Section 5: Cases after Coke's Chief Justiceships

Summary Covering Both Subsections

The Common Pleas after Coke's departure cannot be said to have reversed any positions taken in his time, but wavering and inclination toward a more pro-Commission attitude are visible at a few points. The two decisions made by the Court under Sir Henry Hobart (1613-1625) affirm the High Commission's jurisdiction—over simony, unsurprisingly, in one case, but in the other over clerical misconduct short of serious religious error or gross immorality. The latter case is not a head-on holding, but it is somewhat encouraging to the Commission in the still largely unsettled area of its authority in intra-Church affairs, especially discipline of the clergy.

It is in that area that the Common Pleas under Sir Thomas Richardson (1625-1631) made its clearest holdings restricting the Commission. Two cases, one of them decisive, exclude the Commission from punishing clergymen for variously compounded forms of unedifying behavior—not all of it sub-criminal, though hardly "enormous", and in its pattern distinctly deleterious to the Church. Such decisions are pretty strong reaffirmation of the value of localism, even in criminal and intra-Church matters, and of the "enormity" test for the High Commission's jurisdiction. On the other hand, an opinion in a further case by two judges (Hutton and Richardson), while upholding the "enormity" standard expressly, brings one rather surprising form of misconduct within the standard and hence within the Commission's jurisdiction—viz., converting a church to profane uses. (The suit was brought by a patron against parson and parishioners. Nothing like blatant sacrilege was charged—only failure to keep up the building as a church, whereas the defendants claimed that alternative facilities were available and customarily used.) Another decision supports the Commission's authority to exercise essentially administrative supervision over the ecclesiastical system (specifically, to investigate, and possibly to deprive, a judicial officer—Bishop's Chancellor—for alleged professional incompetence, where there was no pretense that he had committed a crime.) The "intra-Church affairs" cases from the Richardson Court, taken together, suggest an inclination to stretch a point in the Commission's favor for the sake of good order in the Church, provided it did not get involved in listening to bills of complaint against parochial clergy of the sort all-too likely to arise from parochial quarrels.

Otherwise, the High Commission was upheld by Richardson's Common Pleas only in a Puritan-activities case (notable for the comparative triviality of the activities, as against anything that could seriously be considered schism) and in the case of a layman prosecuted for adultery, blasphemy and drunkenness (where, however, the Court's refusal to prohibit was probably owing to an added element of subversive utterance—in itself quite obviously inappropriate to the Commission, but probably the reason why the Court did not look very deeply into the propriety of prosecuting the other offences there.)

The several cases outside the "intra-Church" area in which the Richardson Court restricted the Commission basically perpetuate previously established lines, but they show some signs of strain. Richardson himself was well-connected with the government and in most departments of Prohibition law a conservative judge (i.e., disposed to limit common law interference with extra-common law courts.) It was characteristically Richardson who leaned toward favoring the High Commission. He was not able to carry

the other judges with him, but his influence and the Court's presumable preference for avoiding head-on splits may account in part for the occasionally blunted edges of anti-Commission decisions.

Two cases on sexual offences eventuated in restrictive decisions. One (aggravated pandering to adultery) brings out the division between Richardson and the puisne judges quite clearly. The majority thought the basic offence *ultra vires* for the Commission (without, perhaps, wholly excluding the possibility that aggravation—here prolonged promotion of an adulterous affair—could give jurisdiction); Richardson plainly disagreed. It is less certain that he dissented from the majority view that in any event secular sanctions and bonds could not be used in connection with such an offence. The case, however, was disposable on separate grounds—a pardon covering the offence. Although there were some problems about the applicability of the pardon, the judges agreed that it did apply and were therefore able to stop the High Commission proceedings without dissent. Consequently, the decision is not a strict precedent on the jurisdiction and sanctions question. The second case was incest, which was as such indisputably appropriate to the Commission. The issue was whether the Commission could be controlled (via *Habeas corpus*) when it appeared on the record that statutory standards as to what constitutes incest had been violated. The Court was inclined to think that the Commission was controllable for mishandling a matter within its jurisdiction in that way (misconstruing or ignoring a statute.) Interstitially, however, the discussion of this case brings out positions favorable to the Commission, as to which the judges do not seem to have disagreed: (a) Use of secular sanctions in an incest case (including punitive imprisonment, or at least imprisonment to enforce a fine) is unobjectionable. (This point represents no break with Coke's courts, but is confirmation, for incest, of the rule that secular sanctions may be used in connection with the small number of "enormities" clearly within the Commission's jurisdiction—a rule that in Coke's day was never quite sorted out from the rival rule that secular sanctions nay be used only for heresy—plus clerical incontinence if that is *infra vires*—, where there was a statutory basis.) (b) The Commission may probably justify imprisoning for incest in *Habeas corpus* without showing wherein the incest consisted. (It had simply made the mistake of telling too much and revealing its error in this case). If so for incest, why not for heresy, etc.? (c) No more than bail was so much as sought for the prisoner, much less considered by the Court, though to constrain him by bail was to constrain one who by the Court's holding had done nothing wrong.

The Richardson Court held pretty well to the position that the High Commission may not touch alimony. It was strongly asserted by some judges, especially Hutton. Richardson resisted to a degree, but not decisively. At least one (and possibly another) decision to prohibit an alimony suit was deliberately, at Richardson's request, put on grounds that would be good against any ecclesiastical court, thus avoiding questions specifically about the High Commission's jurisdiction. A little countenance was given to the proposition that a temporary award of alimony, pending marital litigation, may be made by the Commission.

Two other restrictive decisions had special features. The Commission was denied jurisdiction over assaults on clerics because ecclesiastical jurisdiction was entirely statutory and the ancient statute (*Articuli cleri*) conferring it specified the episcopal courts. Save for Richardson, however, the judges would perhaps have been equally ready

to prohibit on the ground that the offence was too minor for the Commission. In this case they expressly confirmed that patents to the Commission may not exceed the bounds set by 1 Eliz. The second case holds that the Commission may not fine when the party could be fined by temporal courts for the same offence. (The report does not tell what particular offence was in question in the instant case.) However, the implications of the discussion are not entirely unfavorable to the Commission. It was held that imprisoning a man subject to a temporal fine for the same offence is at least not controllable by Prohibition. The Commission was prohibited from fining the party in those circumstances, but he was told to bring a *Habeas corpus* if he wanted to challenge his imprisonment. Richardson probably had some doubt about the principal decision (no fine under the circumstances), but he went along with it. The other judges did not deny that the Commission may sometimes fine and imprison, but they did not on this occasion go beyond affirming that it may do so in the clearest cases—heresy and clerical incontinence, owing to the regular ecclesiastical courts' one-time statutory power. Richardson probably favored more permissive standards, at least power to imprison in all cases for the purpose of enforcing a spiritual sentence.

The King's Bench had less of a tradition of restricting the High Commission than the Common Pleas. Nevertheless, the clearest restrictive decisions after Coke's departure come from the King's Bench. All of the significant ones are from the late 1620's, when the Court was presided over by Sir Ranulphe Crewe and Sir Nicholas Hyde.

Alimony was straightforwardly held *ultra vires*. The King's Bench saw itself as adopting Common Pleas precedents at the very moment when the contemporary Common Pleas was wavering somewhat on alimony. In its alimony cases, the King's Bench expressly held that the monarch required, and for this matter lacked, statutory authority to confer jurisdiction on the Commission. The Court also emphasized the importance of preserving appeals. In reaching these oft-repeated general points, the judges implied a little more than they were called on to decide, for it would be hard to deny jurisdiction over alimony with those points in mind and not also to deny it for other civil causes, and perhaps the pettier criminal ones as well.

The strongest reaffirmation of restrictive guidelines came in an "intra-Church" case of sorts (where the High Commission suit was to compel a rector to perform his *de jure* duty to repair the chancel of the church.) In the process of holding this suit inappropriate to the Commission, the Court insisted that the commission is limited, not only to crime, but to "enormous" crime. Strict construction of "enormous" (i.e., that it means "extremely grave", not "unlawful") was insisted on. So was the importance of preserving appeals and the theory that the historic reason for authorizing a High Commission was hardly more than an immediate need to purge the Church of Catholic clergy. Defamation, including defamation of clerics, was incidentally said to be too civil a matter for the Commission. Finally, the actual circumstances of the case were such that Prohibition would probably have been justified if the suit had been in a regular ecclesiastical court. The judges preferred to hold it *ultra vires* for the Commission, rather than avoid passing on the Commission's powers and seek other grounds for Prohibition. Another case in the same Court confirms the principal decision (no suits before the Commission to compel repair of a chancel.)

On the other hand, the Caroline King's Bench showed some signs of permissiveness toward the Commission in the "intra-Church" area. One clerical

discipline case was rather ambiguously handled: A minister who refused to obey his superior's order to preach a visitation sermon was imprisoned by the Commission. The King's Bench relieved his immediate plight by bailing him on *Habeas corpus*. The Court was probably inclined to doubt that imprisonment was lawful for so comparatively petty a misdemeanor (and there was a question as to whether it was a misdemeanor at all), even if the Commission had jurisdiction over the matter. However, the bail decision was represented as tentative, pending a final resolution (of which there is no report.) The indications are that the Court was reluctant to intervene in the process of clerical discipline, although it was very ably urged to by counsel in this case. An opinion in another case by two judges (Jones and Croke, neither particularly royalist or pro-ecclesiastical) confirms such reluctance: they opposed interfering with the Commission's proceedings against a clergyman for drunkenness and "lewd behavior." The King's Bench also had occasion to pass on the Commission's power to proceed against a Bishop's Chancellor for professional incompetence. (The same case as the Common Pleas decided on that point. The party appears to have tried his luck in the two courts successively.) If anything more decisively than the Common Pleas, the King's Bench held that the Commission was within its rights.

No cases from either principal court have been found for the years 1631-1640. What this means, insofar as it is more than an accident of reporting, is not obvious. It may be tempting to suppose that no one dared challenge the High commission in the time of Thorough, or that the courts were unwilling to interfere with it. Yet neither proposition in really convincing. There was good precedential basis for challenging the Commission's activities in several areas, if such activities were taking place. In proportion as the Commission was increasingly unpopular for political reasons, people would perhaps have had all the more animus to resist it if it ventured into civil and petty matters. On the other hand, there was virtually no precedential basis for challenging High Commission proceedings against Puritan activity. Puritans in trouble with the Commission may have thought it futile to seek the help of the common law courts, but that could be for commonplace reasons—because the courts were all but foreclosed by past practice from giving any help to such complainants. Adulterers, delinquent alimony-payers, and the like were not in the same boat. It is possible, indeed probable, that the courts' net sympathy with all anti-Commission positions would have declined in the '30s, owing to changes in the complexion of the Bench and to the political atmosphere. Belief that the courts were prostituted to the government was probably stronger than any reality justifying the belief. Yet the belief is not finally a sound basis for predicting a low incidence of resort to the courts. The impulse to bring test cases in politically supercharged times is not necessarily dampened by pessimism about their success, nor are litigants with any kind of chance likely to be so overcome by pessimism or cynicism that they refrain from testing whether they are really as badly off as they fear. Anyhow, as the Ship Money case classically demonstrated, the judiciary was not a prostituted monolith. A lawyer hoping to save his client from an alimony suit in the High Commission would have had every reason to predict from past performance that at least some judges would argue on his side. Whether Hampden's lawyers, in a far higher matter and with much stronger reason to be gloomy, calculated that they would win Justice Croke's vote is probably unascertainable; in the alimony case, it would be easier to say "Croke at least will be with us, and maybe he will be persuasive."

The safest course, therefore, is to reserve judgment as to what the apparent absence of High Commission cases from the '30s means. The hypothesis that the commission became more prudent and better ordered under Archbishop Laud is at least as convincing as the theory that litigating against the Commission came to seem hopeless (and perhaps was proved to be in cases of which we have no report.) Is it possible that the Commission concentrated on Puritans (and perhaps on the always ambiguous "intra-Church" area), that it learned to stay away from civil and petty matters, especially those involving laymen, and thereby to avoid gratuitous litigation and unedifying squabbles with the secular courts? Could the Laudian vision of the Church not have had some common ground with standard anti-Commission positions—respect for localism and "due process of law" in the ecclesiastical system; a desire to see the regular ecclesiastical courts in competent hands and playing their due role, not in danger of preemption by a central tribunal; a hope of restoring the authority of spiritual sanctions in the common run of spiritual causes, reserving temporal ones for the religious offences and other "enormities" where a serious case for exceptional powers could be made (and whence the secular courts in the 17th century had no inclination to exclude temporal sanctions)? By concentrating on Puritans, as this hypothesis supposes, the Commission may have been working its destruction in the long run—when Puritan political influence emerged in new-found strength, and an explosive mixture of temporal and ecclesiastical politics had been brewed up—, but in the short run it would have been the way to peace with the secular judiciary. The value of religious conformity and the necessity of extraordinary measures to enforce it were too deeply engraved in the law to be repudiated even by judges who (as some, along with other moderate-conservative Anglicans, must have) had no taste for Laud. (As for a possible "intra-Church" penumbra, where the High Commission's right to a free hand was less clear than in Puritan cases: Positing greater self-restraint and appreciation for localism on the Commission's part may suggest that it would have been less inclined than earlier to take commonplace clerical discipline cases and the like. If, on the other hand, we assume a continuing or increasing volume of High Commission activity in that area, a low incidence of complaint about it might reflect something other than a shift, or expected shift, of judicial opinion in the Commission's favor. It could conceivably reflect a certain success for the Laudian ideals and program, clergy and other officers of the Church finding it less acceptable to quarrel with the hierarchy, resist its supervision, and oppose it in the secular courts.)

Three decisions from 1640-1642 give no sign of discontinuity with practice before 1631. The Common Pleas held very clearly in one case that alimony is *ultra vires* for the Commission. Neither of two King's Bench cases counts for much on major issues. One *Habeas corpus* suggests disinclination to let the Commission issue "intra-Church" administrative orders and punish disobedience as contempt, but the reported decision to bail in that case was only a tentative resolution. The other King's Bench case suggests not more than a disinclination to discuss the Commission's power to fine where there were special technical reasons for allowing a fine to be enforced without reaching its original legality. This fragmentary evidence from the eve of the Civil War is probably most consonant with the supposition that judicial opinion in the '30s stayed about where it was before and would, given occasion, have manifested as much. The alternative hypothesis would be that the courts were, or were assumed to be, exceptionally reticent

towards the Commission in the ‘30s and then, in response to a changed political climate, reverted to normal and attracted complainants.

(In connection with the above speculations on the 1630’s, cf. the similar points concerning self-incriminatory questioning by the High Commission in Vol. II.)

Sub-section (a): Cases from the Common Pleas after Coke left the Chief Justiceship (1613 to the Civil War Period)

We move now to post-Cokean cases concerning the High Commission. For whatever reason, there are more from the Common Pleas than from the King's Bench. I shall deal with the former consecutively down to the eve of the Civil War and take up the few King's Bench cases at the end (except .for .one case that is replicated in both courts.)

The earliest Common Pleas case, Bishop v. Caleb Mortry,[118] though obscurely reported, furnishes a clear holding that simony is within the High Commission's jurisdiction. The form of the simony alleged to the Commission in this case was that after being presented to a benefice the presentee entered an obligation to pay the patron £100. I suppose there was a question as to whether this constituted simony, in contrast to a gift—whether in cash or a bond—made to the patron before presentment. In any event, the King took the transaction as simoniacal, and hence as *ipso facto* forfeiture of the immediate presentation to the Crown (by virtue of the statute of 31 Eliz., c.6), for the King presented Mortry to the benefice. Mortry then complained against the erstwhile patron in the High Commission for simony. If his motive was interested, as opposed to a mere desire to see simoniacs punished, I presume it would be the belief that an ecclesiastical judgment that simony was indeed committed would secure his incumbency. A Prohibition was sought to stop the High Commission suit. Serjeant Ashley, arguing in favor of the Prohibition, did not contend that simony was intrinsically inappropriate to the Commission, but that simony was examinable at common law and in the instant case should be examined there rather than in an ecclesiastical court. The report is too sparse to bring out his reasoning, but his effort failed. The Common Pleas decided unanimously that Prohibition would not lie. Two judicial observations shed some light on why Ashley's theory may have been colorable. Chief Justice Hobart, after saying that the High Commission could without question deal with simony, adds that the obligation would only be evidence of the offense. I take this to mean, though the reportorial language is confusing, that the Commission could take note of the bare fact that an obligation was given so long as it stayed away from any questions about the validity or construction of the bond. Justice Winch probably made the same point with the remark, "If they do anything that crossed the bond the prohibition will be granted." Ashley's argument perhaps came to claiming that the potential presence of collateral common law issues owing to the bond gave the common law exclusive jurisdiction. As far as the major High Commission issues are concerned, this case confirms earlier indications that simony as such qualified as an enormous ecclesiastical offense.

Searle's Case[119], also from Hobart's court, does not raise direct questions about the High Commission's powers, but has some oblique bearing on them. Searle was brought to the Bar on *Habeas corpus*. Thereupon he sought a Prohibition to block execution of a sentence depriving him of his Church living that the Commission had imposed on him. His ground was that the offenses for which he was deprived were within a general Parliamentary pardon. The question before the court was in part whether two episodes of misbehavior were included in the pardon; if there were other charges against

[118] P. 16 Jac. C.P. Harl. 1549, f.159b.
[119] M. 22 Jac. C.P. Harl. 5148, f. 63.

Searle, the pardon was presumably applicable without dispute. (1) Searle said "publicly and maliciously in the church", that a Mr. Michell was excommunicated. When he ordered Michell to leave the church and Michell refused, Searle commanded the churchwardens to drag him out. In fact, Michell was not excommunicated. The Common Pleas held that the misconduct was not pardoned because the pardon contained an exception for misdemeanors committed in church. *Per* the court, the exception applied not only to misbehavior by parishioners toward the minister but *a fortiori* to misdemeanors by the minister himself. Searle's claim was obviously that ministers were outside the exception (i.e., covered by the pardon.) I cannot say whether anything in the text of the pardon would render the claim plausible. (2) Searle was also deprived in part for saying to a sick parishioner "that he would commend his body to the earth and his soul to the Devil." The question about those words, which were presumably not spoken in church, was whether they came to heresy or schism, which were excepted from the pardon. The court held that although the words were atheistical and profane they did not amount to heresy or schism and were therefore pardoned. Clearly Searle would have had his Prohibition based on the pardon if he had only been charged with "atheistical and profane" utterance. There is no suggestion in the case, however, that either such language or abusive behavior by a minister in church would as such have been considered insufficiently enormous for the High Commission to proceed against and punish by the ecclesiastical sanction of deprivation. This accords with previous indications that the Commission was given a pretty free hand in disciplining clerics. The effect of the pardon in *Searle* raised complex problems beyond the comparatively simple one whether some of the party's offenses were covered by it, but only the latter has any bearing on the jurisdiction of the High Commission. The case in full will be discussed later in this study, when construction of pardons is taken up as a separate aspect of Prohibition law.

