Summary: The Elizabethan courts permitted parties with identical complaints to join in Prohibition at the surmise stage. The Jacobean King's Bench turned against joint Prohibitions, but 17th-century holdings in general are mixed, and the legitimacy of joinder was never firmly settled. The better opinion at all times was that joint plaintiffs-in-Prohibition must declare separately if the case progressed to formal pleading. Joint Prohibitions were most likely to be allowed when the ecclesiastical suit joined the plaintiffs-in-Prohibition as defendants.

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Over the last several topics, we have been essentially concerned with the degree of procedural flexibility to be admitted into Prohibition law. In general, the public stake in preserving correct jurisdictional lines made for flexibility -- for relaxing, within limits, conventions of "art" and logic that might have been more insisted on in strictly private litigation at common law. Such instruments as Consultations on motion and partial writs may be seen as ways of doing the special work of jurisdiction control sensibly and efficiently, in the face of a certain feeling, perhaps, that such flexible instruments were not quite good form and not absolutely necessary. A few other manifestations of procedural flexibility remain to be inspected.

One question under that rubric concerns the power of parties to join in suing Prohibitions. To take the simplest example: Suppose separate tithe suits are started against several parishioners, all of whom want to claim the same local modus. May the parishioners make themselves joint parties to one surmise and stop all the ecclesiastical suits by a single Prohibition? Other attempts to bring suits arose from different situations, but the characteristic issue is the same: When individuals are similarly aggrieved and want to make what amounts to the same claim, may they pool their resources? May they save themselves money and time by a joint suit -- and thereby save the courts the trouble of dealing repetitiously with identical cases and the risk of handling them inconsistently? The advantages of permitting it are obvious. On the other side, it may be argued that "by nature" litigation is individualistic. Joint suits by persons strictly "one in law" or "one in interest" (e.g., husband and wife; joint-tenants) were un-
questionably appropriate. But a joint suit by persons who simply happen to have the same case to make is more problematic. When A sues B and C separately, is it fair to A to let B and C entrust their legal fortunes to a common bottom? Is A not entitled to gamble on the "hazards of individualism," the possibility that B and C will take different steps in what each supposes to be his interest -- e.g., that B will hire a good lawyer and C a bad one; that B will lose interest and be nonsuited while C persists; that B will adventure an unsuccessful demurrer while C takes a traverse; that if both go to trial, one will be more conscientious in assembling evidence than the other; that B will make a procedural mistake (such as failing to prove his surmise in a Prohibition case) while C dots all the i's? It must, no doubt, be conceded that identical cases should be handled the same way in the same context (e.g., if identical declarations come up on demurrer separately). Apart from the simple judicial duty to handle like cases alike, more complicated procedural routes to consistency my be legitimate. (E.g.: If a modus is found bad as between Parson and Parishioner Jones, should Parishioner Smith's Prohibition on the same modus be denied, or reversed by Consultation on motion, upon a showing of the verdict against Jones? If a local modus is found good by verdict as between Parson and Jones, may Parson be attached without a separate Prohibition when he sues Smith for the same tithes in the same locality? A few cases on such points as these are discussed below.) But whatever the courts may or must do to insure consistency, the argument continues, the private litigant is entitled to whatever "breaks" he may get from proceeding separately against several identically positioned adversaries. Like other forms of "sporting" fairness to the litigant, this one has to do, however decisively or indecisively, with the larger ends of justice. Though identical cases should come out the same way in general, perhaps that is only true when several parties in the same position show equal zeal and care in taking advantage of their position. Perhaps permitting easy joinder tends too much to protect people from their own indifference, folly, and temptation to compromise. (Cf. the sense in which several people conspiring to do something wrongful may seem a little different and a little worse than several people simply doing the same wrongful thing. In the case of a joint suit -- as distinct from a conspiracy to do wrong -- it is hard to object to the economic pooling of resources. I.e.: It is hard to defend a party's sporting chance to defeat some of his identically placed adversaries by exposing them to charges they cannot bear as individuals. But an objection can be made to the pooling of moral resources. It is possible to imagine paro-
chial situations in which bringing a joint Prohibition would have a flavor of conspiracy: Suppose there are one or two parishioners with more to lose than others if tithes in kind are exacted and/or a more virulent desire than others to "get the parson." Suppose they go to work on other parishioners and persuade them to withhold their tithes and defy the parson to sue, proposing a joint Prohibition and agreeing to foot the bill. If the joint Prohibition is permitted and succeeds on the merits, it is likely that some will escape their tithes who would not as individuals have thought it worthwhile to try, or who for the sake of friendly relations with the parson might have paid up or settled in the end. Once in a common bottom, there will probably be no motive for individuals to get out, and the difficulty of doing so is in any event likely to be considerable. A parochial common bottom might well be promoted and maintained by a few men with a special interest in the nominally worthy public end of upholding the locality's immemorial manner of tithing.)

