliz., c.2.) But in Finch's view the statute did not declare pre-existing law, or merely attach specific sanctions to activity that

was already wrongful or intrinsically wrongful. Rather, the statute created—as it were *ex nihilo*—the crime of speaking against the Prayer Book.

Several lines of argument can proceed from the premise that speaking against the Prayer Book is *malum prohibitum* only. Although the report does not make the structure of his speech totally clear, I think Finch can be credited with using the phrase in all the possible ways. He argues for his conclusion—that Caudrey was not validly deprived—both from the premise that the offense is *malum prohibitum* and without that premise. To expound Finch's argument in its complexity, a preliminary word about the problems of applying the Uniformity Act is necessary.

For clerical opponents of the Prayer Book, the Uniformity Act appoints the following sanctions:

(a) Upon conviction for a first offense, forfeiture of a year's income from the offender's benefice plus six months' imprisonment.

(b) Upon conviction for a second offense (meaning an offense committed after the first conviction), a year's imprisonment and the offender to be deprived of his benefice *ipso facto*. (I.e., upon a second conviction the living is automatically vacant; it is not necessary to go through the formality of a suit to obtain a judicial sentence of deprivation—an ecclesiastical suit, for only ecclesiastical courts could deprive judicially.)

(c) The statute gives secular courts jurisdiction over all the offenses it creates or appoints sanctions for, including clerical opposition to the Prayer Book. The statute also, however, gives ecclesiastical courts authority to "reform, correct, and punish by the censures of the Church" anyone who commits the offenses specified in the act. I.e., a system of essentially concurrent jurisdiction was set up. How exactly it was meant to work was the source of the problem in *Caudrey* and sometimes a difficulty in other cases. Clearly only secular courts could impose the two clearly secular punishments designated in the act—forfeiture of income and imprisonment (apart from the possibility, not anticipated by the statute-makers or discussed in this case, that the High Commission uniquely might be allowed to use imprisonment as a "censure of the Church", provided the offense fell under its jurisdiction.) Clearly ecclesiastical courts were not in general debarred from proceeding against the same offense and punishing it by spiritual sanctions. For the instant case, the ecclesiastical role *quoad* first offenders is all that immediately concerns us, for Caudrey was admittedly a first offender. Finch's job was to show that the role assigned to ecclesiastical courts by the statute did not include power to punish a first offender by one "censure of the Church", viz. deprivation of the living. That conclusion, however, can be defended in two different forms.

(1) Ecclesiastical courts may not touch a first offender at all; the only procedure available against him is secular prosecution. The reason is that the only punishment to which he is made liable is one that only a secular court can impose. It is helpful, though not essential, to this conclusion to posit that the offense—speaking against the Prayer Book by a clergyman—is a *malum prohibitum*, for committing a *malum prohibitum* can only expose one to the statutory penalty attached to the offense. Arguably, the statutory penalty here is solely forfeiture of income plus imprisonment, to which only a secular court can sentence a man. I say "helpful but not essential" because one could argue that the statute simply or "positively" limits punishment of the first offense to the secular forfeiture and imprisonment, whether the crime is *malum in se* or *malum prohibitum*. But if one denies that the statute has such an intent or effect, the classification of the

crime makes a difference. An open-and-shut secular *malum prohibitum*—let us say importing Irish horses without a license—is probably not punishable at all except as the statute appoints a penalty—say £10 per horse—and not punishable in any other way, even by a smaller fine. A clear *malum in se* is by definition punishable somehow; discretionarily within limits if neither legislation nor *ius non scriptum* prescribes a definite punishment (such a prescribed punishment could perfectly well be imposable by ecclesiastical courts only.) A statute appointing a definite penalty for a *malum in se* may go to exclude all other punishments, but whether it does is a question of interpretation. If the statute is not construed to have such exclusive effect, penalties that would have been lawful before remain lawful—perhaps not only lesser penalties, but usually lesser ones because it is generally hard to read penalty-creating statutes as not intended to set maximum penalties. There is a certain justification for regarding ecclesiastical sanctions as generically "lesser" than temporal ones, and in any event their different character and purpose tend to suggest that a statute imposing a definite secular penalty for a *malum in se* may not mean to affect concurrent ecclesiastical penalties—granting that ecclesiastical jurisdiction is not tolled by the act imposing the secular penalty (another question of interpretation.)

(2) Ecclesiastical courts are not excluded from proceeding against a first offender, but they may not punish him by deprivation. Rather, they are confined to lesser spiritual sanctions, such as admonition or penance. This position comes to saying the statute does not appoint forfeiture plus imprisonment as the only punishment for the first offense. It appoints those punishments directly and, by the implication of its reservation of ecclesiastical jurisdiction, authority to impose spiritual sanctions for offenses in the statute, "the censures of the Church." Those "censures", however, should be taken to mean "censures other than deprivation." This conclusion can be reached by two routes:

The first is to say that the emendation—"other than deprivation" – is implied by the statute's making deprivation the consequence of the second offense. It would be odd for Parliament to have provided for *ipso facto* deprivation only after a second offense if it intended for clergymen to be deprivable by ecclesiastical process on the first offense. Once there has been a conviction—a secular one, or even perhaps an ecclesiastical one eventuating in a lesser sanction than deprivation—, it may be perfectly lawful for ecclesiastical courts to proceed for a subsequent offense and deprive. If there are problems about that, we need not reach them. What is clear is that the statute-makers thought deprivation too severe a punishment for a clergyman who has gone wrong only once—or, more precisely, who has not once been called to account and thereby put on warning.

(2) It is not necessary, convincing though it may be to construct an implied limitation on the ecclesiastical censures applicable to a first offender from the statute's linking deprivation to second offenders. For one thing is even clearer: Surely the statute permits ecclesiastical courts to punish people only by lawful ecclesiastical censures—lawful, that is, by the standards of ecclesiastical law. Now (as we shall see Finch trying to show), ecclesiastical law does not permit deprivation of clergymen because they have committed *mala prohibita.* If it can be proved that speaking against the Prayer Book, at least on the first offense, is unmistakably a *malum prohibitum*, then it follows that Caudrey was wrongfully deprived.

Finch puts this line of argument first in his discussion of the substance. It has the advantage of avoiding any real construction of the statute's intent. The words of the section saving ecclesiastical jurisdiction say that spiritual courts may use any "censure of the Church" against any offender, with no distinction between first and subsequent. By the letter, that may seem to include deprivation. But one qualification must be understood—not because something intended was not said, but because no one using language normally would consider it necessary to put in an express qualification. Obviously "any censure of the Church" means "any lawful one", "any censure that ecclesiastical law allows to be imposed in a given situation." Deprivation is simply not a lawful censure for a *malum prohibitum* –just as, say, hanging is not for the *in se* crime of fornication. A statue could no doubt make deprivation imposable by ecclesiastical courts for a *malum prohibitum*, and possibly the Uniformity Act has that effect with respect to second offenders, but it certainly does nothing of the kind with respect to a first offender. On the other hand, the disadvantage of this argument is that it calls on a common law court to look into the ecclesiastical law and invites the response that they are not competent to judge ecclesiastical law (cf. *Cheinye* above.) For that reason, Finch necessarily addressed himself to wider questions about the statute's intent and how to make applied sense of its puzzling features.

With these considerations in mind, we may look at Finch's several points. Be it noted that he says nothing specific to the High Commission. The contention is that no ecclesiastical court, High Commission or other, was entitled to deprive Caudrey for his first offense. So far as appears, Finch saw nothing to be gained by arguing that the Commission lacked jurisdiction to proceed against a clerical defamer of the Prayer Book, except in so far as all ecclesiastical courts lacked it with respect to the first offense. At most, a brief and somewhat cryptic remark at the end of his speech touches the High Commission in particular. The following are Finch's specific arguments:

(a)Towards establishing that by ecclesiastical law a clergyman may never be deprived for a *malum prohibitum*: There is authority to show that a clerk may be refused (i.e., the patron's nominee may be turned down by the Bishop) because he has committed a *malum in se*—perjury is the example in the case cited. Finch takes it for granted that a clerk may not be refused because he has committed a *malum prohibitum*. He assumes further, as is clearly reasonable, that a clergyman already installed in a living may not be deprived for a cause that would not justify excluding an uninstalled candidate.

(b) Towards establishing that speaking against the Prayer Book by a clergyman is unmistakably a *malum prohibitum*: Finch recognizes that the offense can be assimilated to schism. I.e., it could be argued that although the specific act of speaking against the Prayer Book is "created" by the Uniformity Act, it is not really "created *ex nihilo*." Rather, the statute operates to specify what shall count in the future as a species of schism, a pre-existing *malum in se*. Finch does not give a fully articulated counter-argument, but he suggests an approach. Schism, he says, means separation from the unity of the Church; it is analogous to sedition, or separation from the body of the *respublica*. With schism so defined and analogized, Finch asserts, rather than argues, that speaking against the Prayer Book is not an instance of it. The thought, I suppose, is that merely saying one disapproves of a prescribed liturgy (or even, perhaps, the "civil disobedience" of refusing to follow it exactly, if Caudrey was convicted of that too) does not bespeak the anti-social spirit required for schism and its secular cousin, sedition. It is like

expressing disapproval of a particular secular law (or perhaps even disobeying it with willingness to take the consequences), rather than like the acts and utterances that would constitute sedition—expressions of contempt for the law or the government generally, active steps short of treason to subvert the government.

(c) Towards clearing away a possible objection to classifying the offense as a *malum prohibitum*: Finch says that not coming to church, another offense subjected to secular sanctions by the Uniformity Act, is a *malum in se*. He proves this by citing Fitzherbert (i.e., an authority antedating the Elizabethan Settlement) for the point that Prohibition does not lie to stop an ecclesiastical prosecution for failure to attend church. The utility of this citation is not brought out in the report, but I suspect it is twofold. First, it might be possible for someone to suppose that the offenses collected in the Uniformity Act are all of the same sort—all *mala in se* or all *mala prohibita*. To leave such an impression uncorrected would invite an opponent to discover that not coming to church is a *malum in se* and then to argue that speaking against the Prayer book must also be, or at least that the intent of the statute must be to permit all the offenses it covers to be punished as if they were in the higher class to which some belonged. So arguing is the more plausible because not coming to church (which by the statute includes skipping a single Sunday without a valid excuse) seems the more minor offense and was in fact subject to a lesser statutory punishment. Therefore Finch anticipates: The two offenses are not of the same nature; what makes one a *malum in se* and the other a *malum prohibitum* is not that one was morally worse, but that one was prosecutable in ecclesiastical courts without any legislated basis, whereas the other could not be prosecuted there before the Uniformity Act.

