An Historical Survey of the Presumption in the Common Law that General Statutes do not bind the Crown

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Volume 1

To the late Harry Koppstein : a sceptic

but never a cynic

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ABSTRACT

This thesis traces the evolution of the presumption that general statutes do not bind the Crown. The writer has attempted to place this development in historical and social context, in so doing, illustrating the inherent obtuseness of the common law on its public law side. Few common lawyers will accept the legitimacy, let alone perform the function of understanding the growth of law such as this presumption. Entirely irrelevant to the late twentieth century, it now exists in more extreme form in the Anglo-Australian legal system than ever it appeared in the time of its medieval genesis.

Chapter one of the thesis deals with the initial period in common law development, from Henry II (1154-1189) to Edward III (1327-1377). The presumption of Crown immunity from the operation of generally worded statutes had its foundations in statutes being construed as royal grants, and the prerogative being secure against all but specific royal disavowals.

Chapter two covers the late medieval period (1377-1509) and the impact on the law of Richard II, the Lancastrians, Yorkists, and the first Tudor, Henry VII. In the fifteenth century occur the first cases still referred to, albeit incorrectly, in modern times. Judges perceive the king being bound by a statute to the extent that he cannot ignore it if the consequences involve depriving a subject of a right invested by parliament in the whole community.

Chapter three concerns the Tudors and the sixteenth century in a general overview. Early in Elizabeth's reign some of the judges displayed a keen awareness of the need for the Crown to adhere to the general law including statutes. The reaction of Elizabeth's government seems to have been to find ways of side-stepping curial sanctions. The effect of the Henrician revolution in the use of parliament and its inevitable impact on some of the prerogatives would not be digested for nearly three hundred years.

Chapter four deals with the specific Elizabethan reaction to a statute of 1571 which threatened to eliminate the Crown's capacity to pay off deserving suitors with Church lands, at no cost to the Crown, and chapter five covers the important litigation concerning that statute, which decided that the Crown was bound by at least certain classes of legislation.

Chapter six is concerned with the Stuart period up to the Glorious Revolution of 1688, following the paradigm shift of the Civil War and the Protectorate which ultimately affected the law so little. The century succeeding the Bill of Rights in 1689 and the failure of the legal profession to adopt a new stance on the Crown and its prerogatives in the wake of the Bill of Rights is the substance of chapter seven.

The nineteenth century saw English judging move into the formal mode (known in America as the "oracular") in which extraneous influences such as the policy of a statute had to be at least notionally discounted in favour of determining solely on the facts and the words of the statute

before the court. This fathered a tendency to place the common law into pigeon-holes for ease of retrieval and application, and the presumption was accordingly simplified and "codified" throughout the nineteenth and into the twentieth century, the period of English common law reviewed in chapter eight.

Chapter nine surveys the same period, the last two hundred years, in Scotland, Ireland and Australia. The extent of the presumption throughout the common law world is discussed in chapter ten, with an overview of judicial and legislative approaches in all common law jurisdictions. The respective merits of proposals from various jurisdictions for dismantling the presumption are discussed, and recommendations for its abolition put forward.

This dissertation was submitted to the University of Adelaide for the degree of Doctor of Philosophy (Law). I certify that it contains no material which has been accepted for the award of any other degree or diploma in any University and that, to the best of my knowledge and belief, it contains no material previously published or written by another person, except when due reference is made to that text.

Steven C. Churches

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My supervisor, Michael Harris, has contrived to maintain calm and unfailingly helpful as the pressure of writing the thesis up some 10,000 kilometres from the University of Adelaide began to reveal itself in increasingly terse letters from Nairobi. I thank him for his care, guidance and charitable tolerance.

Academic and professional assistance is acknowledged in the text in specific instances, but Professor Sir Geoffrey Elton of Clare College, Cambridge deserves to be singled out for special mention. I first wrote to him from Adelaide in late 1985 seeking a copy of a manuscript. A flow of correspondence followed, always by return mail on his part, including on one occasion complete annotations to chapter four. I did not heed all his advice (in chapter four, purely

for "atmospheric" purposes, I left in a passing reference to Robert Bolt's "A Man For All Seasons" which offends all Sir Geoffrey's historical sensibilities) and I was unable to find some of the references for chapter three which he gave me in September 1986 while I was on my way to Nairobi. Nonetheless, he helped me focus on a period of particular importance to this thesis which had previously appeared as a haze. Sir Geoffrey's unfailing scholarly assistance and kindness to someone who wrote to him as a complete stranger is worthy of recounting as an example to the academic world.

Nick Iles, throughout 1986 and 1987 sent academic and case materials from Cambridge and London, a much needed airlift into the resource desert of Nairobi.

Many friends helped with the proof-reading and production of this work, but during the initial writing period of 1985 to 1986 (chapters one to five) Drs P. Horton and L. Albertyn were of particular assistance. The remainder of the thesis was written in Nairobi between May 1987 and March 1988. Without the solicitous midwifery of Dr. A.K. Coaldrake in Adelaide where the thesis was being typed, it would never have reached final form. She has proof-read hundreds of pages and smoothed potentially stormy exchanges with word processor operators with exquisite diplomacy. It is impossible to express on paper adequate gratitude for this degree of involvement.

The law in this thesis is as it was available to me in Nairobi on 31st December, 1987.

Nairobi
Kenya
18th March, 1988

Abbreviations

(Law Reports and Journals not listed)

C.C.R.	Calendar of Close Rolls
C.F.R.	Calendar of Fine Rolls
CP	Common Pleas
C.P.R.	Calendar of Patent Rolls
C.S.P.D.	Calendar of State Papers Domestic
C.S.P.F.	Calendar of State Papers Financial
C.S.P.S.	Calendar of State Papers Spanish
HLS MS	Harvard Law School Manuscript (legal materials on microfiche)
HMC	Historical Manuscript Commission
KB	King's Bench
R.P.	Rotuli Parliamentorum
R.S.	Rolls Series (Year Books)
S.R.	Statutes of the Realm
S.S.	Selden Society
YB	Year Book

INTRODUCTION

"We ourselves of the present age, chose our common law, and consented to the most ancient acts of parliament, for we lived in our ancestors 1000 years ago, and those ancestors are still living in us."

Sir Robert Atkyns CB, from a tract published after Godden v. Hales (1686) 11 St. Tr. 1166 at p.1204.

"Probably the most besetting sin of historians of institutions is their inveterate habit of interpreting earlier stages in the development of these institutions too much in the light of the political thought and practice of their own time. Nothing has distorted the treatment of the background of our own political institutions more than this unfortunate tendency and it has often infected even the best and truest investigators of our institutional past".

C.H. McIlwain "Some Illustrations of the Influence of Unchanged Names for Changing Institutions" in P. Sayre (ed.) Interpretations of Modern Legal Philosophies: Essays in Honor of Roscoe Pound 1947 p.484.

"Like the choice between competing political institutions, that between competing paradigms proves to be choice between incompatible modes of community life. *** As in political revolutions, so in paradigm choice - there is no standard higher than the assent of the relevant community. *** Since new paradigms are born from old ones, they ordinarily incorporate much of the vocabulary and apparatus, both conceptual and manipulative, that the traditional paradigm had previously employed. But they seldom employ these borrowed elements in quite the traditional way. *** Just because it is a transition between incommensurables, the transition between competing paradigms cannot be made a step at a time, forced by logic and neutral experience. Like the gestalt switch, it must occur all at once (though not necessarily in an instant) or not at all".

T.S. Kuhn The Structure of Scientific Revolutions 1970, 2nd ed., pp.94, 149 and 150.

"... the understanding which we want is an understanding of an insistent present. The only use of a knowledge of the past is to equip us for the present ... The present contains all that there is. It is holy ground; for it is the past and it is the future. At the same time it must be observed that an age is no less past if it existed two hundred years ago than if it existed two thousand years ago. Do not be deceived by the pedantry of dates. The ages of Shakespeare and of Moliere are no less past than are the ages of Sophocles and of Virgil. The communion of saints is a great and inspiring assemblage, but it has only one possible hall of meeting, and that is, the present: and the mere lapse of

time through which any particular group of saints must travel to reach that meeting-place, makes very little difference."
A.N. Whitehead "The Aims of Education" in The Aims of Education and Other Essays 1929, pp.3-4.

"That process by which old principles and old phrases are charged with a new content, is from the lawyer's point of view an evolution of the true intent and meaning of the old law; from the historian's point of view it is almost of necessity a process of perversion and misunderstanding. Thus we are tempted to mix up two different logics, the logic of authority and the logic of evidence. What the lawyer wants is authority and the newer the better; what the historian wants is evidence and and the older the better."
F.W. Maitland Collected Papers vol.1, 1911, p.490.

"Sir, the law is as I say it is, and so it has been laid down ever since the law began; and we have several set forms which are held as law, and so held and used for good reason [with reason: "per cause de reason"], though we cannot at present remember that reason [notwithstanding that the reason does not spring to mind: "nient obstante que meme le reason ne soit prest en memory" ("prest" could be "impressed" or "ready")], but by study and labour one can discover, if any such set forms were used; and if they were used contrary to reason, it is no bad thing to amend them."*
(emphasis added to indicate the stress in speech)
Fortescue CJKB (1458) Quartermaynes' case YB 36 Hen. VI pl.21 f.24 at ff.25B-26.

* The principal translation employed down to the words "we cannot at present remember that reason" is Holdsworth's, H.E.L. 5th ed., 1942, vol.3, p.626. Holdsworth has missed the plain irony in Fortescue's delivery, but worse, he did not translate the whole sentence, which made it abundantly clear that Fortescue was not prescribing fatalistic acceptance of outdated law, but to the contrary, was suggesting reform where old law conflicted with the "reason" of another day.

This work is a study of common law evolution: with particularity, the emergence of the modern presumption that statutes expressed in general terms do not bind the State. The search for the common law's roots is a historical discipline. From the law reports, Year Books, parliamentary and royal rolls of various types, the picture emerges not merely of a maxim in the making, but of words forged in the

furnace of human affairs. Burning in varying intensity, those affairs often illuminated human motivation and behaviour for recollection in records too often dismissed as dry legal documents.

Of its very nature the common law is not static, and in the courtroom the synthesis of the common law reflects a relentless clashing of ideas and values, whether the world outside the court is wracked by civil war, or sunk in apparent domestic tranquility. It is this synthesis over 700 years which it is intended to examine. The clash of competing voices, the judicial striving for resolution, and the occasional mendacity of law reporting reveal a very human story. The common law advocate has never been able to afford rarefied philosophy. He (and more latterly she) has had to pursue the practicalities and actualities of the case at hand. It follows that the story to unfold is one of arguments tested in open competition, rather than nursed in scholarly seclusion. However, in this area of the common law, advocates have drawn widely for general propositions, so that not only is the common law clumsily, and sometimes inaptly winnowed, the theorists and civil lawyers will also find their way onto these pages through the mouths of counsel in the royal courts.

Intended not merely as a case study of one small part of the common law, this survey also acknowledges the impact of personality on the development of the law. The common law's socratic technique, combined with an adjudicative

process in which judges had, and have, a discretion of uncertain width in the formulation of legal principles leaves a large ambit for the influence of individuals on the development of the law. The psychological forces driving those individuals will be many and varied, but the nature of the topic under study is such as to reveal the attitude and proclivities of the lawyers concerned to power and authority.

It is the writer's thesis that because of the personal, if at times subconscious, investment of psychological values and background training in legal arguments on whether the State (in emanations as various as a personal medieval king or a modern government controlled transport commission) could be limited in its behaviour by court decision, the law on this topic did not evolve in a happy progression with the rest of the seamless fabric of the common law. Fear for the security of authority in the form of the State, combined at times with a grosser pandering to the State for the purpose of self-promotion has led on occasion to retrogression or at least stagnation.

Curial argument and decision do not, of course, occur in a social vacuum. Relocations of commercial and political power, technical and social developments have been coped with in the sphere of private interests with varying degrees of success over the common law's 700 years, but the common lawyers have had difficulty dealing with the polity in general, and particular trouble with the State in periods of high political pressure. The result has been that most,

although not all, major constitutional developments have taken place in political theatres other than the courtroom.