In Dr. Sutton's Case,[120] an unusual suit was brought in the High Commission, and a persistent effort to prohibit it was unsuccessful. The case is not, however, essentially on the Commission's jurisdiction and powers. There is only one hint in the reports that counsel seeking Prohibition thought of arguing that even if the case was generically within ecclesiastical jurisdiction it was not appropriate to the High Commission specifically. There was no judicial response to the one suggestion of such an argument. The case is an important and difficult one on whether *any* ecclesiastical court could proceed against Sutton in the form in which he was proceeded against. The judges, in deciding against Prohibition, seem to have taken it for granted that the proceedings, since they were within ecclesiastical jurisdiction, could take place in the High Commission. Counsel favoring Prohibition—with the faint exception referred to—seems to assume that to prohibit the suit it must be shown that any ecclesiastical court would be out of bounds in entertaining it. In this chapter, therefore, we do not need to go deeply into *Sutton* as it

[120] H. 2 Car. C.P. Littleton, 2 and 22; Harl. 5148 f. 106 and 114 b (virtually identical reports): Croke. Car., 65. The Croke version has already been discussed (Vol. II, p.191) because it touches a point of general Prohibition law missing from Littleton and Harl. 5148—probably just omitted in the reporting because it makes no difference for the substance. Date, content, and result leave no doubt that the Croke report is of the same case.

was actually argued, but only to note what it obliquely has to say about the High Commission.

It is an oddity of *Sutton* that it occurs in both the Common Pleas and the King's Bench [121] without significant substantive differences. Both principal courts reached the same result—denial of Prohibition—on the same grounds. It seems clear that after Prohibition in one court Sutton and his counsel simply tried their luck in the other. Because Latch's King's Bench report is undated, one cannot say for sure which court discussed the case first. I think, however, that the Common Pleas probably preceded the King's Bench. Sutton's King's Bench surmise has some additions and alterations of what, so far as one can tell, he surmised in the Common Pleas—signs suggesting an effort to strengthen his case in detail for a second try. If so, however, the effort had no effect.

The substance of the case in summary was as follows: Sutton, the Bishop of Gloucester's Chancellor, was "articled against" in the High Commission because he allegedly lacked the educational qualifications required by his office—mainly a doctorate in civil law, and it may have been claimed in addition no experience in the practice of Church law that might compensate for that deficiency. (If he was a Doctor at all, his degree may have been in divinity.) The attempt to prohibit the High Commission proceedings was based on the fact that Sutton had a freehold interest in his office and the theory that an ecclesiastical inquiry into his qualifications was unlawful because a finding of unfitness might lead to deprivation of his freehold by an ecclesiastical court. I defer the ins and outs of this issue and the question of exactly what the Common Pleas and King's Bench decided until later in this study. Minimally, the courts held that Sutton must try to justify his qualifications; the High Commission should not be prohibited here and now on the ground that an ecclesiastical court had no jurisdiction to ask him to,

The following seem to me to be the case's implications for the High Commission specifically:

(1) Mere failure to distinguish High Commission jurisdiction from ecclesiastical jurisdiction in general implies a theory that is not without credentials: viz. The High Commission is "just another ecclesiastical court" with intrinsic or *de jure* authority to entertain any ecclesiastical cause. That jurisdiction may have been limited by 23 Hen. VIII, c.9, as it was for regular ecclesiastical courts (but, as we have seen, that statute was not clearly held to apply to the High Commission.) The Commission may have no power to use secular sanctions, or statutory power to use them only in some of the cases in which its jurisdiction (with power to employ spiritual sanctions) was unexceptionable. (Regular courts of course had no power to use secular sanctions, except for a few ancient statutory exceptions, which since the Elizabethan settlement probably survived only as powers conferrable on the High Commission if the monarch chose to confer them.) These restrictions do not, however, mean that any type of legitimate ecclesiastical complaint was barred from the Commission.

Despite its history and merits, however, it would be surprising to find this theory embraced in Charles I's reign, or—if it were expressly proposed—accepted without controversy. That is because the Cokean period left a considerable deposit of authority for the proposition that 1 Eliz., in giving the monarch authority to constitute a High Commission, did not permit conferral of all kinds of ecclesiastical jurisdiction on it.

[121] Latch, 228. Undated, but early Car. K.B.

Rather, only criminal jurisdiction could be given to the new institution, and within criminal jurisdiction, only power to proceed against "enormous" criminal offenses. The "enormity" test may never have been universally and wholeheartedly accepted by common lawyers and all judges, but it was well-entrenched. It continued to be invoked and applied in some cases between Coke's departure from the Bench and the Civil War. Virtually by-passing it in so weighty a case as *Sutton*, and thereby implying the older theory—High Commission jurisdiction basically = ecclesiastical jurisdiction—may, however, signify a weakening of its influence.

(2) In my opinion, reasonable cases can be made for and against Prohibition in *Sutton* without leaving the High Commission's specific jurisdiction out of account. The case for Prohibition is probably the easier. On that side, one can invoke the idea that the High Commission was exclusively a criminal court and argue that Sutton was not charged with a crime. The High Commission's inquiry was predicated on the suspicion that he was exercising an office without proper qualifications; he was asked in effect to rebut the suspicion, but that is not the same as accusing a man of a crime. It is in fact not clear from the reports of the case that Sutton was thought to have done anything with the flavor of personal wrongdoing. For example, he may not have deceived the Bishop who appointed him and the Dean and Chapter who confirmed his appointment. They may have been satisfied that he was capable of performing the job despite his lack of a civil law degree. He and they may have believed, even if incorrectly, that they were not subject to rigid qualification-requirements. It may have been arguable as a matter of law that the decision of the Bishop and Dean and Chapter was final—or perhaps not examinable except by the diocesan authorities themselves—even if it was mistaken. Should Sutton fail to justify his fitness to continue performing the office, it is not inevitable that he would be subject to anything that can be strictly called a punishment, as a convicted criminal should be. For example, he might be in effect suspended from active exercise of the office without losing the title and emoluments. All these possibilities are at least intimated in the thorny actual discussion of the case, a discussion based on the assumption that the issue was the title of any ecclesiastical court to conduct a retrospective inquiry into Sutton's qualifications. Why could one not evade the question of ecclesiastical jurisdiction in general and merely argue that this case was not a criminal one appropriate to the High Commission? Or—if all "flavor of wrong" cannot be expunged from merely "doing something against the rules"—is it not at any rate arguable that nothing like an "enormous" crime, nothing with the *mens rea* quality a crime against God and the Church surely ought to have, was even indirectly "charged"? Should this argument be accepted and the High Commission prohibited, the open question would be whether regular archdiocesan courts could conduct the same inquiry into Sutton's qualifications as the High Commission undertook to, but that, by this argument, is not our case.

On the other side, a sensible case can be made against prohibiting the High Commission on grounds specific to it. "Criminal" should perhaps not be taken narrowly. Conceding that private litigation—where a plaintiff with an interest sues a defendant with an adverse interest—may not take place in the High Commission, the contrasting category perhaps need not be confined to manifest criminal prosecutions. There may be circumstances in which court-initiated or *ex officio* prosecutions are desirable for purposes other than their usual one of supplementing private prosecution for a clear

ecclesiastical crime. Although there is no 17th century vocabulary for this, what would now be called an "administrative" purpose may sometimes justify such proceedings. Seeing that, or investigating whether, the Church's judicial system is in competent hands, or functioning in accord with qualification-rules for its personnel, is a good illustration. It is hard to argue that the makers of 1 Eliz. actually contemplated this role for the High Commission, but it may not be unduly loose construction to see it as a legitimately modest extension of what they did contemplate.

The central reason for the Commission, after all, was to have an ecclesiastical court that could reach offenders who were not legally unreachable by regular courts, but were likely *de facto* not to be so reached. Besides the case of powerful or refractory people who had misbehaved in serious or complicated ways, it may be reasonable to count situations which, if remediable, called for measures beyond the regular courts' routine. The situation in *Sutton* may be of that sort. It has some affinity with cases in which inability to act owing to vested interests or legal confusion can be predicted for regular courts. (If the Bishop of Gloucester would not, or could not, or believed he could not, review his appointment of a Chancellor and possibly reverse it—and note that to do so he would have to get around his chief legal officer, Chancellor Sutton—a regular archdiocesan court would be the only body to take action if the High Commission is ruled out. It might be diplomatically difficult for the Archbishop, or the civilian judges who did his judicial work, to interfere with a Bishop, and they might have been unsure of their power to interfere, especially in view of Sutton's freehold. The High Commission has the advantage of being, formally anyway, an agent of the King and the whole Church rather than the Archbishop—in a sense a neutral supervisory body to deal with a tricky intra-Church problem.)

Although *Sutton* is a nearly unique example of the High Commission's playing the role of an "administrative" tribunal, there is some support in the case law for its doing so. Some decisions stretch the Commission's jurisdiction from "enormous crimes" properly so-called to aggravated cases of lesser offenses and to compounded misbehavior no single component of which would by itself rise to the level of a High Commission offense. Is that less of a stretch than allowing the Commission to take on disorders in the Church that hardly involve plain criminality, but which it might be practically the best agency to deal with? Whatever else—whether the argument for or against High Commission jurisdiction is the better—the case stands as a practice precedent for the Commission's undertaking to entertain a kind of "administrative" complaint and being allowed to without challenge to its specific jurisdiction.

This hypothetical debate can be given another dimension by taking the High Commission's sanctions into account. Roughly, without further elaborating the complexities of a figment: If one assumes the less-than-certain rule that the High Commission may use secular sanctions in any case within its jurisdiction, then more arguments for and against allowing the High Commission to touch such a case as *Sutton* can be imagined. In favor of prohibiting the Commission on grounds specific to it, one could urge the unfairness of exposing the party not only to deprivation of his office, but to fine or imprisonment as additional punishment, or as means of coercing him to cooperate with the inquiry into his qualifications which he claimed was beyond ecclesiastical authority altogether. Against Prohibition, it could be argued that a larger repertory of sanctions than regular courts possessed, if used to coerce the party's

cooperation rather than to punish, might help to bring about the sort of compromise that would perhaps be the best solution of the case. That would probably take the form of inducing Sutton to accept turning over the exercise of the office to a qualified deputy in exchange for retaining the office itself.

(3) As I mention above, there is in one report a glimmer of an argument specifically against High Commission jurisdiction. This occurs in Latch's report of the King's Bench case. Glanville, speaking from the Bar in favor of Prohibition, starts off with the main argument on that side in all reports: ecclesiastical jurisdiction is barred generally by Sutton's freehold. He then adds, however, the puzzling sentence "and the Court of High Commission is not confirmed by Act of Parliament." In the abstract, this statement seems nonsense. If anything was true of the Commission, it was that the tribunal had a statutory basis, even if the monarch could have created it without one. I can only take Glanville as saying that 1 Eliz. gave no express authorization for conferring on the Commission power to deal with unqualified Chancellors and the like. By contrast, the statute did authorize jurisdiction over heresy and its kin and added the vaguer category of "enormous" ecclesiastical crimes. Glanville's assumption must be that investigating whether such officers as Chancellors were qualified does not fall under the authorized categories of jurisdiction. The point is well-taken and clearly directed at High Commission jurisdiction specifically. It seems, however, to have got no attention or, if attended to at all, to have been rejected. The report only tells us that the King's Bench refused Prohibition without giving any reasons, and two judges, Dodderidge and Jones, who speak as individuals in the report confine themselves to some detailed reasons for holding that ecclesiastical deprivation of the office is lawful notwithstanding the freehold.

A scrap of further information from Latch may, however, suggest part of the reason why the High Commission's specific jurisdiction was not objected to very strongly, or at least not successfully. Latch gives a little more detail of the Commission's articles against Sutton than the Common Pleas reports. They recited *inter alia* that King James had ordered the Archbishop of Canterbury to grant commissions to examine defects of Chancellors and remove insufficient ones, and King Charles had renewed the order. There could perhaps be a "constitutional" dispute over the King's power to do this, but if one wants to avoid the political stratosphere, it makes a certain sense to say that if the King had lawfully authorized special commissions to look into unqualified Chancellors, the Archbishop was entitled to use the extraordinary agency that already existed. Doing so would be most tolerable if the High Commission *qua*—let us say again, "administrative" tribunal—must stick to ordinary ecclesiastical sanctions, which include deprivation.

In Smith v. Clay, [122] a clerical discipline case, the Common Pleas was inclined to prohibit the High Commission (in this case, exceptionally, the High Commission for the Province of York) but deferred final action in the Chief Justice's absence. A private complainant, from public spirit for all that appears, "articled" against Dr. Clay, the Vicar of Halifax. The charges can hardly be called non-criminal, but it may be difficult to promote any of Clay's alleged misdoings to enormity. Whether the suit aimed at

[122] P. 3 Car. C.P. Hetley, 3; Harl. 5148, f. 120. Nearly identical reports. Date specified in MS. only.

depriving Clay does not appear from the reports; it may have had no specific object, but merely invited the Commission to take such measures against him as it saw fit.

Clay was charged with an impressive catalogue of unseemly deeds, as follows: Reading the Bible in church in an irreverent manner, thus scandalizing the congregation; failing to preach himself on Sunday mornings, "against his oath" and contrary to #45 of the 1604 canons; taking communion cups and other holy vessels home, using them for profane purposes, and putting barm in them, "so that the communicants were loath to drink"; observing a recent fast proclaimed for a Wednesday on Thursday instead, "because it was a holy day" (I suppose because Wednesday was and Clay did not want to spoil the fun—?); keeping an adulterous drunkard as a curate or chaplain for a chapel of ease in the parish; failure to catechize in accord with Canon # 59 (mistakenly cited as #39 by the MS., referred to as "the parish canon" in Hetley)—instead Clay allegedly made do with buying a supply of one Dr. Wilkinson's catechism at 2d. apiece and selling copies to the parishioners for 3d.; letting parishioners on whom he was ordered by "commissions" to impose penances get off with a money payment; menacing parishioners, or allowing his servants to; "abusing himself" and "disgracing his function" by engaging in "base labors", specifically making mortar in a leather apron and, having himself taken a tithe pig from the sty, gelding it with his own hands; selling gifts of meat, fish, and ale instead of employing them in hospitality or giving them to the poor; ordering his curate to perform an unlicensed marriage in a private house; letting persons who were "peradventure" unlicensed as preachers and who were "suspected persons and of evil life" preach in the parish.

Serjeant Henden, Clay's counsel, sought a Prohibition on the ground that the High Commission could not by 1 Eliz. meddle with "such matters", "but only examine heresies and not things of this nature" (MS.—the printed version lacks the probably too restrictive "only heresies.") Such a casual invocation of the enormity test might not have satisfied some earlier courts, especially since Clay was so versatile a rascal as to suggest that he could have been too much for the diocesan courts to handle or too much on the good side of episcopal officials to expect discipline. Henden had one further arrow, however, which may have relieved him of need to make a careful case for the pettiness of Clay's offenses: Somehow the Lambeth (Canterbury) High Commission had been consulted about, or in any event found out about, the case and had certified to the York Commission that it would not itself, or York should not, proceed in such a matter; the senior Commission, so to speak, advised the junior to desist, which it would not do. One archdiocesan High Commission probably had no power to command the other, but this case shows that a consistent national policy was regarded as desirable, not least by the Common Pleas, which prohibited unless cause were shown to the contrary. The Prohibition *nisi* was probably a courtesy to the absent Chief Justice rather than a sign of doubt.

In another case from the same term as Smith v. Clay[123], a clergyman, Giles, sued Balam in the High Commission for assaulting him. Serjeant Athowe, arguing for Prohibition, admitted that the current patent purported in express language to give the Commission jurisdiction over assaults on clerics, but maintained that 1 Eliz. did not permit the patent to confer that power. The words of the statute, he said, allowed

[123] Giles v. Balam (or Baulam). P.3 Car. C.P. Hetley, 19; Harl.5148, f. 143b (specific date from MS. only.)

jurisdiction to be given only over "men who stir up dissension in the Church, as schismatics or new-fangled men who offend in this kind" (not a very precise definition of what the Commission's scope was, but Athowe's implication was clearly that violence toward clergymen could not possibly be in the same category as the offenses rather generally indicated.) Serjeant Henden, arguing against Prohibition, emphasized to start with that the ecclesiastical assault suit was for reformation of manners—in other words, essentially criminal. He conceded that Prohibitions had in the past been granted to stop suits of that character, instancing adultery and defamation. Those Prohibitions were proper, because when they were issued the patent did not include those offenses, but the present patent did. Henden did not say that any Prohibitions had been denied in adultery or defamation cases since the current patent was issued, but relied on the familiar general argument that 1 Eliz. annexed all ecclesiastical jurisdiction to the Crown and posed no obstacle to its being granted to the Commission, so long as the patent was express about the sorts of cases granted and so long as they fell in the *pro reformatione morum* class. The qualifications—"so long as"—are not as reported stated with great clarity or insistence, but it would appear that Henden was being careful not to make too extreme a claim. He cited the now-published 5 Coke—*Caudry* and Coke's commentary thereon presumably—in support of his argument.

Prohibition was granted unanimously. Only Chief Justice Richardson's individual opinion is reported. Richardson relied primarily on the old quasi-statute *Articuli cleri*: since that act expressly gave jurisdiction over laying violent hands on ~~an~~ a clergyman to the Ordinaries, allowing it to be given to the High Commission would unlawfully derogate from the Bishops' powers. The court as a whole broadened the basis for granting Prohibition by citing two express grants in the current patent which it regarded as invalid—"a stroke in the churchyard" (presumably meaning a violent act in that location) and substraction of tithes. "Strokes" in a churchyard seem to qualify well enough as criminal or partly criminal offenses; I am not sure how substraction of tithes differs from mere non-payment, a leading example of civil jurisdiction not grantable to the High Commission except on the most permissive theory, but perhaps it is narrower, with a colorable criminal element—retaking of tithes after they have been exposed and so "paid", which amounts to taking the parson's vested property. In any event, the court's ground was that if such cases were allowed to the Commission—and presumably assaults on clergy even without reference to *Articuli cleri*—"all the Ordinaries of England will be to no purpose." Giles v. Balam, in short, deals a pretty strong blow to the extendability of High Commission jurisdiction much beyond the generally conceded core of serious religious offenses.

Isabel Peel's Case and the Countess of Purbeck's Case (1628-29)[124], though separate, relate to the same situation. I shall discuss them together. *Purbeck* raises straightforward questions about the High Commission's powers; *Peel* is about whether a party proceeded against in the High Commission was pardoned by a general pardon—i.e., whether the party's offense was within the terms of the general pardon. The much more

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[124] For *Peel*: P. 4-T.4 Car. C.P. Littleton, 150, *sub nom.* Mrs. Peele's Case—dated P. 4 and confined to the first hearing of the case; Croke Car., 113-114; Hetley, 107-109—Mrs. Peele's Case, not specifically dated. For *Purbeck*: H. 4 Car. C.P. Hetley. 131; Littleton, 242, *sub nom.* Viscountess of Purbeck's Case.

thoroughly reported *Peel* does, however, contain comments bearing incidentally on the major issues concerning the High Commission. The reports of *Purbeck* fall in the term after the last of several in which *Peel* was debated, but remarks in *Peel* show that *Purbeck* was already launched and known to the lawyers and judges dealing with *Peel*. The connection between the two cases is that the Countess of Purbeck was accused in the High Commission of adultery with Sir Robert Howard, while Mrs. Peel was accused of pandering to the Purbeck-Howard affair, a celebrated high-society scandal. Because *Purbeck* is simpler and more important for the main High Commission issues, I shall discuss it first and then return to *Peel*, despite the slightly later litigative disposition of *Purbeck.*

The reports of *Purbeck* are close to identical, but with a couple of significant small variations. Neither (unlike the reports of *Peel)* gives any factual details about the Howard romance, only the legal skeleton of the case. The Countess was proceeded against in the High Commission for adultery, convicted, and sentenced. Only then did she seek a Prohibition, on the ground that the sentence was unlawful. I.e., there is no sign of an earlier attempt to prohibit on the theory that adultery was simply beyond High Commission jurisdiction. Such an attempt would have been unpromising, especially in view of the party's high rank and (as we shall see from *Peel*) the aggravated character of the offense in this case, although it is less than clear that jurisdiction over adultery was settled in the Commission's favor. (There is no evidence that Howard, a son of the Earl of Suffolk, was prosecuted.)