Secondly and more significantly, Finch takes up the fact that the text of the statute is different with respect to the two offenses, He introduces his point by saying that the offense of failing to attend divine service is "at the censures of the Church." The phrase is directly out of the statute; the idea is that ecclesiastical sanctions apply to the two offenses in rather different ways. The Uniformity Act expressly makes non-attenders liable to the censures of the Church and to a forfeiture of 12d. per offense, the forfeiture to be levied by the churchwardens by distraint. Speakers against the Prayer Book are not made liable to the censures of the Church in comparable express terms. In so far as they are liable to them at all, it is by virtue of the statute's separate, general saving clause for ecclesiastical jurisdiction. But in view of the difference between the section on failure to attend church and that on speaking against the Prayer Book, is the best conclusion not that the latter are not subject to ecclesiastical sanctions at all, at any rate on the first offense? An intelligible pattern can be seen: Not attending church, a *malum in se*, was prosecutable in ecclesiastical courts and solely punishable by spiritual sanctions before the statute. The statute affirms the *status quo* by subjecting the offense to ecclesiastical censures in terms and then superadds a secular penalty. It is significant that no secular jurisdiction to impose the pecuniary penalty is conferred, but only a power to distrain. (A basis for involvement of the secular courts is created, for the churchwardens' distraints could of course be challenged, like any other distraint, by ordinary common law process, but that is different from creating secular authority to punish.) Speaking against the Prayer Book, a *malum prohibitum*, is not expressly subjected to the censures of the Church, but solely to forfeiture and imprisonment imposable as a punishment after conviction exclusively by secular tribunals (I presume without discretion to mitigate.)

The best conclusion seems to be that the crime, at least on the first offense, is simply not liable to ecclesiastical censures, as it was not before the statute. We have, in short, an argument for position (a) above—ecclesiastical courts may not touch a first offender against the Prayer Book in any way. As I have shown, however, it is possible to retreat from that position and still maintain that such offenders are not liable to deprivation.

(d) Argument (b) above acknowledges the difficulty raised by schism and disposes of it, leaving the implied conclusion that if speaking against the Prayer Book is not schism it must be a *malum prohibitum*. Later, Finch acknowledges that the either-or choice may not be compelling. His argument shifts to an amended proposition: Not only is deprivation unlawful for any *malum prohibitum*; it is unlawful also for some *mala in se*—"unlawful" meaning still by the standards of ecclesiastical law, without reference to the positive effect of the Uniformity Act.

Towards establishing the general point that deprivation may not always be imposed when a clergyman commits a *malum in se*: There is authority that clergymen may not be deprived for riot or drunkenness, yet those are *mala in se*.

Towards showing that even if speaking against the Prayer Book is a *malum in se* (short of schism), it is still not punishable by deprivation on the first offense: On the distinctly intra-ecclesiastical authority of Linwood, the offense of "speaking against religion" is punishable only by excommunication the first time; on a second offense a clergyman may be deprived. Linwood, that is to say, gives a kind of countenance to the view that the Uniformity Act "declares" an existing *malum in se*—"declare" meaning here not simply "restate" but "redefine", "specify for altered circumstances that x shall be taken as an instance of the existing genus y." One should, I think, say only "a kind of countenance." The position is not compelling, not preferable to the view that speaking against the Prayer Book is a *malum prohibitum*. Indeed, it is probably dubious to admit "redefinition" as a form of "declaration", at least in the absence of statutory language professing to impart the flavor of an old bottle to new wine. More concretely, it is puzzling to see how denouncing a Prayer Book that made no pretense to exist before 1559 (and made no pretense to be the only order of worship acceptable to God) could be other than a crime that came into existence with the Prayer Book. If ecclesiastical courts could proceed for "speaking against religion" before and after 1559, it would seem that after that date they must mean something like what they meant before—something more basic than expressing disapproval of some features of a new document. Perhaps wholesale denunciation of the Establishment would count; perhaps ecclesiastical courts would be entitled to take note of new documents and new legislation towards making out a speaker's generally defamatory intent "against religion", but surely bare speaking against the Prayer Book derives its criminality solely from the statute that makes it criminal and need not have done so. (Suppose the Uniformity Act had not created the offense, but had merely required the use of the Prayer Book in churches. It might still be legitimate to take note of the statute in the larger context of making out that a man had spoken "against religion", but it would be hard to find criminality in an isolated critical utterance. By the statute as it is, but only by it, it is probably not too strong too say that the least of such utterances is criminal in a clergyman, at any rate if they occur in a sermon. With possible ambiguity as to whether public utterances outside church services count, the act makes it criminal for a clergyman to "preach, declare, or speak anything in the derogation or depraving of the said book, of anything therein contained, or of any part

thereof." Non-clerics are forbidden under criminal penalties to speak publicly to the "derogation, depraving, or despising" of the Prayer Book of any part of it. *Quaere* whether "despising" –together with the statute's mention of ballad-makers and stage-players as prospective defamers especially in need of warning—points to a slight difference of standard, a sense in which tone, intent, and effect were meant to be a little more relevant in the lay case than the clerical. "Deprave" in 16th century usage is probably no stronger than "derogate"—"cause something to be less well thought of"—without necessarily making it an object of ridicule or contempt.) If these arguments are not accepted, however,—if one insists that speaking against the Prayer Book is continuous with the prior crime of speaking "against religion"—nevertheless, Linwood shows that deprivation may not be imposed until the second offense.

(e) Now Finch turns away from making out that speaking against the Prayer Book is not a deprivable offense by ecclesiastical law and toward straight construction and application of the statute. He starts by maintaining that the statute's "affirmative" language imposing a penalty for the first offense implies the "negative" addition "and not otherwise." This argument runs into the canon of statutory interpretation that attributed greater force to "negative" than to "affirmative" imperatives—in other words, that opposed reading restrictive implications into positive statements. Nevertheless, it is perfectly sensible to suppose that statutes setting penalties for *mala prohibita* do carry the implication "and not otherwise", not because of their grammatical form, but because of their legal character. More seriously, the argument runs into the clause of the statute reserving to ecclesiastical courts power to punish all the offenses mentioned in the act. It is a little strange to read "and not otherwise" into the provision for forfeiture and imprisonment when this act goes on to provide for what looks like an "otherwise." If, however, Finch's point were conceded, position (a) in the analysis of the issues above would be established and the case clinched: If the statute excludes all punishment for a first offense except forfeiture and imprisonment, then it excludes all ecclesiastical censures, including deprivation.

(f) Finch next argues for preferring the secular law when it collides or overlaps with ecclesiastical law. This argument is quite clearly an attempt to overcome the weakness in (e). As I suggest, it is not very convincing to say that the surface meaning of the statute excludes ecclesiastical courts from meddling with first offenders against the Prayer Book, when a prominent clause of the act seems to go out of its way to not to exclude them from anything covered by the act. Therefore Finch moves from the "surface meaning" to a general policy of the law and of statutory construction.

In one form, his argument comes to the unreasonableness of "double vexation." Exposing people to both spiritual and temporal punishment for the same act is suspect. So is any form of "double exposure." The common law tries to avoid it and does so by taking jurisdiction itself when a competing tribunal has a plausible but ambiguous claim to a share of jurisdiction. (To show that his point transcends temporal-spiritual relations, Finch cites a dictum by Babington in Y.B. 8 Hen. VI, f.31. All Babington says is that a franchise may not have cognizance of a battery that starts outside the franchise and continues within it. The act of beating a man from one place to another is a single trespass, liable to only one suit, and the suit must be at common law despite the franchise's "plausible but ambiguous" claim to jurisdiction when the tort was committed inside its boundaries.) No doubt a statute could impose two punishments administered by

separate tribunals for one offense, but the assumption should be that statutes do not intend such unfair and inconvenient arrangements. If the "surface meaning" of the Uniformity Act rather suggests that Parliament did intend to impose two-way liability, the statute should nevertheless receive "reasonable construction. It should be construed to save the policy of the law. The best interpretation is therefore that the act imposes only one punishment, and when the choice is between a temporal and a spiritual one the former should be preferred.

(About double vexation in a stricter sense Finch does not speak, but he may have had it in mind. If a man can be prosecuted in a spiritual court and punished by ecclesiastical censures, and subsequently be prosecuted in a temporal court and punished by forfeiture and imprisonment, or vice versa, he is literally twice vexed for the same act. That is considerably worse than merely being in a position, prior to prosecution, to be "hit from either side", even though the lesser evil is an evil. It is a source of uncertainty as to the cost of misbehavior, which may mean less effective deterrence despite the appearance of menace to the right and to the left. The fairness of indistinguishable culprits' being exposed to very different fates as luck has it is in any event highly questionable. Double vexation proper would be preventable only by a rule that previous prosecution in the other jurisdiction is a good plea to stop a second prosecution for the same crime. There is nothing in the Uniformity Act to require such a rule, which is an additional reason to suppose that it does not confer double jurisdiction.)

In its second formulation, Finch's point does not so much stress the moral doubtfulness and legal inconvenience of exposing people to two punishments as the mere policy of the law whereby temporal jurisdiction was preferred over spiritual when there was in some sense a choice. The argument shows that there are common law contexts where secular law is held to preempt a field in which ecclesiastical law seems to have a legitimate interest. It concludes that a statute which is ambiguous as to the apportionment of jurisdiction between secular and spiritual tribunals should be construed as giving secular courts exclusive authority, even though the statute deals with matters of interest to the Church. The step from premise to conclusion can be disputed. Insisting on the temporal law's general title to be preferred over the spiritual is still worthwhile for the more modest purpose of reinforcing the point just above: If double punishment is intolerable, there cannot be much doubt but that the secular should win—the punishment with "teeth", obviously put in the statute for that reason. It does not hurt to add that letting it win out is consonant with a more general policy.

