## Section 4: The High Commission during Coke's Chief Justiceships

### Sub-section (a): Common Pleas Cases (1606-1613)

### Summary

Cases on the High Commission from the Common Pleas when it was presided over by Coke are difficult to summarize. Common Pleas law on the Commission was certainly altered over the seven-year span 1606-1613. It is possible to depict the change in bright colors, but the more closely one looks at the reported cases the more muted the colors become. The most important thing to note about this passage of legal history is how the Common Pleas law became more complex and uncertain compared to what it was in the Elizabethan and very early Jacobean period. A sense of that can only come from immersion in the details.

The highlighted picture of the change would be as follows: Before Coke assumed the Chief Justiceship, the court was permissive with respect to substantive jurisdiction and restrictive with respect to sanctions. The High Commission was allowed to entertain any recognized class of ecclesiastical claim or complaint. On the other hand, the Commission was not permitted to go beyond recognized ecclesiastical sanctions. It could neither impose a fine nor commit a party to prison. The Cokean period saw change on both scores. The Commission was restricted to criminal cases and, within that class, to serious offenses called "enormities"; a definite list of these was proposed by Coke. Secular sanctions were permitted in cases on that list. A substantial majority of the court was in favor of these rules, but one Justice, Walmesley, was characteristically at odds with his brethren. As against these changes, restraints on the Commission that were already in place when Coke took over the court persisted. (Procedural rules in *Habeas corpus*, which demanded that commitments to prison be justified in particular even when they were generically legal; the rule that parties could not be arrested first and informed of what they were charged with later, but must be cited to appear and be coerced by excommunication if they failed to; a ban on exacting performance bonds from defendants.)

A more shadowed and more accurate picture has a few specifiable general features, though it is only through looking at the details of particular cases that one can see how the simplified summary above falters. The doctrine that High Commission jurisdiction is at least limited to ecclesiastical criminal law was not easy to apply in all contexts. Civil and criminal matters could be commingled in a single case. A couple of sophisticated arguments appear in the cases to the effect that a kind of "public interest" could sometimes give jurisdiction to the High Commission even when the charge could hardly be made out as "criminal." The simplified picture is certainly correct in asserting that the "enormity test" won out in the Common Pleas as it had not done earlier. (Even Justice Walmesley seems to have acquiesced in it up to a point.) The content of that doctrine, however, was not clearly or stably agreed on. Coke's stab at a very limited but sharp list of enormities was in the event only a stab; additions were made or contended for, and the very basis for the restriction to enormities was not always seen in the same way. Cases within High Commission jurisdiction and cases in which secular sanctions were allowed did not work out as fully coterminous categories. It is unclear that the

conceded power to imprison was ever agreed to permit more than "equity-style" imprisonment—i.e., power to coerce fulfillment of an already-imposed spiritual sanction. Imprisonment to coerce replying to lawful interrogatories despite self-incriminating effect was accepted. That is both an example of "equity-style" commitment and the best proof that it was employed in practice. Though such imprisonment was endorsed judicially for other contexts, there are not many instances of its actually being used. (See Vol. II, Ch. 5, for self-incrimination cases.)

The effects of change in the Common Pleas law can mainly be seen in marital litigation. Puritans were no more protected from the High Commission than they were before. Serious Puritan activity was safely in the category of enormities; at most a few minor misdemeanors inspired by Puritan sentiments may have escaped under the enormity line. Puritans were worse off by being more subject to imprisonment. To the degree that they were better off for common law protection it was largely because of limits on the Commission worked out before Coke's Chief Justiceship—restraints on self-incriminatory questioning and on the power to imprison when it was as such lawfully employed. (Insistence on formally adequate justification of commitments in *Habeas corpus*; checks on perpetual or unreasonably long detention, these never reduced to clear doctrine, but visible in practice.) What as a practical matter the High Commission wanted and was prevented from having by the Common Pleas in several cases was a free hand or wide discretion to handle marital disputes. It was largely in such disputes that criminal elements—whose classification as enormities was typically problematic—were intermixed with parties' attempts to secure civil remedies, such as divorces and alimony awards. While at a theoretical level spokesmen for the High Commission persisted in their belief that the monarch had virtually unlimited prerogative to confer such ecclesiastical jurisdiction and secular powers as he chose on the Commission, there was no serious chance in the 17th century of that position's being accepted by the common law courts. In practice, it was not necessary to go so high to make a reasonable case for at least broader powers in marital affairs than strict limitation to criminal enormities would permit.

The best evidence that marital law was the real bone of contention between the Common Pleas and the High Commission comes from extra-judicial events in 1611. In response to the Common Pleas' prohibiting alimony awards by the High Commission, the government required all the judges to meet with the principal state officials, took the Common Pleas to task for the court's disposal of marital cases, and made a blatant attempt to use the King's Bench and Exchequer judges against those of the Common Pleas. Although one should be cautious about attributing the "constitutional ethics" of the future to the early 17th century, the flavor of inappropriate political interference with the courts hangs heavy over this episode. Coke and his colleagues perceived that flavor and objected; Coke's courage and leadership on behalf of judicial independence are apparent. The dust of the 1611 controversy, however, settled into a compromise. The consequence is that as of the end of Coke's Chief Justiceship of the Common Pleas in 1613 rules on the High Commission's marital role, and the wider implications of that for the Commission's scope, were *in nubibus*. Perhaps the closest thing to a safe generalization would be that although the enormous crimes limit still held in the abstract, the Commission gained some ground towards acknowledgment that it had a role in especially aggravated marital cases. Wider marital jurisdiction for the High Commission would

have favored more humane treatment of married women than lay law combined with ecclesiastical law solely enforced by the regular Church courts would have made for.

Although the changes in Common Pleas law during Coke's Chief Justiceship were more muted and confused than they appear at first sight, changes did occur. In the aetiology of these changes political pressure to accommodate the High Commission may have figured. There was not, however, nearly enough change to satisfy the government and the central officers of the Church. In the event, those patrons of the Commission probably lost more than they gained. Though limited imprisoning power, mainly valuable for more effective disciplining of Puritans, was conceded, narrowing the ecclesiastical jurisdiction available to the Commission made its increasingly prominent aspiration to a role in marital affairs harder to attain. Deference to political authority mainly took the form of deciding cases against it on narrow grounds when possible.

It is likely that the explanation of the legal changes lies largely in Coke's history and then in the influence of his intellect and personality on his fellow judges. Before becoming Chief Justice of the Common Pleas, Coke was a King's Bench lawyer and a government lawyer. The late Chief Justice Popham of the King's Bench was probably his most honored teacher and model. Although the King's Bench did not have as many opportunities as the Elizabethan Common Pleas to develop a comprehensive position on the High Commission, it was tending, under Popham, in the direction the Common Pleas took under Coke. Coke's associations would probably have put him in basic sympathy with the King's Bench tendency to embrace a limited imprisoning power and to adumbrate the enormity test. As Attorney General, he would probably have supported the government he was part of in its hope for strengthening the Commission's sanctions and thereby its effectiveness. In any event, whether or not Coke would have said that the King's Bench point of view taking shape simply made better sense than the older-fashioned Common Pleas law, he must as the new "outsider" Chief Justice of the Common Pleas have been concerned about the mere fact of a degree of divergence between the principal courts. Sooner or later they would have to get together. Better take the lead and achieve harmony sooner, Coke can be imagined thinking, than wait for a Writ of Error in the King's Bench or an Exchequer Chamber decision to override the Common Pleas. Coke took pride in being an engineer of judicial unanimity. In carefully reporting Fuller's Case, whatever his own role in the achievement of unanimity there, he provided an example of harmony on High Commission matters, even though *Fuller* did not address the most basic issues about the Commission. The next step, he might well have thought, was to achieve unanimity on those basic issues by a moderate change of course in the Common Pleas.

Having firmly embraced the enormity test and linked imprisoning power to it, Coke's Common Pleas was not entirely successful in clarifying and sticking with what was now its fundamental High Commission policy. Its commitment to the values behind that policy, on the other hand, probably deepened, with catalytic help from the court's leading role in construing and giving effect to 23 Hen. VIII, c. 9 (Ch. 2 above.) By giving that statute the serious attention it had not previously had, Coke's court was forced to think about the danger of centralized subversion of local ecclesiastical justice and the subject's interest in localism, not only his convenience but his traditional entitlement to two appeals from an adverse sentence. This concern suggests curtailing the High

Commission severely, since with broad jurisdiction it could both preempt local business and, in contrast with other preemptors, cut off appeals completely.

## The Cases

We turn now to Coke's Common Pleas, 1606-1616, the richest source of law on the High Commission. The earliest case decided by that court, Roper v. Bulbrooke,[86] was

[86] M. 3 Jac. C.P. Noy, 149, *sub nom*. Rooper v. Bulbroke; Harl. 4817, f. 191b; Add. 25,205, f. 35b; 12 Coke, 45-47 and (second entry) 47-48, *sub nom*. Sir Anthony Roper's Case.

The date M.3 Jac. is from Add. 25,205. Harl. 4817 is undated, while Noy says that the case was disputed from M.3 until "now", but "now" is not identified; Coke's first entry is undated, but his second dates the case M.5, with a citation to the Plea Roll for that term. The complexity of the case makes it likely that it ran over several terms.

Harl. 4817, a MS. labeled as Justice Warburton's reports, is the only version that gives the full narrative. The text follows that report. Noy is brief but agrees in its statement of the principles behind the result. It is possible to read Noy as saying that according to the holding in this case the High Commission may not deal with any dispute about "*meum* and *tuum*"—i.e., any purely civil matter—but the meaning is probably only that it is excluded from disputes over the interests that were preserved by statute when monastic property was secularized. Add. 25,205 presents some problems of reconciliation. It gives the basic decision as stated in the text (ordinary ecclesiastical remedy before the Dissolution, no remedy at all after 31 Hen. VIII, statutory remedy provided by 34/35 Hen. VIII.) This appears, however, to figure as the argument *against* Prohibition (*per* Justice Foster), and as a successful argument, for the report says that a Consultation was granted. The argument can be imagined as cutting that way, perhaps in the form "If the pension were recoverable *de jure* in an ordinary ecclesiastical court the High Commission should probably not handle it, but it is appropriate for a statutory court, which exercises the Supreme Head's powers by delegation, to entertain a dispute over a special quasi-ecclesiastical interest whose very existence depends on the statutory reorganization of the Church." On the other hand, Add. 25,205 accords with Harl. 4817 in having the court agree that 2 Hen. V requires the libel to be shown to the defendant in civil litigation. It was reportedly agreed that Prohibition will lie *until* a copy of the libel is furnished, which is surely the only meaningful use of a Prohibition claimed solely on 2 Hen. V. Justice Warburton is reported as distinguishing proceedings in ecclesiastical courts, where by definition there is no libel and—*per* Warburton—no requirement that the defendant be apprised of the charges in a manner *equivalent* to showing him the libel in a civil suit (but cf. the last Sub-section above for contrary opinions on this point.) If a general Consultation was really granted, the instant case must be classified as *ex officio*—plausibly, but so classifying it would contradict Harl. 4817. That report is so clear and detailed a narrative account that I think it must be preferred. If Add. 25,205 is not merely inaccurate, it can be reconciled only by supposing that there was still more to the narrative than Harl 4817 tells. Taking the hint from Noy (confirmed by Coke) that debate

begun in 1605, before Coke's accession to the Bench, and unanimously resolved in 1607 It presents an instance of resistance by the High Commission to regulation by the Common Pleas, countered by that court's insistence on its right to regulate. The problem in the case was special, however, with the result that the decision has only limited implications for the general scope of the Commission's authority. Three of the four reports stick to the immediate problem. The fourth, Coke's (from the posthumous *12 Reports*), adds a few broader "resolutions". On the immediate problem, there are no conflicts among the reports. We have had occasion before to observe that Coke was capable of attributing more to courts than they may have known they were deciding. Whether or not he did so in this case, I shall discuss Roper v. Bulbrooke as all the reports agree it was and at the end note the further—not strictly necessary but not irrelevant—holdings reported by Coke.

Bulbrooke was incumbent of a vicarage dependent on an impropriate rectory held by Sir Anthony Roper. Bulbrooke claimed that a pension issuing out of the rectory was due to him and unpaid by Roper—a pension, that is to say, which had been settled on the vicar in the days of the monastery and for which Roper was liable as successor. To recover his pension, Bulbrooke petitioned the King, presumably supposing that he had no other remedy. The King referred the petition to the High Commission, which called the parties before it summarily and decreed that Roper should pay the pension. ("Summarily" means that the Commission proceeded without a libel—i.e., without Bulbrooke's having put in a written statement of claim such as civil litigation in ecclesiastical courts normally started from. The Commission acted directly on the petition to the King to make the defendant appear.) Roper refused to obey the decree, whereupon the Commission imprisoned him in the Fleet.

Roper brought both a Prohibition and a *Habeas corpus* in the Common Pleas. Upon the latter, he was discharged from prison. The reason for this decision is not reported, but no further reason is required than the fairly well-settled view of at least a majority of the court that the Commission simply lacked power to imprison. The Prohibition was sought and granted on the basis of 2 Hen. V, c. 3, which provided that ecclesiastical defendants must be given a copy of the plaintiff's libel. In the present case, relying on 2 Hen. V amounts to contending that Roper was not answerable in any ecclesiastical court for a private adversary's claim to a pension except on being sued by libel. When they released Roper and granted the Prohibition, the judges told Bulbrooke to start a suit by libel. Nothing in the reports at this point suggests that such a suit could not be in the High Commission.

To the actions of the Common Pleas, the High Commission responded: "But the High Commissioners say that they will not obey such direction, but that they have made a decree in the case, and Sir Antony shall perform it or otherwise will be committed again

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of the case extended over several terms starting in M.3 (the date given by Add. 25,205): perhaps the first discussion did result in an inclination to grant Consultation, after which the case was re-opened and the court persuaded to go the other way. Roper's imprisonment and the *Habeas corpus* (not mentioned in Add. 25,205) may have been persuasive in the sense that it exposed the Commission's readiness to act in a manner which the Common Pleas regarded as illegal and therefore prompted the judges to look more closely at its substantive claim to jurisdiction.

*toties poties*, and accordingly they committed him to the Fleet again." Thereupon Roper prayed a new *Habeas corpus* and prayed further that Bulbrooke be attached for disobeying the Prohibition. Both prayers were granted at once. A little later, the court disposed of the case on both scores by deciding that the Prohibition should stand and that Roper should again be discharged. At this stage, the judges resolved unanimously that the High Commission had no jurisdiction to make a decree for a pension of the sort claimed here.

The legal position behind this holding was as follows: The pension would have been recoverable in a regular ecclesiastical court before the dissolution of the monasteries. The statute of dissolution (31 Hen. VIII, c. 13) preserved such pensions, but did not make it clear that they were to continue recoverable in ecclesiastical courts against impropriators or other grantees from the Crown of monastic property. At that point, Bulbrooke's course—petitioning the King for want of an ordinary remedy—may have been correct. The statute of 34/35 Hen. VIII, c. 19, soon altered matters, however. . This act recited 31 Hen. VIII's saving for pensions and took note of the fact that persons entitled to them were not being paid for want of a "direct mean" to recover them. The act therefore provided that such pensions were to be recoverable by ecclesiastical process, as before the dissolution. 34/35 Hen.VIII is not restrictive in terms as to which ecclesiastical courts were to have jurisdiction over suits for pensions. I.e., it does not say that such suits must be in regular episcopal or archiepiscopal courts. The statutory language is general; pensioners are only given "such process" as they formerly had, and they are empowered to recover the sum due, plus costs and damages, when the adverse party is convicted "according to the ecclesiastical laws." The court in *Bulbrooke*, however, interpreted 34/35 Hen. VIII to mean that jurisdiction was restricted to the regular courts—sensibly enough, inasmuch as the statute refers to pre-dissolution practice, before the High Commission (conceived as the creation of 1 Eliz.) existed. Even if the High Commission is considered entitled to entertain all *de jure* ecclesiastical causes, the particular type of suit in question—claims to pensions against successors to the monasteries—is best thought of as authorized "positively" or *de novo* by 34/35 Hen. VIII, and therefore as entertainable only by such ecclesiastical courts as the statute assigns—as held, the regular ones.

Besides the principal holding, the Common Pleas may have taken note of information before it going to show that the High Commission had mishandled Bulbrooke's suit. For one thing, 34/35 Hen. VIII makes pensions recoverable by ecclesiastical process only if they had been in the pensioners' possession (presumably meaning that he had been paid) within ten years before the dissolution. I.e., the successors to the monasteries were protected against liability for old claims to pensions newly dug up. The High Commission had omitted to require proof of payment or "possession" within ten years before the dissolution. Therefore it had erred, in the sense of failing to pursue 34/35 Hen. VIII, even assuming, contrary to the court's opinion, that it had jurisdiction under the statute. Secondly, it was also shown by Roper, apparently to the court's satisfaction, that the pension in question was actually tied to the former possessions of the monastery generally, of which the rectory was only part. Presumably Roper was not the present owner of all the former possessions and therefore, as owner of the rectory, not liable for the whole of the pension. In charging him with all of it, the Commission had allegedly erred in a determination of fact. Whereas that sort of error by

an ecclesiastical court was as a rule not grounds for Prohibition, it might arguably be where an ecclesiastical court is exercising a mere statutory power. 34/35 Hen. VIII is careful to provide that contentions arising out of ex-monastic pensions should be determined at common law if they presented issues appropriately determinable there. Arguably, perhaps, the question of exactly what is charged with a pension is a common law issue, wherefore ecclesiastical courts should be prohibited upon surmise that such an issue has been raised or has been mistakenly disposed of. I am not sure whether the court was made aware of the Commission's alleged mistakes on or off the record. Awareness of them may in any event have made prohibiting easier. Be that as it may, however, the Commission's lack of jurisdiction under 34/35 Hen. VIII as construed was sufficient reason for Prohibition.

The court did not need to hold more than that to hold for Roper. It did not need to examine the nature of the High Commission in any deeper sense than considering whether 34/35 Hen. VIII gave jurisdiction to that tribunal by implication, or only to the regular Church courts. Coke's report, however, says that the Commission's scope was considered in wider terms. It is perfectly plausible that it should have been: in effect, the further "resolutions" reported by Coke provide reinforcing reasons for the result, beyond mere construction of 34/35 Hen. VIII. It is possible that Coke reports his own opinion, rather than what the whole court expressly agreed on, though he professes that the resolutions were unanimously embraced. The only ground for suspecting any such thing is that the other reports have the court going only to the narrower, but sufficient, point (plus perhaps giving some weight to he Commission's errors, which Coke does not mention.)