A final argument against joint Prohibitions specifically is that a joint surmise cannot conform to several libels. If the prohibo must correspond strictly to the prohibendum -- if a misnomer or miscopied figure in a surmise will cause the Prohibition to miss the target it is obviously aimed at -- should a surmise aimed at stopping A v. B not refer solely to A v. B, not to A v. B, A v. C, etc.? That this point is pettifogging -- that it makes less sense than even pedantic insistence on care in reciting the ecclesiastical suit to which the surmise relates -- does not necessarily rule it out.

We turn now to the cases on joint suits for Prohibition. In the early Sir Gilbert Gerrard v. Sherrington,¹ joinder was forbidden in relatively innocuous circumstances. Gerrard sued for tithes (as farmer of a rectory) against (a) Sherrington and (b) a servant of Sherrington's. He either brought two wholly separate libels or stated his claim against the two men twice-over in distinct parts of the same libel. In any event, the Court held that Sherrington and his servant must make separate surmises. There is nothing to suggest that the claims against Sherrington and the servant were in any substantive way distinct -- i.e., that Gerrard was doing anything but suing the legal occupier of land who was responsible for paying the tithes, plus an employee of the legal occupier who was immediately

¹ P. 20 Eliz. Q.B. 1 Leonard, 286.
responsible for the wrongful act of not setting the tithes out. Not letting a master and servant join to stop a suit that was all one in effect could be a strong precedent against joinder as between less closely related parties -- e.g., two parishioners. (It is just possible that there was a touch of politics in the Court's disposition to be tough on Sherrington and his servant. Sir Gilbert Gerrard was an important courtier. He sued as farmer of an inappropriate rectory owned by the Queen. His lawyer, Solicitor General Egerton, argued against the Prohibition on the ground that the Queen's farmer's suit -- like, no doubt, the Queen's own -- could not lawfully be prohibited. Having rejected Egerton's substantive argument, the judges may not have been disinclined to give his well-connected, prerogative-invoking client a technical consolation-prize.)

In our next case, a decade and a half later, joinder in Prohibition was upheld. Bartue sued Wodrofe and Coke for tithes. It does not appear how separate the ecclesiastical suits or claims against them were kept. The situation, in any event, was this: Wodrofe and Coke both wanted to take advantage of a tithe exemption enjoyed by certain land when it was in monastic hands. The allegedly exempt land had been leased to one Pastor by the erstwhile abbot for a term of 99 years. Pastor then sub-leased the land to Wodrofe for 60 years. Wodrofe granted part of the land to Coke for the remainder of his 60-year term. Thus it would appear that Wodrofe and Coke were sued as occupiers in respect of different parcels of land -- Wodrofe for the part he had not granted to Coke; Coke for the other part. They joined in Prohibition because they relied on exactly the same exemption. Godfrey, counsel for Bartue, showed some authority against joinder and attempted to argue that it was only permissible when people were sued in respect of true joint obligations (as if two joint-tenants were sued for tithes from their land). The reports have the Court rejecting Godfrey's argument with a simple statement that the joinder was good (MS: "good enough"). Conceding that, Godfrey showed that either Coke or Wodrofe was dead and moved that the Prohibition abate. The Court again turned him down: "Nothing is to be recovered by them except to be discharged, and the death of one will not abate the Prohibition."