Finch defends the principle that "when the spiritual law meets with our law [the latter] will hold plea" by several citations:

(i) The best is Brooke, Prohibition 14, 22 Edw. IV. The case there is an ecclesiastical suit for defamation prohibited, not necessarily because the suit was as such inappropriate to the ecclesiastical court, but because a common law suit was subsequently brought turning on the same questions of fact. In other words, the ecclesiastical court was not out of bounds, or involved in something in which it had no legitimate interest; the common law was simply preferred in a situation in which it would be inconvenient for the same matter to be tried twice. An abbot allegedly detained a married lady against her will "to make her a meretrix." Her husband talked about the episode, whereupon the abbot sued him in an ecclesiastical court for defamation. Then the husband, on the wife's behalf, brought an action of False Imprisonment. The ecclesiastical suit was prohibited, and

Brian, the only judge who appears in the Abridgment, held that Consultation should not be granted. The report does not tell what the defamatory words were. By later standards, if the husband said "The abbot falsely imprisoned my wife", the words would probably be actionable at common law and therefore not permissible as the subject of an ecclesiastical suit—*contra* if he had said "The abbot seduced, or tried to seduce, my wife". By the standards of 22 Edw. IV, before the development of common law defamation in the 16th century, it is probably all one—a perfectly appropriate ecclesiastical suit, prohibited only because the common law acquired a preemptive interest in ascertaining the facts via the action of False Imprisonment.

Brian goes on in the Abridgment to cite other cases showing, as he puts it, that "where the common law may meddle, the spiritual court shall not meddle." The generality in a sense serves Finch's purpose, but the other cases are less useful than the principal one. They come to saying that the ecclesiastical courts may not entertain suits for breach of oaths to pay debts, make feoffments, and the like. The prohibitability of such suits can be conceived in different ways. They simply to not occur in the period of this study—the breach of faith jurisdiction of the Church had dried up, and any attempt to revive it would probably have been seen as invasion of the secularized field of contract. I admit that my language is anachronistic—conceptualization of contract as a "field" came very slowly. I still suspect that the unarticulated response had become natural—ecclesiastical courts are out of bounds if they touch promissory behavior in any way under the pretext of an oath. In Brian's time, Church courts' proceeding for breach of faith may have looked perfectly appropriate as such—e.g., when the effect was to enforce a "contract" unenforceable at common law. It seemed objectionable only when it so to speak "crowded" the common law by taking up a case which might literally come up at common law—e.g., ordering payment of a debt today when tomorrow the creditor might bring an action of Debt. (A "contract" to make a feoffment is trickier. In Brian's day, the court really "crowded" would have been the Chancery—the enforcer of contracts to convey land via the doctrine of uses. The common law was pre-eminently protective of real-estate interests, however, and perhaps the Chancery's role was tolerated only because it was both familiar and restrained. I.e., it enforced only considerate promises—mainly if not exclusively sales—, whereas ecclesiastical courts, turned loose, might have caused the transference of real property in a wider range of circumstances provided there was an oath. In short, Brian's supporting cases may have been closer to his principal case than they would have looked later.

I belabor these refinements somewhat because the generality stated by Brian will cover what I call the "paradigmatic" Prohibition—stopping an ecclesiastical suit when the plaintiff could just as well have sued at common law (cf. Vol. III above.) That is all very well, and possibly it is in effect what Brian meant to cover. The trouble is that the principle so understood may hurt Finch's case more than it helps it. It seems to me shaky to draw an interpretation of the Uniformity Act from the mere fact that Prohibitions were used to insure the common law's monopoly over some kinds of litigation. It is too easy to reply that the purpose of these Prohibitions is to keep ecclesiastical courts out of territory where they have no business being, whereas the Uniformity Act on its very face acknowledges their interest in the offenses it deals with and assigns them some sort of role. If, on the other hand, Brian's point in historical perspective is different, it lends better support to Finch. The Uniformity Act might intend to exclude ecclesiastical courts

altogether from a limited part of the enforcement role, when their participation would especially threaten awkwardness or injustice. So, *per* Brian in one understanding, Prohibitions may sometimes be used to prevent inconvenience, even when there is no pretense that ecclesiastical courts are drastically out of bounds, or could not in slightly altered circumstances do what they are in these circumstances stopped from doing. (The differences are, of course, refinements. Part of the justification for "paradigmatic" Prohibitions is that an ecclesiastical suit could be started today and have one outcome, when a common law suit for the same object could be started tomorrow and have a different outcome. I doubt that that would in later perspective have seemed the central justification—as it was for what I call Prohibitions to prevent collateral infringement of common law interests, where the ecclesiastical suit is not "for the same object" or in any way inappropriate in itself, but involves issues closely enough related to the possible subject of common law litigation to pose a danger of prejudice. The two categories may not have been so distinguishable in Brian's perspective. For that matter, since *Caudrey* antedates most of the rich development of Prohibition law in this study, the distinctions I make here may not have been so evident to the lawyers involved as I am inclined to think they would have been later.)

(ii) Another of Finch's citations—Y.B. 2 Rich. III, 22—is also useful for his purpose, although the judges in the Year Book are divided on the relevant point. Each of the parties in the case claimed to be the executor of S. One of the contenders pleaded that he had challenged the will under which the other claimed to be executor and finally overturned it on appeal to Rome, wherefore his adversary was no executor. The issue debated on this pleading was whether ecclesiastical invalidation of a will automatically means that the person named executor therein is not the deceased's executor from the point of view of English law. We may omit the reasoning on both sides and note only that two judges thought that the invalidation does not necessarily have that effect. Part of their point—what is valuable to Finch—is that English law should take precedence over ecclesiastical in an ambiguous situation. They thought there was an ambiguity because by English law a person could for some purposes act as executor before probate; the pleading conclusion that a man named executor in an invalid will could not be executor was therefore not airtight. (Only rigor in pleading was in question, I think, nothing in the real world. I take it that the executor in the invalid will would not be rightful executor, but what the pleading said was that he was not executor at all, in any sense. That was presumably true by ecclesiastical standards, but not quite by English.)

(iii)Finally, Finch cites a "Davy's Case at St. Albans" for what became a familiar proposition if it was not already one at the time of *Caudrey*: A common law action will lie for the aspersion "whore" if the woman slandered avers that she lost a prospective marriage as a result. The point for Finch is that although calling someone "whore" is normally ecclesiastical defamation, the common law acquires an interest when temporal loss is claimed and by virtue of that interest has exclusive jurisdiction.

As I suggest above, the utility of establishing what Finch's citations go to establish is not overwhelming, but his idea is interesting, and his introducing it is a nice illustration of the way his argument covers every angle. If one concedes that the Uniformity Act does not clearly oust ecclesiastical courts from dealing with first offenders against the Prayer Book, it is still reasonable to say that the statute is ambiguous in the mere sense of confusing about exactly how it means some kind of concurrent spiritual-temporal

jurisdiction is to work. It sets up "a kind of concurrency" in general terms, but for some specific situations it deals with, such as first offenders against the Prayer Book, it is hard to believe, though not impossible, that full concurrency could be intended. To resolve the doubt in favor of full concurrency, *per* Finch, would be to violate in the realm of statutory interpretation a policy of preferring secular courts that is usually observed in other circumstances. It would be like letting the abbot's defamation suit go forward because in one sense it was not objectionable, or like tolerating an ecclesiastical suit for "whore", even though there was temporal damage, merely because in general ecclesiastical suits for that slander were lawful.

(g) Finch also urges the royal interest in favor of his construction of the statute: If only the secular punishment can be imposed on the first offender, the Queen will profit from the forfeiture of a year's income. If the first offender may be deprived, she will lose this profit. The statute-makers seem to have intended that she should have it and therefore should not be read as undermining their own intention by a subsequent general provision. Moreover, when there is doubt about a statute's meaning, it is legitimate to count the royal interest—part of what moderns would ball the "public interest", be it remembered—towards tipping the balance.

This point only argues against allowing deprivation of first offenders, not against other spiritual sanctions. One might suggest, however, that the simplest way to insure the Queen's interest is to exclude ecclesiastical courts from touching first offenders at all. If an ecclesiastical court "got there first" and imposed a sentence short of deprivation, there would at least be a problem about vexing the party again in the temporal courts, and another one as to whether the forfeiture could be imposed on the strength of an ecclesiastical conviction without retrying the party in a secular court. It would also be a problem whether secular proceedings for a repetition of the offense after ecclesiastical conviction must result in deprivation, with loss of the forfeiture. Short of the legal and moral problems, if we assume that retrial would be allowable but necessary to gain the forfeiture, conviction of a man already punished would probably be hard to obtain. The Queen's interest would only be completely safe if the ecclesiastical court "got there second" and afflicted a man already in jail, without income and with additional spiritual censures—perhaps not a bad thing to a rigorist.

(h) Near the end of his argument, just before making point (g), Finch adds a double edged concessionary twist. His purport throughout is that ecclesiastical courts had no power to deprive before the statute and gained none by the statute. He now adds "but admitting that this offense would have been punishable by deprivation by the common law, yet that is now altered by this statute, but inasmuch as it [the statute] gives authority to the Bishop to deprive for this offense it is good proof that he had no authority before." In other words, I take it, "you can't have it both ways." If you say the offense was subject to deprivation before, then the best reading of the statute, on the grounds above, is that the statute changes the previous law. It is better taken as cutting off a pre-existing ecclesiastical power than as confirming one. If, on the other hand, you construe the statute as conferring power to deprive—well, you are wrong, but in any event you have excluded yourself from arguing that the power existed before. The statute is better mistaken as a grant of new jurisdiction than as a confirmation of old—now let us see if you can make a serious case for the former. (One side of this point may be useful for the purpose that Finch shows no sign of pursuing, viz. arguing against High Commission

jurisdiction specifically. If the statute gives new jurisdiction, it would appear to give it to the regular ecclesiastical courts only, for the language of the clause that might have that effect speaks of "Archbishops, Bishops, and…their officers. " Arguably, for the High Commission to have jurisdiction it would be necessary to show that the relevant powers were vested in the ecclesiastical system before the statute. If that is not showable, or if the other side were willing to stake its case on showing that the statute gave the jurisdiction to deprive, then nothing was given to the Commission. A *de novo* donation ought to go only to the designated recipients.)

Finch, for Caudrey, is succeeded in the MS. report by two lawyers on the other side, Hutton and on a later day Attorney General Coke. Hutton's points were as follows:

(1) He takes issue with Finch's argument that the special verdict failed to find that Caudrey's deprivation was a formally sufficient judicial act because it attributed the sentence to one Commissioner with the assent of others. Hutton maintains that the language of the patent permitted such procedure. He also claims common law analogues for treating certain acts "with A's assent" as A's acts.

