Section 3: The High Commission before Coke's Chief Justiceships.

Courts headed by Coke (the Common Pleas from 1606 -1613, the King's Bench from 1613-1616) handed down a disproportionate share of rulings on the High Commission's scope by way of both Prohibition and *Habeas corpus*. This gives *prima facie* countenance to Coke's reputation as the Commission's arch-foe. It suggests a pattern similar to that formed by cases on 23 Hen. VIII (Ch. 2 above.) It is possible that 23 Hen. VIII would never have come to be enforced by Prohibition, or at least that it would have been interpreted to place fewer restrictions on intra-ecclesiastical operations, without Coke's influence. It may be useful to *ask* whether his influence was similar with respect to 1 Eliz. and the High Commission—whether without Coke the Commission would probably have been allowed to take a wider, or even unlimited, range of ecclesiastical cases away from the regular courts and to use secular sanctions freely. One must not, however, jump to conclusions about the answer. The sub-category of High Commission cases already discussed in this study—those on self-incrimination—Vol. II, Ch.5—stand as a warning. Coke's courts were the favored place to challenge the Commission's use of inquisitorial procedure, as to challenge its jurisdiction and sanctions. In both cases the figures signify something—that lawyers and litigants had better reason to expect sympathy and judicial willingness to take on the Commission from the Cokean courts than from others. But that expectation could be reasonable as a rough practical legal prediction without entailing that Coke's courts clearly held positions more adverse to the Commission than others .One can choose a court in the vague hope of favorable treatment without calculating in a stricter sense that one would probably fail in the alternative court. The self-incrimination cases warn against concluding too much from a general bias, for there is reason to doubt that the Cokean courts embraced different standards for the permissible use of inquisition than other prior and contemporary courts. Might it be thus with respect to other questions about the High Commission? The answer can only be reached by looking at what was decided, and at the comparability of cases, in detail. I shall, however, try to keep the focus on Coke's contribution by taking careful stock of the law on the High Commission in so far as it was settled before he ascended to the Bench, and then of the law as he left it to his successors. To that end, we shall first look at the Elizabethan cases and secondly at the Jacobean ones, mostly from Popham's King's Bench, that precede Coke's Chief Justiceship of the Common Pleas.

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Sub-section (a): Elizabethan Cases

Summary

There are not many Elizabethan cases on the jurisdiction and powers of the High Commission. From these, however, one distinct position emerged *in the Court of Common Pleas around 1600*. It is not until after James I's accession that the King's Bench took significant stands on the principal issues about the Commission. The Common Pleas position was in essence: (a) Any and all parts of ecclesiastical jurisdiction may be conferred on the Commission. (b) No secular sanctions may be given to it. This

contrasts with the predominant Jacobean and later view: (a) Only some parts of ecclesiastical jurisdiction are assignable to the Commission. (b) Within this limited range, or at least part of it, temporal sanctions may be employed. The main architect of the late-Elizabethan Common Pleas position was the senior puisne Justice, Walmesley. Some resistance to it on the part of the Chief Justice, Sir Edmund Anderson, is detectable, but in the upshot unanimity was achieved. Four cases—Mary Barham's, Smith's, Whitewit's, and Poole v. Gray—furnish solid discussion by counsel and the judges of the Commission's sanctions and procedural powers, documenting the court's considered opinion that only spiritual ones are available to the Commission (principally excommunication and its established secular follow-up, *De excommunicato capiendo*.) It is an evident strength of the Walmesley- Common Pleas position that the "secular follow-up" existed, for it forces the question whether additional powers were really necessary for the ecclesiastical system to be effective; the case for a supplementary *tribunal*, albeit with the same powers as other ecclesiastical courts, is perhaps more convincing.

The only evidence from reports of judicial attitudes earlier than the last years of Elizabeth I's reign comes from a Serjeants' Inn discussion by all the judges (1587). This upholds the use of secular sanctions and militates in favor of unlimited substantive jurisdiction so long as it stays within the bounds of ecclesiastical law. One decision against the Commission was, however, made early and remained the law: In *Habeas corpus* the High Commission must explain in some detail why it has imprisoned someone; it may not, as the Privy Council could, merely invoke its authority to justify an imprisonment. More generally, there is indication in Elizabethan cases that "transcendent" views of the High Commission, which enjoyed favor in ecclesiastical circles, made no impression on the common law judiciary. That is, the prevailing opinion was that the monarch had no authority by prerogative or by a highly permissive interpretation of 1 Eliz. to confer whatever jurisdiction and powers he liked on the Commission. The Commission's dependence on the statute and the statute's capacity and tendency to impose at least some limits on the tribunal it created gives every sign of early acceptance.

With this much said, one should note that it would be misleading to suggest that the proposition "so long as the case is within ecclesiastical jurisdiction the High Commission may handle it" was firmly accepted. There are intimations of the view, which prevailed later, that a High Commission case must have at least some degree of special seriousness above the common run of ecclesiastical litigation. In nearly all the cases however, the Commission's substantive jurisdiction was upheld if it was controverted—plausibly enough given a fairly broad view of that jurisdiction. Working out what its limits were and narrowing it to a manageably specific group of "enormous" criminal offenses was largely left to the future.

The Cases

My earliest relevant report is of Hinde's Case,[66] in all probability the case of that name several times referred to as a precedent in discussions of self-incrimination. (Vol. II, Ch. 5.) The present report, however, says nothing about the important rule in that context which *Hinde* and a few other roughly contemporary cases were cited to support (the rule that ecclesiastical courts, including the High Commission, may not expose people to potentially self-incriminatory questioning when they are concurrently liable to ecclesiastical prosecution and, via statute, to secular prosecution for the same offense.) Nor does the report of *Hinde* go to the substantive jurisdiction and punitive powers of the High Commission**.** Rather, the case as reported endorses the fundamental principle on which the many later uses of *Habeas corpus* to raise questions about the Commission's jurisdiction and punitive powers all depend. It would appear that the principle was uncertain nearly two decades into Elizabeth I's reign; having been laid down in *Hinde*, it was so far as I know subsequently unchallenged. The brief report of the case gives the conclusion and adds an important distinction: When *Habeas corpus* is brought to demand justification of a High Commission imprisonment, it must be substantially justified—i.e., why the party was imprisoned must be spelled out, so that the common law court can examine whether he was imprisoned for sufficient cause; it is not enough to do what the High Commission tried to do in *Hinde*—just say that he was imprisoned by the order or the authority of the High Commission. The Common Pleas then added an express contrast with imprisonment by order of the Privy Council. ("But if one be committed to prison by the commandment of the Queen's Privy Council, there the cause needs not to be shewed in the return, because it may concern the state of the realm, which ought not to be published.") Behind the scanty report there clearly lies a major issue about the conception of the High Commission, whether or not this was deeply debated in *Hinde*: Is the Commission the ecclesiastical analogue of the Privy Council—the manifestation of supreme authority on the "spiritual" side that answers to the monarch's and Privy Council's on the "temporal", of which power to imprison without showing cause is a necessary adjunct? Or is the Commission, as it were, "just another court" with powers, real or purported, to imprison? *Hinde* says "just another court" , and so the law remained at the level of general principle (i.e., the decision need not eliminate all dispute about how detailed a "spelled out" return on a High Commission *Habeas corpus* has to be.) It is incidentally noteworthy that the court's position on the Privy Council's imprisoning power looks taken for granted—unsurprisingly for the mid-Elizabethan period, though it became an agitated question in the 1620s.

The next relevant document reports an opinion rendered by all the judges at Serjeants' Inn. [67] It relates to a real case, for particularities are given. A.B. promised marriage to E. F. and committed fornication with her "in Greenwich-house, being in service with one of the Queen's servants." A. B. then married another woman. For this offense, the High Commission fined him 200 marks and certified the fine to the Exchequer. The question discussed at Serjeants' Inn was the legality of the fine. There is no telling whence the question was referred—quite possibly from the Exchequer, in

[66] M. 19 Eliz (i8/19 or 19/20?) Eliz. C.P. 4 Leonard, 21.
[67] T. 29 Eliz. at Serjeants' Inn . Savile, 82 and 114.

connection with whether steps for the collection of the money should be taken. Savile reports the discussion at two places, identically except that in one place he says all the judges agreed and in the other that the greater part did. What at least a majority agreed on was sweepingly supportive of the High Commission: Under 1 Eliz. and the current patent, the Commission may both fine and imprison "for all offences and misdemeanors corrigible by Ecclesiastical power and jurisdiction." Note that the opinion by implication goes beyond asserting the legality of temporal punishments, for it is so stated as to suggest that the Commission may handle any ecclesiastical crime, not only enormous crimes. If one is entitled to doubt whether the judges meant to go that far, one must still take them as recognizing that fornication compounded by breach of promise to marry—and perhaps aggravated in its scandal by proximity to the Queen—was a High Commission matter. The judges then qualified their opinion: Although discretionary, fines imposed by the Commission must be reasonable and imprisonment must not exceed a convenient time. It is implied that common law courts might use the Prohibition to prevent imposition of definite sentences deemed unreasonable and the *Habeas corpus* to discharge from both an excessive definite commitment and, after a reasonable time, from an open-ended one designed to coerce. Absence of appeal from the Commission is given as a reason for insisting on limitation of its punitive discretion.

Partlet v. Butler (1596)[68] is significant for the jurisdiction of the High Commission on one point. In this case, the Commission was prohibited from proceeding for defamation of a clergyman on the ground that a common law action would lie for the words in question. To this intent, it signifies only the uncontroversial proposition that the Commission is an ecclesiastical court, wherefore any subject matter beyond ecclesiastical jurisdiction generally is also beyond the Commission's. The defamatory words here, however, were allegedly spoken during divine service, so that the additional and properly ecclesiastical offense of disturbing divine service was also involved, which offense would have been committed whether or not the words were defamatory. The Prohibition was accordingly framed to extend only to the defamation. The decision accordingly implies that disturbing divine service—hardly the most grievous of crimes in all forms—is appropriate to the Commission. No attempt was made to maintain the contrary.

The first sign that some undoubted ecclesiastical crimes are too minor for the High Commission appears in an anonymous Common Pleas case of 1599.[69] The crime in question was laying violent hands on a clergyman. The judges agreed that an ecclesiastical court could proceed for the offense, but doubted whether the High Commission could, "for they understand (*intend*) that they may not determine such petty things." Immediately, they wanted to advise and see whether there were any relevant precedents, but a Prohibition would seem eventually to have been granted, because according to the report the final result of the case was a Consultation—i.e., there must at some point have been a Prohibition for the counter-writ to undo. While the Consultation is unexplained in the report and could simply represent a decision on deliberation that a High Commission suit for the offense was unobjectionable, one further circumstance is reported that could account for the Consultation independently: Defendant in the High Commission pleaded self-defense and witnesses had been examined in the Commission

[68] M. 38/39 Eliz. K.B. Harl. 1631, f. 148b; Lansd. 1059, f. 256, *sub nom*. Parlor v. Butler.
[69] P. 41 Eliz. C.P. Lansd. 1065, f.10b.

by the time Prohibition was sought. That is to say, plaintiff-in-Prohibition could plausibly be held to have forfeited his right to a writ by waiting too long to seek one. Although delay in pursuing Prohibitions usually did not bar them (cf. Vol. I, Ch. 3), it may be arguable that waiting too long is least excusable when one's claim is only that one is being sued in the wrong ecclesiastical court.

From the same term and court as the first intimation of an "enormity" test for High Commission jurisdiction came the important *Habeas corpus* case of Mary Barham[70]. This case shows the Common Pleas perhaps close to agreement that the Commission had no secular punitive or coercive powers whatsoever; in addition, one judge, without reported objection by others, both embraced an "enormity" standard in general terms and applied it to exclude High Commission jurisdiction in the common run of marital suits.

Barham brought *Habeas corpus* after being committed to the Gatehouse prison. The Keeper's return said she was committed by the Bishop of London and two fellow High Commissioners (Byng and Stanhopp) for disobeying "divers sentences given before them concerning contract of marriage between her and William Dennys." The less complete report, Lansd. 1065, is express that Dennys or Dennis was suing Barham; neither report is very specific about the cause of action, but breach of contract to marry, with or without further complications, seems likely. The Keeper also said that when Barham was in his custody *De excommunicato capiendo* was brought against her. (Clearly the High Commission had excommunicated her—lawfully or not depending on its jurisdiction—as well as sending her to jail without a *De excommunicato*—lawfully or not depending on its procedural powers. Its—or Dennys'—proceeding to sue out a *De excommunicato* perhaps suggests that committing her directly was conceived as an interim measure rather than a properly punitive or coercive one—a matter of securing the party until her imprisonment on *De excommunicato* could be processed. Nothing would exclude the hypothesis that the High Commission itself, at the time of this case, had no aspiration to secular sanctions stronger than a short-term power to keep excommunicated persons from eluding imprisonment by *De excommunicato capiendo*.)

Barham was represented, Lansd. 1065 tells us, by Serjeant Harris who argued flatly that the High Commission had no power to imprison, such power being ruled out by Magna Carta (Ch.29.) In effect, imprisonment by any ecclesiastical court does not count as imprisonment *per legem terrae*. Justice Walmesley, speaking first from the Bench, strongly agreed ("What authority have the High Commissioners to imprison the body of any man [?] [I]t is directly against Magna Charta [,] *nullus liber homo* &c.") He went on to say that although the Queen was authorized by statute to appoint High Commissioners, and they were required or permitted to proceed according to their commission, the language means "according as their Commission is guided & warranted by law, for the Queen hath only that authority which the Pope had before." (If you like, obviously commitment by Papal order before the Reformation was not commitment by "due process of law" as understood by Magna Carta. Implicit in Walmesley's position is the proposition that 1 Eliz. did not "amend Magna Carta" by permitting the monarch to

[70] P. 41 Eliz. C.P. Lansd. 1074, f. 303b (the fuller report, from a series most exceptionally in English) and Lansd. 1065, f.12 (skimpy, but accordant and useful for a couple of details,

authorize ecclesiastical courts under the new regime to exceed the Pope's powers—a sensible reading of Parliament's intentions, though it did not hold up in the long run.)

Justice Glanville spoke next, agreeing "with all this…which Walmesley hath said", subject only to a faint note of hesitancy. (He emphasized that he was speaking "under correction.") Glanville than added, "the chiefe cause of the foundation of the High Commission was for correction and deprivation of Bishops and heresy, not baptizing of children, & such heinous crimes, & not for matters of matrimony and such inferior causes." In short, Glanville, unlike Walmesley, moved from sanctions to jurisdiction and articulated a version of the "enormity" test. The two judges then underscored their opinion on sanctions by saying expressly that excommunication was the ecclesiastical courts' "utmost authority." As Walmesley vividly put it, "theyr sword can give noe deeper wounds, but they are Faine to crave ayde of the temporall sworde, and sue out a *Cap[iendo] excommunicat*[o] for theyr bodyes." And Glanville drove in once more the sense in which Magna Carta was a formidable obstacle to any other construction ("…without doubt the meaning of the statute was in noe case to disannul Magna Charta soe sacredly established.") (It is, I think, clear from this language that Magna Carta was not regarded as unrepealable—only possessed of a prestige and longstandingness such that without unmistakable evidence of intent to repeal or amend it other statutes should not be interpreted as doing so.)

Chief Justice Anderson, speaking last, was alone uncertain. He says nothing substantive at odds with Walmesley or Glanville, only that it would be advisable to look at the statutes and the commission before resolving the case, "or els we shall do rashly." It is hard to say what Anderson thought closer study of the authorizing documents might reveal, but it was scarcely unreasonable to want to consider whether anything in the chapter and verse might stand in the way of releasing the prisoner. Walmesley and Glanville had made no pretense of exact exposition, but spoke from a confident general sense of what the current law was against the background of Magna Carta.

In the event, when the court turned to the mere case before it, the discussion of the High Commission's jurisdiction and sanctions virtually vanished into abstraction. For all the judges agreed that now—*De excommunicato capiendo* having been brought against Barham—she could not be bailed (or, *a fortiori* surely, released outright.) In other words, however illegally she was held before the *De excommunicato* was obtained there was nothing illegal about holding her prisoner now. (Whether there is any technical way of wiggling out of this conclusion I do not know—any conceivable ground for bailing her immediately and forcing whoever was responsible for executing the *De excommunicato* to catch her anew,) In the end, the only action taken by the Common Pleas was to order Barham transferred from the Gatehouse prison to the Fleet. Her counsel requested that this be done, and perhaps it would have been done without the request. Justice Walmesley noted that the Fleet was the "proper prison of this court." (Might there be a testy note in Walmesley's remark, as if to say, "The High Commission's unlawfully throwing someone into a prison of its choosing is certainly no excuse for keeping her there when valid grounds for her imprisonment subsequently appear; if this court is *de facto* the agent of her now-lawful detention, let her be put where this court's ordinary prisoners would."? Again, I am unable to say whether any finer points of *De excommunicato* procedure could be relevant.)

The reports of a Queen's Bench case of 1600, Lovegrove v. Prynne,[71] yield faint dicta on High Commission jurisdiction, though the case is centrally a holding that the ecclesiastical suit should be prohibited as inappropriate to any Church court. That suit was brought in the High Commission by a clergyman, Prynne. The libel had two elements, (a) defamation and (b) battery *or at least assault with intent to beat*. I.e., on the second count the libel used the "or at least" expression instead of firmly claiming battery (presumably legitimate ecclesiastical pleading though it would not be acceptable at common law.) The suit was prohibited (a) because the alleged words—"goose", "woodcock", and other unspecified "opprobrious words", but presumably the level of opprobrium was about the same as "goose's", were too trivial to support a defamation suit, lay or ecclesiastical; and (b) because taken as a complaint of assault—as the second claim must be taken in the absence of a definite claim that Prynne was beaten—the case belonged to the common law. Prynne's counsel, Wilbraham, moved for Consultation, arguing that ecclesiastical courts *may* proceed for a mere assault on a clergyman, but he was unsuccessful. In the process of turning down the Consultation the judges conceded that if battery has been claimed ecclesiastical courts would have jurisdiction, by virtue of the ancient statute *Articuli cleri*, under the rubric of laying violent hands on a clergyman. The report of the case written by Francis Moore, who was Lovegrove's counsel, has the court in its closing remarks saying specifically that the *High Commission* may entertain a suit for "violent hands", but may *not* entertain one for slanderous words about a clergyman –any slander, it would seem, not just one consisting in such aspersions as "goose". (Without doubt regular ecclesiastical courts could hear claims of defamation, whether of clergymen or others, provided the words were not actionable at common law, were not ridiculously trivial, and perhaps, by a further and distinguishable criterion, provided that the words were construable as imputing an ecclesiastical offense to the plaintiff.) To the extent that Moore's language is deliberate and accurate, the Queen's Bench may have delivered two dicta about the High Commission specifically.

Smith's Case (1600) [72] again raised the question of High Commission sanctions in the Common Pleas. Though there were complicating circumstances in *Smith*, it basically strengthens the position to which the court was tending in *Barham*. The case was as follows: Anne Stock was cited before the High Commission for adultery. She was convicted and subsequently excommunicated (presumably for refusal to do assigned penance or to obey an order to refrain from her adulterous behavior.) The High Commission sent a pursuivant, armed with its letters missive, to take Anne prisoner. I.e., it proposed to arrest her on its own authority, by-passing the *De excomminicato capiendo* procedure (That procedure may not have been available to the Commission at the time the pursuivant was sent, since it became so only after forty days from excommunication. An excommunicate could of course make himself or herself hard to find before the

[71] Moore, 607 (undated); Lansd. 1059, f.346 (nearly identical report from a series designated as Francis Moore's reports. s*ub nom.* Lovegrove v. Preyn. Both this and the printed version say that Moore was Lovegrove's lawyer.); Croke Eliz., 753, *sub nom*. Love v. Prin, dated P.42 Eliz. K.B.; Add. 25,203, f. 178b, Lovegrove v. Prinne, dated T. 42 Eliz. Q.B. (supplies the additional detail of Prynne's counsel's name.)

[72] H. 42 Eliz. C.P. Lansd. 1065, f. 44b (much the fuller report) and Croke Eliz., 741, *sub. nom*. Tho[mas] Smith v. Smith.

regular commitment process could be put into effect.) The pursuivant and five henchmen entered Anne's husband's house and broke a cistern (so I read the report) in which they thought the woman was hidden. The local constable and John Smith, presumably a neighbor (who, we are told incidentally, was a Common Pleas attorney) intervened to assist the Stocks against the invaders and prevented the pursuivant from "proceeding in this manner against the peace." Mr. Stock, Anne's husband, subsequently brought an action of Trespass for housebreaking against the pursuivant and his associates. Smith was meanwhile cited before the High Commission for the "rescue"—one should probably say in stricter legal terms for contempt of the Commission in obstructing its officers and process. He obtained a Prohibition. The reported debate is on motion for Consultation.

Serjeant Warburton, for Smith, took the fundamental position against use of temporal sanctions by the High Commission: Spiritual courts have three sanctions—suspension, excommunication, and interdiction. The Commission, as a spiritual court, is confined to those. 1 Eliz., on which the Commission is grounded, makes no alteration of the previous law in this respect. Taking and imprisoning a person is a temporal function, to be carried out by *De excommunicato capiendo* in the case of ecclesiastical offenders .I call this the "fundamental position" in contrast to a narrower one possibly sufficient for this case: To stop the High Commission proceedings against Smith, it might have been enough to claim only that the pursuivant's manner of going about his business—entering the Stocks' house by force and abusing Mr. Stock's property while searching for Anne—was unlawful, wherefore Smith's effort, in collaboration with a peace officer, to stop these actions was not unlawful. Serjeant Warburton, however, must have thought that his client would be at least as well-served by attacking the *fons et origo* of the proceedings that Smith eventually got swept into—the High Commission's project of arresting Anne Stock, illegal even if carried out with scrupulous rectitude. (Given Warburton's highly probable awareness, from *Barham*, of the way the wind was blowing in the Common Pleas, the advice was good. Allegations about the pursuivant's behavior would have raised factual questions that going directly to the Commission's legal powers would sidestep. I should not think it plausible to maintain that the third party, Smith, could commit an offense against the High Commission by getting in the way of its officers regardless of the legality of what they were doing, unless perhaps he could be charged with excessive or unprovoked violence, and then it would be hard to make out that the remedy would not be at common law and belong to the pursuivant and his men as individuals.)

Serjeant Harris's position on the other side was equally radical (and incidentally the opposite of the one he had defended in *Barham*): 1 Eliz. unites all temporal and spiritual jurisdictions in the Queen, which "joint and absolute" authority she has transferred to the Commission. Therefore the only question is what specifically she has authorized the Commission to do. The question is easily answered here because, according to Harris, the current patent expressly authorized the arrest of persons "found in adulterous manner." (The phrase may have a wider reach than "convicted—or indeed convicted and excommunicated—for adultery", but it must surely include those cases.) Harris's language is so broad that besides what it clearly covers—power to confer any part of ecclesiastical jurisdiction on the High Commission and power to give it temporal sanctions—it could conceivably be stretched even to conferral of secular jurisdiction. Such a construction would present grave problems, and though it is more than Harris

needed on the premise "if the attempt to arrest Mrs. Stock was perfectly legal the arresting court may lawfully prosecute someone who tries to thwart the arrest." Erasing limits on the Commission's jurisdiction so far as possible does, however, have the advantage of weakening the contrasting proposition "even if arresting and imprisoning Mrs. Stock for adultery was perfectly legal, ecclesiastical proceedings against Smith look dubious—should any tort or crime he may have committed not be a common law matter?" Admittedly, Harris did not so far as the report indicates show chapter-and-verse from the patent to the effect that interfering with a lawful High Commission arrest is a High Commission offense. If, however, the Commission could be given even more than comprehensive ecclesiastical jurisdiction and secular sanctions, there may be some basis for arguing that "incidents" of its jurisdiction and procedural powers are given to it at least by implication. Harris's final remark in his speech may be meant to push this latter point. What he says is that "the suit in spiritual court is wholly other [*tout auter*] than the cause of action here." He possibly means that the ecclesiastical suit against Smith, a legitimate incident of the Commission's proper proceedings against Mrs. Stock, does not take away Smith's right to bring a common law action (no more, one might say, than Mr. Stock's later action of Trespass was barred by anything that might be determined between the Commission and its officers and either Anne Stock or Smith.) *Sed quaere*. Before making that last point, Harris added to his sweeping defense of the High Commission a rather interesting comparison, though I am not sure it adds any real force to his contentions. "…The commission (i.e., the patent)", he says, "will be of as great force as a custom is." A custom, of course, if it is immemorial and to the judges' eye reasonable, will defeat the common law. Harris must be saying that by 1 Eliz., anything the monarch authorizes the High Commission to do in the patent is as lawful vis-à-vis the common law as if the same practice were warranted by custom. That is at least a strong restatement of the length to which Harris was ready to go, or his clients the Commissioners wanted him to go. It may, on the other hand, sound a slight note of moderation in the sense that owing to the reasonableness requirement a custom cannot trump the common law in *just any* respect. Harris may have intended to concede that the patent could not confer unlimited common law powers on the ecclesiastical Commission, but could, well short of that, confer secular powers useful for the effective discharge of its proper business. The comparison was not pursued; complex problems could have arisen if it had been.

