

# New Light on 'Father' Smith and the Organ of Christ Church, Dublin

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## Introduction

Of the organ builders known to have been working in England between the Restoration of the monarchy in 1660 and the end of the seventeenth century, Bernard Smith (c1630–1708) is perhaps the most celebrated. Known as 'Father' Smith in his own lifetime, he and Renatus Harris (c1653–1724) revolutionized English organ building and dominated the field for the remainder of the century and beyond. Both had served their pupillage in Continental workshops—Harris spent his early years in France, while Smith (as 'Baerent Smit' or 'Schmitt') worked in Holland before settling in England; but there any similarity between the two men ends. The instruments they built were in very different styles, reflecting their respective background and training. In the years during which their careers overlapped they became fierce and acrimonious business competitors, a situation no doubt exacerbated by their different religious proclivities, Harris being a Roman Catholic, and Smith a Protestant. This rivalry reached its state of greatest intensity in the so-called 'Battle of the Organs', which took place in the Temple church in London during 1683–85, and from which Smith (after allegations of skulduggery on both sides) ultimately emerged victorious.<sup>1</sup> To judge from the surviving records of various law courts, Harris was of a particularly litigious bent, in marked contrast to Smith, who has barely left a trace on the same archives. The

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I owe an enormous debt of thanks to Dominic Gwynn, who very generously gave me access to his transcriptions of Chancery documents in class C24 of The National Archives of Great Britain; without his assistance, particularly his painstaking deciphering of some very challenging handwriting, this article would be much the poorer.

<sup>1</sup> For a full account of this curious episode, see David S. Knight, 'The Battle of the Organs, the Smith Organ at the Temple and its Organist', *Journal of the British Institute of Organ Studies*, 21 (1997), 76–99. The standard work on Smith is still Andrew Freeman, *Father Smith, otherwise Bernard Schmidt, being an Account of a Seventeenth Century Organ Maker*, edited, annotated and with new material by John Rowntree (Oxford: Positif Press, 1977).

lawsuit that is the subject of the present article is therefore all the more interesting for its rarity value; it shows Smith, first in Chancery and then in the court of King's Bench in Westminster, defending himself against William Moreton, Bishop of Kildare, on the matter of the organ in Christ Church, Dublin, which he had been commissioned to build some years earlier. His dealings with that institution have been known to Smith biographers and historians of the cathedral for years, with the consensus of opinion being that Smith, though contracted to provide a new instrument, never carried out his side of the bargain, eventually forcing the bishop to turn to Harris as an alternative supplier. Newly discovered documents among the equity and common-law records held by the National Archives at Kew in London throw most of that narrative into serious question. This revisionist view is set out below, interlarded with a series of extracts from the Chancery suit (in English) and the King's Bench plea roll (translated from the original Latin). This new material is of the greatest interest in that it supplements our knowledge of the circumstances surrounding the commission and its aftermath, and provides invaluable detail about the contract and the organ itself that is available from no other source. However, in order to contextualize the new information, it will first be necessary briefly to review our current state of knowledge of the topic, which draws mainly on the records of Christ Church Cathedral.

### **The organ at Christ Church, Dublin<sup>2</sup>**

By 1694 the organ in Christ Church, which George Harris had built thirty years earlier and to which Launcelot Pease subsequently added a choir division, had become old-fashioned and was in need of replacement. In April of that year funds to set in motion the process of acquiring a new instrument were made available in the form of a bill of exchange for £50 payable to Ralph Battell, sub-dean of the Chapel Royal, 'on Account of an Organ to be brought out of England to this church'. Three weeks later the chapter authorized the dean, William Moreton, 'to Treat and Conclude for a new Organ ... according to his Lordships discretion', and, on 23 November following, an agreement was confirmed and sealed with Bernard Smith to that end.<sup>3</sup> The cathedral authorities

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<sup>2</sup> This section is dependent on the work of Barra Boydell, in particular his *Music at Christ Church Before 1800: Documents and Selected Anthems* (Dublin: Four Courts Press, 1999), 103–4; 'The Flourishing of Music, 1660–1800', in Kenneth Milne (ed.), *Christ Church Cathedral, Dublin: A History* (Dublin: Four Courts Press, 2000), 298–314; and *A History of Music at Christ Church Cathedral, Dublin* (Woodbridge: Boydell Press, 2004), 114–5.

<sup>3</sup> Moreton had been dean of Christ Church before his promotion to the mitre in 1682, but owing to the poverty of his diocese he was allowed to retain the deanery. He was later translated to the see of Meath; see 'Moreton, William (1640/41–1715)' in the *Oxford Dictionary of National Biography*. He has

then appear to have let matters drift, perhaps assuming that everything was well in hand; even as late as St Patrick's Day 1697—when they ordered the payment of £100 'to the Deane in London for the Organe for the Church when it is ready to be brought over', and undertook to pay the freight charges—they were still confident that Smith would deliver. However, between then and 25 May following something happened that caused the dean and chapter to lose patience, and on the latter date they entered into a fresh agreement with Renatus Harris, who had just completed the new organ at St Patrick's Cathedral, Dublin, giving him a letter of attorney to recover the money they had advanced to Smith. The new Harris instrument was to be transported to Chester, ready for shipping to Ireland by 10 August 1697, and erected in Christ Church by 25 March of the following year. According to tradition, it utilized parts of the organ that Harris had built for the 'Battle of the Organs' in the Temple church, but it still cost the cathedral £1200.<sup>4</sup>

### **Kildare v. Smith in Chancery**

Having agreed that Harris should provide Christ Church with its new organ, Moreton turned his attention to the matter of compensation for the inconvenience and financial damage he had putatively sustained at Smith's hands, and in the Trinity term of 1697 he instituted proceedings against the organ builder in the court of Chancery.<sup>5</sup> The bill of complaint, filed on 28 July 1697, begins with a summary of the main points of his contract with Smith and includes a list of other grievances, one of which was that a copy of the agreement had not been lodged with the cathedral authorities in Ireland. Therefore, instead of quoting the Chancery version of the contract, which is in the manner of a paraphrase and appears to rely on the bishop's notes and/or memory, I will wait until we discuss the common-law action, which reproduces the original

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the distinction of having ordained Jonathan Swift deacon at Christ Church in October 1694, and priest three months later.

<sup>4</sup> Boydell, *Music at Christ Church Before 1800*, 104; W. H. Grindle, *Irish Cathedral Music* (Belfast: Institute of Irish Studies, Queen's University Belfast, 1989), 140; Stephen Bicknell, *The History of the English Organ* (Cambridge: Cambridge University Press, 1996), 131; Denise M. Neary, 'Organ-building in 17th and 18th Century Dublin, and its English Connection', *Journal of the British Institute of Organ Studies*, 21 (1997), 20–27.

<sup>5</sup> The National Archives of Great Britain: C8/358/17; unless otherwise stated, all subsequent documentary references are to material in that record repository. In the transcriptions that follow, the use of italics indicates the editorial expansion of contractions and abbreviations; editorial insertions, including minimal punctuation to clarify the meaning of long sentences, are shown in square brackets; interlineations in the original text are placed between converging obliques; and, in the longer (indented) quotations, the documents' line-breaks are shown with '!'.

document *verbatim* as part of the pleading process. Suffice it to say for the moment that on 31 May 1694 Smith agreed to build a double organ for Christ Church at a cost of £500; he was to have an additional £70 if he erected the instrument himself, but if he subcontracted the work to another, then that person would receive only £20. The organ was to be paid for in instalments beginning with two deposits of £50, the first made on the day the agreement was signed, and the second five months later on the Feast of All Saints; other scheduled payments, such as an additional £100 when the instrument was ready for shipping to Dublin, were to be made in due course. On signing the contract, the parties agreed that it should be left in the hands of Ralph Battell, 'for the equall benefitt of them both'; little did he know that by agreeing to act as its custodian he would make himself a co-defendant in the case.