(2) He excepts to Finch's proposition that clergymen are never deprivable for *mala prohibita*, claiming authority to show that they are deprivable for the *malum prohibitum* of letting a house attached to the living decay.

(3) He does not challenge Finch on the actual meaning of the Uniformity Act, but falls back on the proposition that if Caudrey was wrongfully deprived the remedy is by appeal within the ecclesiastical system. Since this proposition recurs in both Coke's speech and what was said from the Bench, let us note here the difficulty it seems to present—a much worse one than the same point in *Cheinye*. If the Uniformity Act confers no jurisdiction on ecclesiastical courts, either *de novo* or by confirmation, or if it removes jurisdiction from them, how can it be mere ecclesiastical error to take jurisdiction contrary to the statute? Is that plausible except on the radical premise that any statute regulating ecclesiastical courts is only enforceable on ecclesiastical courts by themselves? In *Cheinye*, by contrast, the High Commission hardly violated the Supremacy Act, save for the sense in which the statute can be said to command the Commission to apply the real or correct ecclesiastical law to cases in its jurisdiction. It is plausible to say that that statutory imperative can only be enforced within the ecclesiastical system, where the expertise lies.

One reading of the Uniformity Act does, however, tend to support Hutton's argument. It should be articulated in making the argument, as it is not in the report, but perhaps it is understood. Suppose one says that deprivation of a first offender is unlawful by non-statutory ecclesiastical standards, but that the statute itself in no way, by words or intent, actually bans the application of that sanction to a first offender by ecclesiastical courts. Then clearly enough depriving such an offender is ecclesiastical error. The only sense in which it might be considered a violation of the statute within common law control is the sense in which the same can be said of the High Commission's sentence in *Cheinye*—the statute implicitly commands correct application of ecclesiastical law, and common law courts responsible for the statutory rights of the subject may enforce even that requirement, at least against flagrantly unwarranted decisions or against a court from which there is no guaranteed appeal. The best riposte to this is intelligently anticipated by Finch: The reason deprivation of a first offender is bad ecclesiastical law—because the offense is a *malum prohibitum*—is itself derivable, in part though not exclusively, by

interpretation of the statute; the interpretation is common law business; ecclesiastical courts are not entitled to hold implicitly that the statute does not does not create the offense or deem it a *malum prohibitum*, whether or not a reasonable case for regarding it as a *malum in se* could be made by ecclesiastical lawyers independently of the statute. Needless to say, the underlying thesis—that the statute does not have the positive effect of ruling out deprivation of a first offender—is vulnerable, for reasons shown by Finch.

For the rest, it seems to me that these problems can only be avoided by focusing on policy for handling special verdicts. I.e., one can argue that special verdicts finding formally sufficient judicial acts by ecclesiastical courts should be uniformly taken as finding acts which are either valid or voidable within the ecclesiastical system; the common law courts may sometimes be entitled to scrutinize the validity of such acts, but they should do so by way of Prohibition.

(4) Finally, Hutton makes an argument tending to uphold the High Commission's jurisdiction, as opposed to that of ecclesiastical tribunals generally, the point omitted by Finch. Hutton claims authority in the form of a holding from 23 Eliz. that the Commission may take cases normally within episcopal jurisdiction without the Bishop's consent. The immediate relevance of this would be to argue that although the Uniformity Act in terms reserves jurisdiction to Archbishops and Bishops, the High Commission may meddle with the offenses covered by the statute if the monarch gives it authority to. The premise would seem to be that the Commission may be authorized to take any ecclesiastical case, since many of the Uniformity Act offenses are hard to construe as "enormities." It is implied that the statute of 23 Hen. VIII (Chap. 2 above) is no more a bar to the Commission than the language of the Uniformity Act. With its implications, Hutton's claim is much too broad in the light of virtually all decisions on the High Commission's jurisdiction. A more modest proposition is perhaps tenable: The Uniformity Act does not intend to exclude the Commission from prosecution of crimes covered by the act if they are in themselves serious enough. Obviously, I should think, only *mala in se* would qualify, and only some of those, but perhaps clerical subversiveness, if it can be made out to be a *malum in se*, would be sufficiently grave.

We come now to Coke's argument in the MS. It is not easy to come to terms with. The first part is a learned and high-flying discourse much to the same effect as the "Treatise" in 5 Coke's Reports—an assertion of the monarch's ecclesiastical supremacy at common law. I suspect Coke must be understood as speaking in part in favor of the monarch's prerogative for its own sake, in his capacity as Attorney General, as well as for the party, Acton, who was trying to have Caudrey's deprivation upheld. The important question is what he hoped to accomplish for his client in the case at hand by insisting elaborately on the Supreme Headship at common law.

To start with, the argument is presumably meant to cover the first technical quibble raised by Finch. If the monarch by virtue of the common law prerogative could create the equivalent of the High Commission without statutory warrant, he could arguably not be bound by the statutory requirement that the Commissioners be natural-born subjects. This seems to involve a large and dubious assumption, however—that the Supremacy Act does not or could not limit the pre-existing prerogative. Coke seeks to avoid being challenged for assuming too much by noting a feature of the special verdict: The jury found in terms that the Commission was appointed "*authoritate suprema*" and not "*virtute actus tantum.*" (One would suspect that it was told by the trial judge so to find.)

Coke therefore seems to be urging the theory that the monarch has two powers—an unlimited common law one and a (possibly) limited statutory one. In any given instance, it may be questionable which one he drew on in constituting a High Commission, but here there is no question because the jury found as a fact that the Queen drew on her common law supremacy. 1 Eliz. does not recognize and narrow a pre-existing prerogative; it leaves that prerogative intact and confers a new and separate power more limited or not as the case may be.

Secondly, asserting the common law prerogative goes to say that the High Commission may be given any part of ecclesiastical jurisdiction if the monarch chooses to draw on the prerogative. It cuts off such arguments as "The statutory power to create a High Commission is only power to create a special tribunal for enormous crimes; whatever else is true, speaking against the Prayer Book is not an enormous offense." A more important argument, in the present context, is not so clearly cut off—viz. that the Uniformity Act created the offense of speaking against the Prayer Book, and all the common law prerogative in the world would not give the monarch power to confer jurisdiction over an offense that did not exist at common law. If, however, one can rebut Finch's arguments and make out that the offense in some way antedates the Uniformity Act, it is helpful to assert the common law prerogative. If the prerogative is separate from the powers conferred by the Supremacy Act, the prerogative should be exercisable without reference to limitations imposed on ecclesiastical jurisdiction by the Uniformity Act. If speaking against the Prayer Book is a "common law" ecclesiastical offense, the monarch, so long as he draws on the prerogative, may assign it to any ecclesiastical court, even though *qua* offense created by the Uniformity Act it is prosecutable only in regular ecclesiastical courts.

As we have seen, however, these arguments do not answer anything that Finch certainly said, apart from the "technical quibble", though they respond to possible arguments on his side. Finch's claim was not centrally that the High Commission had no business dealing with Caudrey, but that ecclesiastical courts generally had no business proceeding against him, or at least no authority to deprive him. The most interesting question about Coke's lead-off argument is whether he conceived it as an answer to Finch's central contention.

I think it is possible that Coke conceived his argument as having that potential. He is at pains not only to prove the monarch's supremacy at common law, but to show its strength. I shall not go into his illustrations and authorities one by one, because they essentially cover part of the same ground as the printed "Treatise." The effect is to show how very much the monarch as Supreme Head can do, as well as showing that his headship had been continuously recognized in spite of Popery—how very much he could have done without statutory acknowledgment of his supremacy and can now do notwithstanding it. For example, according to Coke, the monarch could, as easily without Parliament as with it have accomplished what the Fourth Lateran Council actually accomplished: alteration of ecclesiastical law so that tithes must henceforth be applied to support of parish priests. Most tellingly of all, for this point speaks to a living issue rather than a historical fantasy, Coke asserts strongly that the monarch may "*suprema authoritate*" grant commissions to review sentences by the Delegates. (I.e., the statute of 25 Hen. VIII, c. 19—does not hedge the common law prerogative so as to make decisions by the Delegates unreviewable in any way. That is an entirely respectable position, but it

was not a unanimous position, and judicial decisions later than *Caudrey* are ambiguous. Coke says that he could show "seven precedents" of commissions to review decisions by the Delegates. He undoubtedly could—there were several practice precedents for such commissions, but their legality had not been upheld judicially, and when the effect of the statute finally came to be scrutinized by the courts strong arguments were advanced on both sides. Coke was not strictly entitled to treat the legality of review commissions as a fact, though so regarding it was reasonable on the best evidence available when he spoke.)

Coke's emphasis on the strength of the common law prerogative is encouraging to the following construction of his intent with respect to the case at hand: The ecclesiastical prerogative will by itself justify spiritual punishment of a clerical defamer of the Prayer Book, including deprivation. If there were no Uniformity Act requiring exclusive use of the Prayer Book, the monarch could make a prerogative order to the same effect and could direct ecclesiastical courts to punish at least clergymen for disobeying the order or expressing disapproval of it. Laymen would no doubt pose a problem—to the degree that the monarch used the prerogative to make new rules, laymen would have a strong claim that they could not be subjected to liability without Parliament, even as lay members of the Church. But the prerogative amounts to very broad power to manage the Church internally, which includes making rules for the clergy and punishing them for violations. It makes no difference whether the rules are strictly new (let us avoid ultimate questions by assuming, realistically in our context, that the rules are about "order and discipline", not fundamental religious matters.) Perhaps *mala prohibita* as a general class cannot be punished by deprivation—new rules made by Parliament on subjects within ecclesiastical jurisdiction without express authorization of deprivation as a remedy against clerics—but rules made by virtue of the prerogative properly used are outside that limitation.

Now, one can obviously say that this hypothetical is all very well, perhaps, but in fact requiring the use of the Prayer Book and imposing penalties for offenses against it were not effected by prerogative but by statute. Even if the Uniformity Act, like perhaps the Supremacy Act, did not limit the prerogative, the prerogative was not employed, so the question remains pure and simple what the statute provides, including whether in the relevant aspect it creates a *malum prohibitum* or declares an already existent *malum in se*. The only reply I can think of to this is to fall back on the "*suprema authoritate*" in the special verdict: It is a conclusive fact in this case that the action taken against Caudrey was by virtue of the monarch's prerogative authorization. It takes some doing to stretch that phrase from a basis for saying the High Commission acted legally because it was authorized by the Queen to entertain this kind of case to saying that the very crime and its punishment, at least before the High Commission, were creations of the prerogative, but perhaps Coke was ready to suggest the stretch.