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(MS.) In other words, though a properly brought joint suit with a "positive" objective -- recovery of damages or the like -- would fail by the death of one partner and require recommencement as the survivor's individual suit, that is not true of a Prohibition with the "negative" aim of establishing a tithe exemption.

A year later, the Common Pleas was confronted with the question whether two parishioners sued separately for tithes may join in Prohibition to take advantage of a single local modus. The question is reported simply as "moved at the bar" -- i.e., it does not appear whether there was an "actual controversy," as opposed to a request for an advisory opinion. In any event, the Court was split, with the majority of those present favoring the joinder. Justices Walmesley and Beaumont thought it "clearly" appropriate: "...their title to be discharged by the custom is joint, although the suits are several, as all the tenants in ancient demesne should join in Monstraverunt although they are severally distracted." (The privileged tenants of ancient demesne manors could protect themselves against being distrained for services beyond what the custom of the manor permitted by writ of Monstraverunt. The parallel is closely in point because ancient demesne tenants joining in Monstraverunt, like the parishioners joining in Prohibition here, would be seeking to enforce the custom of a local unit -- the manor in one case, the parish in the other.) Justice Walmesley went on to invoke the "public" theory of Prohibitions in support of joinder: "The offense is to the Queen and her Crown, and that is not several." (In other words, one might say, the object of Prohibitions is to protect the public interest in proper lines of jurisdiction; if several inappropriate ecclesiastical suits are going on at once, it makes no difference in what manner the common law Court is informed thereof -- by one joint surmise or several surmises.) Justice Owen, however, disagreed with Walmesley and Beaumont, insisting on the formalistic point that only the ecclesiastical suit "as is" can be prohibited: "...the suit is the cause of the prohibition, and that [the suit] is several." Since Chief Justice Anderson was absent, we cannot be sure that a majority of the Court would accept joint Prohibitions by a number of parishioners relying on the same custom.

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3 H. 37 Eliz. C.P. Add. 25,200. f.100.
A year later, the same two judges who favored the joint Prohibition in the last report struck down a less defensible attempt at joinder. This time, two parishioners without identical claims tried to economize by bringing a joint Prohibition. It appeared from their surmise itself that one of them claimed to pay 5/ in satisfaction of all tithes, while the other claimed to pay 4/. Justices Walmsley and Beaumont, alone in court, quickly granted a motion to quash the joint action. A limit was drawn: the suits against these two parishioners might equally offend the Queen, but nothing less than an identical claim -- a claim based on a single custom of whose benefit all parishioners are as it were "joint tenants" -- would justify a joint Prohibition.

In Shepard v. Metcalfe, two Queen's Bench judges (Popham and Fenner) reaffirmed the second holding in Wodrofe and Coke v. Bartue above: once a joint suit for Prohibition is properly commenced, it may continue even though the partnership breaks up. That is all the reports give -- the opinion that the withdrawal, nonsuit, or death of one joint-plaintiff-in-Prohibition will not bar his fellows or require them to start over. The feasibility of joint Prohibitions obviously gains with their immunity to breakdown. Permitting joint suits to change easily into individual ones implies a departure from common law formalism, as does permitting such suits in the first place.

In Stevenson et al. v.______, the Common Pleas reendorsed joint Prohibitions upon an explicit challenge to them, drawing at the same time a limit to collectivism. In this case, the ecclesiastical court proceeded ex officio against a number of non-resident landholders of a certain parish, to the end of holding them liable for rates to repair the church. The landholders were all in the same boat, in that they all wanted to challenge the ecclesiastical authorities' right to make non-residents contribute to the upkeep of a church from which they got no benefit, and to claim that the attempt to rate them proceeded from an unlawful piece of ecclesiastical legislation. They accordingly got a joint Prohibition. Yelverton, moving

4 P. 38 Eliz. C.P. Harg. 7, f. 195.
6 M. 41/42 Eliz. C.P. Lansd. 1065, f. 32b. Lansd. 1172. f. 54b, is a brief report of only the holding on joint Prohibitions in this case.
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for Consultation at the Bar, took exception to the joint prohibition, as well as to the substance of the plaintiff's claim. The judges were in doubt and divided on the substance of the plaintiffs' claim, but they agreed, promptly and in general terms, that the joint suit was legitimate. Justice Daniel cited a Darcy's Case as upholding joint Prohibitions. The judges added, however, that the joint plaintiffs must declare separately upon attachment. In other words, the surmise may be joint, but if and when the case proceeds to formal pleading the partners must act as individuals. There would consequently be an outside chance in the long run of the several plaintiffs' cases being differently pleaded and responded to.