The essence of Moreton's complaint was that Smith, having received the two sums of £50 in 1694, had still not built the organ three years later. The latter's inaction, it was claimed, had placed the bishop in an impossible situation, because the prebendaries of the cathedral had

lately superseded your Orators [i.e. Moreton's] authority formerly given him for *providing* them an Organ as aforesaid And they haveing an absolute occasion for a New organ to be forth with sett vp in the said Church[,] the old organ being altogether vseless[,] | they have agreed with some other person for the makeing setting vp & finishing another Organ in the said Church soe that by reason of the said Barnard [*sic*] Smith's neglecting to *performe* his said Agreement as aforesaid in any reasonable time the said Church | is otherwayes supplied with an Organ And your Orator rendered incapable of *performeing* the said contract or Agreement on his part And therefore such Agreement ought to be cancelled & the said one Hundred pounds with interest thereon to be paid | back to your Orator[.]

Furthermore, Smith stands accused of demanding the immediate remittance of monies up-front that both parties had agreed should be paid in instalments, and of unreasonably exploiting a loophole in the contract, which did not prescribe a time limit for carrying out the work. Moreton also alleges that Battell had refused to release the copy of the contract, that by mutual consent had been placed in his charge, 'without the Order & Decree of this Honora<sup>ble</sup> Court', and prays that process be awarded against the defendants to enforce their presence in court to answer his bill.

The Master of the Rolls responded to the plaintiff's petition by issuing the desired subpoena on 21 July 1697;<sup>6</sup> but securing the appearance of Smith and Battell was no

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<sup>6</sup> C33/287, fol. 721. Subpoenas were frequently issued before the filing of the bill; see Henry Horwitz, *Chancery Equity Records and Proceedings 1600–1800: A Guide to Documents in the Public Record Office* (London: HMSO, 1998), 15–16.

easy task, and increasingly severe writs of attachment had to be sued out against them in December and February following.<sup>7</sup> However, that they did eventually comply, even though their answer has been lost from the file, is confirmed by an order of 30 June 1698 that mentions the said document.<sup>8</sup> After the exchange of pleadings in a case before the equity courts (i.e. Chancery and the equity side of the Exchequer), the next stage was the presentation of proofs. Both parties gathered evidence for their cause by means of a series of interrogatories administered to designated witnesses, who were required to answer the questions and then sign each page of their statements; because these depositions were dictated under oath, they are invariably of high evidential value.<sup>9</sup> Among those called upon to depose *ex parte* Moreton were Renatus Harris and George Waylett, one of the churchwardens of St Andrew Undershaft in the city of London. Three of Smith's workmen answered on behalf of their employer; and Ralph Battell and John Blow, who held the court position of 'tuner of the regals, organs, virginals, flutes and recorders' jointly with Smith, testified for both complainant and defendant. The loss of the answer and some supporting documentation is of course regrettable, but it is not fatal to a reasonably coherent account of this protracted legal saga, for the essential points of a defendant's case can often be reconstructed from a close reading of the interrogatories and depositions. The Chancery documents, then, though imperfect, still provide a wealth of relevant and trustworthy detail that enables one to flesh out the skeletal picture hitherto available only from the cathedral archives.

According to the only 'country' deposition generated by the litigation, the Bishop of Kildare's first step towards replacing the organ in his cathedral was taken with the assistance of Henry Aldrich, doctor of divinity and dean of Christ Church, Oxford. In an informative statement made in Oxford on Tuesday 7 February 1699, Aldrich testified that:

he this deponent with his own hand \writing/ | did draw vp Articles betweene the *Defendant*  
[Smith] & the Bishopp of Kildare for the makeing of an Organ for the Church of Christ Church in  
| Dublin *which* to the best of this \deponent's/ remembrance were duely Executed by the  
Bishopp And the *Defendant*.<sup>10</sup>

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<sup>7</sup> Attachment was the initial procedure of contempt to seize a person, normally to enforce the taking of securities for his appearance in court; see C33/289, fols 58*v* and 234.

<sup>8</sup> C33/289, fol. 794*v*. The date of the answer is not known, but it must have been made in the spring or early summer of 1698.

<sup>9</sup> Depositions were either 'town' depositions taken in London or 'country' depositions taken in the provinces, usually before local commissioners appointed by the court.

<sup>10</sup> C22/664/38, 2.

It would have been quite natural for the bishop to consult Aldrich on the matter of the organ; the latter was acquainted with both parties and had probably known Moreton since the early 1660s when they were students together at Christ Church, Oxford. What is more, Aldrich was a keen amateur musician, a collector of music prints and manuscripts, and a competent composer and performer who sang with his college (i.e. cathedral) choir and promoted the highest standards of choral worship in the university.<sup>11</sup> Given his anti-Catholic views, it is hardly surprising that he turned to Smith when asked to advise on the Dublin organ; but the claim that he drafted the agreement for its construction, and that Smith and Moreton acquiesced in it, comes as something of a revelation, and is a matter to which we must return later.

According to Battell's deposition *ex parte* his co-defendant, both Moreton and Smith and other interested parties assembled at Mrs Pryor's 'Rhenesh wine house in Channell Row Westminster' on 31 May 1694 to execute the contract. Before being signed the deed was read aloud, and it was probably at that stage that someone realized that the issue of the instrument's transportation had not been addressed, so the document was endorsed with a memorandum stipulating that Smith was 'to deliver the said Organ anywhere within five Miles of London or therabouts' as the dean and chapter should appoint. Once this omission had been rectified, Moreton and Smith formally ratified the contract and Battell, John Blow, Henry Purcell and a certain Colonel Harry Ewbank witnessed it. A copy was then sent to Dublin, where the dean and chapter confirmed the terms of the agreement and its accompanying memorandum under their hand and seal, and 'did transmit the same back again for England to be left in the hands of the defendant Battle Subdean of his Majestys Chappell Royall for the Equall Benefit of the said Parties together with the said Originall agreement'.<sup>12</sup>

Work presumably began on the Christ Church instrument shortly after the contractual details had been settled, but its construction did not go according to plan; in January 1695, after 'Smith had made a Considerable Progresse in building the said Organ', Battell informed him that he had received a letter from the bishop asking for changes to be made to the specification.<sup>13</sup> The testimony of those asked to depose on this matter differs in some points of detail, but Blow's account of events is probably the most accurate:

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<sup>11</sup> See W. G. Hiscock, *Henry Aldrich of Christ Church, 1648–1710* (Oxford: Holywell Press, 1960), 32–41.

<sup>12</sup> C24/1207/101, 9.

<sup>13</sup> C24/1207/101, 5–6.