Chief Justice Anderson, speaking first from the Bench, did not, as he did not in *Barham*, go at once to the major issues about the High Commission. By the end of his brief speech, however, he appears to concede that the question before the court—whether the Commission may proceed against Smith—depended on whether arresting Mrs. Stock was *infra vires*, which is to say it depended on the "major issues." Before reaching that point, Anderson enunciates the general principle that when a suit is "well-commenced" in an ecclesiastical court, and in the course of that suit a "common law thing" comes up, the ecclesiastical court may still proceed. This principle was often stated in civil cases (there are examples *passim* in Vols. I-III above.) It was often honored rather in the breach than the observance, but it is possible that some judges insisted on it categorically, or at least were reluctant to make exceptions. (Going by the letter of Anderson's words, he stated the principle in especially strong form, for he says that the ecclesiastical court shall proceed "notwithstanding any Prohibition." This is stronger than saying "ecclesiastical

courts should not be prohibited when a common law issue arises in an originally legitimate ecclesiastical suit", for it suggests that even if the ecclesiastical suit is prohibited the ecclesiastical court should still proceed. That would seem to imply that the Church court and parties there are not attachable for violating the Prohibition. *Quaere*. Anderson finishes off this point with "*et issint econtra*" ["and so the other way around"—?] As ecclesiastical courts should be left alone to decide common law questions "incidental" to deciding ecclesiastical questions in common law suits—? But what would that mean? I should have thought that some ecclesiastical questions that must be decided in order for a common law case to be resolved—such as whether two people are married—were simply by the common law itself triable only by ecclesiastical certification, while others were ultimately resolvable by the common law court, subject to a frequently honored moral obligation to seek civilian advice on doubtful questions. Perhaps Anderson was no more than tempted by *Smith* to give voice to his probably over-broad, but plausible, theory of the relationship between the spiritual and temporal legal systems, one tending to limit Prohibitions more than they were limited in practice.)

In any event, the application of Anderson's principle to the case at hand must be that if the High Commission was, so to speak, rightfully possessed of "Anne Stock's Case", it was free to deal with Smith's conduct as an "incident" thereof, not worrying about whether what he actually did was a "common law thing" (a thing which would raise no legal question except the thoroughly temporal one "Did he commit unjustifiable assault or battery?" The alternative would be detaching *Stock* from *Smith* and holding that the High Commission had jurisdiction to proceed against interference with its process even though the form of the interference would have come to an ordinary common law tort. Anderson's approach, to its credit, was more principled than that. As I have already shown, however, Anderson realized at once that his suggested approach was of no use unless the High Commission's sending its pursuivant with his missives (the equivalent of a warrant for Anne Stock's arrest) was lawful, and hence that the major issues about the Commission's powers must be faced. His brethren got to that conclusion more directly.

Justice Walmesley, the senior puisne judge, spoke after Anderson. (The Chief Justice normally gave his opinion last, but there is nothing irregular in variations, especially when a judge had an observation short of his ultimate word on the case, as Anderson's opening point here was.) Walmesley's opinion in *Smith* is entirely consistent with his opinion in *Barham*, but somewhat different in tone and emphasis. There is no mention of Magna Carta, invocation of which is a bit melodramatic and even problematic if scrutinized closely. (As I point out above, a subsequent statute could permit something which Magna Carta by itself should be taken to forbid. It may have been the part of good sense not to declaim about what a scandal it would be to "repeal Magna Carta", but to stick to straightforward argument as to what the statute now in question *does* mean.) Arguing in this case, Walmesley as reported does not construe 1 Eliz. elaborately, but takes it as obvious that the statute permits giving only spiritual jurisdiction to the High Commission; if the Commission's patent purports to give it more it simply fails to, since nothing the statute says about the patent is clear or explicit enough to allow the patent to countervail against the statute's otherwise plain intent. (The formulation here is mine, but I think it comes to what Walmesley thought.) Nothing said by Walmesley or any judge in this case suggests any limits on the substantive ecclesiastical jurisdiction conferrable

on the Commission, much less any doubt as to whether it could be authorized to deal with adultery. It is perhaps noteworthy that for Walmesley saying that the statute confined the High Commission to spiritual jurisdiction sufficed to say that it was confined to spiritual sanctions and procedures, as well as spiritual substance. In other words, to Walmesley and perhaps most late-Elizabethan judges the distinction I have steadily employed in this study between substance and sanctions might have looked meaningless. I believe it is necessary to expound –in the sub-sections below—what might be called "the 17th century synthesis", a predominant though not unanimous position: some substantive jurisdiction but not nearly all of it, may be given to the Commission, and some temporal sanctions. But it may have taken time, increased litigation, and fresh political breezes for such a compromise to look so much as intelligible to many lawyers,

Walmesley's main effort in *Smith* was not to belabor his fundamental beliefs about 1 Eliz., but to develop a strong supplementary argument in support of his position. He observes that the statute of 5 Eliz., (thus another statute quite close in time to 1 Eliz.) confirmed the *De excommunicato capiendo* procedure and modified some details of it. The basic inference is that Parliament is unlikely to have intended, or to have understood 1 Eliz. as intending, that the refurbished *De excommunicato* could be evaded by one ecclesiastical court via a power to arrest and commit directly. Moreover, 5 Eliz. appointed a penalty for persons against whom a *De excommunicato* had been issued if they failed to turn themselves in. The Queen would therefore lose her penalty if the High Commission could effect excommunicates' imprisonment on its independent authority. Besides, Walmesley goes on to say, the common law provides the writ *De cautione admittenda* for someone who has been imprisoned on *De excommunicato capiendo* and has made submission: the writ orders the ecclesiastical court to assoil him. ("Submission" presumably means doing whatever is required to satisfy the spiritual law and entitle the party to have his excommunication lifted.) In short, the ecclesiastical courts do not have an unchecked discretion to keep a person in the state of excommunication and in jail. As the secular arm comes to the aid of the Church by imposing a secular sanction, so it comes to the aid of the subject by seeing that the Church does not abuse the assistance it is given. Thus, Walmesley says, to find in the Supremacy Act an intent to let the High Commission be given imprisoning power would be to do the subject out of a common law right, as it would do the Queen out of a statutory entitlement bestowed on her shortly after the Supremacy Act. It would mean that one ecclesiastical court could imprison people perpetually, contrary to the whole purpose of the *De cautione* procedure. Walmesley sums up with the maxim *ex errore sequitur error*, which perhaps in context says, "Err in construing 1 Eliz., maybe not implausibly in view of the vagueness of its language, and you alter or confuse the law on various scores that the makers of the act are most unlikely to have anticipated."

To close, Walmesley makes one further point: "And for the manner of the action it is out of course also, for by the common law no one may enter a house to arrest anyone's person unless by open doors except only in cases of felony or treason, and if the Queen makes a commission to the contrary it will be held for nothing.", citing Year Books. I take this to say that even if 1 Eliz. did permit the High Commission to be given imprisoning power it would not follow that it could be given, or was given by the current patent, an exemption from the general rule on arresting officers' title to break into houses. Construing *that* into the statute would be several degrees more farfetched than allowing it

to infringe the *De excommunicato* procedure and its incidents, indeed to the extent of threatening their destruction. It would confer on the monarch in one context a power which he or she simply did not have at common law. (I.e., *per* Walmesley, the monarch had no prerogative to authorize breaking into a house to effect an arrest for less than felony, however special or pressing the occasion or carefully specified the authority. The application of this point to the instant case would seem to be: If the pursuivant and his assistants were manifestly violating the common law, surely Smith's interference with them could not be an ecclesiastical offense, even if the attempt to arrest Mrs. Stock was in itself perfectly legal, and even if Smith's interference with an arrest carried out in a proper manner—as if the pursuivant had entered through an open door or was admitted to the house by someone within it—would count as an ecclesiastical offense.

After Walmesley's speech Anderson intervened again by remarking, "The example that lately was at Northampton greatly moves me, for there on such occasion a man in defense of himself and his house killed another, and often felons enter on pretense of such commissions, & by authority, whereby great mischiefs may ensue." I take it that this expresses agreement with Walmesley's last point and suggests a softening of any disinclination to prohibit Anderson may have had. He seems to say that the rule against breaking in to arrest anyone short of a felon is indeed important to preserve, partly because felons could use commissions—forged or crookedly obtained, I suppose—to gain admittance to houses unless such commissions were illegal no matter what. Whatever the circumstances of the case at Northampton Anderson remembered, it impressed on him that illegal entries to make arrests, or with pretense of such a purpose, can lead to dire results—people can get killed and be caused to kill in (presumably justified) self-defense.

Justice Glanville speaks next; like Walmesley, he is consistent with his opinion in Mary Barham's *Habeas corpus*. He expresses his agreement with Walmesley in terms, stating their common view in language we have encountered before: What 1 Eliz. does is "reduce absolute jurisdiction *in causes spiritual* (my italics) …to the Crown", such spiritual jurisdiction having been "by usurped authority…invested in the Pope"; there is simply no reason to suppose the statute "ordain[s] any new spiritual jurisdiction", as opposed to "reducing" (restoring) that which already existed; the Crown's temporal jurisdiction was untouched by the statute because it had never been usurped. (So any notion that by 1 Eliz. the monarch gained *new* temporal authority, which he might transfer if he liked—to an ecclesiastical agency if he chose—is cut off. Glanville does not quite articulate this, but it is intimated in his choice of language.) Glanville then adds a strengthening argument: If the High Commission may imprison an excommunicated person directly, it may by the same line of reasoning execute a heretic (i.e., directly order the execution of someone it has convicted of heresy and excommunicated), which manifestly it may not do, but must deliver the perpetrator to the secular arm for execution. (Glanville does not spell out the rule on heretics, but a long legislative history, rooted in the idea that the Church may not kill or "shed blood" could be invoked.)

Justice Kingsmill speaks next, expressing agreement with Walmesley and Glanville. I think his one-sentence reported opinion might be meant to say a bit more explicitly than the other judges do that "no temporal substantive jurisdiction" implies "no temporal sanctions", but the words are too slight and general for that to be clear. Justice Glanville then spoke again to add one further argument, another significant strengthening

of the case against the High Commission. 1 Eliz., he says, must surely leave the new ecclesiastical court it authorizes in the same procedural position already occupied by ecclesiastical courts generally (excommunication its highest sanction, beyond which *De excommunicato capiendo* takes over.) For if the statute meant to create any different procedures for the new court it would have "ordained" them expressly. An important reason for so believing—in addition, perhaps one should say, to common sense and the context of 1 Eliz.—is that when other new courts were created by statute a distinctive process to be used by them *was* laid down in the act. Two Henrician secular examples are cited, the Courts of Augmentations and Wards and Liveries. (In other words, I take it, a new statutory court meant to proceed somewhat differently than in a well-known pre-existing way—common law or ecclesiastical—is customarily given a specified process by the creating legislation; past practice implies the rule that either the new process is specified or no new process is brought into being.) The reporter says that the other judges "well-allowed of this reason."

Three justices having spoken decisively in favor of the Prohibition, Serjeant Harris made one further attempt. He does not add any new arguments to his earlier speech, but tries again to focus the judges on the patent, insisting that whatever else is true the statute does say clearly enough that the High Commission's current powers are what the current patent gives it. The judges replied, however, that the patent refers to the statute and according to the intent and purpose thereof shall be expounded. The court's decision was apparently unanimous; Croke's concordant synoptic report says it was. If Chief Justice Anderson had any lingering reservations he did not express them, unless perhaps by not speaking for himself on the central issues.

Barham and *Smith*, the one on *Habeas corpus* and the other on Prohibition, have together the effect of a "leading case" for the Common Pleas. The most basic limits on the High Commission—its dependence on 1 Eliz. and construction of the statute as putting *some* limitations on what the Commission could do or could be authorized to—were fixed. Later Common Pleas decisions would tighten restrictions on substantive jurisdiction and somewhat loosen those on procedural powers. With respect to the latter, however, *Barham* and *Smith* can still be said to have established the principle that any pretense on the Commission's part to go beyond standard ecclesiastical procedure was subject to strict scrutiny.

The remaining Elizabethan cases from the Common Pleas are in line with *Barham* and *Smith*; one adds detail and specificity to the procedural restrictions. The case of South v. Whitewit (or Whetwit) [73] is so close in date and form to Smith that one might suspect it of being a version of the same case. The specific facts, however, are different, so it is probably best taken as separate, though legally identical. (Whitewit's wife slandered South—nothing said in the reports to explain how her words were so much as colorable ecclesiastical defamation. South sued her in the High Commission, which

[73] Owen, 145; Harg. 12, f. 188. The reports agree, but the MS. has a little more detail. Neither is dated, but Justice Glanville, who speaks individually in the MS. –not in Owen—died in July, 1600. Both reports oddly refer to the statute of 5 Eliz. when the discussion appears to be about the basic 1 Eliz. This is probably confusion with the statute of 5 Eliz. confirming and revising the *De excommunicato*, which is brought up by Justice Walmesley, as in *Smith*.

excommunicated her— whether after trial or for failure to respond to the citation the reports do not say. A pursuivant was sent to take Mrs. Whitewit prisoner, which he did after breaking into Whitewit's house in the middle of the night. Mr. Whitewit "rescued" his wife, for which he was summoned to come before the Commission. He sought and got a Prohibition. Whether the reported discussion is on his original surmise or on motion for Consultation does not appear.) The same judges speak as in *Smith*, one by one and so far as the report shows they make the same arguments. The MS. report may contribute a significant detail in that it has Chief Justice Anderson by name agreeing with the other judges both on the large questions and in emphasizing that, whatever else, the pursuivant's breaking in to arrest for an offense below the rank of treason and felony was unlawful.

In my last Elizabethan case, [74] Poole, a priest, sued Gray in the High Commission for laying violent hands on him. Generously displaying what it supposed its powers to be, the Commission (1) fined Gray £10 "for the Queen"; (2) excommunicated him; (3) enjoined him to procure absolution and "submissively" acknowledge his offense in "the" (presumably his) parish church; (4) ordered him to pay Poole £20 for costs; (5) committed him to prison at the Commissioners' pleasure *and* until he paid the Queen's fine *and* the "damages" (presumably Poole's "costs" above); (6) ordered him to be bound to perform the "submission."

Gray sought a Prohibition alleging (1) "the custome & lawes of the land *quod omnia placita de transgressione &c.*" [Abbreviations in the Latin spelled out. I am not sure what legal source is referred to, but the principle is clearly that all pleas of trespass belong at common law. It is implied that Poole's suit, at least as handled by the High Commission, was nothing else than a plea of trespass, viz. battery.]; (2) *nullus liber homo* [from Magna Carta, c. 29]; (3) language in the reputed statute *Articuli cleri* which gave or confirmed ecclesiastical courts' jurisdiction to entertain suits for laying violent hands on a clergyman, expressly barred spiritual courts from imposing a pecuniary penalty for it.

The Common Pleas issued a special Prohibition (so designated in the Lansd. 1074 report) *quoad* the fine, "expenses", and imprisonment. (I.e., the Prohibition did not touch the High Commission's jurisdiction over violent hands nor—given its jurisdiction—the excommunication and the injunctions to do spiritual acts appropriate to a convicted and excommunicated person. Interestingly, nothing is said about requiring Gray to enter a bond to perform the spiritual part of the sentence against him.) When the special or partial Prohibition was delivered, the Bishop of London and other Commissioners released Gray from prison but "bound him from court to court" (i.e., made him enter another bond to appear before the Commission at regular intervals.)

Later Serjeant Williams, clearly representing Gray, came to the Bar and prayed Attachment "for this contempt." I.e., Williams's position was that letting Gray out of jail while doing nothing about the fine or the costs/expenses/ damages was not full obedience of the Prohibition. I think Williams's procedural move here is unusual—i.e., asking the

[74] Poole v. Gray. M. 44/45 Eliz. C.P. Lansd. 1074, f. 405; Lansd. 1058, f. 54b. The latter report is not headed by the names of the litigants, but a note at the end says "Grey was one of the parties." Lansd. 1074 is the fuller report; Lansd. 1058 does not disagree, but see text for significant supplementary information it provides.

prohibiting court, upon an informal showing of what had happened, to approve Attachment instead of simply suing out an Attachment-on-Prohibition (pursuant to which the attachee could plead either that he had done what the Prohibition demanded or that the Prohibition was wholly or partly ill-granted.) Be that as it may, the Common Pleas judges took the occasion to argue the legality of all disputable actions taken by the High Commission before it was prohibited. Williams should probably be credited with a useful short-cut and perhaps even with doing the High Commission a favor. For if the Common Pleas gave the dignitaries on the Commission clear advice about their rights they might be able to correct any inadequacies in their response to the Prohibition without actually being attached or forced to plead formally in what might turn out to be a hopeless cause. They could still accept Attachment and controvert it if they chose to, banking on a Writ of Error if the Common Pleas should order attachment—instead, I suggest, of letting its opinion be known and holding back until the Commission undid anything the Common Pleas said was *ultra vires*. One should not, I think, say the Commission was merely foolish or stubborn in its response to the Prohibition. Previous cases had only said unmistakably that the Commission may not imprison, and in this case it had backed off from imprisoning. It was entitled to the court's opinion on fining, taxing costs—or perhaps over-taxing them as a concealed way of imposing damages—, and possibly insuring performance by compulsory bonds, even though the Prohibition here does not seem to have been directed against that practice.

The case was discussed by the puisne judges, Chief Justice Anderson being absent in the Star Chamber. Justice Walmesley was true to form. After reiterating his view that the High Commission had no power to imprison and no sanctions beyond excommunication followed by *De excommunicato capiendo*, he said expressly that no power to impose a fine existed. He said further that the Commission had no power to assess damages, "for in this case there [is] no differ[ence] between dam[ages] & costs for all runne under ye name of damag[e]s but only p[ro]ceed quoad correctio[n]em tantu[m]." The meaning of the last clause raises a question: Does Walmesley mean that ecclesiastical courts including the High Commission may not tax *bona fide* litigative costs? Or that they may but "in this case" had obviously awarded damages by charging Gray the large sum of £20? Or that clearly labeled costs within the bounds of possible *bona fides* may be charged, even if suspiciously large, but "in this case" the High Commission had not successfully camouflaged the damages as costs (perhaps by using the word "damages" in the bond Gray was compelled to enter)? In any event, Walmesley ruled out detectable civil damages as firmly as criminal fines. He did not comment on the use of bonds in itself.

Justice Warburton (Glanville's replacement on the court) followed up on Walmesley's last phrase, "*quoad correctionem tantum*" (i.e., the High Commission like other ecclesiastical courts may proceed only to the end of punishing by spiritual sanctions—"*correctio*.") *Per* Warburton, "That correction must also be moderate for in 2 Hen. IV they imposed soe great a punishment upon an offender that he was faine to agree with his adversary and thereupon had a Prohibition." The test for excessive spiritual punishment is interesting. Would this be the right formulation: If the punishment is so severe that a "reasonable man" would usually rather pay off his adversary it exceeds ecclesiastical power? There would otherwise be an easy ruse to impose a pecuniary sanction in effect.

Serjeants Daniel and Williams then intervened to cite a case they had "had in experience" (had encountered in their practice—it is not independently reported) to confirm Warburton's point that moderation should be enforced on the High Commission. In that case, Haurforth v. Cotten , "The hie Com[m]is[sion] assessed a fine of £200 upon C[otten] for incontinency and extreated it into ye excheq[ue]r & upon all ye matter disclosed there we had it discharged there by all ye barones." This case does not unmistakably support what Warburton was probably saying, for he appears to agree with Walmesley that *no* pecuniary penalty may be imposed and to *add* that *even* spiritual punishments must be moderate. *Haurforth* does not as described seem to rule out fines altogether, but to hold that if a fine is excessive none of it may be collected. It might also imply that Exchequer process, rather than Prohibition, is the way to challenge an immoderate fine. The decision can, however, be taken to uphold not just "Spiritual punishments must be moderate", but a broader principle: "All ecclesiastical punishments must be moderate. That is true if they are spiritual and thus intrinsically lawful. It is also true if the punishment in itself is questionably lawful, or indeed if it is lawful for the High Commission by virtue of special statutory powers given to that tribunal; if immoderation is present, the legality of the type of punishment need not be reached." So Daniel and Williams would seem to take their case. There is nothing to bar saying that pecuniary penalties should be cut off altogether if excessive whatever common law forum gets the chance to stop them, the Exchequer by discharging an apparent debt referred to it for collection or other courts by Prohibition.

After the interruption, Justice Warburton resumed to make a closing point. I think his intent was probably to defend attaching the Commission as Williams proposed (equivalently, to hold the Prohibition violated despite Gray's release from prison, or notwithstanding any possible argument that the Prohibition had been obeyed with respect to the central and clearest illegality committed.) For a paraphrase, perhaps: "This case is important for all interests concerned; it is just as well to settle the questions it raises comprehensively and by a strong measure, rather than get involved in niceties as whether the Prohibition was 'essentially' obeyed or not." Warburton's words in Lansd. 1074 are: "This suit is double for it concernes the credit of ye Church wherein they may deal quoad Correc[t]io[n]em and it concernes the amends of the wrong to the p[ar]ty wherein they may not decide quoad damn[u]m. They might as well to surcease in all dependencyes as in the principall matter." The report ends with "Kingsmill ad idem"—i.e., the judge not yet heard from agreed with Walmesley and Warburton, probably by saying no more than that he agreed.

The briefer Lansd. 1058 report of Poole v. Gray accords with Lansd. 1074 but adds some significant details. (1) Gray's fine was estreated into the Exchequer. This means that imprisoning Gray in part to coerce him to pay the fine—as Lansd. 1074 has it— was not *instead* of subjecting him to normal process for collecting a debt to the Crown, but *in addition*.

(2) The judges are said to have agreed that "if [ecclesiastical defendant] alleges that the tort which the [ecclesiastical] plaintiff had was *de son tort demesne* & they of the Court Christian will not allow this plea Prohibition lies." I take this, applied to the case at hand, to mean that if someone in Poole's position complains of "violent hands" and someone in Gray's, admitting that he did lay hands on the plaintiff, claims self-defense in effect—i.e., that he was only responding to plaintiff's "own tort" by attacking him— the

plea must be allowed and tried as to fact, or else the ecclesiastical court will be prohibited from handling the case. (For Prohibitions sought on the ground that an ecclesiastical court has improperly disallowed a defensive plea, see Vol. II, Ch.2) Lansd. 1074 gives no indication that this matter was discussed over and above the powers of the High Commission specifically. Its being discussed strongly suggests that Gray urged the improper disallowance of his defense as a ground for Prohibition in addition to his multiple complaint of *ultra vires* behavior on the Commission's part.