In any event, Coke gives six resolutions over and above the decision on the narrower point: (1) 1 Eliz. does not "take away" (repeal or amend) any previous statute which it does not expressly name. In application to the case at hand: 34/35 Hen. VIII gives jurisdiction over ex-monastic pensions to the regular ecclesiastical courts; 1 Eliz. does not in effect amend the earlier statute by extending the statutory jurisdiction to the Commission, assuming the monarch authorizes it to exercise such jurisdiction. Similarly, Coke notes, 2/3 Edw. VI, c. 13, gives the then-existing regular ecclesiastical courts authority to award the double value of substracted tithes; 1 Eliz. does not operate to give the High Commission authority to award such statutory punitive damages. Coke observes that substracting tithes is not "injury or crime", but a matter of "interest and property." The implication is perhaps that 1 Eliz. might "take away" a prior criminal statute, but does not give the Commission any statutory civil jurisdiction formerly confined to regular tribunals (despite the punitive element of double damages.)
(2) 1 Eliz. extends only to crime. Here we have a more fundamental statement about the Commission: It may be erected as a criminal court only; no part of ecclesiastical jurisdiction properly classifiable as civil may be given to it. Thus, for the case at hand, whatever 34/35 Hen. VIII says or means, the High Commission cannot be given jurisdiction over claims to pensions which are clearly civil. (Obviously 34/35 Hen. VIII does not make a prophetic exception. A statute *after* 1 Eliz. could no doubt give the Commission civil jurisdiction by express provision, but hardly an earlier statute.) (3) The authority conferred on ecclesiastical courts by 34/35 Hen. VIII is essentially temporal, whereas 1 Eliz. refers to spiritual jurisdiction. I.e., I take it: Waiving the points above—granting that 34/35 Hen. VIII is rather general in its reference to ecclesiastical process,

that 1 Eliz. might be taken to alter previous statutes in favor of the High Commission, and that the Commission may be given civil as well as criminal jurisdiction—the *most* 1 Eliz. gives the Commission is all spiritual jurisdiction properly so-called. But power to entertain suits for pensions of a new sort (pensions charged on successor-grantees of former Church property), such power and the preservation of the pensions themselves being entirely owing to statute, is not true spiritual jurisdiction. It is no different from a totally temporal matter, something in no way even associated with the past and present affairs of the Church, assigned to ecclesiastical courts by statutory fiat. Therefore such jurisdiction is outside the reference of 1 Eliz. (4) 1 Eliz. revives rather than repeals 23 Hen. VIII, c.9, with the implication that the High Commission may not entertain "private causes." (5) If 1 Eliz. intended to give the High Commission civil jurisdiction, it would have provided for appeal from the Commission's sentences. (6) The Commission's patent, in any event, does not give it civil jurisdiction, because it speaks of "offenders" and confers power to imprison them; "offender" is to be understood as a term of art meaning "one who commits a crime."

If Coke's report reflects what the whole court discussed and decided, Bulbrooke v. Roper represents a significant step toward defining the High Commission's scope: It can only be given criminal jurisdiction, which a suit for a pension is not an example of. How to draw the civil-criminal line in less clear-cut situations remains a problem, but the case at any rate insists that the first question to ask is whether a suit falls on one side of the other of that line. The thesis that universal ecclesiastical jurisdiction was grantable to the Commission, which had had its advocates, is ruled out. The resolutions do not say that only some grave ecclesiastical crimes may be assigned to the Commission, but reliance on 23 Hen. VIII and the absence of appeals to exclude the Commission from civil suits perhaps points forward to that. Resolution #6 countenances strict construction of patents even when it is conceded that jurisdiction of a particular type could be assigned to the Commission if the monarch chose. One should, however, be careful about using *Bulbrooke* as clear authority for the Commission's scope in general, since the broader points in Coke's resolutions, though rather reinforcing points or alternative reasons than mere dicta, transcend the special problem in the case, about which there was no judicial disagreement.

In Lane's Case (1607)[87], the High Commission was prohibited from prosecuting a man for defaming his parish minister in church on Sunday before all the parishioners. The words themselves ("a wicked man and an arrant knave") are probably of questionable defamatoriness, but their utterance in the circumstances was no doubt at least a *prima facie* offense. It was not, however, severe enough for the High Commission, the court held–the first *ad hoc* application of the enormity test by Coke's Common Pleas.

In Wither's Case (1608)[88], the Commission proceeded against a "singing man" of Exeter cathedral to the end of depriving him for incompetence as a singer and misbehavior (not observing regulations made for the "government" of the cathedral personnel and behaving himself "indecently.") The suit was prohibited because it was not for an "exorbitant" offense and because the party would lose his appeal. The latter point has particular force in this case because the High Commission had actually interfered

[87] M. 5 Jac. C.P.—included in Coke's report of Bulbrooke. 12 Coke, 47.
[88] P. 6 Jac. C.P. Add. 25,215, f.63b.

with the appellate process: The Bishop of Exeter had already deprived Wither for the same offenses, and Wither had appealed to the Arches. The suit in the High Commission was commenced pending this appeal. The Common Pleas held, as a separate reason for Prohibition, that the appeal suspended the Bishop's sentence, wherefore Wither was not deprived at present. The point of insisting on that may be that if Wither were in contemplation of law deprived the Commission would not be proceeding to the end of depriving him, but for the possibly more excusable end of punishing him otherwise for his misdeeds and not so flagrantly for the purpose of undermining his appellate rights in the deprivation suit. Insofar, however, as the court was determined to exclude the Commission from petty suits, even against clerics, the further consideration would not seem to matter.

Allan Ball's Case (1608)[89] confirms earlier decisions holding that the High Commission may not arrest persons subject to its jurisdiction to secure their attendance and answer. The context of *Ball* is not reported, only the court's unanimous resolution: A pursuivant may not be sent to arrest an accusee; the party must be cited, and if he defaults proper procedure is to excommunicate him, going on if necessary to *De excommunicato capiendo*. In support of this holding, the judges went high, to Magna Carta and other ancient statutes whence it appears that a freeman may not be arrested upon a bare surmise or accusation. 1 Eliz. had no intent to repeal those profitable laws. The judges also went to a recent case (which is alluded to above): The late Chief Justice Anderson and Justice Glanville had resolved at Northamptonshire Assizes that a man who killed a High Commission pursuivant in resisting arrest did not commit murder, the arrest being tortious. The report ends with a note observing that neither the Star Chamber nor the Chancery would warrant arrests merely to procure a party's first appearance; they send a *Subpoena* to the party and arrest him only when he commits the contempt of disobeying. (An exact parallel with the Star Chamber and Chancery is obviously not intended, for whereas those courts may proceed for contempt if the *Subpoena* is disobeyed, the High Commission must excommunicate. The comparison does, however, suggest the question whether the Commission may arrest for contempt after sentence—when a spiritual sentence in the nature of an injunction is disobeyed. The present holding at least does not imply that it may not. In contrast to earlier similar decisions, this one does not cut so close to the general power of the Commission to imprison or otherwise transcend regular ecclesiastical procedure. Its weight is more specifically on the illegality of arrest as the first step in proceedings against a man—illegality which the High Commission did not want to recognize, but which the Star Chamber and Chancery acknowledged in their practice.)

Langdale's Case (1608) [90] is a landmark as the first Cokean case testing the High Commission's authority to entertain marital suits. I think it likely that that authority

[89] T. 6 Jac. C.P. 12 Coke, 49.

[90] The account in the text is constructed from the following sources: (a) Harl. 4817, f. 187b. Undated. (Fullest account of the facts—the wife's allegations about the husband's wealth, the amount of the High Commission's award, subsequent suit in the Arches.) (b) 12 Coke, 50, *sub. nom.* Marmaduke Langdale's Case. Undated. (Agrees with Harl. 4817 on the result of the original motion for Prohibition. Suggests that a demurrer was contemplated and gives the ruling that the count should run against the High

became the main practical bone of contention between the common law judges and the High Commission. Over serious Puritan cases they differed less than is perhaps commonly believed; it is hard to criticize the judges for preventing the Commission from infringing local autonomy for petty quarrels and misdemeanors; in marital matters, the Commission may have believed it had a manifestly desirable role to play because diocesan courts could not be trusted to enforce the morality embodied in ecclesiastical law, or to insure fair treatment of women, against rich and influential people. The belief was probably justified. In so far, however, as one is resolved that the High Commission is limited to crime, and to grievous crime at that—primarily, if not exclusively, religious unorthodoxy—, one will have trouble bringing marital litigation inside the Commission's jurisdiction. Adultery can be seen as a serious crime, even if it comes before the law only as grounds in a divorce suit. But to hold it "enormous" without bringing the whole gamut of commonplace sexual misconduct into the High Commission's scope may be difficult. Other marital matters are harder to give a criminal color or to elevate to enormity.

Langdale's Case presents a pretty clear example of the civil end of the spectrum. Langdale had "put away" his wife—why, whether with a legally valid or at least understandable reason, and in what form, do not appear. The wife sued in the High Commission for a separate-maintenance stipend, claiming that she was not allowed enough support (not that she was provided with nothing at all) and showing her husband's financial circumstances, including her own contribution to his wealth. (He had land to the value of over £1000 per year, plus land in his wife's right worth £160 per year—*quod nota*: we are dealing with a property arrangement for wealthy people.) The Commission awarded that Langdale pay his wife £140 in separate maintenance. He sought and obtained a Prohibition on the ground that no crime or enormous offense was involved. Allowing maintenance belongs to the Bishop, the court said, and Langdale ought not to be deprived of his appeal,

There are further wrinkles to the case, however. Justice Walmesley was at least doubtful about the decision. Walmesley was by no means a friend of the Commission in all respects, but he was to show in later cases a disinclination to exclude it from the marital sector of ecclesiastical jurisdiction. I therefore take him as tending to dissent on the substance in this case, as well as on a further point—whether the Common Pleas may

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Commissioners. Records Walmesley's doubts.) (c) 12 Coke, 58, *sub nom*. Langdale's Case. Dated M. 4 Jac. C.P. (It is likely that the other reports relate to a term or so earlier than M. 4, though this is uncertain. There is no serious doubt that this is the same case as Marmaduke Langdale, since we are told that one issue was whether an alimony suit may be brought before the High Commission. But the report is exclusively about the Common Pleas' standing to prohibit without a plea pending. The arguments of counsel on this point and the reply of a majority of the court are given in learned detail. It is not certain that this discussion was upon the demurrer, but I take it that it was, because the other report in Coke clearly indicates that a demurrer was expected and the arguments have the thoroughness of debate on demurrer. The existence of two reports in Coke suggests successive stages of the same case. Nothing is said about Walmesley's dissent, but Coke gives the names of the judges who agreed with himself—Warburton, Daniel and Foster; Walmesley is missing, exactly as one would expect him to be on the basis of other cases on the same issue.)

prohibit when there is no pending suit, overlapping with the ecclesiastical one, in the Common Pleas itself. The latter point was eventually debated at length and resolved by the usual split: all the judges except Walmesley held that the Common Pleas may prohibit any prohibitable suit, just as the King's Bench may. (There are several cases on this point not yet analyzed as a group in this study.)

The question about the Common Pleas' standing to prohibit without a pending case was resolved on demurrer in *Langdale*. A nice point of procedure was settled to clear the way for a demurrer: The court ruled that plaintiff-in-Prohibition should count against the High Commissioners—i.e., designate them as defendants-in-Prohibition—for the purpose of formal pleading. This was necessary because a husband could not count against his own wife. I.e., the real adverse party, the ecclesiastical plaintiff normally treated as defendant-in-Prohibition, could not be the object of the declaration; a wife could not be *sued* by her husband in Attachment-on-Prohibition, though there was no objection to one spouse's merely *informing* the court of an improper ecclesiastical suit brought by the other; therefore, in order for a demurrer to be possible, the ecclesiastical court must be treated, anomalously, as defendant-in-Prohibition.

The tone of Coke's report suggests to me that the judges found this way to have a demurrer because they were determined to find one. I imagine Langdale's counsel making trouble in the face of Mrs. Langdale's (or perhaps more likely the High Commission's) desire to demur. As it were: "But how can there be a demurrer, when by normal procedure Langdale would have to declare against his wife?" The report suggests that the judges' response may have been something like this: "Well, Prohibition cases will always be settled on demurrer if defendant-in-Prohibition wants it that way. This is categorical. We are not going to prevent Mrs. Langdale from prosecuting her ecclesiastical suit on the basis of a mere surmise, nor confine her to objecting by a mere informal motion. She has a right to her suit until a formal judgment on pleadings is given against her, and when and if such judgment is given she is entitled to her Writ of Error. Here's how we'll do it in his anomalous case—let the declaration run against the High Commission." (The possibility of a Writ of Error upon a formal judgment is expressly mentioned. A parallel is irresistible in the context of this case: The court did not approve of cheating people of their ecclesiastical appeals by taking suits needlessly to the High Commission; it had no intention to let anyone be deprived of appellate recourse in Prohibition proceedings at common law.)

A demurrer, especially one insisted on in the face of a certain difficulty, implies seriousness and hope. Mrs. Langdale, or the High Commission behind her, was unwilling to see a precedent set for prohibiting marital suits without maximum effort to prevent it. She, or the Commission, must have hoped the judges would see the light on full-scale argument. If that hope was faint, the prospect of overturning a Common Pleas judgment by Error in the King's Bench may have looked better. Having demurred, defendant-in-Prohibition would appear to have chosen the Common Pleas' standing to prohibit without a plea pending as the better ground to fight on, for it is the debate on that that is reported, though the jurisdiction question may have had more attention than we know. Emphasizing the standing of the Common Pleas perhaps drew Walmesley's clear dissent, which may have been as much as defendant hoped for. In *Wither* above, where High Commission involvement was especially inexcusable, the court is reported as unanimously holding that the Common Pleas *may* prohibit without an overlapping plea

pending before it. Although Walmesley was to display his contrary opinion in several cases, he would seem to have overcome it in *Wither*. In *Langdale*, he probably did not approve of the Prohibition on the merits, and that disapproval may have moved him to make up his mind to dissent on the issue of the Common Pleas' standing—the stronger ground, since it is hard to give the Commission jurisdiction in a separate maintenance suit and deny it jurisdiction over any other ecclesiastical cause.

Langdale's Case on demurrer had a sequel (briefly reported in Harl. 4817.) Mrs. Langdale, having been prohibited from suing in the High Commission, sued in the Arches. Her husband now sought a Prohibition from the Common Pleas to stop the new suit. The writ was denied. This comes to holding that although an expelled wife's suit for maintenance does not belong in the High Commission it is perfectly appropriate to a regular ecclesiastical court. The decision of the prior case on demurrer had cleared away any objection to pursuing Prohibition in the Common Pleas, so the only question arising is how the husband could have had any chance to stop the Arches suit. One possibility is that exception was taken on 23 Hen. VIII to going to the Arches instead of a diocesan court. There is no indication of that in the report, however, and the large sums of money and complicated circumstances in *Langdale* make it quite likely that the case was removed to the archdiocesan level at the Bishop's request. The other possibility is that the husband thought it arguable that the wife's independent wealth debarred her from recovering. The Common Pleas seems not to have debated that point, for the report has the court saying only that the case was now in the proper court. That comes in effect to saying that entitlement to separate maintenance is purely an ecclesiastical question.

The most significant point about Edwards's Case (1608) [91] is another dissent by Walmesley, it would appear. (The decision to prohibit is given as that of Coke, Warburton, Daniel and Foster. If Walmesley participated he dissented. He could have done so because of his opinion about the Common Pleas' prohibiting power in general. The plausibility of a dissent on the merits is discussed below. The case for prohibiting seems very strong. The High Commission proceeded against Edwards for several things. Part of the charge was that he had defamed a physician, Dr. Walton, by casting aspersions on his professional competence. As to this, the court held that any wrong done to Walton was temporal wrong, for which the remedy was at common law. The judges were vehement: the Commission ran the risk of *Praemunire* for proceeding in such a matter. The point, which is not specific to the High Commission, seems all but unanswerable. The only possible basis for dissenting I can see so far is that defamation of Oxford University was mixed in with defamation of Walton. (Edwards "taxed the University with rashness" in making Walton an M.D.) The majority went on to say that even if there were a cause for ecclesiastical defamation it should be complained of in the episcopal court, not the High Commission. (Edwards had allegedly said that Walton and another physician, Dr. Maders, were cuckolds and that Walton had inherited syphilis and leprosy from his father. Such aspersions were less apt than professional incompetence to support a common law action, for which reason there is perhaps a difficulty about contesting their *prima facie* power to support an ecclesiastical suit, though I doubt that they would be

[91] M. 6 Jac. C.P. 13 Coke, 9; Lansd. 601, f.2ll. No important differences. Lansd. 601 consists of cases published in 12 and 13 Coke, usually little different from the printed versions.

held capable of doing so. The judges were content to say that there was no High Commission matter here.) One can dissent from the proposition that the High Commission is excluded from ecclesiastical defamation at all; Justice Walmesley may have done so.

Most of the color of enormity in the charges against Edwards comes from the rest: Walton's late father had been Bishop of Exeter, so that attributing French pox and leprosy to him worked "to the dislike of the dignity and calling of Bishops." Edwards had obtained a Star Chamber sentence against Dr. Walton and boasted about it; as it happened, Dr. Walton was a member of the Ecclesiastical Commission for Exeter (local equivalent of the national—properly Canterbury Archdiocese—High Commission); by bragging that he "had gotten on the hip of a Commissioner for causes ecclesiastical", Edwards not only vilified Walton but "in him the whole commission ecclesiastical in those parts.". Finally, when summoned before the High Commission, Edwards had "arrogantly" said that "he cared not for anything this Court can do" to him, and that he could remove the case at his pleasure. In short, the charges in part accused Edwards of "contempt" or collective slander of the Church, smacking of Puritanism if not plain irreverence. The majority of the Common Pleas held that slander of the High Commission itself—referring to his behavior upon receiving his summons—was punishable at common law. This accords with the King's Bench in *Fuller*. The majority did not single out what I call the further element of collective slander or disrespect, but lumped it together with any possible ingredient of individual ecclesiastical defamation as clearly less than enormous. Justice Walmesley could have dissented from the proposition that the Commission may not proceed against contempt or slander of itself, and he could have seen sufficient admixture of "collective slander" and irreligion to make a High Commission case here without abandoning the enormity criterion and admitting the Commission to any and all ecclesiastical causes. The majority decision adds no limitations on the Commission that were not well-anticipated. (A further point on self-incrimination in Edwards is discussed in Vol. II above, p. 194.)

Perepoynt's Case (1609)[92] is considered in Chapter 2 above for its bearing on 23 Hen. VIII. On the High Commission's substantive jurisdiction, the report gives a *per Curiam* holding without sign of dissent that tithe, marriage, and testamentary matters are not examinable by the Commission. The charge in the instant case was procuring a priest to marry a gentleman's daughter to a ploughman in the night and attending the clandestine wedding. The case was complicated by an element of double vexation: The defendant had been excommunicated by his bishop for the same offense and subsequently absolved, after which the Commission undertook to prosecute him. We are told also that he was imprisoned by the Commission, and that the court resolved that it would set him at liberty if the Commission did not do so upon his making submission. That seems a bit reticent if the court thought the Commission utterly *ultra vires*. The report, however, does not so much as inform us whether the case arose on Prohibition or *Habeas corpus*. If the former, advising the party to submit may come only to saving trouble and conflict—as it were, "Go be polite and say you're sorry and see whether the Commission, taking note of the Prohibition, won't release you, but if you fail bring a *Habeas corpus*." There is no sign of a *Habeas corpus* before the court and no discussion of the imprisoning power.

[92] H. 6 Jac. C.P. Godbolt, 158.

Veniar v. Pellin (1609)[93] is of interest mainly for its unusual structure and the arguments of counsel. (A few judicial remarks are reported, but the case was adjourned without decision.) Pellin, a parson, was prosecuted in the High Commission by the "procurement" of Sir Henry Veniar. I.e., he was prosecuted *ex officio*, but Veniar informed the Commission of his alleged offense and promoted the prosecution. Pellin was charged with failure to provide services in a chapel of ease in his parish, as the parson was allegedly bound to do by custom. Veniar failed to furnish sufficient proof (presumably of the custom). Thereupon Pellin was acquitted of liability and Veniar was sentenced to pay Pellin costs to the sum of 10 marks. Veniar sought a Prohibition to block execution of the award of costs.

Serjeant Harris, for Veniar, argued simply that the High Commission had no business proceeding for such a matter as failing to provide and finance religious services in a chapel. This is surely a valid application of the enormity criterion, which Harris expressly asserted. (1 Eliz. was directed against Popery and heresy and confines the Commission to exorbitant offenses of that order.) As far as the report indicates, Harris did not elaborate the tricky aspect of this case. The only question, as he represented the case, was whether the Commission had jurisdiction over the matter. If it did not, then all acts of the Commission in consequence of the proceeding were *ultra vires* and ought to be nullified by Prohibition, as much the award of costs against Veniar upon Pellin's acquittal as any sentence that might have been given against Pellin if he had been found at fault. That Veniar was responsible for Pellin's being brought before the Commission for an inappropriate matter and put to expense made no difference by Harris's theory. (Let it be said, before Pellin is pitied, that on Harris's view of the law he could have nipped the High Commission suit in the bud by Prohibition; contesting it can certainly be called his folly.)