An undated report, certainly Elizabethan,\(^7\) upholds the joint Prohibition in especially strong terms. Several occupiers of land in the Forest of Gisborne joined to assert a modus applicable to tithes throughout the Forest. The Court accepted the joinder although the joint plaintiffs were sued by separate libels in the ecclesiastical court. It justified the joinder by express reference to the public character of Prohibitions, i.e., their exemption from the individualistic canons of mere private litigation: "... for the Prohibition is no action, but an ex officio act on information, and there is neither plaintiff nor defendant nor pleading in Prohibition." The last clause amounts to saying that "plaintiff, defendant, and pleading" come in only at the next stage -- Attachment on Prohibition. At the earlier stage, there are only "informers" pro and con, and they may speak in any "natural" form (as opposed to the "artificial" style of pleading.) The report goes on to say that the joint plaintiffs in the instant case declared separately. We have, therefore, a practice-precedent to support the rule, stated judicially elsewhere, that though "informing" may be joint, "pleading" must be individual.

Basically, the Elizabethan authority supports joint Prohibitions, stronger support coming from the Common Pleas than from the Queen's Bench. The Jacobean King's Bench turned the other way. In Burges and Dixon v. Ashton,\(^8\) it clearly repudiated joint Prohibitions, though with lenient effect in the event. Two tithe-payers joined to take advantage of the

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\(^7\) Harl. 4817, f. 162. The dated cases surrounding this and other undated ones in the series are all from ca. the 1590's, mostly C.P.

\(^8\) T. 6 Jac. K.B. Yelverton, 128.
same local *modus*. Upon motion for Consultation, the Court agreed unanimously that the Prohibition should never have been granted in joint form. The judges clearly embraced "formalistic individualism": The two parishioners were sued by separate libels, ergo they must seek separate Prohibitions; "the tortious vexation of the one does not extend to the other." Nevertheless, the judges denied the motion for Consultation. They consciously treated the case like a "misconceived surmise": The joint surmise was bad; the plaintiffs should have been told then and there to start over as individuals. Since, however, the Prohibition had been granted, and since it appeared to the Court that both parishioners had good grounds for individual Prohibitions, Consultation was denied. The two parishioners were told to declare separately (as Stevenson *et al.* says they should do in any case).

In Barnard *et al.* v. Little,⁹ two terms later, three joint plaintiffs managed to keep their partnership going too long. They were punished accordingly. Here, the plaintiffs made their surmises jointly and went on to declare jointly. Upon demurrer, the Court granted Consultation. The Court's language makes it clear that the joinder was considered bad *ab initio*, though perhaps it was only fatal because it survived through the declaration stage. There were three libels, the judges said, ergo there must be three Prohibitions (leaving the implication, as the last case does, that a joint Prohibition might be justified if the ecclesiastical plaintiff had comprehended his separable claims against several persons into a single libel). The report does not say what kind of common claim caused the three plaintiffs-in-Prohibition to join. Justice Fenner did not participate in this decision, but the judges present were unanimous.