Perhaps most disturbing is the capacity of many common lawyers to ignore a "paradigm shift" of the sort described by Thomas Kuhn, when new community political values become common currency in society. This is depressingly apparent even when the paradigm shift has been effected by an institution on to whose shoulders lawyers prefer to push responsibility for such changes. The outstanding example of this behaviour, discussed in this work, was the failure of most eighteenth century lawyers to fall into step with the sentiments of the Bill of Rights, 1689. As suggested in the text, the shift in limiting executive power may not have been dramatic enough, insufficiently "paradigm" to move lawyers from their inertia. Most of the common lawyers seemed unable to make the "gestalt switch" referred to by Kuhn in the quote above, or the continued use of the same vocabulary, alluded to by Kuhn, allowed them to treat the mechanics of the constitution as though there had never been a Bill of Rights.

One of the quirks of the common law, unlike science of which Kuhn was writing, is its self-contained system of authority. Judges resolve what is an acceptable statement of the law, and the only appeal to an "empirical" assessment of their correctness is to the legislature. But the modern executive either controls the legislature, or can in large measure veto its proposals: a curbing of legal advantage to

the State is unlikely to come from that quarter.

In consequence of the State orientation of some of the many powerful courtroom personalities and the antipathy to those views of other lawyers, together with the general inertia of the common law when confronted with State interest, there has been a marked variation in the quality, evenness and extent of common law evolution on the public, as opposed to the private law side. Reflecting this lack of steady linear development, the common law may be seen as just one of the multitudinous ethical constructs which people erect to help order their affairs, and which, given a long enough lifespan, flourish and wither in predictable cycles.

The tendency to decay is of singular interest. In the common law, as in so many other attempts at ordering human affairs, the progressive debility is acutely ironic, being brought on by a loss of faith in the ability of the adherents to adapt the schema to their own times and psyches. In order to sustain the "faith" in pure form, authority in the form of precedent is invoked in increasing quantities, the present and the future are viewed with growing fear, and the past is dwelt upon as the repository of good order. A system capable, as far as any, of serving individual needs while acknowledging the requirements of the community in aggregate is brought undone by this loss of faith amongst its head men. A thumbnail sketch of the history of Judaism from the middle ages serves to illustrate the point:

"The Teachers of the Torah began their efforts as an insistence that the singularity of their students not be lost before the majesty of the law. Eventually their Talmudism ossified into a tradition-bound rationalism of its own, an empty legalism within which the entrapped Torah study had little room for freeing the individual spirit.

"The Masters of the Kabbala rose up against this entrapment. The routinization of their charisma came in the form of an increasing commitment to elaborate methodology. They lost any real personal contact with their students. Soon they were more like magical authorities who alone had access to the great Truths...

"Hasidism arose, in part, in answer to this oppression.. (1) As is the case with all of man's best efforts, Hasidism eventually fell into a state of corruption. The Hasid's fervent love of the Zaddik [trusted helper] declined into reverence for a great magician."2

So it is with the common law. The study which follows reveals a legal system tending, when dealing with the State, to formalism and the blind citation of precedent. The tendency has been stoutly and successfully resisted at times, and must be seen in the context of different judicial philosophies, which vary widely according to both time and place. The evident evolutionary success of the common law, albeit cyclical, in the commercial and private areas has saved it from extinction as an irrelevance, but as this study illustrates, on the public law side the path has been tortuous. After 700 years it would not be unfair to call it retrograde.

1. S.B. Kopp Guru: Metaphors from a Psychotherapist 1971, p.126
2. Ibid p.44.

CHAPTER ONE

FROM HENRY II TO EDWARD III: THE DEVELOPING COMMON LAW UNTIL 1377.

> "Anyone soever in the future who shall reckon this land as the property of the state, may all the gods whose names are mentioned on this stone curse him with a curse that cannot be loosened, may they command that he live not a single day, may they not let him, nor his name, nor his seed endure. Days of drought, years of famine, may they assign for his lot. Before god, king, lord and prince may his whining be continuous, and may he come to an evil end."
>
> Inscription on Babylonian boundary stone c.2000 BC as reconstructed from T. Ruoff "Links with London" (1962) 36 Australian Law Journal p.53.

The earliest common law sources relating to statutes and the Crown date from the reign of Edward I (1272-1307); not until then did statutes begin to acquire a semblance of their modern aspect. This is apparent in their mode of making, their method of promulgation, and in the regard in which they were held from the time of Edward I.[1] This process was an evolutionary one through the century occupied by the first three Edwards (1272-1377), but in that period the standing of legislation had become sufficiently concrete to raise specific problems over the relationship of the king to certain statutes.

Both argument in litigation and the hardening of status for statutes gave an edge to theory which had in previous writing bordered on the completely mystical. The earliest English writer who could be graced with the title of political theorist was John of Salisbury, writing in the reign of Henry II (1154-1189). Of the Chapter heading in

1. H.G. Richardson and G.O. Sayles "The Early Statutes" (1934) 50 L.Q.R. 201 and 540.

Salisbury's Policraticus[2], "That the Prince, although he is not bound by the ties of Law, is yet Law's servant as well as that of Equity; that he bears a public person, and that he sheds blood without guilt", Kantorowicz wrote[3] that this might appear self contradictory or an effort to square a circle, for Salisbury attributed to his Prince both absolute power and absolute limitation by law.

The chapter of the Policraticus referred to above contains the following words:

> "... it is said that the prince is absolved from the obligations of the law; but this is not true in the sense that it is lawful for him to do unjust acts, but only in the sense that his character should be such as to cause him to practice equity not through fear of the penalties of the law but through love of justice..."

Of these sentiments Kantorowicz wrote[4], "It may be correct to say that the Prince of John of Salisbury is not a human being in the ordinary sense. He is 'perfection' if at all he be Prince and not tyrant. He is ... the very idea of Justice which itself is bound to Law and yet above the Law because it is the end of all Law."

Bracton, a royal Judge who died near the end of Henry III's reign (1272), delineated the features of medieval kingship in terms of prerogative and privilege. Time did

2. The Statesman's Book of John of Salisbury (1159) (ed.) J. Dickinson, 1963, Book IV ch. II. John of Salisbury, diplomat and royal official to Henry II was not writing in a theoretical vacuum, as he had fallen into disgrace in 1156 : G. Constable "The Alleged Disgrace of John of Salisbury in 1159" (1954) 69 E.H.R. 67.
3. E.H. Kantorowicz The King's Two Bodies 1957, p.95.
4. Ibid p.96.

not run against the king[5], and a fountainhead of advantage this was to remain. The king was very much a man to Bracton, lacking in much of Bracton's theory a corporate abstract dimension which modern lawyers call "the Crown"[6], but privileges were granted to him as the sovereign (if not the ultimate feudal lord)[7] which formed a redoubtable bridgehead for the prerogative claims of royal lawyers in the period of this chapter, and allowed for the development of the king's public side with a muddled recognition of his dual capacity as man-feudal lord, and sovereign-head of state.[8]

Bracton is now best remembered for having written that "the king must not be under man but under God and under the law ...".[9] Certainly Coke battened onto this aphorism and employed it in argument with James I 350 years later, without any regard to the limitations on the concept, now so painstakingly examined by Kantorowicz.[10] The following extracts from that writer, assessing the emergence in Bracton's writings of the concept of prerogative, serve as the backdrop against which the arguments of counsel in

5. Bracton De Legibus et Consuetudinibus (ed.) S.E. Thorne, 1968, f.103, vol.II p.293.
6. J.F. Reinhardt "The Status of the Crown in the Time of Bracton" (1943) 17 Temple U.L.Q. 242; F. Pollock and F.W. Maitland History of English Law Before the Time of Edward I 1968, (ed.) S.F.C. Milsom, vol. I, p.511 et seq. But see Kantorowicz King's Two Bodies at p.149, n.180.
7. L. Ehrlich "Proceedings against the Crown 1216-1377" in (ed.) P. Vinogradoff Oxford Studies in Social and Legal History vol. VI, 1921, p.11, attacking the notion of the thirteenth century king as only the leading feudatory.
8. See eg. Kantorowicz King's Two Bodies pp.377-379 for the theory of the king as guardian of the Crown.
9. Bracton De Legibus f.5B, vol. II, p.33.
10. See Kantorowicz King's Two Bodies pp.146-164.

Edward I's reign and later may be arrayed.

> "Nowhere can we deduce from Bracton's political theories an intention to invalidate or even reduce those res quasi sacrae which pertained to the Crown and which were to form what soon would be called the 'Prerogative', that is, more or less undefined rights, along with clearly defined ones, which were not subjected to the customary Positive Law."11

> "The king is bound to the Law that makes him king; but the Law that made him king enhances also his royal power and bestows upon the ruler extraordinary rights which in many respects placed the king, legally, above the laws."12

> "Bracton's method is ... exaltation through limitation, the limitation itself following from the king's exaltation, from his vicariate of God, which the king would jeopardize were he not limited and bound by the Law. This method may be called dialectical. It relies upon the logic that there cannot be a genuine 'Prerogative' on the one hand without submission to the Law on the other, and that a legal status above the Law could legitimately exist only if there existed also a legal status under the Law."13

Before turning from the speculations of jurists to the arguments of the courtroom as they first become available, it is worth noting that two centuries after the Conquest the English polity reflected development at least in the form of reaction to special interest pressure. Magna Carta, the Barons' War in the reign of Henry III and the first tentative parliamentary steps established the non-omnipotence of the thirteenth century English kings. The limitations were imposed by practical men pursuing personal objectives without reference to book learning. Sayles has

11. Ibid p.149.
12. Ibid p.150.
13. Ibid pp.157-158.

suggested that this was a period ill at ease with theory.[14]

An overview of royal claims made in litigation is presented to allow an inductive insight into early Edwardian constitutional law, when theory first struck its roots in the poor soil of Realpolitik. The prerogative is fundamental to this study as these cases will illustrate. Sayles wrote, "[T]he medieval constitution had its origin embedded in the royal prerogative and as one developed, so did the other."[15] As the constitutional position of the king became formalized, at least in the courts, it was axiomatic that the prerogative receive form and prescription amounting to limitation at law.[16]

Litigation from the time of Edward I indicated a royal perception of the need to maintain the legal privileges of the king, not merely as a personal bolster but in realisation of his peculiar role in the order of things. The claims made by the king's counsel and largely accepted by the royal judges[17] in the reigns of the first two Edwards showed a clear acceptance that the king was more than primus inter pares to his nobles: he was rather the very

14. G.O. Sayles (ed.) (1939) 58 S.S. (K.B. vol. III) p.xxxvi.
15. Ibid p.xliii.
16. S.B. Chrimes English Constitutional Ideas in the Fifteenth Century 1936, p.43 noted that in the fifteenth century "prerogatives seem to be rather those particular exercises of the Prerogative which have received definition and therefore restriction, by litigation and the process of law." See also Kantorowicz on Bracton loc. cit. f.n.13.
17. "...the Justices did so rather for the King's profit than to vindicate the law etc., and they did it under fear." R v. Robert (1313) YB 6 & 7 Ed.II Eyre of Kent vol.1, 24 S.S. 102 at 104.

fulcrum of government, and the law of the community would not necessarily apply to him.[18]

These early enunciations of executive privilege were contemporaneous with the fledgling development of representative institutions, but as it was to be three and a half centuries before tension between parliament and the monarchy came to a head, it was not impossible for the two potentially inimical concepts to develop side by side. And so they grew, in accordance with the expedience of counsels' arguments.

Counsel for the king in two cases in 1279 made claims founded on the exceptional nature of the royal position. In the first case[19], concerning the alienation of an advowson (feudal right of clerical presentation i.e. capacity to appoint a priest to a particular church), Walter of Wimborne for the king denied the possibility of such alienation without express as opposed to general royal consent if prejudicial to the king, because "the lord king has a special prerogative attached to his crown ...". In the second case, an action for lands granted at Henry III's pleasure, John Le Fauconer asserted that the "king is not bound by the laws and has no necessity to use ordinary writs ..."[20] to recover his own possessions. The broad sweep of Le Fauconer's assertion was tempered by its restriction to

18. See Bereford CJCP and Toudeby, counsel for the king in (1315) YB 8 Ed.II,41 S.S. pp.74 and 75, the king is without peer and above the law: infra f.nn.71 and 72. See generally Sayles 58 S.S. pp.xliii et seq., and Kantorowicz King's Two Bodies p.378. n.216.
19. (1279) 55 S.S., KB vol.I. p.48.
20. (1279) Ibid p.54.

royal property. The former case, although at first blush relating to the hierarchical nature of the feudal system, was in fact similarly restricted to royal property, the incorporeal hereditament of an advowson.