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That he hath seene some letter or letters from the *Complainant* the deane wherin | he desired there might be some alteration or addition of Stopps made | in the said Organ more then was by their Articles contracted for | And this *deponent* particularly remembers that the *Complainant* the deane desired | the Trumpett Stopp and Eccoes might be added And this *deponent* sayth that such | Alteracion of Stopps as desired might in this *deponent*'s Judgment have bin | made notwithstanding the Organ had bin soe farr finished but what | such alteration or Addition would have cost this *deponent* doth not knowe nor | doth he remember that the *Complainant* the Bishop in such his letters did write | any thing of his offering or promising any further payment or recompence | for such alteration or addition of Stopps[.]<sup>14</sup>

Predictably perhaps, Renatus Harris in his deposition was anxious to play down any disruption that the bishop's change of heart might have caused to Smith's business:

And this *deponent* sayth that All and any of the Alteracions or | Additions of Stopps that are by the said letters desired might have bin made | with a small Alteracion of the Case and soundbords which Alteracion in the | Case and soundbords might have stood a Workman in five pounds or | thereabouts[.]<sup>15</sup>

However, he conveniently failed to take account of the considerable cost of making the new stops, which, in the estimation of the other organ builders who deposed, would have amounted to about £250. To take just one quotation for the work as a sample, John Coombe testified:

That the *Defendant* hath usually for makeing the Trumpet Stop in an Organ 100<sup>ii</sup> & for Voyce Human | stop 80<sup>ii</sup> & the Eccho stop is dearer or cheaper according as *Persons* will have it made[,] there | being great Variety of makeing it & it is a little Organ within an Organ to *which* fowre or more | Stopps may be made & according to the Stopps made it is dearer or cheaper to \wit/ 100<sup>ii</sup> | or upwards ... And this *Deponent* saith that the *Defendant* Smith did well | deserve 250<sup>ii</sup> for adding the Trumpet Stop & Voyce Humane Stop & putting in such an Eccho | as would fit the said Organ[.]<sup>16</sup>

John Blow bore witness to the competitive nature of those figures:

this *Deponent* doth know that 100<sup>ii</sup> *per* stop hath | been demanded by Organ Builders for Each of the Stopps in the *Interrogatory* mencioned | & this *Deponent* doth assuredly believe they have been paid according to or *about* those Rates | for such Stopps in severall Churches of this Towne[.]<sup>17</sup>

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<sup>14</sup> C24/1206/27, 19. According to Battell (p. 13), Moreton 'desired an alteration of Stopps to witt the Trumpitt Stopp and Voyce Humane in lieu of the Cornett'.

<sup>15</sup> C24/1206/27, 3.

<sup>16</sup> C24/1207/101, 3.

<sup>17</sup> C24/1207/101, 10.

Battell added that ‘he hath heard M<sup>r</sup> Harris another Organ builder say He woud not make the *said* stops und<sup>er</sup> the prizes [i.e. prices] abovemencioned’.<sup>18</sup>

It is not clear from the proceedings whether Smith was able to accommodate the bishop and make the desired changes to the organ, but with no offer from the latter of additional funds to cover the extra cost, it is to be very much doubted; secure in the knowledge that he had a legally binding contract, he appears simply to have carried on regardless. The instrument was finished and ready for delivery by midsummer 1695—some deponents say May or June, others July—and when Blow came to test it in ‘the late King James his Popish Chapple in Whitehall’, where it was being stored, he was full of praise:

it was a very good Instrumen<sup>t</sup> and | as good as could be made for the price as aforesaid by the said Articles agreed on as | this Deponen<sup>t</sup> beleeves & did as this Deponen<sup>t</sup> believes in every Respect answer the *said* | Condicions & true intent & meaning of the said Articles on the Defendan<sup>t</sup> Smiths Part to be Performed | & in this Deponen<sup>ts</sup> Judgmen<sup>t</sup> the Tone of the said ... Organ was as | good as any this Deponen<sup>t</sup> ever heard in his life[.]<sup>19</sup>

Shortly thereafter Colonel Ewbank, ‘who was dayly sollicitor in this affaire’, gave the bishop notice that the instrument was ready for transportation, which prompted the cathedral authorities to release the £100 that they were contractually obliged to pay at this point; however, the conditions imposed by the payor on how the funds were to be transferred proved to be another stumbling block. Battell’s deposition *ex parte* Kildare gives the fullest version of events:

about August in the yeare of our Lord 1695 he this deponen<sup>t</sup> received a letter | wrott by the said Complainan<sup>t</sup> the deane from Ireland That he would send the defendan<sup>t</sup> | Smith a Bank Bill of 100<sup>li</sup>; in Case he would gett the Organ on the | wheeles that way and that he heard that Bank bills were as good | as ready money or to that effect ... And sayth that the Complainan<sup>t</sup> the Deanes brother accordingly in | or about August 1695 offered to deliver to this deponen<sup>t</sup> on the behalfe of the defendan<sup>t</sup> Smith a Bank bill | of 100<sup>li</sup> with which this deponent soone after acquainted the defendan<sup>t</sup> Smith who \then/ refused | to accept the said bank bill for 100<sup>li</sup> | or any thing else but ready money | with which refusall he this deponen<sup>t</sup> soone | afterwards acquainted the said Complainan<sup>t</sup> the Deanes | brother ... And this deponen<sup>t</sup> doth beleive that | the reason the said defendan<sup>t</sup> Smith did dislike the said Banke bill | was For that Bank bills at that time were not att parr but great | discount and soe as this deponen<sup>t</sup> remembers he told the said Complainan<sup>t</sup> |

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<sup>18</sup> C24/1207/101, 6.

<sup>19</sup> C24/1207/101, 10.



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the deanes brother[,] which dislike of the *defendan*<sup>t</sup> Smith as this *deponen*<sup>t</sup> | beleives was reall and not a *pretence*[.]<sup>20</sup>

There is nothing in the documents to suggest that Smith and the cathedral authorities ever resolved this *impasse*, which subsequently became a major contributing factor to the collapse of their agreement. Battell, whose attitude towards Moreton was at times quite hostile, put the blame squarely on the bishop's shoulders for two reasons. Firstly, he had allegedly failed to name a port within five miles of London to which Smith might deliver the finished organ, thereby breaching the terms of the memorandum attached to the articles of agreement. Secondly, Battell believed that:

the true Cause or reason | why the said *Lord Bishop* did not send for the *said* Organ assoone [sic] as the same was finished or made | ready to be sent & appoint a tyme & place when where & to whom the same should be delivered as | by the articles he had liberty & Power to doe was Because the money was not | ready it being then a Difficult tyme for money[.]<sup>21</sup>

One can assume, from the bishop's lack of communication and his refusal to take receipt of the instrument when it was finished, that he no longer wanted it because it did not include the stops he had belatedly requested.

Had Smith been as litigiously minded as Harris appears to have been, Moreton would undoubtedly have had a case to answer in the courts, but instead of going to law the organ builder attempted to find a buyer for his instrument, and towards the end of 1695 he called on Henry Aldrich in his London lodgings to see if he was interested. Aldrich's initial reaction to being offered the organ was one of surprise, and he

refused to deale for it saying twas intended for the | Bishopp of Kildare[,] where vpon the *Defendan*<sup>t</sup> produced a letter from the said Bishopp wherein the Bishopp seemed to be | displeased and Desired the *Defendan*<sup>t</sup> to Dispose of it as he could or some words therein to that

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<sup>20</sup> C24/1206/27, 10–11. It was part of the bishop's case that Smith never intended to let him have the organ, and that he invented excuses for refusing payment—such as claiming that the money bill offered was below par when it was not—in order to avoid fulfilling his side of the contract; Blow reported hearing Smith say that the discount on bank bills at the time was as much as 20%. To expose the alleged pretence, counsel for the plaintiff even solicited the testimony of one Thomas Fagan, a London merchant, who deposed that 'Banck bills were all the yeare 1695 and untill the 4<sup>th</sup> of May 1696 att noe discount' (C24/1206/27, 16). Of the deponents who expressed an opinion on the matter, all but Harris confirmed that the organ had been destined for Christ Church, Dublin, from the beginning.