Serjeant Shurley, for Pellin, argued at greater length, both attacking Harris's position on the Commission's jurisdiction and contending that the award of costs against Veniar was lawful even if the prosecution of Pellin was not. On the jurisdiction question, Shurley advanced a theory midway between that which would confine the Commission to enormous crimes and that which would permit it to entertain any ecclesiastical causes the King chose to assign it. His underlying premise is the same as will support unlimited ecclesiastical jurisdiction for the High Commission: Supreme ecclesiastical authority is in the monarch *de jure*, and 1 Eliz. only confirms his title and removes the Pope from *de facto* possession. By virtue of his supremacy, the monarch may delegate ecclesiastical jurisdiction without specific authorization from the statute. He may so delegate it as to give special commissioners jurisdiction which would ordinarily belong to regular Church courts. This is evident from the fact that the monarch, by virtue of the same supremacy, may grant individuals exemption from ordinary episcopal jurisdiction by charter, as several Year Books are cited to show. I.e., if the King may derogate from the regular courts by way of charter of exemption, so may he by setting up an extraordinary court by patent.

Shurley did not, however, push these premises to their implicit conclusion. Rather, he conceded that the Commission was limited to "public offenses" and excluded from "private or meum et tuum." This contention he appears to rest on the statute, not on

[93] P. 7 Jac. C.P. Harg. 52, f. 7b.

the contingent fact that the monarch had granted only "public" jurisdiction to the Commission in his patent. The theory would seem to be: 1 Eliz. *does* limit the monarch's *de jure* power to assign any class of ecclesiastical litigation to special tribunals in derogation of the ordinary ones. It confines such assignment to "public offenses" (whatever the exact boundary between public and private, and however precisely that distinction corresponds to criminal/civil and to the procedural antithesis *ex officio*/libel-commenced.) Public offense means any public offense; there is no restriction to enormities. The offense charged against Pellin in the instant case, according to Shurley, was clearly public.

What does the application in this case say about the meaning of "public"? It seems questionable that Pellin's alleged default can be made out as criminal, let alone enormous. "Public" = "criminal" may = "lawfully *liable* to *ex officio* prosecution", but it can hardly be equivalent to "merely in fact prosecuted *ex officio*", because any alleged wrong could be prosecuted—improperly—in that form. Shurley is careful to point out in his argument that no *common law* action would lie for neglect of Pellin's duty—in contrast to the situation where someone is obliged to maintain a chapel for the use of a particular individual and his family. But that only goes to say that the High Commission had not invaded the temporal sphere in this case. It *need* not imply that no one would have "civil standing" to enforce the duty in the ecclesiastical sphere, though it is possible that Shurley intended so to claim—i.e., to argue that since the chapel was for the benefit of all the inhabitants of the hamlet it served, the duty to maintain it was not civilly enforceable, whence breach of the duty, if legally controllable at all, must be controllable as a "crime" of sorts. Shurley points to the rule that the King may pardon ecclesiastical suits *pro salute animae*, but not ecclesiastical suits in which a private party has an interest and says that in the instant case no particular party had one. Whether that implies only that the present High Commission suit could be pardoned or that any conceivable suit by inhabitants would be pardonable makes a question. Shurley probably intended to suggest the latter—that an inhabitants' suit, if possible, would still be pardonable and therefore is inherently "public." If we assume, however, that a civil suit by inhabitants would be perfectly appropriate, or even unpardonable, does it follow that Pellin's neglect of his duty is not a "public" offense? Not necessarily. Arguably, the duty is "public" because it runs to all inhabitants and concerns their spiritual welfare, as opposed to mere material interest—notwithstanding that a suit by particular inhabitants, or a "class action" for all of them, would lie. The only help Shurley supplies is that he says the offense here was not "not only public *facto* but *exemplo*." "*Facto*" must refer to the considerations I have advanced. "*Exemplo*" may add a bit. I suggest: To make out that an ecclesiastical offense is public, it is relevant to consider whether deterring it is plausibly important for setting a good example in the Church, with a view to the Church's morale and "image." If that is the point, the application makes sense. Clergymen responsible for maintaining ancillary chapels in their parishes—for seeing that religious services are as conveniently available to the people as they have been in the past—should be encouraged to take their responsibility seriously. If known instances of neglect are overlooked, or left to the chances of private litigation, other clergymen will be tempted to similar neglect. And the quality of religious life will suffer. By contrast, one might suggest, whether Jane secures the right to live apart from her abusive husband and receive alimony is a comparatively private question, though the husband's conduct is morally much worse than that of a

clergyman trying to save himself the trouble of keeping up a separate chapel in an obscure hamlet. Of course the husband is a bad example too, but so are those who infringe the ecclesiastical duties that must surely be reserved for the private side, such as the duty to pay tithes. Hence my suggestion that "*exemplo*" be taken to refer to the Church's internal standards and discipline.

How Shurley arrived at his theory about the High Commission's scope is not evident. He does not linger over exposition of 1 Eliz. A case for "crimes and public offenses only, but not only enormous ones" based on the statute's words does not seem to me easy to make. Going by probable intent, however, that formula is plausible: Why *should* Parliament have wanted to override the ordinary civil jurisdiction of established ecclesiastical courts, with such effects as defeating the policy of 23 Hen. VIII? Why should it *not* have foreseen the utility of an extraordinary, centralized tribunal for enforcing the "public law" of the Church, especially the part of it that regulates clerical behavior and demands respectful treatment by the laity? Is that not just the area where local courts, if not lax or intimidated, are at least likely not to have uniform standards? Are variable standards and the lure of paths of least resistance not likely to be a more serious problem in small matters than in great—more likely to lead in some localities to the decay of chapels of ease, say, than to the propagation of heresy? Rather than argue directly about the statute, Shurley cites two important clerical-behavior cases, *Cheinye* (in which he was counsel) and *Caudry*—both discussed above. In those cases, the Commission's authority to meddle beyond the narrow range of enormities can be said to have been upheld. Though to rely on those cases alone is to ignore many decisions made in the meantime, Shurley's theory is a reasonable projection from King's Bench cases, which include those two.

Shurley then proceeded to argue that whether or not the Commission's prosecution of Pellin was lawful, Prohibition should not be granted to frustrate the award of costs. Most basically, he sought in effect to distinguish that award from any sentence that might have been given against Pellin. Conceding that the latter would have been an improper arrogation of the diocesan court's role, the same cannot be said of the former. The award of costs to Pellin finally implies only that he was wrongfully vexed by the suit in the High Commission and should therefore be compensated. To make that judgment is not to pretend to do something that a Bishop's court ought to be doing, or *could* do in the circumstances (albeit that the circumstances may include a wrongful assumption of jurisdiction by the Commission.) Surely the High Commission is prohibitable on jurisdictional—as opposed to sanction—grounds only if it is in fact taking something away from regular ecclesiastical courts. (I elaborate the argument here from the bare sentence, "*Auxi les costes assesse devant les Hault Commissioners est solement pur le vexacon et ne tolle le Jurisdiccon del Ordinary*.")

Shurley's next argument is that a sentence given in an ecclesiastical court may not be examined by a common law court. That is as much as he says. What does he mean? The remark could be a flat objection to Prohibition after sentence. That, however, is not a very promising line (see Vol. I, pp. 115 ff.), and Shurley's own further argument (just below) shows that he knew a categorical rule against intervention after judgment was untenable. I suggest as an alternative that Shurley's point here is that the Common Pleas ought not to take note of *why* Pellin was awarded costs. I.e., saying in the present context that the sentence is not examinable is an instance of the respectable position that common

law courts ought not to go behind ecclesiastical sentences to ask whether they were just or correct by ecclesiastical law—a position perfectly compatible with holding that an originally *ultra vires* suit may be prohibited whether or not it has proceeded to sentence. Here, there is great virtue, from Shurley's point of view, in not looking behind the sentence awarding costs to Pellin. In fact, that sentence was given because the prosecutor, Veniar, failed to prove the charge against Pellin, the Commission having assumed jurisdiction. If we note only *that* sentence of costs was awarded to defendant for wrongful vexation and ignore the reason, it need not appear to the court judicially that the Commission assumed jurisdiction improperly, if that was the case. Costs for wrongful vexation might have been awarded to defendant for what Shurley's opponents must regard as the best of reasons: because Pellin was wrongfully sued in the High Commission instead of a diocesan court. Only by prying into how the Commission actually justified the sentence to itself and claiming that a mistake about its jurisdiction was involved as a cause of the Commission's act can those opponents object to the sentence  On their own premises, they ought to welcome it as such—as due compensation of a man who *was* wrongfully vexed. (Between the words quoted at the end of the last paragraph above and those on which this paragraph is based—"*Auxi sentence done in Spirituall Court ne serra examine hic*"—comes a sentence of which I can make no direct sense: "*Auxi le jusisdiccon fuit que suer devant lordinary*." I wonder whether that could be a garbled link between the two intelligible points. As it were, "The most that can be said is that by proper jurisdictional rules Pellin ought to have been sued before the Ordinary; if we do not examine the reason for the sentence, we cannot say but what the sentence takes note of that very point and compensates Pellin accordingly.")

Shurley's final point may seem the most obvious: that Veniar was trying to prohibit, not his own private suit, but as good as that—a criminal suit prosecuted by him. Shurley realized, however, that exploiting this situation was *not* obvious, however weak Veniar's moral position. (See Vol. I, pp. 161 ff. for the general point that prohibiting one's own suit was by no means ruled out in principle.) Shurley's words here are, ""Sir H. V. himself preferred the suit to the High Commissioners, and therefore he will not have Prohibition, *and yet 22 Edw. IV although the party admits the jurisdiction yet the Court will award Prohibition*…"  The italics, which are mine, indicate the words by which Shurley concedes, with the help of his Year Book source, that prohibiting what is in some sense "one's own suit" is not absolutely barred. (It is these words which lead me to say above that Shurley probably did not claim that there can be no Prohibition after sentence. As it were, waiting until after sentence is one form of –arguably—"admitting the jurisdiction of the court"; starting a suit in a given court oneself is another.)  To get around this difficulty, Shurley proposed what can be seen as a modified version of Justice Walmesley's view of the Common Pleas' general standing to prohibit: It is true that admitting the jurisdiction of an ecclesiastical court is no bar to Prohibition if the purpose of the Prohibition is to protect a plea pending in the Common Pleas. Otherwise, it is a bar (*mes ceo* [the point based on 22 Edw. IV above] *est intend ou est plea pendant in cest court et issint nest nostre case*") Walmesley's full view was that there must always be a "plea pending in this court" to justify Common Pleas Prohibitions. Shurley would seem to have realized that that would not go down with any of the judges except Walmesley, but to have thought a piece of it salvageable. His position restated comes to: The policy of the law, or at least this court, *is* against self-prohibition, but an exception is made in

the situation in which Prohibition is so urgently desirable that it will lie on even the most restrictive view of the Common Pleas' authority—where to stop a foreign suit is to stop encroachment on the court's own business. But that situation does not obtain here, ergo Veniar may not have a Prohibition after admitting the High Commission's jurisdiction.

In justice to Shurley's subtle argument, it is worth noting a road he does *not* take. I think it is plausible to argue that people whose ecclesiastical suits are misplaced to begin with may not later prohibit them. I.e., self-prohibition is clearly unobjectionable only when the suit is well-commenced originally, but an issue appropriate to common law determination arises in the course of it. If one concedes that Veniar ought never to have promoted the High Commission suit, then one can argue that he ought not to have a Prohibition. But that would be to concede what Shurley's opponents claimed—the High Commission lacked jurisdiction—, though they of course did not draw the conclusion therefrom that Veniar lacked standing to have a Prohibition. Not wanting to concede that, Shurley took another tack: asserting a general policy against self-prohibition, subject only to exceptions not relevant here—wherefore Veniar should not have a Prohibition regardless of whether the High Commission had jurisdiction. Note that Shurley's two points before the present one are in the same form. They do not involve conceding for the sake of argument that the High Commission lacked jurisdiction, but by-pass that question: whether it had jurisdiction or not, it did not encroach on the diocesan courts by the specific act of awarding costs to Pellin and, in compensating him for wrongful vexation, may for all we need know have denied its own jurisdiction. A judge who thought the High Commission lacked jurisdiction might, however, take the alternative route to denying Veniar a Prohibition. On Veniar's, or Harris's, own premise it may follow that Veniar should not have a Prohibition, though Shurley's claim that the general policy is against self-prohibition be rejected. On the same premise, it may follow that Prohibition lies because who informs the court of the *ultra vires* suit is immaterial. The choice, which trenches to the theory of Prohibitions, must be made once the premise is accepted. Shurley's argument, on the other hand, permits holding that the Commission had jurisdiction and therefore Prohibition does not lie. It also permits making no decision about the Commission's jurisdiction and still concluding that Prohibition does not lie. (Again, cf. Vol. I on self-prohibition generally.)

The judicial response to Shurley's careful argument was for the moment cursory. Coke jumped immediately on the last point: "But as to that, Lord Coke said the Prohibition is the King's suit, as appears by 28 Edw. III. And the writ is contra coronam et dignitatem, and therefore although the party himself may not sue, yet the Court must award Prohibition." I.e., Coke predictably embraced the "public stake" theory of Prohibitions, whereby all that matters is whether a foreign suit should be prohibited on the merits and the standing of the private party seeking Prohibition is never objectionable. However, though Coke opposed his last argument, Shurley had several more. The rest that Coke says, reportedly with Justice Foster's concurrence, avoids taking up Shurley's further points but sounds encouraging for his cause. For after objecting to Shurley's position on self-prohibition, Coke turns around with a "but" and says Consultation will lie in this case. The reasons he gives have nothing to do with the substance: "For although the statute of 1 Eliz. is shown, which gives authority to the King to appoint Commissioners etc., yet it is not shown what authority is given to him [sic—"luy"—but probably "them"], and so it does not appear to the court that they have authority of the

matter in question. Also, it is not shown that there are any commissioners, etc." It looks as if Coke turned his attention to picking purely formal holes in Veniar's surmise—failure to recite the statute and patent, the names of the Commissioners, and the like in such form as was required if one wanted to prohibit the Commission. If that is right, the course is understandable. The majority of the court is unlikely to have been persuadable by Shurley's theory of the Commission's jurisdiction. On the other hand, Veniar's moral position was weak. If narrow reasons for holding in Pellin's favor could be found, so much the better. Raking over the Commission's jurisdiction again—in the face of an able argument against the court's preferred enormity theory—could be avoided. If technicalities would do the job of justice, it would be unnecessary to grapple with Shurley's position on the jurisdiction question. Even if nothing he said was actually accepted by the court, Shurley's argument may have had its effect in heading off Harris's glib appeal to the enormity theory and forcing a search for narrow grounds. The case was adjourned after Coke spoke, and I have no report of its resumption.

Darrington's Case (1609-10) [94] is discussed at length in Vol. II because of its incidental bearing on self-incrimination. It will suffice here to restate summarily its significance for the High Commission's jurisdiction and sanctions. The significance is considerable. For present purposes we need concern ourselves only with Darrington's *Habeas corpus*, not with the Prohibition he obtained at a later stage in his struggle with the Commission. The case is the first on *Habeas corpus* wholly from the period of Coke's Chief Justiceship. It resulted in remand of the prisoner originally and later, on a second writ, in his admission to bail at most—i.e., he was not discharged outright. In justification of this result, the court *per* Coke adopted and supported by an express theory the position that the Commission may imprison for some offenses. This position must be regarded as a reversal of the opinion, which was quite well-entrenched in the Common Pleas before Coke's accession, that the Commission may simply not use secular sanctions. In addition, going beyond the immediate needs of this case, Coke laid down with purported comprehensiveness what offenses fall within the Commission's jurisdiction. The enormity test was endorsed, and its content was specified as in no previous case. Finally, the court confirmed two propositions that were hardly still within the range of realistic controversy. (a) Exposition of 1 Eliz., and hence the last word on what the High Commission's powers are, belongs to the common law judges and not to the Commission itself. (b) The statute itself delimits the Commission's powers—i.e., does not enable the monarch to confer such power as he chooses on it.

With respect to jurisdiction, *Darrington* itself was not difficult. The return on the *Habeas corpus* may not have been beyond criticism with regard to every element in a complex charge against the prisoner, but it was reasonably full and it made clear that one of his offenses, at any rate, was Brownism. In his speech, Coke called Brownism heresy. Be that as it may, it was certainly serious religious error by the standards of the Established Church, with which the judges were never disposed to quarrel. The enormity test was easily satisfied in this case. It is therefore by way of dictum that Coke in the

[94] Harg. 52, f. 20b; 2 Brownlow and Goldesborough, 3. Harg. 52 dates the case T. 7 Jac.; Brownlow is undated. T. 7 appears to be the date of the second *Habeas corpus*. The account in the text here depends almost entirely on Brownlow. For the MS. report and other evidence on the case, see the account in Vol. II.

course of his opinion ventured to say what offenses belonged to the Commission—viz. heresy, schism, polygamy, incest and recusancy. He represents this list as exhaustive and as having been agreed on in Queen Elizabeth's time (by whom or in what context he does not say.) For the inclusion of one item, polygamy, he offers an argument: that offense was made felony by the statute of 3 Jac., wherefore it must have been an enormous spiritual offense before. I.e., Parliament would surely not have felonized an ecclesiastical crime unless it adjudged it to be of the most heinous intrinsic character. Towards defining the Commission's jurisdiction negatively, Coke offered one example of a non-enormous crime: It was held in a Reimore's Case (undated by Coke and not independently reported) that the High Commission may not punish a man for working on holidays.

The problematic issue in *Darrington* was the power to imprison. It appeared on Darrington's first *Habeas corpus* that he was imprisoned until such time as he should "make submission" to the Commission and give security not to repeat his offenses. I.e., he was committed to coerce performance of a spiritual sentence, not as a punishment. (The order to make submission was a plainly legitimate ecclesiastical sentence. The legitimacy of forcing him to enter a good behavior bond could probably be challenged, but the reports give no sign of its having been.) The court's decision upholding the imprisonment, therefore, goes in strictness only to coercive or equity-style commitment. Nothing in the Chief Justice's language, however, indicates an intent to limit the Commission to coercing and restrain it from punishing. Coke says incidentally that the Commission may fine where it may imprison, and fining is hard not to regard as punitive. (From other evidence—see the discussion of this case in Vol. II—it appears that Darrington was in fact modestly fined. This fact does not come out in the reports of the *Habeas corpus*, however, and was presumably not before the court.) After having been remanded, Darrington brought a second *Habeas corpus*, claiming he had made submission as required and was still not discharged. The second writ raised problems of its own, concerning how closely the common law court should look into whether Darrington had in fact made submission, or done so in an adequate form (see Vol. II.) But no new questions about the imprisoning power as such arose on the second *Habeas corpus*.