Two Common Pleas holdings, just slightly later than the two from the King's Bench above, reaffirm the former court's acceptance of joint Prohibitions. The first report¹⁰ is of a *per Curiam* opinion: Tithe-payers may join to take advantage of a common local *modus*, but they must declare separately. "Public theory" language was used to support the point: "...
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the Prohibition is only to give notice to the court." Essentially the same point is repeated in the Court's resolution of Hopkins, Smyth, et al. 11 It appears that the libel in this case was joint in the sense of "conglomerate," "one document comprising similar claims against a number of tithe-payers." It may be easier to justify a joint Prohibition in that case than where there are fully distinct libels. Even so, the Court in Hopkins, Smyth, et al. reiterated that the joint plaintiffs must declare separately. A Sir Francis Drurye's Case was cited in support of the holding in Hopkins, Smyth, et al. The reporter adds a note on a Bugg's Case from the same term (M. 8 Jac.), where it was argued that one Prohibition should be directed against two joint ecclesiastical plaintiffs, but that plaintiffs-in-Prohibition should declare against them separately. That goes to support distinguishing the surmise stage from the declaration stage. The undated Parker's Case, 12 probably roughly contemporary with the two reports above, reaffirms the joint-Prohibition-separate-declaration rule (where the Prohibition aimed at taking advantage of the tithe exemption for reclaimed land under 2/3 Edw. 6).

In Cotes and Succerman v. Warner, 13 the King's Bench was confronted with two of its seemingly contradictory precedents. One side urged Burges and Dixon v. Ashton against the joint Prohibition. The other side urged Wodrofe and Coke v. Bartue in its favor. Actually, Cotes and Succerman was not quite like any earlier case. The following features are to be noted: (a) Cotes and Succerman were both sued by the same ecclesiastical libel. (b) They were sued for tithes of hay cut from certain fenland, of which they made no pretense to be owners -- i.e., for hay taken by virtue of a right of common. (c) They claimed in their joint surmise to be beneficiaries of a quondam monastic exemption: A monastery was seised of the fen and prescribed in exemption from tithes for itself, its tenants, farmers, and occupiers. The exemption was preserved by the Statute of Monasteries. Cotes and Succerman had houses near the fen, the occupiers of which had always taken hay from the fen by way of common. They claimed, therefore, to be "occupiers" within the prescription, even though they had nothing in the soil of the fen. (d) Having got a

11 M. 8 Jac. C.P. Harg. 15, f. 225.
12 Brownlow and Goldesborough, 7.
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joint Prohibition on that surmise, Cotes and Succerman went on to declare jointly. The parson then pleaded over (in effect disputing the monastery's seisin and the prescription and that Cotes and Succerman were "occupiers" within the prescription if it was true). It is only at this point that the legitimacy of the joint surmise and declaration was discussed. The procedural form in which the question was raised does not appear from the report (plaintiff's demurrer to the plea in bar? latter-day motion for Consultation?).

The parson contested the substantive sufficiency of the Prohibition as well as the joinder (the former on the ground that a pernor of profits by way of common is not an "occupier" within the meaning of the prescription). The judges' remarks in our report are largely on the joinder, though as much as is said on the other point is favorable to Cotes and Succerman -- i.e., to taking "occupier" broadly. (It is not irrelevant to note that, for the Court's disinclination to jump on a point of procedure at a late state might be explained by its belief that the plaintiffs were substantively in the right.)

On the joinder, Justice Yelverton was strong for Cotes and Succerman. He had "no question" but that they might join. His reasoning seems to go as follows: It is significant, but not decisive, that one libel was brought against both men. What is decisive is that the libel did not show on its face that their "interests and titles" were separate. I take that to mean in effect that the libel should be construed against the parson. If the libel were merely "conglomerate," the joinder would be bad. But if for all that appeared the parson might be suing with respect to a single act of taking hay, jointly performed by the two men -- or if so far as the parson was concerned they might have been "joint tenants" of one and the same pretended right or non-right to withhold tithes -- then the joinder is good. (My second formulation is awkward, but perhaps necessary to make the point. I think it is clear that Cotes and Succerman did actually have separate "interests and titles" within Yelverton's meaning. I.e.: Each had a house; each took hay by right of common appurtenant to his house; each claimed to take it tithe-free by virtue of an exemption applicable to the occupier of his particular house; in principle, Cotes might have a valid right of common and concomitant tithe-exemption, while Succerman's claim to the same sort of right might be invalid. I therefore take Yelverton to refer solely to the way the libel is drawn and the assumptions on
the parson's part it implies. The difference would be between libels in the following alternative forms: Libel 1 - "C is an inhabitant and land-occupier of my parish, and has cut hay in the fen, and has not rendered tithes thereof as the law requires; S is also an inhabitant, etc.," Libel 2 - "C and S are inhabitants of my parish and have cut hay in the fen, etc." By Yelverton's opinion, C and S may join in Prohibition if the libel is like Libel 2, contra if it is like Libel 1. The opinion comes to this: A parson who sues several parishioners in one tithe suit risks a joint Prohibition unless he is careful to show that his libel is not a true joint suit, but a mere conglomerate of several individual suits, analogous to a single suit against one parishioner for several different tithes.