<sup>21</sup> C24/1207/101, 6. Battell repeats the accusations even in his deposition *ex parte* Kildare: 'And the reason the said Organ was not sent to Ireland as this *deponen*<sup>t</sup> beleives was for that the said *Complainan*<sup>t</sup> the deane had not sent any Orders at what port he would have the Organ delivered nor yett made a *Retorne* of the said 100<sup>li</sup>' (C24/1206/27, 11).

or the like effect to which letter | for more certainty this Deponent<sup>t</sup> [Aldrich] refers himselfe And further sayth vpon this Deponent<sup>ts</sup> reading the said letter the | Defendant<sup>t</sup> said he was ill vsed And that now the Bishopp should not have the Organ or to that purpose[.]<sup>22</sup>

Following this conversation Aldrich may have taken a more sympathetic view of Smith's predicament and perhaps agreed to look into the possibility of purchasing the instrument without actually committing himself. However, when Battell heard that the two men had met to discuss the matter, he apparently jumped to the conclusion that the organ had been bargained for and sold, and wrote to Moreton saying as much. His account of the misunderstanding and how he extricated himself therefrom is as follows:

soone after the defendant Smith was in treaty with doctor Aldridge ... [.] this deponent wrott to the Complainant<sup>t</sup> the deane that the Organ | was sold which he supposed then to be true but hath bin since told that itt | was not actually sold but only a Treaty made in Order to Sale[.]<sup>23</sup> And this deponent | wrott the said letter according to the best vnderstanding he had from the | Information taken from the defendant Smith[,] vpon which the deponent did receive | a letter or two from the Complainant<sup>t</sup> the deane mightily blameing the defendant | Smith for parting with the Organ just when money was ready for itt or | to that effect \and demanded the hundred pounds back which M<sup>r</sup> Smith had received[,]<sup>24</sup> to which letter or letters this deponent returned the mildest | Answere he could[,] not by way of recriminateing for the delay of the | money soe long or excuseing M<sup>r</sup> Smith who had done this altogether | without his privacy[,] but rather endeavouring as farr as itt was possible | to accomodate matters[,] when by the said defendant Smith's Order he wrote | to him againe the choyce of these two things[:] either to pay him back | fifty pounds (which M<sup>r</sup> Harris thought a very faire proposition) or else to | make him another Organ altogether as good as the first vpon the | same foundation of the bargaine within a yeares time or therabouts[,] | with which second proposition the deane Agreed and sent back A | letter in testimony therof and the deponent hoped all things would then have | gone on very amicably ...<sup>25</sup>

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<sup>22</sup> C22/664/38, 2.

<sup>23</sup> Elsewhere Smith denied that what he had reached with Aldrich was 'an absolute agreement' (C24/1207/101, 8, in a marginal note).

<sup>24</sup> That is to say, the two payments of £50.

<sup>25</sup> C24/1206/27, 12–13. Battell's meaning is a little clearer in his other deposition, where he states that 'the Defendant Smith did | for Peace & quietude's sake offer the said Lord Bishop if he would give or allow him | Fifty pounds He would acquit him of the said Bargain & dispose of the said Organ | as he could[,] there being by reasone of the said moneys not being paid & an | Intimacion given by the said Lord Bishop as tho' he was desirous | to be off the Bargain ... But the said Lord Bishop chose to goe on with the Bargain & have a | new Organ made' (C24/1207/101, 8).

The beginning of Battell's answer to the next interrogatory supplies a few more details:

he doth knowe of the *defendant* Smiths making a second Organ for the | *Complainant*<sup>s</sup> [the dean and chapter] and the same was first proposed by the *defendant* Smith and this *deponent* | wrote of itt to the *Complainant*<sup>t</sup> the deane by way of accomodation for selling \or treating about the Sale of/ | the first Organ but this *deponent* doth not knowe whether the said *Complainant*<sup>s</sup> | would have accepted the proposall had they knowne the first Organ had | bin vnsold and in the *defendants* possession And this *deponent* doth now think and hath | bin informed that the first Organ att the time of the said proposall | and making such second Organ was not Actually sold or disposed off[.]<sup>26</sup>

Smith probably began work on the new Dublin instrument in May 1696 and, with a clearer picture of the bishop's requirements in mind, he made good progress.<sup>27</sup> The payment of £100 that the Christ Church archives mention, and which the dean and chapter sanctioned on St Patrick's Day 1697, must refer to this second organ.<sup>28</sup> In April Moreton wrote to Battell asking that 'Roome might be left in the said second Organ for such stops as himselfe and the Chapter should agree upon', and reminded him of the revised specification, 'intimating that he desired the Cornet Stop might be changed for the Trumpet Stop & Echo & that the Flute Stop might be added'.<sup>29</sup> Moreton also indicated 'that he designed to come over for England in June then next', presumably to finalize matters and pay Smith the cash on which he was so insistent.<sup>30</sup> However, as we know from the Dublin records, the bishop soon afterwards withdrew from his agreement with Smith and by 25 May he had found himself another builder in the form of Renatus Harris. News of this apparently did not reach London until late June, by which time work on the instrument was well nigh complete. It is unlikely that Moreton's reason for backing out this time had anything to do with the specification, for Johan Knoppell, one of the organ builders, deposed 'That the said second Organ was larger then the *said* first Organ & had 3 or 4 more stopps in it'; and John Coombe observed 'it was built much larger than the said [first] Organ & [had] Roome for 14 or

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<sup>26</sup> C24/1206/27, 13.

<sup>27</sup> C24/1207/101, 6; some of Smith's men believed that work started on it in February or March 1697 (C24/1207/101, 2–3).

<sup>28</sup> See note 3 above, and Boydell, *Music at Christ Church Before 1800*, 104 (item 133).

<sup>29</sup> The list of desired stops appears to have changed again, with the Flute replacing the Vox Humana. Battell took the view that Moreton's vacillation and last-minute instructions to Smith delayed the final stages of work on the second instrument, which would otherwise have been finished by mid-summer 1697 (C24/1207/101, 6).

<sup>30</sup> C24/1207/101, 6.

15 stopps in it'.<sup>31</sup> Another of Smith's workmen, William Stephens, offered a possible explanation for Moreton's backtracking when he reported hearing 'Mr Smith say that he made a second Organ for the *Complainant*<sup>s</sup> and that the Bishop of Kildare had \afterwards/ sent him a letter that he would not have that Organ neither because it was to deare'.<sup>32</sup>

### 'Father' Smith and Renatus Harris

Ralph Battell had his own ideas about Moreton's reasons for pulling out of the contract with Smith. Certain comments in his depositions suggest that he detected the machinations of Renatus Harris behind the scenes and thought that unscrupulous meddling on the latter's part had undermined the bishop's business relationship with Smith. Harris had unquestionably some role to play in that process, and when the agreement to build the second organ broke down Battell remarked 'that the said Mr Harris is the Prosecutor or carryer on of this suit & that he is to have the 100<sup>li</sup> in Caution [i.e. the two sums of £50 held in pledge] as *Part* of *payment*<sup>t</sup> for his Organ *which* he hath sold the said Dean & Chapter'. Earlier on the same page he opined:

That the said Lord Bishop did not stay for the *said* second Organ as he did intend to doe | vizt \till/ Midsummer 1697 But before that tyme Mr Harris made an vnder hand \or after/ Bargain with | him \& the Chapter/ for another Organ *which* this *Deponen*<sup>t</sup> doth believe was the true Reason why the *said* Lord Bishop | did not stay or send for the *said* second Organ *agains*<sup>t</sup> [i.e. in case] it should be ready or fit for service[.]