Coke's theory in justification of the Commission's power to imprison goes as follows: Ecclesiastical courts have no inherent power to imprison, even for the most serious crimes. Three statutes prior to 1 Eliz., however, gave them limited imprisoning power. Two of these—5 Rich. II, Stat. 2, c. 5, and 2 Hen. IV, c.15—applied to heresy and closely related matters. Both were repealed by 1 Eliz. The intention of 1 Eliz. was not, however, to do away with such imprisoning power; it was rather to transfer it from the ordinary ecclesiastical courts to the High Commission. With respect to heresy, removal of secular sanctions from the hands of the then-untrustworthy Bishops, rather than the reduction of all ecclesiastical courts to their *de jure* spiritual sanctions, was the policy of the Elizabethan settlement. It obviously does not follow that imprisonment is lawful for the other crimes on Coke's list above, especially polygamy and incest (for serious religious error short of heresy at least partakes of the nature of heresy, and it may fall within the letter of the medieval statutes.) Indeed, it is the opposite that follows from the present theory, on which Coke seems to insist quite clearly: nothing is punishable by imprisonment in the High Commission that was not so punishable in other ecclesiastical courts before the High Commission existed, even though 1 Eliz. permits the

Commission's *jurisdiction* to extend to a few major crimes which could not previously be punished by imprisonment. Whether Coke intended so strict an inference to be drawn from the theory I am not sure. The alternative would be that 1 Eliz. meant to give the Commission imprisoning power for all offenses within its jurisdiction, in which case it would not properly speaking have *transferred* the power from the Bishops to the Commission. It would have made such a transfer for the most important offenses, while conferring the power to imprison on the Commission *de novo* for a couple of further crimes of comparable gravity. The only clue to Coke's choice between the two possibilities is indecisive: his citation of Fuller's Case for the proposition that the Commission may imprison for heresy *or schism*. If schism (which, rather than heresy, was Fuller's offense) is within the words or equity of the medieval statutes, then perhaps imprisonment is lawful only for heresy, schism, *et similia*; otherwise, schism is within the same case as incest for present purposes, and the Commission may imprison so long as it has jurisdiction.

Coke's third example of ecclesiastical power to imprison before 1 Eliz. introduces its own complications. 1 Hen. VII, c. 4, gave ecclesiastical courts power to imprison clergymen for various forms of incontinence. Coke mentions this statute only to complete his catalogue of exceptions to the general rule that spiritual courts may not use temporal sanctions. He does not say that 1 Eliz. intended to allow the monarch to confer power on the High Commission to proceed against clerical incontinence. There were strong reasons to suppose that the statute meant to permit the Commission to be given jurisdiction, together with power of imprisonment, over serious religious offenses once subject to ecclesiastical imprisonment, but why over the more commonplace clerical incontinence, which regular ecclesiastical courts were already equipped to deal with by imprisonment? I have found no spelled-out answers to this question. Cases below suggest that the High Commission was unlikely to be prohibited from dealing with incontinent clergy. This may reflect a never fully justified broadening of the "enormous" category beyond Coke's short list in *Darrington*, together with a loose readiness to assume that in creating an ecclesiastical court with power to imprison Parliament intended that anyone in danger of ecclesiastical imprisonment was subject to that court's jurisdiction.

In sum, *Darrington* is a clear vindication of the High Commission's imprisoning power in grave religious error cases. Coke was ready to stretch "enormity" a bit farther, but only to a few specified crimes. It is worth noting that he took the occasion of this case to affirm a broad limit on the imprisoning power: Coke cites, as Symsone's Case, a "resolution" of the Elizabethan Judges Anderson and Gianville at assizes, which we have seen referred to before. In this case, a pursuivant was sent to arrest a man (for adultery, probably not an *infra vires* High Commission offense) "in a layman's house." The pursuivant was slain—by whom does not appear (the householder? the intended arrestee?) It was decided "on great deliberation and conference with the other Justices" that the slayer had committed manslaughter rather than murder, because the High Commission may not arrest a man's body, but should proceed by citation and excommunication. This decision was the ancestor of others to the effect that the Commission could not "imprison" suspects by arresting them, whatever its power to detain the convicted.

In Parson Wransfield's Case, from the same term as Darrington's second *Habeas corpus*, [95] the Common Pleas had no objection to the High Commission's prosecuting Wransfield for inveighing against the Book of Common Prayer. The court called the offense enormous, without labeling it heresy or, more plausibly, schism and without speaking to whether a layman's liability would be the same as that of the clergyman who was defendant here. Imprisoning Wransfield for the purpose of compelling him to testify was upheld, and he was accordingly sent back to prison. The serious issues in the case were on authority to exact self-incriminating testimony, for which see the discussion of the case in Vol. II (pp. 370-372, 376.)

A small point on the High Commission's jurisdiction was decided the same term at Serjeants' Inn (probably by reference from the Common Pleas to all the judges.)[96] It was agreed that perjury committed in ecclesiastical courts is to be punished by those courts, rather than by temporal proceedings pursuant to the statute of 5 Eliz., c.9. This holding simply states what the Perjury Act of 5 Eliz. all but unmistakably provides. The significant point in this case is a further gloss: "this is not to be understood [as meaning] that one may be punished before the High Commissioners, but in the Ordinary's court." I.e., if a man commits perjury in a regular ecclesiastical court he is to be punished for it there; he is not to be cited before the High Commission. If you like, perjury in ecclesiastical proceedings is not an enormous offense, nor does the High Commission have a kind of supervisory authority over the whole ecclesiastical judicial system, by virtue of which it may punish such abuses of the system as perjury wherever within it they occur. The report leaves hanging, however, the question whether perjury committed in the High Commission itself, in the course of proceedings within its jurisdiction, may be punished by the Commission. To deny that it may seems an extreme conclusion, but it is not an impossible one. If one insists that the Commission has jurisdiction over only a few specified enormities, and perjury is not among them, it may well follow that perjury even in a legitimate High Commission case must be prosecuted in a regular ecclesiastical court. To the principal holding, Coke is reported to have added a further point: In practice, he said in effect, perjury committed in ecclesiastical courts was not always left to the ecclesiastical system. Rather, it was commonly punished in the Star Chamber. (That practice in no way conflicts with 5 Eliz. The statute exempts perjury in ecclesiastical courts from new penalty actions created by it, but it expressly saves means of prosecuting perjury which already existed when the statute was made. The major effect of that proviso was to preserve Star Camber jurisdiction over perjury in the temporal sphere as an alternative to the newly created procedures, but there could be no reason why it should not save such jurisdiction in the spiritual sphere as well. ) Calling attention to the Star Chamber's role in punishing ecclesiastical perjury reflects in two ways on the judges' holding concerning the High Commission. First, it points up the contrast between the Star Chamber and the High Commission, the sense in which the Commission should *not* be conceived as a kind of "ecclesiastical Star Chamber." It was a function of the Star Chamber, as an extraordinary court with a special responsibility for punishing abuses of legal process, to deal with perjury committed anywhere in the judicial system, whether in

[95] T. 7 Jac. C.P. Harg. 52, f. 15.

[96] T. 7 Jac. Identified in the margin as C.P., but called in the text a Serjeants' Inn case. Identified as the case of "Walgrave in Bucks."

the lay or the ecclesiastical branch. According to our principal holding, the High Commission was not to function as an equivalent tribunal for the ecclesiastical system alone. Secondly, the Star Chamber was simply available as a supplement to ecclesiastical courts for ecclesiastical perjury. There was no need for the High Commission to serve as a duplicate supplement to ordinary ecclesiastical courts. The availability of the Star Chamber may, indeed, argue that the Commission ought not even to punish perjury committed in its own cases. It is perhaps disturbing to imagine perjury in the superior High Commission being tried in an inferior Bishop's court, but there is no oddity in holding that such perjury belongs to the still-superior, more comprehensive Star Chamber.

A dictum by Coke from early 1610[97] takes a surprisingly broad view of the Commission's jurisdiction. In the principal case reported, the Common Pleas refused to prohibit a regular ecclesiastical court from prosecuting a man who said he would not listen to sermons by ministers who came to their positions via Bishops—i.e., presumably, by episcopal institution. That is a highly predictable decision, the sort of Puritan case in which the courts were not inclined to interfere with ecclesiastical discipline, including that wielded by the High Commission. By the way, Coke noted another case, in which a parson sued someone in the High Commission for calling him "knave." According to Coke, this suit was regarded as good in itself, but it was prohibited because the Commission imprisoned the defendant. Coke seems to cite this decision with approval, presumably thinking it supportive in the principal case. (If ecclesiastical courts, even the High Commission, may proceed for defaming a clergyman by words so trivial that they would probably not be defamatory of anyone else, surely they may proceed for a much more serious expression of disrespect toward towards the constituted ecclesiastical order.) Coke's citation seems to deviate from *Darrington* in two ways: (1) It extends High Commission jurisdiction, not to all ecclesiastical causes, presumably, but to small-potatoes disrespect for the cloth. (2) Contrary to *Darrington*, it does not treat jurisdiction and the power to impose secular sanctions as coterminous. I can only explain the report by supposing that Coke casually used a pre-*Darrington* holding for his immediate purpose without considering its correctness by present standards, if indeed he thought the standards had been decisively changed.

With three reports from 1610, we return to marital disputes. One, George Melton's Case,[98] tells us that Melton was imprisoned by the High Commission in his wife's suit for separate maintenance, a separation having been made between them. No further particulars are given—at what stage of the wife's suit and to what end the husband was committed, whether the separation was *de facto*, as that in *Langdale* probably was, or by order of the Commission or another ecclesiastical court. We are told in addition that Melton was compelled to enter a bond to abide by the Commission's award (but not whether he had actually entered it, as opposed to holding out and suffering imprisonment wholly or partly for his refusal.) Whether the case reached the Common Pleas by *Habeas corpus* or Prohibition is not reported. In any event, three judges—Coke, Walmesley, and Daniel—held that the imprisonment was unlawful. So far as the report indicates, that is all they held. I.e., there is no affirmative sign, at any rate, that the judges objected to the

[97] H., 7 Jac. C.P. Add. 25,209, f. 180b.
[98] P. 8 Jac. C.P. Add. 25,209. f. 197.

Commission's taking jurisdiction of the separate maintenance suit, if only it had not resorted to a temporal sanction. Justice Walmesley, at least, should be expected so to distinguish the scope of the Commission's jurisdiction from the more limited range of its secular sanctions; that position would be more surprising in Coke and Daniel (cf. *Langdale*.) In support of their holding, the three judges cited the statute of 1 Hen, VII, c. 4, permitting the imprisonment of incontinent priests. The relevance is presumably to say that ecclesiastical courts have no inherent power to imprison, for to the extent that they have the power it has been by statute, and to the extent that the High Commission has it the warrant of statute before 1 Eliz. is required (as held in *Darrington*.) After this principal point, the report has Daniel and Walmesley saying that it was unlawful to take a bond of the sort demanded of Melton. Is it possible that Coke's not being mentioned in connection with this holding means he doubted or dissented? It of course need not mean that. (There is no sign of dissent by the other members of the court, Foster and Warburton; they were probably simply absent.)

A second report from the same term [99] in the form of an opinion not tied to a particular case, is probably only another version of *Melton*. It in any event, it appears to confirm that in an alimony suit, if not across the board of ecclesiastical causes, the High Commission may not fine or imprison, but may handle the suit by means of excommunication and *De excommunicato capiendo* , again in apparent disregard of the enormity test. Bonds to abide the award of the court are also said to be "void."

Lady Throgmorton's Case, from the next term,[100] in a sense clears up points left hanging by *Darrington* and subsequent cases and in a sense introduces further confusion into the picture of just what the Common Pleas held. The double effect is owing to two reports which are not irreconcilable but do differ in emphasis. It will be best to look at them separately.

(a) The report from posthumous Coke (12 *Reports*) gives the facts and the outcome straightforwardly. It appeared by return on *Habeas corpus* that Lady Throgmorton was imprisoned for (1) "many evil offices" between Sir James Scudamore and her daughter, Lady Scudamore, to the end of causing the Scudamores to be separated and for "detaining" Lady Scudamore from her husband and (2) speaking contemptuous words of the Commission after sentence ("she had neither law nor justice there.") I.e., it would appear that the interfering mother-in-law was prosecuted for breaking up a marriage, convicted, and sentenced. Whether she was sentenced to imprisonment for the primary offense, or in order to enforce some other sentence, or only for the contemptuous words, is not clear, but the record on *Habeas corpus*, at any rate, related the imprisonment to the offense, not merely to the contempt. The court reportedly resolved, first, that the offense was not enormous and hence not within the Commission's jurisdiction. I.e., taking the case was held objectionable, not simply imprisoning in connection with such a case—a predictable application of the enormity test, were it not for the disturbing note in *Melton*. (A suit for separate maintenance hardly seems *more* appropriate to the Commission than a prosecution for sowing domestic discord.) The court also said that a common law remedy would lie for detaining Lady Scudamore from her husband, which is of course a reason why no ecclesiastical court should proceed for

[99] P.8 Jac, C.P. Harg. 15, f. 208b.
[100] T. 8 Jac. C.P, 12 Coke, 69; Harl. 4817, f.218.

that. It said further that the wife could not be imprisoned for such an offense. Since there is no sign that Lady Scudamore was prosecuted along with her mother, though she may have been, I take this remark as reinforcing: A wife may not be imprisoned for doing of her own accord what Lady Scudamore stirred up her daughter to do—running away from her husband and avoiding his efforts to get her back. If that is so, surely a third-party promoter of such conduct may not be imprisoned. Note, however, that by the letter the report does not say that the High Commission could not proceed against the wife, only that it must not imprison her.

Secondly, as to Lady Throgmorton's contemptuous words, the judges held that it did not appear that the words were spoken in court, and that even if they were imprisoning the party was unlawful because the Commission was not a court of record. The implied position would seem to be: (1) the Commission may not punish for expressions of disrespect spoken out of court, but may punish, as for contempt of court, if the words are spoken in the face of the sitting Commission; (2) in the latter case, however, it must confine itself to spiritual sanctions, for only contempt of a court of record is a misdemeanor summarily punishable by imprisonment by the court offended.(I put it this way because other cases suggest that contempt of the Commission may be prosecuted by information or indictment at common law and punished by imprisonment. The present holding could quarrel with that rule, but it need not.)

Having held against the Commission on both scores, the court proceeded to bail Lady Throgmorton, rather than release her outright. I find this result hard to interpret except as an example of discretion employed in *Habeas corpus* cases to avoid challenging the High Commission too abruptly, even when it was found to lack jurisdiction and to have used inappropriate sanctions. Other cases display the same tendency. One must ask whether, in marital matters involving the highly placed, the common law courts did not recognize a certain virtue in the High Commission's taking a hand, even though properly such cases belonged to regular ecclesiastical courts and processes.

Coke's report concludes by adding another case from the same term: a *Habeas corpus* in which Randal and Hickins were remanded to prison because they were shown to have been committed on vehement suspicion of Brownism. Coke explains this decision by saying, consistently with his opinion in *Darrington*, that Brownism is heresy. Imprisoning power in enormous cases is here extended to the suspected, as opposed to the convicted or those who refuse to cooperate with the Commission. Coke introduces the case to point to its contrast with *Lady Throgmorton*—the enormity case as against the case of misconduct in marital affairs.

(b) The MS. report comes from a series headed "*hors del liver de Justice* Warburton", Warburton being a member of Coke's Common Pleas. It is identifiable as the same case as that reported in 12 Coke only by being labeled "Lady Throckmorton's Case", for it bears no date and gives neither the facts nor the judgment in the case at hand. Rather, it reports in general terms certain holdings about the High Commission. I see no reason to doubt, however, that the report relates to the same Lady Throgmorton's Case we have just discussed. The points it makes are appropriate to the context of that case, even though they do not go to its immediate issues. I surmise that the case gave the court occasion to speak more at large than Coke's report suggests.

In any event, the MS. has the court holding that the High Commission may imprison in some cases and in others not, and may sometimes fine and sometimes not. This states as a clear generalization what other cases leave in doubt: The Commission's jurisdiction and its power to employ secular sanctions are not coterminous. The report then proceeds to put flesh on the generalization. It reiterates the basic holding in *Darrington*: the Commission may imprison in those cases in which ecclesiastical courts could imprison by the authority of statutes in force *before* 1 Eliz. That means heresy, as is is clear in *Darrington* and explicit in the present report. Whether it means schism and serious religious error short of heresy is left open, as before. The present report's advantage over those of *Darrington* is that it draws an explicit conclusion from 1 Hen. VII (incontinent clerics.) That statute is plainly given the same status as the medieval heresy acts: Anyone may be imprisoned for heresy; a clergyman, but not a layman, may be imprisoned for incontinence. The language of the report is such, however, as to suggest that the judges may have meant to give 1 Hen. VII a wider significance—as permitting the Commission to imprison clerics for any offense appropriate to its jurisdiction, not just the acts of incontinence covered by 1 Hen. VII. One cannot be sure that that was intended, and the convincingness of so projecting from 1 Hen. VII is not evident, but the language of the relevant passage is notably general. ("*Auxi per le statute de 1 Hen. VII, c.4, le Ordinary poyt imprison un ecclesiastical person pur incontinency, et pur ceo les Hault Commissioners poyt imprison ascum ecclesiastical person mes nemy un temporall person nient plus que le Ordinary poyt*.") The ambiguity hangs on "*ascun*." It could mean *some* ecclesiastical persons—viz. ones guilty of incontinency—or it could mean *any* ecclesiastical person, which is linguistically more compatible with the singular number. The sentence just quoted is followed by "*et quant al imposer des fynes ils ne poyent ceo faire*." This I take to mean that the Commission may not fine an incontinent, or perhaps otherwise offending, cleric, because the warrant for that case, 1 Hen. VII, speaks only of imprisonment, not of fines. It cannot mean the Commission may never fine, because the report has already said that it sometimes may. I do not see how one can deduce a power to fine from the medieval heresy statutes, except by the theory that power to impose a lesser secular punishment is comprehended in the power to impose the greater one of imprisonment, and that reasoning seems as applicable to the incontinent clerics act as to the heresy acts. The puzzling upshot seems still to be that an incontinent cleric may not be fined, but a heretic may. (The final, incomplete, sentence of the report, following the words just quoted, is "*Et nota que le dame Throckmorton fuit imprison pur ceo que…*" It seems as if the reporter were at last ready to say something about the case at hand, but was interrupted before writing down the cause of Lady Throgmorton's commitment. The context, however—discussion of the power to fine—suggests a speculative possibility about the facts: that Lady Throgmorton may have been fined and then imprisoned to enforce payment. The nature of her offense—non-religious and hardly of the gravest criminality—would make a fine the predictable secular punishment in the first instance.)

For the rest, the MS. restates the enormity test and the general principle that 1 Eliz. has a restrictive force. (On the latter point, the judges imagined alternative words which *would* have allowed the Commission to use secular sanctions to any extent the monarch chose—"according to such censure and manner as shall be appointed in and by the said letters patent." But given the actual words of the statute the Commission was

confined to sanctions already employable by ecclesiastical courts, either *de jure* or by statutory authority.) No content is given to the enormity standard except for the negative statement that matters between party and party, such as proving of wills, and "common inferior causes" are beyond the Commission's jurisdiction. The rest of the report insists that clerical incontinence must be added to Coke's list of High Commission causes in *Darrington* and perhaps suggests that other clerical misbehavior of comparable gravity should be added. It may also suggest that punishment of clerics by imprisonment in cases unaffected by the medieval heresy statutes—say bigamy or polygamy—might be justified where such punishment of laymen would not.

The report of Eager's Case, from the next term,[101] consists entirely of generalities and is rather unclear. Standing alone, it might be read as denying the Commission's power to fine and imprison altogether, but I doubt that it does any more than repeat the general holdings in *Lady Throgmorton*. A second report from Michaelmas, 1610,[102] has Coke saying by the way, in a tithe case with no apparent connection to the High Commission, that *Fuller* upheld the Commission's power to imprison for heresy and schism. His explanation is the now well-entrenched theory that 1 Eliz. transferred to the High Commission such imprisoning power as medieval statutes gave to regular ecclesiastical courts, even while repealing those statutes. Coke seems to have had no doubt that schism, as well as heresy, was within the medieval statutes.