Justice Williams agreed with Yelverton, perhaps with slightly different emphasis: The ecclesiastical suit is against both, "but if the interest had appeared to be several they ought to have had several prohibitions." There may be difference between the two judges, coming to the difference between "the joint ecclesiastical suit is a sort of prima facie justification for the joint Prohibition" (Yelverton) and "It makes no difference whether the ecclesiastical suit is upon one libel or several; joint Prohibition can only be justified by the absence of anything in the libel to suggest that the two parishioners' 'interests' are separate" (Williams). Chief Justice Fleming's words on the joinder are "if you have a joint libel they shall join in prohibition, because there it does not appear that they have several interests." If there are any hairs worth splitting as among the Justices' opinions, Fleming seems stronger than Yelverton on the matter (as if to say, "A joint libel always implies that so far as the parson is concerned the parishioners' interests are not several"). But his "if" suggests that he wanted to see the ecclesiastical record before making a decision. (It is perfectly possible that the other judges were speaking hypothetically, not with certain knowledge of the shape of the ecclesiastical suit.) In any event, the case was adjourned, so that we have no reported decision.

In sum, Cotes and Succerman v. Warner at least goes to qualify the generalized disapproval of joint Prohibitions that might be incautiously projected from Burges and Dixon v. Ashton. It also tends to qualify any wholly generalized distinction between the surmise stage and the declaration stage. On the other hand, the judges showed no inclination to follow the theory implicit in Wodrofe and Coke v. Bartue, as counsel urged them
to: That two persons claiming the same merely "negative" monastic discharge may always join. The cases are probably distinguishable: Wodrofe and Coke were closer "in interest" than Cotes and Succerman because Wodrofe was Coke's lessor of part of the land affected. I.e.: If Blackacre as a whole was exempt, Blackacre minus X (what Coke had) was certainly in the same boat as the rest of Blackacre (what Wodrofe retained). By contrast, Cotes could have had a good right of common and Succerman a bad one.

In all the cases we have looked at so far, two or three people with related but technically distinct claims attempted to join. The case of the Parishioners of Begger's Barton\textsuperscript{14} presents a different situation -- the true "group Prohibition." The report is unfortunately too brief to do much with. We are told that plaintiffs-in-Prohibition were the parishioners generally. They surmised that the vicar had a piece of land in satisfaction of certain tithes. The Court thought that Prohibition lay because "every parishioner will take advantage." The way that it is put suggests that the doubt was the "standing to sue" of parishioners who were not objects of ecclesiastical proceedings. It is most unlikely that there was a libel out against every single parishioner. The chances are that some parishioners were sued for their tithes, whereupon all the parishioners got together in a Prohibition. The Court held that this form of proceeding was acceptable, since all the parishioners had an interest in upholding the modus. Is it not anomalous to admit this sort of joint Prohibition, but to frown on joinder by actual parties to ecclesiastical suits wishing to make the same claim? Yet the Court that was liberal towards the Parishioners of Beggar's Barton was the King's Bench, the Court that tended to frown on private joinder.

In Kadwalder \textit{et al.} v. Bryan,\textsuperscript{15} the Caroline King's Bench ruled out a joint Prohibition. Kadwalder and confrere based their Prohibition on 23 Hen. 8, c. 9, complaining that they had been sued in the wrong ecclesiastical court. (For defamation. Nothing appears as to whether there were two libels, or, in the more likely event that there was only one, as to whether and how the two people were associated in defamatory conduct.)