(3) *Per* Lansd. 1058, it was "shown" that the Commissioners after receiving the Prohibition "still bind" Gray by surety to perform their decree. This probably indicates that binding Gray "from day to day" did not merely oblige him—legally or not, a question that cannot be answered without going into whether the use of bonds was in itself a temporal procedure unavailable to any ecclesiastical court—to attend on the Court until he had satisfied the properly spiritual injunctions he had been given. Rather, he was still bound to pay the fine and the costs or damages. Therefore it was clearer that the Commission had disobeyed the Prohibition, and was subject to Attachment, than if it had simply done nothing positive to cancel the fine and the civil award. Justice Warburton in Lansd. 1058 seems to say this in essence when he says that "certes" Attachment lies because "in [illegible word] and the dependencies they proceed against the Prohibition." It would seem that there was judicial doubt about Williams' motion for immediate Attachment, I take it because the case in one way raises a problem about what "proceeding against a Prohibition" consists in. (If a court has already imposed a fine and taken the routine first step to get it collected, and then the court is prohibited *quoad finem*, doing nothing to rectify the misstep hardly seems to be *proceeding* in violation of the Prohibition.) Warburton escaped this problem by finding the perpetuation of the bond after the Prohibition a sufficient "positive step" incompatible with the Prohibition.

(4) A further remark by Justice Walmesley reported in Lansd. 1058 indicates, I think, that he was basically aligned with Warburton on the Commission's immediate attachability, but concerned about the procedure. For he says, "It seems to me that a special writ should be formed for this purpose." My spelling out of Walmesley's thinking would go as follows: Yes, the Prohibition *has been* disobeyed. The High Commission should be held in contempt and attached now; it is not necessary to sue out a regular writ *claiming* a contempt for which Attachment is the legal remedy, to which writ the Commission must plead. But what is the procedural form for such an immediate Attachment? Do we not need a new writ to effect that (whatever would be involved in framing one—perhaps instructing the clerks of the court to draw up a new judicial writ for the judges' approval)?

(5) In the event, Lansd. 1058 tells us, the court did not order attachment here and now, but assigned a day to show cause that "attachment should not issue." This information comes right after Walmesley's remark— (4) above. Although the delay is unsurprising, it could represent a compromise response to Walmesley's procedural qualm. The court would seem to have asserted its power to attach without a "special writ", not to mention a writ of Attachment and the formal pleading it would entail, while avoiding the appearance of heavy-handed action and giving the Commission the floor to object. As I suggest above, the Commission may not have been unhappy with this solution: better to be merely prohibited and (probably) no more than compelled in the instant case to rescind everything the Common Pleas took exception to than to lose in

full-scale Attachment-*sur*-Prohibition proceedings, which would constitute a legal record. I do not think Serjeant Williams' innovation affected the future; there is probably little point in departing from the standard rule "obey the Prohibition or face formal Attachment" outside a case like *Gray*, where there are tricky questions as to whether a multiplex Prohibition has clearly *been* disobeyed. In such a case, an informal mode of procedure may have advantages somewhat analogous to granting Consultation on motion even though not all the information needed to justify the writ is strictly before the court. In *Gray*, the information "not strictly before the court" was what the High Commission had done after receiving the Prohibition.

(6) Finally, Lansd, 1058 contains a sharper phrase (though hardly a clarifying one) than anything in Lansd. 1074 on the relationship of "costs" and "damages". The words are, "…where by their law they may not proceed except *ad correctionem*, yet they do otherwise by a color, and where they allow plaintiff costs of suit they include damages also under name of costs." This shows clearly enough that the Common Pleas thought the High Commission guilty of fraud in calling damages "costs." It gives no clue, however, to how one tells in a given case whether the fraud has been committed or what the best response to the danger of fraud would be. Allow no costs awards because they can too easily conceal damages? Go by common probability and assume that a suspiciously high charge labeled "costs" must be at least largely damages in reality? A tendency to leave this problem hanging may be an inconvenience of the unusual procedure attempted in *Gray*. On a straight writ of Attachment plaintiff could allege fraudulent "color", defendant could deny it, and a jury would decide.

In sum, on the major High Commission issues—leaving aside the procedural twist—Poole v. Gray rounds out the accomplishment of the Elizabethan Common Pleas by pretty well ruling out, as improper secular sanctions, not only the imprisonment well-covered by previous cases, but also fines, damages recognizable as such, and excessive spiritual penalties likely to force a pecuniary penalty on the party in practice. It also rules out underhanded enforcement of secular sanctions by bonds, while leaving the use of bonds to enforce spiritual ones undetermined. Substantive jurisdiction is left untouched and by implication upheld for "violent hands", as earlier cases do not question it for the particular offenses involved in those cases, or attack the general proposition that all forms of substantive ecclesiastical jurisdiction may be conferred on the Commission.

Sub-section (b): Jacobean Courts before Coke's Chief Justiceships
(Common Pleas, 1603-1606; King's Bench, 1603-1613)

Summary

The only case in the Common Pleas between James I's accession and Coke's appointment to head the court was decided on recognized narrow grounds of *Habeas corpus* procedure: the necessity of a full and specific return. Judicial dicta on the substance re-emphasize denying the High Commission all temporal sanctions without limiting its ecclesiastical jurisdiction to any particular class or classes of suit.

The two earliest Jacobean cases in the King's Bench were also decided on *Habeas corpus* procedure. Judicial commentary in these cases, however, went beyond that subject. Especially important is a speech in one of the cases (Needham's) by Coke when

he was still at the Bar and Attorney General. Whether he spoke as counsel for the prisoner or for himself as adviser to the court, he defended the view that the High Commission had *some* imprisoning power, but only within a narrow range of serious religious offenses. Moreover, he connected this point with an earlier King's Bench precedent (not independently reported) from the time of Chief Justice Wray (1574-1592.) Though the wider implications of this position are problematic, and though the case at hand was decidable without it, Coke at least dissociated himself –and King's Bench tradition—from the Common Pleas' rejection of all secular sanctions.

A few reports from the King's Bench under Chief Justice Popham (who died in June, 1607) are tangled and complex. They are indeed primarily interesting for their complexity; the discussions suggest a court feeling its way into the High Commission issues it had not, in contrast with the Common Pleas, been much compelled to face in Queen Elizabeth's reign. Differences in the thinking of individual judges appear, but they do not resolve either into sharp and durable differences or into clear consensus following debate. Two propositions, however, can probably be considered firm King's Bench law:

(1) The High Commission may imprison to coerce performance of spiritual sentences, but not otherwise. This appears to have been Popham's main conviction on High Commission matters. It has the virtue of seeing in 1 Eliz. intent to give the Commission an instrument for making enforcement of ecclesiastical law more effective. That is to say, it responds to the argument that there would not have been sufficient point in merely erecting an additional ecclesiastical court with the same powers as the old ones had. One Justice (Tanfield) favored taking the principle –that the new court was meant to have "teeth" ordinary Church courts lacked—a step farther and permitting punitive imprisonment as well as coercive. Other judges, such as Fenner, were skeptical of conceding a general power to imprison coercively, but did not clearly dissent from an actual decision on that basis. The reach of the imprisoning power depends on the Commission's substantive jurisdiction, which the King's Bench did not debate comprehensively. (Coercive enforcement of sentences in a few grave criminal cases is after all different from freedom to use imprisonment in petty cases as well.)

(2) It follows from (1) that imprisonment to enforce payment of a fine would be unlawful. Fining in itself, however,—in lieu of a spiritual punishment or in addition—need not be ruled out. In an oblique way, the early Jacobean King's Bench still came close to ruling it out in practice. There are signs of reluctance to hold formally that the High Commission simply lacked power to fine. The reason was perhaps that it seemed anomalous to confer imprisoning power in any form or degree and at the same time to deny utterly that the conventionally lesser secular sanction of fining could be used. Since, however, imprisoning to coerce payment of a fine was ruled out, there was only one way to achieve payment—estreating the fine into the Exchequer. (That means referring the fine to the Exchequer for collection as a debt to the Crown. Actually, there is one alternative besides imprisonment—making the party enter a bond conditioned on payment of the fine. It is unsurprising that the High Commission thought of this trick and unsurprising that the judges found it unlawful.) The upshot of this line of thought is that whether a High Commission fine was a collectable royal debt belonged to the Exchequer to decide. Some of the King's Bench judges claimed to know that the Exchequer had in the relatively recent past decided with full deliberation that the fines were *not* lawful debts, which must mean that in the Exchequer court's opinion 1 Eliz. did not permit the

High Commission to fine (as the contemporary Common Pleas held.) There is an Exchequer story here which I am not in a position to tell, but there is no reason to doubt at least the short-run truth of what the judges reported. (I.e., there was such a decision in the Exchequer, whether of not it was followed later; purported fines imposed by the High Commission were not currently being collected.) Some of the King's Bench judges seem to have thought that since such fines were realistically nugatory one might as well say that fines could not legally be imposed; others seem reluctant to say that quite flatly, on the strength of another court's reading of the statute. The difference, however, comes in practice to very little. (One school could say that the King's Bench might as well prohibit the High Commission from imposing fines and save the Exchequer the trouble of rejecting it as a debt; the other school, perhaps a bit more punctiliously, might decline to prohibit. "So what?" is a good question. No actual cases hang on the difference.)

The most famous Jacobean King's Bench case touching the High Commission, decided after Popham's death, when Sir Thomas Richardson had assumed the Chief Justiceship, was Fuller's Case. Though elaborately argued in at least its final stage, in consultation with the Common Pleas and Exchequer judges, and though decisive on a peripheral point of "constitutional" significance in historical perspective, *Fuller* is of slight importance for the basic High Commission issues. The following are the points decided that bear on High Commission jurisdiction and powers. (There are some further points of general significance for Prohibition law.)

(1) As for the long-run "constitutional" matter: The judges held, without any sign of disagreement among themselves, that a lawyer arguing for his client in a common law court has no immunity from ecclesiastical prosecution for remarks constituting ecclesiastical crime. The ecclesiastical court in the case at hand was the High Commission, and it was the Commission's jurisdiction that was upheld, viz. its jurisdiction to prosecute for schism, here allegedly committed in the form of a lawyer's statements in common law argument (specifically, Nicholas Fuller's argument in *Maunsell and Ladd*, for a full account of which see Vol. II, pp. 339 ff.) Schism was uncontroversially a High Commission matter, so there was no jurisdictional issue apart from Fuller's contention that a lawyer speaking in the line of duty was exempt from liability.

(2) Use of imprisonment in a clear *infra vires* case such as schism was upheld, but within the bounds of the established King's Bench principle that such imprisonment is permissible only to coerce conformity with a spiritual sentence.

(3) The judges enunciated a limit on the High Commission which they probably would have considered settled and uncontroversial law, but which had not previously been so clearly stated: The High Commission has no jurisdiction over slander of itself. That, together with other slanders of the "government", lay or ecclesiastical, was a common law offense. The High Commission was free to proceed against Fuller for schism, which the judges thought he was sufficiently charged with, but it must not count as schism what only came to slander of its authority. (In some places, the Commission's original charge against Fuller seems to confound the two categories, but the reports do not give a detailed account of what the judges considered schism and what slander; the Commission was warned off from the latter in general terms.)

(4) The proposition—uncontroversial by 1608 when *Fuller* was decided—that the High Commission has no authority to expound 1 Eliz. or its own patent was strongly re-emphasized.

Thus, for all its celebrity as a case on "advocate's privilege", *Fuller* was not a weighty or innovative one on the High Commission's jurisdiction and powers. It does, however, present major problems of construction in itself; these are dealt with in detail in the text.

I have found no cases in the King's Bench between *Fuller* and Coke's transference to the Chief Justiceship of that court in 1613. This Sub-section concludes with two extrajudicial opinions from 1604 and 1606. Although the earlier is of considerable interest in itself, neither contributes importantly to the development of doctrine concerning the High Commission. The 1604-5 opinion upholds the Commission's power to exercise ecclesiastical jurisdiction in a new context with special problems, but does not touch its authority to go beyond ecclesiastical sanctions. The less formal opinion from 1606 (given in discussion at Serjeants' Inn) denies the Commission's power to use imprisonment. It goes to show Coke still in line with previous Common Pleas opinion at the very beginning of his service on that court (see the next Section for his and his court's subsequent change of position on imprisonment.) If King's Bench judges participated in the opinion, they would not have been quite in accord with their earlier decisions. Coke himself was the reporter, however: he may have characteristically attributed more unanimous agreement with his own views to other judges than would have held up in adversarial debate.

The Cases

I have only one Common Pleas case earlier than Coke's assumption of the Chief Justiceship of that court in June, 1606. Chambers's Case (1605) [75] was a *Habeas corpus*. Chambers having been committed by the High Commission and having brought a writ, the sheriff responsible for his custody returned only that he was imprisoned for diverse contempts against the King. The vagueness of this return afforded sufficient grounds for disposing of the case, and it was ultimately decided on that basis. When the case first came up, however, two judges,Walmesley and Daniel, went straight to the broader issues about the High Commission's powers. (The other puisne justices, Warburton and Kingsmill, may have been present, for the report says no one contradicted Walmesley and Daniel. It says expressly that Sir Francis Gawdy, who in August, 1605, succeeded Anderson as Chief Justice of the Common Pleas after sixteen years as a King's Bench judge, was absent.) In keeping with the court's Elizabethan position, Walmesley and Daniel said flatly that the Commission had no authority to imprison and that 1 Eliz. confined it to ecclesiastical law even if the patent could be read as purporting to give it powers not warranted by that law. By way of dictum so far as the present case goes, they also said, somewhat more qualifiedly, that the Commission may not fine and estreat fines into the Exchequer. On this point, they conceded that "there has been opinion delivered to the contrary", but added that "since that time they have changed their opinion." It is not

[75] M. 2 Jac. C.P. Harg. 19, f. 169 b.

explicit whom "they" refers to, but I think it must mean the Barons of the Exchequer. If that is correct, Walmesley and Daniel would seem to be granting that it was the Exchequer's role to decide whether High Commission fines were legally collectable. But if Exchequer opinion was now clearly against the lawfulness of such fines, perhaps any obstacle to other common law courts' prohibiting them would be cleared away.

Walmesley and Daniel then added a further argument, the full implications of which seem to me somewhat elusive. Their words are: "And great mischief arises thereon [reference of 'thereon' unclear], for if a man is cited before them for only a petty thing, yet he will have a pursuivant sent for him who is 40 miles from him. And it has been seen recently that a man & his wife and 1 of his children were cited before them, &the child paid for his miles as well as the man or his wife." Off-hand the picture projected from the recent episode would seem to be of a pursuivant sent to arrest defendants, at least for the purpose of bringing them before the Commission. Naming several co-defendants from the same family and charging a man by the mile for conducting three people a considerable distance back to the Commission's seat would result in a large bill of costs if the party summoned lost the suit against him. The costs would arguably amount to a pecuniary penalty even without a fine (cf. Poole v. Gray above.) Banning all forms of taking people into custody, of course including punitive or coercive imprisonment, would cut that off (not to mention the flagrant behavior of pursuivants sent to make arrests in two of the Elizabethan cases above.) The judges' essential thought may therefore be: High Commission power to take parties into custody can ramify into more mischief than jailing convicted persons to punish or to coerce performance of spiritual sentences. Even if the latter could be justified by 1 Eliz.'s presumed purpose of more effective ecclesiastical justice, the abusive by-products cannot be. Therefore a flat ban is the only solution.

A further thought is also possible, however: Even if pursuivants were and were allowed to be nothing more than process-servers, costs could still be inflated to a degree, by charging by the mile for the pursuivant's own round trip. If (as the judges had just said) punitive fines are ruled out, must one not consider what to do about costs as well—if not barring them altogether, at any rate scrutinizing the size of the bill and whether the Commission has contributed to inflating it?

Tantalizingly, Walmesley and Daniel emphasize that the abuses they outline could be practiced on someone accused of a very minor offense or civil wrong. The obvious way to deal with that would be to have some criterion of seriousness for permissible High Commission cases. But if that solution crossed the judges' minds they do not say so. Reluctance to consider it, but instead to believe that stringent elimination of secular sanctions was the only justifiable way to restrain the Commission, characterized the Elizabethan Common Pleas and may well have been as far as the early Jacobean court would have gone. (In practice, it should be said, that approach would probably have prevented most High Commission interference with petty offenders. Why, after all, should a Commission forbidden to touch people in their personal liberty and pocketbooks go to the trouble of pursing the spiritual correction of small fry? Serious offenders are another matter—people who ought to feel the hand of ecclesiastical justice and be made examples of, but might not if lack of zeal or favoritism affected regular diocesan courts. Indeed, private complainants might as a rule need to feel strong outrage

at a serious grievance to prosecute in an august court away from home, if embarrassing the adverse party were the only advantage over local prosecution.)

Chambers was adjourned after the first discussion. When it was taken up again on a later day in the same term, the full court, including Chief Justice Gawdy, was present. The case was now unanimously resolved in the prisoner's favor without mention of the High Commission's sanctions. The basis for the resolution—quite sufficient and precedented (see *Hinde* above)—was that the return on the *Habeas corpus* was inadequate : saying only that Chambers was imprisoned for "divers contempts", it did not give the Common Pleas enough information to judge whether he was committed for a valid cause. As the court pointed out, for all that appeared Chambers could have been imprisoned for a "temporal thing", or for a contempt for which he should instead have been bailed. (There is no indication of criteria for distinguishing a bailable contempt of an ecclesiastical court that has not strayed out of the spiritual sphere from one not bailable. Talking about bailability necessarily assumes imprisoning power as well as limits thereon, but the court now chose to by-pass whether the power existed. In summing up its ground for discharging Chambers, after saying merely that the return was bad for "uncertainty" the court added, "and [for] not showing the degree of the offense." The latter phrase could be significant. Does "degree" mean only "what, or of what kind, the offense was", or does it mean "degree of seriousness among ecclesiastical offenses"? Could the implication of the word be that some offenses, though spiritual, are too minor for High Commission jurisdiction? Or that all ecclesiastical offenses are within the jurisdiction but some not grave enough to punish by imprisonment? Or not serious enough to hold a man for if he can and will put up bail? *Quaere*.)

The unexceptionable decision in Chambers was buttressed by a little obliquely related authority. A case from Dyer—254—was cited for showing that conclusory language (*criminosus* and *inhabilis*, criminal and unqualified), even though supported by specific allegation of peccadilloes (haunting taverns and [participating in] unlawful games) was insufficient to permit judging of some point about a presentee to an ecclesiastical living or his presentor—perhaps whether the former was clearly rejectable by the Bishop or whether the latter had forfeited his right to present for the immediate vacancy. Also cited was a rule that a valid Chancery bill may not be brought for "divers lands and tenements" but must say which ones.

Resolving Chambers on general *Habeas corpus* law rather than on the High Commission's powers may have been in deference to the Chief Justice, who as a veteran King's Bench judge may have been unready to agree with the strong restrictions on secular sanctions pioneered by the Common Pleas. (Since Gawdy died in 1606, making way for Coke's appointment, he left no record of his opinion about the predominant Common Pleas view.) It is of course impossible to tell whether the puisne judges would have preferred to press the issues specific to the High Commission if that could have been done without dividing the court. They may all on consideration have approved the idea that if a "narrow grounds", procedural route to decision is easily reachable it should usually be taken.

Once the court had shown where it stood, a motion was made that the sheriff holding Chambers be allowed to amend his return. The motion was denied because "the *mittimus* by which he was committed to prison & the return agree in words, so that the sheriff has done all that is in him to discharge himself, so that he may not amend it or

make it better." (I.e., the High Commission ordered the sheriff to commit Chambers for "divers contempts." When the sheriff was asked by *Habeas corpus* to justify holding the prisoner, he did all he could by passing on the reason for the detention exactly as it had been given to him. He is not in the position of a jailer who may be allowed to amend because he has over-abbreviated or summed up too vaguely the grounds communicated to him. Realistically—since the sheriff was in all probability a neutral participant interested only in doing his job according to law—the court's decision means that the *High Commission* was denied the opportunity to commit people with a sketchy statement of the reason, then re-write the order for commitment [*Mittimus*] in the event a common law court on *Habeas corpus* thinks the return unsatisfactory. Such shoddiness—if intentional, presumably meant to keep the prisoner himself ignorant of just what he had allegedly done wrong—should surely be disciplined.) Chambers was accordingly discharged outright.

We may now turn to King's Bench cases from the period between James I's accession in 1603 and Coke's translation to the Chief Justiceship of the King's Bench in October, 1613. Several antedate the span during which Coke presided over the Common Pleas, 1606-1613. Those from Coke's Common Pleas years raise the question whether the large number of decisions about the High Commission during that time affected King's Bench law on the subject. The question cannot easily be discussed, however, until the Common Pleas cases have been inspected in detail. I shall immediately describe the King's Bench cases straightforwardly.

My first two King's Bench cases conform to the type of *Chambers*: decisions based on *Habeas corpus* law, rather than the court's view of the High Commission's powers. Both, however, present significant variations.

In Bery's (or Birry's) Case (1605)[76], the original return on *Habeas corpus* said only that Bery was committed for "certain ecclesiastical causes" (Add. 25,205 says that he was committed "by means of Dr. Newman." This may have been specified in the return, but I do not think it affects the legal questions. The role of this civilian in the case is unclear.}The court rejected the return as too general. In this case, however, the (unspecified) returning officer was allowed to amend. The new return said that the prisoner was committed "for unreverend speeches to Dr. Newman & saucy carriage toward him."

The second return was also disallowed, and Bery was discharged. For all that appears from Add. 25,205 the discharge might have been outright, but Godbolt has it that the prisoner was put in bail to appear *de die in diem* before being released. Add. 25,205 says that the amended return was rejected "for generality too." The implication in the circumstances of this case would be that a specific enough return would need to give the content of the "unreverend speeches" and an indication of what acts were deemed "saucy carriage." The court in fact gave an explanation of its thinking on the score of "saucy carriage" (identical in both reports) and in so doing contributed the case's most important point. The reported words: "And it was held that if he had not put off his cap or not given the wall to him, although those are misdemeanors, yet they may not imprison him for them." This would seem to mean: (a) Though minor forms of disrespect toward clerics

[76] M. 3 Jac, K.B. Add. 25,205, f.22 (Bery); Godbolt, 147 (Birry). The reports are very close, but a few details are furnished by one and not the other.

and Church dignitaries are ecclesiastical offenses (analogous to common law misdemeanors, I should think— not, from the examples given, actual ones) and though as such they are not outside the reach of High Commission jurisdiction, they may not be punished by imprisonment. (b) The High Commission has power to imprison for serious offenses, wherever the line between petty and serious falls—serious in any event does not include disrespect in forms hardly worse than bad manners.

For its final point, touching self-incrimination, *Bery* is treated in Vol. II above (p. 339.) By whatever way the issue arose in this case, the court's opinion was that binding someone to answer interrogatories before he has been furnished with the charges against him is invalid. For present purposes, note that the High Commission was not altogether forbidden to use bonds, say to enforce cooperation with its processes or performance of its sentences, only bonds meant to obligate a person to answer questions no ecclesiastical court was entitled to ask.