Three specific holdings from the same term are reported. One [103] confirms by an actual decision Coke's previously expressed opinion that polygamy is a High Commission crime. It also shows notable reluctance to interfere with the Commission's handling of substantively appropriate suits. In this case, a man cited before the Commission for polygamy was acquitted of the offense, but nevertheless censured to pay costs. He sought a Prohibition to block the sentence for costs. The Common Pleas denied Prohibition, relying on the principal-incident doctrine. I.e., the Commission was entitled to proceed for the crime of polygamy; therefore Prohibition will not lie on account of such an "accessory" decision as a costs award. One can of course object that it is scandalous to charge costs against an acquitted party, and also that the courts did not consistently refuse to prohibit the "incident" when the "principal" was within a tribunal's jurisdiction. Coke tried to soften the decision by saying, "peradventure it was very suspicious that he was guilty." I do not find the scandal much mitigated by the suggestion that an innocent party is not really treated unjustly if made to pay for litigation caused by conduct he was reasonably suspected of. One is inclined to posit considerable "political will" not to make an issue of the High Commission's doings so long as it stays within its jurisdiction.

The same policy of perhaps overdone restraint can be seen in Parker's Case.[104] The High Commission deprived Parson Parker of his living for drunkenness, and Parker sought a Prohibition. We are not told his grounds, but they must have been that drunkenness, even in a clergyman, is not a High Commission offense, and that deprivation on relatively trivial grounds by the Commission is especially objectionable

[101] M. 8 Jac. C.P. Harg. 15, f. 225.
[102] M. 8 Jac. C.P. Add. 25,209, f.205b.
[103] M. 8 Jac. C.P. 2 Brownlow and Goldesborough, 7.
[104] M. 8 Jac, C.P. 2 Brownlow and Goldesborough, 37.

because it imposes a serious loss without possibility of appeal, The Common Pleas in this case simply side-stepped deciding whether the Commission had exceeded its authority, It denied the Prohibition, and instructed Parker to bring an action for the tithes attached to his living, whereby the validity of his deprivation could be drawn in question. Why were the judges unwilling to act straightforwardly on the application for Prohibition before them? Two slightly different answers are possible: (a) Judicial restraint is simply the right policy toward an extraordinary ecclesiastical court of high rank, backed by the government and putatively performing what it conceives as important functions for the well-being of the Church. Therefore, even when the Commission appears to be exceeding its authority, one ought to avoid checking it directly when other means are available to insure that the law is correctly applied in the long run, and one should be reluctant to draw sharp lines around the Commission's authority when it is not necessary to do so. Here the suggested action for tithes is a feasible alternative to the direct check of a Prohibition. If gone through with, the tithe action might eventually require a decision on the Commission's powers, but later rather than sooner. If a decision against the Commission should turn out to be necessary, it would not take the form of a direct restriction on the Commission, but of a judgment against a private party—successor-parson or parishioner—claiming that Parker was duly deprived. Litigation about the tithes might manage to stay within the ecclesiastical system, questions about the validity of the deprivation being raised and decided there, possibly against the Commission. Finally, litigation about the tithes might not force a decision on the Commission's legal power. It might, for example, be resolvable in Parker's favor on the facts (if he could manage in pleading to get behind the sentence of deprivation and reopen the question whether he was guilty of drunkenness) or on the incidents of procedure (as if he could show that sentence was given against him without proper evidence or the like.) (b) Other cases indicate that the Common Pleas was not quite firm, or unanimous, in the conviction that the Commission was excluded from dealing with a fairly wide range of *clerical* misconduct. The position that it could not only proceed, but imprison, for clerical incontinence may have been at least a source of awkwardness—a reason for wondering whether other behavior seriously unworthy of a clergyman might not be enormous enough, even though the same behavior in a layman would clearly fall short of enormity. The decision in *Parker* might reflect an inclination to hold that clerical drunkenness is appropriate to the Commission, or at least enough doubt on the question to recommend avoiding a contrary holding, especially when Parker could have another hearing by way of tithe litigation if he wanted to insist on one.

The last decision from Michaelmas, 1610, in Dr. Conway's Case, [105] confirms that sexual offenses committed by a layman, save for incest and polygamy, are outside the High Commission's authority. Conway and his wife were prosecuted together, the wife for adultery with one Sir Michael Blunt and the husband for conniving at the affair as a "wittal" or pimp. The proceedings were prohibited, partly on the express ground that no enormous offense was charged. The element of distastefulness beyond simple adultery, pandering for one's wife, was insufficient to promote the crime to a higher rank. There was, however, a separate ground for Prohibition: a general pardon covered the offense, in spite of which costs had been taxed against Conway. (Conway's doctorate need not

[105] M. 8 Jac. C.P. 2 Brownlow and Goldesborough, 37.

identify him as a cleric. One may wonder whether the Commission would have been held unauthorized to proceed against a clergyman for the gross indecency he was charged with. He was probably a physician or civilian.)

Two decisions from the next term—Hilary, 1611—add no new limits on the High Commission, but implement well-established principles. The more important of these, Huntley v. Clifford, [106] has been discussed in Vol. II (pp.373-375) because of its bearing on incriminatory inquisition. For the rest, that case of blatant impropriety and abuse on the Commission's part makes the following points: The High Commission has no jurisdiction over a complaint sounding in breach of promise to marry. Mary Clifford's promisee, Huntley, claimed that she intended to marry one Cage instead of himself and sued in the Commission to restrain her both from doing that and from cohabiting with Cage. The Common Pleas prohibited and clearly would have done so even if there had been no procedural irregularities to add justification for the Prohibition. The ideas behind the decision are not rendered in exactly the same way in the reports. The small differences project to significantly different pictures of the court's thinking. (1) Harl.4817, which may have been written by Justice Warburton, a member of the court, says that the Commissioners "must deal in high matters, and therefore it is called the High Commission, but they may not meddle in inferior matters, which are called civil causes or ordinary causes, such as contracts of matrimony, legacies, pensions, portions, tithes, or such like, for those are not any offenses or contempts, but civil or ordinary causes, and cognizance of such matters belongs to the Ordinaries, and not to the High Commission." This language, represented as what the whole court agreed on, is not extremely restrictive. It is interesting for its hesitancy about taking a civil-criminal distinction as quite adequate for demarcating the Commission's authority. The examples, however, are all of matters where it is next to inconceivable that litigation could be commenced except on the initiative of a party harmed in a material interest. At the same time, this report avoids drawing any lines *within* the area of "offenses and contempts" (an expression approximating "crimes" but still different), or within the area of matters at least amenable to *ex officio* prosecution (though not solely prosecutable in that form or incapable of being intermixed with interested private claims.)

(2) If there is one member of the court whom I would suspect of a propensity to exclude the Commission *only* from strictly civil cases, it is Justice Walmesley. In Brownlow's report, Walmesley speaks first to the question of jurisdiction, agreeing with the result and saying. "… these High Commissioners ought to meddle only with things of the most high nature, and not of [*sic*] things which concern matrimony, and the ordinary jurisdiction." These words do not suggest a strict civil-criminal distinction so much as the antithesis between routine cases, including merely civil ones, and a few enormous offenses. One may still wonder whether Walmesley's participation in the decision might not have been based on a narrower understanding of it than his words suggest. It is questionable, in view of other cases, whether he was ready to exclude the Commission from everything concerning matrimony short of situations involving the gravest sexual crimes (Cf. Langdale.) Coke, following Walmesley in Brownlow, says only that the Commission may not meddle with civil causes, instancing tithes and legacies and

[106] H. 8 Jac. C.P. Harl. 4817, f. 219; 2 Brownlow and Goldesborough, 14; Harg. 15, f. 239.

pointing to the usual reasons (the policy of the law can hardly be to "dissolve" the Ordinaries' jurisdiction and deprive parties of appeals.) I.e., Coke, speaking for himself in this version, refrains from going beyond the immediate case and from distinguishing enormous from non-enormous crimes.

(3) It is not quite clear whether the third report, Harg. 15, is a synopsis of what all the judges agreed on or Coke's speech, taken by the reporter as expressing the opinion of the whole court. In any event, its language on the question of jurisdiction is somewhat different from that of the other reports: "The ecclesiastical law has two terms or names for all causes before them, causes civil or criminal, as with us common pleas and pleas of the crown. Pleas civil comprise common matters, which are testamentary or matrimonial or for tithes. Criminal [consist] in this—adultery and the like. For the first, the High Commission by the said statute of 1 Eliz. may not deal [with it.] For the latter, solely in certain [*ascun*] of them which are exorbitant and enormous [may the Commission] intermeddle by this law, and not with legacies, obventions, tithes, pensions, nor matrimony. For then they could well bastardize anyone's issue, and no appeal, for it is the highest court, from which there is no appeal. And this was confessed by the Archbishop who lately was, that their jurisdiction does not extend to those things." This version is of interest because, while insisting that not all criminal causes are proper to the Commission and in general terms laying down the enormity test, it still represents the civil-criminal distinction as the main clue to the jurisdiction question and as grounded in ecclesiastical law itself. It produces the distinctly interesting counter-example of adultery to the most obviously civil examples also given in the other reports. The emphasized reason for keeping matrimonial matters out of the Commission's hands is neither their basically civil nature nor the non-enormity of most marital misconduct, but the danger of having marriages invalidated without appeal. That rationale is open to the objection that not every cause classifiable as matrimonial could lead to invalidation of a marriage, while the favored enormities, polygamy and incest could.

In sum, the reports of *Huntley* yield a somewhat confused account of the *ratio decidendi* in the case. The absence of a clear embrace of "criminal jurisdiction only and within that over only a specific list of enormities" may indicate that the court did not get together on an unambiguous solution or intentionally avoided a decisive generalization. It was not necessary to reach one in order to hold that a suit for breach of promise to marry, at the behest of the offended party, is not a High Commission matter. Judicial restraint may be visible in the very unreadiness to be decisive at a higher level.

(b) Clifford and Cage were arrested by a pursuivant at the outset of proceedings against them—i.e., were not cited to appear, subject to spiritual sanctions, but attached bodily as the first step. In clear accord with several earlier decisions, and with specific reliance on the holding of Glanville and Anderson in Simpson's (=Symsone's) Case, here dated 42 Eliz., the arrest was held illegal—"utterly tortious", per Harg. 15, and false imprisonment.

(c) Having been arrested, Clifford was compelled to enter a £2000 bond to answer Huntley's complaint in the Arches and meanwhile not to marry, make a conflicting contract to marry, or commit fornication. The bond was held invalid (1) because it was exacted by duress—i.e., by holding Clifford pursuant to an arrest that was both illegal in form and motivated by a complaint over which the Commission had no jurisdiction—and (2) because the Commission was held to have no power to exact a bond

requiring a party to appear in another ecclesiastical court—i.e., the Arches (in the same way, it was said, as the Common Pleas could not make someone enter an obligation to appear before the Council of Wales—the specificity of the example may suggest a specific case.) In Brownlow's report, Coke generalizes about the Commission's authority to demand bonds. It may not do so in civil cases, such cases being beyond its jurisdiction. The point of this may be a bit more than truistic, since it is conceivable that if the power existed in could be used to gain a hold on a party to an *ultra vires* suit. Suppose there is no element of duress, as there was in the present case, the effect of which is presumably to make the bond like a secular one exacted by threat of mere force—uncollectable by action of Debt if the duress is proved. Suppose, however, a gullible party is induced to enter a bond to abide the award of the Commission and an attempt is then made to collect on the bond if he changes his mind and seeks to prohibit the suit. I should not think this apparently voluntary bond would be intrinsically "invalid" without a simple rule "no jurisdiction, no bond of any sort connected with the case—an attempt to proceed on such a bond should be prohibited." On the other hand, Coke said, with conspicuous tentativeness, that it *seemed* the Commission could take a bond in criminal cases, if the case required, but that he did not want to dispute about that or affirm the point for sure. One can only ask what the tentativeness signifies. Doubt and an uneasy inclination toward a complementary "simple rule"—"granting the Commission's jurisdiction, its choice of means to make its decisions effectual, including perhaps the use of fines and imprisonment, is its own business"? Dislike of bonds, perhaps *because* other secular sanctions were available, combined with a preference not to lay down broader rules than deciding *Huntley* required, with which other members of the court might not agree?

(d) Huntley was a terribly weak case from the High Commission's point of view. All that can be said practically in its behalf is that perhaps the amorous and concomitant material squabbles of a certain class of people (rich enough to impose a £2000 bond on) were too much for the regular ecclesiastical courts and the parties' misconduct unlikely to be responsive to spiritual sanctions. Despite poor prospects, however, one La Herbe, a B.C.L and a King's Proctor, was received to argue against the Prohibition. He did so in a high theoretical vein, very likely representing the Commission more than the party Huntley. We need not delay over this phase of the case, which appears from Harg. 15 alone, for the civilian only took the predictable and hopeless line of his party: "…Prohibition ought not to be granted, first, because the King has both ecclesiastical and temporal jurisdiction in his person, and the one shall not control the other so long as they execute what is their proper jurisdiction. And if the King grants to either part more than naturally belongs to it, the other part is not to examine that, because he has two rights and powers in him and may abridge the one and enlarge the other as pertains to him. And inasmuch as they have observed and held themselves within that which is given to them, they may not be restrained from that, for that is to erect altar against altar…" The reporter lacked patience with this (for he adds only that the Proctor "said many things to this effect for the maintenance of their jurisdiction"), and the court was irritated. The Proctor was mistaken, the judges said, in suggesting that they proposed to dispute the King's ecclesiastical authority; rather, "we are not here to do anything except expound an act of Parliament, that is, the statute of 1 Eliz., which properly belongs to us to expound, and to no others than the judges of the common law, and that is not altar against altar, as was said, but it is to construe that which properly pertains to none other." By now, years of

practice were founded on the general position thus expressed, by no means all if it illiberal towards the High Commission. Between the lines of the present scandalous case (again, see the discussion in Vol. II for the full flavor) reluctance to hedge the Commission more than was necessary can be discerned. As we shall see from other phenomena than the Proctor's performance in Huntley, a counter-offensive was working up.

The second case from Hilary, 1611, Symonds v. Green,[107] has also been dealt with in Vol. II (pp.382-384, 390.) The decision appears from both reports to have been based on the rule that the High Commission may not arrest accused persons by pursuivant, the least controversial of the holdings in Huntley, well-confirmed by other cases. The MS. report, however, has the judges reaffirming their decision in *Huntley* generally, which probably implies the tentative view that the Commission was on no stronger jurisdictional ground in this case than in the other, and so prohibitable even if there had not been procedural abuses. Given fully adequate narrow grounds, the court probably preferred to rest on them, rather than take up the Commission's jurisdiction once more and struggle with whether anything could be said in its favor in *Symonds* by distinguishing *Huntley*. Coke says in so many words that he did not want to argue recently debated matters again. In substance, *Symonds* is close to *Huntley*: the charge was promoting a clandestine marriage, the making of which was a violation of a previous contract to marry, The offense seems about as doubtful a High Commission matter as the intended breach of contract in Huntley, but circumstances made suing in the Commission perhaps more colorable: The participants in the offense were scattered over several dioceses, and the Bishop with most probable jurisdiction had allegedly requested the Commission to take the case. It seems the part of wisdom not to have gone into the possibility of an anomalous extension of the Commission's power (which would raise 23 Hen. VIII problems) when a simple resolution was at hand. The arrest was especially egregious, since the pursuivant had demanded fees of the arrestees and received £4 from one of them. Coke called the proceedings tort and oppression and reminded the parties that False Imprisonment would lie against the pursuivant. The Prohibition was upheld "with wonder" on the judges' part that such troubles and oppressions should be done to the subject.

A third decision from Hilary, 1611,[108] concerned a celebrated personage but legally went only to a technicality. Legate, soon to be distinguished as one of the two last heretics executed in England, was committed to Newgate prison by the High Commission for Arianism. He sought a *Habeas corpus*, and a writ was granted. The whole issue, however, seems to have been whether Newgate was a lawful place for his imprisonment. The basis for saying that the Commission is legally bound to use certain prisons is not clear from this case, nor from a few others in which the matter occurs. Here Coke cites the statute of 5 Hen. IV, c. 10, for the proposition that a Justice of the Peace may not commit a man to a "private prison", and that it is false imprisonment to do so in violation of the statute. He adds that to commit someone to the Counters in London (the sheriffs' private prison for debtors) for anything but debt is false imprisonment. The application of these points to the present case is not explained. It would seem that there was some

[107] H. 8 Jac. C.P. 2 Brownlow and Goldesborough, 16; Add. 25,215, f. 78b.
[108] H. 8 Jac. C.P. 2 Brownlow and Goldesborough, 41.

objection to the High Commission's using Newgate; Coke's brandishing the danger of false imprisonment may come to saying that the Commission, like the officials mentioned, should take its choice of prisons seriously. No outcome is reported. It is surely unlikely that a suspect of unambiguous heresy went free; if Newgate was indeed held to be an improper jail, the threat of liberating him, implicit in *Habeas corpus*, was probably only used to make sure that Legate was transferred to a proper one.

In the following term, Easter 1611, came Sir William Chancey's Case.[109] This case was something of a landmark for the use of 23 Hen. VIII to expound 1 Eliz. There are two other senses as well in which it stands out. First, it raises squarely issues about the High Commission's authority over sexual offenses and marital affairs, which earlier cases touch on obliquely and leave unsettled. Secondly, Chancey was the specific occasion for political counterattack by the Commission against the Common Pleas.

Chancey brought *Habeas corpus* and Prohibition at the same time. This appears from the best report, Brownlow's, as does the fullest statement of the case; the other reports are consistent but abbreviated. Chancey's offenses were flagrant adultery, expelling his wife, and allowing her either no or inadequate maintenance. The history of his misbehavior and legal troubles was somewhat complex, and not every detail is as exactly specified in the reports as could be wished. Some considerable time before the present proceedings, he was cited before his Bishop and sentenced to penance for adultery. Whether that suit was *ex officio* or on the complaint of Lady Chancey does not appear, but there is nothing to suggest that a legal separation was granted or alimony allowed at that time, only the criminal-style spiritual punishment. Chancey then commuted the penance—i.e., made a charitable contribution or the like, with the ecclesiastical court's assent, in satisfaction of that duty. He then proceeded for several years to live adulterously in his house with two successive women and begot two bastards. At just what point Lady Chancey was turned out does not appear, but she clearly was expelled in favor of the in-residence paramours, if she did not depart on her own motion. At length, Chancey was cited before the High Commission for (a) adultery and (b) not allowing his wife competent maintenance. It is not reported whether the proceedings were *ex officio*—though presumably on the wife's information—or in the form of a suit by the wife for alimony, alleging the adultery. According to Brownlow, Chancey was imprisoned because he refused to enter a bond to perform the Commission's order. Coke has him sentenced to pay alimony and to make submission for the adultery, then imprisoned for failure to carry out the sentence. Either way, he sought to challenge his imprisonment by *Habeas corpus* and, following Brownlow, also to challenge the Commission's jurisdiction by Prohibition.

Aside from arguing that 23 Hen.VIII was grounds for excluding the High Commission from this case, Chancey's counsel, Nichols, made the following arguments:

(a) Adultery is not enormous. The conclusion from that is surely that the Commission had no authority to deal with Chancey criminally for that offense. But the proposition also raises some collateral questions: May the Commission notice adultery as part of a pattern of marital misconduct that would justify an award of separation and alimony?—a question that obviously involves the further one whether it may make such

[109] P. 9 Jac. C.P. 12 Coke, 82; 2 Brownlow and Goldesborough, 18; Harg. 15, f. 54b, *sub. nom*. Chauncye.

civil awards in any circumstances. It would be possible to argue that the Commission may award a wife maintenance after convicting her husband of incest or polygamy, those offenses being within its criminal jurisdiction, but not upon convicting him of adultery. On the other hand, one could argue that settlement of disastrous marital situations is simply, as a civil matter, beyond the Commission, so that the incestuous polygamist can only be punished criminally; if his wife is entitled to a divorce, she must seek it in the Bishop's court. Theoretically, though this would be hard to justify, one could argue that the High Commission has civil jurisdiction in separation and alimony cases, even though no crime within its authority, or no crime punishable by spiritual sanctions at all, is charged against the husband.