Five Year Book reports available for the year 1292 illustrate the tenacity of the king's lawyers in asserting his claims to privilege, the acceptance of a flow of such privilege from its feudal antecedents (the king as lord in his own courts) to a more central concept of monarchy, and the subtleties of the adversary system of law when working on imprecise theories of government.

In the Year Book 20 and 21 Edward I[21] appear four cases repeatedly asserting "le Roy est prerogatyf". In three, as a concomitant of this claim, the king was not bound by the common writ procedures[22], but in the fourth, dealing with feudal succession, the resulting assertion that no prescription of time ran against the king[23] was of farther reaching consequence.

A fifth report from 1292 is intriguing as it shows Louther, king's serjeant, arguing in the King's Bench that a grant of land made by the king based upon a previous imperfect grant was invalid "as the lord king had no wish by that grant to change the common law of his realm."[24] The curiosity in this case lay in the claim by a widow seeking

21. (1292) YB 20 & 21 Ed.I, R.S.
22. Ibid at p.56 and p.112 per Louther, king's sergeant, and p.86 per Huntyndone.
23. Ibid at p.68 per Louther.
24. (1292)KB vol. II, 57 S.S. p.68.

dower that the grant to her late husband had been valid "since the king himself is above all law ...". The theory of royal privilege from the machinery of the law was not to be stretched beyond the requirements of the king or Crown: it was not part of the general legal system to be manipulated by subjects to their advantage. Hawise, the widow, was unsuccessful in her plea.

A sixth case from 1292, Humphrey of Bohun v. Gilbert of Clare contained all these threads of prerogative, specifically that time does not run against the king, coupled with the earlier Bractonian mysticism:

> "... for the common utility he [the king] is in many cases by his prerogative above the laws and customs usually recognized in his realm ... But also the Lord King is, in view of all and sundry of his kingdom, the debtor of justice."25

It is noteworthy that the prerogative in these general assertions is not measured against the law : rather the king is elevated above the general law. The king is of another caste, sometimes outside the "common law". But Ehrlich noted the inference that some laws and customs did bind the king, and that the prerogative was based in notions of common utility.

The remaining reports on this subject from the reign of Edward I develop the same themes. In two it was argued that the legal relationship implicit in the feudal system acted

25. R.P. vol. I, pp.71 and 74 cited in Kantorowicz King's Two Bodies p.163 and Ehrlich "Proceedings" pp.58-59 citing as additional source Placitorum Ab reviatis 196, rot.30.

to limit the privilege of the king[26], but in 1293 another claim was made as to the effect of the prerogative on normal writ procedure[27], and in 1302, despite the assumption of Brumpton J that the king would be bound to warranty by the words of a grant, counsel asserted that "It is a peculiarity of the king that he binds himself to no one in warranty."[28]

It seemed that the law was being avoided and defeated, but incrementally it would be regarded as capable of determining the limits of dispensation from its operation. The breadth of maverick claims to prerogative dispensation from procedure and law that courts afforded the first three Edwards was not to remain untrammelled.

Professor McIlwain, citing Seneca, summarized the medieval condition: "To Kings belongs authority over all

26. (1304) YB 32 & 33 Ed.I, R.S. p.36; (1307) YB 33-35 Ed.I, R.S. p.406.
27. (1293) YB 21 & 22 Ed.I, R.S. p.74. By 1307 Passeley could argue that "in old times every writ, whether of right or of the possession, lay well against the king, and nothing is now changed except that one must now sue against him by bill, where formerly one sued by writ ..." YB 33-35 Ed.I, R.S. at p.470. But see Sayles 58 S.S. at p.xlix.
28. (1302) YB 30 & 31 Ed.I, R.S. p.98. Discussed in Ehrlich "Proceedings" at pp.58-59. Even more germane to the topic at hand is Ehrlich's discussion (at pp.56-58) of a decision in 1301 which led to the inference that the king was not bound by the Statute of Gloucester (1278). This statute is explained in N.D. Hurnard The King's Pardon for Homicide Before A.D.1307 1969, pp.281-297 as a check on the pardoning of homicides. It was intended that the prerogative of mercy be exercised only after trial, so it could not be used to pre-empt judicial process. This would appear to be the first statutory restriction of the prerogative, but the statute, set out by Hurnard at p.281 expresses the king's wish that Chancery procedure be controlled. Hurnard sets out numerous examples of Edward I ignoring the statute from 1280 onwards. Pardons continued to be a thorny topic throughout the medieval period.

men, to subjects ownership."[29] The legal concomitant was an acceptance of royal privilege in litigious procedure - the prerogative - sufficient to match Bracton's definition of regal authority: "Those [things] connected with justice and the peace ... ."[30] The prerogative has dwindled to a rump in the late twentieth century but common law courts remain bemused by the application of necessary but discretionary governmental powers. The frontier of legal contest has altered from the royal prerogative to executive discretion.[31]

The prerogative was not an intangible monolith unrelated to circumstances, and the relationship of the king to statutes illustrated the prerogative's varied nature. The study of this relationship demands firstly an understanding of medieval law making.

29. C. McIlwain The Growth of Political Thought in the West 1932, p.373, Seneca De Beneficiis VII, iv.
30. Bracton De Legibus f.55B, vol. II, p.167.
31. Sayles wrote of this "age old problem of government" (1957) 76 S.S. p.lxxxiv. On the modern problem see for example J. Jowell "The Legal Control of Administrative Discretion" [1973] Public Law 178, and the provocative article by S. Wexler "Discretion: The Unacknowledged Side Of Law" (1975) 25 U.Tor.L.J.120, both cited in the author's article, "Natural Justice and Executive Discretion in Australia" [1980] Public Law 397. See Council of Civil Service Unions v. Minister for the Civil Service [1985] AC 374 and Patriotic Front ZAPU v. Minister of Justice 1986 (1) S.A. 532 (Full Court, Zimbabwe Supreme Court) for the prerogative and executive discretion discussed together. This change of legal battleground matches the perception of political scientists. M.J. Tooley editing J. Bodin Six Books of the Commonwealth undated after 1953, (first published 1576) wrote at p.xiv, "... no one in the middle ages asked 'What is a state and how is it constructed?' but only 'Who are the rulers and what are their powers?'"

It was apparent from the mid-thirteenth century that legislation (whatever the form of the legislature) was adding to, adapting and moulding the existing body of customary law.[32] Some of this statutory law was only declaratory, while other of it was "novel ley" : "radical legislation which deliberately and consciously changed and abrogated the common law whenever that was considered necessary."[33] But whether new law, or old law restated, Sayles and Plucknett were agreed that in the Edwardian period legislation was perceived as no more than an expression of the royal will.[34]

Both Sayles and Plucknett[35] relied on Scoland v. Grandison[36] to illustrate the intersection of statutes and the prerogative. Chapter 10 of the Statute of Westminster II (1285) provided that writs issued after a date proclaimed at the commencement of an Eyre should be null. Scoland issued his writ after the date proclaimed, and in accordance with the provisions of Westminster II c.10 the action should have been struck out. But Edward I writes to the justices conducting the Eyre and declares himself a partisan of Scoland's cause.[37]

32. Sayles 58 S.S. p.xxix.
33. Ibid p.xxxvi and see G. Barraclough "Legislation in Medieval England" (1940) 56 L.Q.R. 75 at p.76 on Quia Emptores 1290 as the first legislation rather than declaration.
34. Sayles 58 S.S. p.xxxviii and T.F.T. Plucknett Statutes and Their Interpretation in the First Half of the Fourteenth Century 1922, p.141.
35. Ibid, Plucknett at pp.139-141.
36. (1313) YB 6 & 7 Ed.II, Eyre of Kent vol. I, 24 S.S. p.158 and p.170, commented on by the editors F.W. Maitland et al. p.lxxviii at pp.lxxxiii-lxxxiv.
37. The terms of this communication are set out in 24 S.S. p.lxxxiii n.3.

Stonor and Passeley, counsel for Grandison, confronted the justices with Scoland's tardiness. In the first account, Staunton and Ormesby JJ avoid discussing the relative merits of the statute and the king's command to proceed with the litigation, although Passeley tries to force the issue. Ormesby J says he cannot dispute the king's authority, while Staunton J assumes that that authority justifies his actions.[38] But the second account is much more specific and reads as follows:

> "Staunton J We have received a later authority [warrant] to do so [give effect to Scoland's writ] from the King, and this is equally binding with the statute [as high as the statute].
>
> Stonore And we answer to that that the law is laid down in the statute, and that no man may go contrary to statute.
>
> Spigurnel J ... We have received it [the writ] by the command of the King, under a new authority which is as binding as the statute.
>
> Passeley Sir, the statute is made by the General Council of the Realm, which may not be over-ridden by a simple order from the King; and we submit that such an order cannot make of no effect the plain words of the statute.
>
> Ormesby J What the King commands we must suppose to be commanded by the General Council; and moreover no man may plead in objection to an act of the King."[39]

This was not the last occasion on which a king would stay the effect of Westminster II c.10, but it is a first taste of prerogative power being used in a ruling and legislative capacity, not merely as a personal shroud for the king. Leaving aside the philosophy of kingship,

38. 24 S.S. p.161.
39. 24 S.S. pp.175-176.

Edward II's intervention was, to the modern eye, of nc greater effect than the equitable and ameliorating function performed by Statutes of Limitations in tempering absolute time requirements associated with civil litigation. However, in the technical and inflexible atmosphere of fourteenth century courtroom argument, the king's effective dispensing with a statutory prop in the defence case brought out into the open the judicial perception of royal power. But Scoland v. Grandison is not authority for regal omnipotence, despite its first appearances. Rather it illustrates the king's legislative functions, as accepted by his servants the royal judges, but already under attack by counsel for being too wide.

Staunton J had put the king's warrant as high as a statute. As emanations of the royal will it is understandable that statutes should receive similar treatment to grants under royal charter.[40] Sayles cited[41] a case from 1276 which indicated that when the king granted a manor to which was attached the advowson of a church, the court assumed that the king retained the advowson as part of his "special prerogative" unless he "expressly stated the contrary in his charter."

40. Barraclough "Legislation" at p.80 wrote of the king's "Acts" being performed in the early fourteenth century as relatively indistinguishable charters, writs, assizes, provisions, edicts, ordinances and statutes. See also Richardson and Sayles "Early Statutes" at p.550 et seq.
41. 58 S.S. p.xlvii. T.F.T. Plucknett Legislation of Edward I 1949, p.42 n.2 alluded to the distinction made in the apocryphal De Prerogativa Regis (dated by Maitland to Edward II) between appurtenances in royal and private grants.

In Burgesses of Yarmouth[42] the plea was made for a "franchise as largely as our lord the king had granted it", but the court held that acceptance of such a claim would involve a diminution of the king's interests, and disallowed the claim. A judicial tenderness for the perceived necessary perquisites of kingship shows in these examples, and the king is assumed not to be granting away his interests unless there is an express intention recorded to this effect.

In such circumstances it is not surprising that Hartlepool, counsel for the Crown, should assert in 1311, "Statut ne lye my en countre la prerogative le Roy" [Statute does not affect the King's prerogative].[43] This asseveration was advanced in one of the Courtenay cases, catalogued and analysed by Plucknett.[44] The litigation arose from a three way contest between Thomas de Hothewayt, Hugh de Courtenay[45] and the king for the right of presentation to the church of Brigham in Cumberland. Hothewayt claimed that Courtenay's ancestor, Isabel de Forz, Countess of Albemarle and Devon, had presented to the church when he, Hothewayt, was under age with a claim to the presentation, and this clearly contravened the terms of

42. (1293) YB 21 & 22 Ed.I, R.S. p.230.
43. Courtenay v. The King (1311) YB 5 Ed.II, 31 S.S. p.130 at p.131.
44. (1944) 63 S.S. p.xviii et seq.
45. An apparently aggressive and acquisitive minor noble intent on becoming Earl of Devon : M. Buck Politics, Finance and the Church in the Reign of Edward II 1983, pp.46 and 74.

Statute of Westminster II (1285) c.5. The king had another claim to the advowson stemming to Isabel[46], and Hartlepool for the king was making the point that the statute might have allowed a claim against Isabel, but it was useless against the king, because the king having seisin of the advowson could remain secure in his title despite this apparent breach of the statute in the chain of title.