The argument is certainly extreme. I do not think Coke *in propria persona* can have been comfortable with its implications. I shall show below that Coke's own report of *Caudrey* reflects no such argument. There, assertion of the monarch's prerogative in the reported "resolutions" of the court figures as a gigantic tail wagging a miniature dog. That in itself is a reason for doubting that Coke actually did mean to use the ecclesiastical prerogative to evade all problems about the construction of the Uniformity Act. But if he meant so to use it, he must be given credit for characteristic cleverness in the *persona* of advocate. For if the argument would sell, it amounts to a splendid gambit, an end-run

around all the complexities raised by Finch, a way not to face the meaning of a none-too-intelligible statute. Perhaps the relative pettiness of the immediate objective and its salutariness from an Establishment point of view would tend to make the argument vendible. For the end of all was to be rid of a non-conformist minister. Convince a court that is unlikely to be sympathetic with Puritans that the Royal Supremacy in all its historic color is probably sufficient justification for dealing harshly with Caudrey, and perhaps the court will look past the tangles of Finch's all-too impressive defense of a wretched displaced non-conformist. After all, the court is only asked to construe a special verdict in favor of the Crown and the ecclesiastical authorities—and in favor of an innocent successor to Caudrey, who stands to lose his living. (A Prohibition case, where the court is nominally asked to protect the "royal dignity" against encroachment, is perhaps a less eligible occasion for going a bit light on the hard problems of the law.)

Coke puts his assertion of the common law prerogative first and devotes a disproportionate part of his time to it, if the MS. reflects reality. This is a ground for surmising that it might carry conclusive weight. His argument in the MS. goes on to further points, however.

(1)With specific citations, Coke restates the argument already made by Hutton that if deprivation of Caudrey was erroneous the error was one of ecclesiastical law, not subject to the scrutiny of this court. His first citation is *Cheinye*. I have already discussed how that case is both relevant for this one and convincingly distinguishable. Coke emphasizes the most hardboiled side of *Cheinye*, stressing how hardboiled it was: In that case, the High Commission did not simply err in a matter of pure ecclesiastical law (by taking over a case pending elsewhere); it violated the terms of its patent by sentencing Cheinye on a presumptive confession, without factual investigation of his guilt. In his own report of *Caudrey* (there is no intimation of this in the MS.), Coke says that Caudrey was deprived on non-appearance—i.e., like Cheinye, without direct proof of his guilt—and that exception was taken thereto. The exception was based on the Uniformity Act, not the Commission's patent, as in *Cheinye*, for the statute speaks of offenders convicted "by verdict of twelve men, or by his own confession, or by the notorious evidence of the fact." I.e., the statute seems to exclude a default judgment. The difference between violating a statute and violating a patent may make the cases distinguishable on this point, but if Caudrey was in fact condemned by default *Cheinye's* relevance as a precedent is enhanced.

Coke's other citation, Bunting v. Leppingwell, held that common law courts may not force their standards on ecclesiastical courts in some circumstances even though interests in the common law sphere are affected. A woman was sued for wrongfully marrying B when she was pre-contacted to marry A. Her husband, B, was not named as co-defendant, as he would have to be in a common law suit against a married woman. The court held that the ecclesiastical decree dissolving the woman's marriage with B could not be interfered with, even though the effect was to bastardize B's children without his having had a hearing. Thus, even quite objectionable ecclesiastical results must be accepted, including those that produce temporal loss—e.g., Caudrey's loss of his freehold living, if indeed he was wrongfully deprived. The precedent is well-chosen.

(2) At last Coke reaches the Uniformity Act. Rather than painfully expound it, Coke advances a clever argument anticipated by Finch. If, Coke says, a clerical defamer of the Prayer Book cannot be deprived for his first offense, he cannot be deprived for his second

offense either, except after secular conviction of the second (when his judicial deprivation would be nugatory, since he is already deprived *ipso facto*.) That is absurd; ergo the first offender may be deprived. Although not all the steps are articulated in the report, I think there is no doubt but that Coke hit on a substantial difficulty in the statute. One does not have to accept his reasoning, but it demands attention.

I can best explain Coke's argument by first expressing what the common sense interpretation of the statute seems to me: A first offender may, *pace* Finch, be punished by minor ecclesiastical censures before the secular courts touch him. He may not be deprived, however, until he has once been convicted and punished by secular courts and has committed the offense again at a time subsequent to said conviction. But then ecclesiastical courts may prosecute him and deprive him upon finding him guilty of such second offense. They need not wait on the secular tribunals to prosecute and convict a second time. For if they did have to wait, the statute's saving of ecclesiastical jurisdiction would be nearly empty as far as clerical offenders are concerned. They would be debarred from using their serious sanction for clerical discipline, deprivation. They would be limited to the vain motion of pronouncing sentence of deprivation on someone already deprived. To all intents they would be confined to punishing clergymen by minor sanctions. For second offenders, that would not be to much purpose. Why impose admonition or penance on someone who is liable to *ipso facto* deprivation? Better to promote his prosecution in a secular court and see that he receives the condign punishment. There is still less point in visiting minor sanctions on someone who has already suffered a second secular conviction and the greater penalty of deprivation plus a year in jail.

I see nothing in the language of the statute sufficient to defeat this interpretation. Coke's strategy, however, is to knock it out by concentrating on the second offender: Either no meaningful power to deprive is reserved to ecclesiastical courts, or they have such power against first offenders as well as later ones. It is not true that the statute poses no obstacle to allowing second offenders to be deprived by ecclesiastical process without waiting on a second secular conviction. For this contention, Coke has sound, if tricky, verbal grounds—hardly good enough, it seems to me, to overcome a "common sense" guess at what the ill-drafted statute intends, but still persuasive.

The statute says that a first offender "lawfully convicted, according to the laws of this realm, by verdict of twelve men, or by his own confession, or by the notorious evidence of the fact" shall forfeit a year's income and be imprisoned for six months. This language plainly refers to secular courts, for the act subsequently makes it clear that ecclesiastical courts may only apply ecclesiastical censures, which do not include forfeiture or jail. Speaking of second offenders, the statute says that one who "shall after his first conviction eftsoons offend, and be thereof in form aforesaid lawfully convicted" shall be imprisoned for a year and deprived *ipso facto*. "In form aforesaid" obviously refers to the first-offenders clause—i.e., repeats the requirement that conviction be by the laws of the realm, by verdict, confession, etc. The first-offenders clause refers only to secular tribunals. Therefore the second-offenders clause refers only to those. Therefore deprivation can only follow on conviction, in the manner specified, by a secular tribunal. Therefore ecclesiastical courts may never deprive, unless in the empty sense of depriving someone already deprived. That is absurd for the reason the "common sense" interpretation above gives. If the ecclesiastical courts' reserved powers mean anything,

those courts must have power to deprive at some point. But the sections of the statute we have looked at do not countenance ecclesiastical deprivation after one secular conviction any more than they countenance it before. Therefore the only part of the statute that authorized ecclesiastical deprivation at any point is the general clause permitting punishment of all offenders against the act by the censures of the Church. Those censures are in no way defined to exclude deprivation, and no distinction is made between first and second offenders in the clause permitting their use. Therefore first offenders may be proceeded against in ecclesiastical courts and deprived if the court does not see fit to give the culprit a second chance (whereas automatic deprivation requires two secular convictions. Note that this is both a corollary and an advantage of Coke's theory. The statute could be read as providing that a second conviction in an ecclesiastical court as well as in a secular one would result in *ipso facto* deprivation, though of course the other sanction, imprisonment, could not be imposed. But that is incompatible with Coke's reading. It is also improbable. The statute-makers are likely to have wanted to insure that a man would incur certain deprivation only after enjoying secular process of law. Ecclesiastical could after all not be obliged to deprive a second, or a thirteenth, offender. By Coke's theory, the price of this benign and probable result is that a first offender is in danger of deprivation if the ecclesiastical court gets its hands on him before a secular one. Freer and easier interpretation, merely by likely intent, would avoid the price.) So, with some spelling out, I take Coke's point to be. It has considerable force and is squarely on the statute. If accepted, it removes all need to rely on the Royal Supremacy at common law, all need to persuade the court that it may not scrutinize ecclesiastical error, and, failing the second, any need to make out that there was no ecclesiastical error (either because deprivation for a *malum prohibitum* is not always unlawful or because speaking against the Prayer Book is not a *malum prohibitum*.) The argument's only fault, if it is one, is that it takes the words of the statute very seriously. A cynic might say that gives the statute-makers too much credit—that rougher guesswork about their intentions is a better bet.

(3)Coke's last point, like his others, has the "something extra" that distinguished his advocacy. He starts by saying that the Uniformity Act, being in the affirmative, does not abolish any pre-existing authority. As I observe in discussing Finch's argument, this position as such is sound and standard. Express "negative" or disauthorizing language was usually necessary to do away with an existing jurisdiction, remedy, or procedure when a new one in the same area was enacted.

This point is obviously only of use if ecclesiastical courts could in fact proceed against the equivalent of defamers of the Prayer Book before the Uniformity Act and punish first offenders by deprivation. Coke does not rebut Finch's cogent arguments that no such power existed. It is possible that the high-sounding argument about the Royal Supremacy is meant in part to cover this weakness. I.e., it may be necessary to admit that ecclesiastical courts could not deprive for *mala prohibita*, nor for the *malum in se* of "speaking against religion" on the first offense. The only resource may be to argue that the monarch could at any time alter the ecclesiastical law, at least *quoad* clerical discipline, and by virtue of the special verdict had presumptively done so.

Coke does not, however, rest content with assuming the problematic premise—prior ecclesiastical power—and asserting that the conclusion is obvious by accepted canons of statutory interpretation. His final effort, as I understand it, implicitly admits that the

conclusion may not be so obvious and finds a reason for it beyond the "accepted canons." I have already suggested, in connection with Finch, why the Uniformity Act's "affirmative" appointment of secular procedures and sanctions may not obviously leave intact other procedures and sanctions admitted to exist—why, as Finch puts it, a "negative" ("and not otherwise") may be implied in this affirmative: There is no particular reason why a statute creating a new civil remedy should be construed to take away an old one without express evidence of such intent, but a criminal statute is not in the same boat. The precept that "affirmatives" do not imply "negatives" has no higher status than the rule that penal acts should be construed strictly. The latter maxim is applicable to the instant case. There is plenty of reason why an act appointing a stiff penalty for a first offense, but explicitly sparing first offenders the further grave penalty of automatic deprivation, should be construed as limiting what can be done to first offenders by any tribunal, if necessary even at the expense of prior powers.