(b) No ecclesiastical court may in any event imprison a layman for adultery—or, as one must say to meet the facts of this case, in connection with adultery, even to enforce a spiritual sentence; nor may any ecclesiastical court put a party under the pressure of a bond to fulfill such a sentence. This is apparent from the fact that it is only by force of the statute of 1 Hen. VII that clergymen *may* be imprisoned for adultery by ecclesiastical courts

(c) No ecclesiastical court may grant alimony unless the husband is unwilling to live with his wife. *Per* Nichols, Chancey was desirous of cohabiting with Lady Chancey (now at any rate—nothing in the report reveals whether he took the position that her removal was all along her own choice.) But even if alimony were awardable by a regular ecclesiastical court, it is not a High Commission matter and should not be granted by a court from which there is no appeal. (These propositions are stated categorically, so as presumably to imply that the High Commission may not award alimony even if it has criminal jurisdiction over matters connected with the breakdown of a marriage.)

Dodderidge, arguing *contra*, took a precise, narrow position. The report identifies him as the King's Serjeant. By virtue of his position, he probably appeared at the behest of the Commission and the government. (One should note the contrast between this common lawyer and the civilians received in various cases to defend ecclesiastical interests. Dodderidge concedes what was likely to be lost and looks for winning ground; civilians, as in *Huntley* above, tended to open wide, foredoomed theoretical questions.) He admitted the general proposition that the Commission is confined to enormities and that the matters in question, adultery and alimony, are not "originally" enormous. He went on, however, to argue that Chancey's behavior in the circumstances of this case *did* amount to an enormous offense—his persistence in adultery of a flagrant character after being disciplined by a regular ecclesiastical court, whereby he established himself as an incorrigible offender.

Dodderidge's theory is not without problems, but it makes a good deal of common and historical sense. Is Parliament likely to have created an extraordinary court with an *absolutely* definite list of offenses it was entitled to handle in mind? Is it not more likely that the legislature was looking to need and contemplating that although only a few offenses are by nature so grave that ordinary courts may not be adequate to them, others can become so aggravated by circumstances that it may be necessary for the extraordinary tribunal to step in? It is a problem for this approach whether all lesser crimes, if appropriately aggravated by such factors as defiance of ordinary courts and the evident failure of such courts to meet it, should be allowed to go to the Commission. Perhaps a "moral gravity" test for the original offense would be required and hence

explicit argument in such a case as this that adultery qualifies as close enough to the recognized enormities while other specifiable ecclesiastical crimes do not. More generally, the approach requires conceding to common law courts considerable discretion, in Prohibition or *Habeas corpus* proceedings, to assess whether substantial signs of aggravation, incorrigibility, or the helplessness of regular ecclesiastical courts really exist. Nevertheless, the Dodderidge theory perhaps offers the best answer to "Why should there be a High Commission?" unless one accepts the historically plausible view that the tribunal was intended only to handle heresy and its near relatives, a view which Coke's willingness to stretch the list of enormities at least to polygamy and incest tends to subvert.

Dodderidge's position makes the better sense if the High Commission is entitled to use secular sanctions whenever it has jurisdiction. I.e., if the Commission was essentially meant to do what the regular courts, either presumptively for some offenses or in actual aggravating circumstances, cannot effectively do, must the Commission not have been given teeth that the regular courts lacked? The advantage of turning someone like Chancey over to the Commission must surely consist mainly in exposing him to the choice of reforming his ways or going to jail. It is rather idle to say merely that he is worse than a simple adulterer—enough worse to pass the border between enormous and non-enormous offenders—and therefore within the Commission's jurisdiction, and then to add that the Commission may do no more than try its luck with the spiritual sanctions that had already failed. If Dodderidge is taken as speaking to the *Habeas corpus*, he must be understood as making that extension of his point—i.e., as arguing that the Commission has jurisdiction over aggravated adultery and by the same token may use imprisonment, at least as a means to make its award effectual if not as a punishment proper. Coke's report, however, says that Dodderidge did not try to maintain that the imprisonment was lawful. If that is correct, he conceded not only that adultery must be aggravated to give jurisdiction, but that, having jurisdiction, the Commission is still confined to spiritual sanctions. The concession tends to undercut the jurisdictional argument in the way I suggest, but that does not prevent it from being a prudent anticipation of the court's opinion.

Dodderidge's position leaves its civil implications hanging. Once an aggravated form of criminal misconduct gives the Commission jurisdiction, may it award civil remedies appropriate to the situation, such as granting alimony to Lady Chancey? For that matter, could aggravated resistance to performing a merely civil duty, such as paying tithes, justify the High Commission's assuming jurisdiction? In sum, would Dodderidge have presupposed the rule that the Commission is exclusively a criminal court, and did the Commission do more than extend the enormity test to aggravated forms of non-enormous crime?

The judges did not respond at once to counsel's arguments. On a later day, Justices Foster, Warburton, and Walmesley spoke generally to the High Commission's powers in the area of this case, dividing Foster and Warburton versus Walmesley. They did not speak directly to Dodderidge's aggravation theory. (So Brownlow reports. In his own report, Coke associates himself with the position of Foster and Warburton. He was probably absent from the first discussion. Coke acknowledges Walmesley's dissent.) The Foster-Warburton opinion amounts to cursory acceptance of all Nichols said: adultery is not enormous; use of secular sanctions is in any event unlawful in such a case as the

present one; alimony is beyond the Commission's jurisdiction. The MS. report, which gives the court's opinion without stating the case and without mentioning the dissent, adds a little emphasis on the last point. This version makes it clear that the court accepted Nichols's contention that an award of alimony was inappropriate in this case apart from the Commission's jurisdiction to award it. Whereas Nichols says generally that alimony may not be granted if the husband is willing to cohabit with his wife, the judges say it may be granted by Ordinaries on "divorce", but not on separation. I.e., alimony is grantable on a court-ordered legal separation ("divorce"), not when a wife is driven out *de facto*, or when she goes away with justification, but does not bother to sue for a "divorce." (The husband's willingness to cohabit would ordinarily bar a legal divorce, I assume, but perhaps not in every situation. Whether there might be exceptions makes a question, not only about the ecclesiastical law, but about the common law courts' tolerance for ecclesiastical decisions in marital cases. Would the grant of a divorce withstand Prohibition in the face of evidence of the husband's present willingness to live with his wife?) The MS. report also confirms that the appealability of alimony awards seemed important to the judges; they emphasize that such an award may be appealed on the ground that it is excessive in amount.

Walmesley's dissent, delivered at greater length than the Foster-Warburton view, goes unmistakably only to one point—criminal jurisdiction over adultery. He says nothing about the alimony as a separate question and may have agreed with his brethren on that. On the lawfulness of imprisoning Chancey, his position was complicated, as will appear. On the criminal jurisdiction, Walmesley held that adultery is an enormous offense. He says that in so many words. His reasoning, however, is far from certain. He starts out by endorsing the enormity test and proceeds to apply it so that adultery comes out an enormity. His reason is explicit: adultery is forbidden in the Decalogue. At first sight, it may seem that there could hardly be a better criterion. On reflection, however, questions quickly arise. Is it convincing that every article of ecclesiastical criminal law with a basis in the Decalogue is an enormity by the intent of 1 Eliz. (one might instance cursing and Sabbath-breaking as problem cases)? My inclination in the end, even so, is to think that Walmesley did embrace the strong position that would confer jurisdiction over some seemingly minor offenses on the High Commission. If so, however, he did little more than propose a refined version of what he had long been disposed to think: viz. if an action is a crime (not the basis for a civil claim assigned to the ecclesiastical system, such as the paradigm cases of tithes and legacies), and if it falls under ecclesiastical jurisdiction (of course some offenses in the Decalogue were preempted by secular law), then it is up to the ecclesiastical system to decide whether resort to the extraordinary High Commission is justified. The refinement in Walmesley's Chancey opinion is to concede that High Commission offenses other than heresy must by the language of the statute be enormities and to imply that by and large ecclesiastical crimes *are* enormities. This need not mean, I suggest, that they are all evidenced by the Decalogue, only that they can be shown to be clear divine mandates not incorporated into "human" or secular law. Of course an express commandment of God in the Decalogue is the most, perhaps the only, indisputable example, and sufficient to the needs of *Chancey*, but there would seem to be no reason to exclude more constructive ones from consideration.

I think that this interpretation of Walmesley is borne out by his further remarks. From declaring that its place in the Decalogue makes adultery an enormity, he goes on to

dispute the other judges' view that "enormity" and "exorbitant crime" are synonyms. Resorting to etymology, he insists on the root sense of "enormous", whereby its meaning is closer to "illegal" (a broad enough term to include disobedience of clear divine law) than to "extremely grave" or "outrageous." ("…enormous is where a thing is made without rule, or against law." So the translated report; read "done" for "made.") He then reinforces his linguistic point by looking at English legal usage: Writs of Trespass use the phrase "*et alia enormia ei intulit*," where the reference is not to extreme crimes, but only to the trespasses specifically recited in the writ before that phrase ("…and yet these are not intended exorbitant offences, but other trespasses of the nature of them, which are first expressed particularly.") So interpreted, Walmesley's position seems to me coherent, though it leaves many problems about how to isolate true ecclesiastical crimes from the whole class of misdemeanors dealt with by Church courts, many of which are harder to classify than the clearest analogues of secular civil claims. It may still be constructive to hold that the problem is not one of weighing "gravity", which is not easily ponderable, but of placing an offense, as it were, in the theory and history of Christian moral doctrine; adultery, at any rate, is an easy case on that premise.

Walmesley concludes the first part of his speech by saying that 1 Eliz. had been expounded as he expounded it for many years. It is unclear whether he means only that adultery has been recognized as a High Commission offense, or that his exposition of the general sense of "enormity" had been accepted. Either way, his statement may at first sight seem factually dubious. I am not sure, however, that the evidence above in this chapter decisively rebuts it.

When he turns to the Commission's power to imprison, Walmesley comes down much closer to the other judges. Coke reports expressly that he concurred with the rest of the court in holding Chancey's imprisonment unlawful. That report has him saying that it would be unlawful even if the Commission had been imprisoning in such cases for twenty years. That position would come to saying that jurisdiction over adultery does not entail authority to imprison in connection with adultery proceedings. Along with the rest of the court, to go by earlier cases, Walmesley would have held that the Commission may imprison only in those cases in which ecclesiastical courts had imprisoning power by statute before 1 Eliz.

Brownlow's report, however, shows that Walmesley reached his final position only with some difficulty. In that account, he starts out by saying that the High Commission *had* been imprisoning for twenty years. That could mean in adultery cases or across the board in cases that came before it and were not halted by Prohibition. He then admits that there was no warrant for the practice in 1 Eliz., but observes that it was authorized in the King's patent. Whether the authorization by patent was lawful without the backing of the statute Walmesley does not say one way or the other, as if he might consider that question still open. He expresses reluctance to interfere "suddenly" with longstanding practice and concludes by giving a day at the beginning of the next term for argument on the imprisoning power.

Walmesley's assigning the day for reopening the case, as senior puisne Justice, shows that Coke was not present at the first discussion. Probably only the judges who spoke on that occasion—Warburton and Foster in addition to Walmesley—were in court. Another round of debate was clearly necessary, as a courtesy to the absent judges and

also because the *Habeas corpus* was a separate procedure not yet addressed. Even *quoad* the Prohibition there was not yet a certain majority of the whole court in favor of a writ.

Going by the two printed reports, the court's final stance was agreement on the illegality of the imprisonment offset by a 3-1 split on the Commission's jurisdiction over adultery. Neither report gives a judicial reaction to Dodderidge's argument that adultery aggravated in the way it was in the circumstances of this case was proper to the Commission. The MS. report corrects the impression that that argument was ignored. This non-narrative report only summarizes the court's final opinion. While otherwise consonant with the printed versions, it records further that the judges were moved by Dodderidge's contention, though undecided as to its ultimate correctness. ("But the Justices said that because the party was sentenced in the Ordinary's Court to do penance and reform himself, which he has done, and yet is newly relapsed in the same sin and perseveres in it more grievously, whether this circumstance will not alter the nature of the act and make that determinable before the High Commission which was not originally, and they doubted thereof.") Their doubt on this score, I think, was an important consideration behind their final action.

To that final action we come at last. Pursuant to the *Habeas corpus*, after asserting their right to deliver someone unlawfully imprisoned, the judges exercised their discretion and bailed Chancey. He was instructed, while free on bail, to attend on the Archbishop and do what right and reason required (Coke's report). He did so attend, the Archbishop assumed a mediator's role, Chancey was reconciled with his wife, "and that was the end of this business" (Brownlow). It is clear, I think, that the court simply took no action on the Prohibition. To have prohibited the Commission, the judges would have had to make up their minds on the effect of aggravating circumstances, the matter they were in doubt about, and if the majority resolved that against the Commission they would have had to act as a divided court. As it was, they asserted a principle they agreed on and took advantage of their rather principle-free discretion, which is attested by several cases, to bail the unlawfully imprisoned whom they might have liberated. Going by results, the discretion could be useful, as *Chancey* shows, and as the judges probably realized, though they were also probably aware that it was the better part of valor not to display implacable hostility toward the High Commission. In an oblique way, Dodderidge won his case on pretty much the ground he chose. Although he did not get a decision against Prohibition, his shaking the court by his emphasis on aggravated circumstances is likely to have been part of the reason for the compromise handling of the *Habeas corpus*. Claiming High Commission jurisdiction over adultery as such, though congenial to Justice Walmesley, might have prompted the other judges to favor outright discharge of the prisoner as well as denial of the Prohibition. As a final note, Coke's report adds that the return on the *Habeas corpus* was found insufficient for uncertainty. There is no explanation; it is hard to see in what the uncertainty could have consisted, since Coke, who represents his report as relating only to the *Habeas corpus*, states the essential facts of the case, presumably from the return. Reliance on a technicality as at least an additional reason for finding the imprisonment unlawful is consistent, however, with the court's preference for narrow grounds.

In the upshot, Chancey's Case was not a great blow to the High Commission. On the other hand, a majority of the Common Pleas enunciated a strong anti-Commission stance in principle on the sensitive matter of sexual and marital cases involving

substantial people. It is therefore both appropriate and inappropriate that *Chancey* should have prompted an extrajudicial offensive against the Common Pleas in the term after it was resolved. It is likely that the case pushed a growing resentment on the High Commission's part, based on more cases than this single one, beyond the boiling point. I shall only summarize the out-of-court proceedings here; for the details and the sources, see the long note at the send of this Sub-section.

The Privy Council first held a series of meetings to consider complaints against the Common Pleas' handling of the Commission. As usual in such cases of political intervention, the Council was hardly neutral. The hope, at least on the part of the Archbishop of Canterbury and the dominant officers of state, Lord Treasurer Salisbury and Lord Chancellor Ellesmere, was to talk the Common Pleas judges out of their opinion or, failing that, to use their colleagues from the other common law courts against them. Coke was forced to produce a written "brief" in defense of his court, and then the Common Pleas judges were called before the Council and required to defend themselves orally. When they proved unbudgeable, the Council sought to extract pro-Commission opinions from the King's Bench and Exchequer judges by summoning and interrogating them in the absence of their Common Pleas brethren. This operation had only qualified success. As one would expect from decided cases, King's Bench opinion was less set against the High Commission. Some encouraging things, from the government's point of view, were said by some of the judges and Barons. The main result, however, was that the friends of the Commission were persuaded that its patent ought to be narrowed. I.e., even the judges who would not embrace the Common Pleas position thought that the way to avoid future trouble between the Commission and the courts was for the King to give the Commission less sweeping jurisdiction than he had in the past. The politicians and ecclesiastical authorities were either convinced of the merits of that proposal or persuaded that the best they could do without offending a united judiciary was to concede something in the hope that the Commission would be upheld in the more strictly defined powers to be assigned to it. Issuance of a new patent subsequently led to a fresh contretemps with Coke, for it was cleverly—or all-too cleverly—proposed to make him and several other judges members of the Commission. (Laymen and non-civilians were perfectly eligible; Commissions ordinarily included more members than were expected to participate in practice in the tribunal's business.) Coke thought of reasons—perfectly good ones—to resist this scheme for creating a conflict of interest in certain judges. Whether this further episode undermined such good as the earlier compromise might have done I cannot say. In the last glimpse the documents give of the Archbishop, he seems to be trying to soothe a newly ruffled Coke, rather than defy him further. Whether, in more general terms, the extra-judicial offensive of the summer of 1611 had the effect of making the courts more cautious in their regulation of the Commission, or by virtue of the compromise of mitigating conflict, can only be determined from future cases. "A little, perhaps, but hardly dramatically" is probably the right answer.

For the rest of Coke's tenure on the Common Pleas, I have only two more cases. Chetwirke's Case, from the same term as Chancey's,[110] does not go far beyond *Habeas corpus* policy. Chetwirke having been imprisoned by the High Commission, the return on his *Habeas corpus* said that he was committed because he was the means of distributing

[110] P. 9 Jac. C.P. Harg. 125, f. 246b.

libels "scandalous to the state and government of the Church." The Common Pleas held the return insufficient "because he could disperse and be the means of dispersing without having notice"—i.e., without knowing the subversive character of the literature. This holding was justified by saying that distributors of libels and forged writings without knowledge of the character of what they distributed were not punishable in the Star Chamber. The court's action in the light of this holding was stronger than it might have been: the judges bailed Chetwirke instead of giving an opportunity for amendment of the return and leaving him in jail meanwhile. The decision limits the Commission only in the sense of forbidding it to impose criminal liability on, and use imprisonment against, a bookseller or the like for mere unwitting distribution of objectionable literature, or for taking insufficient care to know the content of what he disperses. The court had no occasion to decide whether the Commission had jurisdiction to prosecute and power to imprison an intentional distributor of such material. Earlier decisions suggest that its authority would be upheld in such a case, subject to whatever requirements the court would enforce as to an adequate showing that the literature was really subversive of the Church. The argument from the Star Chamber would seem to imply that where that tribunal could punish for distributing a secular libel the High Commission could proceed for dispersing an ecclesiastical one—and probably imprison for it, on the strength of such cases as Fuller's, upholding the imprisoning power for schism. As an implementation of *Habeas corpus* policy, *Chetwirke* militates against giving the Commission the benefit of the doubt—i.e., presuming that it held Chetwirke liable by appropriate standards, as a knowledgeable distributor, and leaving him to his action of False Imprisonment should the presumption be false. The decision to bail, rather than release outright, indicates respect for the Commission's presumptive interest in the matter, though it also presumes in the prisoner's favor compared to merely waiting on a better return.

The last case, and the only one after the flurry of extrajudicial debate prompted by *Chancey*, is another marital dispute. All the cursory report of this case, Agar's,[111] tells is that a man was sued or prosecuted for beating his wife and calling her whore; that he was sentenced to pay her 3/ per week alimony; that he was subsequently fined for not performing the sentence and required to enter a bond to perform it; and that he had both a Prohibition and a *Habeas corpus* to deliver him. Obviously he was imprisoned on top of the other sanctions, or because he resisted them. Legally, nothing can be said for the Commission as this case appears. The adultery and aggravated adultery of *Chancey* are lacking; there is no sign of a divorce, nor of clear entitlement to one; even the clear-cut expulsion of a wife, as in *Langdale*, is absent. This of course does not mean that the High Commission was not readier to enforce humane behavior on husbands than regular ecclesiastical courts, or than common law courts thought appropriate for ecclesiastical tribunals.