The sentence imposed on the Countess was that she be imprisoned without bail until she found sureties to perform the sentence and that she be fined 400 marks. We are told (Littleton) that she was "censured" in the High Commission, but no specific penitential acts enjoined on her are reported. Thus it is not clear whether "performing the sentence" would have required anything more than paying the fine. The most notable feature of the sentence is its specification that the imprisonment be without bail until the sureties were produced. I should very much doubt—as Justice Yelverton did in this case (below)—that the Commission had any authority to make such a provision, even if imprisoning the party were held unobjectionable *per se*. I.e., should she have brought *Habeas corpus*, I think the common law court in which the writ was returnable would surely have had its usual choice to release outright, remand, or bail, and that the anti-bail provision in the sentence would have been nugatory. Nothing, however, is said explicitly about the bail provision by Purbeck's counsel seeking Prohibition. One wonders whether it might not have reinforced his conviction, *arguendo*, that the sentence was utterly out of bounds, but he perhaps thought he had enough reason for that conclusion without belaboring this further point.

Serjeant Henden, representing the Countess, claimed Prohibition basically on the ground that the High Commission may not impose secular punishment, imprisonment or fine, in spiritual causes; excommunication is the only punitive measure, properly speaking, that it may take. (Penances and the like, though it is often convenient to refer to them as spiritual sanctions, were of course—to borrow a modern idiom—rather "treatment" than punishment.) Without some qualification or explanation, that is a strong proposition for 1629, but despite skimpy reports it is clear that Henden in fact admitted a degree of modification. For he says that 1 Eliz. did not alter the rule (only spiritual sanctions backed by excommunication for ecclesiastical offenses, whether they were

pursued in the High Commission or a regular ecclesiastical court) except for the "things there named." He does not specify what those things are, but he must mean heresy (plus perhaps a few other forms of comparably grave religious error and perhaps the special case of clerical incontinence.) The striking feature of Henden's argument is that the "enormity" test is by implication rejected, both as a test for High Commission jurisdiction and a test for power to use secular sanctions. With respect to the former, Henden shows no disposition to be concerned with whether Purbeck's adultery was grave enough for the High Commission; he appears to concede that as an accepted ecclesiastical offense it was as pursuable in the Commission as elsewhere in the ecclesiastical system. With respect to sanctions, he flatly rejects the notion that an ecclesiastical offense must meet a certain standard of gravity to be subject to them: the term "enormity" in 1 Eliz. is in effect reduced to a synonym for the exceptions "named" in the statute. This is "strong for 1629", but a leading lawyer did not think the argument futile; I do not think this study shows unambiguously that he should have, that unsettlement of the most fundamental issues about the Commission was firmly overcome so long as the tribunal lasted (i.e., until it was abolished by the Long Parliament.) Henden goes high in his argument, insisting that the "precious" liberty of the subject demanded his comprehensive rule against secular punishment and citing *Magna Carta*. By way of precedent he cites Smith's Case from 42 Eliz., and he makes the argument from 23 Hen. VIII against High Commission jurisdiction.

Following Henden's argument, observations by Chief Justice Richardson, Serjeant Brampston, and Justice Yelverton are reported. Richardson says that the first part of the High Commission's sentence is not part of the punishment. In other words, the Countess was not imprisoned punitively, but only to coerce performance of the rest of the sentence. To imprisonment for that purpose, Richardson had no objection; by implication, he would have considered punishing by imprisonment in the case at hand unlawful. We have seen that distinguishing between impermissible punitive punishment and permissible coercive had a pedigree, though to what extent it was accepted is unclear. Serjeant Henden does not touch on the distinction, but would presumably have said that the liberty of the subject demands *no* imprisonment by any court in ecclesiastical causes, apart from a handful in which the High Commission had express statutory authority to use the sanction. Besides embracing the difference, Richardson provides a little reasoning in its support. He points out that if instead of jailing Purbeck directly the Commission had excommunicated her, and then she had been committed to prison by *De excommunicato capiendo*, she would be in virtually the same position she was in now: to be released she would have to satisfy whatever ecclesiastical requirements she was excommunicated for not having satisfied, or else agree to a substitute satisfaction acceptable to the ecclesiastical courts, of which finding surety for performance, as prescribed in this case, would be an instance. In Richardson's view, the direct coercive imprisonment used in Purbeck was "not but agreeable to the ecclesiastical course." I.e., though technically different from the course used by regular ecclesiastical courts, it came to the same thing. (Needless to say, this equivalentizing can be criticized. Arguably, the "ecclesiastical course" is the course that must be followed; there is no basis for saying that 1 Eliz. permits a kind of short-cut around the letter of the due legal procedure, even if it would be a practical convenience without substantive side-effects. Actually, the practical equivalence is not perfect. *De excommunicato capiendo* was a distinct procedure, which

at least required that for an excommunicated person to be jailed he must be able to be apprehended, and there were checks on the writ such that the bare fact that X had been excommunicated by some ecclesiastical court was not an automatic guarantee that he would go to jail even if apprehended. Richardson's theory needs a premise to the effect that part of the purpose of the High Commission was to improve the efficiency of ecclesiastical procedure, as by imprisoning an excommunicated "bird in the hand" subject to being imprisoned by regular process eventually. Richardson may well have believed this, but he could properly be pressed to argue it.)

As to what he calls the second part of the sentence—i.e., the fine—Richardson had no doubt of its legality. (As I note generally above, if the sentence required any strictly spiritual act nothing is said of it. Richardson's position is clearly that the imprisonment was lawful as the means to insure payment of a lawful fine.) On this point, there is a significant difference between the reports. Littleton has Richardson saying that fining the party "is expressly within their commission", while Hetley has him saying it is "express within their power." The Littleton version involves the highly debatable premise that if the current royal patent authorized punishing by fine, doing so was beyond legal reproach. The Hetley version tends to make Richardson's meaning, "1 Eliz. authorized conferring power to fine on the Commission and the current patent confers it." Either way, the claim provides plenty to argue about. As *Purbeck* turned out, however, there was no opportunity to contest Richardson's claim or to review the cases in which it had already been contested.

Serjeant Brampston spoke next. I think it probable that he was speaking for himself, or using his Serjeant's privilege to advise the court without being retained as counsel for either side. Such interventions are not common in the 16th-17th century reports, but in several of them comments by Brampston are interspersed with the judges', rather than clearly placed among the arguments of counsel. Both his readiness to speak and the characteristic intelligence of what he has to say perhaps reflect an intellectual authority later honored by his appointment as Chief Justice of the King's Bench. In *Purbeck*, he points out a disarming feature of the case, which poses a grave problem for Richardson's approach: The Countess was a married woman; therefore the part of the sentence consisting in a fine was impossible to be performed (because money and chattels brought to a marriage by the wife were disposable by the husband); therefore, if subject to imprisonment to coerce performance of the sentence, the Countess could be perpetually imprisoned. Brampston states no further conclusion, but surely he thought it unacceptable to imprison coercively when the prisoner is releasable only on a condition which nothing in his or her power to do would satisfy.

Possible generalized conclusions from Brampston's point would include: (1) Whether or not the High Commission may impose a determinate jail sentence as a punishment, it may not imprison in the "equity style"—until the prisoner does something prescribed—owing to the risk that in some circumstances the required performance could be impossible. (2) The High Commission may imprison coercively (whatever its punitive resources) in the sense that Prohibition will not lie to block execution of a sentence ordering such imprisonment; the prisoner may, however, bring *Habeas corpus*, and if he does so he should be released if it appears that the imprisonment could continue indefinitely, or that release could not be achieved by the prisoner's doing an immediately doable act. (3) Imprisonment to coerce performance of a strictly spiritual injunction is

unobjectionable, because by definition what is prescribed must be doable; it is fining that introduces the possibility of perpetual imprisonment—certainly for a married woman for as long as she remains one, but also for insolvents and parties simply too poor to pay the amount of the fine .One response to this inconvenience is to rule out punishment by fine altogether; the less radical response is to rule it out at least in the paradigm case of the married woman, (Leaving open the question of how to deal with other forms of inability to pay has the disadvantage, however, that observing the basic principle—no coercive imprisonment unless the sentence is performable here and now—would in those other cases require fact-finding in a nebulous area to enforce the law by Prohibition. I.e.: That a party is a married woman is a simple and often notorious fact. Plaintiff-in-Prohibition could easily allege it if that were considered a desirable formality; it would rarely be controvertible. Other claims of inability to pay would tend to be resolvable only on Attachment, and a jury would have to make a difficult determination; meanwhile—unless bailed on *Habeas corpus*—the party would stay in prison, in effect suffering a covert and indefinite form of punitive imprisonment.) Serjeant Brampston's remark hardly commits him among these projected possibilities—and there may be further permutations—but it surely implies that Prohibition should be granted in the instant case.

Justice Yelverton, the last speaker, says that the High Commission could not imprison with a "no bail" stipulation because its patent gave it no power to do so. The minimum meaning of this I have already indicated: Prohibition need not, perhaps should not, be granted, but the High Commission may of course not extinguish the common law's power to bail on *Habeas corpus*. A stronger meaning would be that execution of the sentence should be prohibited for no further reason than the Commission's purporting to do something utterly *ultra vires*. Even if the impropriety could be undone on *Habeas corpus*, why should the party have an extra procedural step forced on her? Why should the legally transgressing court be able to detain its prisoner until she actually achieved release, with or without bail—an outcome which, if perhaps likely, would not be inevitable? Yelverton does not spell out the conclusion he wants to be drawn. He states his point conservatively in emphasizing the patent's failure to authorize "without bail" addenda to imprisonment sentences. That does not imply, however, that if the patent *had* authorized the addition "without bail" it would be within 1 Eliz. Yelverton had no reason to go into that. His opinion does imply that if the patent authorized imprisonment in general terms (as it probably did) adding "without bail"—a plain encroachment on common law territory—would be acceptable. (Ecclesiastical courts had enjoyed, and the High Commission probably did enjoy, on the basis of statute, at least within narrow bounds, some power to imprison. Giving it that power does not *per se* limit the common law in its administration of *Habeas corpus*. To do that, the High Commission would need both a sufficient grounding in 1 Eliz. and an express direction by the monarch pursuant thereto.)

On a day in the same term later than that of Henden's argument for Prohibition from the Bar and the three comments following it, Chief Justice Richardson is reported—with a slight variation between the two reports—as saying in effect that whatever else was true Prohibition could not be granted because the fine had already been estreated into the Exchequer. There is no sign of disagreement on the part of any other judge. The point is well-taken, for we have seen earlier indications that once a fine was estreated it became the Exchequer's business whether it was a legally collectable debt to the King. (How the

Exchequer would regard the fine in this case, or any High Commission fine, is uncertain for 1629, though there are earlier instances in which it appears to have disallowed fines imposed by the Commission.)

As to the slight variance between the reports: Hetley has Richardson saying merely that no Prohibition may be granted when a fine has been estreated, while in Littleton he says that the Commission "has such power" *and* that Prohibition may not be granted after estreatment. The difference is unimportant except for reconstructing the narrative of *Purbeck* in detail. We obviously have thin evidence for such a reconstruction. The following seems to me a reasonable speculation: When the case was first argued, the court was not full, for we hear from only two judges. Richardson and Yelverton could have granted a Prohibition, subject to motion for Consultation, if they agreed, but they did not agree in favoring one. Richardson was opposed and Yelverton more likely than not inclined the other way. They had heard from Brampston a strong objection to Richardson's view. The Chief Justice may not have been shaken in a perhaps stubborn unwillingness to prohibit the High Commission in this case—a visible one, in which the Commission had demonstrated its readiness to use its purported powers to bear down on a prominent and egregious offender, arguably just what the Commission was for. On the other hand, Brampston could hardly have avoided reinforcing Yelverton's doubts. Then, after the inevitable adjournment, the case was reopened. Not much time could have passed, for Hilary was a short term, but enough had passed either for the fine to be estreated or for the Common Pleas to learn that it had been. Although in the final entry of both reports only Richardson speaks, it is probable that he was speaking for the court, not for himself alone. That is to say, however strongly other judges may have opposed him on the merits, they had no choice but to acknowledge that estreatment mooted the merits that the case now belonged to the Exchequer. In Hetley's version, Richardson took the "cool" course and said only what the court held. In Littleton's, he could not resist adding that the narrow ground for decision led to victory for the side he still favored on the wider questions, so far as the court he presided over was concerned.

Peel involved the High Commission, but was not centrally a case on the Commission's powers. Rather, it was about whether a general pardon released Mrs. Peel from a sentence the Commission had imposed on her. In the course of discussion, however, some judicial commentary on the basic High Commission issues occurs. The reporting is confusing, especially Hetley's, though that report significantly supplements Croke, the best account of the case as a whole. Littleton is clear on its limited subject, the first hearing of the case.

Mrs. Peel was prosecuted and convicted in the High Commission for abetting adultery. (She had a house close by [*"prochein annex"* to] Somerset House, and there was a private passage through her residence into Somerset House. She permitted Sir Robert Howard to go to the Viscountess Purbeck by this passage for the purpose of committing adultery with that lady. Peel was accused moreover of being an active promoter of the illicit affair. (*Per* Littleton, she "abetted, caused, and procured adultery between them"; *per* Croke, she was "chief agent for their meetings at unseasonable times, by and through her private lodgings and passages, by means whereof they took their opportunities to commit adultery." In Croke's language, her sentence was for bawdry and "lenocynie" (anglicized form of the Latin *lenocinium*: the practice of being a go-between or procurer.) The carryings-on around Somerset House took place over a span of

about three years. Croke tells us that one Elizabeth Ash was joined with Peel in the sentence and had a Prohibition on the same surmise—she was probably a friend or servant of Peel's who collaborated in the mischief.

Upon conviction, Mrs. Peel was sentenced to a £200 fine and enjoined to make such penitential satisfaction in the Savoy Church as the Commissioners should appoint; she was imprisoned until she found sureties for performance of the sentence (or, alternatively, sentenced to imprisonment in addition to the other penalties—which construction one adopts makes a difference. See below for this aspect of the case.) At this point, she sought a Prohibition and, by *Habeas corpus*, release from imprisonment. Her ground was that the offense behind the sentence was pardoned by the general pardon of 21 Jac. Littleton's report notes that adultery itself was excepted from the pardon but abetment thereof was not, which suggests that it may have been urged against Prohibition that the exception for the principal offense carried incidentals such as abetment with it, but if so the argument got nowhere: On the first hearing of the case, the court simply assigned a day for the Commission to show why Prohibition should not be granted. Certainly later on and probably from the start, Mrs. Peel was represented by the ubiquitous Serjeant Henden.

There was ample debate when the case was reopened—lasting several days, Croke says, "chiefly upon the pardon." In the end Prohibition was granted, meaning "chiefly" that the pardon was held to apply to Mrs. Peel's sentence. The point was problematic, even given that abetment of adultery was covered, because the sentence expressly referred to acts committed after the pardon. I.e., the Commission claimed, and Peel conceded, that the offense had gone on for some time before the pardon, but it was claimed against Peel that it had also gone on for a while after; she, on the other hand, had averred in her surmise seeking Prohibition that she had not continued to offend beyond the date of the pardon. So was she released from her penalties in virtue of the pre-pardon offenses, which may have been the only ones committed, or still subject to them so long as her averment was not found true by verdict or by admission in common law pleading? There are numerous remarks in the reports on this quite technical issue. I do not think they add up to a completely clear presentation of both sides, but they do not as such matter for our present purposes. Prohibition cases dealing with the law on pardons, of which there are enough to constitute a separate topic in this study, have not yet been discussed. What do matter here are the implications of judges' and lawyers' remarks for the basic questions about the Commission's powers.

As reported by Croke, Justice Hutton made two general observations on the Commission's authority after giving his opinion that the pardon applied and therefore that Prohibition should be granted. (1) Peel's imprisonment until she found sureties for performance of the spiritual sentence and payment of the fine was unwarrantable. The reason for this, *per* Hutton, is that 1 Eliz. gave the High Commission power to fine or imprison "for the offense", but not "for the fine or until sureties found." Rather, the fine "ought to be certified into the Exchequer." Construing this remark and relating it to earlier law present some problems. The conclusion was probably established law: Granting the legality of imposing a fine, collection must be left to the Exchequer; the Commission may not imprison in order to put pressure on the party to pay or to guarantee payment by a bond. Punitive imprisonment is upheld, perhaps more explicitly than in any previous case. I doubt that Hutton meant to exclude coercive imprisonment *purely* to

coerce performance of a spiritual sentence, which would contradict most precedents, *sed quaere*. Whether, on the punitive side, he meant that the Commission must choose between a fine and imprisonment and may not use both instruments (in an alternative statement, that using both in the same case should automatically be interpreted as imprisoning to enforce the fine, whatever language the sentence uses) is uncertain. In any event, Hutton's opinion must, so far as the principal case is concerned, demand Peel's release on her *Habeas corpus*, though it does not say so in so many words. (Nor is there any other separate mention of the *Habeas corpus* in the reported discussion. It may not have been necessary for the Common Pleas to discharge her formally, given the decision that she was fully pardoned.)

(2) Hutton next commented, a little indecisively, on the High Commission's jurisdiction over Peel in the first place. He noted that the Common Pleas had ruled that adultery suits should go to the Ordinary, not the Commission, unless "exorbitant and notorious." I take his drift to be, though he does not spell this out, that even apart from the pardon there might well be grounds for Prohibition: If adultery is *ultra vires*, abetting it must surely be. Admittedly, the jurisdictional rule on adultery may be open to an exception for aggravated cases—here Hutton makes the only express acknowledgment from the Bench that I have seen of Dodderidge's argument from the Bar in Chancey's Case. If aggravated abetment is in the same class as aggravated adultery, the duration of Peel's misbehavior and the high-ranking principal offenders might suffice to promote her offenses to the "exorbitant and notorious." At the least, however, if she had sought Prohibition on substantive jurisdiction rather than the pardon, she would have had a serious case, which might tend to encourage, though it would not legally justify, taking the pardon in her favor. To reinforce his point about simple adultery, and by implication simple abetment, Hutton states the familiar rule that High Commission patents are bounded by1 Eliz. and may not confer any jurisdiction beyond what the statute allows to be conferred. He observes that alimony suits have no place before the Commission and cites several cases upholding the general principle that the statute controls the patent. One, Dr. Conward's (probably = Conway's below) cuts close to the present case and could plausibly be said to involve aggravation: the suit was prohibited even though the defendant was accused of pandering to his own wife. The other two citations are outside the marital/sexual category—Giles v. Balam (just above) about assaults on clerics and a Condie's Case on the election of a parish clerk.