\textsuperscript{14} H. 12 Jac. K.B. Add. 25,213, f. 169.
\textsuperscript{15} M. 5 Car., K.B. Add. 25,213, f. 169.
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The case was pleaded to a legal issue: declaration, plea in bar, demurrer by the plaintiffs to the plea. Omitting the reasons why, the Court thought the plaintiffs had no case -- i.e., that the plea in bar was perfectly good, the points urged in support of the demurrer largely frivolous. Strongly disposed to grant a Consultation anyhow, the Court added that the joint Prohibition was not good because the plaintiffs' "grievs" were several. Under the circumstances, the decision does not mean much. The implications are worth reflecting on, however. Suppose A. and B are sued in Diocese X by the same libel but with respect to acts or offenses that could, if necessary, be made the object of separate suits. If both live in X, there is obviously no basis for Prohibition under 23 Hen. 8. The other possibilities are (1) that A lives in X but B does not, or vice versa; (2) that neither lives in X. The existence of the first possibility recommends insisting on separate Prohibitions. I.e.: If identity of "title" is required to justify a joint Prohibition, A and B should not be permitted to join, because there is a possibility that one is entitled to a Prohibition and the other not. However, even if it is true that A lives in X and B does not, the ecclesiastical suit "as is" should be stopped. I.e.: It should be stopped qua joint suit. Do A and B not have a truly joint interest in stopping that suit? Do they not suffer a joint "grief" by being so sued, even though one would have no grievance if he were sued separately? In sum, it seems to me that cases arising on 23 H. 8 pose a special dilemma with respect to joint Prohibitions. Our case, however, counts against the argument that could be made in favor of joinder.

In Wood and Carvener v. Symons\(^{16}\) (treated above for its other points), the Caroline Common Pleas discussed joint Prohibitions. Defendant-in-Prohibition made nothing of the fact that the surmise in question was joint, but persuaded the Court on other grounds that no Prohibition should be granted. Chief Justice Richardson brought up the joinder of his own motion, implying that joint Prohibitions were bad in general. Yelverton, of counsel with plaintiffs-in-Prohibition, argued that when the ecclesiastical suit is joint, the Prohibition may be joint too. Such, he said, was the King's Bench rule. He also invoked the "public theory" argument for joinder -- that a Prohibition is not a simple private suit, but in one aspect "for the King," and therefore not subject to the individualism of mere

\(^{16}\) M. 5 Car. C.P. Hetley, 147.
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civil litigation. Two Justices, Hutton and Harvey, then laid down the well-precedented rule that joinder at the surmise stage is permissible, but not at the declaration stage (not necessarily confining joint surmises to cases where the ecclesiastical suit is joint). Richardson, however, held out against joinder generally. A wrongful ecclesiastical suit, he argued -- albeit a joint suit -- wrongs the several parties individually; consequently, their surmises complaining of such wrong must be separate and individual. He expressly rejected Yelverton's invocation of the public aspect of Prohibitions: ". . . it is as the sute of the party is" -- i.e., in the most basic respect, a Prohibition is just another lawsuit, an individualistic matter. Finally, Richardson was frank about one disadvantage of joinder: "It is against the profit of the Court to suffer many to joyn. . ." He then adds: ". . . and it is usual in the case of customs of a parish in debate, to order proceedings in the two prohibitions, and that to bind all the parish and parson." I would construe the last remark as follows: If several parishioners are sued for tithes and want to invoke the same local modus, the practice is to insist on at least two separate Prohibitions -- i.e., not to permit all the parishioners to join in a single one. If both come out the same way -- validating or invalidating the modus -- then the decisions will be given collateral effect as res judicata for or against other parishioners (see below for cases on such "collateral effect"). Regardless of whether Richardson was right about the practice, there is some point in insisting on two separate Prohibitions -- by way of "double check" -- if one is thinking about settling a matter so as to bind non-parties. Wood and Carverner v. Symons principally testifies to the unsettledness of basic questions about the joint Prohibition as late as 1629.

A final scrap of late evidence is conservatively favorable to joint Prohibitions. In 1641,17 two Common Pleas Justices, Reeve and Foster, said that parishioners jointly sued for tithes may join in Prohibition if they rely on the same modus. Contra if they want to allege different modi.

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17 H. 16 Car. C.P. March, 94.