It will be remembered that the prerogative right of the king to advowsons in his possession as feudal lord was pressed at least as early as 1279.[47] The Statute of Westminster II (1285) c.5 was part of Edward I's legislative package to rectify the deficiencies of Henry II's possessory remedies based in seisin.[48] The principal process for assertion of title to an advowson was the possessory writ of Quare Impedit, but it was inadequate where the right of presentation had already been usurped. Westminster II c.5 aimed (inter alia) to improve the lot of wards and infant heirs who were disseised of their advowsons

46. Perfidiously obtained, Plucknett 63 S.S. p.xxix, and see p.xxxiv on royal fraud in this case. See also p.xxxvii on how procedural advantage in the king could defeat a claimant, even when, as in this case, the statute was framed not merely in a possessory fashion, but to take account of other rights. Further examples of the confusion over Isabella's inheritance, and the king having wardship over Hugh de Courtenay and other of Isabella's heirs may be seen in (1307-1313) C.C.R. pp.273-4.
47. See f.n.19, and also f.nn.41 and 72.
48. Plucknett 63 S.S. pp.xxxv-xxxvi, and Pollock and Maitland History, vol. II pp.139-140. Also Plucknett Edward I, pp.53-54. The best primary sources on this issue are Fleta Book V c.17, written about 1300, set out in (1983) 99 S.S., Fleta vol. IV, pp.60-61, and Thomas Brugge's Reading on Westminster II c.5 in 1469 in (1952) Readings and Moots at the Inns of Court vol. I 71 S.S. pp.106-107.

by fraud or negligence: the disseisee was to have access to the possessory writ which would have otherwise been denied him, provided he acted within six months of coming into legal capacity. Other disseisees had to act within six months of the usurpation. If the bishop appointed an incumbent, as he was entitled after a vacancy of six months, the infant deprived of the power was to receive damages.

It is important to remember at this early juncture that what Hartlepool asserted was that the statute did not affect the king's prerogative, not as Plucknett claimed when noting Hothewayt's inability to receive the benefits the statute was meant to confer, that "statutes do not lie against the King."[49]

The prerogative in this case may have lain in the assertion of royal seisin in "real property", although the advowson was in fact both a chose in action and an incorporeal hereditament.[50] It is more likely that the king was relying on the prerogative that time did not run against him. Thomas Brugge's reading on Westminster II c.5

49. 63 S.S. p.xxxvi. Sayles had it right : 58 S.S. p.xliv.
50. This concept of a prerogative in real property looks rather thin, cutting across, as it inevitably must, the private property rights of subjects (see supra f.n.29). In the first (and last) surfacing of Courtenay's Case in the nominate or later reports, Levinz sjt, submitted in R v. The Bishop of London and Dr Lancaster (1693) 3 Lev. 377; 83 E.R. 738 at 379; 739 that the argument for the king in Maynard's edition of YB 5 Ed.II 148 was a prerogative of cession, that is, that upon promoting the incumbent of the church, the king had the right to replace the parson with his own nominee. Levinz sjt denounced this claim of cession as a non-existent prerogative, but the decision in The Bishop of London's Case went against him. The case will be discussed below in chapter 7.

in 1469 refers to the maxim on four occasions, always in the context of situations in which the king can claim some legal, if temporary, basis for title to an advowson. The most likely situation here is the fourth referred to by Brugge : wardship in the king of a minor who would have title on his majority.[51] The distinction between not binding the king, as opposed to the king's prerogative may have been arguable in 1311, but developments over the next two hundred years in definition of the prerogative, and the burgeoning role of parliament in legislation, were to make this distinction very important.

It is worth noting in passing that another case in the same chain of litigation provided the claim (accepted by the bench) that "The King is always within age etc., and in different places he can change his title to the same property."[52] Vinogradoff thought that the king was frequently held to be a perpetual infant for the purpose of litigation, taking the advantages of minority, including the ability to alter pleadings and vary title for the purpose of proceedings.[53] On the other hand, Bolland cited[54] the antiquity of the doctrine that time does not run against the

51. Brugge Reading 1469 pp.109, 112, 115 and 127. Note also the Prerogativa Regis (dated by Maitland to the reign of Edward II) concerning advowsons vested in the king : time did not run against the king in the context of the six months in which defensive action had to be taken against a usurper. S.R. vol. I, p.226.
52. Courtenay v. The King (1311) YB 5 Ed.II, 63 S.S. p.166 at p.167.
53. P. Vinogradoff Collected Papers vol. I pp.200-201.
54. W.C. Bolland Manual of Year Book Studies 1925, p.29.

king[55], but claimed that the theory that the king was always under age was not accepted by the courts, as inequitable consequences would follow.[56] Whatever Bereford CJCP may have thought in 1305 and 1317, it is clear that in 1311 the judges of King's Bench were prepared (to use the phrase Bolland thought he had negatived) to confine the king "in a constitutional nursery all the days of his life".

That time does not run against the king was accepted in 1315[57] and 1317[58], but only in the eccentric Mirror of Justices and two arguments by Scrope, king's serjeant are we finally presented with a rationale for this claim: "... no time runs against the king in his franchises, but the king is treated in the likeness of an infant who cannot lose [by negligence]."[59] Geoffrey le Scrope, created a king's serjeant in 1315 at little more than age thirty[60] argued twice in 1317 to the effect firstly that

55. Bolland's example is from 1305. See supra f.n. 23 for a reference to 1292. Bracton supra f.n.5 had referred to the concept pre-Edward I.
56. Per Bereford CJCP 1305 MS unspecified by Bolland. Bolland is borne out by Kantorowicz King's Two Bodies, pp.372 et seq. who explored the confusion extending through the medieval period between the competing ideas of, on the one hand, the king and on the other the Crown being always under age, and the rise by the Tudor period of the doctrine that the Crown was never under age. Note particularly Bereford CJCP in (1317) YB 10 Ed.II. 54 S.S. p.198 cited by Kantorowicz at pp.377-378 attacking the anomalies that would follow if the king were always a minor at law.
57. 37 S.S. p.xlviii.
58. R. v. Prior of Merton (1317) YB II Ed.II, 61 S.S. p.88.
59. Mirror of Justices 7 S.S. p.113. Maitland, editing, thought the Mirror dated from Edward II's time.
60. D.W. Sutherland (1981) 97 S.S. The Eyre of North amptonshire, pp.xl et seq. Kantorowicz supra f.n.56 is incorrect in referring to Scrope in the cases in 1317 as a justice. He was not elevated to the bench until 1323. His brother Henry, with whom he is often confused, was a judge of Common Pleas from 1308, and chief justice of King's Bench from 1317.

"no time runs against the King because he is always within age ..."[61] and secondly that the Crown "is always within age and cannot lose in court."[62] Kantorowicz has made much of the about face (as he saw it) in the space of a few months from arguing the king's legal infancy to the Crown's perpetual minority.[63]

It might also be tempting to see in these apparent distinctions between king and Crown a budding of constitutional theory, in which specific prerogatives will attach to the Crown. However, while the distinctions were undoubtedly drawn between king and Crown in the reign of Edward II, reliance in theory based on the distinctions seems premature : it would follow later and after much confusion and a civil war. The pronouns in law French are too inexact for a modern reader to be absolutely certain how much reliance Scrope was placing on the difference between king and Crown.[64] What can be seen with clarity is the burgeoning of a law officer of the Crown. Where Bereford CJCP varied his devotion to the king's position at law according to circumstances, Scrope's career showed a single minded care for the Crown's cause. Bereford was prepared to address the anomalies and inequities that would arise from assuming the king's privileged position[65], but Scrope became the first of many Crown-minded lawyers who would

61. R v. Le Latimer (1317) YB 10 Ed.II, 54 S.S. p.45.
62. R v. The Prior of Worksop and Nassington (1317) YB 10 Ed.II, 54 S.S. p.74.
63. See also f.n.56 supra.
64. See the original text in 54 S.S. at pp.45 and 74.
65. See f.n.56 supra.

leave a personal mark on this area of the common law.

Another expression of the preservation of royal interests lay in the assumption that statutes did not extend to ancient demesne of the Crown[66] : "... the statute saith naught about ancient demesne, and therefore he [the king] remaineth under the common law as before the statute".[67] The key words are "the statute saith naught ...". Express words may have acted in derogation of royal rights. Ancient demesne pertained to the king in his character of ultimate allodial landholder. As such, the basic assumption would follow that, in the absence of express words, no private property interest of the king was being deleteriously affected. The king's absolute authority, whether as supreme feudal lord or sovereign retained its integrity.[68]

In explaining the position of the king in the first half of the fourteenth century, Sayles wrote:[69]

> "It is hardly necessary to add that the king does not and cannot ride rough shod over the provisions of statutes. The king acknowledges limitations upon his power, he is chary of going against the common law or

66. Plucknett Statutes at p.64 especially n.3.
67. Per Stonor arguendo in Noreis v. Northcott (1312) YB 5 Ed.II, 33 S.S. p.77.
68. E.g. Mirror of Justices 7 S.S. p.107 "... time does not run against the king in respect of the rights of the Crown or his free estate." but see Portseye v. Halstede (1311) YB 4 Ed.II, 42 S.S. p.1 at pp.2-5 for recognition that the mere person of the king cannot alter property relations. The King held land as a baron, so he could claim neither his personal royal prerogative nor those pertaining to the sovereign/Crown. Conversely, the king's privileges could not be bestowed on others. Bereford CJ said in Portseye (at p.4) "... for although the king grants services or wardships to people he does not grant his prerogative etc." This was in accord with the case from 1292 concerning Hawise the widow: supra f.n.24.
69. 58 S.S. p.xl.

in any way prejudicing the rights of his individual subjects."

Certainly the Mayor of Bedford's Case (1329) as subsequently recounted by Sayles[70] bore out the capacity of the common law courts (in that case Exchequer of Pleas) to refuse acceptance of executive intervention designed to deprive a litigant of a lawful right. However, the capacity of the king to behave as an extra-legal autocrat achieved a startling zenith in 1315 with the incident of the Hospitallers of St. John of Jerusalem. The king's counsel, serjeant Toudeby, claimed that "the King's charter may not be judged by other than the king, for he is without peer and is above all law."[71] This followed Bereford CJCP's assertion, "... against the King, who is above the law, you cannot rely on legal principles."[72] When private property rights were submerged by raisons d'etat there remained no bulwark restraining royal authority, bearing out the oft repeated adage that the medieval era had no public law, but

70. 76 S.S. p.lxxxv.

71. R v. The Prior of the Order of the Hospital of St. John of Jerusalem (1315) YB 8 Ed.II, 41 S.S. p.73 at p.75. This litigation arose from the suppression of the Order of the Knights Templar by Papal order, carried out with complete ruthlessness in France from 1307 and rather more casually in England. The Pope ordered that the Templars' real property be transferred to the rival body, the Knights Hospitallers of St. John of Jerusalem, but Edward II showed no inclination to urgency in carrying out this transfer, the Templars' lands having been seized into his hands at the time of suppression : see Denham arguendo in R v. The Prior of the Hospital of St. John of Jerusalem 41 S.S. p.73. The sweeping claim and acceptance of royal prerogative powers must be seen in the context of this highly politicised suppression of a powerful, trans-national military order. The Hospitallers were still pursuing claims to the Templars' former land as late as 1338 : see generally T.W. Parker The Knights Templars in England 1963 pp.98 et seq.

72. 41 S.S. at p.74. This established the potential extent of "public" royal authority. The previous year, in an advowson case, R v. Washingley (1314) YB 7 Ed.II, 37 S.S. p.179, counsel had disputed the power of the king in his "private" feudal capacity, Malbethorpe saying (at p.180) that the advowson belonged to the king "until it be sued out of his hand by due process." Scrope however rejoinded (at p.181), "If a man hold a single acre of the King in chief, the King will seize all his land in virtue of his prerogative." Uttered the year prior to becoming a king's serjeant, this was probably Scrope's most extreme argument in a long career devoted to whoever was in power (see Sutherland loc cit. supra f.n.60), flying as it did in the face of the medieval sanctity of private property. McIlwain wrote about property being the right of subjects, 600 years after these events. Scrope was properly arguing to the limit. The prerogative was undefined because there was no constitution, bill of rights or at that time common law to restrain it. Scrope simply argued for total power in the king over property. Bereford CJCP agreed the next year that the king was above the law. It was the triumph of the later medieval period that it did produce in practice limits on royal power over property and began to contemplate the relationship of king to polity, such contemplation axiomatically leading to circumscription of the prerogative. If the relationship had been beyond contemplation, the king could always have been beyond legal restraint. The fault lay not in Scrope arguing to the limit in a legal environment in which precious few parameters on royal power existed, but in judges of a later day, in a different environment, after the evolution of practice and theory beginning to limit the king, inappropriately applying the adages of the common law in a time of growth, making their own a period of decay.

only the law of private property, upon which advocates might perform procrustean feats in attempts to elucidate general constitutional principles.