Hetley has Justice Croke (the same person as the reporter) saying more firmly than Hutton-*per*-Croke that there were two separate reasons for Prohibition, the applicability of the pardon and the mere rule that the High Commission may not inquire into adultery. Croke-*per*-Hetley makes no gesture toward a loophole for aggravation. Rather, he simply cites the same case as Hutton-*per*-Croke *sub nom* Convey's or Conway's with a bit more detail. Conway and his wife were sued together, she for adultery with Sir Richard Blunt and he for serving as pander; Prohibition was granted. The precedent was clearly being used to show that adultery and pandering to it are both beyond the Commission's jurisdiction and perhaps to imply that as no aggravation factor was brought up in that case none could plausibly be in this. Croke-*per*-Hetley goes on to say, like Hutton *supra*, that the High Commission could not touch alimony and, having asserted the general principle that the patent without the statute's support cannot confer jurisdiction, to cite the parish clerk case *sub nom* Condith's, also brought up by Hutton-

per-Croke, explaining it. (It was properly a case on creating disturbance in a church, behind which lay a dispute over the method for choosing a parish clerk. The 1604 canons prescribed that the minister should select this official, but in many places it was claimed that there was another method based on local custom. Regular ecclesiastical courts were frequently stopped by Prohibition from giving effect to the canons pending common law trial of whether the alleged custom existed. So far as I am aware, the High Commission was never involved in mere electoral disputes. I take it that *Condith* acquired a criminal flavor, and the Commission some pretense to jurisdiction, because in that case electees by both methods tried to exercise the office at once—each setting his own psalms for the congregation and so disturbing good order. The suit was prohibited because the matter was too petty for the Commission, whatever the patent may have said.) At another point in Hetley, Justice Croke expresses for himself essentially the view he attributes as reporter to Hutton that the sentence to pay a fine and make submission (to spiritual punishment) *and* be imprisoned until security was found was "void". Justice Hutton speaks twice as an individual in Hetley. (1) He cites a case from 44 Eliz. as holding that the High Commission may only fine for heresies, schisms, and errors (which may be a more stringent restriction than he would have insisted on himself.) (2) He says in general terms, without reference to marital misconduct cases such as the one at hand, that 1 Eliz. should be expounded according to "the meaning of the first intent", which was to provide a corrective to the Bishops who remained Catholic at Queen Elizabeth's accession. The only example he gives of the principle's effect—excluding petty offenses from the Commission—is an (undated and unnamed) prosecution for working on saints' days) , but in connection with that he provides a valuable datum: The saint's day violator was fined and the fine estreated, but *the Exchequer held upon argument that the High Commission proceedings were void*. This remark confirms scanty earlier indications that the Exchequer played a significant part in limiting the Commission.

The small variances between the reports do not matter very much. Justices Hutton and Croke were clearly enough in substantial agreement on all the issues in *Peel*. Scattered remarks in Hetley (which I shall discuss below) tend to put Justice Yelverton on the same side across the board. Justice Harvey is only reported as agreeing that Peel was fully pardoned; there is no indication of whether he thought that the suit against her should be prohibited even in the absence of the pardon. Chief Justice Richardson may have been the odd man out. Most of his remarks are directed toward trying to make some kind of case for the High Commission, but whether he ultimately dissented is uncertain. By an unusual reportorial move, Hetley cuts us off from knowing all of what the Chief Justice had to say, though he gives some of it. The reporter's words are: "Richardson objected divers things [to various arguments by counsel and judges] with much earnestness, but so apparently contrary to the law, that I have omitted it." The following are the comments from Richardson that Hetley does report: (1) In response to Justice Croke's saying the sentence was void because of its demand for security backed by imprisonment, he objected that the Commission had no other means to make the party pay her fine and added that if she would pay she would be discharged. I suppose that comes to suggesting that although it might have been improper to imprison her on top of the other penalties, using imprisonment just to get the sentence performed was legitimate. The rest of the judges replied, conventionally, that estreatment into the Exchequer was the proper procedure. (2) Against Hutton's statement that fines were lawful only for

serious religious offenses, he said that I Eliz. provided that the Commission might proceed according to the tenor and effect of the patent. He may have meant that the patent could confer jurisdiction over any ecclesiastical crime, or only that it could confer somewhat wider jurisdiction than the narrowest interpretation of the statute allows, and with jurisdiction, secular sanctions. (3) A little later he perhaps adopts the less extreme meaning of (2) by noting—relevantly enough—that by the words of the statute the Commission was not confined to heresies and schisms, but permitted to proceed against "abuses, contempts, &c." (4) In response to Hutton's saying in effect, with a citation, that at least some offenses are too petty for the High Commission, Richardson revived Justice Walmesley's philological argument that "enormity" covers more than major religious crimes because it means "*quicquid est contra regulam et normam Juris*". There is no telling whether Richardson would infer from this definition that anything in any sense illegal by ecclesiastical law was conferrable on the High Commission or would see some limiting implication in it—say to the criminal part of that law. Justice Yelverton promptly rebuffed Richardson's suggestion, saying that an "enormous" offense means only a great one, for "so in common acceptance it imports." (5) At the end of the discussion reported by Hetley (which preceded the court's delivering a decision), Richardson makes what looks like an about-face by saying "They should proceed by excommunication and not fine and imprison." One can only speculate about what was in his mind. Could he have thought, after sparring with his puisne judges, that the best hope for the High Commission lay in the old Common Pleas doctrine that the tribunal's jurisdiction extended as far as ecclesiastical law but its sanctions no farther than those available to other ecclesiastical courts? Going back to the old ways would have entailed granting Peel's Prohibition and releasing her from jail—in other words, the Commission's losing the present case—, but it would in future cases make room for a useful High Commission role in such situations as flagrant abetment of adultery, especially among the sort of people the Ordinaries may have found hard to deal with. As to whether the final decision to grant Prohibition was unanimous, all one can say is that aside from most of Richardson's comments in Hetley there is no evidence to the contrary. Croke simply gives the result—Prohibition granted—without any indication of ultimate disagreement.

A few features of *Peel* remain to be noted. As I intimate above, there might be a shadow of doubt whether Justice Yelverton was completely in line with Croke and Hutton, though he certainly agreed that Prohibition should be granted. From a couple of remarks in Hetley, it is clear that he thought the pardon freed Mrs. Peel from any obligation to pay the fine and any liability to imprisonment. He does not say that even in the absence of the pardon the Commission would have lacked jurisdiction over her case or at least power to use secular sanctions in such a case. One remark may suggest that he was not entirely opposed to such sanctions, for he seems to base his objection to the demand for security and the use of imprisonment on the form of the sentence rather than the mere illegality of the sanctions. He says that the sentence *was* to a fine and penance, and that the security-and-imprisonment clause on top of that was void. Per Serjeant Brampston as well as Henden on Peel's side and Serjeant Atthowe for the Commission, one Sir Wil. Chamcer is said to have been both fined and imprisoned for adultery and that "all the judges of England" held that the Commission could proceed by fine and imprisonment. This looks like a not quite accurate reference to *Chancey* drawing on the extrajudicial aftermath of that case. Taken as a comprehensive view of what the

Commission might do, it was not followed in *Peel*, having probably been cited by the Commission's counsel.

Howson's Case, decided in the same term as Mrs. Peel's,[125] is close in character to Smith v. Clay above. The High Commission for York proceeded on libel against another unedifying vicar. Howson's sins were the following: non-residency and neglecting his cure (Littleton specifies that Howson was Vicar of Sturton, Nottinghamshire, but lived in Doncaster); wearing his hat during divine service; offensive behavior when the High Commissioners visited his church (he spoke too loudly and "gave a scornful answer" when he was reproved for doing so); spitting "in abundance" on the pew of one Wright when Wright and his wife were occupying it; saying after that, "with a common voice" (I suppose in a vulgar and offensive tone—?), that his own wife was as good as Wright's (i.e., her social equal); making jests in a sermon, which the next words are presumably meant to illustrate (he said that Christ was laid in a manger because he had no money to pay for a chamber, and attributed his exclusion to the knavery of innkeepers—as it happened Howson was at the time "in contention" with an innkeeper in the parish); (presumably on a different occasion than the spitting episode) during divine service and to the disturbance thereof, thrusting open the door of Wright's pew and saying that he (Howson) and his wife would sit there.

Without any sign of divided opinion, the High Commission proceedings were prohibited. Two of Howson's offenses are singled out in the reports as in the court's view not punishable by the Commission, non-residency and breaking into the Wrights' seat during service—perhaps as not enormous enough, though perfectly good ecclesiastical complaints in a regular court, but the reason might be legislative secularization of non-residency and common law interests in the use of pews. For the rest of his offenses, the judges said, he could or should be bound to good behavior. I take that to mean that Howson's critics should go to a Justice of the Peace and seek a plain secular good behavior bond. I am not sure why the offenses should be divided into two classes. In any event, the Common Pleas was unwilling to concede to the Commission any powers of clerical discipline in multiform and perhaps refractory situations where the particular acts of wrongdoing were run-of the-mill.

Aldam's Case is also from Trinity, 1628.[126] Here the High Commission suit was for adultery, drunkenness, blasphemy, and speaking against the King. The last of the offenses took a curious form: Aldam had seen a deed dated by the regnal year of Charles I and said "Charles there was one Charles an Egyptian." I can only suppose that this utterance was taken to say something like, "Who is this fellow Charles? The gypsy of that name I once heard of?" Prohibition was denied. Littleton had it privately from Justice Harvey that the reason for the decision was "such scornful words against the King." I am inclined to take the court as indulging in a little innocuous politics. The charges of adultery and blasphemy, though hardly of drunkenness, might perhaps with some plausibility, though not a lot, be held grave enough for the Commission; "speaking against the King" in the way Aldam spoke might have been hard to make out as secular sedition. The "right" solution of the case would probably have been *quoad* the first three

[125] T. 4 Car. C.P. Littleton, 152; Hetley, 104. Reports nearly identical; dating from Littleton.
[126] T. 4 Car. C.P. Littleton, 156.

offenses Prohibition for want of enormity and *quoad* the fourth Prohibition because the matter belonged to the common law. A dose of the High Commission, however, would be sharper medicine for Aldam than he would be likely to receive otherwise, and the judges can hardly be blamed for preferring to avoid the aspersion that they had let a bad apple go, when he might—if not merely inebriated—have been a bad subject too.

In Larkin's Case, from the next term,[127] the Common Pleas prohibited an alimony suit, but on grounds that avoided denying the High Commission's jurisdiction over alimony. It appeared from the two parties' claims in the suit that Larkin himself caught his wife in adultery, whereupon he beat and threatened her; she then left him and sued for separate maintenance. The suit was therefore prohibitable on the theory that an adulterous wife who has suffered lawful chastisement and left the husband's house on her own motion has no claim to alimony. (This harsh doctrine may not have been categorical in all circumstances, but I take it there was nothing on the record amounting to a sufficient claim of excessive cruelty in the justifiable beating or of threats constituting a "clear and present danger" to the wife's physical safety.) The judges were unanimous for Prohibition, but Chief Justice Richardson "commanded" that it be express in the court's order that the action was taken "on view of the articles & hearing the articles of both parties." In other words, the court prohibited in awareness of the full state of the case as pleaded, not because it knew, or pretended to know, only that the suit was for alimony. Richardson may not have agreed with the rest of the court that alimony as such was *ultra vires*; it was entirely proper for the others to go along with his insistence, since grounds that would be good against any ecclesiastical court were the best reason for prohibiting the Commission.

Coventry and Stamford's Case (1628) [128] is reported in its first phase by Littleton. Another report by Hetley *sub nom*. Coventry's Case is clearly of the same controversy at a later stage of the litigation. One aspect of the case is discussed in the End Note to Ch. 2 above , because it involved the statute of 23 Hen VIII, c. 9 (specifically, power to remove a suit from a regular ecclesiastical court to the High Commission.) I shall first follow Littleton and then Hetley. Though I shall indicate how the issue involving 23 Hen. VIII fits in, the reader is referred to the End Note for the details of that aspect.

Littleton initially states the case without reference to the fact that it had been removed to the High Commission—as if, in other words, it had been brought there originally. The first round of discussion by counsel and the judges dealt only with whether the suit was intrinsically appropriate to the Commission—as if, again, it had been started there.

Coventry was a deputy of the Undersheriff of Essex. (Stamford, the co-defendant, is not identified. He was probably a sub-deputy of Coventry's who assisted him in making the arrest whose legality was the substantive issue in the case.) When a minister named Gumell was in his church on Sunday at the time of divine service, Coventry entered the church "with Pistol, Sword, and Baston" and stationed himself under Gumell's pulpit. The congregation was "amazed" and asked "them" (Coventry and, presumably, his sole assistant, Stamford) what they meant. They replied that they intended to arrest Gumell at the suit of one Larkin. (I.e., their business was to effect an

[127] M. 4 Car. C.P. Littleton, 194.
[128] M. 4 Car. C.P. Littleton 194; Hetley, 124 (not specifically dated.)

ordinary civil arrest, probably on behalf of an unsatisfied creditor.) Then they said that if he would not come out of his pulpit they would pull him out. Gumell, "being terrified", came out before dismissing the congregation (thus while divine service was still going on) and was arrested.

How just this account of the events reached the court and the reporter is mysterious, because the case arose from Coventry's and Stamford's attempt to get a Prohibition. They are unlikely to have put the colorful side of Gumell's seizure into their surmise, as opposed to saying only that they were sued for laying violent hands on a clergyman, they being officers performing their lawful duty, for which they were not answerable in an ecclesiastical court, or at least not in the High Commission. (Littleton's statement of the facts ends by saying "and so" violent hands were laid on Gumell. This indicates that that was the core of the charge against Coventry and Stamford. They would naturally have surmised something of their grounds for claiming that they were improperly pursued for this *prima facie* ecclesiastical offense, but hardly—one would suppose—with embellishments of their violent behavior. As will appear, however, they could well have had reason for admitting in their surmise that their action involved disturbing divine service, for one part of their contention was that that element turned the offense into a secular one.)

In any event, Serjeant Ayliffe, launching the debate by arguing in favor of Prohibition, made two separate points: (1) The offense Coventry and Stamford committed was great, but was not heresy or schism and therefore not within the High Commission's jurisdiction. This is of course to adopt the narrowest construction of the authority 1 Eliz. allowed to be conferred on the Commission. (2) Coventry and Stamford should not be being sued in any ecclesiastical court because the statute of 1 Rich. II, c. 15, subjected the specific class of act charged against these parties to secular remedies. (The statute provided, roughly, that officers who make an arrest which in other circumstances would be perfectly lawful in or near a church during services, or just before or after services, should be subject to imprisonment and fine, and should be liable to compensate the victim civilly. For a detailed analysis of this statute and its predecessor, 50 Edw. III, c.5, see the case of Pit v. Webly, above in this chapter, where that legislation figures in a central, though different, way.) As Ayliffe says expressly, 1 Eliz. left the 14th century statute intact. Laying violent hands on a clergyman and interrupting divine service remained ecclesiastical offenses, whether or not suitable to the High Commission, but if they were committed by arresting officers they were preempted for the common law by force of 1 Rich. II.

The first speaker after Ayliffe was Serjeant Brampston. I note in *Purbeck*, above, that Brampston sometimes spoke for himself rather than as retained counsel, and so he may have here, especially since on one point he disagrees with Ayliffe, although his remarks put him on the same side with respect to the basic issue. Brampston says first that the parties' offense was "enormous", but not punishable in any ecclesiastical court. By using the word "enormous", he was probably implying that if the parties were pursuable in ecclesiastical courts at all they could be proceeded against in the High Commission. That is to say, Ayliffe's extremely narrow view of High Commission jurisdiction was mistaken; wherever the line between "enormous" offenses appropriate to the Commission and lesser offenses should be drawn, the parties' conduct here was within the bounds of "enormity". This position is more realistic, in the light of numerous

cases, than Ayliffe's ultra-restrictiveness. Having so said, however, Brampston goes on to make the case against ecclesiastical jurisdiction altogether. He does so with at least a different emphasis than Aylliffe's. Rather than simply claiming that 1 Rich. II takes away ecclesiastical jurisdiction, he says that if the parties were to be fined or imprisoned by an ecclesiastical court they would be liable to being fined and imprisoned again at common law. The implication is that such double exposure would be unlawful; clearly, in Brampston's opinion, neither ecclesiastical nor lay courts could be prevented from imposing punishment by a showing that the other system had already done so. Since, however, the High Commission was the only ecclesiastical court that could possibly fine or imprison for the offense in question here, Brampston's second point is not perfectly compatible with his apparent earlier statement that the offense was simply not punishable in an ecclesiastical court. I.e., why should the parties not be pursued in an ordinary ecclesiastical court and punished spiritually—the only way they could be punished by such a court—over and above secular penalties that might be or had been imposed at common law pursuant to 1 Rich. II? Indeed, why should the High Commission not proceed so long as it did not use its secular sanctions, but only the spiritual ones which it undoubtedly had as well? I suspect that the reporter, in letting this contradiction appear, may have slightly garbled the argument he heard. In any event, "double exposure" became an important motif in the case; Brampston first broached it.

In the first round of judicial discussion, remarks by three judges are reported. (1) Justice Yelverton spoke briefly twice. The first time, in the immediate light of Brampston's observations, he says that the place makes the offense ecclesiastical. I.e., he expresses skepticism toward Ayliffe's and Brampston's suggestions that ecclesiastical jurisdiction is simply ruled out in this case; *per* Yelverton, it is not ruled out because the offense was at least partly committed *in* a church; ruling it out in other situations covered by 1 Rich. II need not be debarred. There is no necessary implication that High Commission jurisdiction should be upheld. Yelverton's second speech, which follows Hutton (just below), is cryptic, perhaps misleadingly reported. Yelverton emphasizes that the offense in question was a "great abuse" then adds—with a "yet" to introduce the point—that 1 Rich. II and 1 Mary c.3 "aid all there is in this case". What could that mean? It rather sounds as if Yelverton now wanted to retreat from his previous suggestion that secular law had *not* simply ousted all ecclesiastical jurisdiction—*sed quaere*.

(2) Justice Hutton observed that such offenses as the one in question here would have been punished in the Star Chamber, and that there were several precedents of this. The rest of the court conceded the point. The Star Chamber practice in itself need have no particular significance. By virtue of the medieval legislation, abusive behavior by officials of the sort displayed by Coventry and Stamford was unquestionably a secular offense, and it is unsurprising that it should commonly, perhaps exclusively, have been prosecuted in the Star Chamber when it was prosecuted (as a major misdemeanor subject to indefinite non-capital punishment and also to private damages, it is a typical Star Chamber offense.) Hutton may have meant to suggest that the practice tended to support the thesis that ecclesiastical jurisdiction of any sort was taken away, but it need not imply that, and Hutton expresses no such conclusion.

(3) Chief Justice Richardson also spoke twice. His first, brief, contribution was only to say that if the offense here was ecclesiastical it was "enormous" and thus fit for

the High Commission (contrary to Ayliffe, but not to Brampston.) His second speech, after Hutton's reminder of the Star Chamber's role, is more extensive. He acknowledges that Star Chamber jurisdiction is perfectly appropriate, while noting that ordinary common law procedure by indictment was also available. He goes on to say that if someone exposed to secular process should be fined or imprisoned by the High Commission he would be punished twice for the same offense: the High Commission punishment could not be pleaded in the Star Chamber nor to bar an indictment. The rest of the court agreed with these points as such. Richardson does not say in this speech that double punishment would be intolerable, but there is no doubt that he and his colleagues thought so. Richardson's distinctive view turned out to be (below) that the High Commission should not be prohibited until it actually *did* impose secular punishment. That is contrary to a vein of opinion among the judges that immediate Prohibition was the better course, but there was no dispute about the unacceptability of double secular punishment.