In Needham's Case, from the same term as *Bery* (there is no way of telling which case was taken up first) ,[77] the return on *Habeas corpus* said that the prisoner was censured for speaking opprobrious words of Price, a minister, for which he was fined £20 and committed (to the Gatehouse prison) until he paid the fine. The court agreed that the stated cause of imprisonment was insufficient; the words called "opprobrious" should be given expressly "so the Court can judge." This is all the report says strictly about the disposition of the *Habeas corpus*. There is no information as to whether Needham was discharged outright or bailed, or as to whether amendment of the return was sought or allowed. Nor are there any observations from the court as a whole on power to fine or to imprison in order to coerce payment of a fine. There is no reason there should be, for on the bare *Habeas corpus* question the decision seems open-and-shut: Unspecified "opprobrious words" might constitute common law defamation; they might be so vague or such commonplace vilification as not to be pursuable in any court, ecclesiastical or lay; they might (if the court was ready to think along these lines, as *Bery* suggests it was, not be utterly beyond the High Commission's reach, but too trivial a manifestation of disrespect for the kind and degree of punishment imposed to be allowable.

The report contains further important material, however. (a) It is noted at the end of the report that "Needham sued Prohibition and had habeas corpus". Furthermore, the "opprobrious words" for which Price sued Needham are given—"a knave priest & fitter to weare a white cloke than a blacke." The Prohibition is the likely source of the actual words, since as plaintiff seeking that writ Needham would have had to recite them. I am not sure what the insulting edge of the utterance is. Could "priest" and "white cloke" be meant to say by innuendo that Price had Popish tendencies, suggesting in turn that Needham had Puritanical ones? Possibly, but even so the opprobrium would be very indefinite, admitting of the *mitior sensus* of "nearly meaningless aspersion—conveyed mostly by 'knave'—whatever intention one might suspect to be behind it." However one takes them, the words seem well-qualified as the sort of "letting off steam" outburst, virtually without factual content capable of being assessed as true or false, that would be hard to make out as routine ecclesiastical defamation. The report does not say whether Needham got his Prohibition, but he probably had a good chance for one without regard to the High Commission's powers.

[77] M. 3 Jac. K.B. Lansd. 1111, f. 141b.

(b) Speeches by Justice Fenner and Attorney General Coke are reported, both going beyond "the bare *Habeas corpus* question." Coke may speak as Needham's counsel, but he says so much more than was necessary to get Needham released that one wonders whether he was not speaking for himself as *amicus curiae*. (He makes some in-court appearances as Attorney General in which it seems likely that he was representing the government rather than a private client. That cannot be true in this case, for the views he expresses can hardly be what the government wanted to hear. My guess would be that his high office and prestige would permit his being allowed to address the King's Bench *in propria persona*: analogously, Serjeants sometimes spoke in the Common Pleas without being of counsel for one of the parties, as in effect *ex officio* advisers to the court.)

Justice Fenner's first speech makes one point without elaborating what conclusion it leads to: "…if one speaks opprobrious words of a minister & is [proceeded against] for them in Court Christian & wants to justify them he will not be suffered, for as they say, Est contra caritatem." I.e.: Construing the remark strictly, ecclesiastical courts take the position that truth is not a defense *in one special category of defamation*, when the words are spoken of a minister. *In that case*, the ecclesiastical view is that uncharitable (*contra caritatem*) speech is punishable even if true—to which should perhaps be added "and even if expressive of an unfavorable value judgment or hostile attitude, though not assessable for truth or falsity." Questions can be asked as to whether the "truth defense" was clearly acknowledged in ecclesiastical law across the board, and also whether it was enforced by lay courts as a required conformity with common law standards. (See Ambler v. Metcalfe, Vol. II above, p. 46, where the question is touched but not addressed head-on, and *passim* in Vol. II for the general legitimacy of insisting that ecclesiastical courts imitate the common law as closely as possible in such matters as available defenses and standards of proof.) Fenner would seem to imply that the defense was usually good in ecclesiastical law, or at least insisted on by common law courts wielding the Prohibition, except that the Church courts claimed an exception for opprobrious words spoken of a minister, which common law courts had at any rate not yet overruled.

Granting Fenner his premise, what does he want to make of it? One or both of the following, I should think: (1) Over and above the obvious vagueness of the return, it is especially important that this court know the exact words judged opprobrious, lest language constituting common law slander, or language that does not meet the most minimal standard for "defamatory" or "disrespectful", not only be punished by an ecclesiastical court, but also be sheltered from the truth defense. (2) Assuming, on the other hand, that disclosure of just what Needham said revealed that it had enough factual content to call true or false, and assuming that the words were appropriate to ecclesiastical jurisdiction, the truth defense must be made available to the defendant in the Church court. Whatever else ecclesiastical courts should or should not be allowed to do in the area of speech-offenses, they may not so far depart from the common law model as to punish someone who has only spoken what he can show to be true. Whether Needham had so spoken could obviously not be ascertained without a fuller return. (Again, Vol. II, *passim*. The position that "the common law model" often has a strong claim to be followed by ecclesiastical courts and that the truth defense in defamation is an instance, was plausible but problematic.) It is worth noting that in various contexts

Justice Fenner was not very indulgent toward ecclesiastical courts, including the High Commission.

Coke's speech, following Fenner's observation, starts by saying that the return on Needham's *Habeas corpus* was "without doubt bad", but he does not say so for, as it were, the general reason that the return was too general. Rather, at the outset he locates the return's inadequacy in its failure to say that "the party is a schismatic, heretic, or the like." The return must be "special" (specific), he says, so that "this court can judge of the heresy." I.e., Coke implies, as he later makes explicit, that the High Commission's authority extends only to the gravest ecclesiastical crimes. To support his point broadly, without immediately referring to the High Commission, he cites a case from 4 Edw. IV: An excommunicated man said "his corn grew no worse [for his having been excommunicated];" he was cited by his Ordinary "and committed as a heretic by the statute of 2 Hen. IV" (i.e, by the statute *De heretico comburendo*, which permitted ecclesiastical courts to imprison heretics—they could then be turned over to the secular authorities for burning.) The alleged heretic brought *Habeas corpus* in the King's Bench. The Ordinary returned that the prisoner was a heretic, and the return was adjudged bad. The Ordinary, clearly being allowed to amend, then revealed what the heresy consisted in. The prisoner was delivered: In the court's view his irreverent utterance about excommunication's apparent lack of temporal consequences did not constitute heresy "because it did not concern any fundamental part of religion." (Though I cannot say how precisely known the case of Edw. IV was, its hero's skepticism about what one need fear from God in this world merely by being excommunicated was a familiar anecdote.) The moral for the present case would be that a return on a High Commission *Habeas corpus* must first say "heresy" or the like to establish the imprisoning court's jurisdiction and then explain what that court counts as heresy.

Coke then turns to the High Commission in particular, with the observation that "their authority is to be well considered." He points out that at common law Ordinaries had no power to fine or imprison before 2 Hen. IV authorized them to commit for heresy. The report is not clear as to the step he took from there, but I suppose it is the argument that the existence of statutory imprisoning power before 1 Eliz. justifies, as is necessary to justify, reading the Supremacy Act as conferring on the High Commission alone imprisoning power covering only heresy and its near relatives. Coke in any event says that the High Commission is an ecclesiastical court founded "merely" by 1 Eliz. (This tends to cut off the argument that powers beyond those conferred by the statute could be given to the Commission by patent on the strength of the monarch's common law prerogative.) 1 Eliz., Coke continues, was made when the (still Catholic) Ordinaries were suspected of being remiss in punishing "heresy, error, and schism" (a little more than just heresy), and was made in order to punish "enormous schisms and heresies, & not to deal with every petty offence against ecclesiastical law or private controversies, for "that would toll Ordinaries' jurisdiction." Note from the last phrase that for Coke it was central that the statute's intent was to keep infringement on the regular ecclesiastical courts' jurisdiction to a minimum. Although this is not mentioned in the *Needham* speech, saving the policy of 23 Hen. VIII (Ch. 2 above) could be, as it came to be, an important further argument for the construction.

Here, so far as I know for the first documentable time, Coke stated the view of the High Commission which in its basic features characterized him on the Bench. (1) The

Commission's jurisdiction—not only its imprisoning or secular-sanctioning power—is limited to "enormities." (2) Given jurisdiction, imprisoning is not ruled out (and perhaps not fines and bonds, *sed quaere*). The present case adds that commitments, if challenged, must be justified by showing what specific words or acts were taken by the Commission to be "enormous." Both of these features depart from the Elizabethan Common Pleas position, of which Justice Walmesley may perhaps be considered the father.

Coke concludes his speech by citing an important precedent. The case is not named, precisely dated, or described in detail. But, *per* Coke, it was ruled "in the time of Sir Christopher Wray" (Chief Justice of the Queen's Bench 1574-1592) that the High Commission may "commit solely in great & enormous offences in which they proceed ex offic[io] for the peace of the church & in cases of heresy & not in any/every (ch[esc]un) case between p[ar]ty & p[ar]ty." Note the precedent supports Coke on power to commit, but not in terms on substantive jurisdiction, Note also that it says explicitly, as other sources we have examined so far do not, that High Commission imprisoning power applies only to criminal cases in a stricter sense than "criminal" by itself necessarily signifies—the Commission *must* be proceeding *ex officio*. Though not quite as broad as Coke's opinion, the ruling from Wray's time shows more sharply than other hints we have noted that the Elizabethan Queen's Bench was not in line with the Elizabethan Common Pleas.

After Coke's speech, Justice Fenner made a further remark: The High Commission has "come to" proceed according to their instructions, "but what those instructions are no one can know, and also no one can see what their commission is, for it is not enrolled, which seems to me a great abuse." The application of this is not evident. The observation shows, as his first speech does more subtly, that Fenner was no friend of the High Commission. It suggests that any attempt on the Commission's part to claim that its actions were authorized by its instructions or commission should be rebuffed, the more so because these documents were not in the public domain. The argument (which we have seen made) that the statute permitted the Commission to do whatever the monarch permitted or told it to in the patent would have received short shrift from Fenner.

My next piece of evidence [78] is only a *nota* without context: Justices Williams and Tanfield, "on Serjeant Nicholl's motion", said that the High Commission had no authority to impose a fine on anyone or imprison him for non-payment thereof. They go on, "if they may impose a fine, it must be estreated into the Excheq[uer]." At first sight there appears to be an ambiguity as between "fining is flatly unlawful" and"fining at least may be lawful, but imprisonment to coerce payment is not—estreatment into the Exchequer is the only allowable procedure to realize the fine." I think the ambiguity is dispelled, however, by a further remark from Williams. He says the matter was debated "at large" in the Exchequer in a case in which he was of counsel, and it was "finally adjudged" that the High Commission may not impose a fine. (The case is very likely the same one Williams cited as counsel in *Chambers* above.) With this addition, the two judges' thinking can be spelled out as follows: We can *now* say safely enough that High Commission fines are "flatly unlawful", but it is not strictly ours to say. So long as the Exchequer would or might regard High Commission fines as lawful and handle them like

[78] H. 3 Jac. K.B. Add.25,205, f.25

other estreated debts to the Crown, we would have no clear power to interfere. The Exchequer having with full deliberation ruled out such fines, however, there is no obstacle to our saying they are simply ruled out, as in our opinion they should be. If the Exchequer had not disallowed estreating High Commission fines, it would be our option to decide whether imprisonment to coerce payment should be permitted as a supplementary means of enforcement. To permit it as the sole means—assuming contrary to fact that we were inclined to think that fines are authorized by 1 Eliz. –would be a breach of inter-court comity. Besides strong convictions on the statute's meaning, such a step would involve either saying (outside regular appellate channels) that the Exchequer was wrong or disputing (whether or not it is in the abstract disputable) the Exchequer's primary responsibility for deciding whether an alleged debt to the Crown is really due.

In the *Habeas corpus* case of Williams (1606)[79] , the return said: (a) The complaint for which Williams was committed to the Gatehouse was incontinency, irreverent words "given" to the Bishop of Llandaff when he was sitting in his Consistory, and slanderous speaking of the Bishop's wife. (b) On conviction, Williams was enjoined to make purgation and do penance, fined, and ordered to pay costs. He paid the fine, but was imprisoned for nonfeasance of the rest of the sentence.

With respect to (a) –the original cause of prosecution, incontinency, *may* be vulnerable. Is incontinence serious enough for the High Commission? If not, however, speech-offenses against a high ecclesiastical dignitary and his family, especially when aggravated by disturbance of order and expression of contempt for the judge in a Church court, might well be *infra vires*. Even so, in the light of *Bery* and *Needham*, it would not be out of the question to ask for specification of the words spoken to the Bishop and about his wife, for the words ought perhaps to appear to be ecclesiastical defamation (even with the "contempt of court" element added.)

The King's Bench as reported did not, however, say anything about the return *quoad* the substantive case against Williams. That is unsurprising, partly because of the problems about attacking the original prosecution I have suggested, and the more so because the return as a whole posed two perfectly clear legal questions: (1) Even if the High Commission may not imprison for any other purpose, may it do so to coerce performance of a purely spiritual sentence? (2) Should a costs award be considered a legitimate part of a spiritual sentence (and if so, should the return give the amount of the costs or itemize them lest costs include covert damages?)

While the King's Bench judges confined themselves in *Williams* to the Commission's punitive and coercive powers, they did not *just* address the legality of imprisonment to enforce spiritual penalties, and they said nothing about the costs. (It should be noted that abuse of costs had been made an issue of in the Common Pleas, but not in the King's Bench.) The judges' discussion of *Williams* therefore raises questions of interpretation going to its premises.

The first time the case came up, Chief Justice Popham said the High Commissioners may not imprison for a fine imposed by them, nor take an obligation for it to the King's use, but must estreat the fine into the Exchequer. But if the Commissioners impose penance "or other lawful ecclesiastical censure", they may

[79] P. 4 Jac. K.B. Lansd.1111, f. 210. The prisoner Williams here should of course not be confused with *Justice* Williams, who participated judicially in the case.

imprison the party *quousque* he conforms. Justices Fenner, Tanfield and Yelverton agreed with Popham (leaving only Justice Williams unheard from—he may of course have been absent.) In short, the whole court or most of it was at one on the nature and extent of the imprisoning power (leaving aside the costs, in which none of the judges took an interest.) Popham's remark on fines can be taken as a dictum, save for one twist: Suppose Williams had been imprisoned to coerce payment of his fine *and* performance of his penance—i.e., for one lawful and one unlawful purpose. Should he not, perhaps, be released in consideration of the wrongful aspect of his commitment, though he might reasonably be bailed to constrain him more mildly to perform the rightful part? (Release on bail would probably obligate him to report to the High Commission from time to time so that it could be ascertained whether he had conformed to the spiritual sentence. He would probably be subject to recommitment at the Commission's discretion for obdurate resistance, and at any rate he would be in danger of excommunication and its consequences.) In the actual case, by contrast, Williams had paid the fine voluntarily .It seems disproportionate to be harder on a man who has acknowledged his wrongdoing to the extent of making monetary amends for it without being coerced than on one who refuses all cooperation with the High Commission. Therefore Williams should be discharged on at least as favorable terms as someone released from partially illegal imprisonment.

If this is the conclusion to which Popham's thinking tends, his insistence that the High Commission may not commit to force payment of a fine does not reduce to a dictum added to his on-the-issue holding that imprisonment to compel performance of spiritual sentences is lawful. He needs to say that "imposing a fine" is in a sense as improper as imprisoning to coerce payment of a fine, for "imposing" one at all can have the effect of inducing a person to pay up at once if he is able; the only way for the Commission, in a manner of speaking, to "fine" is to estreat immediately into the Exchequer, which agency may eventually collect the money, provided its judicial branch considers a payment to the monarch assessed by the High Commission a lawful debt to the Crown. (Popham probably knew as well as Justices Williams and Tanfield in the *nota* just above that the contemporary Exchequer was unfavorable to High Commission fines. It remains correct toward Exchequer jurisdiction to say that sums the High Commission thinks should be paid to the Crown should be referred to the Exchequer for evaluation. They should not, however, be coerced by imprisonment, guaranteed by bonds, or—by the reasoning I have been exploring—"imposed" in the sense "ordered", so that the party is given the impression that the sooner he pays the better he may fare with the authorities.

The analysis I have pursued has the virtue that it predicts what eventually happened to Williams—he was released on bail. But his release did not occur until after two more discussions of his case among the judges. A few loose ends in the analysis of Popham's and three puisne judges' first pronouncement need commentary before moving on to later judicial remarks:

(a) The picture of Williams paying the fine but resisting the spiritual penalties is puzzling. Why might someone do that? There are several possibilities. (1) The belief that paying the fine might save one from imprisonment, even if one knew or surmised that this was not legally guaranteed. Behind this belief might lie the further one, which could be cynical and could be Puritan, that the Commission cared more about the money than about whether penance and the like were actually performed. "Caring more about the

money" need not proceed from a low desire to enrich the Crown. It could reflect the perfectly rational view that fines deter, whereas performance of spiritual penalties, especially nominal performance by people who do not repent of anything they sincerely regard as wrong and do not respect the court bearing down on them, is unlikely to affect the future very much. (2) A purer religious attitude: As it were, "Let my persecutors have the lucre they seek to extort from me illegally, but let them not have the satisfaction of seeing me hypocritically perform their ceremonies—they may accommodate me in their jail for a while if they must." (3) We of course do not know that Williams really had paid his fine, only that the High Commission said so. The Commission might well waive the fine by returning that it was paid, correctly predicting that the chances of being allowed to hold Williams for the spiritual penalties only was better than the chance of realizing the fine, either through an Exchequer unlikely to be cooperative or by its own coercion. Even apart from the risk of losing all by trying for too much, a less cynical view of the Commission than that suggested above might credit it with thinking spiritual discipline of misbehaving Christians more important and more clearly its role than exacting a pecuniary penalty—and after all, the bite of jail is for most people a more memorable punishment than a fine even when the keys to the jail are in the prisoner's hand.

(b) It is worth noting that the High Commission did not say that Williams was imprisoned as a punishment. In *Bery* and *Needham* a punishment may have been intended, but instead of saying so the Commission tried to conceal what it was behind vague language. The High Commission's course in *Williams* reflects the failure of that expedient. Yet from earlier than these three cases we have not seen the King's Bench decisively ruling out punitive imprisonment. The case from Wray's time cited by Coke in Needham is the closest thing. Williams' offenses hardly meet the standard of gravity Wray thought required to justify any imprisonment, coercive or punitive. The Popham opinion in *Williams* lowers that standard for the coercive variety *quoad* spiritual penalties. The much sharper Common Pleas opinion against secular sanctions may have deterred the High Commissioners or their advisers from supposing they could persuade the King's Bench to take a radically different stance, extending to the punitive imprisonment of an offender of Williams' grade.

(c) It bears re-emphasizing that Popham and his colleagues ruled out not only imprisoning to enforce payment of a fine, but also taking a bond conditioned on payment. While it may be tenable to hold that requiring a performance bond of an ecclesiastical defendant is intrinsically secular and therefore *ultra vires* by the same token as fining and imprisoning, *Williams* shows why such bonds *for fines* must be excluded without reaching so broad a rule. The judges stress that the only way the High Commission could fine was to estreat the fine into the Exchequer as a debt to the Crown, whether or not they thought the Exchequer likely to allow it as a debt. Obviously, if the Commission could demand a bond payable to the King on forfeiture it could secure payment without the Exchequer's cooperation. It could in effect insure itself against an unfavorable Exchequer view of High Commission fines (A further and more abusive step would be to put a penalty in the bond so that the party would be under pressure to pay the principal sum of the fine without disputing its legality in the Exchequer. I do not know whether Exchequer procedure would admit of such a ruse and assume that equitable protection against the penalty would be available, perhaps in the Exchequer itself. But a naïve

person might still be frightened into paying the principal to avoid trouble, if not serious risk of incurring the penalty.)

Williams' Case was taken up for the second time on another day in the same term (P.4 Jac.) On this occasion, Justices Fenner and Williams said flatly that the High Commission may not "assess fines" or imprison. Fenner must have thought better of his concurrence with Popham on the earlier day, if he and Justice Williams meant their point to be as absolute as it sounds in the report. (Note the phrase "assess fines." Could the "assess" make the meaning "do anything that resembles fining, even if the Commission simply estreats the sum due and resorts to no form of enforcement on its own"?) Justice Tanfield disagreed. He too had changed his mind since the earlier discussion. As starkly as Fenner and Williams say the Commission may not "assess fines" or imprison, Tanfield says "they may well do both." He gives two reasons: (1) He reads the statute as allowing the High Commission to proceed according to its discretion ("*iuxta sanam discretionem suam*"—the report uses the Latin.) I take this to mean that the Commission may go beyond regular ecclesiastical sanctions at discretion, as deemed necessary, though it may not imply that no limits on the abuse of discretion may be enforced by common law procedures. (2) If the High Commission may not fine and imprison it has no more power than an Ordinary, "which were in a manner to make the statute idle." In making this point, Tanfield is the first judge we have encountered to suggest a reason for the High Commission's existence to compete with the one that has several times come to our attention. One might formulate the two reasons this way:

Reason I—Historically, the Commission was created because the Ordinaries left over from Queen Mary's reign were unreliable. It was for suppressing religious offenses at the level of heresy that they were really unreliable, which favors the inference that the Commission was intended to have jurisdiction only over such grave matters. But even if one is unwilling to draw that inference, it was and still is true that the value of having a High Commission reduces to the value of having a supplementary ecclesiastical court. It *does* make sense to have one, even when there is no longer a general cause to distrust the regular courts on the score of heresy and the like. For it may always be the case that Ordinaries here and Ordinaries there will be deficient in zeal to enforce all parts of ecclesiastical criminal law or in competence or freedom from bias to apply the civil branch correctly. From this—the conception of the High Commission as a concurrent supplement—the appropriate inference is that that the Commission, as "just another ecclesiastical court" with the same jurisdiction as any other, cannot go beyond regular ecclesiastical sanctions. Parliament can hardly have intended to give one ecclesiastical court extensive temporal sanctions to be used against anyone who happens to be caught in its grasp, down to the pettiest malfeasor. (Does this not probably represent the reasoning of Justice Walmesley?)

Reason II—Tanfield's reason: A mere overlapping supplementary court does *not* make much sense. It may have for a brief time around the enactment of 1 Eliz., but one should assume that a statute not expressly made temporary, and which has stayed on the books for many years and been frequently put into execution, has a serious long-run purpose. Having one high-ranking ecclesiastical court with discretion to use secular sanctions when that seems necessary is a more cogent purpose than having an extra court with no more effectual means for exacting obedience of the ecclesiastical law than the regular tribunals have. Such a court could at best (i) cause some offenders to be

prosecuted and, if convicted, punished spiritually who might otherwise, on account of this or that contingency, escape those fates; and (ii) permit private complainants to choose their court. Intent to create such a court is a weak explanation compared to creating a new tribunal with "teeth" the regular courts lacked.

Beyond the unresolved difference between Fenner-Williams and Tanfield, the report gives no further information on events in P. 4 Jac. Two notations at the end carry the case into the next term (Trinity.) (1) In that term the whole court is said to have agreed that the High Commission may not commit "for their fines assessed", but "make estreats into the Exchequer." It would appear that both sides of the debate in Easter were persuaded, perhaps by the Chief Justice, to retreat on fining (which was not directly in issue in *Williams*, since the prisoner had already paid the fine.) The retreat on neither side need have been a drastic reversal. Justices Fenner and Williams would not have had to concede more than that it was too extreme to say the Commission may not "assess" a fine; they may not have granted more than that it was the Exchequer's business to pass on the validity of estreated fines (and they may well have thought that the Exchequer would not uphold them.) Tanfield would only have had to concede that bonds or imprisonment should not be used to enforce fines: estreating was the "due process"; if the realization of fines was being frustrated by the Exchequer, perhaps that should be changed by legislation or judicial negotiation, perhaps it must be suffered, but it does not affect the Commission's legal power under the statute to fine. The point is not empty formalism, for a party who paid the fine, as the prisoner Williams had, would have satisfied a substantial part of his ecclesiastical duty and have at least a moral claim to lenient treatment in other respects—he would not have paid "of his own folly." Someone who failed to pay could not only be imprisoned to coerce performance of spiritual sentences, but also as a punishment for his original offense, by what I take to be Tanfield's position.