Such lawlessness was, however, unusual, to the extent that kings were always bound by raw political considerations : abuse of private property on a sufficiently large scale might provoke rebellion. But a legal system requires operation on a more schematic and rational basis than the keeping of a weather eye for potential revolt. The relationship of the king to statute law was plastic because not only did it seem that, at least to some extent, he was not bound by statutes, but that he could alter, suspend, dispense with or even annul them.[73] The basis for this flexibility appears to have been twofold:

(1) As an expression of the royal will, a statute could only impinge upon royal rights - the prerogative - by express words or intention:

(2) While the king would not normally contravene the common law which regulated and protected subjects' property rights, some statute law was "novel ley" and there were no fundamental assumptions as to how the king should relate to such law. The overriding practice was that the king as promulgating authority of statutes had a watching brief over their operation. Adjustment, to the extent of abrogating a statute, was not evidence of bad faith <u>per se</u>: the public good might demand it.[74]

73. Sayles 58 S.S. p.xxxviii and Richardson and Sayles "Early Statutes" pp.548-549.
74. Sayles <u>supra</u>, Richardson and Sayles <u>supra</u> p.550.

"The contrast ever present in men's minds was between common law and royal prerogative ...",[75] but the prerogative, investing as it did both the personal property rights of the king and the necessary governmental capacities of the Crown stood as a bastion of reserved royal rights against the "new law" and an active ingredient in tempering and adjusting statutes to the needs of the Crown.

The problem of the royal relationship to statutes as "novel ley" was not directly confronted in the reign of Edward I. As Barraclough wrote of "the English Justinian", the mass of "Radical legislation" from this period paralleled that of Henry II in being concerned with the "adjustment of right and procedure".[76] It is suggested that Quia Emptores (1290) was the first "legislation" rather than statutory declaration of existing law.[77] Certainly the Statute of Westminster II (1285) provided fresh remedies for mischiefs newly recognised. However, the form of chapters 1 and 5, (De Donis Conditionalibus and Benefices - Advowsons) to cite two instances which later attracted curial attention for their relationship to the king, was not to alter existing legal rights and remedies, but to extend them by analogy to deal with newly recognised problems.[78]

The simple recognition, however, of problems for which a statutory solution was required looked to a potential

75. Sayles 76 S.S. p.lxxxiv.
76. Barraclough "Legislation" p.81.
77. Ibid p.76.
78. T.F.T. Plucknett Concise History of the Common Law 5th Ed. 1956, pp.551-557. Note that Westminster II c.10, the subject of litigation concerning the king in 1313 and 1329 (f.nn.36 and 86) did provide "novel ley" dealing with procedure.

departure from the assumptions of static law which prevailed to the end of the thirteenth century. Edward II's coronation oath of 1307[79] evidenced this new perception. Its primary clause, as in previous coronation oaths, requested that the king "confirm to the people of England the laws and customs given to them by the previous just and God-fearing kings...". However, the last clause of the oath was newly added and is usually taken to indicate a grant to the community to participate in the making of legislation. Perhaps more importantly than being official recognition of legislative capacity in the populace, it assumed the necessity of law making. The king was asked if he would "grant to be held and observed the just laws and customs that the community of your realm shall determine ...".

There was potential here for conflict in the royal undertaking : should community determined law take precedence over law given by previous kings, however just and God-fearing? This conflict in the constitutional aspect of law making arose at the beginning of the period in which the legislative function became clearly distinguished from general administrative activity, a process in which the king's legislative power came under greater scrutiny.[80]

Richardson and Sayles viewed this potential conflict in functional terms: "who then is to determine whether or not a statute conflicts with the laws and customs of the realm?"[81]

79. B. Tierney (ed.) The Middle Ages: Sources of Medieval History vol.I, 1970 pp.254-255. The oath in Norman French may be found in S.R. 5 Ed.II vol. I, p.168.
80. Barraclough "Legislation" pp.81-83.
81. Richardson and Sayles "Early Statutes" p.555.

They cited an Irish incident from 1310 in which the Justiciar, as the king's representative in Ireland, revoked a statute in the public interest.[82] The pattern continued into the next reign.

In 1328 the Statute of Northampton c.2 (with parliamentary imprimatur) forbade the granting of pardons save in particular circumstances and then openly in parliament.[83] The following year the king offered a general pardon to one Kirton, and when arrested for homicide and brought before King's Bench, Kirton produced his pardon. The court consulted not parliament, but the king and council, and was informed that it was not the king's will that such pardons, granted in times past should be disallowed.[84] The court, presided over by Geoffrey Scrope, now CJKB, expressed no formula for defying the intention of the legislators who must have assumed they could control the royal act of pardoning. Lacking theoretical justification, but carrying the weight of curial decision, here was an example of a court not permitting a statute expressed in specific terms to detract from a fundamental perquisite of royal government, the prerogative of pardon.

It is only fair to attempt a reasoning for the decision of King's Bench. Richardson and Sayles quoted from a Year

82. Ibid p.550.
83. Sutherland 97 S.S. pp.xxiii commented on the social problem dating back to the thirteenth century of royal pardons to felons in return for military and political services.
84. Sayles 58 S.S. pp.xli-xlii.

Book some two decades after Kirton's case to the effect that "the king ... makes the laws with the assent of the peers and the commune, and not the peers and the commune. The king then is the legislator, not parliament: and it is a difficult question, not only how far he is bound to consult parliament, but how far, once parliament has been consulted, he is bound by the decision then made."[85] If the king were the legislator, no fabric would be torn by subsequently allowing him to countermand his earlier statute. This concept underlies the remaining decisions in this field from the reign of Edward III (1327-1377).

Presiding over the Eyre of Northamptonshire in 1329-1330, Scrope CJ was appropriately compliant to a royal command to allow writs to be entered after the date for the closure of receipt of writs set under the Statute of Westminster II (1285) c.10. Of the king's order Scrope CJ said:

> "This writ is flatly derogatory to the statute. But we who are the king's ministers cannot overrule his command."[86]

However, the Chief Justice was careful to attend on parliament and obtain a non obstante against the terms of the statute, granted not merely by the king, but "par comune consoil."[87]

Sutherland expounded at some length on further administrative action he thought Scrope had taken to ensure that the statute was complied with.[88] A reference to

85. Richardson and Sayles "Early Statutes" p.562.
86. 98 S.S. p.500. Scrope of course had precedent on his side: See f.n. 39 supra.
87. Ibid and Sutherland 97 S.S. p.xlii.
88. 97 S.S. p.xliii n.1.

records ordered to be made up of writs contravening the Statute, and now no longer in existence, seems rather slim evidence for the conclusion "that the proceedings were eventually quashed as contrary to the statute."

Furthermore, Scrope CJ sat on Park v. Botiler[89], a case commencing with a late writ. Sutherland justified Scrope's action (with some merit) by reference to the finding that no inequity would be suffered by allowing the late writ (the mischief the statute was designed to prevent would not be exacerbated), and that in any case the parties came to a compromise settlement.

But Scrope's attentiveness to royal requirements, to the point of not merely placing the king outside the constraints of the legal system but dropping the rationality fundamental to that system at the request of the king, is again revealed in Walter of Langton's Executor v. Abbot of Selby in which Bacon sjt said, "the Statute of Northampton [(1328) c.8], says that justices shall not omit to do right according to the common law on account of any order from the king that is contrary to the law." Scrope CJ is reported in one manuscript as saying in reply:

> "the king has commanded us by his writ not to trouble the abbot ... So our hands are tied."[90]

It is noteworthy that Scrope saw himself in the judgment

89. 98 S.S. p.593.
90. 98 S.S. p.609 at p.611 n.2.

seat as the king's minister.[91] Commenting on Scrope's "wonderful ability to survive and continue through the troubled political changes of his time," Sutherland wrote:

> "We do not know what combination it was of talents and courtliness, goodness and wickedness, that enabled him to stand so high with all political parties." 92

Under Scrope's guidance the law regarding the ambit of the prerogative did not stand still in the relative imprecision left by Bereford CJCP.[93] The attempt at tempering the prerogative according to circumstances or showing disinterest in litigation affecting the royal cause died at least temporarily with Bereford. Scrope was hardly without collaborators in this, but his force of presence and intellect steered infant public law in a path that certainly did no harm to Scrope's career, left little room for evolution to a more equitable position, and provided an at least subliminal benchmark for royal lawyers of later periods to view as "the law."[94]

91. Supra f.n.86. Sutherland 97 S.S. pp.xvii-xviii reviewed the extraordinary range of administrative activities to be undertaken by the justices on eyre. Criticism of Scrope must be tempered by a realisation of the bureaucratic functions that judges were expected to perform in this period, stamping them as royal servants, rather than impartial arbiters.
92. Sutherland 97 S.S. p.xli.
93. Bereford's "diplomatic suppleness" was referred to by Plucknett 63 S.S. pp.xv-xvi. Bereford's judgments as recounted above ranged from favouring an unrestricted prerogative (f.n.72) to limiting in small fashion royal claims (f.n.56) and see Sayles 58 S.S. p.xlvi n.9 referring to Bereford in 1314 limiting the king's capacity to alter his pleading.
94. See the cases relied on by counsel for the plaintiff, and Weston J in Willion v. Berkley (1562) and by Thomas Egerton in his writings, all recounted in chapter 3.

Bracton had written some eighty years earlier of the need to delegate the judicial function. He wrote that the king "must select from his realm wise and God-fearing men in whom there is the truth of eloquence, who shun avarice which breeds covetousness, and make of them justices, sheriffs, and other ministers and officials ..."[95] Allowing the evidence that supported Stones' finding "every sign that Scrope turned his success in public affairs to the advantage of his private fortune"[96], avarice seems not the primary motivating force in Scrope's psyche. Rather it was the desire for or to be near power, and in this Scrope was no more than the father of 650 years of partisan judges as executive minded as the government, seen in every generation. The system capable of flexible growth to meet the needs of succeeding generations under the direction of the charismatic leaders prescribed by Bracton, began to lose its way and opt for static security in the rigid pro-royal formulae that Scrope brought to the bench from his days as a successful advocate.

The common law would reflect, in this small area under study, various expressions of flexibility and inertia, boldness and Crown-protectiveness, growth and decay according to the psychological predilections of the dominant personalities in any given period. In contradistinction with Bereford's intermittent care for the logical limits of the prerogative, Scrope's jurisprudence, in its assumption

95. Bracton De Legibus f.108 vol. II, p.306.
96. E.G.L. Stones "Sir Geoffrey le Scrope Chief Justice of the King's Bench" (1954) 69 E.H.R. p.12.

of absolute constitutional principles [97], gave shelter to some less bold souls that came after him.

A final note of interest from the recently translated Eyre of Northamptonshire for 1329-1330 is the exchange between serjeants Scarborough and Aldborough in R v. The Abbot of Peterborough. Bearing directly on the discussion raised by Kantorowicz over the perpetual minority of either the king or the Crown, in which he referred to the other medieval doctrine of the eternal infancy of the Church [98], Scarborough sjt said:

> "Holy Church is always under age, and our predecessor was only a guardian for the time being. By his deed, therefore, the right of our church ought not to be lost."

To this Aldborough king's serjeant replied:

> "So is the king always under age in respect of matters of this sort which concern his crown ..."

and subsequently:

> "In respect of the rights of the crown the king is always under age. So even if the king has in general terms confirmed to you the franchises that you wrongfully possess, he has not thereby lost his right to seize them."[99]

97. One of the compelling factors in the legal environment urging the courts towards a consistent, if pro-royalist, general attitude to the king and the law, was the move away from the equitable attitude which had prevailed under Bereford. Thus Plucknett Concise History p.333 cited Hilary J three times in 1343-4 to the effect that "statutes are to be interpreted strictly."
98. Supra f.n.56.
99. 97 S.S. p.87 at pp.90 and 91.

In another example of a general grant from the king being restricted so that the king could claim later not to have parted with express powers, but without reliance on the theory of royal infancy, Scrope sjt argued in R v. The Merchants of Almain[100] that a general grant to the merchants of the Hanseatic League by Edward II in terms of the grants of his predecessors did not involve bestowing specific privileges upon the alien merchants such as holding their own court.