With this much discussed on the apparent assumption that Coventry and Stamford were prosecuted in the High Commission originally, Justice Hutton called the court's attention to the fact that the case had actually been removed to the Commission by request of a diocesan judge in whose cognizance it originally fell. One cannot be sure whether the Common Pleas was unaware of this feature until Hutton noticed it or simply ignored it because the first point to get clear was whether 1 Rich. II ruled out ecclesiastical jurisdiction altogether. Inasmuch, however, as there was not consensus that ecclesiastical jurisdiction over such a case was flatly and long-since abolished, the fact that the court was dealing with a removed case had to be taken into account. Hutton may have so realized when he introduced the fact. The removal raised two questions: (1) whether suits could ever be removed to the High Commission, as opposed to regular ecclesiastical courts other than the one where the suit was commenced; (2) assuming removal to the Commission was not altogether banned, whether, to be removed there, the suit must be one appropriate to the Commission if originally brought there. These questions depended on the meaning of the statute of 23 Hen. VIII, c. 9. That act preserved a longstanding power to remove ecclesiastical suits at the request or with the consent of the initial judge, subject to some restrictions, concerning which there was a good deal of litigation. See the End Note to Ch. 2 for these matters in greater detail. For present purposes, the point to keep in mind is that the remainder of the discussion of *Coventry* intermixed consideration of the removal power with the issues already broached—whether the offense in question was within ecclesiastical jurisdiction at all, and if so whether it was a High Commission offense.

The rest of Littleton's report contains several speeches by the three judges already heard from—Richardson, Yelverton, and Hutton:

Richardson adheres, with greater explicitness, to the position he had already adumbrated: no objection to the High Commission's handling the case, provided it uses only spiritual sanctions; Prohibition should not be granted until secular ones were actually imposed. Removal to the High Commission seems in itself to have posed no problem for Richardson. (It should be noted that the offense in *Coventry* was first presented at an episcopal visitation and then remitted by the Bishop to the Commission. Although none of the judges comments on this circumstance specifically, it does guarantee that the case removed was criminal. Richardson need not have thought that

civil cases could ever be removed to the Commission, much less that their removability was virtually obvious. He had already said that Coventry's and Stamford's offense met the enormity standard for High Commission matters, with which he would appear to have had no quarrel.) As against what seems a flat assertion by Yelverton (below) that 23 Hen. VIII did not permit removal to the High Commission, Richardson made the general point that the statute did not, after all, ban removals-with-consent completely. He gave an example of the sort of case in which the power to remove made especially good sense and would surely be upheld (where the parties are fugitives, all of whom an Ordinary could not reach within his diocese.) Though it is not spelled out, Richardson's thought may be that a criminal case as grave as Coventry's and Stamford's—involving officials subject to secular punishment, whom diocesan judges might not be sure they were entitled to punish spiritually, and who might be resistant with their superiors' support—would be, like the fugitives case, a fairly obvious candidate for removability. Of course either case *could* be handled by removal to a regular archdiocesan court, but it makes sense to argue, as it were, that since the High Commission existed it might as well be used for the function it specialized in—seeing that serious ecclesiastical criminals with good prospects for evading local ecclesiastical justice did not get away with it. Finally, Richardson contradicts the position that 1 Rich. II took away ecclesiastical jurisdiction operating with spiritual sanctions over offenses covered by that statute. The statute's purpose was to increase the punishment, to see that "such offenders could be smitten with two swords."

This last point of Richardson's is quite persuasive. While double secular punishment for one offense would clearly be unacceptable, why should Parliament want the offenders it had singled out as deserving secular punishment to escape spiritual correction if the ecclesiastical authorities thought smiting them with the spiritual sword would be to their religious benefit? To get around this argument, Justice Yelverton came up with a plausible, though shaky, counter-position. Yelverton was indecisive in the first round of discussion, but in the second his opinion is strong and clear. He now shows what looks like an inclination to hold that 1 Rich. II simply terminated ecclesiastical jurisdiction over the offenses it covers, for he emphasizes that the statute was made at the prelates' request, as if they wanted to be relieved of such cases. After Richardson's "two swords" speech, however, he retreats, conceding that Ordinaries could proceed spiritually against statutory offenders. The High Commission, on the other hand, could not so proceed. One reason for that, Yelverton now asserts, is that removal to the Commission is simply not permitted by 23 Hen. VIII. That is a respectable position, backed by some authority (see End Note, Ch. 2.) Yelverton does not, however, go into arguments for the construction. Rather, he relies on the ingenious point at the center of his final stance in Coventry: It should be presumed that if a case is before the Commission, either originally or by removal, secular sanctions will be used. Therefore, the only way to avoid double secular punishment is to prohibit the Commission from entertaining any suit for offenses subject to common law or Star Chamber process. (Unless the secularizing statute preserves ecclesiastical jurisdiction with an express proviso that only spiritual sanctions be used? Possibly, but Yelverton adds no such qualification.)

It is certainly a good question, as Richardson insists, why the presumption Yelverton proposes should be made. Yelverton does not say something like, "It almost always happens, everybody knows—persons convicted in the High Commission are in one way or another fined or imprisoned, or at least threatened with those sanctions unless

they perform spiritual acts they are ordered to do for their correction, or unless they put in a bond to guarantee performance." (What the actual practice was would be hard to ascertain historically, and a 17th century common lawyer would be unlikely to have more than an impression.) Legally, the cases above show that there was less than perfect judicial consensus as to whether, granting the High Commission's jurisdiction, it could always, sometimes, or –except perhaps in a heresy or schism case—never apply temporal sanctions. Despite these difficulties, however, Yelverton's "presumption" theory has a certain plausibility, which I would state as follows: After all, starting a case in the Commission or removing one there is usually, though not necessarily, motivated by a desire to see an ecclesiastical offender punished more severely than by spiritual sanctions, or at least coerced more effectively to perform a spiritual injunction than the regular course of excommunication could insure. It makes better sense to assume that the Commission will do what it primarily exists to do, even though what is assumed is not a certainty, than to stand by until the Commission has wasted time and energy working out whether to impose secular sanctions that cannot possibly be enforced (i.e., must be blocked by Prohibition or another process, such as *Habeas corpus*.) Owing to the threat of double exposure, the present case is paradigmatic for a sentence that "cannot possibly be enforced." In more routine cases, would it not be in the interest of efficiency for the common law judges to ascertain here and now whether a majority would object to secular sanctions' being used in a given suit, and if it would to prohibit at once? The alternative is treating jurisdiction as a separate issue, possibly leaving the suit before the Commission, then later—when a secular sanction has been imposed—considering its legality separately, perhaps with the result of having to prohibit a suit in which Prohibition had been once refused, or to liberate a prisoner on *Habeas corpus* when he could have been spared the trouble and expense of launching a legal proceeding.

Yelverton does not state such a rationale, but he must have had something like it in mind when he proposed a rather strained presumption. All he is reported as saying to justify it is that it resembles the presumption that ecclesiastical courts will not admit any plea against tithes. At the present stage of this study—for tithe law as a whole has not yet been analyzed—I can only suggest wariness of the analogy. It is true that persons sued for tithes in kind could have a Prohibition merely by surmising that the tithes were commuted by *modus decimandi* or composition real. Claiming such a commutation is nearly all that making a "plea against tithes" could mean, since claims to complete exemption from tithes were by the common law simply not available to laymen. If a layman sued for tithes were to claim a total exemption as his defense in an ecclesiastical court, I do not think there would be any basis for stopping the suit, though the plea would in all probability be overruled. For another angle, by the better opinion attempts to prohibit tithe suits on the ground that the current parson had agreed to take a commutation in lieu of the tithes in kind ought not to succeed; taking that for law, though the matter was controverted, one must say that ecclesiastical courts were left free to recognize such bargains or not to; the parishioner's common law protection, if the parson did recover the tithes in kind contrary to his agreement, was an action for breach of contract. The picture is somewhat complicated by the rule that ecclesiastical corporations owning land could enjoy complete freedom from tithes. When such exemptions were claimed, the common law did frequently preempt the case by Prohibition, but hardly because it was presumed that ecclesiastical courts would not entertain pleas "against

tithes." Rather, the claims of these privileged institutions were usually based on alleged immemorial custom or on statutory guarantees of exemptions originally granted by the Pope. Over disputed customs and statutory titles, the common law simply asserted exclusive jurisdiction. Ordinary *modi* too were custom-based. The best reason for taking claims to them away from ecclesiastical courts was just that a custom disputed as to fact must be tried by jury at common law. The connected question whether an alleged custom is reasonable or valid on its face, whatever the *de facto* practice from time immemorial, standardly belonged to the common law—almost always, in tithe law, questions of this type were about whether an alleged *modus* was a disguised claim to total exemption from some tithe.

In short, no presumption about what ecclesiastical courts would do with tithe litigation is necessary to account for how those courts were restricted. At best there is a superficial parallel between Yelverton's proposed presumption and—let us say—what could be conceived as a sort of practical presumption that ecclesiastical courts were too apt to favor the tithe-recipient over the tithe-payer to be trusted with pleas that tithes claimed were not owed. Both presume what may tend to happen but need not. The High Commission perhaps as a rule used its secular sanctions when it had possession of a suit, perhaps tended to the view that if it took a case at all, or was allowed to by the common law courts, the matter was severe enough to be more stringently dealt with than by regular ecclesiastical sanctions. Nothing, however, prevented the Commission from making the judgment that spiritual sanctions would be sufficient correction for a convicted defendant, or appropriate on other grounds, such as avoidance of prospective double punishment. Estimation of how, over time, the Commission would choose among its remedies and coercive tools could be no more than guesswork. Similarly, if ecclesiastical courts had been given more scope to handle pleas "against tithes" than they were given, it is by no means certain that they would have overruled such pleas massively. Ecclesiastical lawyers tended to insist that reasonable commutations duly established by their standard of prescription—which was not in principle as strict as the common law's, though perhaps more likely to be scrupulously applied than the common law's were by juries of lay tithe-payers—would be respected. (Although in this passage I project beyond the cases I have analyzed systematically, the first three volumes of this study contain a great deal of material on tithe law, some of it touching the issues discussed here. The reader is referred to the index covering those volumes.)

When Justice Hutton reminded the court that it was dealing with a removed suit, he said that removal to the Commission at least of offenses presented at visitations was precedented and in his view unobjectionable. In the judges' later discussion, however, he says that the question before the court reduced to whether 23 Hen. VIII permitted removal to the High Commission and announced his opinion that the statute does not so permit. Then his thinking underwent another shift—see just below.

Littleton's report ends by summing up where the judges stood. They were divided 2-2 and therefore unable to grant a Prohibition at present. Justices Yelverton and Harvey (who does not speak individually) favored immediate Prohibition. Chief Justice Richardson of course opposed granting a writ until the Commission gave sentence imposing secular punishment. Hutton now said that he was in doubt. All he says by way of justifying his doubts is that "they"—presumably the Commissioners—were proceeding for *reformatio morum*, which is too vague to explain much. Perhaps he was

not quite sure of the interpretation of 23 Hen. VIII he had last seemed to embrace. Even if that statute did not authorize removal to the Commission as liberally as it authorized removal to regular ecclesiastical courts, did it make sense to suppose that it barred removal of criminal suits looking to a spiritual remedy, so long as the offense was grave enough to have been pursued in the Commission originally? Not being quite sure about that, he may have been skeptical, with reason, of Yelverton's "presumption theory", and yet preferred to hear more before joining Richardson in rejecting it. There was quite a lot more to be heard in the next discussion of the case, reported by Hetley.

Hetley's report, *sub nom*. Coventries Case, is all but certainly of an immediate sequel. It may be in strictness of a separate case—a new attempt to get a Prohibition in the light of events in the High Commission later than the debate we have just reviewed, or at least unknown to the Common Pleas judges when they had that debate; or it could be a reopening of the existing case left undecided by the divided court, with new information adduced; which of these it is makes no significant difference. Hetley does not tell us what the substance of the case was. Besides the case's name and date, however, one remark by Justice Yelverton makes it clear enough that Hetley is reporting a further phase of the controversy described by Littleton. Yelverton says that although the High Commission may sometimes fine and imprison, it may not do so in the present case *because the party was liable to be fined at common law*. That is to say, the case was of the type of Littleton's *Coventry*, and the propinquity of name and date almost guarantees that it was the identical case. Other judicial remarks, though "up in the air" as reported by Hetley, resonate with the judges' attitudes and concerns in the debate reported by Littleton.

I now follow Hetley's report as it unfolds: Serjeant Ashley, seeking Prohibition, produced a copy of the libel in the High Commission, whereby the parties (note the plural, another hint that this is the case of Coventry *and* Stamford) were fined £30 and imprisoned. Chief Justice Richardson said at once that if the Commissioners had only excommunicated the parties they would have "been well." In effect, Richardson was still insisting that the High Commission could, and in this case should, have confined itself to spiritual sanctions, and that the Commission ought not to be prohibited until it failed to do so; he was now, however, forced to admit that the condition had not been fulfilled and thus that Prohibition was probably inevitable.

Justice Yelverton then makes the observation I note just above. He dissociates himself from the extreme view that the Commission had no or very little power to fine and imprison, without generalizing about the limits of that power beyond making the point that the Commission may not impose secular punishment on a party subject to being penalized at common law. This is consistent with the position he comes to in Littleton. He does not mention his "presumption theory" again. There would of course be no purpose in bringing it up now that it was ascertained that the Commission actually had sentenced to fine and imprisonment. He must, however, have felt entitled to the "last laugh", since the High Commission had done what he proposed presuming it would do. Its sentence is hard to account for if the Commissioners were aware of the previous discussion in the Common Pleas, or for that matter if they knew of the statutes secularizing the offense Coventry and Stamford were charged with. Granting that the Commissioners were not ignorant of the high probability of their being prohibited if they imposed a temporal punishment, they could conceivably have found the facts different

enough from the narrative of the offense given in Littleton to take the officers' conduct outside the terms of 1 Rich, II while leaving them still guilty of laying violent hands on a clergyman, although this hardly seems likely. (For example, Coventry and Stamford could have behaved more politely than the Littleton narrative has them doing; Gumell could have compliantly gone with them to his house or a public place, where they told him their business; hot words and a scuffle could have occurred only then, which led to their using inappropriate force in arresting him.) Otherwise, the Commissioners' position would have had to be that it was their duty to employ their temporal punitive powers against anyone they convicted; if the common law courts had, or claimed to have, authority to stop enforcement of the secular sentence, let them stop it, but until they did let the warranted, or indeed obligatory, sentence be carried out. This comes to a stark statement of the position Yelverton had wanted to presume the Commission would take.

One further twist in Yelverton's remarks is worth noting. In explanation of his basic view that the Commission was barred from imposing a secular penalty on a party subject to common law punishment, he says that if someone is fined by the High Commission and later indicted at common law he cannot plead the High Commission fine. His legal incapacity to bar the indictment by pleading his High Commission fine of course means that if the Commission may use secular punishments for the offense in question, men can be exposed to double punishment for one offense, the crux of *Coventry*. I do not think one could possibly argue that prosecution for an indictable offense created by statute can be barred by events in the ecclesiastical sphere without an express proviso in the creating statute. Thus Yelverton's remarks as they start out come to no more than restatement of the obvious. As they continue, however, they become more interesting and more puzzling, for Yelverton goes on to state the converse: If one is indicted and later sued in the High Commission he *may* plead the indictment. Is putting it this way saying more than that the secular indictee may have a Prohibition *quoad* any secular sanctions? May he have one to stop the ecclesiastical prosecution unconditionally (in which event one proceeded against in a regular ecclesiastical court, with no danger of incurring secular sanctions save by *De excommunicato capiendo*, should also be entitled to a Prohibition?) Does the indictment simply—formalistically—constitute common law preemption? If the indictee is acquitted at common law is he safe from ecclesiastical suit looking only to spiritual sanctions? I can only put a *quaere* on these matters; it is of some interest whether Yelverton meant to open them.

Richardson speaks again after Yelverton. Although he does not depart from his concession that in the present case Prohibition must be granted to prevent execution of the Commission's secular punishments (at any rate the fine—an important qualification, as we shall see), he adopts a position on the Commission's imprisoning power of which he gives no intimation in Littleton, but which he had embraced in *Purbeck* above. The Chief Justice, it must be said, was persistent in his effort to salvage what could be salvaged for the High Commission without permitting double punishment of a single offense.

Richardson begins by stating what he took the strongest opponents of the Commission's secular powers to hold: without absolutely denying it power to fine and imprison, they confined such power to heresy and clerical incontinence cases. Noting this view seems at first hardly relevant for present purposes. Richardson did not think the secular powers were that narrow, nor did the judges with whom he had disagreed on

whether Prohibition should be granted to prevent secular punishment before it was actually imposed. Even so, there is perhaps a sense in which having the most restrictive view in mind is useful for the main point to emerge from Richardson's speech. Before reaching that point, Richardson deplores a bit more what the Commission had pig-headedly done in *Coventry*. Excommunication, he says—as others had said over the High Commission's history—is really a "greater" punishment than fines and jail terms, if only it were so regarded. The immediate implication must be that the Commission's imposing secular punishment in the face of certain Prohibition reflects the general underestimation of excommunication. (The explanation and remedy for that of course make a question. Negligent religious instruction, all-too easily fallen into when ecclesiastical offenders serious enough to bother about could be punished in ways that hurt, whether or not they appreciated the soul's desolation an excommunicate ought to feel? Failure to punish frequently enough in the always-available "way that hurt", imprisonment via *De excommunicato capiendo*, when excommunicates did not do prescribed penances and amend their lives to gain absolution? This failure was surely the more likely to occur when an ecclesiastical tribunal existed with fairly broad powers to fine and imprison directly, without the procedural fuss of putting *De excommunicato* in motion. Suppose, as one brand of "strict constructionists" believed, the High Commission could only fine and imprison heretics and incontinent clerics. Might forced reliance on excommunication and its follow-up for the great majority of offenses not reduce the very need to excommunicate, because sinners would face a more certain prospect of temporal unpleasantness?)

Having so ruminated, Richardson announces his embrace of the position on the High Commission's powers that does not appear in Littleton, but which puts his point of view throughout *Coventry* in a new light. For he now says, "they may enjoyn penance, and put the party in prison until he does it." The position is one we have encountered aside from Richardson's own adoption of it in *Purbeck*; it can be associated with Chief Justice Popham, though it was not predominant since Coke's time: Whatever the limits of the Commission's power to imprison punitively, it may always do so coercively to enforce penance. If we assume Richardson held this opinion throughout the first debate in *Coventry*, his insistence on withholding Prohibition until it was known what the Commission would do takes on a different color. The Common Pleas was obliged to wait, not until it was clear whether only a spiritual penalty had been imposed, and at most followed by excommunication, but until it appeared that the parties had been fined or, if imprisoned, imprisoned as a punishment rather than a coercive measure to effect compliance with a spiritual injunction, Ascertaining that imprisonment was punitive could not be easy. If a definite term was not specified, it requires only giving the Commission the benefit of the doubt to infer a coercive intent—until new information renders the supposition implausible, and that must probably take the form of a showing of excessively long imprisonment, probably on *Habeas corpus*. The striking legal proposition implied in Richardson's position as now developed is that imprisoning a High Commission convict coercively would not be ruled out by his liability to common law punishment; double temporal punishment must be avoided, but a person who, though liable to be, has not yet been sentenced to a punishment pursuant to indictment or in the Star Chamber may be imprisoned for a while as an adjunct of his spiritual correction, from which his temporal liabilities do not exempt him, *per* Richardson. The endorsement

of coercive imprisonment does not sit quite comfortably with Richardson's paeans to excommunication, but there is no logical inconsistency. One can say, not only logically but sensibly, that the High Commission would have barely been necessary if the Church and its regular courts had done their job better; being necessary, it would we well-advised to strengthen the established ecclesiastical sanctions by preferring them; it was, however, empowered at discretion to use coercive imprisonment as a shorter route than *De excommunicato capiendo* and a surer threat to offenders who, if they were in the Commission's hands and convicted, must do their penance promptly or taste jail, rather than go off at worst excommunicated with a chance of evading commitment by *De excommunicato*. If it makes sense to say that a new special tribunal must have some kind of "teeth" that ordinary tribunals lacked, coercive imprisonment is a modest increment.