(2) As I have already noted, the report says at the very end that the prisoner Williams was delivered with bail. No summarizing tally of the judges' positions is given. The best projection from the information we have would be that three justices (Popham, Tanfield, and Yelverton) thought the imprisonment was perfectly lawful, Fenner and Justice Williams probably dissenting, though upon the first discussion Fenner went along with imprisonment to back up ecclesiastical sanctions. Popham and probably Yelverton might have limited imprisonment to coercion of spiritual performance, with Tanfield alone ready to support punitive imprisonment.

Though justly imprisoned *per* the majority, the prisoner was nevertheless released. Only one of the majority would have needed to favor release, but there is nothing to suggest that the decision was not unanimous. Decisions in *Habeas corpus* cases to release with bail are often hard to interpret. (This is illustrated in some of the cases involving self-incrimination—Vol. II, Ch. 5) One always-present consideration is that whatever imprisoning power, punitive or coercive, the High Commission had, it could not plausibly be entitled to hold people perpetually. Release by the common law court's discretion after the prisoner had served a reasonable time in relation to the gravity of his offense—with bail if the commitment was initially lawful and the Church's interest in the party's conformity remained unsatisfied—is the best general formula. The prisoner Williams would have spent only a matter of weeks in jail—part of Easter term, the interval between terms, and part of Trinity—but his original misbehavior was not very grievous. As I have suggested, his payment of the fine, leaving (aside from the

undiscussed costs) only the spiritual penalties, which could have been addressed by excommunication, would quite reasonably be counted in his favor. (It would be a nice, though entirely speculative, irony if Justice Tanfield, the strongest supporter of secular sanctions, was firmly for letting the prisoner go: A perfectly legal secular punishment had been accomplished, just what the statute, in Tanfield's opinion, meant to allow.)

Another case from the same term as *Williams* [80] requires mention here only for a remark by Chief Justice Popham at the end of the report. Popham's words are puzzling; the reporter may have caught only a fragment of what he said. The comment does however, tend to confirm Popham's view in *Williams* of the High Commission's imprisoning power. The case itself was about the writ called *Vi laica removenda*, whereby the sheriff's assistance could be called in to remove a clergyman from physical property attached to a living if he was not entitled, or was no longer entitled, to occupy it but would not vacate voluntarily. Whether this procedure could be used in the circumstances of this case and, if so, whether the procedure was followed properly gave the King's Bench judges trouble and evoked divided opinions; no resolution is reported.

The High Commission was involved with the case in that it deprived a beneficed clergyman called Smith "upon the new canons" (i.e., for some unspecified infraction of the 1604 canons) and also committed him to prison. The *Vi laica* was brought by the person entitled to present the next incumbent; the issues on the *Vi laica* were the more complicated because, Smith being absent in jail, the eviction proceedings were a matter of ousting his wife and servants, who remained in possession of the minister's residence. Except for Popham's final remark, nothing in the discussion of the case touched High Commission questions. If the Commission's jurisdiction, act of deprivation, and act of imprisoning could have been challenged by Prohibition or *Habeas corpus*, they were not.

Popham's reported words are: "if the High Commission may commit one quousque he submits to the censure of the Church not in other manner [no punctuation]." If the "if" is a slip, Popham would be reiterating his opinion in Williams, with the "not in other manner" making it clearer than before that only coercive commitment to enforce spiritual sentences was lawful. But what does this have to do with the *Vi laica* case? One conjecture occurs to me. Popham's thought spelled out as follows might fit the context: "If [as I believe is true, but in any event assuming it is] the Commission may commit someone until he submits to the censure of the Church and not otherwise [i.e., not as a punishment for his original offense or to compel payment of a fine], is there not reason to doubt whether Smith was lawfully imprisoned? If a clergyman is deprived of his living are there likely to be other censures of the Church to which he ought to submit? There possibly could be, but one must wonder whether imprisonment on top of deprivation is not a dose of temporal punishment in addition to an already severe ecclesiastical sanction. If we assume the imprisonment was unlawful, could the *Vi laica* be affected? Could it matter that the sheriff took action against Smith's wife and maid-servant when Smith's absence was in a sense explicable by his unlawful detention, though obviously as a free man he could have been absent on a given occasion?"

I cannot answer the concluding question for want of sufficient understanding of the *Vi laica* law. The judges' discussion of the case, however, though too brief to clarify much, makes me wonder whether concern about the legality of Smith's imprisonment

[80] P. 4 Jac. K.B. Harl. 1631, f.327.

could not have come up in further debate. (Justices Yelverton and Fenner appear to think that neither a deprived clergyman nor his servants or family may be removed by *Vi laica*. Justice Williams thought that if the minister is merely absent his servants—nothing said about the family—may be removed. Popham thought that if the servants or wife keep possession by force they may be removed and committed. In the instant case, however, Mrs. Smith and the servant girl do not seem to have used force, The sheriff used a little, first by breaking in when the servant refused to admit him and then preventing the wife, who was out when he arrived, from entering, though she expressed her desire to and signified that she was not surrendering possession. Justice Tanfield essentially agreed with Popham and emphasized that even though Smith was in prison he remained in possession through his servants, and that merely by preventing Mrs. Smith from re-entering he "removed" her as a matter of law. Amid this confusion and disagreement—I can against only ask—could the possibility that the case might not have arisen if Smith had not be wrongfully imprisoned have been focused on as a way out?)

The important *Habeas corpus* case of Maunsell and Ladd (1607)[81] has been exhaustively discussed in Vol. II above, because it is about the High Commission's power to require accusees to answer self-incriminating questions and imprison them in order to coerce them to answer. The argument of this exceptionally well-reported case was far-ranging. It inevitably touched questions about the High Commission broader than the immediate issue—about its power to imprison at all and the general nature and scope of the tribunal. I shall not try to abstract everything the prisoners' lawyers and the judges said that transcends the self-incrimination question in which such remarks are enmeshed, but refer the reader to the detailed presentation of the case in Vol. II. Two points, however, may be usefully picked out as contributions to the on-going debates about the Commission's jurisdiction and procedural powers, other than its interrogating power.

(1) Maunsell and Ladd were imprisoned, *per* the return on *Habeas corpus*, because they were unwilling to answer a question about a conventicle. Exactly what they were asked is unclear; it was probably whether they had participated in such an unlawful religious assembly. No issue was made in the case as to whether proceedings against conventicles or alleged conventiclers fell within the Commission's substantive jurisdiction. This is evidence that the activity was a grave enough religious offense for the High Commission. It may have been thought to amount to schism, or at least to be close enough, but there was no discussion of the matter. Counsel vehemently attacking the Commission on its interrogating power and more did not suggest that if conventicling was illegal at all by ecclesiastical law it was a relatively minor offense within diocesan jurisdiction.

(2) The prisoners had been held for nine months at the time they brought their *Habeas corpus*. It was cogently argued by Ladd's counsel (Fuller, for whom see the next case below—Vol. II, pp. 344 and 350-51 for Fuller's argument) that even granting that their imprisonment was initially lawful they could not be held longer than three months. The argument depends on the contention that any imprisoning power the Commission

[81] P.5-T.5 Jac. K.B. Vol. II, pp. 340-370. For documentation, Note 14, p. 430. One further report—Noy, 127, undated, *sub nom*. Maunsell v. Orian—is clearly about the same case, but it is not used in Vol. II since it does not touch the debate on self-incrimination. It is used here for remarks by Chief Justice Popham.

possibly had was owing to the statute *De heretico comburendo* (2 Hen. IV, c. 15) , which expressly provided that heretics imprisoned by ecclesiastical courts must be tried within three months of their commitment. Chief Justice Popham rebutted Fuller vigorously. Which side of the debate is the stronger seems to me uncertain—see Vol. II for analysis. Nowhere else in reported cases is the permissible duration of High Commission imprisonment so expressly raised. All that can be said about the exchange in *Maunsell and Ladd* is that Fuller did not persuade Popham of his three-month rule—none of the other judges comments.

(3) Noy's brief report is of a single remark by Popham. It basically says that the High Commission may imprison if it is proceeding within its jurisdiction. The passage is of interest because of the Chief Justice's way of making that point, for he founds the power to imprison on the power to fine. "[I]t hath been adjudged", he says, "that a fine imposed by the High Commissioners was estreated into the Exchequer. And that was levied by process out of the Exchequer, and well. And if they may impose a fine, they may imprison, and it hath been so used these 50 years, without any repugnancy, if the offence be ecclesiastical and belong to them." The language here is puzzling. What court "adjudged"? That a fine *was* estreated and *was* subsequently levied seems rather a fact than something adjudged. Perhaps the "and well" is the clue to the idea: For the fifty years the High Commission has existed, fines have been imposed and collected through the Exchequer. The practice has at least gone unchallenged and may have been judicially endorsed, perhaps by the Exchequer or perhaps by other courts, either directly by refusal to prohibit fining or at least collaterally—e.g., by holding that the Commission may not imprison to enforce fines because estreating is the correct procedure (even if by current Exchequer law actual collection could be blocked—which Popham may not have believed.) In any event, it is notable that in this speech Popham takes the power to fine as the entering wedge for use of temporal sanctions by the High Commission. His thought seems to be "If a court can fine, surely it can imprison." On the surface that jars with the assumption that jail is a heavier sanction than a fine, but remember that Popham held High Commission imprisonment lawful only to coerce performance of spiritual penalties. A fine is hard not to see as a punishment, unless perhaps by seeing it as a forced commutation of spiritual sanctions: coercive imprisonment, savoring of civil commitment by courts of equity, can be reasonably regarded as lighter.

Maunsell and Ladd brought in its train Fuller's Case.[82] Although celebrated, *Fuller* is not well-reported. Almost all solid information about the case comes from 12 Coke, one of the two posthumous volumes of the *Reports*, for the accounts in Add. 25,213 and Noy are cursory. Coke reports the case in the form of "resolutions", which he says were agreed on by the Common Pleas and Exchequer judges as well as those of the King's Bench, where the case arose. (Whether *Fuller* was formally adjourned into the Exchequer Chamber for decision by all the judges or only discussed informally by the whole Bench, perhaps at Serjeants' Inn, does not appear. I think the latter is more likely,

[82] M. 5 Jac. K.B. Add. 25,213, f.81; Noy, 127 (undated); 12 Coke, 41; Harg. 33, f. 119 ("An Exact Copie of the Record of Nicholas Fuller's case of Grayes' Inne Esqr Termino Trin Anno 5 Jac Regis"—in Latin except for the Commission's charges against Fuller in English.)

since the procedural setting at the crucial point to which the resolutions relate was a mere motion for Consultation to reverse a King's Bench Prohibition. By participation in the deliberations of all the judges, as Chief Justice of the Common Pleas, Coke would have had direct knowledge of the resolutions and no doubt a role in working them out.) The resolutions certainly give a clear rendering of judicial opinion on the issues of the case; they suffer from the fault of all reporting of ultimate conclusions alone, to which Coke was partial, in that they do not tell us about debate on the way to that end, though inferences about the intermediate steps are sometimes possible. In addition to the three reports, a copy of the official record of *Fuller* is preserved among the manuscripts consisting largely of reports. This document is useful for some narrative details and occasional hints of how legal issues may have been seen, but like all official records it supplies no direct evidence of the thinking of counsel and judges.

The bare narrative of *Fuller*—synthesized from the documents, none of which gives the whole story—is as follows: In the vacation between Trinity 5 Jac., when *Maunsell and Ladd* was argued for the second time, and Michaelmas, Fuller was summoned before the High Commission and accused of culpable utterances in the course of his argument as Ladd's counsel in that case. He obtained a Prohibition from two King's Bench judges, Fenner and Croke. In Michaelmas, the Prohibition was partially undone by Consultation. It is out of the discussion of the motion for Consultation that Coke's resolutions came. The High Commission then proceeded against Fuller and convicted him of schism and erroneous opinions. He was fined £200 and committed to the Fleet prison. Thereupon he brought a *Habeas corpus* in the King's Bench. Counsel—"Serjeant Harris Minor" and Serjeant Hutton—were assigned to Fuller. They took two unspecified exceptions to the return, but the court, with all judges participating, held it satisfactory and remanded the prisoner.

The official record of the case gives us the whole of Fuller's surmise to have a Prohibition, in repetitious legalese. We do not, however, have any information about argument from the surmise—i.e., argument as to why, assuming factual statements in the surmise to be true, a Prohibition should or should not be granted. There almost certainly was no such argument: The Prohibition was granted by two judges in vacation; Fuller's exhaustive complaint could hardly fail, and did not as the case was later decided, to state *some* ways in which the High Commission had exceeded its jurisdiction; granting Prohibition fairly casually, especially outside court, if there was *prima facie* justification and leaving serious debate until Consultation was moved for was common enough. Coke's resolutions, on the other hand, give a good picture of what the judges held on the fundamental High Commission issues by way of deciding on what scores the Commission might proceed against Fuller and on which ones they might not—i.e., how much of the Prohibition stopping all proceedings should be upheld and how much should be reversed by Consultation. We lack only give-and-take debate of these matters.

The most striking absence in the materials is any extended discussion of the question that to modern eyes is likely to seem the most interesting: Is a lawyer arguing in court for his client liable to be prosecuted for words which, if spoken in other circumstances, would or might be a speech-offense? Less generally, is a common lawyer arguing for his client in common law proceedings answerable to ecclesiastical courts for utterances which, outside that context, would or might be ecclesiastical offenses? It is, I think, clear from Fuller's surmise that he claimed a broad "advocate's privilege", though

exactly what he claimed presents some problems. (For a detailed analysis of his claim, addressed to those problems, see the End Note at the conclusion of this Section.) From Coke, it is entirely clear that the judges rejected any comprehensive privilege. Resolution # 4 contains the holding that rules out such privilege, because it is specifically about a counselor arguing in court. It starts with the general point that if a counselor "scandals" (slanders) the King or the government, *temporal or ecclesiastical*, he has committed a misdemeanor and contempt of court; he is subject to indictment and, if convicted, to fine and imprisonment. I.e., slandering the authorities in common law courtroom argument is a common law offense; it is such even if the slander is *of* ecclesiastical authorities; no "advocate's privilege" protects the slanderer. Resolution # 4 then emphasizes expressly that ecclesiastical courts do *not* have jurisdiction (even if the slander is of ecclesiastical authorities.) Resolution #3 spells out the application of this principle to Fuller's Case: Charges made by the High Commission against Fuller claiming that he had slandered the Commission were outside its power; it had improperly charged him with offenses determinable at common law. Therefore, *per* Resolution #3, the Consultation was qualified by a clause forbidding it from pursuing slander of itself (or—the clause adds for good measure—anything else "*punienda et determinanda*" at common law or by statute.) Resolution #4, however, goes on from the general point to add that if "he" (i.e., a counselor) "publishes" heresy, schism, or error he may be corrected by ecclesiastical law. Therefore, *per* the Resolution expressly, Consultation was granted. (I.e., the only reason for not letting the whole Prohibition stand was that *inter alia* the High Commission charged Fuller—or plausibly charged him—with some or all of the three serious religious offenses herewith affirmed to be within its jurisdiction.

I shall return to the other Resolutions and to detailed implications of #s 3 and 4. The present point—that #4 rules out Fuller's claim to an "advocate's privilege"—is clear in itself. The steps to this conclusion are unknowable from the documents we have, but some speculation may be warranted. Normal procedure would be for the motion for Consultation to be argued for and against in the King's Bench (the alternative dispositions being to uphold the Prohibition *in toto*, reverse it *in toto*, or to take the course actually taken in the end—Consultation for part of the High Commission suit, Prohibition stands for the rest.) Following debate by counsel, if the King's Bench judges did not feel ready to give their opinions, they could have adjourned the case for further discussion. Not routinely, but naturally enough in so far as the case can be seen as difficult or important, they might have conferred privately with the judges of the other major courts, announcing their decision only after such conference. This is one route to Coke's pan-judicial Resolutions. The other would be to hear no argument when the motion was first made, but to adjourn the case for argument before the judges of all three courts. Either way, there would have been public debate between Fuller's counsel, or Fuller representing himself, and counsel for the High Commission. The judges—whether the whole Bench or the King's Bench judges only—might interrupt or participate in such debate, but they were of course not obliged to. At the end of debate, the judges might have given their individual opinions *seriatim*, but they were perfectly free to hold off until they had had time to confer among themselves. Ultimately, they might have made an order without publicly stating their reasons, announced a unanimous *per Curiam* opinion with a statement of reasons, or delivered individual opinions with dissents and concurrences on distinctive grounds articulated.

It is surprising not to have reports of adversarial debate on the motion for Consultation in *Fuller*, since the case must have attracted interest, partly because of its politically lively subject matter concerning the High Commission and Puritanism and the more so because it concerned the rights of lawyers in the line of duty. (Cf. the excellent reporting of *Fuller's* antecedent, *Maunsell and Ladd*.) Of course reports of adversarial debate may be found, or at any rate may once have existed. Nevertheless, it seems to me that the absence of any is suspicious enough to suggest the possibility that there was no open-court debate on the motion and that Coke's Resolutions are the product of irregular procedure on the part of the King's Bench. Although I am on conjectural ground, I think a plausible story can be told.

Let us try to imagine the perspective of the King's Bench when the High Commission moved for Consultation instead of accepting the Prohibition and leaving Fuller alone. With his Puritan sympathies and his Puritan client Ladd, Fuller may not have been a favorite of most judges, but. I can still imagine their rather wishing that he had been left alone. Determination on the High Commission's part to punish him for whatever it could salvage as within its jurisdiction must have looked like a vendetta even to eyes not particularly hostile toward the Commission. A gratuitous vendetta against a barrister arising from his in-court words cannot have been a happy prospect even to judges inclined to think—as in the event they all agreed—that nothing could be done to shield a common law advocate from prosecution for proper High Commission offenses. Gratuitousness is not hard to see. *Maunsell and Ladd* was still not finally decided when the Consultation in *Fuller* was sought. I do not think, however, that the Commission could have had much to fear about the probable outcome of that case—nothing like a desperate need to silence Fuller lest upon re-argument he and his co-counsel should be successful in liberating their clients though they had failed heretofore.

It is true that the King's Bench in Michaelmas was altered in composition from the court that in the preceding Easter term and (minus the dying Chief Justice Popham) in Trinity had listened to Fuller *et al*. and sent their clients back to jail, where they remained pending final decision. A major shake-up of the King's Bench occurred late in Trinity: On June 25, 1607, Sir Thomas Fleming was moved from Chief Baron of the Exchequer to be Chief Justice of the King's Bench in succession to as Chief Justice Popham, who died on June 10; Justice Tanfield was promoted to Chief Baron of the Exchequer; and Sir John Croke was appointed as his successor on the King's Bench. Therefore, if *Maunsell and Ladd* were moved again—as no evidence I know about suggests it was—the parties would have faced a court with two judges who had not previously sat on the case and without the two (Popham and Tanfield) who when they were members of the court had been strongest against the prisoners on their duty to answer and the legality of imprisoning them for refusal. Despite this circumstance, however, I doubt that there would have been a significant chance of reversal in midstream upon another hearing of *Maunsell and Ladd*. That is partly because it would have required the novice judges to overrule the two former ones who, besides having heard argument from the beginning of the case, probably enjoyed the highest intellectual prestige on the court, one of them the late venerable and formidable Chief Justice. If another round would have offered any prospect of the prisoners' being liberated, almost certainly with bail, it would probably have been on the still-open ground that High Commission imprisonment must *eventually* end. (By the time of the motion for Consultation in *Fuller* the prisoners would have

served a good year.) I conclude that the motion, rather than being seen as a strategic move, must have worn the aspect of a vendetta—or, more mildly, a manifestation of mere zeal to make an example of Fuller and strike a blow against Puritanism. As such, the King's Bench judges cannot have been eager to act on the motion, though of course they must.

In this situation, I can imagine the judges' preferring to avoid a regular hearing. Having one would involve giving the floor to Fuller's counsel, if not to Fuller himself, to attack the High Commission with renewed vigor and especially to enlarge on the scandal and attack the legality of prosecuting an advocate for doing his best on a client's behalf. It would likewise give the High Commission the floor to elaborate the justification for doing what it probably could not be denied the right to do—punish schism committed even in the course of advocacy—, but which a court with a regard for comity should be reluctant to do. For a member of the family of courts under the King to put another in the position of having to stand by while occurrences inside its courtroom are scrutinized from without—while words listened to and argued with inside are identified from the outside as "enormous" crime—is not a graceful way to foster correct relations between courts. Having been put in that embarrassing position, a sensible thing for the King's Bench to do—instead of staging a vendetta and counter-vendetta—would be to confer informally with their brother judges in the hope of responding to the motion without adversarial debate and with the authority of pan-judicial consensus. Coke's Resolutions fulfill that hope, though one can only conjecture about the motives and steps that led to them.

For a more complete picture of the state of *Maunsell and Ladd* when *Fuller* arose, see the account of the former in Vol. II. The reflections in the paragraphs just above can be enriched by noting two specific features of Fuller's claim to a Prohibition in the official record. Towards strengthening his case for "advocate's privilege", Fuller sates that he was assigned to be Ladd's counsel and that *Maunsell and Ladd* was still pending when he was summoned by the High Commission. I doubt that either allegation adds to the substance of his claim that he could not be prosecuted for what he said as an advocate. (See End Note.) Both, however, add sharpness to the moral conundrum I have suggested the motion for Consultation posed for the King's Bench. The first emphasizes that Fuller was serving as an "officer of the court" in a strong sense—not a highly partisan lawyer brought in by Puritan interests to vilify the High Commission as much as possible in the process of speaking for his Puritan client. (In its charges against Fuller, the High Commission represented him very much in the latter light.)

I do not know what the court's rules and practice were with respect to the assignment of counsel. Apart from Fuller's Case, I have seen nothing to suggest that parties bringing *Habeas corpus* could not, or normally did not, have counsel engaged by themselves on hand when they were brought into court in obedience to the writ. Assignment occurs twice in the present case, however—Fuller's appointment to represent Ladd and the appointment of two Serjeants to represent Fuller in his own *Habeas corpus*. Ladd could well have been a poor man, who got his writ with no more than the help of an attorney, appeared without a barrister, requested that one be assigned him, and was routinely given one. Fuller himself, as a prominent barrister, could presumably have arranged for his representation, even from jail. He might certainly have preferred not to speak for himself, if that would have been allowable, having already tangled unsuccessfully with the King's Bench over *Maunsell and Ladd*. He might also have

thought it in his interest to be represented by court-chosen lawyers presumptively free from any motive except to expound the law in his favor as well as they could. If that was his desire, even if alternatives were legally open to him, the court would seem to have been bound to make an assignment despite his presumable ability to find and pay counsel. With respect to the assignment of Fuller to represent Ladd, it is of course possible that Fuller was in a sense disingenuous in formulating his claim to a Prohibition. He could have been technically court-appointed although behind the scenes it was made known that he wanted to be assigned and that Ladd wanted him. The court may have customarily gratified such off-the-record preferences. At one point in the official record Fuller says that he was not only assigned as Ladd's counsel, but "retained." The additional word suggests, as one would expect, that court-appointed counsel must be accepted by those they were chosen to represent. About all this, however, I am obliged to conclude with a *quaere*.