As might be expected, Battell's deposition *ex parte* Smith is clearly supportive of his co-defendant, nowhere more so than in the glowing character reference with which he ends his final answer:

this *Deponen*<sup>t</sup> in all the Dealings he hath ever had with the *Defendan*<sup>t</sup> Smith had | allways found him an honest fair Dealing Man & without any Guyle or Deceipt & if this | *Deponen*<sup>t</sup> wrote the *Lor*<sup>d</sup> Bishop word the *said* *Defendan*<sup>t</sup> was an Humourist (as this *Deponen*<sup>t</sup> believes he might) this *Deponen*<sup>t</sup> did thereby | mean that the *Defendan*<sup>t</sup> was an Humourist as to his Constitucion nott his Moralls for if they spoyled his | Fancy they spoyled his work[.]<sup>33</sup>

The confrontation of Smith and Harris in the Temple church all those years ago had clearly left its mark on them and was still a vivid memory for both. According to Harris:

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<sup>31</sup> C24/1207/101, 3–4.

<sup>32</sup> C24/1206/27, 7.

<sup>33</sup> C24/1207/101, 8.

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this deponent<sup>t</sup> has bin very credibly | informed[,] and that particularly by Doctor Blow[,] that after this deponent<sup>s</sup> said Agreement | with the said Church of S<sup>t</sup> Patrick the defendant<sup>t</sup> Smith has often declared he | would not send any Organ into Ireland whatsoever For that he would not | be putt to a Vy [i.e. 'vie' or 'challenge'] there as he was in the Temple[.]<sup>34</sup>

Further evidence of the bad blood that existed between the two men appears in the following extracts from the depositions *ex parte* Moreton, the first from Blow's and the second from Battell's:

That one M<sup>r</sup> Harris did propose and offer to | this deponent<sup>t</sup> that he would take the defendant Smith's first organ and in every | thing abide by performe and fullfill the Complainan<sup>s</sup> agreement with the defendant | Smith touching the matters in Question with which he this deponent acquainted | the defendant Smith And the said defendant Smith sayd that Harris should have none | of his Organ and he would have nothing to doe with him and | he should not learne his Art And sayth that the said Harris made the | said Proposall or offer on the behalfe of himselfe and not the Complainan<sup>s</sup>[.]

That he doth knowe that before this Suite Commenced \as he thinks/ itt was proposed or | offered the defendant Smith by the Complainan<sup>s</sup> that M<sup>r</sup> Harris should | take one of the said Organs instead of the said Complainant but M<sup>r</sup> Smith | absolutely refused to meete M<sup>r</sup> Harris or have any converse with him about that affaire[.]<sup>35</sup>

Smith's indignation at the unbelievably crass suggestion that he should allow his arch-rival to take over and complete work on one of his instruments, thereby giving him access to closely guarded trade secrets, is predictable in the circumstances.

### The outcome of the Chancery suit

It is clear from various Chancery orders that the defendants deployed a series of evasive tactics to frustrate Moreton's attempts to secure their attendance and fix a date for the hearing. Eventually, however, on Wednesday 15 March 1699 the case came before the Master of the Rolls who, after summarizing its key features, reached the following conclusions:

His Honou<sup>r</sup> conceived the matters in Difference proper to be tryed at Law [i.e. common law] and doth therefore order that | the *plaintiffs* have 12 months time to bring such *accion* at Law as they shall be advised against the | defendant and the articles \being/ deposited in the hands of the said m<sup>r</sup> Ralph Battle Sub deane of his Majesties | Chapple Royall Itt is ordered that he do produce the said articles at the tryall of such *accion* & do at the *plaintiffs* charge | forthwith give them a copy thereof & after such Tryall had[,] either party is at liberty to resort back to this | Court but in default of the *plaintiffs* trying the said *accion* by the time aforesaid the matter of the

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<sup>34</sup> C24/1206/27, 4.

<sup>35</sup> C24/1206/27, 21 and 14.

plaintiffs bill is to | stand dismissed out of this Court with Costs to be taxed by Thomas pitt Esq<sup>r</sup>  
one of the maste<sup>rs</sup> of this Court[.]<sup>36</sup>

To understand why the judge pointed *Kildare v. Smith* in this new direction, one needs briefly to consider the relationship between two fundamental branches of the English legal system—equity and the common law. Equity is said to be conscience-based, moral, and discretionary in ways that the strictly regulated common law is not; as a consequence, many litigants were attracted to Chancery or the equity side of the Exchequer because they believed that their chances of success were greater there than in an action in King’s Bench or Common Pleas. However, the equity courts were more than just courts of first instance; they could also be used to mitigate the rigidities of the common law. For example, an individual dissatisfied with the outcome of his/her lawsuit could petition the king (who delegated the matter to his chancellor or Exchequer barons), alleging that the constraints of the common law had worked an injustice; the case might then be heard in one of the equity courts, which would apply principles of fairness and natural justice to the plaintiff’s grievance. Common-law litigants could also resort to equity for reasons perfectly exemplified by the case of *Kildare v. Smith*. When it was thought that a suit might entail problems of disclosure—i.e. the right of litigants to access information relevant to the issue between them, which is or has been in the control of just one party—an individual, as a prelude to his/her common-law action, might initiate proceedings in equity for the purposes of discovery, employing the court’s primary disclosure devices (interrogatories, depositions, etc.) to preserve evidence for use at a future trial.<sup>37</sup> It is apparent from Moreton’s bill that he was concerned that the sub-dean might withhold documents germane to the case, namely, the articles of agreement that were in his, and only his, keeping. This concern resurfaces in Battell’s deposition *ex parte* Smith where, after listing the correspondence he had received from the bishop on the matter of the organ, he adds the following marginal note:

tho’ this Deponen<sup>t</sup> doth not remember that he made any such | promise as this Deponen<sup>t</sup> is charged with in the said Letter dated the | 26<sup>th</sup> May 1697 of delivery [*sic*] up the said articles to any | Person the said Lord Bishop shoud appoint & this Deponen<sup>t</sup> hopes | nothing soe inconsiderate did drip from his Pen[,] his | Intencion having ever been verily to deliver up the said | articles in Court in Case any difference happened about<sup>t</sup> them[.]<sup>38</sup>

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<sup>36</sup> C33/291, fol. 595.

<sup>37</sup> Horwitz, 8.

<sup>38</sup> C24/1207/101, 7.

The reason why the Chancery suit preceded the action in King's Bench was that it made available evidence that Moreton thought was essential to a successful outcome of his case, and which he knew a common-law court would otherwise have difficulty collecting.

### **Kildare v. Smith in King's Bench**

Armed with as much evidence as he could muster, Moreton brought his case of breach of contract to King's Bench in the Easter term of 1699.<sup>39</sup> At the initial hearing neither plaintiff nor defendant appeared in person, both parties being represented by their attorneys. The bishop's opening statement of claim or 'declaration' begins by asserting that on 31 May 1694, allegedly in the parish of St Mary-le-Bow in the ward of Cheap, London, he entered into an agreement with Bernard Smith, 'Organ-maker and Servant to their Majesties the King and Queen', to build a double organ of a certain specification for Christ Church, Dublin, for the sum of £500.<sup>40</sup> Moreton's attorney produced in court the cathedral's copy of the contract, which dealt with the building of the first organ only, since subsequent requests for changes to the stop-list had been made informally and were never encapsulated in a new document under seal. This copy of the original agreement was then translated into Latin and entered on the plea roll, but without its final clause.<sup>41</sup> The case as pleaded by Moreton's counsel also contains the implication that the instrument was to be finished and set up within fourteen months, though this is not enshrined in the original contract as a binding condition. The bishop's declaration finishes in the usual manner with an assignment of breach, complaining in characteristically formulaic language that Smith

did not perform or fulfil any of the covenants or agreements contained in the aforesaid writing that were to be performed and fulfilled on the said Bernard's behalf; in fact, he says that, although the selfsame bishop paid the said Bernard the aforesaid two separate sums of fifty pounds and fifty pounds first mentioned in the aforesaid writing according to the form and effect of the said writing ... and although the aforesaid Bernard within one year and two months of the drafting of the aforesaid writing could have comfortably made and set up the aforesaid organ according to the form and effect of that writing, and was asked about it by the said bishop, to wit, on the twentieth day of March in the year of our Lord sixteen hundred and ninety-four

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<sup>39</sup> KB27/2135 (Michaelmas 11 William III), rotulus 274.