Adopting the coercive imprisonment theory made no practical difference for *Coventry* as it stood, and Richardson says nothing more about it. He acknowledges again that Prohibition must be granted. Yet he makes one more Fabian move, by saying that "before he granted a Prohibition he would have the parties present." He may have wanted to have his own turn at lecturing the parties and impressing them with the importance of making their peace with the Church. In any event, I suppose the Chief Justice's preference could not be denied as a matter of courtesy, even if the other judges would sooner have put an end to the case at once by prohibiting execution of the whole punitive sentence. As we shall see, however, by putting off a writ yet again Richardson gained more than an opportunity to confront the culprits (and perhaps also to use the court's influence to insure that they were actually indicted or prosecuted in the Star Chamber before they escaped custody.)

After Richardson, Justice Harvey made his sole individual comment in *Coventry* (in Littleton we are only told that he was Yelverton's ally in favor of immediate Prohibition.) I do not understand his point, which has to do with the process of estreating fines into the Exchequer. His remark may be a scrap of evidence that the High Commission had accepted estreatment as the only permissible way to collect such fines as it could lawfully impose (as contrasted with imprisoning to coerce payment of a fine or exacting a bond conditioned on payment of the fine.) Harvey's concern seems to be based on the belief that if a fine such as the one in *Coventry* were estreated (he speaks of "such unreasonable fines') 1/3 of the sum would go to the prosecutor (but who would count as that in the present case?) This Harvey regarded as impermissible. Whatever the technicalities, my guess would be that he was just adding a reason why execution of the sentence, at least *quoad* the fine, must be prohibited, without believing that any reason was required beyond the fact that persons liable to a common law fine were fined by the Commission.

The last observation in Hetley's report is by Serjeant Brampston. He says that in order to strengthen the High Commission's jurisdiction the law gave power to fine and imprison in cases not previously (before 1 Eliz. presumably) fineable at common law, but the offense in the present case was fineable before, I take this as politely critical of Richardson's convoluted thoughts: It is better to keep things simple. The Commission may fine and imprison as a punishment in many, perhaps nearly all, cases within its jurisdiction—certainly not only for heresy and clerical incontinence. No doubt it may imprison to coerce performance of a spiritual sentence, but that does not exhaust its power to impose temporal sanctions. The one clear case in which it may not use them at

all is where an offense—which need not be altogether beyond ecclesiastical or High Commission jurisdiction as such—was subject to common law punishment before the Commission came into existence, and this is that case.

On a later occasion, the Common Pleas at last decided *Coventry*. A Prohibition was granted as to the fine, but not as to the imprisonment because "for that he ought to have his habeas corpus." The final move introduces a new note into the law, as well as being one more tactical victory for the Chief Justice. I do not think it had been held before that Prohibition would not lie to ban imprisonment from being imposed when it should not be or to stop execution of a sentence of imprisonment already imposed. The suggestion that *Habeas corpus* is the one way to challenge imprisonment is, I believe, novel. A rule to that effect could be narrowed by holding that *Habeas corpus* is the only route to release for someone already imprisoned, but that the High Commission may be prohibited from imprisoning by anticipation at the time Prohibition is refused on jurisdictional grounds. (It is implied, in other words, that there can be cases in which High Commission jurisdiction is unobjectionable so long as spiritual sanctions alone are used. This goes against the probably better opinion that if the Commission has jurisdiction it may resort to secular sanctions. Chief Justice Richardson was successful, however, in making out an exception in the unusual circumstances of *Coventry*.).

In Webb's Case (1629),[129] the patron of a living sued the parson and parishioners in the High Commission for converting the church to profane use. The defendants alleged in their pleading before the Commission that the parish had existed from before memory and had no church; rather, the parishioners repaired to the nearest church in another parish and paid all Church "duties" (presumably tithes, rates, mortuary fees, and the like) there; in addition the parson of the churchless parish paid the neighboring parson 6/8d .a year for the "instruction" the parishioners had there.

Chief Justice Richardson and Justice Hutton, who were alone in court, agreed that Prohibition should be denied. Their basic position, which would have been good against any ecclesiastical court, was that if there is a parish, the parishioners are compellable to edify a church. That comes to saying that there could be no prescription against the; universal duty to maintain an active church in the parish; a parish by prescription could not be churchless by prescription; the fact that not having a church was in this case compensated in a manner—the parishioners gaining no material benefit and the parson paying for his sinecure—made no difference. If the arrangement made practical sense as a sort of "merger" of small parishes, it was nonetheless illegal. Secondly, Hutton and Richardson said without explanation that the "crime" was enormous and fit for the High Commission. Seeing the case as criminal and the crime as enormous seems a little surprising for Hutton, if not for Richardson. "Hands off the High Commission if possible, when it is only trying to keep the ecclesiastical life of the nation running according to the rules" might be the maxim of the decision. The fact that the suit would not have had a chance of being prohibited if it had been brought in the Bishop's court, and the fact that the Bishop had presumably overlooked an illegal arrangement in his diocese for a long time, tend to justify indulging the Commission.

[129] P. 5 Car. C.P. Littleton, 263.

Miller's Case, from the next term, [130] is discussed in Vol. II (pp.429-430) for a self-incrimination aspect, which in the event had no effect on the resolution. In substance, Miller *et al*. were prosecuted *ex officio* in the High Commission for minor Puritan offenses. Prohibition was sought *per* Serjeant Hetley on the ground that they were too minor to pursue in the Commission. Three judges, probably the only participants—Richardson, Harvey, and Hutton—denied a writ. No serious discussion is reported of where, if anywhere, a line runs between major religious crime—usually schism when Puritans were concerned—and expressions of opinion with a Puritan tendency that were illegal but non-enormous. Richardson delivered a diatribe against the plaintiffs-in-Prohibition and their activities, with which his colleagues appear to have been satisfied. Harvey contributed the information that when he was at the Bar he once tried unsuccessfully to prohibit a suit (presumably in the High Commission) for an (unspecified) offense against the Book of Common Prayer on the ground that the Uniformity Act subjected it to a secular penalty. (It is no wonder that he lost, because it was generally agreed that the ecclesiastical courts retained concurrent jurisdiction over such secularized offenses. They were only prohibited from interrogating the party so as to force a confession of the secular crime.) For the purposes of the present case, Harvey was probably saying something like. "If the High Commission may proceed against practically any expression of disapproval of the Prayer Book—so long as it relies on evidence rather than coerced confession—surely the misdemeanors charged here are grave enough to fall within its jurisdiction." In sum, *Miller* shows once again that Puritans got almost no protection from the enormity standard; they were only shielded from improper interrogation (which in the event Miller was held not to have suffered—see Vol. II.)

The charges in *Miller* may of course have been better specified officially than as reported by Littleton. In the report, Miller and associates are said to have been "men that slighted the Government of the Church" (if "slight" means "speak disparagingly of", they should perhaps be prosecuted at common law—cf. *Fuller)*; they "did hinder the jurisdiction of a conformable minister" (What could be meant by his jurisdiction?); they "had procured publique fasts & been present at them"; "had procured publique Collections to be made for Poor Ministers and others of the Palatinate"; "commended Mr. Angel to be a good Minister if he did not conform" (i.e., said it would be to his credit if he would not or had not conformed—no assertion that he had actually not done so); and "Received the Communion Sitting and not Kneeling." Richardson in his denunciation started off with the conclusion that they were "non-conformists to the government of the Church of England." He then said that it was not "fit" that they organized fasts and collections because "the King of England should appoint fasts and collections." (I should like to be told the legal warrant for this royal monopoly. Collecting donations for the Palatinate did, it is true, touch foreign policy.) He announced as a conclusion that these misdoings were not "small things" and added that prosecuting them in the High Commission did not violate 23 Hen. VIII because that statute "goes only to the Ordinary, & only such causes which are ordinary." In other words, Richardson endorsed the reputable, but not clearly universal, opinion that 23 Hen. VIII simply did not apply to the High Commission.

[130] T. 5 Car. C.P. Littleton, 274.

One further feature is noteworthy. The party Miller sought Prohibition after he had been fined £40 *and the fine was estreated*. (The heavy penalty is in a way explicable because he, but not the other parties, was accused of failing to appear before the Commission when summoned. He claimed to have a valid excuse, but the Commission disallowed it.) The judges held that Prohibition would not lie after estreatment of a fine, confirming the reason for decision in *Purbeck* above.

In a briefly reported case from the autumn of 1629,[131] the High Commission was prohibited from entertaining a wife's libel seeking alimony. This is predictable for a majority of the court, and no disagreement is reported. Littleton adds a rule qualifying the general position that alimony is unsuitable for the Commission. There is no indication whether there was any consideration of whether the rule might be applicable in the instant case. If so, it was held inapplicable. The rule is that if a wife libels against her husband *causa saevitiae* before the Commission, and it is ordered that the husband "allow the wife so much *pro expensis* & alimony during the suit"—as it is said the Commission customarily did—Prohibition will not be granted. In other words, if the wife has left the husband on account of cruelty and sues him for it, he may be ordered to pay her a temporary allowance to cover her litigative expenses and her living expenses while the suit is going on. Indefinite alimony, normally attached to a divorce, is for the regular courts.

The report of Lady Sherley's Case, undated but from early in Charles I's reign,[132] is inconclusive. Lady Sherley sued her husband, Sir Henry, for alimony in the High Commission. Nothing is said about the particular circumstances. Serjeant Hitcham moved for Prohibition simply on the ground that alimony was not within the Commission's power. Chief Justice Richardson observed that the current patent purported to give jurisdiction over alimony, but admitted that there was nothing in 1 Eliz. to warrant granting such jurisdiction. Therefore, he said, the question was whether the King was entitled by the common law to grant it. He suggests no answer. At most, his words indicate that he thought the question a serious one—unsurprisingly in view of his remarks in other cases. Justices Hutton and Yelverton, who with Richardson were the only members of the court present, did not pay the question the compliment of taking it seriously. Hutton made the familiar point that if alimony was conferrable without a basis in the statute, so was any other form of ecclesiastical jurisdiction. Yelverton said that Coke, at the extrajudicial conference following Chancey's Case, had peruaded James I to take alimony out of the Commission's patent. Yelverton "marvailed" that it had found its way back in. (The exact words of the report of Yelverton's opinion are: "I marvail how that came within their commission: he said, that in tempore Iacobi, upon a debate before him, Sir Edw. Cook so fully satisfied the King. And this matter of alimony was commanded to be put out of their commission." The speech is of some significance as an additional datum on the post-Chancey conference. Note how ambiguous it is as to what Coke "satisfied" King James of: That the King had no common law power to confer jurisdiction on the Commission without a basis in the statute? That the statute in any event provided no basis? That even if conferring alimony was not clearly illegal it was unwise, wherefore it should be dropped from the patent, and was dropped as part of the

[131] Anon. M. 5 Car. C.P. Littleton, 314.
[132] 3-7 Car. C.P. Hetley, 95.

compromise in which the proceedings ended? Yelverton may of course have had no ready answer to these questions, but was merely irritated that Richardson might be ready to jettison a sensible solution, causing such questions to be reopened.) Littleton's report ends with Richardson adjourning the case, instructing Hitcham to move it again when the court was full, and saying that the judges would advise in the meantime. It is highly likely that Hutton and Yelverton would have favored Prohibition in the end, and so, probably, would Croke and Harvey. Richardson, having used the opportunity he could not be denied to have a debate he thought worth having, may finally have acquiesced in the Prohibition he could not in the advisement process talk his brethren out of.

Williams' Case (1631)[133] raised deep questions that had not been debated before. The judges described it as a "great case." No final outcome is reported; having said that the case required deliberation, the court adjourned it. The reporter does, however, set down his impression of where the judges' thinking seemed to be tending on the first discussion.

Williams arose on *Habeas corpus*. The carefully stated return was as follows: "[The prisoner was held because the High Commissioners] have concluded unanimously that he was guilty of incest because he had married the widow of his brother's son & had lived with her as his wife, and that such marriage was prohibited by certain canons made to direct marriages by the Archbishop & clergy convocate & ordered to be read every year in every church. And for this incest they sentenced him to be fined £500 & to be imprisoned. And desire [i.e., the Commission requests] the Judge of the Arches to annul the marriage."

Serjeant Henden, representing Williams, moved that he be bailed. The reason was that the marriage was lawful by the law of the land. That was because the statute of 32 Hen. VIII, c. 38, provided that "no reservation or prohibition except God's law shall impeach any marriage outside the Levitical degrees." The statute of 25 Hen. VIII, *per* Henden, though repealed, explains what 32 Hen. VIII means by "Levitical degrees", and neither that statute nor the later one mentions the present case of marriage to the widow of a biological nephew. "And so", says Henden, the common law judges have taken upon themselves the exposition of the Levitical degrees "by force of the statute of 32 Hen. VIII."

Note that Henden took no exception to the use of secular sanctions as such, nor to the general proposition that incest is an enormity within the High Commission's jurisdiction—as Coke said in *Darrington*. His case rested on two foundations: (1) that Williams did not commit incest by the relevant legal definition of that offense; (2) that it was the common law courts' business to say what that definition was, because it was laid down by statute. It is interesting, however, that Henden seems not quite to proclaim it as obvious that ecclesiastical courts are bound by the common law courts' interpretation of the term "incest" by virtue of their general monopoly over statutory construction. For he says that the common law judges *have* taken on expounding the Levitical degrees and cites precedential evidence, as if practice could have been different. If it had been, could 32 Hen. VIII be taken as intending to enact a standard for ecclesiastical courts alone—at least with respect to criminal prosecution for incest—and to leave the meaning of "Levitical degrees" to them? I say "at least with respect to criminal prosecution" because

[133] H.6 Car. C.P. Littleton, 355.

the High Commission seems to have been watching its step in Williams' Case, carefully avoiding the civil measure of annulling a marriage. Henden's grounds ought perhaps to justify outright discharge of the prisoner. His requesting only release on bail defers to the common practice of restraint in *Habeas corpus*—relieving the party of imprisonment but keeping him under the Commission's thumb if there might be some basis for its still having a legitimate interest in him. Here, Henden's possible apprehension that serious arguments *contra* could be made and the consideration that the case was generically well-within the Commission's jurisdiction would recommend his concession that release on bail would be a sufficient remedy.

Serjeant Brampston argued the other side, probably the harder one, with considerable ingenuity. He took as his premise the indisputable rule that matters of fact stated in returns on *Habeas corpus* must be taken as true. (I.e., if facts as stated are false but furnish sufficient reason to return the prisoner to jail, he must be returned; his remedy for wrongful detention is False Imprisonment.) Brampston proceeded to argue that the present case was governed by that rule. Without (so far as the report shows) being quite express, he introduced a second, almost equally incontrovertible, rule—just that the High Commission had power to examine incest. (One must, I think, articulate this, because it is surely obvious that it would not be a false statement of fact to say that the Commission had jurisdiction over anything you please—say poaching, or, to stay within the ecclesiastical realm, suits for legacies. It would be a statement of law, which would fail to justify a commitment if a common law court in *Habeas corpus* regarded it as erroneous.) The next step is the difficult one for Brampston's argument. I think it amounts to maintaining that in giving an explanation of the handling of Williams' prosecution the return did the *equivalent* of making mere factual statements, the truth of which would be irrelevant for *Habeas corpus*. In view of earlier cases, it was probably necessary to say more than "He was prosecuted and imprisoned for incest." The common law courts demanded a reasonable degree of specification when the Commission claimed to be within its jurisdiction in pursuing and punishing someone for, say, erroneous opinions or defamatory words—i.e., it was required to specify what opinions or what words. Surely, then, the return in the present case must say something to show in what the Commission took incest to consist. By Brampston's theory, however, the return *qua* explanation need not be on its face legally correct, but only colorable. It must make it appear, say, that drunkenness had not been treated as incest. If, however, the Commission was only mistaken about the legal bounds of incest, while making a *bona fide* effort to identify the offense plausibly, and doing so in the sense that it followed canonical prescriptions ecclesiastical courts were ordered to follow, its return on the *Habeas corpus* was not *ipso facto* inadequate. Why should it be, when a return full of untrue statements of simple fact would be perfectly satisfactory? Why should saying something true as mere fact—Williams was convicted of marrying his niece-in-law and the Commission was applying rules it thought it was or might be bound by—have consequences no different than simply lying to make jurisdiction airtight, say by asserting that he was punished for marrying his sister? The questions seem to me to make some sense, notwithstanding the objection that the Commission had committed legal error, if it had, rather than factual misstatement properly speaking. I do not think that the Commission (or its agent the jailer) would escape liability in False Imprisonment if it was mistaken about the standard of incest it should apply, but at least Williams would not be let out of jail here and now

on the basis of an inadequate return. Some common law court in the future, with a jury, would decide whether he was wronged and how much. (I think the words of the report, though brief, show clearly enough that the "facts" in the return which Brampston took as beyond scrutiny were the specification of what the Commission treated as incest and the basis in the canons for that. The return contained a couple of facts in the simple sense—the Commission's unanimity and its reference of annulment to the Arches—, but whether those were actually or putatively true could have no significant effect on the issue of the return's adequacy; they at most reinforce the Commission's claim to have acted circumspectly.)

In the rest of his argument, Brampston moved beyond the formal point that the return was adequate even if it was not "true" to a substantive claim, viz. that the High Commission was free to construe "incest" as it did. Perhaps it ought not, in what one can only call an ideal sense, to have allowed the canons to supplement or override the statute of 32 Hen. VIII, but if that was a mistaken reading of the statute, the mistake was the Commission's to make. In other words, the High Commission—specifically, not any ecclesiastical court—had authority to interpret the statute. An exception was made from the pervasive general rule that non-common law courts violating statutory requirements as the common law judges understood them should be prohibited (and in the limited range of situations in which non-common law courts could commit to prison—rarely extending beyond High Commission cases—persons imprisoned in consequence of misapplying a statute should be liberated on *Habeas corpus*.) Brampston reached this surprising result by drawing an analogy between heresy and incest.

The statute of 1 Eliz. c. 10 provided that the High Commission—solely and specifically the High Commission—should not have power to adjudge any thing heresy which had not before been so adjudged by the authority of the canonical scriptures, &c. By Brampston's argument, although this statute was made to prevent the Commission from over-extending the meaning of heresy, it implied that only the Commission had jurisdiction to determine that meaning. At any rate, common law courts were to have no role in determining it by way of their general responsibility to see that the statutes were correctly observed by ecclesiastical courts—the rationale was that theological expertise was required to tell whether alleged heresy had ever been adjudged heresy on proper scriptural and supplementary theological authority. If regular ecclesiastical courts did not utterly lose power to entertain a heresy case, still the High Commission was primarily if not exclusively created to make sure that they did not decide such cases by wrong, statutorily forbidden criteria. If a surviving Catholic Bishop were to do so, or were to be invited to by a complainant, he should presumably be prohibited.

After listening to Brampston, the Common Pleas judges would not deliver any opinion "fully" (i.e., a final opinion, normally in the form of judge-by-judge argument of the case, though a *per curiam* statement of the grounds for decision could with the whole court's assent be substituted.) They were not ready to free the prisoner at present, but ordered that he appear with a keeper on a future day for a ruling of the case. In addition to emphasizing the magnitude and difficulty of the case and the need for deliberation, the judges expressed their desire to hear both civilians and divines.