Calling attention to the undetermined state of *Maunsell and Ladd*, like calling attention to Fuller's assignment as counsel, probably does not affect the claim to Prohibition. I.e., if one can commit—let us say heresy—by what one says in common law advocacy, there is no plausible ground for making it a matter of law that the advocate should be left at large, perhaps to commit a deadly offense again, until the case he is arguing is finished. On the other hand, if the ecclesiastical authorities are so impatient to pursue their heretic that they interrupt common law proceedings, they can hardly expect indulgence from the common law court. In *Fuller*, they were not indulged in three ways: (1) A comprehensive Prohibition was issued, as opposed to a tailored one inhibiting the High Commission from proceeding in inappropriate ways but permitting it to proceed *quoad* the serious ecclesiastical offenses Fuller was charged with. In a sense, the King's Bench interrupted the High Commission's business in response to the Commission's interruption of its business, though of course it could have done that without Fuller's calling attention to the "interruption." (2) The King's Bench may have denied the High Commission the opportunity it might have preferred to debate the motion for Consultation openly. (3) The Consultation issued with the concurrence of the court's Common Pleas and Exchequer colleagues was carefully drawn to emphasize limits on the High Commission, as we shall see in detail. Although the Commission was permitted to carry on its prosecution of Fuller *quoad* religious offenses, it was expressly told what it could *not* take note of. These spelled-out restrictions are not likely to have been welcome to the Commission.

I shall shortly return to the Consultation phase of Fuller's Case and the rest of Coke's Resolutions. Let us first, however, for the sake of narrative continuity, look at the case's final phase.

Having been permitted by the Consultation to proceed against Fuller for his alleged religious offenses, the High Commission did so. He was convicted, fined, and imprisoned, whereupon he brought *Habeas corpus*. The reports tell us that Serjeants Hutton and Harris were assigned to speak for Fuller and that they urged two exceptions to the return. Then we are told that Fuller was remanded—by unanimous decision *per* Add. 25,213. There are no straightforward reports of what was argued for and against holding him. A few hints in and inferences from the sources can, however, add something to the bare account.

The most significant clue is Coke's Resolution #6: "Resolved, that the special Consultation being only for heresy, schism, and erroneous opinion, if they convict Fuller of those things & he recant, that he shall never be punished by ecclesiastical law." Thus, in issuing the qualified Consultation that allowed the Commission to proceed against Fuller at all, the judges in effect laid it down that he could be imprisoned to coerce recantation, but not otherwise. This applies what by 1608 was well-established King's Bench law—High Commission imprisonment is lawful only to enforce spiritual sanctions, not to punish and not to enforce fines. The return on Fuller's *Habeas corpus* must have said that he had not recanted and was therefore being held.

What, then, could Fuller have hoped to gain from his *Habeas corpus*, beyond putting his enemy—the High Commission—to trouble? What arguments could there be for his liberation, given that he had not recanted and was detained only to make him do so? It may be that the very sparsity of the reports is a kind of clue toward answering this question. Add. 25,213 says only that the Serjeants took the two unspecified exceptions and that the judges all agreed that the return was sufficient: Coke says only that the jailer returned the cause of detention. Do these matter-of-fact sounding statements perhaps suggest that one of the Serjeants' exceptions was formal in the way we have seen in some previous cases? I.e., without positively arguing that Fuller could not plausibly have been convicted of schism and error, counsel may have maintained simply that the return did not show enough of what he said in *Maunsell and Ladd* for the court to make any judgment on whether his conviction could have been justified. For all we know, lacking the text of the return, the justification was stated minimally, perhaps so minimally that the return was reasonably challengeable. I take it as clear law from earlier speech-offense cases that although deference was due to the ecclesiastical court as competent judge of what schism and error consist in, the High Commission could not in *Habeas corpus* get away with saying no more than "the prisoner was convicted of speaking words adjudged to constitute schism"; it must give enough of the language so adjudged to let the common law court see that the conclusion "schism" was at least *prima facie* convincing enough. From Fuller's verbatim recital of the charges against him in his application for Prohibition (official record) we know that the High Commission used the terms "schism" and "error" generously and did in a manner say what remarks by Fuller in *Maunsell and Ladd* were considered to amount to those offenses or to evidence of them. I think questions can probably be raised as to whether all the utterances recited were schismatical, or at any rate lucidly shown to be. (See End Note for detailed analysis of the charges.) For the present, it is enough to note that the King's Bench judges knew the charges too and so knowing had granted Consultation *quoad* prosecution of grave religious offenses. For this reason, they may in the *Habeas corpus* have been undemanding of great specificity (and the High Commission may not have felt pressed to give a very detailed justification.) That is to say that the Serjeants may have had a quite good argument from formal insufficiency, but also that the judges' overruling it is unsurprising. I.e., the judges already knew that the schism-and-error charge was not ridiculously fabricated; the alternative to remanding Fuller would probably have only been to permit amendment of the return, which would probably only have led to more detail sustaining at least the plausibility of his conviction; if Fuller really was a victim of abuse of ecclesiastical law, perhaps he had better try False Imprisonment

A second clue to Fuller's possible grounds for release from prison is provided by Noy's report. One can, I think, wonder whether Fuller's claim to some sort of "advocate's privilege" had been as thoroughly or as subtly explored in adjudicating the motion for Consultation as it might have been. The judges as reported by Coke seem to move a little hastily from "there is no such privilege to protect a lawyer who commits the secular offense of slandering lay or ecclesiastical authorities" to "a lawyer in the lay system cannot in any way be protected from ecclesiastical prosecution for ecclesiastical offenses, at any rate major ones." Noy indicates that the matter was broached again in Fuller's *Habeas corpus*, though in the form of a more modest claim to privilege than Fuller probably advanced in his surmise for Prohibition. All Noy says is that "Lee's Case" was vouched, as well as "Mitton's Case in the time of Lord Dyer." These cases are almost certainly the *Leigh* and *Mitton* that figured prominently in *Maunsell and Ladd* (see Vol. II.) Their importance there was for the principle that the High Commission had no authority to compel defendants to answer questions under oath when a true answer would amount to confession of a common law offense. Noy, however, cites *Leigh/Lee* for another point: "that Lee being an attorney of the court was bailed because of his necessary attendance in court." It is then said that "so it was ruled in Mitton's Case." (To this Noy then adds, "And in that case it was agreed that the High Commissioners may commit to prison." The reference is probably to *Mitton* alone, but whether it is also or instead to *Leigh/Lee* makes no difference. One or both of those cases decided originally that the High Commission has some imprisoning power, a point little contested by the King's Bench though for a time discountenanced by the Common Pleas.) Here it is the party's position as an attorney that matters. It seems likely that in Fuller's *Habeas corpus* the Serjeants brought up these early cases to show that "officers" of common law courts were privileged against High Commission imprisonment to the extent that they should, though lawfully committed (and *a fortiori* answerable in ecclesiastical courts and subject to other sanctions), be released on bail in order to fulfill their office for the court's convenience. It is of course not necessary that a barrister should enjoy the same privilege as an attorney, much less a clearer one. That he does not is implied in the unexplained decision to remand Fuller. Fuller's emphasizing that he was counsel in a still-pending case might seem to strengthen his claim to temporary protection, but it does not appear to have moved the judges.

To conclude the discussion of *Fuller*, let us note the further features of the Consultation. Two of Coke's Resolutions, #1 and #5, are about procedural law. They were prompted by *Fuller* and amount to endorsement of the procedures followed in the case, but they say nothing about the jurisdiction and powers of the High Commission. (#1 holds that Consultations—in contrast to Prohibitions—may not be granted in vacation; #5 upholds granting Prohibition to stop ecclesiastical suits altogether when they are partly *infra vires* and partly *ultra* and later returning the *infra vires* parts to the ecclesiastical court by Consultation on motion. This is said to be common practice, whereas partial Prohibitions stopping only the *ultra vires* parts, though permissible, are rare. For these points in Fuller, see Vol. I, pp. 306-308, 319.) To Resolution #5 six "general rules about prohibitions" are appended, with the notation that Prohibitions (or rules about them) are rarely encountered in "our books." None of these has any particular relevance for *Fuller*. They have every appearance of a personal touch of Coke's—bits from his collection of lore suggested by the general discussion of Prohibitions and Consultations. The source

may be Bracton or other ancient treatises, since the rules are in Latin; it is true enough that there is not a lot of Prohibition law in "our books" in the sense of the Year Books.

Resolution # 2 lays down the general principle that construction of 1 Eliz. and letters patent pursuant thereto belongs exclusively to the common law courts. The principle is applied to justify one of the qualifications in the Consultation in *Fuller*: The Commission is permitted to proceed so long as it stays away from exposition of its own patent and interpretation of 1 Eliz. I do not think that as of 1608 the generality was in serious doubt in either principal common law court. Its unequivocal statement by all the judges, however, together with its practical embodiment in Prohibition law—for the Resolution says in effect that the High Commission (and presumably by extension any ecclesiastical court) may be explicitly prohibited from infringing the "common law monopoly"—contribute at least to clarification of the law.

With respect to the exposition of patents, a significant supporting analogue is cited: If the King has a benefice donative by letters patent, the holder of such a benefice is not visitable or deprivable by ecclesiastical authority, but only by the Chancellor or commissioners under the Great Seal. (I.e., besides an ordinary advowson—a "presentative" benefice—it was possible to own a "donative" one. The owner could grant the living to a clergyman directly instead of nominating one to the Bishop. A donative benefice belonging to the King might have the further characteristic that it could only be granted by letters patent. The rule cited means that the holder of such a benefice is not subject to ordinary ecclesiastical discipline; his behavior as a beneficed clergyman can only be investigated and punished by the Chancellor— the issuer of letters patent responsible for seeing that their beneficiaries do not obtain them corruptly or abuse their intent—or by a special royal commission in effect constituted by letters patent—i.e., by a a document bearing the Great Seal) This rather arcane rule relevantly supports a common type of Prohibition—to prevent ecclesiastical courts from construing letters patent, usually ones pardoning various offenses including ecclesiastical crime. Fitting it exactly to the High Commission seems to me a bit tricky, since 1 Eliz. *could* have given the Commission authority to construe its own patent. Towards arguing that it does no such thing it may be useful to be able to say, "Any such empowerment of the Commission would involve making an exception from the principle, operative in other contexts, that ecclesiastical courts may not scrutinize letters patent even when they relate to Church interests or proceedings affecting the Church." Cf. "1 Eliz. *could* amend Magna Carta, but overwhelmingly explicit textual evidence would be required to make out that it does."

Resolution # 3, already discussed for its applied point, starts with the generalization that any question about what power belongs to ecclesiastical courts belongs to the common law, for which the venerable authority of Bracton is cited. (Bk. 5, *De exceptionibus*, f. 412.) The passage in Bracton is scarcely more than a statement of the generalization in the form of saying that if ecclesiastical judges were entitled to decide on their own jurisdiction they could proceed as they liked, ignoring the King's Prohibition (the surrounding passage is about 13th century Prohibition law.) Neither the general principle nor its implied ground—that in a system comprising temporal and spiritual courts ultimate authority to determine how jurisdiction is to be divided, must rest somewhere and it does rest with the King's courts—cannot be called controversial in the 17th century. I suppose the ancient authority is cited with the thought that being clear about the King's "sovereignty" over inter-jurisdictional questions should help dispel any

doubt about the matter actually in question—common law authority over slanders of the ecclesiastical "government." Perhaps: If ecclesiastical courts had the last word about whether derogation of their authority is criminal, they might as well have it with respect to the substance of their jurisdiction.

With one exception (an anomalous case dealt with at the end of this sub-section), *Fuller* concludes the cases decided in both courts before Coke presided over them successively. To complete the mainline account of both principal courts before Coke's Chief Justiceships, we need to note two early-Jacobean extra-judicial events. (As at other points in this study, I deal occasionally with extra-judicial proceedings when accounts of them occur among law reports. Here as elsewhere, at least with reference to the first event, it is possible that there are fuller and better records of such proceedings among classes of documents I have not investigated. Cf. explanation of the boundaries of the study in Vol. I, "General Introduction.") Both of the extra-judicial opinions in question here are affirmative of some of the High Commission's claims. Neither, however, is inconsistent with the case law as of the time the opinions were rendered.

The first episode, in 1604 or early 1605,[83] was a solemn government-initiated conference attended by all the judges and the principal state dignitaries. The object was to get a public declaration by the judges in support of several anti-Puritan positions of importance to the government, and that object was attained. There is no reason to see in this conference an adversarial encounter between the government and the judges. In this respect, the 1604-5 conference contrasts with a similarly full-dress conciliar meeting in 1611 discussed in the Section following. The latter was an attempt, probably prompted by a particular case, to put pressure on the Common Pleas to alter that court's handling of the High Commission—significantly in areas other than Puritanism. The former may of course have been less than welcome to some judges, as an effort to secure pre-commitment on issues that might arise judicially, but it was basically addressed to the judges in their recognized capacity of legal advisers to the Crown. In affirming the legality of the government's views on several points, it is unlikely that the judges said anything they did not fully believe. It is perhaps worth noting that neither the Attorney General, Sir Edward Coke, nor the Solicitor General attended the Conference (the roster is listed by two reports, Croke and the MS.) That probably only signifies that having lawyers present to argue for the government's preferences would have been out of keeping with the spirit of an encounter between the King seeking advice and his Justices.

The conference was prompted by two recent events, the propagation of a series of canons for the Church of England in 1604 and the Puritan Millenary Petition presented to James I at the beginning of his reign. (New petitions modeled on that one were probably expected in response to the canons, or some may already have been in circulation.) The

[83] Croke Jac, 37 (dated M.2 Jac.); Noy, 100 (dated H. 2 Jac, 13 February); Harl.3209, f. 58b (dated 13 February 2 Jac. –report series labeled "Reports of Mr. Andrew of Lincoln's Inn.") Croke is the fullest report, but the three are entirely consistent. The discrepancy in dating is unimportant; both dates are plausible, but the one specified by two reporters is slightly more probable. "13 Feb., H.2 Jac." puts the conference at the beginning of 1605. It must in any event follow by a certain interval the issuance of the canons early in l604 and fall close to the end of November, 1604, when a period of grace for conforming with the canons given by royal proclamation ran out.

Chancellor opened the meeting with a "long speech" (Croke) deploring both Puritans and Papists as "disturbers of the State" and then asked the judges their opinions on three matters. The judges responded unanimously to all three. *Per* Croke, they said in reply to the first inquiry, before going to the substance, that they had already conferred about the question. This shows that they were not taken by surprise and suggests that the conference was rather a ceremony to publicize the judges' foreknown agreement with the government than an expected occasion for debate. Presumably the same opportunity to prepare responses to the second and third questions was afforded.

(1) The first question was whether the High Commission could deprive Puritan ministers for refusal to conform to ceremonies prescribed by the new canons. (The designation "ceremonies" covers some 18 canons concerning the conduct of divine worship—out of a total of 141, which as a whole takes in many aspects of Church administration. The extent to which the clearly "ceremonial" canons were innovative is open to question, but at least they insisted on practices which *de facto* had not been regularly observed by some clergymen and were objected to by Puritan consciences, touching such matters as the use of the sign of the cross, kneeling, and following the Book of Common Prayer exactly.) It is the limitation of the first question to the High Commission that makes the conference of interest for the present discussion of the Commission's jurisdiction and powers. Why was the pressing question not simply the validity of the canons and the appropriateness of deprivation as a sanction for flouting them applicable by *any* ecclesiastical court? It looks as if the government foresaw that regular Church courts were not likely to prosecute non-conformity with the canons very vigorously, nor to deprive local clergy of their livings even if they were prosecuted and convicted. The expectation seems realistic. Whatever the distribution throughout the ordinary Church hierarchy of a certain sympathy for Puritanism, one or another degree of disapproval, and distaste for newfangled regulations, one could predict reluctance on the Bishops' part to adopt a policy of strong enforcement. A mere fatherly preference for dealing gently with erring members of the clerical community must have combined with fear of upsetting local relationships by offending the patrons whose friends, relatives, and protégés would be the victims of deprivation. In sum, the appearances suggest that the government and the central hierarchy intended a campaign to get rid of Puritan incumbents, knew that the High Commission would have to do the job, and wanted the Commission's legal authority made clear before it was challenged in particular cases.

Why, however, was it challengeable? Let us assume that ecclesiastical courts generally were free to enforce the canons, by deprivation if they saw fit, and that the High Commission could entertain or initiate any kind of ecclesiastical suit (as most case law as of 1604-5 suggests most judges thought it could.) Is there an argument that the Commission should be debarred from enforcing the canons by deprivation even though regular ecclesiastical courts were not debarred?

Such an argument can, I think, be made out from the reports. The judges said unequivocally that the argument is invalid, but it must have been taken seriously enough by the government and hierarchy to recommend cutting it off by judicial pronouncement before it was urged in perhaps numerous attempts to prohibit the Commission. I would propose constructing the argument against the High Commission's power to enforce the 1604 canons by deprivation as follows: The Commission was simply created by 1 Eliz. The monarch may have been authorized to give the new court jurisdiction to enforce any

or all ecclesiastical law existing at the time 1 Eliz. was enacted. Obviously, however, new requirements of ecclesiastical law that came into being in 1604 were not covered. Even if the line between innovation and codification in the canons is sometimes disputable, they cannot be used as a source of law by a tribunal that had no such source when it acquired its powers; the burden of showing that any rule contained in them antedated 1 Eliz. would rest on the Commission (and be very hard to sustain.) So, granting the validity of the canons and in consequence their enforceability by regular ecclesiastical courts, violation of these new or newly propounded rules would not be within the High Commission's cognizance. New Parliamentary legislation would be necessary to extend the Commission's jurisdiction to ecclesiastical law added or altered after 1 Eliz.

I so reconstruct the argument against the High Commission because that is what the clearly reported opinion of the judges seems to answer. The burden of their opinion is that 1 Eliz. did *not* create the High Commission as a new court. Rather, the statute is strictly declaratory. What it clarifies or pins down in certain terms, for present purposes, is that restoration of the monarch's erstwhile usurped ecclesiastical prerogative included his power, not only to alter or reformulate the canon law without Parliamentary assent, but to establish new tribunals to exercise any or all parts of substantive ecclesiastical jurisdiction, using any or all recognized ecclesiastical sanctions. The substantive jurisdiction contemplated by 1 Eliz. included lawful future additions to the body of ecclesiastical rights and duties. (Membership in that body would presumably be determined by subject matter. There might be ambiguous cases, but rules prescribing what clergy must do in the conduct of religious services would seem to be a clear one.) The ecclesiastical sanctions already existed—there is no implication in this opinion that new sanctions could be added; the existing ones were freely available to new tribunals, including deprivation. (It should perhaps be observed that although the opinion goes only to the monarch's prerogative, and indeed implies that a document such as the 1604 canons could have been issued solely on his authority, the Church had internal consultative procedures which propriety, at least, required to be used. The 1604 canons were in fact prepared by the Convocation of the Clergy for Canterbury Archdiocese, with the King's leave and approval. He followed up on their enactment by a proclamation giving notice of them, commanding obedience, prescribing deprivation of non-conforming clergy, and allowing a few months' grace for ministers to come into conformity before the sanction would be applied. The judges in their opinion commended him for these measures.)

(2) The second question put to the judges went to a possible hitch in the reply to the first. In response to the opening general question about the High Commission's power to proceed against violators of the canons and punish them by deprivation, the judges already said that the Commission was free to prosecute *ex officio*—i.e., without a libel. The second question was expressly whether Prohibitions founded on the statute of 2 Hen. V, c.3, could be employed to stop High Commission prosecution and deprivation of offenders against the canons. The 15th century statute provided that ecclesiastical defendants must be furnished with a copy of the libel by which the plaintiff commenced his suit. It seems at first sight that if, as declared by the judges in reply to Question #1, *ex officio* prosecution was permissible 2 Hen. V could have no relevance: the statute in its terms is about the normal run of civil cases started by libel, not about *ex*

officio—roughly "criminal" –suits. So the judges held in response to Question #2. Is that clearly the right answer?

The problem raised by the second inquiry is what kind of case clergy who ran afoul of the new canons might have made for invoking 2 Hen. V or what the government was afraid of when it sought a separate, explicit declaration of the irrelevance of that statute. It seems implausible to claim that a clergyman's failure to follow ceremonial requirements imposed by the new canons could not be prosecuted *ex officio*—by regular courts even if the High Commission were to be excluded from jurisdiction. General regulations for the performance of the Church's religious functions would seem unlikely to give many individual complainants a motive to sue misdoers by libel, especially a respectable motive (a less than respectable one would be, say, a patron's desire to get rid of his incumbent in order to gain a new presentation, perhaps to be used for the benefit of someone personally preferred by the patron.) The "party in interest" with respect to the Church's general ceremonial rules is surely, primarily, the Church at large; the purpose of *ex officio* proceedings was surely to allow for representation of that interest. (Analogy with moral offences pursued *ex officio* is close enough. Rarely will live-and-let-live attitudes be overcome to produce private prosecution, save from dubious motives of vengeance or enmity. If Christian morality is to be significantly enforced at all, it must be on the initiative of the ecclesiastical courts themselves, given the absence of an adequate separate system for "public prosecution." (True, the Church had such a system of sorts in the institution of Episcopal visitation. It is probably fair to say, however, that *ex officio* prosecution found a place in the sun because presentment at visitation was too subject to local prejudices and tolerances to turn up a large share of offenders, especially among the relatively well-connected.)

In the light of these considerations and some indirect evidence, I think the Puritans' hope in 2 Hen. V, and the political authorities' fear, was more solidly based than in objection to *ex officio* proceedings as such. The purpose of requiring that defendants be given a copy of the libel is plainly to insure that they have a full and precise statement of the complaint so that they can prepare their defense. Although the language of 2 Hen. V only covers suits started by libel, it remains a good question why the equivalent of a copy of the libel should not be furnished to *ex officio* defendants, at least in some sorts of cases. Let there be no libel; recognize the power of ecclesiastical courts, in appropriate cases, simply to summon subjects before them, without—so far—any notice of what they are summoned for. Would it not be reasonable *now*—before proceeding to trial—for the ecclesiastical court serving as accuser to be required to furnish the defendant with a written statement of the accusation and allow him some time to prepare his response to a fixed claim? One can of course reply that it might be reasonable, but 2 Hen. V does not require it: the statute is about what by the letter it speaks of, cases in which there is a libel. So the judges declared in 1604-5. Naturally enough, in the face of a Privy Council looking for crisp results, they made no excursions into the legal anomaly, the gap between the law's solicitude for fairness to libel-defendants and its at least formal indifference toward *ex officio* defendants.

There is, however, potential mileage in the anomaly; the government knew what it was doing in seeking to have an inch disallowed lest it turn into miles. In general jurisprudential terms, "The statute just does not apply" was not quite a final blow in litigation when the doctrine of "the equity of a statute" was still good law, as it was in the

early 17th century. That doctrine means that no claim of legislative intent is necessary to extend a statute beyond what it says, only a showing that there is no significant distinction between the situation the statutory language covers and some other situation it does not. (The most familiar example is a statute giving a right of action to executors but saying nothing about administrators. The latter were held to have the same right "by the equity.") Even without the doctrine of statutory equity, however, interpretation and application of statutes was less rule-bound and more flexible in the early 17th century than it later became. It would not be terribly surprising to find Puritan ministers threatened with deprivation seeking Prohibitions with the argument that the intent of 2 Hen. V, or the mere policy of the law implied when the statute was made with reference to libel-based suits, forbade exposing *any* accusee to serious loss without first giving him a written statement of the particulars of the accusation; it would not be a miracle to find some judge agreeing. Even if such a decision did not catch on as law, there would be a precedent and there would be disputes in future cases. The best way to strike a "final blow" to the use of 2 Hen. V would be by means of a unanimous judicial opinion in advance of actual attempts to use it.