<sup>40</sup> The business was of course transacted in Channel Row, Westminster; relocating it to St Mary-le-Bow was a legal fiction commonly used in King's Bench proceedings.

<sup>41</sup> There is no legal reason for this omission, which is accountable only as a clerical oversight. The memorandum added to the original contract, specifying how the organ was to be delivered, is not mentioned either.

[i.e. 1695] and often afterwards in London aforesaid in the parish and ward aforesaid; nevertheless, the said Bernard did not take the trouble to build and set up any organ in the aforesaid form within the aforesaid one year and two months or at any time afterwards up to this point, but altogether neglected and utterly refused so to make and install it, against the form and effect of the aforesaid writing. And thus the said bishop says that the aforesaid Bernard, although often asked etc., did not keep to but broke his aforesaid contract made in that behalf with the said bishop, and he has altogether refused and still refuses to keep to it, to the damage of the said bishop five hundred pounds. And thereof he produces suit, etc.<sup>42</sup>

The defendant's attorney then petitioned the court for licence to imparl, that is, he asked for time to consider what answer should be made to the plaintiff's bill of complaint; this was granted as a matter of course, and the case was adjourned for six months.

When the parties reassembled on Monday 'next after the three weeks of Michaelmas', that is, on 23 October (the first day of Michaelmas term), Smith's legal team made a formal denial of 'force and tort', and asked for the contract to be read out in court. I include below a diplomatic transcription of that document as it appears on the plea roll, but with its 'clauses' numbered in bold type, and the list of organ stops disposed in two columns for ease of reference:

xxxj<sup>o</sup> May MDCXCIII<sup>o</sup> It is this day agreed betweene the Righ<sup>t</sup> Reverend | Father in God William lord bishop of kildar and Deane of Christs Church in Dublin to whose | appointment the said Church have submitted the *provision* of an Organ for it and betweene | Bernard Smith Organ maker and servant to their *majest.<sup>ies</sup>* that [1] the said Bernard Smith in | consideracion of Five

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<sup>42</sup> non performavit seu perimplevit aliqua convenciones seu agreamenta in scripto *predicto* | contenta ex parte ipsius Bernardi *performanda et perimplenda in facto dicit quod licet ipse idem Episcopus predictas* | duas separales summas quinquaginta librarum et quinquaginta librarum in scripto *predicto* primo mencionatas prefato | Bernardo solvit *secundum* formam et effectum dicti scripti ... licetque *predictus* Bernardus Organum *predictum* infra unum Annum et duos menses proximos post confeccionem eiusdem | scripti convenienter facere et erigere potuisset iuxta formam et effectum scripti illius ac *per ipsum* | Episcopum adinde requisitus fuisset scilicet vicesimo die Martij anno domini millesimo sexcentesimo nonagesimo | quarto et sepius postea apud londoniam *predictam* in parochia et Warda *predictis* idem tamen Bernardus aliquod | Organum in forma *predicta* facere et erigere infra annum et duos menses *predictos* vel vnquam postea hucusque non | curavit sed omnino neglexit ac *illud* sic facere et erigere penitus recusavit et adhuc recusat contra | formam et effectum scripti *predicti* et sic idem Episcopus dicit quod Bernardus licet sepius requisitus etc | convencionem suam *predictam* cum eodem Episcopo in hac parte factam non tenuit sed infregit ac ille ei tenere | omnino contradixit et adhuc contradicit ad dampna ipsius Episcopi quingenti librarum Et inde producit sectam etc[.]



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hundred pounds of good and lawfull money of England to him to be paid | in manner and forme hereafter to be specified shall make for the aforesaid Church a double | Organ in one case wherein shall be these following stopps

in the great Organ	in the little Organ
an open Diapason of Metall	a principall of Metal
a stopp Diapason of Wood	a stopp Diapason of Wood
a principall of Metall	a Nason of Wood and
a Nason of Wood	a Fifteenth of Metal
a great twelfth of Metal	
a Fifteenth of Metal	
a Sesquialtera of Metal	
a mixture of Metal and	
a Cornett of Metal	

[2] It is further agreed that if the aforesaid Bernard shall | himselfe sett vp the said Organ in the Church aforesaid he shall then receive seventy | pounds above the Five hundred pounds before mencioned and the said seaventy pounds shall | be payd in london as aforesaid but in Case the said Bernard Smith shall not sett vp the said | Organ himselfe but employ some other person then that *person* soe employed shall receive only Twenty | pounds for his service in setting vp the said Organ [3] In the third place it is agreed that the money | above contracted for shall be paid in manner and forme following vizt That the said Bernard | Smith shall receive Fifty pounds in hand and fifty pounds more within the *present* yeare of our lord | MDCXCIII<sup>o</sup> vpon All Saints day alsoe one hundred pounds more when the said Organ | shall be sent to Ireland alsoe one other hundred pounds when the said Organ shall be sett | vp *and* finished in the Church aforesaid and that The remainder of the money shall be made good | by his lordshipp and the Church aforesaid by halfe yearely payments vntill the said summe | of five hundred and seaventy pounds [(]the said Barnard Smith making good his part of the | *Condicions*) be fully and compleately satisfyed and payd [4] Finally itt is hereby agreed between | the parties aforesaid that if the said Organ be safely delivered at any port of England | to be named by the Right Reverend Father in God the lord Bishopp of kildare aforesaid | and it shall soe please god that itt shall not safely arrive at the port of Dublin that | the said Barnard Smith shall not be answerable for such a miscarriage but the losse | shall be susteined entirely by the Church of Christ Church in Dublin aforesaid and | the contract hereby made with the said Bernard Smith shall be made good to him as | if noe such accident had happened In witnesse whereof vpon deliverance of a | bill of fifty pounds to the aforesaid Barnard Smith and the same by him accepted | the abovenamed *Righ<sup>t</sup>* Reverend Father in God and the said Barnard Smith have | interchangeably sett their hands and seales in the day and yeare above written[.]