No final decision after the adjournment is reported. Littleton, the reporter, does however, give his impression of what the judges seemed to think, so they must have discussed the issues in a preliminary way before adjourning. Two tentative views are

attributed to the court: (1) If the prisoner had been committed for heresy, and the return on *Habeas corpus* did not state the cause "clearly" (i.e., show in particular in what the heresy consisted), the prisoner could not be bailed—a common law court simply could not meddle in the matter; (2) incest is not parallel to heresy—32 Hen. VIII governs what can be counted as incest, and the interpretation of that statute, as of nearly all others, belongs to the common law. In short, Brampston was right in his analysis of heresy, but wrong in his attempt to bring incest under the same principle.

On the verge of the Civil War, in 164l-42, an important Prohibition case concerning alimony came before the Common Pleas, the personnel of which had changed. This case, Powell's, was soon followed by another which, though different in form, may involve the same people and the same controversy at a later stage.[134] Lady Powell sued Sir Edward for alimony in the High Commission; the husband sought a Prohibition *per* Serjeant Clark. Rather than argue that alimony was too minor or too civil for the Commission, Clark took the position that no ecclesiastical court could grant alimony. Those courts could, he conceded without excluding the High Commission, compel husbands to treat their wives properly and grant divorces. Alimony, however, belongs to the common law. Clark's first reason for this conclusion is a writ to a sheriff from 7 and 8 Hen. III ordering him to set out "reasonable estovers" for a wife's alimony .In other words, ancient evidence showed that a wife entitled to alimony, presumably in consequence of a divorce or of her justified withdrawal from the husband's household, could and therefore must pursue a common law procedure to secure payment. (There is a variance between March and Harg. 23 in that the latter has Chief Justice Banks, rather than counsel, bringing up the writ from Hen. III, with a more specific citation—Close Rolls, 5 Hen. III, membrane 3. In the Harg. 23 version, Clark starts off with the more predictable argument that alimony belongs to the Ordinary and so is inappropriate for the High Commission. March shows, however, that Banks agreed with the more drastic position evidenced by the 13th century writ. Discovering it, whoever was the original discoverer, testifies, as do several cases in this study, to a higher standard of antiquarian research in the mid-17th century than had obtained earlier.) According to the March account, Clark went on to cite Chancey (probably MS. garbled) as a post-1 Eliz. precedent for prohibiting an alimony suit in the High Commission. He presumably wanted to show that the statute had not been taken to give the Commission specifically a power in alimony which ecclesiastical courts in general lacked, Although in a narrow way cases such as *Chancey* could be considered precedents for that, it misunderstands them so to use them, since there is no sign that they rested on anything more than the proposition that alimony, together with most of the rest of matrimonial law, was reserved to the Bishops' courts. Either some lawyers of the 1630s and beyond had lost touch with the Jacobean law, or else they were doubtful that the Commission could be restrained

[134] H. 16 Car. C.P. Harg. 23, f. 73 (plaintiff-in-Prohibition named Sir Edmund Powell) and P. 17 Car. C.P. March, 80 (where he is called Sir Edmund Powell.) The second report is fuller, but the two are consistent. One or the other, more likely Harg. 23, is probably just misdated, since both eventuate in a grant of Prohibition—i.e., they do not look like earlier and later discussions of the case. I shall follow March. The possibly connected further case mentioned in the text is reported in Harg. 23, f. 86, *sub nom*. Sir Edmund Plowden v. Warden of the Fleet and dated T. 18 Car.

from exercising any form of ecclesiastical jurisdiction. Clark next made a textual argument from 1 Eliz., as opposed to one from Prohibition precedents: the statute gives the Commission power to "reform" or "redress" , but it is "not apt" to say that alimony should be "reformed" or "redressed". This amounts to saying that the Commission's powers, however extensive, must be criminal, which awarding alimony cannot be; not paying alimony might be seen as a "reformable ", or punishable, offense, but it has no foundation if ecclesiastical courts may not create a duty to pay. With the help of the precedent from Hen. III, such a duty can come into being only when the common law responds to a marital situation by conferring entitlement to material support on a divorced or estranged wife. Finally, Clark says that alimony is a temporal thing and that it charges a man's inheritance (I.e., I suppose, it would be collectable from the heirs of the man charged with alimony, instead of the administrators of his personal estate. How Clark knows this is unclear, but perhaps it is in his 13th century source.}

Serjeant Rolle (spelled Rolls in March) then agued for the other side, against Prohibition. His general position is that suits for alimony are perfectly appropriate to ecclesiastical courts. Those courts, *per* Rolle with no exception for the High Commission, may not fine or imprison, but they are not subject to Prohibition until they purport to use those sanctions. So far as appears, his rule is categorical: ecclesiastical courts, including the Commission, may order payment of alimony and excommunicate if it is not paid; imprisonment to coerce payment or enforce a penance imposed for not paying is no more lawful than punitive imprisonment and fining. Rolle's reason for his position is that alimony is merely an "incident" of the "principal" power of separation. I should think this comes to little more than saying it makes sense, and is traditional, for courts entitled to grant divorces and order abusive husbands to stay away from wives who have fled them also to be entitled to insure the wives a livelihood. Rolle does not comment on the argument, central to the other side, that the common law provided an equivalent of alimony and preempted the field. Skepticism about the force to be given to a single document 300 years old can of course be respected. Rolle does answer another argument, which he says was made on the other side. (It does not occur in Clark's speech, but from the judicial remarks below it is clear that it weighed with the Bench.) The argument is the familiar one, that parties should not be inconvenienced and lose appeals by being cited out of their home diocese (owing to 23 Hen. VIII, that is to say, though Rolle does not mention the statute.) His rebuttal, so far as one can tell from his words in March, comes to no more than an assertion that citation outside the party's diocese is unobjectionable so long as it is within the same province. The more serious argument that 23 Hen. VIII does not apply to the High Commission (see End Note to Ch. 2) is untouched.

Chief Justice Banks speaks first from the Bench in March's report. His first point is that precedents for the High Commission's having held plea of alimony and granted it do not mean that the practice is or ever was lawful, and that the patent's purporting to give the Commission jurisdiction in alimony is without effect unless 1 Eliz. permits. On the matter of citation outside the diocese, Banks observes that the Commission would be useless if it could not so cite. This must come to saying that 23 Hen. VIII does not govern the High Commission, though Banks, like Rolle, does not mention the statute. Clearly, however, the Commission's being exempt from 23 Hen. VIII implies nothing about its jurisdiction over any particular subject, such as alimony. The puisne justices—Crawley, Reeve, and Foster—agreed that a Prohibition should be granted in the case at hand. They

expressed doubt about Banks' view that citation out of the diocese into the High Commission must be lawful if the Commission were to be effectual at all; deprivation of appeals still seemed to them a serious cost. Banks speaks once more to correct Rolle's statement that the Commission had all forms of ecclesiastical jurisdiction; even if it had jurisdiction in alimony, as Banks reemphasizes it does not, the more sweeping point would not follow. Prohibition was granted unanimously, the judges agreeing that if the High Commission could charge a man's land with alimony it might as well have power to encumber it with a rent charge.

About a year after Powell's Case was decided, a Sir Edmund Plowden v. Warden of the Fleet is reported. While there is no necessary reason why this could not be unconnected with *Powell*, it seems unlikely. Powell and Plowden are similar enough names to be confused; one version of *Powell* gives Edmund as the party's first name, and in all versions he is a "Sir"; most important, the issue in *Plowden* is whether the High Commission had cognizance of alimony. *Plowden*, however, is a common law suit for false imprisonment against the jailer. The defendant pleaded that he was holding the plaintiff by virtue of a High Commission warrant; Plaintiff demurred on the ground that the Commission lacked jurisdiction in alimony, so that he was proceeded against *coram non judice* and the jailer was liable for false imprisonment. No result is reported except that a day was assigned for plaintiff to maintain his demurrer.

If we assume that we are dealing with one and the same Sir. E.P., and that he was imprisoned by the High Commission in consequence of Lady P.'s suit for alimony, there is a mystery: Since Lady P.'s suit was prohibited, how did the Commission get the occasion to imprison Sir. E.? One can only speculate. Could the Commission have simply disobeyed the Prohibition, whereupon Sir E., being imprisoned, opted neither for suing Attachment on his Prohibition nor for seeking liberation on *Habeas corpus*, but instead pursued damages and the solemnest possible decision that the Commission had no business touching alimony, viz. a common law judgment on demurrer?

Sub-section (b): King's Bench Cases after Coke's Dismissal (1616 to the Civil War Period)

Our last group of cases comes from the King's Bench after Coke's dismissal in 1616. Atwood's Case of 1617,[135] the only Jacobean one, is neither a Prohibition nor a *Habeas corpus*, but it contains a significant incidental reference to the High Commission. The case itself was a Writ of Error pursuant to Atwood's indictment and conviction before Justices of the Peace for scandalous words touching religion; upon conviction the Justices had fined him 100 marks. The words in question, whether High Church or Catholic in inspiration, were distinctly anti-Puritan. Atwood said that "the religion now professed was a new religion within fifty years; preaching was but prating, & hearing of service more edifying that two hours preaching." The Writ of Error was based on the proposition that speaking such words was not "inquirable by indictment" or before Justices of the Peace, but only before the High Commission.

The King's Bench did not make a definitive decision so far as the report goes. It first referred the question of the J.P.s' jurisdiction and the legality of proceeding by indictment to Attorney General Yelverton. (This was Sir Henry Yelverton, who served as a Common Pleas judge between 1625 and 1630 and appears several times in the cases above.) Yelverton certified that the J.P.s had no authority in the matter. The court agreed with him, but put off final decision pending advisement. The merits of the common law question need not concern us. The feature of the report that is arresting for our purposes is the statement in or in support of the Writ of Error that religious speech of the sort complained of here could only be prosecuted in the High Commission. I think a more correct formulation would be that the cause was ecclesiastical; whether it could be pursued in the High Commission—or, doubtfully I should think, could not be pursued in a regular Church court—would be determinable in challenges to some ecclesiastical tribunal by Prohibition or *Habeas corpus*; those questions would be basically irrelevant for the present case, unless perhaps someone were willing to argue that the absence of an ecclesiastical remedy suggests that a lay one must exist. The remark about the High Commission is therefore probably best seen as evidence of a common assumption: viz. that the Commission is the place where in practice religious speech-offenses are dealt with, rather than Bishops' courts and rather than lay ones save where they were expressly given jurisdiction by statute. The casual suggestion by the authors of Atwood's Writ of Error that the Commission positively *could* proceed for the words he was accused of speaking should perhaps not be taken too seriously. An attempt to prohibit a High Commission suit for those words—where a note of disrespect for the Church exactly as established is offset by defense, perhaps in overzealous terms, of outlooks rather favored by ecclesiastical officialdom—might be problematic. The political reality behind *Atwood* was probably that Justices of the Peace with at least vague Puritan sympathies proceeded against, and punished severely, a man whom they knew the High Commission might not have prosecuted *ex officio* and might have treated leniently even if a libel against him would have been hard to throw out flatly, as so non-enormous a complaint might not have been.

[135] P. 15 Jac. K.B. Croke Jac., 421.

Stanway's Case, of 1626[136], came to a predictable result in the light of earlier decisions. It is mainly of interest for details of the way the court discussed the limits on the High Commission. Stanway was the farmer of a rectory that came to the Crown when the monasteries were dissolved (i. e., the King retained title to the impropriate rectory, but leased it to Stanway.) He was sued in the High Commission to compel him to repair the chancel of the Church. The suit was prohibited as improper for the Commission. The decision was defended first by saying that that tribunal was for enormous and exorbitant offenses, heresy and schism "and such like." (One wants to ask how sure the judges were that the Commission was limited to a very few very serious spiritual offenses and how much of an escape-clause "such like" provides.) Then the judges say the Commission is "more" ("*plusors*") a criminal court than a civil one. (How much tentativeness is in the "more", how much realization that defining and defending a strict civil-criminal distinction would cause problems?) The Commission was "principally" founded by1 Eliz. to deprive Popish priests. (What can be inferred from this main, but not exclusive, original purpose? Anything more restrictive, or less so, than confining the Commission to heresy and a penumbra of unorthodoxy only technically distinct from heresy to which Catholic clergy might be disposed?) Next the judges say that the Commission has nothing to do with "matter of interest"; repairing a church or chancel belongs to ecclesiastical jurisdiction, but not, since it involves "interest", to the Commission. (Is the line drawn here any different than that between civil and criminal? Is a matter of "interest" any ecclesiastical suit in which a losing party could be ordered to pay or expend money?) Toward explaining and justifying the last point, the judges cite a case from 5 Jac. C.P. in which a tithe suit in the Commission, being a "matter of interest", was prohibited. (Tithes had been cited before as a paradigm example of an ecclesiastical duty not enforceable by the High Commission, but we have not previously seen a specific precedent invoked. Although both involve a judgment to pay money, can no distinction be claimed between every producer's obligation to pay tithes and the duty of a particular officer of the Church to defray a particular parish expense—repair of the chancel in this case, for which the holder of the parochial living was normally responsible? We have noted before that neglect of such burdens by clergy might well be looked on indulgently by ordinary ecclesiastical courts, leaving the laity—which was normally responsible for maintaining the body of the church, but not the chancel—with the full burden of keeping the church from decaying. That seems a reason for High Commission authority, if one is willing to extend it beyond the most austere limits.) The judges then cite another precedent on a quite different subject: Prohibition granted in H. 5 Jac. to stop a High Commission suit for calling a parson a "Knave and Brabler." The court explains this by saying that Prohibition was issued "because the suit was for words." (There were certainly precedents for using the enormity test to prevent the Commission from entertaining minor defamatory remarks about clergymen, sometimes, as here, aspersions so vague that regarding them as defamatory at all may be doubtful. The question that arises in the present context is whether "suits for words" are not close to the opposite of "matters of interest." Ecclesiastical defamation was admittedly a semi-criminal offense. Whether it was generically criminal enough for the Commission or whether a particular instance was serious enough are good questions, but the object of suits was certainly not

[136] H. 1 Car. K.B. Harg. 38, f. 45b; Lansd. 1063, f. 154b (nearly identical reports.)

to compel a monetary payment; at most it could turn into one if the ecclesiastical court, probably illegally, imposed compensation of the defamed person as, or in lieu of, a spiritual punishment.)

I have asked caviling questions about the first passage of the judges' opinion to make one point: By 1626 there had been several decades of intense litigation about the High Commission. All the doctrines broached in *Stanway* had been discussed before. Qualifications and complications run through the reported cases, however. A more nuanced—and from the Commission's point of view less restrictive—position than the maxims confidently embraced by the early Caroline judges add up to need not be accepted, but I should expect it to be considered and, if rejected, rejected in favor of a more coherent across-the-board theory of what the Commission may and may not do than appears in *Stanway*. The judges in that case give the impression of grasping at the scraps of familiar doctrine that would help justify the result they wanted, rather than of interest in clarifying a confused area of the law for the future. One almost feels that they had given up on making much sense of High Commission law.

After some judicial observations on medieval secular law touching on "matter of interest" and what contrasts with it, Justice Jones makes an argument for the proposition that ecclesiastical courts (High Commission or otherwise) may be prohibited from entertaining suits for the repair of churches. Nothing earlier in the report suggests that this was questionable as such, but it might plausibly have been. It is a little hard to see—leaving aside "matters of interest", which were urged only as an objection to High Commission jurisdiction—what secular or "royal" interest would be offended if the duty to repair churches, whether that of clerics or (to include lay impropriators) "officials of the Church" or that of parishioners, were simply left to ecclesiastical justice. Jones's argument is that a suit for contribution to repairs can certainly be prohibited if the party being sued claims to be an inhabitant of another parish. The reason is that the claim puts the boundaries of parishes in question, and that is—as most authority agrees—a common law issue requiring jury determination. Jones's implication is presumably that if Prohibition is appropriate in one sort of church-repair case it cannot be ruled out in others, or is not an intrinsically improper remedy. This point does not seem to have any necessary consequence for the jurisdiction of the High Commission versus that of regular ecclesiastical courts, except that of course if no Church court could be prohibited in a repair case the Commission could not be. If the remedy in itself was proper enough, it remains an open question whether the Commission with its statutory basis was banned from entertaining some or all repair cases.

The rest of the report of *Stanway* explains aspects of the case that do not touch the prohibitability of repair suits as such or the High Commission's jurisdiction. These need not concern us. (Briefly, the King had leased the rectory to Stanway rendering rent and covenanted to discharge his grantee of all pensions and encumbrances. The present suit was originally for the minister's pension as well as the repairs, but the first part of the claim was mooted by payment of the pension. Justice Whitelocke thought that if it had not been paid the minister could not pursue it in any ecclesiastical court, but only in the Exchequer Chamber—here the branch of the Exchequer with authority over royal grants. On the still-alive issue whether the King or his grantee was responsible for repairing the chancel the reporter only refers his reader to a case in Dyer—36 Hen. VIII, f. 58. No decision on the aspect of the case involving the law of royal grants is reported.)

Johnson's Case [137] is of interest because it is on the same jurisdictional issue as *Stanway*. It was decided the same way on the most obvious available grounds, without any elaborate or far-ranging argument. Johnson, being sued in the High Commission for not repairing a chancel, sought a Prohibition *per* Banks for two reasons: (1) The charge was not for an enormous crime and therefore not within the Commission's jurisdiction; (2) Because there is no appeal from the Commission, the party would not have the same privilege as parties in other ecclesiastical courts. All the report tells us is that Prohibition was granted for these two reasons.

Brown's Case[138] is reported twice by Latch, unclearly both times. The High Commission is not said to have been involved, but from the report at Latch, 204, I think it must have been. For there the question seems to be whether Brown should be discharged, and it is clear that he was imprisoned. His lawyer, Finch, argued that he should be discharged because "the statute' (one would suppose 1 Eliz.) did not intend "to aid ecclesiastical judges with temporal power in such small cases as defamations &c.", but only in "great cases of heresies." Finch said there were many precedents of prisoners discharged in such cases, and Rolle, also from the Bar, supported him with the remark that there were many precedents in Lord Coke's time. So far, the case looks like a straightforward assertion of the enormity test, at least *quoad* power to imprison, in a *Habeas corpus* to challenge a High Commission commitment. The rest of the report, as well as the one—pretty clearly of the same case—at Latch, 174, confuse this familiar picture, however. As Rolle continues (Latch, 204) he points out that the words of "the statute" say that all pains and forfeitures are to be discharged and says that there is no pain greater than imprisonment. The court is then reported as deciding that "this statute" does not discharge the imprisonment. It is unclear what statute is now referred to. Maybe Brown was trying to use Prohibition on 23 Hen. VIII instead of *Habeas corpus.*

Alimony arose in the King's Bench in Hurbie's Case.[139] The report tells only that Harbie's wife sued him in the High Commission for alimony and that Prohibition was sought *per* Serjeant Lloid, who so far as appears did not say more than that several Prohibitions "in the very point" had recently been granted by the Common Pleas. The King's Bench was not ready to go along just for the sake of conformity and must have argued the principles, for the case was discussed several times before decision. In the end Prohibition was granted, however. The court emphasized the old rule that the Commission's patent can only confer what 1 Eliz. allows it to, which suggests that despite the rule's frequent reaffirmation, some members of the King's Bench may have had doubts.