Coke's final strategy is to shift from the Uniformity Act to the Supremacy Act. He claims to have a "clincher" for the purposes of the case at hand, for he introduces his last remark with the phrase "but to oust [or overcome—*d'ouster*] all argument in this case." Coke's point is that the Supremacy Act expressly authorizes the High Commission "to proceed as has been used before this statute." To spell out: Let us grant that the Uniformity Act, albeit without express negative language, destroys any pre-existing power in regular ecclesiastical courts—the Archbishops and Bishops specified in the "censures of the Church" clause—to deprive for a first offense. That might be equivalent to destroying all ecclesiastical power to deprive for a first offense if the Uniformity Act stood alone. To preserve the power would at any rate require falling back on the reserve of royal prerogative and the special verdict. But for present purposes it is not necessary to fall back on those. The letter of the Supremacy Act is sufficient. For that statute in terms permits the High Commission to do anything that could previously be done by ecclesiastical courts, whether or not it still lay in the power of regular ecclesiastical courts. Therefore, granting that before the Elizabethan Settlement any ecclesiastical court could have punished by deprivation, the High Commission may do so now. It makes no difference whether the Uniformity Act destroys other ecclesiastical courts' power to deprive.

This argument of course involves interpretation of the Supremacy Act. It requires giving literal force to the words "…such jurisdictions [etc.]…as by any ecclesiastical power or authority have heretofore been…exercised or used…" But Coke's interpretation was to enjoy considerable favor. Its usual application was to prove that the High Commission could imprison for heresy because episcopal courts once had power to do so, though by repeal of the relevant statutes they no longer had it. It is if anything more convincing to argue that the High Commission may deprive for defaming the Prayer Book because regular courts could once do so. That is true because power once exercised solely by virtue of now-repealed statutes may be trickier to bring under "heretofore…exercised" than prior *de jure* power. The argument of course still needs the shaky premise that power to deprive defamers of the Prayer Book did in a meaningful sense exist before the Elizabethan settlement.

With this Coke rested. The court's immediate response, according to the MS., was to delay responding. Chief Justice Popham, noting that the case was of great consequence, said that the judges wanted to advise with their brethren of the other common law courts

as well as among themselves. On a later day, Coke moved for judgment, and it was entered for his client.

The report gives the judges' position in the form of a *per Curiam* opinion:

(a) The first proposition endorsed is that Caudrey's deprivation was good because the statute in the affirmative does not take away the authority which spiritual courts had at common law. Nothing is said as to why one should assume that spiritual courts did have relevant authority at common law.

(b) The court held that deprivation by one High Commissioner with the consent of others was good enough. No large theses about the common law prerogative or the meaning of the Supremacy Act are put forward. Rather, the opinion distinguishes between a judicial act and a property transaction; A Dean cannot make a lease of land belonging to the Dean and Chapter "with the assent of the Chapter"; the lessor must appear (in pleading or a special verdict) to be the Dean and Chapter as a body. The standard for a judicial act is less exacting; "this is the act of one judge with the consent of two others" is equivalent to "this is the act of three judges as a body." The point is pure common law. Nothing is said about the other technicality raised—whether the special verdict was defective because it did not say the High Commissioners were all native Englishmen.

(c) Finally the court held that whether or not Caudrey was duly deprived his deprivation was at worst only voidable within the ecclesiastical system. ("Also, admitting that the deprivation is not duly done, yet without question it is not void, but voidable only by suit in the spiritual court, and so inasmuch as it is not void at this point [*adhuc*], the parson [Caudrey] is out of possession of the parsonage, for he is not parson, and so cannot enter there and make a lease at this time [wherefore the fictitious lessee must lose in an action of Ejectment.]" I have already said what I think is wrong with this argument, but it does follow *Cheinye* at least superficially, and it does take advantage of Finch's weakest sector. (His attempt to show that Church courts had no prior authority to deprive someone in Caudrey's position led him into propositions about ecclesiastical law, which invite the response that ecclesiastical courts are the only competent judge of their truth.) The proposition that ecclesiastical courts may have had prior authority, and that whether they did is an ecclesiastical question, combined with the court's perfectly traditional view that the affirmative statute did not take away any prior authority that existed, in a sense justifies the decision. It seems to me, however, that the court as reported by the MS. was all-too willing not to tangle with the meaning of the Uniformity Act—too willing to treat as a reality the rather phony issue whether a crime which common sense would say was unheard of before the statute was already within ecclesiastical cognizance and to evade deciding how the statute-makers actually meant to have offenders dealt with. To do him justice, Coke showed the court rather more elegant ways to get where it wanted to go than the court shows any sign of taking up. Resorting to a *per Curiam* opinion in a case as carefully argued as this one probably signifies, let us say, a preference for letting Coke's theories about the prerogative stand non-contradicted and uninvestigated and for not sinking into difficult questions that might have to be resolved in favor of a non-conformist.

The task remains of comparing the MS. with the printed reports. Popham's report overlaps both Coke and the MS. and differs from both in its presentation of the court's holdings. Like the MS., it does not have the court embracing any far-reaching doctrines

about the monarch's prerogative. For the arguments of counsel, the report is negligible. It notes briefly the technical points made by Finch (without naming him or the opposing counsel) and his thesis that the Uniformity Act banned deprivation until the second offense (without any of the subtleties of his argument.) As to the court's opinion, Popham distinguishes the following holdings:

(a) Deprivation by one Commissioner with the assent of others is unobjectionable because it is good ecclesiastical form; that is the proper standard, rather than rules applicable to the judicial acts of a secular commission.

(b) It is not a fault that the verdict failed to find the Commissioners native subjects, for two reasons: (1) Common intendment—i.e., if the verdict said nothing even by implication on the subject, it would be presumed that the Commissioners were natives unless the contrary were asserted as a fact. (2) Actually, the verdict did say something by implication, viz. that the Commission was appointed "*secundum tenorem & effectum actus*." That is a sufficient finding that the Commissioners met the native-birth standard and any others. {Note that the court read the verdict as referring to a Commission constituted pursuant to the Supremacy Act, not to the Queen's common law prerogative.

(c) Caudrey's deprivation was lawful because the Uniformity Act is in the affirmative. I.e., (as the Popham version explains) the language fixing a penalty for a first offense restricts only secular courts to that penalty, leaving ecclesiastical courts unaffected. As in the MS., there is no justification of the proposition that ecclesiastical courts had any prior authority to leave intact.

(d) The Supremacy Act and the High Commissioners' patent warrants their punishing the offense at discretion. So I take the words: "…by the Act and their commission, they may proceed according to their discretion to punish the offense proved or confessed against them, and so are the words of their commission warranted by the clause of the Act." I am not sure what this holding adds. There could possibly be, despite (c), some doubt whether the Uniformity Act leaves regular ecclesiastical courts with power to deprive. But since, as (c) says, it does not cut off ecclesiastical jurisdiction over first offenders altogether, the permissiveness of the Supremacy Act supports the conclusion that at least the High Commission may be authorized to use any ecclesiastical sanction.

(e) The Uniformity Act saves ecclesiastical jurisdiction. To add this as a separate holding only underscores the obvious. It does not solve the problem whether ecclesiastical jurisdiction is saved *quoad* deprivation of a first offender.

(f) The last point in Popham seems only to reinforce (d) –the wide statutory warrant for conferring powers on the High Commission, including powers not enjoyed by regular ecclesiastical courts. It is first said that "all the bishops and popish priests were deprived by virtue of a commission warranted by this clause in the Act." This does not seem to be more than a historical truism—that early in Elizabeth's reign the High Commission was used to get rid of Catholic clergy. Secondly, the report cites a recent case in which all the judges allegedly agreed that the Commission, being duly warranted by its patent, was entitled to fine a "vicious liver" 200 marks. Asserting the Commission's power to impose secular sanctions in the context of the present case—where there was no direct question about that power—seems to say that the Commission's power to deprive cannot be challenged even if ordinary ecclesiastical courts are not conceded the same power. (*Quaere* how compelling that is. Because secular sanctions available to no ecclesiastical court without—*pace* Coke's high prerogative theories—statutory warrant can be given to

the Commission, that court can also be excepted out of a statute limiting the use of an ordinary ecclesiastical sanction in a particular situation?)

To summarize: Aside from the technical exceptions to the verdict, Popham's report differs from the MS. mainly in the omission of one important point—the court's holding that the rightfulness of Caudrey's deprivation was an ecclesiastical question. Secondly, Popham has the court upholding the High Commission's specific authority to deprive, which tends to moot the matter omitted.

Turning now to Coke's report: After stating the case, Coke summarizes the arguments of Caudrey's counsel (not identifying them by name.) The summary contains some points and emphases that do not appear in Finch's argument in the MS. On the other hand, it does not reflect the complexity which that argument seems to me to have. This is not to say that Coke is unfair to the losing side or represents its case so as to make weaknesses prominent. On the contrary, he gives a clear and solid argument, which certainly conveys the essence of what can be, and was, said on Caudrey's behalf. All I suspect him of is just that—formulating the essence with some loss and possibly some gain. Finch might have thought his various angles and authorities too boiled down to "what it comes to"; he might have had to give Coke credit for a better statement than his own of parts of his contentions and for adding some considerations he failed to develop.