A plea in bar was then entered that sought wholly to defeat Moreton's case by claiming that the defendant had fulfilled his contractual obligations to the letter. According to Smith, after the contract had been signed and within the prescribed period of fourteen months, he did indeed build the organ for Christ Church to the required specification, and he repeats in Latin the stop-list from the contract. His plea continues as follows:

And afterwards, within the aforesaid space of one year and two months and before the suing out of the aforesaid bishop's aforesaid bill, to wit, on the twentieth day of July in the year of our Lord sixteen hundred and ninety-five, he gave the aforesaid bishop notice thereof in London aforesaid in the parish and ward aforesaid, and was always afterwards prepared and still is prepared to deliver the aforesaid organ to any port in England, according to the aforesaid bishop's direction, for transportation to Ireland aforesaid. But in fact the same Bernard says that the aforesaid bishop, before the suing out of the said bishop's aforesaid bill, did not at any time nominate or appoint any port in England where the aforesaid organ should be delivered by the same Bernard for transportation to Ireland aforesaid, which the aforesaid bishop ought to have done according to the form and effect of the aforesaid writing. And he is prepared to prove this, wherefore he prays judgment whether the aforesaid bishop ought to have or maintain his action aforesaid against him therein, etc.<sup>43</sup>

At this point in the proceedings Moreton demurred to the defendant's answer, and in so doing raised a matter of controversy that had to be determined by the court before further progress in the case could be made. In English common-law pleading, a demurrer was a plea by which one of the parties alleged that the preceding pleading of the other party showed no good cause of action or defence.<sup>44</sup> In other words, the bishop objected to the legal sufficiency of the organ builder's plea, maintaining that, even if factually true, it did not entitle the latter to bar his action, and that he was himself entitled in law to succeed. By demurring Moreton admitted all the facts alleged by his opponent, since a demurrer referred the law arising on those facts to the judgment of the court. Smith's attorney then joined in demurrer by averring that

the aforesaid plea pleaded above by the said Bernard in the aforesaid manner and form, and the matter contained therein, are good and sufficient in law to preclude the said bishop from having his aforesaid action against the aforesaid Bernard; which certain plea, and the matter contained therein, the same Bernard is prepared to verify and prove as the court [shall direct]. And because the aforesaid bishop neither answers that plea nor hitherto in any wise denies it, the same

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<sup>43</sup> ac postea et infra predictum spacium unius anni et duorum mensium et ante diem exhibicionis bille predictae Episcopi predicti | scilicet vicesimo die Julij anno domini millesimo sexcentesimo nonagesimo quinto apud londoniam predictam | in parochia et warda predictis predicto Episcopo inde noticiam dedit et semper postea hucusque paratus fuit et | adhuc paratus existit ad deliberandum Organum predictum ad aliquem portum in Anglia secundum direccionem | predicti Episcopi ad hiberniam predictam transportandum Sed in facto idem Bernardus dicit quod predictus Episcopus ad | aliquod tempus ante diem exhibicionis bille ipsius Episcopi predictae non nominavit seu appunctuavit | aliquem Portum in Anglia ubi Organum predictum per eundem Bernardum deliberatum foret ad hiberniam | predictam transportandum quod predictus Episcopus secundum formam et effectum scripti predicti fecisse debuit | Et hoc paratus est verificare vnde petit iudicium si predictus Episcopus accionem suam predictam inde versus | eum habere seu manutenere debeat etc[.]

<sup>44</sup> Demurrers were abolished in 1883.

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Bernard as before asks judgment and that the aforesaid bishop should be barred from having his aforesaid action against the said Bernard therein, etc[.]<sup>45</sup>

As the parties were now at issue on a point of law, not of fact, the jury was discharged and the demurrer decided by the judges of the court sitting *in banc*, that is, not singly (as they might do at the Assizes) but as a body. A date was agreed for them to hear arguments in support of the opposing parties from the barristers who had signed the pleadings, namely William Hall for Smith and Edward Northey for Moreton.<sup>46</sup> When the court reconvened on 'the Tuesday next after the morrow of St Martin' (14 November) Smith again appeared through his attorney, but Moreton this time attended in person. The judicial deliberations *in banc*, which had taken place earlier and of which unfortunately we have no record, must have favoured Smith at least in part, for the bishop's tone is now a good deal more conciliatory on a matter raised in the second 'clause' of the contract:

And the same bishop freely acknowledges here in court that he does not wish further to proceed against the same Bernard for any damages to be adjudged to him on account of the aforesaid organ not being set up, and utterly refuses and rejects further prosecution of the same damages. And the same bishop asks judgment against the same Bernard for breaching the remainder of the contract assigned above to be rendered unto him.<sup>47</sup>

The judges clearly took exception to one part or 'count' of Moreton's declaration, while recognizing that the claim as a whole was not without its merits. Permission to continue with his cause was therefore made conditional on the bishop dealing with the count that they had found problematic. It was certainly possible to amend a declara-

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<sup>45</sup> Et *predictus* Bernardus dicit quod placitum *predictum* per ipsum Bernardum modo et forma *predictis* superius placitatum materiaque in eodem | contenta bona et sufficientia in lege existunt ad ipsum Episcopum ab accione sua *predicta* versus *predictum* Bernardum habenda | precludendum quod quidem placitum materiamque in eodem contenta idem Barnardus paratus est verificare | et probare provt Curia etc Et quia *predictus* Episcopus ad placitum illud non respondit nec illud hucusque aliquo modo | dedicit idem Bernardus vt prius petit iudicium et quod *predictus* Episcopus ab accione sua *predicta* inde versus | ipsum Bernardum habenda precludatur etc[.]

<sup>46</sup> Possibly the William Hall who was admitted to the Middle Temple on 19 May 1680; see *Register of Admissions to the Honourable Society of the Middle Temple*, 3 vols. (London: Butterworth, 1949), i, 200. For Northey's distinguished career as a lawyer and politician, see 'Northey, Sir Edward (1652–1723)' in the *Oxford Dictionary of National Biography*.

<sup>47</sup> Et idem Episcopus gratis hic in Curia cognoscit se nolle ulterius prosequi versus eundem | Bernardum pro aliquibus dampnis occasione non erectionis Organi *predicti* sibi adiudicandis Et ulterius prosequi pro | eisdem dampna penitus deadvoat et recusat Et petit idem Episcopus iudicium versus eundem Bernardum | occasione fraccionis residui convencionis superius assignati sibi reddi[.]

tion after argument on demurrer and before the court gave judgment, but leave to do so had to be sought; once this was obtained, Moreton effected the necessary amendment by entering a *nolle prosequi* ('to be unwilling to prosecute') as to the disputed count, thereby ostensibly opening the way for him to proceed to trial on the others. However, the *nolle prosequi* was a solution to but one of this case's many apparent difficulties; the plea roll shows that another continuance for advisement (i.e. adjournment) was subsequently mooted, but no day was given for it, and it can be assumed, in the absence of any judgment, that the parties eventually resolved—or tried to resolve—their differences out of court. Given the nature of the case, the lack of a decision is unsurprising, for it is a fact that the majority of sixteenth- and seventeenth-century demurrers were left undetermined. Demurrers did not settle as much law as one might have expected, because the court was extremely reluctant to decide them if there was even the slightest division of judicial opinion on the bench. The usual effect of a formal demurrer was therefore to confirm and perpetuate the legal uncertainty that had given rise to it in the first place; in such circumstances one can understand why parties perhaps preferred, once that uncertainty had been established, to attempt a compromise. In *Kildare v. Smith* a negotiated settlement apparently proved impossible, for in June 1700 the bishop was back in Chancery trying to have his case reheard; nothing came of it, however, and it is most likely that both parties gave up the fight out of sheer exhaustion.<sup>48</sup>

### What happened to the Smith organs?

Finally, a few words about the subsequent fate of Smith's two rejected instruments may be of interest, though one should stress that any conclusions must be treated with circumspection because of the contradictory nature of some of the testimony and the difficulty of establishing the identity of the organs referred to therein. Whatever 'Treaty' Smith had with dean Aldrich about selling the first organ to Christ Church, Oxford, in late 1695 evidently came to nothing, for on 12 March following the parish officers of St Andrew Undershaft were invited to James II's chapel in Whitehall to inspect the same instrument, with a view possibly to purchasing it.<sup>49</sup> However, that transaction also fell through, and, as we have seen, witnesses reported that the first organ was still unsold by the time work on the second began in May 1696. When Harris deposed in July 1698, he stated that Smith had 'very lately ... sold one of the

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<sup>48</sup> C33/293, fols 384*v* and 402*v*.