Ever present is the notion of the king being able to escape from the general terms of his grants, at least as they affect the Crown, because the king as guardian of the Crown is always a minor. To this first concept must be added a second which pervaded the fourteenth century, that statutes were to be construed as royal grants. No progress in constitutional thought on the topic under study was possible until new attitudes evolved away from these matched nostrums of royal refuge and administrative expediency.

In 1337 the king suspended a statute from operation over the county and city of Chester. It had been revoked with regard to London with parliamentary approval, but this was not thought necessary in the subsequent case of Chester.[101]

100. (1320) 14 Ed.II, Eyre of London vol. II, 86 S.S. p.180 at pp. 184-5. On the topic generally see T.H. Lloyd Alien Merchants in England in the High Middle Ages 1982. In 1344 Willoughby J agreed with Notton's argument that even if the king made livery to deliver a wardship, this would be without effect "unless he deliver it by express words" YB 18 Ed.III (R.S.) p.180.

101. Richardson and Sayles "Early Statutes" p. 552. Plucknett Edward I p.105 referred to Chester as vesting in the king's person. The incident may illustrate assumptions about the royal will expressed in statutes being exercised in the royal demesne.

Continuing this pattern, in 1341, Edward III annulled a statute. The chancellor, treasurer and some judges indicated prior to the sealing of this statute that parts of it were contrary to the usages and customs of the realm. The king later claimed that he permitted the statute to be sealed against his free will, and that it was contrary not only to the laws and customs of the realm, but the rights and prerogatives of the Crown. After consulting with the magnates,[102] the statute was declared null and void. However, two years later the commons demanded a review of this action.[103]

By 1356 all the judges and serjeants gathered together could advise that since a statute of 1340 expressly provided that the king could not seize temporalities (church property) without due process of law, he could not expropriate the Bishop of Ely's property. Judgment had not been passed against the Bishop in parliament, and the statute forbidding this action "ne peust estre defait ne chaunge sanz parlement [could not be annulled or altered without Parliament]."[104]

102. Richardson and Sayles "Early Statutes" p.551.
103. Ibid p.554.
104. The advice is reprinted in full in Sayles 58 S.S. p.cxxi, and Richardson and Sayles "Early Statutes" p.555, n.73. The statute was 14 Ed.III st. 4 c. 3 which provided that temporalities could only be seized according to the law of the land. Another statute in 1340, 14 Ed.III st. 1 c.15 reinforced the Statute of Northampton c.2 1328 (see f.n.83 supra) by providing that royal pardons for homicides or felonies made contrary to the king's coronation oath, or previous statutes restricting the pardoning power, should be "holden for none". This was the moment when the legislature first challenged the executive's capacity to trump its will. With this statute the battle lines were first seen, albeit distantly in a contest that was to last 350 years. A century would pass before parliament directly challenged the royal capacity to dispense with legislation: see chapter 2 f.n.62.

In the event the king ignored the advice and seized the property.[105] However, formalities had to be attended to when a statute was annulled. The king's seal was a necessary part of the evidence.[106] This was only reflective of the general assumption that "the same authority and the same assent are required for the reversal of legislation as are required for its promulgation."[107] Inevitably, as parliamentary activity became more important to statute making, evidenced by the distinctions in the later fourteenth century between statutes on the one hand, and ordinances and other expressions of royal will on the other[108], the royal power to supress a statute by administrative fiat was called in question.

This uncertainty would flower into one of the dominant constitutional issues of the Tudor and Stuart dynasties, the power of the Crown to suspend or dispense with statutes. While this issue is not exactly to the point of the present work, the themes are germane, the political debate that it fuelled ran parallel to the discussion of whether statutes bound the crown, and the personalities involved in these debates divided similarily on both questions. Until the suspending and dispensing power was abolished in 1689, it was the subject of frequent discussion, and the debate on the capacity to suspend and dispense is an unavoidable _doppelganger_ to the issue of whether statutes bind the Crown.

105. Richardson and Sayles "Early Statutes" p.555, n.74.
106. _Ibid_ pp.552-553.
107. _Ibid_ p.555.
108. _Ibid_ pp.556 _et seq_.

The examples above from the reign of Edward III reveal an unsubtle approach to dispensing with statutes. Churchill has found others from the same reign, described in articles in which the suspending and dispensing power is discussed in relation to certain governmental functions.[109] Growing sophistication in the definition and promulgation of statutes would be matched by refinement in the technique of dispensing, with pressure for such refinement being applied from both administrative (public) and commercial (private) quarters.

109. E.F. Churchill "Dispensations under the Tudors and Stuarts" (1919) 34 E.H.R. 409; "The Crown and the Alien" (1920) 36 L.Q.R. 402; "The Dispensing Power and the Defence of the Realm" (1921) 37 L.Q.R. 412; and "The Dispensing Power of the Crown in Ecclesiastical Affairs" (1922) 38 L.Q.R. 297. The references to Edwardian dispensing activity are to be found in "Aliens" and "Ecclesiastical Affairs."

CHAPTER TWO

FROM RICHARD II TO HENRY VII
THE LATE MEDIEVAL PERIOD TO 1500

> "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past."
>
> O.W. Holmes "The Path of the Law" (1897) 10 Harvard Law Review p.457 at p.469.

Some of the available sources for understanding the relationship of the king and Crown to statutes in the fifteenth century, principally Year Books and parliamentary rolls have been explored by Plucknett, and to a greater extent Chrimes. However, there are notable lacunae in the topography of fifteenth century public law as mapped by these two historians.

The period under review contained political upheaval aplenty, so that the relationship between the king and statute law was being fired in a kiln of particularly heated events. The problem for the twentieth century legal historian is that much of the evidence of the contents and working of this crucible is a great deal more obscure than the evidence of events only a century later. His general problem is apparent in the specifics of Year Book law French and parliamentary rolls Latin.

Perhaps motivated by the rudimentary indexes to the Year Books fleshed out in Fitzherbert's and Brooke's Abridgements in the sixteeth century, indexes sophisticated when compared with the lack of adequate sign-posts across the morass of Statutes of the Realm and Rotuli Parliamentorum, legal and constitutional historians have explored the

fifteenth century through the reports of litigation in the Year Books. This has been quite unsatisfactory for two salient reasons. Firstly, the Year Books are not law reports in the modern sense, but rather case studies of procedure, in the interstices of which legal doctrine may be found, pearls secreted by the oyster. Secondly, and more importantly, a study of legal history solely through the law reports, ancient or modern, imposes a quite undesirable ex post facto flavour on the analysis. Reported cases are only a fraction of those being litigated, so that many decisions of relevance will escape unnoticed.

Litigation in any event depends on personalities robust enough to resort to the courtroom. It does reveal the temper of counsel and judges on a topic at the time of the suit, but it misses, in the case of this study, the attitude of administrators, parliamentarians and kings who in an earlier time set in train policy, instrument or statute on the basis of certain assumptions, which later are only inferentially available. The contents of statutes reveal presumptions as to their efficacy and ambit. A failure to examine statutes for content and style, restricting observation to subject matter, will leave half the story untold, as has been the case to date in fifteenth century constitutional history.

The major political landmarks of this period are well known, beginning with Richard II's fecklessness, followed by Henry IV's uncertain title to the Crown and proceeding to Henry V's administrative and martial capacity. The problem of

Henry VI's infancy, and late life struggles with York and his son Edward IV are commonplace, as are the deaths of Edward V and Richard III and security measures of Henry VII, but two events in Henry VI's reign, while not so clearly silhouetted, attract attention in this survey.

Henry began his personal rule at about age 16 in 1437 and set about granting property and offices on a lavish scale. Recent biographies present a picture of a well meaning but headstrong young king. There is clear evidence, to be adduced in the course of the story, that Henry's royal officials, prototype career civil servants, set about trying to curb his wasteful propensities, which were dangerous to the long term interests of the Crown, and sometimes had the effect of alienating powerful subjects.

Attempt at control from within government prompted promulgation of limitations on royal behaviour in statutory form, the only precedents for which lie in the reign of Richard II, who presented similar problems (The Statute of Northampton of 1328, the time of Edward III's youth, may also be seen in this light). So it was that in the first years after throwing aside his minority in favour of personal rule, Henry VI was confronted with statutes enacting the necessary involvement of royal officials such as the Chancellor in order to validate certain royal grants. Litigation in the remainder of this century and the next would test these provisions attempting to bind the king's behaviour. This is in no way to suggest a battle of wills between king and parliament, but the evidence does indicate that parliament was being used as an

instrument to attempt a curb on the king, with the parties interested in the limitation of royal power being chiefly royal officials.

The second event to provoke constitutional activity in Henry's reign was his insanity from late 1453 to the close of 1454. The Duke of York was Protector during this period, and whether the king was subject to statutory control would be litigated afresh in the atmosphere of inter-regnum that prevailed until York's son, Edward IV, finally seized the throne in March 1461. As the greatest subject of the realm, York had already been a focus of complaint over Henry's granting techniques in the late 1430s and early 1440s. After his term as Protector, his appointees would be targets for litigation by the re-established Lancastrian machine. York attracted the following of those who saw themselves disadvantaged by a regime that did not recognise that the one law which should bind the king, irrespective of the vagaries of theory, was that property was the subjects', to be tampered with only by scrupulous deference to the process provided by custom.

HENRY VI - Part I - Predecessors and Minority

For all the latitude allowed the Edwardian kings in the late thirteenth and fourteenth centuries from adherence to the law as it applied to subjects, two decisions from the reign of

Henry IV (1399-1413) illustrate curial capacity to contain royal claims on the legal system.

In 1413 Hill JCP found in Gilbert de Clare's case[1] (a complicated trial concerning the feudal right of wardship) that the king's prerogative could not be extended to another person, so that if the king granted his lordship over property to another person, that person would "not be in the same condition as the king had been", that is to say that the prerogative relating to feudal rights in property, such as wardship, did not pass with property when alienated by the king. This was in accordance with the doctrine in Portseye v. Halstede[2] just a century earlier.

Gilbert de Clare's case[3] affirmed an existing notion, but a decision in 1409 broke new ground by limiting the king's granting power in a manner which did not favour the king. By the statute 13 Ric.II stat. 1 c.16 (1389) the king could give letters of protection to persons on royal missions, as a shield against debt recovery. It was held that the grant of such a letter by Henry IV to an individual accompanying Henry's son Prince Thomas to Ireland was ineffective as such a journey could not be classed as a royal mission.[4] The

1. YB 14 Hen.IV Mich. pl.6, f.2 at ff.8 and 9. See P. Vinogradoff "Constitutional History and the Year Books" (1913) 29 L.Q.R. 273 at p.281. There was no Hillary CJ as suggested by Vinogradoff.
2. See ch.1 f.n.68.
3. Not 1411 as both Vinogradoff Collected Papers p.204 and Chrimes Fifteenth Century p.280 asserted, and see Chrimes p.54. Vinogradoff referred to Thirning CJCP, but the only judges referred to in the 1679 edition of the Year Books are Tirwit JKB and Hankford JCP.
4. YB 11 Hen.IV. Mich.pl.17, f.7.

king could not exercise a statutory power larger than parliament had given to him.

A few statutes from the reign of Richard II reveal concepts which would become all the more common in the reign of Henry VI. The statute referred to above, 13 Ric.II stat.I c.16 (1389) gave a power to the king to stay legal proceedings against persons, which power was allowed him only in the circumstances allowed by the statute, and similarly, but relating to an existing prerogative power, the statute 13 Ric.II stat. 2 c.1 (1389) limited the royal capacity to pardon the crimes of murder, treason and rape. The pardon in future was not to be general, but had to specify the particular events to which it purported to relate. To that extent it conformed to the attempted limitation on the prerogative evidenced by the Statute of Northampton c.2 (1328)[5], but the statute of 1389 went on to provide the procedure by which a pardon had to be made out: it would require the warrant of a privy seal. It is also notable that the king was petitioned by the Commons for this act, and he granted it with the assent of the great men and nobles, having first asserted "That he will save his Liberty and Regality."[6]

There seems room for the inference that kings could assent to statutory restriction of their prerogative powers. It was noted by Gray that between 1422 and 1451 four bills

5. See ch.1 f.nn.83 et seq.
6. S.R.vol.2 p.68.

presented by the Commons were amended to reserve the royal prerogative[7], or at least a capacity to exercise a discretionary power contrary to the intention of the legislation. But this horse-trading in respect of the exercise of royal power in areas uniquely the province of government shed no light on the issue of general statutes and the Crown. Whether statutes speaking to the whole realm and its general activities bound the king in respect of his prerogative or otherwise, is not intimated by the legislation of this period.