Coke attributes four arguments to Caudrey's counsel, of which the first comprises the substantive points. The other three are the technical exceptions to the verdict, plus the further argument, absent from the MS., that it was unlawful to deprive Caudrey by a default judgment even if his deprivation was otherwise justifiable. Nothing about Coke's representation of the technicalities seems to me to vary from the MS. His picture of the substantive contention has two distinguishing features. First, it speaks more clearly than Finch in the MS., if more exclusively, to the policy of the Uniformity Act. It addresses what common sense cannot miss after all is said that can be about *mala prohibita* and *mala in se*, affirmative and negative statutes, and the like: Viz. the Uniformity Act appears to be "*moderatum & aequum* "in that it intends to spare non-conformist clergy until they have been put on warning by the solemnity of conviction and punishment for a first offense. (To embroider in my words, not Coke's: The act appears to allow for what realistic and even-tempered legislators in 1559 ought to have allowed for—that a new liturgy coming in a succession of new liturgies was not going to please everybody, that the Settlement would not at once be accepted by some of those who would have preferred to settle somewhere else. Wise legislators would be both, insistent and indulgent, insistent that the clergy recognize the Settlement and start cooperating right now, indulgent in the light of recent history and an agitated climate of opinion. The Uniformity Act seems to practice both virtues by making a first offense highly penal, but not running men out of their livelihoods and the Church's service until it has really been brought home to them that the Settlement is for keeps and demands respect.) In so far as Coke emphasizes, rather than represses, the strong common sense appeal of the losing case, he sets up the winning one as a triumph for the "artificial reason of the law", the paradoxical deep truth of our societal understandings, embedded in the law that oftentimes belies what seems to make sense. Could he have been conscious of this effect? It is a "paradoxical deep truth" to which his "Treatise" will point: The Royal Supremacy is so embedded in English hearts and institutions that what everyone would have thought—

that the Pope, however wrongfully, had at least successfully enjoyed supremacy over the English Church through much of its history—comes out a very superficial semblance.

Secondly, Coke introduces a two-pronged argument specific to the High Commission: The clauses preserving ecclesiastical jurisdiction in the Uniformity Act speak only of Archbishops, Bishops, and other Ordinaries; therefore the High Commission is excluded. If, however, this proposition is denied and the High Commission is conceded as much jurisdiction as other ecclesiastical courts, then it is limited in the same way as other courts—i.e., may not deprive for a first offense. This argument, in both branches, is clearly relevant. Save for a hint, it is missing from the MS., which of course need not mean Finch did not make it. If he left it out, the cause would not necessarily be negligence. He might have figured that there was little hope of persuading the court that the Commission's deprivation of Caudrey was unlawful if the court could not be convinced he was simply not deprivable. That would probably be a realistic calculation both practically and legally. (Practically because there is not a lot of sense in excluding the Commission from doing what other ecclesiastical courts may do by way of clerical discipline, when there is no lay interest in local justice and the avoidance of secular sanctions without secular process of law; because offending the Church dignitaries to no great purpose is foolish; because it is pretty vain motion to undo one tribunal's longstanding sentence of deprivation when the same sentence could be obtained in another—a different matter from prohibiting proceedings in the wrong court before they have occurred. Legally because it is pretty literal reading of the statute to take its mention of Archbishops and Bishops as intended to exclude the High Commission.) If Coke ascribed the argument to Caudrey's counsel without the warrant of what they actually said, motives are assignable. It was he who needed an argument specific to the High Commission in order to refute it, and refutation opens the way to his higher themes.

From his summary of the arguments on Caudrey's side, Coke proceeds to the "resolutions" of a unanimous court, cast as responses to the "objections" above. Arguments on the side he himself represented are not given, and there is no mention of his own role. These are the "resolutions":

(a)The substance and the exception to Caudrey's having been deprived by default are covered by one resolution going to interpretation of the Uniformity Act. It has several sub-divisions:

(1)The affirmative statute does not take away any existing ecclesiastical power (as was held according to all accounts.)

(2) Secular and spiritual punishments have different ends and means—"the one to punish the outward man, the other to reform the inward." Only Coke's report has the court articulating this truism. What function does it serve? As we have seen, it is dubious to deny a penal statute restrictive force just because it does not use express negative language. It is a better argument to say that a statute appointing a secular penalty has no restrictive reference to spiritual penalties without express language, because by the principle stated the two kinds of penalty simply "fail to meet." So to speak, the legislature may mean to exclude other secular penalties when it appoints one affirmatively, but it hardly means to abandon souls to the devil. It may of course insist that ecclesiastical courts follow Parliament's judgment as to what "treatment" is good for souls in particular circumstances, instead of using their own discretion, but the odds are against Parliament's wanting so to insist. For the most part, legislation reshapes and corrects secular law.

Therefore highly explicit evidence of intent to limit the remedial discretion of spiritual courts must be shown.

Secondly, I would speculate that emphasizing the distinct end of spiritual law is helpful for reaching the conclusion that Caudrey's deprivation was not ecclesiastical error. I.e.: Assume for the sake of argument that whether there was ecclesiastical error is not beyond common law scrutiny. One approach to deciding whether there was error is to take on such specific questions as "May deprivation be used as a sanction for a *malum prohibitum*?" and "Is the seeming statutory offense of speaking against the Prayer Book actually an instance of a longstanding ecclesiastical crime for which deprivation is an eligible sanction?" Another approach is to say that the very end of improving the "inward man" requires that courts with that function have wide discretion in the choice of sanctions. They are never engaged in applying the penalty to the crime that has been committed, but in deciding what will do the particular criminal the most spiritual good. Perhaps if there were perfectly certain answers to the specific questions above—analogous to an unmistakable Parliamentary intent to curb ecclesiastical discretion—it would be possible for an outsider, such as a common law court, to say "The ecclesiastical court has erred." Short of that, there must be a strong presumption that application of any sanction on the list of recognized spiritual ones is an exercise of lawful discretion and therefore "correct ecclesiastical law." To say otherwise belongs only to insiders—superior ecclesiastical courts, part of whose function is to reconsider the discretionary decisions of inferiors. Leaving aside the special case of the High Commission (or dismissing it in the cavalier manner of *Cheinye*), the generosity of ecclesiastical appeals is reason for supposing that inexpert "spiritual physicianship" will almost always be corrected. Without at least the presumption that any spiritual sanction is lawfully applicable at discretion to any crime within ecclesiastical cognizance, the ecclesiastical system would be turned into something foreign to its purpose—a mere structure of rule-bound courts, indifferent to the inward man so long as the outward gets what by the law he has coming to him. (It is ironic that "mere rule-bound courts" are what Puritan hyper-sensitivity to inward states saw in the ecclesiastical system.)

(3) The statute in any event expressly saves ecclesiastical power to apply any sanction hitherto used to the offenses in the act. As above, creating a new temporal sanction does not take away the old ecclesiastical ones; in addition, if instead of creating some new sanctions the statute said nothing at all about penalties—but merely commended the use of the Prayer Book in churches—ecclesiastical courts would have authority to apply their traditional censures at discretion to clerics who disobeyed or "depraved" it. (I take it that this means even if the saving had been omitted as well, but *a fortiori* with it.) The question is still left open whether deprivation of a first-offending clergyman for offenses against the Prayer Book or the equivalent was really "hitherto used" and not against positive rules of ecclesiastical law, except as the point above about the distinct end of spiritual law is a kind of answer.

(b) One High Commissioner acting with the assent of others is unobjectionable because (as in Popham) it is good ecclesiastical form. The court's opinion in Coke elaborates with the generality that faith and credit should be shown to judicial acts in the ecclesiastical sphere. For this the two cases used by Coke in his MS. argument are cited—*Cheinye* and *Bunting*. The cases and the generality they support are brought up solely in connection with the technical objection to the verdict.

(c) The Commissioners will be presumed native subjects. Three reasons are given for this. Two are the same as Popham's ("common intendment" and the verdict's having found generally that the Commission was constituted in accord with the Supremacy Act.) The third is that the Supremacy Act is declaratory, so that the High Commission could have been created without statutory warrant. Here and only here, in connection with the technicality about the Commissioners' nationality, are the grand theories urged by Coke in his MS. argument touched on. As reporter of the court's "resolutions", Coke says the statute was held declaratory partly on the basis of its title ("An Act Restoring to the Crown the ancient Jurisdiction over the state ecclesiastical etc.") and partly on the basis of its "body" But there is no indication whether the judges actually said anything about the body of the statute, nor of how they proposed to apply the declaratory theory to the case at hand, even to the quibble about the Commissioners' native status. Coke launches into his "Treatise" without any real transition; what exposition of the "body" of the statute effectively means is the whole elaborate historical case for the common law prerogative. Coke admits frankly that this is his own contribution. There is no similar admission as to other features of the reported "resolutions."

Notes to Cheinye and Caudrey

1. (*Cheinye*) The reports of this case are as follows. Note that details suggest that the history of the litigation was somewhat more complicated than the accounts in the text. If so, it makes no difference; I have synthesized all reports in recounting the case.

Harg. 15, f. 134b. Dated M. 26/27 Eliz. Court not specified. Gives Cheinye as plaintiff in the action of Trespass. States the facts and gives argument by Wroth for Cheinye.

Harl. 6687, f. 730. *Sub. nom.* Cheyny v. Frankwell. Dated T. 29 Eliz. Court not specified, but the source is Coke's interleaved Littleton, which runs to Queen's Bench cases in which Coke was involved (as we know he was in this one from Leonard.) Does not state facts but summarizes the issues and rulings. Hard to read, but agrees with Leonard as to what was decided. If dates in the two MSS. are correct, note that the gap between M. 26/27 and T. 29 is rather large.

Leonard,176. *Sub.nom.* Frankwell's Case. Dated T. 30 Eliz. Has Parson Frankwell deprived and the unnamed new clergyman suing Frankwell for carrying away tithes.

Leonard describes both the first round and the Writ of Error. The former is plainly in the Queen's Bench, for Coke and Wray speak individually. (Arguments on the side opposed to Coke are summarized, without naming the lawyers.) The Writ of Error is clearly in the new Exchequer Chamber, for the judges who speak, Anderson and Periam, were Common Pleas judges who would have sat on that court.

These things would scarcely be worth mentioning if a disturbing note were not introduced by Justice Periam, for he refers to a time when the ccase was in the Common Pleas. (At that time, he says, the civilian Dr. Clark was consulted about whether an appeal would lie from the High Commission.) It seems unlikely that "Common Pleas"is a mere slip for "Queen's Bench" , because the Common Pleas judge Periam remembered the episode precisely, including the civilian's name, which would suggest that it took place in his court. One can only speculate as to how the same case, or at least the same in substance, got into both the Common Pleas and the Queen's Bench. The best guess is that Cheinye and Frankwell sued each other in different courts but eventually agreed to have it out in the Queen's Bench, whereupon the Common Pleas suit was dropped. Small oddities in the reports—dating and confusion about which party was plaintiff and which defendant—give that hypothesis a little support.

Add. 24,845, f. 129b is a strange report, which probably amounts to notes on *Cheinye*. The case is summarily stated at the end of the document: Incumbent "Cheney", being deprived by the Bishop of Lincoln appealed to the Archbishop, pending which appeal Cheney was sued before the High Commission and deprived by that court. The points in the document are ones which the straightforward reports show were made in *Cheinye*, or at least points relevant for that case.