<sup>49</sup> C24/1206/27, 15.

said Organs to St Marye's in Cambridge And the other of them to Barbadoes'.<sup>50</sup> A contemporary Chancery order corroborates this, noting that 'since answering[,] ye *said* *Defendant* Smith had sold or was about to dispose of the *said* two severall Organs One for Barbadoes *whi*<sup>ch</sup> he was sending thither & was settling the other up in S<sup>t</sup> Marys Church in Cambridge'.<sup>51</sup> William Stephens specified that it was the second instrument that went to Cambridge where it was installed in about November 1697, and 'the other [went] to the Kings Chappell'.<sup>52</sup> Stephens may have identified the organ correctly, but he must be mistaken in locating it in Cambridge so early, for all the evidence points to both instruments still being in London in the early months of 1698.<sup>53</sup> Smith's other three workmen later deposed that both organs were standing in their cases in the Catholic chapel at the time of the fire that devastated the palace of Whitehall in January 1698.<sup>54</sup> The instruments were damaged not only by the flames but by the London mob, which went on the rampage and vented its anti-Catholic paranoia on James II's chapel and its contents. Joachim Bielfeld, father of the organ builder John Byfield (c1694–1751), testified that:

this Deponen<sup>t</sup> being | then present doth know that Part of the *said* second Organ case was preserved but the rest of that Case | & the Case of the *said* first Organ was broaken bruised spoyled lost or burnt soe that | no Part of them was fit for the same use they then served for & many of [the] Pipes were bruised or | broaken & some lost & the stopps & Sounding Boards were broaken as alsoe most of the | Inside Movements And this Deponen<sup>t</sup> saith that both the *said* Organs were by the means | aforesayd very much dampnified & that the *Defendan<sup>t</sup>* Smith doth well deserve 250<sup>li</sup> to put both | the sayd Organs into the same Plight & Condi<sup>ti</sup>on they were before the *said* Fire and this | Deponen<sup>t</sup> saith that it was with \great/ difficulty that any Part of the *said* first Organ was saved For the | Fire came fiercely on & the Mobb rushed violently into the Chapple & threw the *said* Organ | all a long while by & in breaking it to peeces & to save what was saved & throwing it | out at [the] window in order to save it the *said* first Organ was soe much dampnified that | the *Defendan<sup>t</sup>* well deserves in this Deponen<sup>t</sup>s Judgmen<sup>t</sup> 220<sup>li</sup> to put it into such Condi<sup>ti</sup>on as it | was before the sayd Fire and the *said* *Defendan<sup>t</sup>* in this Deponen<sup>t</sup>s

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<sup>50</sup> C24/1206/27, 5. The latter sale is confirmed by a news item in the *London Post* of 2–4 October 1699. Freeman *et al.* believe that the organ for St Michael, Barbados, had three manuals; see Freeman, 138 and 203.

<sup>51</sup> C33/289, fol. 795, under date 30 June 1698.

<sup>52</sup> Great St Mary's is, of course, the university church, and Battell confirmed that the second instrument was bought by 'the vniversity of Cambridge' (C24/1206/27, 14).

<sup>53</sup> According to Freeman *et al.* (p. 137), Cambridge University acquired its two-manual Smith organ in that year.

<sup>54</sup> Simon Thurley, *Whitehall Palace: An Architectural History of the Royal Apartments 1240–1698* (New Haven & London: Yale University Press, 1999), 142–5; and *Whitehall Palace: The Official Illustrated History* (London: Merrell, 2008), 104–5.

Judgment doth well deserve 30<sup>li</sup> | for restoring & new making what was broaken in the *said* other Organ & putting it into the | same Condicion & Plight it was before the said Fire[.]<sup>55</sup>

Though damaged, neither instrument was beyond repair, and, once restored to their original condition, they probably became the organs later despatched to Cambridge and Barbados. However, there was at least one other redundant organ housed in the Catholic chapel at the time of the conflagration, namely the one that Smith had built for Hampton Court. Commissioned by Queen Mary in August 1690, this was set up on completion in James II's chapel, pending some alterations at Hampton Court, but it was still there, unpaid for, many years later. Harris refers to the instrument in his deposition when he implies that Smith had recycled its front pipes in making the 'second' Christ Church organ.<sup>56</sup> It was so extensively damaged by the fire that Smith later petitioned the Treasury for compensation, and on 26 November 1700 he was awarded £500, payable in instalments:

as of his *Majes<sup>tes</sup>* free Guift & royall Bounty | to him, in Consideracion of a Loss by him susteynd | by the burning an Organ he *prepared* by *Warrant*<sup>t</sup> | from the late Queen for y<sup>e</sup> Use of the Chappell | at Hampton Court and *whi<sup>ch</sup>* by her *Comman<sup>d</sup>* (till some | alteracions were made in y<sup>e</sup> said Chappell, | at Hampton Court) was set up in the late | Popish Chappell at Whitehall and burnt by y<sup>e</sup> | late dreadfull fire *whi<sup>ch</sup>* happened there[.]<sup>57</sup>

## Conclusion

Given the nature of Smith's work and the heavy demand for his services, it is surprising that he did not become enmeshed in the law more often than he did. At the core of his legal battle with the Bishop of Kildare were two fundamental issues: Smith's refusal to accept anything but ready money for his expertise and materials, and Moreton's lack of awareness that effecting unilateral changes to what had been agreed might have financial implications for the other party. In view of the latter's inability fully to appreciate the binding nature of a contract, it is somewhat ironic that it was the bishop who took the organ builder to court. The Chancery bill, once thought to have disappeared, contains an account of the agreement between Moreton and Smith, which the King's Bench plea roll preserves more formally. Embedded in that contract is the specification of Smith's first organ for Christ Church, Dublin, which would have been lost to posterity had the bishop not gone to court. According to

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<sup>55</sup> C24/1207/101, 2.

<sup>56</sup> C24/1206/27, 4.

<sup>57</sup> T60/5, 238.

Stephen Bicknell, 'there are still surprisingly few authentic stop-lists from this period'.<sup>58</sup> This has not always been acknowledged, even by such careful scholars as Freeman and Rowntree; in their account of Smith's output they gave a specification for each organ where one existed, but they were sometimes over-reliant on information in later sources, such as the Leffler manuscript (c1800), which did not always indicate clearly where subsequent modifications had been made to Smith's original schemes.<sup>59</sup> The Chancery depositions contain an abundance of information on a wide range of other subjects, including little known details about the practice and business organization of an organ builder's workshop; Henry Aldrich's musical interests and influence; the disastrous Whitehall fire of 1698; and Smith's contentious relationship with Rhenatus Harris, which must rank as one of the bitterest rivalries in the history of English music. Perhaps most significantly, they put to rest once and for all the question of whether or not Smith built an organ for Dublin, the answer to which we can now give in the affirmative. In fact, we now know that he built two, both of which turned out to be surplus to requirements. Taking a broader perspective, the legal documents enable us to restore a lost chapter in the musical history of Christ Church Cathedral, and illuminate its complex and at times peevish relationship with the foremost organ builder of the day.

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<sup>58</sup> Bicknell, 128.

<sup>59</sup> Bicknell, 132; see also *The Leffler Manuscript*, facsimile edition with introduction by Peter Williams (Reigate: British Institute of Organ Studies, 2010).