The other factor not revealed by statutes which began to set procedures for the exercise of royal power was their capacity for enforcement. The evidence of constraint on royal granting power contained in legislation does not necessarily indicate that the king concerned, as promulgator of the legislation, intended to abide by it. He may have assented to it for political reasons, perhaps to give himself time to manoeuvre against critics or opponents. Or he may just have assumed that as the source of legislation he could undo what he had granted in the first place.

Two statutes of Richard II first appear to accept complete limitation of the king's power to grant offices, in this case the position of customs inspector. The

7. H.L. Gray The Influence of the Commons on Early Legislation 1932, p.311. The bills concerned royal rights over bullion, safe conducts, export control over English possessions in France, and horses for hostlers and brewers in royal service. See introduction to (1910) 25 S.S. Select Cases in Star Chamber vol. II pp. xxvi et seq. (ed.) I.S. Leadam.

statute 14 Ric.II c.10 (1390) provided:

> "...that no Customer, Comptroller, Searcher, Weigher or Finder, have any such Office for Term of Life, but only as long as shall please the King, notwithstanding any Patent or Grant made to any to the contrary; and if any such Patent or Grant for Term of Life be made to any of such Office in Time past, the King will that it be utterly repealed and void, and of no Force nor Value."

Three years later the statute of 17 Ric.II c.5 (1393) appeared to go a little further. None of the officials referred to above was to hold his office for life or a term of years:

> "...the said Offices shall remain in the King's Hands under the Governance of the Treasurer for the Time being, with the Assent of the Council, when Need is; and if any Charters or Letters Patents be made to the contrary, they shall be clearly adnulled, void, and of none Effect."

Whether the sovereign could over-ride this statute and its successor, 1 Hen.IV c.13 was the subject of litigation in 1571, but Dyer's report is not absolutely clear as to whether Queen Mary's grant of office for 21 years could have been made good with a non obstante clause.[8] The attempts to restrain the king's granting power would become more explicit in the reign of Henry VI with at least one express statutory prohibition of his granting non obstante (notwithstanding) the statute in question.

Two cases in Exchequer Chamber[9] from Henry VI's

8. Northcote v. Ward (1571) 3 Dyer 303A; 73 E.R. 681.
9. The Duchess of York's Case (1431) YB 9 Hen. VI Trin. pl.30, f.27, 51 S.S. p.58 ("Headnote" p.194) and R v. Prior of St Bartholomew's (1435-1436) YB 14 Hen.VI pl.43, f.11B, 51 S.S. p.66 ("Headnote" p.195).

minority illustrate the perpetuation, and perplexity of the doctrine that the king's grants were to be construed strictly and in his favour.

Though the discussion in both was indecisive, and neither dealt with the problem of statutes and the king they serve to illustrate that fifteenth century public law was not necessarily the primitive parody of private law that Plucknett[10], and to a lesser extent Chrimes[11] thought it. If legislation was no more than the expressed will of the sovereign, albeit with the assent of Lords and Commons, then it continued to resemble a royal grant, and as such it should be no surprise if statutes were construed in accordance with the developing canons of construction for written documents. Such construction is, however, not just a branch of the private law of property. In this context it is relevant to note the special position of the king:

> "Let us suppose that at the present time the King by letters patent gives land to me and my heirs etc., and that by the same patent he grants that I shall be as free in this land as he is in his crown yet... if I alien in mortmain he shall enter, for it is vested in him because of his prerogative which cannot pass away from his person by such general words [parolx generalx]." 12

HENRY VI - Part II - Personal Rule

This period witnessed the emergence of the Exchequer

10. T.F.T. Plucknett "The Lancastrition Constitution" in R.W. Seton-Watson (ed.) Tudor Studies 1924, pp.163, 168, 173-4, 177 and 180.
11. Chrimes Fifteenth Century pp. 22, 31 and 34.
12. R v. Prior of St Bartholomew's per Paston JCP at 51 S.S. p.70.

Chamber, composed of the judges and barons of the three royal courts, as the ultimate forum for the mooting of doubtful points of law. It was not, however, an ultimate appellate tribunal in the modern sense, but rather a meeting point for the senior judicial minds to grapple with contentious legal issues. If they could not produce unanimity in their ranks, then the point remained unresolved.[13] Such was the case in the first three contests concerning the king and statutes in Henry VI's reign, all three being heard in 1441 in the Exchequer Chamber.

The Rectors of the Austin Friars of the Order of Grammont at Edington in Wiltshire had, from 1359, obtained grants of immunity from successive kings precluding payment of clerical taxation to the Crown when it was voted by parliament or by convocation (which stood in the same relationship to the clergy as parliament stood to all subjects in the realm).

This exemption was granted again in Henry VI's infancy in 1423. Later, however, the government, spurred by financial exigency, decided to force the collection of a "fifteenth" voted by parliament, and in Easter term, 1441 the Rector was defending the exemption through counsel in the Exchequer Chamber against the arguments put by the King's attorney and other lawyers.

Plucknett has described R v. Rector of the Austin Friars of Grammont at Edington[14] in great detail.[15] From this

13. J.H. Baker "English Law and the Renaissance" (1985) 44 C.L.J. 46 at pp.57 and 59-60 compellingly conveys the concept of "common erudition" as an "inherited wisdom".
14. (1441) YB 19 Hen.VI Pas.pl.1, f.62.
15. Plucknett Lancastrian Constitution pp.162-168.

case he drew conclusions regarding the paucity of public law in the fifteenth century. In particular he made much of Markham sjt and Fray CB (supported in part by Hody CJKB) referring to a parliamentary vote of taxation as the king's inheritance of his court of parliament, analogous to any other royal hereditament in the king's courts.[16]

Plucknett himself conceded that the king's attorney, Vampage, (placed with other royal counsel in the position of arguing against the king's grant of exemption) and Newton CJCP specifically discounted this theory.[17] The argument was long, hard fought and inconclusive, the report ending in early 1442 with Fortescue, appointed king's serjeant at the beginning of the case, having just been commissioned chief justice of King's Bench on the death of Hody CJKB. The case is by no means a revelation of unrelenting primitivism, although some of the emphasis in argument is unusual to modern eyes.

Concern was expressed as to whether the king could make a grant in respect of property not in existence at the time of the grant (the fifteenth voted after the grant of exemption in 1423), but this developed into arguments over the general nature of grants.

A speech delivered by Hody CJKB made it clear that he thought the issue was not one of parliamentary capacity to restrain the king's acts, but rather of the king's capacity to make grants in respect of property not yet his.[18]

16. Markham sjt at YB f.62B, Plucknett p.164, Fray CB at YB f.63, Plucknett p.164 and Hody CJKB at YB f.64, Plucknett p.165.
17. Vampage AG at YB f.62B, Plucknett p.164 and Newton CJCP at YB f.64, Plucknett p.165.
18. At YB f.64.

However, Newton CJCP had a broad notion of the power of parliament which caused his brother chief justice to change tack. Newton CJCP said:

> "... the grant of the fifteenth made after [the grant of exemption] by the Parliament will bind each person generally, even if no special mention was made of binding him to whom the King had made his grant, and thus he remains bound until a proviso is provided for him by another parliament." 19

This caused Hody CJKB to retort that:

> "... the grant made by the King himself by his Letters patent restrains the Statute with respect to him whom the King had made them." 20

Markham sjt, for the rector (ie for the king's granting power and against the king's financial interest) asserted that:

> "although the grant was made in Parliament yet it shall not bind everybody ... although the Rector was party to the general grant of the fifteenth, yet the special grant made to him alone is not defeated thereby unless there are special words [to that effect] 21 put [in place by the parliament] which will stand notwithstanding any special grant granted beforehand."

Markham, arguing for the king's granting power, did not submit that it was unlimited, but conceded that "special words" in a parliamentary instrument, addressed directly to the king's grant, could circumscribe it. Markham, it must be acknowledged, was the rector's counsel, and not the king's, so that he would argue at large irrespective of his impact on the king's constitutional position, but he seems clearly to have accepted that the power of parliament, of which the king was a constituent, was greater in respect of

19. At YB f.64B.
20. Ibid. These words immediately precede those in Plucknett p.165 incorrectly ascribed to Fray CB.
21. At YB f.64B, Plucknett p.166. Plucknett's translation finishes here. A better translation ignores the words in brackets and proceeds as above (emphasis added).

the king's executive acts than the king's power alone. This stance was an advance on the bald assertion of Crown counsel 130 years earlier in Courtenay[22] that "Statute does not affect the King's prerogative." Whatever the state of the king's privileged legal position when controverted by statute, serjeant Markham accepted by 1441 that the king's executive acts could be overridden by "special words" i.e. express reference in a parliamentary instrument.

Other arguments in this indecisive case are of some relevance to this enquiry. Fortescue as king's serjeant noted that the king only had his fifteenth "by grant of his people" so that an exemption made by the king from the grant before it existed was void.[23] Ayscoghe JCP agreed with Fortescue in finding the grant bad. Both used the analogy of the king granting immunity from prosecution for future general felonies, which grant would be bad.[24]

Fortescue's example was of a grant of immunity for the future killing of a man. He put this in the context of the king not being able to disadvantage third parties by a grant to an individual. It followed, in Fortescue's argument, that if the rector were exempted from paying his share of the fifteenth, the others levied would have to pay all the more to compensate. Since a fifteenth was a levy on church property and not a fixed sum which had to be contributed, it comes as no surprise that the entire court rejected this possibility.

22. Ch.1 f.n.43.
23. YB f.62.
24. YB at ff.62B and 63 respectively.

Hody CJKB observed that a parliament could defeat an estate created in a previous parliament.[25] Fray CB, in finding for the grant, together with Hunt B and Paston JCP, indulged in a potent generalisation which a cynic of a later generation might see as an exercise in royal mysticism, but which plainly indicated the importance to Fray's mind of the legal system:

> ... the Law is the highest inheritance that the King has, for by the Law he himself and all his subjects are ruled, and if there were no Law there would be no King and no inheritance." [26]

The report concluded with remarks of Fortescue[27], now CJKB, made in early 1442 that general statutes bound all those subject to the common law, but did not defeat special privileges. Fortescue as chief justice appeared to take a line more favourable to the king's grant than he had as king's serjeant. He had implicitly treated the king's grant of exemption and the parliamentary grant of a fifteenth as on the same footing, and so open to canons of statutory construction when he said "that such a general thing did not exclude a speciality of which express mention had been made", which is directly in line with the modern maxim "Generalia specialibus non derogant".

Fortescue ended effectively agreeing with Markham sjt that a special statutory reference could work to enforce an otherwise general grant against a legal privilege. The example was of those persons not fully subject to the common law : denizens of London were not bound by all the general provisions of the Statute of Westminster. The

25. YB at f.63B.
26. YB at f.63, Plucknett p.164.
27. YB ff.64B-65.

analogy was with the king, also a special case under the common law, and to those placed in position by the king's grant: "they will not be bound without a special reference."

Later in the same year in which the Rector of Edington's case had begun, the "obiter dicta" of Markham and Fortescue regarding special statutory words limiting royal grants was tested in the Prior of Leeds' case.[28] The report of proceedings in the Exchequer Chamber noted that the prior had been granted an exemption by the king from collecting tenths (on 24 October, 1439)[29], but that the convocation of the province of Canterbury had subsequently granted the king a tenth (on 21 November,1439)[30], to be collected as directed by the Head of the See. When directed by the Archbishop to collect revenue, the prior pleaded his exemption, but as Portington, a king's serjeant pointed out, the act of convocation granting the tenth included the words "provided that no person to whom a privilege has been granted shall be excused from being collector of the same."[31]

The Prior of Leeds' case is a more clear cut instance of royal officialdom attempting to undo one of Henry VI's

28. R v. Prior of Leeds (1441) YB 20 Hen.VI Mich.pl.25, f.12B, 51 S.S. p.84 ("Headnote" p.196), Plucknett Lancastrian Constitution pp.168-172, Vinogradoff "Year Books" pp.282-283. Michaelmas of 20 Henry VI is November, 1441, while Paschae 19 Henry VI is Easter of 1441, so that Edington and Leeds both commenced in the same, not successive years, as asserted by Plucknett at p.168, and Vinogradoff at p.282.
29. 51 S.S. p.88, Translation of the Record.
30. 51 S.S. p.93 Ibid.
31. 51 S.S. p.84.

personal grants than its immediate predecessor the Rector of Edington's case. Successive rectors had been receiving grants of exemption from all kings from the reign of Edward III, the grant contested in 1441-1442 having been made in Henry VI's infancy in 1423. But the grant of exemption to the Prior of Leeds was made after Henry had begun his personal rule in 1437. While it may have reflected the sovereign's generous nature when confronted with a sick and frail old man who wished to be spared the rigours of revenue collecting, the grant of exemption took no account of the difficulty imposed on other senior clergy in the province, which difficulty was addressed in the determination of convocation that all clergy should perform their duty, irrespective of exemptions.