The document is dated M. 15/16 Eliz. , however, (court not indicated.) It starts with the generality that the High Commission has power to deprive, and someone identified as "Recorder" is reported to have said that there had been several such deprivations. The document states next that "this case" was before a Bishop and that while it was pending the party was sued for the same cause before the High Commission, which latter suit was "not good." ("This case" sounds like *Cheinye*.) The document

proceeds to report the opinion given by a civilian "being there": A person sued before an ecclesiastical judge should not be sued for the same cause before any other ecclesiastical judge; further, an erroneous ecclesiastical sentence is "avoidable" by appeal, and appeal suspends execution, but a sentence given by the Pope or the King's commissioners will be "void" by a supplication to the King to make a new commission or to the Pope to make new delegates; such supplication does not, however, suspend execution of the existing sentence.

The document then jumps to P. 25 Eliz. (close to *Cheinye*, but still a little earlier than the clear reports of the case.) Remarks by Fenner—whom we know to have been of counsel in *Cheinye*—are given: It had been adjudged in the King's Bench that if "Commissioners" give sentence in time of Parliament and then the same Parliament pardons the offense by the general pardon the said sentence is void, and therefore—*per* Fenner—when "commissioners" give erroneous sentence "it will be void in itself [*en lui mesme*.]

Next, "in the same term" (P. 25 presumably) it was disputed between two civilians whether, if a suit is pending before a Bishop or Archbishop and "it" (presumably a suit for the same cause) should be commenced before Commissioners and judgment given the sentence will be void or voidable, and thus (i.e., likewise) if a sentence is given before an Archbishop pending a suit before a Bishop. It was also said "there" (probably =on the same occasion) that appeal ought at common law to be taken within 10 days after sentence, though "now" he has 15 days, but "supplication" (for royal intervention) may be brought within 2 years and there will be restitution of the profits, but supplication lies after 2 years (i.e., presumably, if the new royal commission reverses the earlier sentence there is restitution only if "supplication" for such a new commission was timely, but supplication may be made at any time, except that if it is delayed beyond 2 years and reversal results there will be no restitution.

The brief explicit reference to *Cheinye* follows. My best guess is that the material in the document reports early proceedings in that case and precedential citations therein, unless some of it reflects only the research of a lawyer concerned with the case.

2. (*Caudrey*) There are some problems about the reports of *Caudrey*. These bear immediately on no more than factual trivia. Because Coke's reporting of this case is so singular, however (see text), one should be especially inquisitive about its literal accuracy. Substantial differences among the reports, discussed in the text, are the main evidence on that, but oddities in the trivia may also be suggestive. The picture at the end of this note of what Coke may have been "up to" is meant *cum grano salis*—as a projection from both the details and the substance that is worth considering, but hardly as solid as the comparison in the text between Coke's report and a very convincing MS.

Bare references for the case, omitting dates, which are part of the problem, are as follows:

(a) 5 Coke's Reports, 1. *Sub nom*. Caudrey's Case (and the name of the other party is given in the body of the report as Atton.)

(b) Popham, 59. *Sub nom.* Cawdry v. Atton.

(c)Add. 25,201, f. 65b. Cawdry v. Hatton. Very fragmentary notes on Coke's argument in the case. Adds nothing except one citation contributed by the reporter.

(d) Add. 25,211, f. 87. The important MS. Relied on principally in the text.

(e) Harg. 7, f.34. *Sub nom*. Cawdry's Case. Although this MS. presents some problems of legibility, as Add. 25,211 does not, it is all but identical with the latter. One of these two reports is evidently a copy of the other.

As for dating: Coke dates the case, by its original enrollment as H. 33 Eliz., but records that it was not decided until H. 37. (Popham's dating is the same.) That is slow progress, but not necessarily reason for surprise apart from a discrepancy in the reports as to the cause of action. Coke and Popham both say that the action was Trespass *Quare clausum fregit*, the special verdict being rendered upon a plea of "Not guilty." Add. 25,211, the strong MS., together with Harg. 7, is dated M. 36/37 and gives the action as Ejectment. The date itself is compatible with Coke. The MS. does not say that the court's decision was handed down in the next term, H. 37, but it implies as much, while showing that it was argued on two different days in M.36/37. For the MS. tells us that the judges wanted to deliberate and gave their opinion on a motion for judgment "another day." It is more than likely that this "other day" was in the next term. (The incomplete MS. Report—Add. 25,201—giving only the argument of Coke as counsel in the case, is also dated M. 36/37, confirming the chronology.) Whether the action was Trespass or Ejectment is of no importance for the substantive issues, but I do not think we can let the discrepancy go at that. These small matters bear on the "dramatic" structure of the case and hence on the reliability of the different accounts.

If we had Coke's report alone, we would have an action of Trespass commenced in 1591 and decided in 1595. The impression would be of a difficult case, as this one certainly was, reargued on several occasions and finally decided in the most thorough fashion. Indeed, Coke says it was: "*Et haec causa pro tribunali per advocatos utriusque parties, & de tribunali per Judices saepius tractata est, & post magnam & maturam deliberationem, & cum caeteris Judicibus consultationem…adjudicata…"* (Coke wrote his report of *Caudrey* in Latin, presumably to make it continuous with his "Treatise"—see text—for which he considered the learned language appropriate. He thought, as he says, that contents of the "Treatise" were important for the general public—the "educated public" in modern parlance—to know about; concealing them in the jargon of the legal fraternity would have been a pity. Coke was translated so early and is so familiarly known in English that it is sometimes forgotten he wrote and first published his Reports in Law French.)

If we had Add. 25,211 alone, we would have an action of Ejectment argued late in 1594, perceived as difficult, put off for "deliberation and consultation with other judges", and probably decided early in 1595. Moreover, we would have a *per Curiam* opinion, not a decision rendered in the form of separate speeches by all the Justices, as Coke's words "from the Bench by the judges often argued" imply. (Coke does not actually give arguments by individual judges, but that is in itself unsurprising. He did not characteristically write "narrative" reports, but summed up the holdings of the court. In this case, however, there is good MS. Evidence that there were no individual judicial arguments in open court, whereas Coke creates the impression that he is merely not spelling them out.) From the fact that the case was argued at the Bar in M. 36/37, it of course does not follow that it was not argued any number of times before. But I wonder. As I show in the text, the debate by counsel in M. 36/37 was thorough. When that debate was concluded, the judges reacted as one would expect after hearing a hard case ably

argued—they took time to advise. One would hardly suppose that they had heard of it off and on for four years.

Finally, Add. 25,211 provides a bit more evidence that the action was Ejectment than merely saying so. For as that report renders the *per Curiam* opinion, it contains language specifically appropriate to judgment in Ejectment and not appropriate to Trespass.

What then is to be made of the discrepancies? It seems out of the question that there were two separate and simultaneous lawsuits between the same parties to try the same matter, both decided in H.37. In general, the clearest ring of authenticity comes from Add. 25,211, simply because it is a narrative report—the arguments of named counsel given in order, their speeches recorded in enough detail for successive lines of reasoning to stand out, citations abundantly noted by the reporter. I therefore conclude that an action of Ejectment was argued for the first time in M. 36/37 and decided in a relatively cursory way in H. 37. Yet Coke and Popham testify to an action of Trespass begun in H. 33. I suggest that there was such an action, but that it was dropped before it was decided—not necessarily without ever having been discussed, but probably without thorough discussion. One explanation might be that Caudrey was advised to try to get his deprivation reversed within the ecclesiastical system before pressing a common law test of its validity. A few years later, that having failed and the parties being still at odds, a new suit' was commenced, Ejectment this time (possibly chosen as the slightly "higher" action when the litigation was clearly to be seen through to a showdown,) Some confusion or conflation took place when Coke prepared his report. The same is true of the author of the report in Popham. (The book called Popham's Reports was published late in the 17th century and is of uneven quality. Connection with Chief Justice Popham—who presided over the court that decided *Caudrey*—is dubious, though the publisher claimed that most of the volume was taken from MSS. in Popham's hand.) Both Coke and Popham cite the roll number for H. 33 where the action of Trespass was entered. Perhaps they found that case in the rolls and confused it with the action of Ejectment they remembered the debate of. Nothing in the substance would arouse suspicion in someone who had forgotten the details.

All this goes to cast doubt on Coke's memory and his proximity to the case when he composed his report. Doubt based on these trivia goes to reinforce the touch of skepticism that should always greet a well-wrought Cokean report, even when there is no other source to compare with it. Did the judges really "resolve" the points Coke has them "resolving" in quite the terms he gives? The volume of the skepticism should rise a bit with the addition of a piece of information supplied only by the MSS.: *Caudrey* was won by Coke, won by an argument that does credit to his powers. Ordinarily, Coke was not given to suppressing his victories, but here, perhaps, one can imagine a different temptation, essentially a literary one: A great case, after maturing for four years, yields deeply thought through resolutions, on the basis of which a legal scholar erects a "Treatise" of considerable historical and constitutional interest, and also of patriotic or Papist-confuting appeal. Tempting, is it not, to make it seem so? A better picture emerges than the one that Add. 25,211 seems to put closer to the photographic truth.
The latter would run this way: Coke, Attorney General, makes an effective argument in a new case, whose complexity is revealed to the judges by able advocacy on both sides. Coke wins. The judges find enough in his several arguments to be persuaded that his client should win. But they are aware that they have not thought through every angle.

Rather than lay down too much law, rather than embrace every theory that proceeded from the Attorney General, and rather than speak too freely about politically sensitive matters, they grasp at the essential and avoid the histrionics of "great cases." The Chief Justice sketches out the court's opinion on enough points to settle the case, and judgment is entered. The victorious Attorney General is perhaps a bit disappointed to have offered more than was received.

Later, with a "Treatise " to write—for which Coke's argument in *Caudrey per* the MS. was a kind of first draft—it may have seemed no more than poetic license to make the style of the decision look a little grander than it was. As the text shows, Coke claims that the court accepted the doctrines of his "Treatise" and his argument. At the same time, he subordinates those doctrines to a minor issue in the case easily resolvable without reference to them. If license was taken at all, it was taken modestly, for Coke does not pretend that the broad ideas in the "Treatise" and argument were the real reason the case was decided as it was.