The specific situation we are concerned with favors the temptation to rely on 2 Hen. V one way or another. Offenses pursued *ex officio* that could only be penalized by routine spiritual sanctions arguably do not demand the formality of written, spelled out charges. Should the Church not be trusted to deal with her suspected erring children though she does so without much legalism? But if the sanction of deprivation is contemplated, the equities are radically altered. A man sued for tithes, let us say, deserves, and by 2 Hen. V enjoys, a right to know just what his parson claims, for he has a plain material interest, both in his pocketbook immediately and in the long-run value of his land, in paying no more than is justly demanded. Is the material stake of a clergyman in peril of deprivation not at least as weighty? He stands to lose not only his position in the Church, but a common law interest, his freehold in the living, his life-estate in the incomes and property attached thereto. Whether by in some extended sense "applying" 2 Hen. V or by merely pointing to the principle of justice animating it, excluding the statute from any sort of relevance seems as harsh as overlooking the comparability of the prospective deprivee's plight with that of the tithe payer, the executor sued for a legacy, or other like defendant. It is perhaps further arguable that at any rate the High Commission should be bound by "something like 2 Hen. V." A clergyman prosecuted *ex officio* in a regular ecclesiastical court to the potential end of deprivation, even if given no firm advance notice of the charges, had two ecclesiastical appeals ahead of him in the event of conviction. The appellate process, in which all factual and legal findings were reviewable, would perhaps be very likely to rectify any mistakes or injustices traceable to hasty trial at the first-instance level or confusion and poor defense on the part of an inadequately informed defendant. The protection of appeal was not available against the High Commission.

Indirect evidence that 2 Hen. V was given relevance for more than the libel-commenced suits it applies to literally comes from the law of self-incrimination. For detailed discussion of this matter, see Vol. II, pp. 404-405 and 410-416. In summary: Throughout early discussion of inquisitorial procedure in ecclesiastical courts, there runs a somewhat scrappy vein of consensus that when ecclesiastical defendants were lawfully compellable to answer interrogatories under oath, whereby they might be required to

incriminate themselves, they were entitled to be apprised in writing of the questions, or at least the topics of the questions, in advance of testifying. (See Vol. II, Ch.5, *passim*.) I have not, however, found this opinion tied to 2 Hen. V until Chief Justice Coke made the connection firmly in the major *Habeas corpus* case of Burrowes *et al*. of 1616. There was some hesitation between saying that the equity of 2 Hen. V ensured this right and saying that the statute was strictly declaratory of the general principle of entitlement to notice (i.e., 2 Hen V did not enact *de novo* that civil defendants must be given a copy of the libel, but declared or explained that the general, common law principle so demanded.) Either way, toward the end of his judicial career Coke had made up his mind that the statute was the solidest prop to rest the right of notice of incriminating interrogatories on. In *Burrowes* his King's Bench colleagues give no sign of disagreeing with him, though that case hardly settled the point. There were grounds indisputably rooted in the precedents for deciding the case against the High Commission without taking up failure to provide adequate notice of the articles of examination to the—Puritan—defendants. The idea of relying on 2 Hen. V may have been Coke's inspiration, which the other judges may have thought hardly worth considering deeply when the case was easily decidable without a theory of 2 Hen. V and when the need for notice of potentially incriminating questions was already pretty well recognized. All that can really be said is that upwards of a decade after the 1604-5 conference Coke did flatly reject the general position on 2 Hen. V taken by all the judges at that conference, i.e., the position that limits the statute to its literal meaning and disallows any penumbras. I have no evidence as to whether Coke remembered the 1604-5 conference and was aware that he was proposing a turnabout from the judges' opinion there. It of course does not automatically follow that if 2 Hen. V should be used to check incriminatory questioning it should also be used to insure that clergy merely accused of disobeying the canons were entitled to a bill of particulars; their conviction for that offense would seem unlikely as a rule to depend on confessional evidence, as opposed to evidence of their conduct supplied by witnesses. I should note that among the miscellaneous Prohibition cases not yet analyzed in this study there are quite a few on the construction of 2 Hen. V in its straightforward application to libel-based cases.

(3) The third question addressed to the judges was occasioned by the Millenary Petition and perhaps the fear of similar petitions reacting to the new canons. It has no direct bearing on jurisdictional law except for showing further that the judiciary shared the rest of officialdom's hostility toward Puritans and willingness to use sharp measures against them. The question was essentially whether it was a punishable offense to petition the King with an "intimation" that his turning down the petition would cause thousands of subjects to be discontented. The judges' reply was emphatically "yes": with slight variation in the language of the reports, such petitioning is "an offense finable at discretion, and is near to treason by raising sedition by discontent, &c." (Noy); "finable at discretion, and very near to treason & felony in the punishment, for they tended to the raising of sedition, rebellion, and discontent among the people" (Croke); "near to treason and greatly finable" (Harl.3209.) One can only wonder whether the Privy Councilors could have hoped for more, say a declaration that unlawful petitioning *was* treason or felony, as opposed to dangerously close, or that discretionary imprisonment was available as a punishment in addition to discretionary fining. Apparently after the judges had given their basic answer to the third inquiry, *per* Croke, "many" of the Councilors said that

"some" Puritans had spread a false rumor that King James intended to grant toleration to Papists. This information prompted the judges to declare that disseminating such a rumor would also be "heinously finable by the rules of the common law, either in the King's Bench, or by the King and his Council, or now since the statute of 3 Hen, 7, c. 1, in the Star Chamber." (Harl. 3209 tells the same story in slightly abbreviated form. 3 Hen VII is the so-called Star Chamber Act, believed to have created that court though, it is now thought, erroneously.) Some of the Councilors reported further that the King had recently been informed of the rumor and disavowed in the strongest terms having the tolerationist intentions attributed to him. It is worth observing, for the purposes of our concern with the High Commission, that there is not the least suggestion that ecclesiastical courts, including the Commission, would have the least color of jurisdiction to proceed against improper petitioning or rumor-spreading touching the state's religious policy. That was purely common law business.

The later of the two extra-judicial reports bearing on the High Commission [84] presents no problems of meaning. It is valuable for recording an out-of-court opinion from the winter of 1606 affirming the position on the High Commission that had pretty clearly been reached by the end of Elizabeth I's reign. Viz. the Commission may be authorized to exercise all parts of ecclesiastical jurisdiction, but is strictly confined to spiritual sanctions; the patent may not give it power to fine or imprison. The occasion for this opinion was a post-prandial discussion at Serjeants' Inn. We are told that the question raised was whether the Commission may imprison and that "all" agreed on the resolution, which spoke to substantive jurisdiction and fining as well as to imprisoning. It is not certain that all the judges were present, but likely that the company included more judges than the members of the Common Pleas and the Serjeants who practiced in that court. Coke, who reports the question and resolution, was presumably present. As of a time only shortly after his appointment as Chief Justice of the Common Pleas, he would not appear to have departed from his court's consensus, though he was later to do so. There is nothing surprising in the sparely reported reasoning behind the Serjeant's Inn opinion. The premise that the monarch could have created a High Commission over and above the ordinary ecclesiastical courts by prerogative is endorsed. The deduction from that premise is that such a creation would be "just another ecclesiastical court", with the permissive implication that it may, if so authorized by the monarch, enforce all parts of ecclesiastical law and the restrictive one that it may enforce them solely by spiritual sanctions. A statute of course could add to or subtract from such jurisdiction and powers, but there is no reason to say 1 Eliz. does so. That statute's reference to the patent constituting the Commission does not mean that the monarch may give it jurisdiction or powers it would not have if it came into existence without a Parliamentary mandate.

One final case from the King's Bench involving the High Commission, Pit v. Webly, [85] came just before Coke's transfer to that court as Chief Justice. This case was settled by the parties before Prohibition was definitely granted or denied. The judges' inclination on an unusual issue is, however, reported. Because the case touches on the statute of 23 Hen. VIII, c. 9, it is discussed for that aspect in the End Note to Ch. 2 above. In the event, after proposing to seek Prohibition on the basis of 23 Hen. VIII, counsel

[84] 12 Coke, 19. Dated H. 4 Jac.
[85] P. 11 Jac. K.B. 2 Bulstrode, 72.

dropped the attempt with the court's encouragement. Plaintiff-in-Prohibition's surmise was changed so that 23 Hen. VIII was not mentioned and Prohibition was sought on another ground, which alone concerns us here.

Pit is identified as "the serjeant of the mace." He arrested Webly when the latter was coming from church after a sermon. The report does not say who Webly was. He could have been the clergyman of the church, but he might have had plausible legal grounds for complaining about the arrest if he was only a member of the congregation that heard the sermon. The report also informs us that the arrest did not take place on Sunday, but of course there could be religious services including a sermon on other days. One remark by counsel suggests that the arrest was after evening prayer. It is reported further that Pit arrested Webly by warrant of a Justice of the Peace. Thus, as counsel says, the arrest was "for the King", rather than "between party and party"—i.e., it was not pursuant to a civil dispute, as a creditor's arrest of a delinquent debtor would be. Finally, the arrest was affected "without tumult."

Webly sued Pit for the arrest in the High Commission by libel. It will hardly seem evident that Pit committed an ecclesiastical offense, much less a High Commission one, in performing his function as a royal officer. Were it not for two medieval statutes, one would suppose either that merely arresting a minister or worshipper in, so to speak, close proximity to a religious service was a recognized ecclesiastical offense, or else that Webly's version of the facts, presented in his libel, was more damning than that presented in Pit's surmise, which is all that was before the court and what my statement of the case above must mainly depend on. (The Webly version could have complained that Pit invaded the church, interrupted divine service, created a "tumult", or—if Webly was a cleric—laid violent hands on him; the last of these was certainly an ecclesiastical crime, and the others probably offenses which the Church would not have considered excusable by claiming that they were committed in the performance of official duties.) In reality, however, there were two crucially relevant statutes—50 Edw. III, c. 5, and 1 Rich. II, c. 15. It may seem pedantic to look in detail at these two extremely vague old statutes, but I think it is worthwhile because they are a good example of what 17th century courts faced when obliged to make sense of legislation over 200 years old, of whose form and historical circumstances they could have had little idea. The judges hardly had a choice but to imagine what the law based on these sources came to; there is no sign of their analyzing the texts closely, if indeed they had the texts.

The later statute, 1 Rich. II, is the important one to focus on, as the 17th century lawyers did, for it is at least less vague than its predecessor. The statute starts by reciting the complaint of the prelates from which it arose: Viz., "beneficed people of Holy Church" and "others" are arrested in cathedrals and other churches and conducted ("drawn") out of those edifices; they are also arrested and removed from the churchyards attached to such churches ("their" churchyards); sometimes these arrests and removals occur when the arrestee is "intending" on divine service; arrests are also made in "other places" "although" "they" are bearing Christ's body to sick persons, such arrestees being "bound and brought to prison against the Liberty of Holy Church." The ambiguities so far are: (1) Are *all* arrests in churches and churchyards complained about, or only arrests of beneficed clergy *and other clerical personnel*? (2) Is anyone included among those "intending" on divine service beyond the clergy performing it? Note that while arresting people directly involved in services is singled out, it is not expressly differentiated as a

more serious cause of complaint than simply arresting in a church or churchyard. (3) Do improperly arrested bearers of the Host to the sick extend beyond the priest on his way to perform the sacrament—i.e., to servants or assistants, clerical or lay, accompanying him?

The enacting clause following the recital of the complaint is clear enough as far as it goes: It is ordained "That if any Minister of the King or other, do arrest any Person of Holy Church by such Manner, & thereof be duly convict, he shall have Imprisonment, and then be ransomed at the King's Will, and make Gree to the Parties so arrested…" It modernizes the language only mildly to say that the statute makes the arrests complained of a secular criminal offense and a secular tort for which the victim is entitled to be compensated. (Ancient legal concepts are employed, such as taking pecuniary punishment as "ransom" paid to the King. The only obscure word is "Gree", but that is only a truncated form of "agree"—"make Gree" probably means something like "come to terms with", which I suppose amounts to "settle with the victim for damage he claims, or, failing settlement, be subject to suit by him.") The statute says nothing specific about procedure on either the criminal side or the civil. What it most conspicuously does not make clear is where it leaves the ecclesiastical courts. If before the legislation those courts could proceed against any or all of the arresters complained of and punish them by spiritual censures, could they still do so, over and above the temporal sanctions now imposed? Or was any prior ecclesiastical power taken away when the offenses were "secularized"?

The antecedent act, 50 Edw. III, is not of much help for construing 1 Rich. II At two places it uses language that seems more restrictive: Complaining of arrests—by royal authority or "Commandment of other Temporal Lords"—of those taking the Sacrament to the sick, it refers to "priests" and "their clerks with them"; it also refers to "Persons of Holy Church" arrested when they are "attending ["*entendant*" in the extant French version of this statute—equivalent to "intending" in 1 Rich. 2, which only survives in English] to Divine Services in Churches, Churchyards, & other Places dedicated to God." Nothing is said to suggest that arrests of laymen, even if they are immediately participating in services, are within the complaint behind the statute. It is, however, said expressly in 50 Edw. III that besides offending God and the liberties of the church, the arrests previously mentioned are disturbances of divine services (a likely candidate for an already existing ecclesiastical crime, though officers executing their duty could possibly be exempt.) The enacting part of this statute does not sharply create new offenses or new remedies as 1 Rich. II does, but after saying that the King will be displeased if anyone makes the arrests complained of, it says that he "will & granteth and defendeth [forbids] *upon his grievous forfeiture*, That none do the same from henceforth." The phrase I italicize does have the effect of creating a highly indefinite secular offense—the King, so to speak, undertakes to use his punitive arsenal against offenders somehow.

Both statutes end with provisos forbidding collusion on the part of churchmen: 1 Rich. II, "Provided always, That the said People of Holy Church shall not hold them within the Churches of Sanctuaries by Fraud or Collusion in any Manner"; 50 Edw. III, "So that Collusion or feigned causes be not found in any of the said Persons of Holy Church in that Behalf." The fear behind these clauses must be that clerics in charge of the ecclesiastical places and occasions mentioned would collude with persons liable to arrest in order to bring them under the protection of the statutes. There may be a faint suggestion here that lay people merely present in those places or on those occasions are

within the act's contemplation, rendering it necessary to provide that they be *bona fide* participants in services rather than beneficiaries of favoritism or a "deal". This is not, however, a certain implication, for clerics could collude with other clerics too.

With the refractory but unavoidable statutes in mind, we may now return to the course of *Pit*. Webly having put in his libel, the High Commission tried the case and awarded Webly £6. The report says that the Commission allowed the cause of the arrest, but gave Webly £6 as costs for the "contempt." This is puzzling language. My suggestion for making sense of it would be that it shows the High Commission leaning over backwards to avoid any appearance of exceeding ordinary ecclesiastical powers. As it were: "We have not used any secular punitive powers we may have against a man who could be prosecuted at common law by virtue of 1 Rich. II and punished by secular means if convicted there. We have pursued that man to the sole end of correcting him spiritually. Upon finding him guilty of a contempt toward the Church and religion—by making an arrest at a time and place that the secular law itself recognizes as out of bounds—we awarded his prosecutor his costs for bringing the infraction to the ecclesiastical court's attention. That is not punishing the offender nor compensating the person wronged, but a normal exercise of ecclesiastical courts' power to tax litigative costs against violators of ecclesiastical law in favor of a plaintiff or informer who has incurred expenses in bringing the wrongdoer to justice. The action we have taken involves no judgment that the arrest was unlawful in the sense that, if committed, it would merit punishment or damages under 1 Rich. II, for that is a common law question. All we have adjudged is that from the Church's point of view a contempt of a sacred place and occasion occurred, to which we might if we saw fit respond with admonition or an assignment of penance, or perhaps no more than seeing that the worthy act of complaining about the contempt did not leave the complainant out of pocket."

Whatever the High Commission had in mind, Serjeant Henry Yelverton (son of the judge Sir Christopher Yelverton and later a judge himself) sought a Prohibition *as to the costs*. He did not object to Pit's citation into an ecclesiastical court notwithstanding his liability to secular sanctions, only to the monetary charge. The implied position on the 14th century statutes is that they bar ecclesiastical courts from imposing any material loss on an offending officer—call it a fine, call it costs, or be it imprisonment—but not from correcting him spiritually. Although it is not articulated in the report, the rationale of this position must be that the statutes cannot intend an offender (in the special class of officers carrying out their functions) to be out, let us say, £6, or £6 more if he should be imprisoned or fined at common law, or should be prosecuted and acquitted there, or indeed convicted and spared criminal punishment by judicial discretion, or found by jury to have inflicted no damage on the arrested party.

The first judicial remark comes from Justice Croke, who alone speaks as an individual in Bulstrode's account. All he says is that 1 Rich. II certainly forbids arrests during divine service, to which he added enough to give the reporter the impression that he thought arrests of persons going to or coming from a service were also banned. Then Henry Yelverton makes a remark which departs somewhat from the position stated above in defense of Prohibition for the costs alone. Now he says that it is "hard" for one in Pit's circumstances—a royal officer "duly" arresting a man "for the King", after evening service (i.e., not during the service and not following a full Sunday Eucharistic service, suggesting perhaps an arrest "at the end of the day", when there might be no further

opportunity to arrest the man that day) –should be sued in an ecclesiastical court and excommunicated. That is to say, even if there had been no costs award, there might be sufficient cause for Prohibition –this arrest is not forbidden by the statutes and therefore not even purely spiritual measures may be taken against the arrester. The statutes may not preempt jurisdiction for the common law absolutely, so that arrests they clearly forbid could not be punished spiritually over and above the common law sanctions they were subject to, but if an arrest simply does not violate the statutes ecclesiastical courts are not free to treat it as nonetheless a spiritual offense. (Serjeant Yelverton's language suggests that Pit had actually been excommunicated, and a later comment of his does the same. I.e., ecclesiastical process had run its course to excommunication, to which the award of costs was then added. It does not seem to me to matter for the argument whether that was the case, or whether Pit was only put in danger of excommunication by subjecting him to ecclesiastical jurisdiction.)

Serjeant Yelverton next turned to the fact that the surmise before the court relied on 23 Hen. VIII, the claim that neither he nor the judges thought advisable and that was soon dropped. (See End Note, Ch.2.) After the exchange on that matter, with 23 Hen. VIII out of the way, Justice Croke spoke again, reiterating his former opinion a bit more decisively. (1 Rich. II forbids arrests during divine service and arrests of people going to and coming from such services on Sunday, but not on other days.) Serjeant Yelverton then makes an important argument for his side, not previously broached: 1 Rich. II does not forbid arrests in a matter between the King and a subject, but only in those arising out of civil lawsuits. I cannot see any textual warrant for this distinction, but it has considerable common-sense probability. Is it likely that the King would have undertaken to punish his own servants doing his own business, presumptively at his immediate command, in order to secure ideal respect for the Church? Would he not have been much more believably willing to discipline established officers less directly tied to his personal service (principally sheriffs and their deputies) when they were routinely executing the law for the benefit of a private litigant (typically a creditor)?

If Serjeant Yelverton's construction is right, it would rule out secular proceedings against officers strictly acting for the King, but would not by logical necessity forbid their spiritual correction. If, however, we imagine the King balking at dissuading some of his officers by means at his own disposal from making arrests the Church objected to, it is reasonable to imagine him also declining to concede the Church's power to dissuade from such conduct by its means. If this argument is accepted, it gives Serjeant Yelverton his simplest and strongest claim to a Prohibition. It comes to saying that by the statute book it is merely not an ecclesiastical wrong for an officer acting directly for the King to make arrests which if made by an officer acting on behalf of a private party would certainly be a secular wrong and at least perhaps an ecclesiastical one as well. (One might urge at the "constitutional" level that the statutes are irrelevant for ecclesiastical power to proceed against such an officer, the ecclesiastical law being independently determinative. I would not expect such an argument to prosper. To act on it might be to flirt with *Praemunire*.)

So far as one can tell from a spare report, Serjeant Yelverton seems to have come around to the "simplest and strongest" claim to Prohibition, abandoning not only the initial invocation of 23 Hen. VIII, but also the idea that the High Commission's mistake

lay only in taxing costs, rather than in assuming jurisdiction at all. The King's Bench, moreover, seems to have concurred.

At the end of the report, the new surmise is described. As we have already noted, it is in one way fully consonant with the stark "no jurisdiction" basis for Prohibition, since it specifies the nature of the arrest—on a Justice of the Peace's warrant—with the evident purpose of showing that Pit was not acting in a matter between private parties. The surmise is not, however, confined to that, for it adds that the arrest was after evening service and without "tumult". These alleged facts would seem to be irrelevant on the "no jurisdiction" theory. Introducing them may be explicable as "insurance" in case the justices should be reluctant to protect royal officers who gratuitously disturbed an on-going service or otherwise violated decorum extremely.

The statement of the surmise is followed by a detached remark that does no more than repeat the doctrine that the medieval statutes apply only in private suits. Whether this came from one of the judges or from Serjeant Yelverton again is unclear. In any event, the court is reported as seeming to be of clear opinion that Prohibition lay. Although one cannot be sure, it seems probable from the course of the discussion that the judges' reason was the position developed by Serjeant Yelverton: there is no basis for ecclesiastical, including High Commission, proceedings unless the 14th century statutes authorize them, and they do not for the circumstances of this case. The judges were not however, ready to grant Prohibition at once; in adjourning the case with permission to move it again, they perhaps acknowledged its puzzling character. The parties' settling, on terms that are not reported, meant that it was never reopened. Although Pit v. Webly is of negligible importance for issues specific to the High Commission, it is significant for this study in part because of a later case.

End Note; The Official Record in Fuller's Case

Some aspects of Fuller's Case appear from the official record only. For want of full or fully reported, argument, one cannot say exactly how these aspects were dealt with by counsel and the judges. The purpose of this note is to look at these for their intrinsic interest.

The official record consists of Fuller's spelled out claim to have a Prohibition, plus the brief text of the Consultation by which part of the Prohibition was reversed. It raises two basic questions: (1) Just what did Fuller claim by way of privilege as a barrister to say in the King's Bench whatever he thought would avail his client, and what were the grounds of his claim? (2) Just what did the High Commission accuse Fuller of, and how plausibly can it be argued that it accused him partly of offenses within the Commission's jurisdiction and partly not? The second question can be asked because in his complaint Fuller recites completely the charges, or "articles", the Commission brought against him.

The main point to note about the "advocate's privilege" claim is that it is cast in insistently prescriptive form. After reciting that he has been a member of Gray's Inn for 43 years, Fuller says that "from the time of memory" Gray's has been an Inn of "men of the common law courts" and of "conciliar men of the common law" [men who act as common law counsel] ." He then says that for 32 years he has been "a conciliar man and apprentice (in English an utter barrister") of the Inn, and has been erudite in the common law." (In effect, he was certified as learned by his promotion from student to barrister.)

Fuller continues by saying that from the time of memory the following "ancient and laudable custom has existed [*habetur*] and has been used and approved [viz.] that all free men of the realm who prosecute or defend any action real or personal between party and party or any other thing or cause whatsoever (pleas of high treason or felony alone excepted") in the King's Bench from the time of memory have retained and been accustomed to retain conciliar men learned in the law and Serjeants at law for stating, pleading, and explicating their causes to the Justices." (Note that Fuller is careful to say that the prescriptive right to counsel extends beyond civil suits, although it stops short of prosecutions for treason or felony. The application here must be, although it is not spelled out, that someone bringing a *Habeas corpus* to challenge a commitment for an ecclesiastical offense is just as entitled to counsel as a civil plaintiff or defendant. The exception, of course, states the familiar common law principle that persons indicted for the gravest secular crimes may not be represented by counsel, so that the question of "advocate's privilege" could not arise.)

Next, crucially for "advocate's privilege", Fuller says that it is lawful, and from time of memory has been, for counselors and Serjeants in arguing and pleading for a client "modestly and decently" to object what they can against letters patent, commissions, and grants of the King to whomever it [such patent or grant] has been made, as much as against all liberties, jurisdictions, and privileges of private and particular people if the cause of their client requires, leaving judgment and determination to the Court aforesaid, which custom exists, has existed from time of memory "of necessity", and "contains in itself *equum et bonum*."(The striking point about this passage is its specification of the custom beyond a general right to say what one's client's cause requires. The general right as stated *includes specifically* a right to challenge the validity, or propose a construction, of royal patents, commissions, and grants. The judges may reject any such challenge or construction, but a lawyer does no wrong in making one—within the bounds of "modesty and decency", which seems to go rather to the manner than the matter. There is nothing untouchable about royal grants in *discussion* of people's rights and liabilities, whatever the law as determined by the judges may be—even if it should turn out to be that the court addressed lacks jurisdiction to authenticate or construe the grant.)