[111] T. 11 Jac. 2 Brownlow and Goldesborough, 36. Not identified as a C.P. case, but almost certainly one coming from that series of reports .The report does not even say that the case concerned the High Commission, but it obviously did, at least at the stage where secular sanctions were employed. It is perfectly conceivable that the case originated in a lower ecclesiastical court, the High Commission taking over when the party proved obdurate.

**End-note: Sources and details of the 1611 extrajudicial debate.**

I have four documents bearing on the extrajudicial debate summarized in the text:

(a) Lansd. 161, f.250. This document is headed "The Copy of th' Information, delivered to his Ma[jes]ty by Mr. Serse his Proctor, touch[ing] the many Prohibitions sent to the High Com[m]issioners Ecclesiasticall fro[m] the Court of Com[m]on Pleas. 1611"

The Privy Council discussions about the Common Pleas' regulation of the High Commission took place in the summer of 1611 (T. 9 Jac.) The present document, appropriately dated as to year, looks like a, or the, position paper from the ecclesiastical side registering the complaints that led the Council to take action. It is a general statement of objections and a petition to the King to come to the Commission's help, rather than a precedent-citing argument.

The High Commission's point of view is clearly stated: The monarch may give the Commission any or all parts of ecclesiastical jurisdiction, civil as well as criminal. Pursuant to this power, Queen Elizabeth gave it, and King James has given it, such unlimited jurisdiction. Their intention was not that the Commission should handle petty matters to the derogation of regular ecclesiastical courts. Rather, the policy has been to trust the Commissioners' discretion to accept only "exorbitant" cases. By the same token, however, the policy is not to pre-define "exorbitant." Correct use of discretion would consist in taking major criminal cases plus lesser criminal and civil cases when "the qualities of the persons in question enforced them." (That, I believe, is close in practical meaning to "divorce and morals cases involving substantial people", as in *Chancey*.) The Commission has always in fact used its discretion in this restrained way, and inferior ecclesiastical courts have never complained. The Common Pleas specifically, not the common law courts in general, is criticized for issuing unwarranted Prohibitions. The Common Pleas is correctly enough credited with the position that the Commission may use temporal sanctions in the few "enormous" criminal cases over which it has jurisdiction. I.e., it is not said, falsely, that the court took the more extreme position that temporal sanctions are unlawful as such. From the author's point of view, of course, temporal penalties are lawful whenever the Commission in its discretion decides that a case is major or exceptional enough for it to take.

The paper takes express exception to the Common Pleas position that 23 Hen. VIII was in a sense applicable to the High Commission (one of the points embraced in *Chancey*), on the ground that that pre-Elizabethan statute in its terms covered only regular ecclesiastical courts. Exception is also taken to the doctrine that the common law judges have exclusive responsibility to interpret statutes. Excessive Prohibitions to regular Church courts, as well as the High Commission, are protested incidentally. It is objected that old, and irrelevant, statutes (*Magna Carta* and *Articuli cleri*) were relied on as reasons why the Commission should not use temporal sanctions: the Common Pleas' straightforward reliance on its reading of 1 Eliz. is perhaps underemphasized, and the job of refuting that reading by close construction avoided.

The "information" ends by asking the King to "give order to take away these Prohibitions" or else to authorize the Commission to disregard them. "Give order to take away" may, I suppose, mean (vaguely) "do something to remove the abuse" or (specifically) "order the Common Pleas to stop issuing them." The King in the event "did something" he hoped would be constructive—Privy Council meetings with the judges,

persuasion, pressure, and compromise. The Proctor may have believed that he could or would give direct orders to the common law courts.

(b) 12 Coke, 84.

This is a report of four successive Privy Council meetings concerned with the Common Pleas and the High Commission, the first a few days before T. 9 Jac. and the rest in that term.

(1) Owing to complaints specifically about *Chancey*, all the judges (i.e., it appears, King's Bench and Exchequer as well as Common Pleas) were summoned before the Council, where the Archbishop of Canterbury and other churchmen and civilians were also in attendance. Coke had already delivered to the Commission what he describes as "the treatise which I made of it"—meaning presumably a brief or apologia he had prepared defending his court's actions in *Chancey*, if not its decisions generally. It would appear that an out-of-court battle was going on before the Council intervened. Oral argument on the points of Coke's "treatise" took place before the Council, Coke and Archbishop Abbot holding the floor. The Archbishop finally came up with a couple of arguments which he thought the "treatise" did not anticipate; in his report, Coke treats them with contempt, and so perhaps he did in oral argument. (The Archbishop claimed in effect that 1 Eliz. authorized the monarch to give the Commission any powers he had previously given *de facto* to commissioners appointed to hear ecclesiastical causes, whether he had done so lawfully of not; he claimed that Henry VIII and Edward VI had given temporal sanctions to such commissioners; Coke did not dispute the fact, only the absurd theory that 1 Eliz. meant to legalize previously illegal acts so long as they were precedented. Abbot also advanced the theory that because pre-Elizabethan statutes had given ecclesiastical courts temporal sanctions in some cases, 1 Eliz. should be taken as authorizing the monarch to give the Commission such sanctions, not only in those cases, but in all others. One senses that Coke could do little more than sputter at so total a *non sequitur*.) The meeting apparently ended inconclusively.

(2) The Common Pleas judges alone were summoned before the Council for further argument. This time the Lord Chancellor did the talking against the resolutions in *Chancey*. The judges stuck by their guns.

(3) The King's Bench judges, except for Fenner and Yelverton, plus the Barons of the Exchequer, were summoned before the Council. Document (c) below confirms what reported cases would suggest: Fenner and Yelverton were probably left out because they were the members of the King's Bench least favorable to the Commission. Coke says that the King's Bench and Exchequer judges did not know why they were summoned, and that they were unacquainted with the reasons behind the holdings in *Chancey*. (But since they were present at Meeting #1 above, it is unlikely that they were completely in the dark about the case.) Coke obviously and properly disapproved of the government's attempt to trick the King's Bench and Exchequer judges into statements of disagreement with the Common Pleas; he is visibly proud that it did not work.
For the King's Bench and Exchequer judges, off the cuff and without talking among themselves, came down in agreement with the Common Pleas. (At least as against broad claims for the Commission put forward by the Lord Chancellor. One cannot tell from the report exactly how the question was framed for the judges, Ellesmere is reported as saying that the Commission had always fined and imprisoned for exorbitant crimes under

the authority of 1 Eliz. This is what the King's Bench judges are said to have reacted against. How untrue or objectionable Ellesmere's statement is depends on what it is taken to mean. Possibly he suggested in an overstated way that there was simply no question about the legality of temporal sanctions, that to deny their legality was to say that a great deal of practice had been illegal and the assumptions underlying it false. Perhaps in the context he was using "exorbitant" as the Proctor in the first document above uses it. To such a tone and such a usage of "exorbitant" the judges ought to have reacted with at least skepticism.

(4) This time the judges of all three principal courts were summoned, Fenner and Yelverton included. The Common Pleas judges, however, were at once sent from the room, to wait until the Council had parleyed with the members of the other courts. Lord Treasurer Salisbury cast aspersions on the Common Pleas judges in the process of stating a pretext for requesting their withdrawal. (They had "contested with the King.") According to Coke, the King and the Prince now entered and listened to the ensuing discussion, but Document (c) below is better evidence that their entrance actually took place after the interrogation of the judges. Coke again complains that questions were in effect sprung on the King's Bench and Exchequer judges. In contrast with the last occasion, their replies were not unanimous this time. (The report gives no details as to how they differed. There is of course nothing particularly surprising in the discrepancy between their testimony on this occasion and on the previous one. Their responses would depend on exactly what questions were put and in what manner. There is every reason to think that judicial opinion outside the Common Pleas was at least relatively unformed, and probably more favorable to the Commission.)

After two and a half hours, the Common Pleas judges were called back in. Instead of upbraiding them for misapplying the law, the King announced his intention to reform the Commission's patent and define more narrowly or precisely what causes it should have jurisdiction in. Only the general intent was announced, it would seem, not the detailed features of the proposed new patent. The government's exact game is therefore hard to make out. It was clearly persuaded to concede something; interrogating the King's Bench and Exchequer judges did not leave the King and Council in a position to say that the Common Pleas was flatly wrong. But it remains uncertain whether the government was ready to retreat in substance from an overextended position, or only to make minimal concessions and insist in the new patent on all the points it was really interested in, such as adultery and alimony. Perhaps it had little more in mind at this moment than a general strategy and a peace-making gesture; there had after all been no time to deliberate.

After the King, the Lord Treasurer made a speech. Its tone is elusive, and it contributes little clarification on the real point of the announced solution. Salisbury starts on a sad or angry note ("…the principal feather was plucked from the High Commissioners, and nothing but stumps remaining, and that they should not intermeddle with matter of importance, but of petit crimes…") If this is meant as criticism of the judges, it is odd. Perhaps the "principal feather" is wide discretion in the Commission to decide what "matter of importance" suitable to its jurisdiction is, without regard to legalisms such as the civil-criminal distinction. The tendency of an enormity test in some form, after all, is hardly to leave the Commission only "petit crimes", unless Salisbury wanted to suggest that leaving it mostly, in practice, with disciplining obscure Puritans

and misbehaving clergymen amounted to as much, compared to dealing with important people unwilling to respect ecclesiastical justice. He goes on, however, to give a little indication of what may have been thought wrong with the present patent and how it would be reformed. This suggests that the "sad or angry note" may have applied to the proposed reform, Salisbury saying that in his own view too much was being conceded, or else dramatizing the generosity of the concession. On the deficiencies of the present patent, he notes that it used the loose word "errors", which would be defined more precisely for the future. He also says that the Commission's taking bonds from parties, "as before absurdly and unjustly had been taken," would be stopped. That practice, at least, he considered a genuine abuse, not a "principal feather." He adds, finally, that there would be still other reforms, but does not specify them. One senses that Coke, writing the report, suspected that the reform would fall far short of bringing the patent clearly into line with the law.

At last Coke got the floor and used it, with characteristic courage and relentlessness, to complain to the King's face about the Council's examining judges of other courts separately concerning a case argued and decided in the Common Pleas (clearly *Chancey*.) In closing, he was only so far conciliatory as to say that when he and his colleagues saw the new patent they would "as to that which is of right, seek to satisfy the King's expectation." Again, it sounds as if he was hardly sanguine about the reform. The meeting broke up with nothing more said.

(c) Harg. 17, f. 1, among a number of pages inserted upside down at the end of a volume of reports.

This document is a personal minute by Justice Sir Christopher Yelverton of the last of the meetings reported by Coke. It is written in the first person and refers to Yelverton's own feelings and problems. Its authenticity as Yelverton's product, or a copy thereof, is confirmed by the fact that the next document among the papers appended at the end of Harg. 17 is labeled as Yelverton's argument in Calvin's Case (to which he makes incidental reference in his minute of the Council meeting.) The document dates the meeting—10 June, 9 Jac.

After giving the names of the fourteen Privy Councilors present and saying generally that the question was about 1 Eliz. and the High Commission, Yelverton recounts his own remarks to the Council. He begins by observing that he had not previously heard the matter in question debated because of his omission from the earlier meeting of the King's Bench judges. He takes the occasion to complain about the omission and clearly intimates that the reason for it was that he was suspected of being unfriendly to the Commission. This he denies, citing his concurrence in Fuller's Case, where the Commission's power to fine and imprison was upheld. He then generalizes: "and so in other cases I think they may likewise do secundum quantitatem delicti." The language here is probably hedging. Fuller was visited with secular sanctions for schism. "*Secundum quantitatem delicti*" probably means that those sanctions may be used in *some* cases besides schism, provided the crime is serious enough—a true enough proposition from the Common Pleas point of view. Alternatively, the phrase could mean that secular sanctions are lawful in all cases within the Commission's jurisdiction, but in quantity they must be reasonably proportioned to the gravity of the offense. That too need not on its face quarrel with the Common Pleas; it all depends on what the Commission's

jurisdiction comprises, and for the moment Yelverton says nothing about that. He continues in what seems to me still a hedging vein. Wandering from what I should call tightly relevant considerations, he notes that secular judges have a good deal of discretion to fine and imprison when there is no "positive law" appointing those punishments in specific amount. Even lowly constables may imprison under some conditions, and that by common law (i.e., non-statutory) authority. Considering these truths, Yelverton wonders how the High Commission can lack power to fine and imprison. ("And why may not ecclesiastical Comissioners doe the same though they be not bounded within any compasse for the Bishopps which be the Cheife Comissioners be most reverent learned grave and considerable men.") Then Yelverton observes that royal commissioners in various secular contexts purporting to give power to imprison or seize goods would be unlawful. But why? Because such commissions lack the statutory warrant that the High Commission has—implying that the statute behind the High Commission's patents makes it at least probable that its use of secular sanctions is lawful.

At last, after what I should call a good deal of warm-up, Yelverton gets explicit and says in effect that the best construction of 1 Eliz. is that it warrants secular sanctions if the monarch chooses to authorize them. ("…the statute is the ground of the commission and the commission the warrant of there authoritie, and the statute and the commission together doe give them power to sett fines and to imprison men, And if the statute had expressly given them power to sett fines and imprisonment noe man will denye but they might have done it and so if the statute had expressly sett downe that the commission should be so and this amounts to as much for the statute is that they shall execute all the premises according to the effect of the commission and it is but a degree further that that is contayned in the commission which is warranted by the statute and not contayned in the statute it self.")

So in the end Yelverton said what the Privy Council wanted to hear. He took the respectable position that the "tenor and effect" clause in the puzzling 1 Eliz. is best read as intended to give the monarch wide discretion as to the powers (and similarly the jurisdiction) to be conferred on the Commission. His awkward way of saying that, however, adds to the impression one gets from his roundabout way of working up to it—of a thinking-out-loud quality that is natural enough if Yelverton was really surprised to be asked his opinion, but that could also be assumed to avoid contradicting the Common Pleas too flatly. His tone seems close to, "Well, now that you ask, it would seem odd if the High Commission could not fine and imprison when so many other courts and officers can do so without obviously overwhelming justification, and if we start with that presumption—well, it is a little funny that 1 Eliz. does not give clear directions, but then some of its language is hard to give effect except as conferring broad authority on the monarch."

The sequel seems to confirm that Yelverton was not enthusiastic about coming out for the Commission. For after doing so, his face brightens, as it were, and he goes on to suggest that the King take the initiative to clear up the present unpleasantness: "But in this great commission I could wish that it would please his ma[jes]tie to bound it within a more narrow compasse and not extend it to so many nor so slight causes." Yelverton then suggests three reforms: (1) Avoiding a multiplicity of Commissions—i.e., having just one High Commission (per Archdiocese, presumably) and not supplementing the major tribunal with other local ones of the same legal nature. (2) Some way of obviating the

repeated objection that to confer jurisdiction on the Commission was to deprive men of their appeals in ecclesiastical causes. As Yelverton puts it, “That there might be a petic[i]on to his Ma[jes]tie for the reviewe of there sentence, and not to have it so finall or so peremptory as it may not be contradicted.” He proceeds to remind the Council that no other high court in the realm is free from appellate review and that judges are always better off when the possibility of reversal hangs over them. His proposal is not specific, but it presumably calls for routinization of what was already technically available—the right to petition the monarch for a review commission. Presumably, in Yelverton’s view, some sort of standing body to hear appeals should be constituted, and the subject would be assured that petitions would lead automatically to a hearing before such a body, without an *ad hoc* exercise of royal discretion. Yelverton’s emphasis on this point reveals, as his other reforms do not, his sympathy with a deep-seated judicial motive for holding back the Commission’s jurisdiction. Assuring routine appeal might well be an indirect cure for diseases beyond the immediate one, for the impulse of civil complainants and private prosecutors to go to the Commission must have been strengthened by knowledge that resorting there was a way to avoid the tedious process of ecclesiastical appeals. (3) The personnel of the Commission should be improved by appointment of “men of worth and of some eminence in the world and not the servants of Bishopps nor any of there family.” Whatever the exact reality that suggested this proposal, there is plenty in the reports of cases to make one think the Commission had more trouble with the courts than a wiser use of its purported discretion would have brought upon it. It would of course be optimistic to suppose that improving the caliber of the Commission would cause the legal problems surrounding it to vanish.

Yelverton credits his scheme with smashing success. The Treasurer “amongst many words in comendacon of it, said, he had not seene in so weake a body so strong a minde.” The Lord Chancellor was no less impressed, saying “that I had satisfied him in the matter more than all the rest of the Judges, and that it was a speech the best framed and the most judicious that ever he heard.” With a pinch of salt for vanity—and perhaps for condescension, irony, and appeasement of an offended Justice on the part of the great officers—it is still possible that the idea of conceding some abuses and compromising around a new patent originated with Yelverton, so that the Privy Councilors were indebted to him for a constructive suggestion as well as a comforting doctrine. Yelverton says that the other eight judges and Barons interrogated were “of the same opinion.” There are too many variables to permit telling exactly what the terms of agreement were. It can hardly be out of the question that the judges pre-concerted a united front. To the degree that they were spontaneous, “of roughly the same opinion” would seem a likely emendation—not so firmly against the Commission as the Common Pleas was supposed to be, inclined to the compromise-reform option once it was broached.

At this point, after the interrogation of the judges, the King came in. Thus Yelverton’s version, in contrast to Coke’s, as to when exactly the royal presence graced the occasion. All one can say is that Yelverton was there while Coke fretted in the antechamber. Salisbury and Ellesmere proceeded to recount the conference to the King. There are no further details, except that Salisbury “tooke occason to speake in comendacon of me, upon which I kneeled down“(perhaps a confirming hint that there really was something special about Yelverton’s contribution.)

The rest of Yelverton's account is given over to a bit of by-play concerning himself. Having an opportunity to speak to the King, and enjoying a modest limelight, Yelverton thanked him for diverting "the disgrace that was intended to be imposed upon me by removing me from my Circuite." Yelverton explains in his minute that "the Lord Chancellor before had purposed upon some private concept against me to have displaced me of my Circuite." He is presumably thanking the King for some previous decision to veto the Chancellor's recommendation, not for an action taken here and now in the glow of Yelverton's good performance in the matter of the High Commission. The King replied that he never meant to remove Yelverton, had always thought well of him, and was especially in his debt for his speech in the Case of the Post Nati or Calvin's Case (when Yelverton was among the large judicial majority, led by Coke, that decided the case as the King wanted it decided.) The information supplied by this closing note reflects back on the history of the meetings on the High Commission in several ways. Yelverton's initial exclusion might be explained by the Chancellor's hostility, whatever motivated that, as well as by the suspicion that Yelverton held unsound views on the High Commission. That suspicion might of course have entered into the hostility. Ellesmere may have gone out of his way to commend Yelverton on the present occasion because he had a personal offense to make up for. Yelverton's being out of favor for collateral reasons may have moved him to say as much for the government's point of view on the High Commission as he conscionably could.

(d) 12 Coke, 88. M. 9 Jac. (i.e., the term following the Privy Council meetings discussed above.)

This document is Coke's account of his resistance to the plan to include him, together with six other judges, on the new High Commission. The others were Chief Justice Fleming of the King's Bench, Chief Baron Tanfield , Justices Williams and Croke from the King's Bench , and Barons Altham and Bromley from the Exchequer. The puisne Justices of the Common Pleas were unrepresented.

Coke's position had three elements: (1) He claimed the right to be fully informed of the content of the new patent before consenting, or being obliged, to serve. His insistence was in the face of what would seem to have been a deliberate attempt to prevent him from knowing what jurisdiction and powers were purportedly conferred on the tribunal he was appointed to. (Coke says that the King's Bench and Exchequer judges knew the content of the patent, whereas he and the other Common Pleas judges did not. This suggests that confabulation between the government and the favored King's Bench-Exchequer group went on beyond the meetings above, as the new patent was being drawn up.)