I mention an anonymous report from i629[140] only because it shows that the High Commission's occasional bad habit of committing people to improper prisons was still alive. The circumstances of the case are not entirely clear, but a person brought into the King's Bench on *Habeas corpus* had been committed to what is referred to as "the new prison." He appears to have been remanded, but not to the "new prison"—rather "here".

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[137] Not specifically dated—early Car. K.B, Latch, 10.
[138] Undated, but early Car. K.B. Latch, 174, and H. 2 Car—court not specified but presumably K.B.—Latch 204.
[139] H. 4 Car. K.B. Harg. 39, f. 17b.
[140] T. 5 Car. K.B. Harg. 39, f. 53.

Whatever that may mean, presumably a regular King's Bench jail—"for this Court does not take notice of the said prison. It would be otherwise if he were in a known prison." I suppose it would not have to be one of the King's Bench's own.

More materially, Drake's Case (1631) [141] brings us back to alimony for one last time. The wife suing in the High Commission alleged the "various" cruelties she had suffered; she was forced to leave her husband, and he would not allow her maintenance. The suit was prohibited, on the motion of Sir Laurence Hyde, because it belonged to the Ordinary, from whom the losing party could appeal. The report acknowledges that the Commission's current patent gave it authority to try alimony suits; 1 Eliz., however, did not in the court's opinion permit conferral of such jurisdiction.

The rest of our cases shift away from matrimonial law and for the most part concern clerical discipline and intra-Church affairs. George Huntley's Case of 1629 [142] is a well-argued *Habeas corpus*. It contains novel issues, by which the judges were sufficiently baffled to put off final decision. The return on Huntley's *Habeas corpus* said that he was imprisoned by the High Commission for refusing to preach a visitation sermon, having been commanded to do so by the Archdeacon, and also for "various contempts" against the Archdeacon and against the Archbishop of Canterbury, who was Huntley's immediate Ordinary. (I.e., he lived in the Diocese of Canterbury, rather than another diocese within the Province of Canterbury. That means the Archbishop in his other *persona* as Bishop was conducting his routine visitation on the occasion of Huntley's misbehavior; he was insulted in the line of duty, so to speak, rather than as a dignitary who merely happened to be present.)

Huntley was represented by two prominent lawyers, Serjeant Heath and Calthrope. Heath, who spoke first, started off by maintaining emphatically that Huntley had done nothing deserving imprisonment. (In Prohibition, he might have said the party had done nothing of which the High Commission had any business taking notice, but it was at once more modest not to insist that even the mildest spiritual censure would have been unlawful and more effective rhetorically to focus on the scandal of this imprisonment. Liberation from prison was after all the only object of the *Habeas corpus*.) *Per* Heath, Huntley had no duty entailed by his canonical obedience to preach the sermon; his doing so would have been no more than "matter of courtesy." Lest, however, discourtesy toward the Ordinary and his entourage should furnish some kind of basis for Huntley's treatment, Heath goes on to argue that that he *could* not legally conform with the Archdeacon's request: As a licensed preacher, he was not allowed to preach outside his cure; the Archdeacon had no power to dispense with that rule just by ordering him to preach elsewhere. From highlighting the absurdity of the imprisonment in the particular situation, Heath moves to more general points: The offense is intrinsically petty. (Though he does not spell this out, Heath is obviously drawing on the entrenched idea that there is some degree of seriousness required for High Commission jurisdiction, whether or not a stringent test separates a few "enormities" from the bulk of reasonably consequential offenses. Somewhat disobliging or somewhat legalistic behavior by a clergyman, who for all we know may only have embarrassed by a demand that he preach without sufficient preparation, does perhaps set a standard for pettiness.) The Commission's patent does

[141] T. 7 Car. K.B. Croke Car., 220.
[142] H, 4 Car. K.B. Harg. 39, f. 14b.

not include the offense (however it would be described if it were to be put in the patent), but even if it did such an item in the patent would not be warranted by 1 Eliz. As what appears to be conceived as a separate point, Heath proceeds to say flatly that the Commission lacked power to fine and imprison "in this case." (I would take this to telescope another familiar argument—that the Commission's power to use secular sanctions is not coterminous with its jurisdiction, so that even if minor misconduct in the special setting in which Huntley offended were within High Commission jurisdiction, it must still be dealt with by spiritual sanctions.) Heath then adds some information by telling us that besides imprisoning Huntley the Commission had fined him £500 (no less!) and estreated the fine into the Exchequer, but that this fact was not contained in the return. (Here a technical issue not anticipated in earlier cases arises. Must a valid return on *Habeas corpus* involving the High Commission recite the whole punishment imposed, spiritual and temporal elements alike, to justify the use of imprisonment, when that is the only secular sanction that the writ challenges? There would seem to be good reasons for an affirmative answer. It was occasionally suggested in earlier cases that an ecclesiastical court with the privilege of using secular sanctions must keep them within reasonable bounds. In the circumstances of *Huntley*, a huge fine and punitive imprisonment as well must surely exceed plausible bounds. A further question is whether, regardless of quantities, both punishments could legally be used in the same case. Heath's thinking is not spelled out on these and related matters, but he does seem to conclude that returns must give a full picture of the sentence.) The penultimate point in this extensive argument is the predictable unavailability of appeal; in the context in which that objection is presented, it must be intended to emphasize that an outrageously disproportionate sentence would be beyond appeal. Heath's final point is a recurrent one in earlier cases: in speaking of "various contempts" in addition to the more specified offenses, the return is bad because too general.

After what I think one may call Heath's crushing case for liberation of the prisoner, his colleague Calthrope comes on with still more considerations. I am not sure what his first argument says beyond what Heath had said amply, but there may be a nuance. Calthrope, after asserting that it does not appear (from the return) that the offense is within the Commission's power, adds "and the Court will not take notice of their particular jurisdiction." The twist here may be that the return needed to say in some explicit way that the High Commission laid claim to jurisdiction—say because its patent conferred it (lawfully or not) over conduct recognizably, as described, like that attributed to Huntley; common law courts should not decide whether to liberate or not to liberate people committed by a special court—whose jurisdiction was certainly confined to ecclesiastical law and was at least notoriously believed to be further limited—on the basis of whatever they may think its jurisdiction is; an express claim to jurisdiction in the case at hand must be put before the common law court for its evaluation; lacking one, obviously the prisoner should be let go. If this is possibly the tendency of Calthrope's formulation, *quaere* whether the degree of nicety in returns it calls for was in practice insisted on.

From his first argument, Calthrope moves into new territory. Focusing on the part of the accusations against Huntley that had him "affronting" the Archdeacon by charging that official with "injustice and wrongful dealing", Calthrope maintained with the help of secular analogies that at any rate Huntley could not be imprisoned for that. (It would

seem that the return gave a little more information than the initial account of it in the report specifies—or said at least something about what the "various contempts" consisted in.) Counsel cites two common law cases to support this argument—the famous Dr. Bonham's Case as reported by Coke and a King's Bench Case from 41 Eliz., Jarrett v. Denlie. How *Bonham* applies is not explained, but *Jarret* is recounted: Someone said to a London Alderman that he was a fool and knave and was for so saying imprisoned by the Mayor; the King's Bench liberated him. Why, one may ask, should the Mayor of London's lack of authority to punish criminally (at any rate by imprisonment) the defamer of an Alderman (or at least one who spoke disrespectfully of him) have implications for the High Commission's powers? The question need not be unanswerable. In any event, with this argument Calthrope seems to intimate a deep theory of the need for some level of ultimate agreement between the law applied in ecclesiastical courts and the secular "law of the land." Such theories are not implausible—see Vols. II and III *sparsim*—but novel in discussion of the High Commission.

Calthorpe then returns to more familiar themes, apparently declaring that the High Commission simply had no power to fine or imprison because 1 Eliz. was "only a restoration of ecclesiastical jurisdiction." Though too extreme a doctrine to fit most of the case law later than Queen Elizabeth's reign, this view has a history, and some lawyers may have thought that the old formula "all ecclesiastical jurisdiction but no secular sanctions" remained the best solution to the puzzles of the Commission's authority and was still worthy of serious consideration. Calthrope cites "2 Hen. 4" for the general point that ecclesiastical courts may not imprison but must punish by spiritual censures. This is probably a Year Book holding what for its time—before the picture was somewhat complicated by statute—was undoubtedly true.

Two more arguments complete Calthrope's contribution. He notes that the return said in part that Huntley was imprisoned because he did not pay costs (again adding a bit more to the return than the reporter's opening statement of it contains.) *Per* Calthrope, an action of Debt—not imprisonment outside the regular course of Debt proceedings—was the proper remedy to recover costs, so that at least in one respect jailing Huntley was unjustified. Finally, Calthrope came up with a canon requiring the Bishop himself to preach at visitations—a further basis for arguing that Huntley was illegally imprisoned for unwillingness to comply with an illegal command.

Two brief remarks by individual judges are reported after the speeches by counsel. Justice Whitelocke took exception to Calthrope's raising the general question of the Commission's power to fine and imprison. In Whitelocke's view, the sole question in this case was whether, admitting that Huntley's refusal to preach was a breach of his duty of canonical obedience, a complaint of that offense could under 1 Eliz. be assigned to the High Commission or must be left to the Ordinary. Since the "general question" is not intellectually irrelevant for the case, Whitelocke must have thought it so firmly resolved as to be beyond reopening (i.e., resolved in favor of the Commission's having *some* power to use secular sanctions, leaving only the question of its extent.) His formulation of the narrow issue sufficient for the purposes of this case is at odds with Heath's statement that the refusal was not a breach of canonical obedience, but perhaps Whitelocke meant no more than that it was better for the court to stay away from a canon-law matter which it might arguably be considered incompetent to decide. Assuming that the Commission had grounds for holding that Huntley was guilty of an ecclesiastical offense obviously

left ample room for doubting whether the offense was a High Commission matter. The second judicial remark, by Justice Croke, is too cryptically reported to make sense of, except to say that it had something to do with the role of the fine in the case.

On a later day than the argument of the case from the Bar, the court bailed Huntley until the next term, but it deferred delivering an opinion on the "matter in law." There is no report of subsequent proceedings. Bailing the prisoner rather than remanding him is a symptom of an inclination on the judges' part to think the imprisonment unlawful. On the other hand, in the light of the strong advocacy in his favor, it may seem surprising that he was not released outright, that the judges thought there was enough merit on the High Commission's side to require advisement and perhaps a round of public discussion from the Bench. It is tempting to suspect a political motive not to offend the Archbishop of Canterbury, and there may have been strains of politics that the report does not reveal in Huntley's trouble-making at the visitation. The hierarchy could have had various motives for giving that clergyman a "hard time", perhaps not very honorable ones, but sensitivity toward the Archbishop might still be the better part of valor. Puritanism may have figured in the contretemps: We know that Huntley was a "preaching parson"; he was willing to make a great fuss by refusing to preach before and in lieu of an official he may have thoroughly disapproved of, and of course expectation of a fuss by the other side may have been why this improbable preacher was picked out; he was so inordinately punished that it is hard to believe mere orneriness or some personal quarrel was behind the assault on him; trapping a notorious Puritan and making a colossal example of him, hoping to get away with it because common law courts did not go out of their way to help Puritans, could have been an attractive project to the authorities; fighting his imprisonment with impressive legal auxiliaries may have been attractive to Huntley for larger purposes than escaping a personal imbroglio. If, however, we curb the play of imagination over a strange episode and stick to the law, I think the King's Bench may have been well-advised to move slowly and be sure of its steps. While there was probably enough in Huntley's whole armory to require his eventual release, I do not think earlier cases clearly rule out High Commission jurisdiction and secular sanctions in a matter of clerical discipline, especially an unprecedented one full of complications and uncertainties which regular episcopal courts could perhaps hardly be expected to unravel,

William Copland's Case (1629) [143] also concerned clerical discipline, but in a much simpler way than *Huntley*. Copland, a minister from Cumberland, was sued in the High Commission for drunkenness and lewd behavior and sought a Prohibition *per* Banks. The report notes that Prohibition was pursued after sentence against Copland. Although sentence was not a bar to Prohibition (see Vol. I pp. 115 ff.), common law courts retained some discretion to withhold a writ when plaintiff-in-Prohibition delayed seeking one until after he had been tried and sentenced. There would be no reason to make such an exception in a case such as *Copland*; we see in this case, from a turn of Banks' language, that there are situations in which Prohibition could reasonably be denied *unless* a sentence had already been given. A minor point about dealing with the High Commission is perhaps documented by this detail. To open his briefly reported argument, Banks relies on one precedent (Turner and Neweport's Case, 43 Eliz. C.P) where Prohibition was granted to stop a prosecution for drunkenness and "brabling"

[143] T. 5 Car. K.B. Harg. 39, f. 51.

words. In the present case, he says, Prohibition should "the rather" be granted because Copland had no appeal from the sentence against him. The phrase suggests that if common law intervention had been sought before sentence there might be grounds for waiting and seeing what the High Commission would do, whereas the subject's right to appeal a sentence was rarely defeasible (i.e., only for a few heinous offenses, where Parliament unmistakably meant to cut off appeals.) This reversal of the view that Prohibitions should be sought as soon as possible, even though delay should not normally stand in the way of a writ, makes some sense in High Commission cases as a class. To defend a hands-off policy toward the Commission, one surely must regard it as a self-policing agency, which could be expected to understand the interest of Bishops' courts, the subject's interest in conveniently local justice and appellate rights (affirmed by 23 Hen. VIII even if that statute did not bind the Commission), and the sheer undesirability of distracting a solemn tribunal with petty litigation (on the level of drunken clergyman one might well say.) It should therefore be presumed that the Commission will not take a case without strong special reason, so that Prohibition should be withheld until the Commission has acted. One should always remember also that the Commission was an ecclesiastical court, free to confine itself to spiritual sanctions whatever secular ones it might have power to apply at discretion in one or another sort of case. This bears on the value of preserving appellate rights. Someone convicted by the Commission and given, let us say, only admonition and a mild penance ought perhaps in the abstract to enjoy the same right of appeal as any ecclesiastical litigant, but how likely is it that pursuing an appeal would be worth the party's time and money? Again, it perhaps makes sense to know that the party actually wants to make an issue of his interest in appeals before telling a high-ranking Church court that it is out of bounds. (Of course insisting on Prohibition after sentence would be most probable if secular sanctions had been applied, and the common law court's duty to be sure that they were properly applied would be clear. Unfortunately the report of *Copland* says nothing about the content of the sentence.)

The points above are only speculative reflections prompted by *Copland*, for the case itself, so far as the report goes, went flatly against plaintiff-in-Prohibition. Justices Jones and Croke, who were the only judges present in court, simply declined to grant Prohibition on their own. The best explanation of their decision is probably that the "lewd behavior" alleged against Copland makes his case a cut more serious than *Turner and Neweport* and may, depending on what the vague charge covered, turn the case into one on clerical incontinence, arguably always appropriate for the High Commission. Otherwise, the two judges must be seen as leaning to a very broad tolerance for the Commission's power to take any case on clerical conduct if in its discretion it saw reason. (It is not clear from Banks' Elizabethan precedent as stated that the party was a clergyman, and if he was his offense hardly extends beyond drunkenness—"drunk and noisy or quarrelsome", without so much as a suggestion that anyone was defamed, is a small stretch from mere "drunk.")

One late anonymous case[144] brings up a point not anticipated in any previous report. A prisoner brought *Habeas corpus*, on which the return said he was committed by order of the Exchequer for not paying a £50 fine imposed by the High Commission.

[144] P. 16 Car. K.B. Croke Car., 597.

(The commitment is said to have taken place in 9 Car., which if correct means the man had been in jail for seven years!) The King's Bench held that although the return did not show why the fine was imposed it could not bail or discharge the prisoner because he was imprisoned by a "Judicial Court." I do not know how to formulate or generalize the *Habeas corpus* law applied in this decision, but it would seem to be that none of the principal common law courts (probably most of the meaning, if not necessarily all of the meaning, of "judicial court") may release the prisoners of another by means of the writ. Perhaps False Imprisonment against the jailer would lie in another court than the one responsible for the imprisonment. *Quaere*. Otherwise, the case adds a few strands to the history of the Exchequer's role in the regulation of the High Commission, of which we have seen other traces but not enough evidence for a satisfactory account. The Exchequer obviously did not in this case rule the High Commission fine unlawful, as it appears sometimes to have done, but it may not have been unlawful by standards of the Commissions' jurisdiction and secular powers shared by the other principal courts. All the decision really says on High Commission law is that a return which would certainly have been found inadequate if the Commission itself had committed the prisoner was saved by a "judicial court's" having done the deed, here the Exchequer in the process of trying to collect an estreated fine. If the prisoner had in fact been held for an inordinate time, it is conceivable that in seeking a writ after so many years he was hoping that irregular intervention by the King's Bench could be sold as the remedy against perpetual imprisonment for a High Commission offense. A few earlier indications suggest it would be remedied, although there are no instances of prisoners clearly released for no other reason than that they had been held as long as any ecclesiastical offender could be.

Torle's Case (1640),[145] on *Habeas corpus*, involves a purported High Commission power untested in previous cases. Torle and four others were committed for contempt of the High Commissioners in not performing their order to pay a parish clerk his wages. It is not clear why these four persons were considered liable to pay the wages, but we are told that the Commissioners had assessed the sum due at 4d. a quarter for every house in the parish (the London parish of Great St. Bartholomew's.) It is unusual to see what amounts to a parish rate pursued in the High Commission, as opposed to a regular ecclesiastical court, where such suits were commonplace. It is not, however, obvious that such a suit on intra-Church affairs must be *ultra vires* for the Commission. Torle et al. refused to pay because they claimed that by custom they were obliged to pay the clerk what the churchwardens and vestry assessed. Their defense, again, is one that occurs in many cases: parties alleged to be liable for a rate duly assessed by ecclesiastical law (usually according to the 1604 canons) claim that they are entitled to the benefit of an alternative customary method of assessment. The defense was almost always successful, on the theory that immemorial custom in these matters of parish finance should prevail over ecclesiastical law, and when a custom was claimed ecclesiastical suits for the rate should be prohibited until it was ascertained whether a jury would verify the custom. (The practice is closely analogous to the treatment of customary *modi decimandi* in tithe law.) The involvement of the High Commission in the instant case would seem to be irrelevant, in the sense that the standard doctrine *quoad* jurisdiction to proceed at all pending common law determination of the existence of the alleged custom would seem to

[145] P. 16 Car. K.B. Croke Car., 582.

apply to the Commission as well as any other ecclesiastical court. If the Commission had no authority to proceed, it would seem to have no authority to imprison, whether or not it might have such authority after the custom was disverified at common law. It looks as if in *Torle* the Commission had hopes to evade the law applicable to ecclesiastical courts generally, for it brought on two civilians (Dr. Merrick and Ecleston) to argue that the Commission's patent expressly provided that parish clerks should receive their wages as ordered by the Commission and could be fined or imprisoned for any "contempt." Even apart from whether such terms in the patent were consistent with 1 Eliz., the argument for making a special case of the Commission for such parochial purposes seems to me feeble. It is not clear that the King's Bench thought so too, because the action the judges took was to bail the parties until a specified day in the next term. I suspect, however, that granting bail instead of discharging outright was mostly a courtesy to the Commission. The prisoners, relieved of duress, were given some time to seek the Prohibition that would temporarily free them from liability to any sort of ecclesiastical prosecution. Should they neglect to do so, the Commission might have some color to claim acquiescence in its jurisdiction and to use its patent to argue that it had acted within its authority in using secular sanctions.