Apart from "advocate's privilege," the official record is mainly valuable for showing the terms in which the High Commission charged Fuller. Lacking any reports of *pro* and *con* argument by counsel and the judges, first on whether the High Commission's prosecution of Fuller should be prohibited and then of whether his Prohibition should be reversed by Consultation, we have no way of knowing what the judges thought about the charges one by one. We do know from the reports that in the upshot a qualified Consultation was issued. The official record confirms that. The record concludes with the full text of the Consultation. Although the reports are clear and accurate about what it provided, the picture is perhaps sharpened by looking at the exact form of the Consultation at the crucial point. First come words of permission: "We signify to you [the Commissioners] that *quoad* schism, heresy, or erroneous . . . opinion . . . you may proceed [against Fuller] . . . notwithstanding [the Prohibition] . . ." Then come two inhibitions: (1) *Quatenus non agatur de* [so long as there be no dealing with or treating of] the authority or validity of our [the monarch's] letters patent for ecclesiastical causes directed to you or any . . . or concerning the exposition or interpretation of the statute [of

1 Eliz.] (2) And *quatenus non agatur de* any slanders, contempts, or other things which by the common law or a statute of the realm should be punished or determined."

There are no indications in the Consultation whether any of the charges we shall now review might be in danger of violating the inhibitions or be considered not to make an adequate accusation of "schism, heresy, or error" on Fuller's part. The charges are, however, of historical interest. Looked at in one way, the High Commission's winning a qualified Consultation can be seen as a Pyrrhic victory. The Commission would have been liable to Attachment for disobeying the Prohibition if it proceeded against Fuller for, say, "slander and contempt" of the Commission because a given charge was reducible to that offense, even if the charge was written to give it the color of "schism, heresy, or error." In the opposite perspective, the Consultation can be seen as a clear vindication of the High Commission's power to proceed against Fuller on any or all of the charges, with only an easily obeyed warning not to challenge the common law's monopoly to construe statutes and patents and not to punish "slanders and contempts" amenable to common law prosecution. This comes to saying that the charges are carefully drawn to allege a spiritual or religious component in Fuller's misbehavior, over and above anything he nay have said, correctly or incorrectly, touching secular matters.

In discussing the charges, besides simply summarizing them, I shall comment on whether they probably do accuse Fuller of schism in a meaningful way, as opposed to merely calling words or acts "schismatical" when they come down at most to secular contempts or to claims about what 1 Eliz. and the patents implementing it provided. I focus on schism because of the other two subjects the Commission was allowed to take up heresy is referred to only once, and "error," though affirmed in the Consultation (and in other legal sources) is never in the charges against Fuller spoken of as an offense that can clearly be committed without also committing schism or heresy.

There are eleven specific charges, all relating to utterances by Fuller in arguing *Maunsell and Ladd*. They are assigned to particular times (nine of them to the 6th of May or thereabouts, two to the 13th of June or thereabouts.) The charges are stated in English, the language in which the Commission would have addressed them to Fuller, as opposed to the Latin of the official record as a whole. Each is introduced by the same formula with no more than trivial variations from item to item (". . . wee object and articulate to you that . . . you did factiously and falsly affirme publiquely and in the hearing of many either in expressed words or in effect that . . .") Note that this form alone implies that Fuller's schismatical behavior as alleged consisted in, or at any rate was solely evidenced by, his speech-acts—speech-acts in a straightforward sense public, being committed in the courtroom. He was not charged for his beliefs, nor confessions thereof exacted by constraint, including any oath to answer questions about his beliefs; nor for overt acts such as the participation in conventicles charged against Fuller's client Ladd; nor for communications to a few people, or intended to be heard or read only by selected addressees.

The charges were as follows: (1) Fuller said that the High Commission's "manner of proceeding" was "Popish in that sometymes they did comitt men to Prison." The Commission alleged that his words to such effect "did tend to ye great offence of manie and to the slander of the Church, to the hardening of Papists against the said Commissioners, and to the malicious impeachment of his Ma[jes]t[ie']s Authoritie in Causes Eccl[es]i[ast]icall."

Why Fuller should call the High Commission's proceedings "Popish" for the specific reason that the court sometimes imprisoned in not obvious. For some reflections on that, see Charge #11. #1 does not say in terms that casting the aspersion "Popish" on the Commissioners was schism (or a form of error more suitable to top-level ecclesiastical correction than other opinions that can be reasonably, but were not unanimously, regarded as erroneous—e.g., that 1 Eliz. did not as a mere matter of law permit giving the Commission imprisoning power.) My guess would be that the High Commission in #1 was hoping to make out that any use of the epithet "Popish", which Puritans were notoriously given to applying to Church practices they thought should be reformed, put the speaker in the class of schismatics, or nearly so, as other ways of expressing the same criticisms might not—e.g., asserting that the criticized practices lacked Scriptural warrant, or that they were illegal by secular law. As it were, "Papist" and "Popish" express hatred, as opposed to disagreement or disapproval. How Fuller's words would "harden" Roman Catholics is less than evident. Catholics would not be less subject to discipline for their outright opposition to the Royal Supremacy and all its fruits because dissident Protestants "maliciously impeached" that institution, would they? Could the point be that unless calling aspects of the English Church "Popish" was branded as radically false, some average Protestants might lose zeal for prosecuting genuine Papists?

(2) This article does not make a definite accusation, but concludes by ordering Fuller to explain what he meant by certain language. The article recites that Fuller *appeared* to cast "a malicious aspersion and false interpretation" on the High Commissioners but was too vague to be quite so characterized. Therefore Fuller is "commanded" to "set downe" his meaning.

Fuller had said he "feared" lest the authority to imprison "in some cases" which the monarch had given the Commission "would be used to suppressed the ffaith of the Sacrament." He spoke, the charge continues, "as if you knew them to be Enemies to the true doctrine of the Sacrament in that you feared least they would cast men into prison for their maintenance of it, and suspecting that in your words touching the ffaith of the Sacrament you purposed to broach some Error wee command you to set down what you meane by the faith of the Sacrament."

There is not much point in speculating about Fuller's meaning when the High Commission was not sure of it. He was presumably suspected of unacceptable beliefs about Eucharistic doctrine. It would be helpful for showing that Fuller was a schismatic to exact a religious error from him, as opposed to utterances construable as slander of Church government.

(3) Fuller said: "Ordinaries (meaning B[isho]pps and the officers under them) did proceed in these dayes by taking an el when they had but an ynch granted them, and in examining men upon their Oathes at their discre[ci]on and indiscrecc[i]on and such their dealings were now lamentable . . ." By so saying Fuller "used these and the like scandalous words of purpose to bring in Contempt the calling of B[isho]pps and their Eccl[esiasti]call Courts as being suspected, to be yourself a schismatick and a mainteyner of sundrie false and erroneous opinions both against their calling and Authoritie."

This article looks designed to avoid being a claim that Fuller had slandered the High Commission itself or the "ecclesiastical government in general"—i.e., to head off the argument that his offenses added up to no more than contempt subject to secular

prosecution. There may be validity in maintaining that to slander the bishops was to commit schism, even if slandering a latter-day department of ecclesiastical government and the legal structure that made it possible was only contempt. The bishops were after all deemed to hold ancient canonical power in succession to Christ's apostles. Anglican Protestants could well maintain that Henry VIII and his non-Romanist successors did not choose episcopacy for the governance of their Church; they were vested by God with Supreme Headship of a Church that was *ab origine* Episcopal. Thus to slander the bishops come to attacking the Holy Catholic and Apostolic Church *per se*, surely schism if not heresy too. By contrast, having a High Commission was a choice (by monarch and Parliament), a contingent feature of the ecclesiastical government, and perhaps even the power of monarch and Parliament to regulate the ecclesiastical judicial system can be seen as a political choice.

Some Puritans, of the so-called "Presbyterian" branch, of course believed that episcopacy was unscriptural (and its imposition in England an unjustifiable choice.) Whether what Fuller said about the bishops—in effect that some of their proceedings were beyond their legal power and that they were greedy for powers never given them—were slanderous enough to count as schism raises a question. Saying in the charge that Fuller was himself *suspected* of the thoroughgoing anti-episcopal school adds nothing; if the suspicion was correct, it might be arguable that slander from an "unclean heart" could be schism, although the same words would not be if said by a lawyer personally free of unorthodox ecclesiological views.

The only suggestion in Fuller's alleged words of a specific basis for his vague aspersion is his mention of wrongful examination under oath by the bishops. Whether they were guilty of that is a question of fact on which I have no evidence. Legally, they had well-warranted power to conduct sworn examination, subject to limits (see Vol. II.) Since the issue in *Maunsell and Ladd* was the High Commission's examining power, which need not be identical with that of diocesan courts, it was in a strict sense irrelevant for Fuller to take up the latter. In a looser sense, however, a neutral lawyer's taking it up might not be irrelevant if his point was that abuse of interrogating power was so widespread in the ecclesiastical courts at large that one would surely expect it in the High Commission. If it could somehow be made to stick that Fuller was infected with anti-episcopal principles, his taking an irrelevant swipe at the bishops might reinforce the gravity of his offenses.

(4) Fuller said that the High Commissioners imprisoned men without showing them cause why they were imprisoned and that they detained them in prison as long as they liked and did not permit them to be bailed. He "uttered these untruths to make both themselves [the Commissioners] and their proceedings odious, thereby rather satisfying yo[u]r scismaticall and factious humor then having any regard of truth, or as if you might slander yo[u]r sup[er]ior as you list without controllment insinuating directly, that they kept men in Prison rather to suffer their owne wills than for anie just cause."

This article seems to me a straightforward accusation of slander, with very little said to stretch the alleged offense to schism or error close to schism. Fuller is alleged to have actually said only that the Commission had abused its power to imprison. There is not in his words so much as a claim that the Commission lacked imprisoning power altogether, however untrue as to fact the imputation of abuse may have been or however incorrect as to law Fuller's assumptions about the extent of the imprisoning power may

have been. To the degree that the charge goes beyond stating what Fuller said, it gets no farther than a cloudy suggestion that "gross" or "malicious" slander exceeds the category of slander.

(5) Fuller allegedly said falsely that "administering the oath ex officio doth tend to the damning of their soules that take it thereby insinuating that it is an oath not lawfull to bee ministered, but likewise in effect publishing such a gross and intolerable Error as tendeth to the great ov[er]throw in manie Cases of Justice as well in the temporall Courts of this Realme as in Eccl[esiast]icall."

The idea behind Fuller's words is that requiring people to testify under oath when to answer the questions truthfully might be deleterious to themselves was a temptation to perjury, a soul-damning sin. This idea was a motif throughout the history of controversy over self-incrimination. What asserting it is alleged to "insinuate" was not, however, legally true, viz. that the oath *ex officio* was flatly unlawful. The *ex officio* oath means the oath by which ecclesiastical courts forced criminal defendants to testify against themselves. English law held that examination under such oath was *sometimes* illegal, but not always—not when the party was accused of a purely ecclesiastical offense and some fairness rules were observed, such as that the examinee be informed of the questions he would be asked before testifying. (For all this, see Vol. II, Ch. V.)

Fuller certainly believed that all sworn testimony with incriminating potential *ought* to be against the law—essentially on moral grounds, though in *Maunsell and Ladd* he proposed some good legal ones as well. It seems very hard to make a major ecclesiastical offense out of misrepresenting the law or criticizing it. If egregious enough that conduct might at most qualify as contempt, none too plausibly. The High Commission's effort to strengthen its charge by saying that Fuller's language would be subversive of secular justice is surely self-defeating. It is true that some anomalous secular procedures used possibly soul-endangering oaths (e.g., compurgation in some civil cases at common law), but by and large the common law's reliance on juries rendered such oaths unnecessary (and I believe tribunals such as the equity courts and the Star Chamber avoided them.) To call attention to any threat Fuller's opinions might pose to secular law tends, however, to admit that if those opinions were criminal they should be corrected by secular law.

(6) This article says in so many words that Fuller "presumed to slander his Ma[jes]tie as well to bring his action into Contempt, as to pynch at his lawfull Authoritie in Causes Eccl[esiast]icall" (by saying that the King's patent authorizing the High Commission was "contrarie to the Lawe"—how is not specified in the text of the article.)

This seems a manifest charge of contempt and slander of the government, no doubt the graver for being directed at the King himself. The charge is given the color of schism only by adding that "factious persons and disobedient scismatics cannot endure" the King's lawful authority in ecclesiastical causes.

(7) Fuller said that "his Ma[jes]ty'[s] Commissioners for causes eccl[esiast]icall (notwithstanding you knew the tenor of his Ma[jes]t[ie']s Commission granted unto them) had no more Authoritie by the Act of Parliament primo Eliz: whereupon the said Commission is founded, then they had before the making of that Act, whereby you utterly deny in effect the Kings L[ette]res Patents granted to his said Com[missione]rs to bee of any validitie for it is apparent, that before the said Act, there was nev[e]r anie such Commission nor Com[missione]rs and that then if such his Ma[jes]t[y's]

Com[missione]rs have now no more Authoritie by such his highnes[s'] Commission then they had before the making of the said Act, that they have now none at all, which is to take from his Ma[jes]tie all lawfull meanes to execute his power and Authoritie in causes Eccl[esiat]icall and consequently together [probably 'altogether'] to deprive him if it, a thing as well by the factious p[er]sons and scismaticks in these dayes as by the Papists o[u]r Mortall Enemies much affected and desired."

It is hard to say what Fuller was getting at in the words attributed to him. The striking feature of this article is that the Commission appends a string of deductions to show that those words have extreme implications. Because the letter of Fuller's words implies that the High Commission at present has no authority at all, it is further implied that the King has "no lawful means to execute his power and authority in causes ecclesiastical." That is equivalent to claiming that he *has* no such authority. That, *per* the Commission, is indistinguishable from what Roman Catholics hold. It comes, one can say, to flatly denying the Royal Supremacy in a major aspect. If the deduction is conceded, it seems difficult not to consider Fuller a schismatic, for separating himself from the Church in England as now constituted, no less radically than Romanists do. It may be no worse than contempt to criticize *how* the King's ecclesiastical justice is organized and applied, but can it not be schism to deny, with the Catholics, that there is any such thing?

(8) Some of this article I can make no sense of, but it essentially objects that Fuller's "scornfull speeches" were grounded on his ignorance. (Of what I cannot make out, but Fuller has already been accused, not without some justification, of not knowing the law and the High Commission's actual practices. Of course ignorance and open-eyed misrepresentation are hard to distinguish.) Most significantly, it is alleged that Fuller's "sawcie ignorance did proceed from your malicious desire to discredit as much as in you lay both his Ma[jes]t[y's] Commission and Com[missione]rs as foreseeing that if that Authoritie might be ov[er]throwne once, your scismaticall Masters might doe what they list."

Again, we have a plea for the relevance of motive: Fuller is represented as errand-boy for a conspiracy of people with notoriously schismatical intentions, though they may have lacked or avoided his opportunities to commit prosecutable schism (and lacked the cover, though it failed him, of his advocate's role.) Could speaking falsely and ignorantly about the High Commission to the end of liberating his co-conspirators from need to fear ecclesiastical prosecution for schism, however boldly they pressed their program, not *be* schism? Is it not weak consolation to the Church for the removal of this danger merely to concede that the faction Fuller was spokesman for could not be saved from the peril of secular prosecution—prosecution that *might* be effective, if lay jurors willing to indict or convict could be found?

(9) Fuller said that the High Commissioners "by reason of their absolute Authoritie, did thereby oftentimes commit sundrie absolute Wrongs." This article, like #2, concludes with a "command", except here it is in the alternative: ". . . wee command you to name the Com[mission]ers that have done such absolute wrongs, that they may be dealt with according to their desert, or if you are able to name none, you may receive such due punishment as your slanderous words deserve."

Again, I think the point of this charge must be that loose defamatory language about individual Commissioners comes to schism, not merely contempt for the

ecclesiastical government. There is perhaps some plausibility in contending that even if irresponsible aspersions on the Commission as an institution must come to the secular offense, unwarranted attacks on the reputations of particular Commissioners need not. The claim would be that the pitch of sinfulness reached by expressions of hatred or malice against flesh and blood—against fellow Christians, especially ones clothed in ecclesiastical dignity—is inherently spiritual and divisive within the Church to the point of schism; this hardly *can* be turned into a secular crime (at any rate not without very explicit Parliamentary legislation.) By contrast, attacks on institutions of Church government need not be beyond the reach of secularization. (On the other hand, the attacks on individuals attributed to Fuller might be reducible to common law defamation, depending on how the vague "absolute wrongs" is taken or whether Fuller could be compelled to spell it out.)

(10) This article contains vague and puzzling language, but on one point it is specific enough. The charge starts by accusing Fuller of saying that the High Commission's proceedings were contrary to law, which of course he believed and could hardly avoid asserting in some respects merely to argue that his client was improperly held. Then he is said "in pride of yo[u]r hart" to have made "manie scornfull glosses and observations" upon the Commission. In the first example of these, I can see no explicable meaning. (Fuller allegedly said that the Commissioners "had power to devise wayes for searching out of matters to proceed either by Eccl[esiast]icall lawed or otherwise at their discrecion to command all Justic[e]s all subjects [sic] wh[i]ch you disdainfully pretended you knew not how farr it extended . . .")

Of the next point, however—or the continuation of the last after "extended"—the legal gist is visible. Fuller allegedly went on with ". . . and to appoint Receivers of ffynes . . ." It seems clear that Fuller was accusing the Commission of collecting its own fines (fines he probably considered illegal, but he is not charged with error as to the fining power itself.)

Granting that the Commission was not completely debarred from imposing fines, there is ample authority that it must certify its fines to the Exchequer for collection as debts to the Crown, rather than collect them itself. The procedure put the Exchequer in a position to scrutinize the legality of fines. In the present article, the High Commissioners were presumably saying they observed the procedure and had not appointed their own collectors, or at any rate that they were not currently doing so. (The numerous common law judicial pronouncements that estreatment into the Exchequer was always required suggest that at some point the Commission had tried to do its own collecting.) Assuming the Commission had acquiesced in the common law's insistence on using the Exchequer, it was gratuitous for Fuller to harp on a past error that may have been innocent before the common law courts settled the point, and that in any event had nothing to do with the issues in *Maunsell and Ladd*. To make things worse, Fuller allegedly could not resist adding a sarcasm to his observations on fine-collection: ". . . if they had auditors too what an Exchesq[uer] this would be." I.e., so far as Fuller pretended to know, the Commission might be planning to set up a full replica of the Exchequer. (A few more words in the charge, following these about fine-collection I find simply unintelligible; perhaps they were mistranscribed in copying the official record.)

For the purpose of making out schism or serious religious error, charge #10—like #9—seems to me to rely on the tenuous but not entirely empty ground that gratuitousness

and a "saucy" tone might lift Fuller's utterances above secular contempt. As it were, a broadside of assorted untruths about an ecclesiastical court bespeaks a schismatical spirit as relevant argument in a case concerning an ecclesiastical court would not, even if it were mistaken, known to the speaker to be, and in danger of constituting secular slander/contempt.

(11) The final charge against Fuller may come to the clearest accusation of schism, the hardest to reduce to contempt and slander of the ecclesiastical government, Fuller is alleged to have said that the ecclesiastical jurisdiction granted to the High Commissioners by 1Eliz. and the monarch's patents "giving them Authoritie to inflict some corporall punishment upon Delinquents is Antichristian, and that such Eccl[esiast]icall Jurisdiccon is not of Christ, but of Antichrist and that thereby you showed yo[u]r selfe to have embraced some notable scisme and heresie fitt to bee corrected and amended in you . . ." The article continues, "besides that you have made manifest your rebellious and lewd heart towards his Ma[jes]tie in ascribing unto him that the maintenance of that Eccl[esiast]icall Jurisdiccon which is not of Chirst and making Him to bee the Author and Grantor of that Authoritie unto his Com[missione]rs which is Antichristian."

It is the first part of the article that concerns us. The second part paints Fuller's offense as the worse for manifesting disloyalty toward the King, but does not represent that as constituting schism or heresy. The Commission was well-advised not to appear to be proceeding for a secular crime. Whether saying the monarch granted and maintained an "Antichristian" jurisdiction and authority was treason or less, its prosecution must surely be secular.

With respect to the first and essential section of the article, it should be noted that calling a practice anti-Christian in the 17th century rings deep. As our document itself explains, it means "not of Christ, but of Anti-Christ." At the least, that says the practice was shaped by Christ's worst enemies, who to 17th century Protestants would include both the devil and the Pope. That is stronger than some such definition as "inconsistent with Christian ethical ideas as those are best understood."

Observe secondly that Fuller's extreme animadversion was on one particular power—to inflict corporal punishment. That can only mean power to imprison—not the Commission's substantive jurisdiction, nor its authority to use *temporal* sanctions, notably fining, but authority to imprison. I do not think that even Fuller could have pretended that the Commission ever punished or thought it could punish in any further "corporal" way—from death through the various "cruel and unusual" punishments for which the Star Chamber eventually became notorious to minor inflictions of discomfort and shaming in English secular law, such as setting people in the stocks. (I would suggest reading the odd-sounding phrase "some corporall" punishment as "*any* punishment that can be considered corporal, including arresting men's bodies, even briefly, as well as detaining them in jail.")

Notice thirdly that here alone in the catalogue of charges against Fuller heresy is alleged. While schism was usually spoken of as the second-ranking offense within High Commission jurisdiction, after heresy—and some Puritan acts and utterances that could not reasonably be taken as heresy were prosecuted as schism—the present article shows that the most serious forms of schism could not be sharply differentiated from heresy and that a heretic within the Church of England was *ipso facto* a schismatic.

I can only speculate on why Fuller should have singled out "corporal punishment", among the disputed areas of jurisdiction and disputed sanctions belonging to the High Commission as "of Antichrist." Perhaps the ancient and undisputed rule that the Christian Church may not shed blood was extended in some precisionist minds to rule out any use of physical coercion by agents of the Church. This can be further extended to the Church's evading the rule by farming out physical coercion to the secular authorities, as the statute *De heretico comburendo* provided for, or as the English writ *De excommunicato capiendo* permitted. One can probably find enough examples of physical coercion directly applied in the medieval and Counter-Reformation Roman church to make out "corporal punishment" as "Popish" and so *per* Fuller "Antichristian"—hard physical penances, "imprisoning" misbehaving clerics in monasteries, Church courts' handling of the many varieties of wrongdoers subject to their jurisdiction via benefit of clergy. More generally, it was a Puritan motif that the "discipline" of the Church should be distinctively spiritual, rather than a sister-ship of worldly government, using the latter's rough if necessary sanctions and failing comparably short of reforming misbehavers' souls. (See my observations in Vol. I, p. 20 ff., on the sense in which Puritans were at least latently hostile to the whole structure of ecclesiastical law. Fuller may have thought there was much more "Antichristian" about the High Commission and even the ordinary courts it partly displaced and exceeded in efficiency, than "corporal punishment", though he reserved his strongest rhetoric for the last straw.)

There seems to me no compelling basis for determining when criticism of ecclesiastical courts' procedures grows from a degree of reckless falsity and gratuitous vituperation that *only* makes it slander and contempt to religious misconduct so grave that its correction cannot be taken away from ecclesiastical justice (or from the High Commission.) Whether any of the other charges against Fuller sufficed to cross that line, one must probably say that as a matter of law Article 11 does so: The High Commission imprisoned Fuller, he was remanded to prison on *Habeas corpus*, and the brief report of his *Habeas corpus* suggests that the return focused on the charges in Article 11(". . . he was accused of saying that their proceedings were Popish and that it proceeds from Antichrist and not Christ & c.")