(2) Underlying Coke's demand for disclosure was his view that a judge ought not to sit on the Commission unless he was convinced of its legality. That is surely a respectable position, if not axiomatic. It is perhaps arguable that a subject is bound to accept appointment regardless of whether he considers the powers of the body to which he is appointed legally unexceptionable. Could he not resist from within the exercise of powers he thought unlawful? Was the point of introducing a common law component into the Commission not to internalize possible disagreements over what powers could be bestowed on the Commission and so to reduce the probability of inter-court warfare? Those cavils seem pretty casuistical, however. It is likely that Coke was right in the view that must presumably be imputed to him: the scheme was basically to embarrass him and

other judges by setting up a conflict of roles and making the judges complicit in decisions they thought the Commission had no title to render.

As things turned out, Coke got some support from the other judges and got his way, or at least part of it. The patent was read aloud at the meeting to which Coke's report refers. This was an assembly at the Archbishop's palace in Lambeth, where the new commission was officially "published"—albeit without a reading, by the original plan—and the new members of the court were to be sworn in by taking the Oaths of Supremacy and Allegiance. Coke raised his objections towards the outset of the meeting and thereby kept the ceremonies from moving smoothly on to the swearing-in. He may have thought that written copies of the patent should have been furnished to the appointees, but in any event he insisted successfully on a reading. Having heard it read, he still refused to accept appointment, now on the ground that he needed more time to consider. In his report, he tells us that in fact he thought the patent illegal in several ways, but unfortunately he does not say what they were. Perhaps he was rather estopped by the situation from saying more then and there but that he needed time. Having made his protest, he then proceeded, "as the subject of the King", to take the oaths, His posture must have been something like, "I will not refuse to take the oaths here offered as the requisite step to effect my induction into the office of High Commissioner, because as a loyal subject I would be glad so to swear daily before breakfast, but I do not regard my swearing as inducting me into the office and regard it as my right, which I continue to reserve, to refuse appointment." Questions can be raised at this point about the law and about Coke's intent. Having protested first and then sworn, is it clear that he did not "accept" the appointment? In the end was there any way of "refusing" except by not taking the oaths? Did he mean the observers to see that at least his intention was to decline the office, and that he swore only because it would be graceless not to when the opportunity was offered? Or did he mean to allow them to suppose that he relented despite his misgivings? In writing his report he could have touched up the face of his behavior.

Coke's taking the oaths at last cleared the way for the public relations stunt that Archbishop Abbot had planned. Abbot delivered an oration on the urgent need for a High Commission in these sinful days, "and then he caused to be called a most blasphemous heretic, and after him another, who was brought hither by his appointment, to shew to the Lords and the auditory the necessity of that commission." One may suspect that the flat tone of this reportorial language is charged with contempt for the sideshow on Coke's part. For the benefit of his judicial auditory, the Archbishop should perhaps have substituted a delinquent alimony-payer for one of the heretics.

Coke then tells us that the Archbishop "afterwards" spoke privately with himself and Chief Justice Fleming of the King's Bench, promising them a copy of the new patent and assuring Coke that when he had an opportunity to study it properly he would find it very different from its predecessor. Whether "afterwards" means before the meeting broke up or on a subsequent day is uncertain. In any case, the final note is conciliatory. As at the last Privy Council conference in Trinity, there was at the end a certain yielding to the judges' sensitivities, a certain shrinking from political bravado. That Archbishop Abbot was a reasonable man may have something to do with it.

Near the close of his report, Coke notes again something he mentions in passing earlier: that the judges, on Coke's insistence, remained standing throughout the meeting

although they were asked to sit down. It looks as if what was normally a gesture of respect was meant as a gesture of stand-offishness, a symbol of resistance to instant co-optation. The report ends with the Archbishop announcing the time and place at which he would hold sessions of the new High Commission. This was pursuant to the King's order that the court sit in an "open place" at stated times—presumably a facet of the new leaf, a response to the objection that the Commission was irregular in its habits and sometimes avoided the publicity appropriate to judicial tribunals. Abbot also announced that there would be a sermon in the morning of the days on which the Commission sat, for the purpose of keeping the Commissioners better informed of their duty. Here too the odor is of reform. Was the homilist to warn the Commissioners against foolish over-extension of their jurisdiction and heavy-handed use of secular sanctions, as well as remind them of the blasphemous heretics who needed putting down? "Bad public relations" seems to have been part of the diagnosis of the High Commission's troubles with the courts in recent years. In several ways, Archbishop Abbot was trying to do better.

## Sub-section (b): The King's Bench during Coke's Chief Justiceship (1613-1616)

### Summary

The King's Bench during Coke's Chief Justiceship did not define the High Commission's authority in significantly new ways. The court may have been brought into clearer line with the Common Pleas position that the Commission lacked power to award alimony, and probably by extension jurisdiction on the civil side of matrimonial law generally. Although Coke's King's Bench held clearly enough that the Commission may not touch alimony, and *a fortiori* may not use secular sanctions and bonds in connection with alimony disputes, the court was tacitly disinclined to interfere heavy-handedly with the Commission's assumption of matrimonial jurisdiction. Persons imprisoned in consequence of such proceedings were only bailed on *Habeas corpus* or were induced to mediate their marital troubles. Recognition that the Commission's role was more useful than lawful seems implied, as well as a degree of deference to the sensitivities of the government and the ecclesiastical hierarchy.

Otherwise, decisions from Coke's King's Bench largely confirm the High Commission's jurisdiction in areas where earlier holdings tend to support it: Clerical incontinence, simony, Puritan activity in the nature of schism. On the other side, there is a trace of confirmation that contempt or slander of the High Commission is not punishable by it.

### The Cases

We turn now to the cases from the King's Bench during Coke's Chief Justiceship there, from October, 1613, until his dismissal in November, 1616. For all the qualifications that must be put on his ferocity as a foe of the High Commission, litigants seeking to limit that court certainly followed Coke. I have no cases from the Common Pleas for the period he headed the King's Bench, and there was little King's Bench business touching the Commission when he presided over the Common Pleas. The two principal courts, though somewhat different, were not far enough apart on High Commission questions to make seeking relief against the Commission hopeless except where Coke sat. Nevertheless, he seems to have been the beacon for those who wanted to complain

Two cases from Coke's first term on the King's Bench rather vindicate than limit the High Commission's jurisdiction. The structure of Watts' Case[112] is unclear from the reports, but the essential point of the holding comes through. The Commission was prohibited from awarding costs against Watts because he had a pardon covering the offense for which he had been sued, clerical incontinence. The problem for the court seems to have been whether the King's pardon could toll the interest of the private plaintiff in the High Commission suit. (Who the private plaintiff was, or what kind of interest he could have claimed, is one of the obscurities in the reports, but there plainly was such a plaintiff.) The court held that the offense was indeed pardonable, and the award of costs accordingly improper, because all suits in the High Commission, like

[112] H. 11 Jac. K.B. 2 Bulstrode, 182; Croke, Jac. 335.

those in the Star Chamber, are the King's, whether or not there is a private plaintiff. That in effect says that the High Commission is an exclusively criminal court, even when its proceedings are civil in form. So to hold is obviously to say that the Commission does not have universal ecclesiastical jurisdiction, but that was by 1613 hardly controversial. On the way to this determination, Coke spoke about the offense of clerical incontinence in such a way as to show that he regarded it as manifestly a High Commission matter.(This comes out from Bulstrode's report alone.) He called it "heinous", which from the tone and context would seem to be indistinguishable from "enormous" and "exorbitant." He said that pre-Reformation statutes (not specifically cited) had made it felony. (I do not think that is correct, but as we have seen above it was subject to imprisonment by ecclesiastical courts by statute. Coke added that since clerical marriage had come in the offense was so much the worse, because what was once mere fornication was now in danger of being adultery. While earlier cases leave little doubt that clerical incontinence, unlike most sexual offenses, was prosecutable in the Commission, the proposition had never been embraced quite so firmly. Although its costs award was nullified, the Commission gained in *Watts* a strong affirmation of authority in an important area from its point of view. Centralized control over the moral standards of the clergy, as over its religious conformity, was surely at the heart of what the government and the hierarchy were seeking, control that would be effective in the face of local laxity and the private interest of patrons.

The second case, Sir William Boyer's[113], has been discussed in Vol. II (pp. 399-401) since its problematic aspect concerns the power to exact incriminating testimony. Here we need only recall that along the way Coke declared simony an enormous offense, "worse than felony." His intent was clearly to leave no doubt that the crime was entirely appropriate to the High Commission, whether proceedings were directed against a clergyman who gained his benefice by simony or against laymen who made simoniacal bargains in dealing with the advowson. Problems arose in the case only when it came to whether interrogation tending to temporal detriment should be prohibited. It is not surprising to find simony classified as an enormity, but no previous case affirms it to be.

Bradshawe's (or Bradstone's) Case (1614) [114] has also been discussed in Vol. II (pp. 401-404) for the element of self-incrimination. As to the powers of the High Commission generally, the King's Bench held that fining and imprisoning to enforce payment of alimony are unlawful. It made no difference at the level of principle that adultery and aggravated marital misconduct were involved in the instant case. The court also held that it was improper for the Commission to take a bond from the delinquent husband; Coke said he would grant a Prohibition *quoad* the bond if one were sought. The case, however, arose on *Habeas corpus*, and, as in several other such cases, the result was not severely discouraging to the Commission's meddling in marital disputes. The prisoner was bailed, rather than discharged outright, and told to go to the Bishop of London, submit himself, and use his wife better. The Bishop of London may have been his diocesan, who ought to have handled the case in the first place, as well as a leading member of the High Commission. But even if the party is considered referred to his

[113] H. 11 Jac. K.B. 2 Bulstrode, 182.

[114] M. 12 Jac. K.B. 1 Rolle, 110 (*sub nom.* Bradston); 2 Bulstrode. 300 (Bradstone); Add. 25,213, f. 163 (Bradshawe).

Ordinary, his imprisonment commuted into bail was the means to make him heed the ecclesiastical authorities,

Whereas the reports of Bradshawe go only to the use of secular sanctions, an anonymous Prohibition case from the same term[115] speaks to jurisdiction over alimony by way of dictum. So far as appears the principal case did not involve the High Commission, A wife complained of cruelty to the Ordinary, who awarded her weekly alimony. The husband sought a Prohibition, on what ground is not reported, The theory that alimony is only grantable as an adjunct of a formal divorce may have been the ground, for the judges, besides saying generally that the matter was proper to the Ordinary, said that he was entitled to take order for the wife's safety and award alimony, The judges added that a misused wife also has a temporal remedy, because she may have her husband bound to good behavior (but it is not implied that this is any bar to her ecclesiastical remedy.) They added further, incidentally it seems, that the High Commission may not meddle with alimony. (There may be an implication, in the context, that there is no need for the Commission to meddle with it, considering that Ordinaries have a fairly wide discretion to deal with marital discord, and secular good behavior bonds may if necessary be used to reinforce the regular ecclesiastical courts.)

The final cases in this Sub-section essentially adopt the Common Pleas position on marital disputes into King's Bench practice. In Broke's Case, [116] it was returned on *Habeas corpus* that the prisoner was committed for refusal to allow alimony to his wife. The court held that the High Commission may not meddle in such a private case. This time the judges did not use the bail technique to keep the misbehaving husband responsive to ecclesiastical authority. Instead, they undertook mediation themselves and persuaded the couple to agree that the wife should receive £20 per year in separate maintenance.

A further group of eight reports[117], all possibly relating to the same case and probably to the same marital disturbance, also concerns whether alimony is beyond the High Commission's authority. The reportorial picture is so tangled that it will be best simply to look at the accounts one by one:

(1) Harl. 4817, f. 234 b., dated H. 12 Jac. K.B.

Codd was sentenced to pay his wife alimony, entered an obligation to perform the award, and was subsequently committed for failure to perform it. These facts being returned on *Habeas corpus*, the court discharged Codd, outright it seems. The judges held that the Bishops, not the High Commission, may hold plea of alimony. They also said that the bond was unlawful.

(2) A Codd's Case is mentioned in Rolle's report of *Bradshawe/Bradstone* above. It is dated H. 12 Jac.—oddly, since that term follows the M. 12 of *Bradshawe/Bradstone*. Perhaps it is the reporter's interpolation. No outcome is given, only that the return on *Habeas corpus* said Codd was committed for contempt of the High Commission's order to receive his wife and use her as his wife—that rather than failure to pay alimony.

(3) 3 Bulstrode, 109, dated M. 13 Jac. K.B., *sub nom.* Codd v. Turback.

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[115] M. 12 Jac, K.B, Add. 25,213, f. 168b.

[116] P. 13 Jac. K.B. Moore, 840.

[117] See text for references to these.

The return on *Habeas corpus* said that Codd was committed for refusing his wife alimony and for "*diversa opprobriosa verba*." In this report, the court says nothing about the alimony. It held vehemently, *per* Coke, that the return was insufficient for failure to specify what the opprobrious words were and when they were spoken. The prisoner was bailed.

(4) 1 Rolle, 245, *sub nom*. Codde's Case; 3 Bulstrode, 146, *sub nom*. Hodd v. High Commission; Harg. 47, f. 79b.

These three reports are all dated M. 13 Jac. K.B. They all have the return on *Habeas corpus* saying that the prisoner was committed for reproachful words touching the Commission and refusing to respond to articles concerning the same. I.e., there is no mention of an underlying marital case. According to all the reports, the court held that neither the reproachful words nor the articles of inquiry were sufficiently specified. It also held that even if the return had been more detailed it would still almost certainly fail to make out that the Commission had jurisdiction. The reason for this was that slander of the High Commission going to the legality of is proceedings is not punishable by the Commission itself, but at common law. This holding accords with earlier decisions. Coke cited in support a Hales's Case, where a man said that a sentence of divorce given by the Commissioners was against their consciences, as well as against the law. He was indicted for the slander at common law and fined upon his confession. (Note that *Hales* furnishes a precedent of a High Commission divorce. Presumably the party did not try to prohibit the divorce suit, just denounced the decision therein. The common law's treating the denunciation as a criminal contempt without regard for the suit's lawfulness bespeaks respect for the Commission's dignity. Attacking its integrity as well as the legal correctness of what it had done of course adds to the weight of the slander; it could possibly be essential to its criminality.) Bulstrode has the prisoner in the principal case discharged; Rolle has him bailed until the next term and then discharged; the MS. has him simply bailed. (This version of Codd's Case is discussed in Vol. II (pp. 427-428) as it touches self-incrimination.)

(5) 1 Rolle, 432, and Harl. 4561, f. 272b.

These virtually identical reports are dated M. 14 Jac. K.B. That is Coke's last term on the court. He was already in disgrace, and one cannot be sure of his participation. The decision given in these reports suggests either Coke's absence or a change of tune when he was in his straits.

Again, one Codd was imprisoned by the High Commission and brought a *Habeas corpus*. The return explained that he had been ordered to cohabit with his wife or else show cause why he should not, and that he refused to do either. It explained further that he was ordered "*superinde*" (probably, "thereupon" rather than "moreover"—see below for the difference) to enter an obligation to attend from day to day until the Commission should determine what alimony he ought to allow his wife, which he also refused, and was committed for refusing. The King's Bench, "upon the sudden reading of this," thought that two reasons were alleged for the imprisonment—(a) refusal to cohabit or show cause and (b) refusal to enter the obligation. The reporter thought, however, that the return clearly claimed only the second reason, the first serving as "background." Anyhow, the judges said that the Commission could imprison for the first reason; they were in doubt about the second and therefore remanded the prisoner for the present.

Leaving aside the judges' confusion about what they were called on to decide, their opinion seems surprising. If they adhered to their earlier position that marital matters were almost entirely beyond the Commission's jurisdiction, and certainly not subject to secular sanctions, it is hard to see how they could justify the imprisonment on one score and be in doubt on the other. The only possibility of distinguishing I can see is to take the Commission's acts as merely interlocutory. I.e.: Codd was not ordered to cohabit with his wife, but given a chance to show why he should not cohabit with her. Perhaps he could prohibit the Commission from entertaining the case that led to that order, and perhaps he should be released on *Habeas corpus* if he were ordered to cohabit and refused to; but the Commission may imprison to make a party who has not protested its jurisdiction cooperate in the sense of not "standing mute." Similarly, Codd was not ordered to pay alimony, but to cooperate with the process of assessing alimony. If we straighten out the reading of the return, as the reporter suggests, this sort of argument gains in persuasiveness: The Commission did not imprison Codd to make him cooperate with proceedings designed to determine whether he ought to live with his wife. It did not treat him as one subject to a *nisi* order is ordinarily treated if he fails to appear and show cause—i.e., did not order him to live with Mrs. Codd. Such a disposition would be poor handling of a marital situation even if Mrs. Codd was trying to get her husband to take her back, and worse if separate maintenance was equally or more eligible from her point of view. Rather, the Commission accepted the husband's unresponsiveness to its first order as an expression of unwillingness to live with his wife, in effect dropping the demand that he justify his unwillingness. It held his unresponsiveness against him only in the sense of concluding that he had nothing to say that would justify his refusal to cohabit and therefore mitigate, if not remove, his responsibility to maintain his wife separately—such as showing that the wife was adulterous or otherwise to blame for the breakdown of the marriage. That is to say, the Commission concluded that an arrangement for separate maintenance must be made. Even then, it did no more than seek to enforce the husband's cooperation in proceedings to assess the alimony—in which, incidentally, he might still have an opportunity to cast blame on the wife by way of reducing the sum to be paid her. It sought only to keep Codd from frustrating its efforts to ascertain such things as his ability to pay, without which a settlement could hardly be worked out. To that end, it tried to restrict itself to a bond and used imprisonment only to make Codd enter the obligation after he refused to do so without coercion. All the while he made no effort to prohibit the Commission and thereby liberate his wife to pursue her remedy in a regular ecclesiastical court.

These considerations seem to me to lend a good deal of common-sense justification to the King's Bench's decision to remand the prisoner, and even so he was remanded only for the time being, until the judges resolved their doubts. They showed a degree of sympathy for the Commission's seemingly restrained effort to deal with a refractory situation, even if on consideration they would have felt compelled to hold the bond unlawful, in accord with most authority, and their decision need not quarrel flatly with the well-established rule that alimony and related matters are simply beyond the High Commission's jurisdiction. One may still find it on balance surprising, given the prior common law insistence that alimony is simply *ultra vires* for the Commission.

Exactly what human and legal story these clearly related reports add up to is not worth speculating about. Suffice it to say in summary that among the reports one can find

(a) straight confirmation of the position that the High Commission may not meddle with alimony and *a fortiori* may not use secular sanctions in connection with it and may not demand bonds; (b) a propensity to evade the question of the High Commission's marital jurisdiction by settling *Habeas corpus* cases on the formal sufficiency of returns and by limiting the Commission's authority to punish slander of itself; and (c) a qualified retreat from (a), to the extent of saying that in some circumstances use of imprisonment in marital proceedings may be justifiable. *Codd* may illustrate the truth that drawn-out, oddly managed, intractable situations can distort the law.

Coke's last major case involving the High Commission was the *Habeas corpus* of Burrowes, Cox et al., which has been discussed at length in Vol. II (pp. 338, 404-427, 430) because it turns essentially on the power to exact self-incriminating testimony. We may recall here that that case confirms the well-established principle that heresy and schism are within the Commission's jurisdiction and imprisoning power. It shows that schism was interpreted broadly enough to take in most Puritan activity. It also illustrates, along with several other cases, including marital ones, discretionary, indeed self-restrained, administration of the *Habeas corpus*, whereby people whom the High Commission ought never to have imprisoned were in practice allowed to spend considerable time in jail or liberated only on bail.