Portington and Fortescue, both king's serjeants, alone argued before the chancellor, the three chiefs and Ayscoghe and Paston JJCP. Portington opened the argument claiming that the grant of a tenth was a spiritual matter which could not be impinged upon by the king's temporal grant of exemption. He followed up with the submission that the prior was amongst those who made the grant, and as he made no protest at that time, he had renounced his exemption.[32]

Fortescue, concluding argument in the Year Book report, dropped the spiritual/temporal distinction after poor reception by the bench, but in the interests of the king's revenue-collecting, he went a long way to arguing limitations on the king's granting power. Fortescue asserted that the Archbishop had a right to have the clergy under him attend to

32. 51 S.S. pp.84-85.

duties required of him, such as collecting this tenth, and that such a right was an inheritance, i.e. property. Just as the king could not discharge a tenant from his obligations to a landlord, because that would interfere with the landlord's rights in property, "to deprive the [Arch]Bishop of the submission of his subjects is against the law, and this patent which the Prior has now shown, tends to this end.".[33]

Despite the fact that Leeds contained the exact fact situation averted to in Edington of a "statutory" provision expressly suppressing exemptions, only Ayscoghe JCP referred to the problem, saying in passing:

> "...if the grant in Convocation had been general, then to my mind there would have been no question but that the Prior ought now to have advantage by his patent".34

The inference was that the "special words" in the grant of the tenth did over-ride the king's previous grant of exemption.

Plucknett devoted his analysis of Leeds to the discussion of whether the prior was estopped from claiming his exemption because he had been a member of convocation granting the tenth. He made investigation of whether the same doctrines applied in convocation by this period as applied in parliament. It seems clear that by 1439 the concept of plena potestas worked in the English parliament so that the representatives of shires and boroughs in the commons were not mere delegates, but could bind their constituencies, and furthermore that all boroughs would be bound to do what was

33. 51 S.S. p.87. Plucknett, intent on establishing the lack of Lancastrian public law, completely ignored this argument.
34. 51 S.S. p.85, and see Ayscoghe also at p.86.

ordained by common counsel.[35] The position in convocation is not so clear.

Plucknett's obsession is irrelevant for the purposes of this study, his claims of non-existant public law nebulous. Ayscoghe JCP had clearly inferred the capacity of convocation to control a previous royal exemption, and Fortescue, a king's serjeant had gone to the extraordinary length of arguing that the king's exempting grant was bad at law generally, let alone in the face of convocation's subsequent grant.

For all that claim made in November, 1441 the king set about over-riding convocation's terms of grant with a subsequent writ under his privy seal of 23 February, 1442 specifically exempting the prior from having to collect revenue. The next day the Archbishop of Canterbury brought this writ into court[36] (before the barons of the Exchequer) and the prior was subsequently released from any revenue collecting obligation "without a day."[37] The king had apparently no qualms about using the dispensing power ex post facto against the express words of convocation's grant, and the barons of the Exchequer accepted this new administrative expedient.

The result cannot be explained as a simple temporal succession of grants, because firstly the convocation tried to limit counter grants with express words, and secondly it is

35. J.G. Edwards "The Plena Potestas of English Parliamentary Representatives" in E.B. Fryde and E. Miller (eds) Historical Studies of The English Parliament - vol. I Origins to 1399, 1970, p.136 at pp.143 and 146.
36. 51 S.S. pp.93-94 Translation of the Record.
37. 51 S.S. p.95 Ibid.

not clear whether the king was a part of convocation as he was of parliament. If he was not, then the grants could not even nominally be put on the same footing as royal edicts. In the end Henry VI had his way, relieving the prior of his tax gathering, and leaving the Archbishop of Canterbury to order other of his clergy to get the revenue in. Henry lost nothing superficially, but the arguments in Leeds must have revealed his government in disarray.

The third hearing in Exchequer Chamber in this one year concerning the king's relationship to statutes was reported just before the Prior of Leed's Case in November, 1441. John Pilkington had been appointed under a series of royal letters patent stemming back to Henry V as an escheator (the official getting in the land falling to the Crown of the heirless deceased, felons etc.) in Ireland. Pilkington never actually went to Ireland to perform his functions, but exercised them through deputies on the spot.[38]

This practice was challenged by an act of the Irish parliament of 16 November, 1437 which provided that persons holding office in Ireland by the king's gift should serve the office personally or it would be foreit.[39] It is apparent from the Year Book report of this matter that the king was not a constituent of the parliament making this legislation. His role was taken for the purpose of the Irish parliaments by his

38. C.P.R. (1416-1422) Hen.V p.331, (1422-1429) Hen.VI p.51, and (1429-1436) Hen.VI pp.57 (twice).
39. The act no longer survives but this is plainly its sense: see 51 S.S. p.81 and H.G. Richardson and G.O. Sayles The Irish Parliament in the Middle Ages 1964, p.256.

lieutenant in Ireland, and in the event of the lieutenancy being vacant, by a justiciar[40] elected by the Irish lords who were the king's councillors. Such was the case in this instance, so that the contest between Henry VI's grant and the restrictions in the Irish statute could not, for the first time, be dissected as an exercise in dominance by one royal grant over another.

The litigation in Pilkington v. Bathe[41] arose from Thomas Bathe, an Irish resident, importuning Henry VI for the office of escheator in Ireland, which he obtained in a grant under letters patent from the English chancery of 11 July, 1439.[42] The English patent, it is noteworthy, gave the office to Bathe to serve personally or by his deputy, apparently oblivious of the Irish statute. Pilkington had already been engaged in rear guard litigation against John Charnels' claim to the escheatorship over the previous fifteen years : he now proceeded to sue Bathe in litigation which ended in the Exchequer Chamber.[43]

The contest between Pilkington and Bathe, both armed with royal grants, would be resolved by reference to the conditions imposed in the Irish act. Henry's grant to Bathe of 1439 does not appear to be in response to the Irish legislation, but

40. Richardson and Sayles Irish Parliament p.256, not a "Justice" as set out in 51 S.S. p.81.
41. (1441) YB 20 Hen.VI Mich.pl.17, f.8 (The Maynard Year Books incorrectly head f.8 as "Anno xix H.vi"), 51 S.S. p.81 ("Headnote" p.196) and Richardson and Sayles Irish Parliament pp.255-260.
42. C.P.R. (1436-1441) Hen.VI p.302.
43. Richardson and Sayles Irish Parliament pp.255-257. The Year Book report is of Exchequer Chamber, not King's Bench as Richardson and Sayles stated.

rather to be symptomatic of the well meaning carelessness and lack of method in Henry's personal rule : the earlier grant to Pilkington was overlooked.

Plucknett has ignored this case, Chrimes has cited it as authority rather dubiously[44], and Richardson and Sayles noted that "though there is no report of the judgment, it seems evident that he [Pilkington] failed in his action, presumably on the ground that the court would not question the acts of the Irish parliament."[45] In fact the report of Pilkington v. Bathe is worthy of rather closer examination.

Yelverton sjt and Portington king's sjt argued for Pilkington. Yelverton attacked the idea of the Irish parliament being able to control the king's property in any way. That parliament, assembled under the justiciar, could not grant away royal land in Ireland held directly by the Crown. "So here when the King has given an office by patent to one man to occupy by deputy, it is to his disherison to give it to another by virtue of a prescription [a limitation as set in the Irish statute]; ... Therefore this does not lie in prescription."[46]

Portington approached the Irish parliament's limitations by instancing a hypothetical grant of land by that body to one of the king's enemies, the Irish rebel MacMurrough. Portington argued that the Irish parliament could no more make such a grant than it could limit the king's grant to

44. Chrimes Fifteenth Century p.268. He relied on the argument of Portington obiter that a tenth granted in England would bind the Irish even though they had not been represented in the English parliament.
45. Richardson and Sayles Irish Parliament p.257.
46. 51 S.S. p.82.

Pilkington. Portington also countered Fortescue's claims that England and Ireland were separate jurisdictions for the purposes of legislation. Implicit in his argument is an unspoken fear of the consequences of the king being held the sovereign of different and separate sovereign jurisdictions.[47]

Apart from his argument regarding the separateness of Ireland, Fortescue, a king's serjeant soon to be chief justice of King's Bench, opened for Bathe with an analogy that happily accepted limitation on the king's granting capacity in the form of his delegate's actions:

> " ... the Chancellor of England can present to benefices, of which the King is patron etc., which are [valued] under a certain sum, and this presentation holds good and shall be upheld by prescription; which prescription is understood [to be] in the King and yet the Chancellor only occupies his office at the King's will."[48]

This is to accept that the king could delegate some of his power. Fortescue's further example regarding the king appointing to a position which was in the gift of a justice leaves no doubt that Fortescue thought the king's acts could be controlled by law : in fact by reference to the king's instrument of "prescription" which delegated the power of appointment in a particular official. As the prescription and the position of the appointing officer were both the king's, Fortescue saw no diminution of his position.

This did rather skip over the fact that the Irish act did not in this case lie with the king himself as Fortescue claimed, nor even the king's appointee : the Irish lords had selected the justiciar themselves.

47. 51 S.S. p.83.
48. 51 S.S. p.82.

Markham sjt concluded for Bathe that there was no logical inconsistency[49] precluding the king being limited in his power by a prescription (presumably such as in the Irish act). He cited examples from local customary, and common law which allowed individuals to impinge on the king's right to escheat. This argument seems thinnest of all, and does rather support Plucknett's general complaint of easy reliance on property law notions to convey public law ideas. However, common lawyers in every generation have a tendency to cling to the shoreline of those concepts they know best - only the braver souls launch out onto uncharted seas to find new precepts. Fortescue had shown his mettle by discussing the king's capacity to delegate and the consequent limits on his action, using the analogy of the king's appointing power, where the other counsel clung to real and personal property arguments.

The case concluded with Ayscoghe JCP finding that Bathe's letter patent should stand intact, on a purely procedural basis.[50] Bathe had pleaded the Irish act (the English courts would take no notice of it without special pleading). Pilkington wished to impugn the validity of the Irish act, but as he had not pleaded the act himself, he could not rest his case on a denial of the act which he had not raised before the court. Further research by Richardson and Sayles leaves no doubt that Pilkington had lost.[51] The decision was on a technicality, and Exchequer Chamber was spared the anxiety of having to explore the capacity of Irish statutes to limit the

49. 51 S.S. p.83 "inconvenient" in the first line of Markham's argument is better translated "logically inconsistent".
50. 51 S.S. pp.83-84.
51. Richardson and Sayles Irish Parliament p.260.

king's grants : as it was, the decision inferentially, though clearly, accepted that the Irish act would operate in derogation of the royal grant to Pilkington for life made in 1423.

The grants made in 1439 to Thomas Bathe and the Prior of Leeds, both of which led to unnecessary and embarrassing litigation (the mystique of government in any generation is better preserved by keeping lawyers from arguing over it) prompt a wider search of Henry VI's approach to personal government after assuming power in 1437. Griffiths, in a recent biography, makes clear the scale of well-intentioned exercise of royal patronage by Henry, coupled with expressions of concern by the royal council.[52]

Referring to the contemporary perception of Henry's generosity, and particularly to the appointing of grantees to office for life, Griffiths wrote:

> "Yet in a king, this unstinting liberality was foolhardy and, if continued, financially disastrous and politically dangerous. The crown's material resources were being depleted in an improvident fashion. The degree of accountability to which officers, both central and provincial, were subjected was weakened in an increasing number of cases. Inefficiency, pluralism, and absenteeism were able to flourish, and even the country's security might be compromised in certain circumstances. After a year or so of personal rule, his council began to appreciate the significance of what was happening. On 3 February 1438 it expressed concern on two grounds : the threat to sound financial administration posed by appointments for life, and the implications of grants that allowed a deputy to act for a receiver [reference cited]. The cautionary advice was disregarded. More constructive criticism was formulated during 1444, when the council returned to the whole question of patronage and suggested a number of practical rules to modify its application [reference cited]."[53]

52. R.A. Griffiths The Reign of King Henry VI 1981 pp.251, 329-332 and 362-367.
53. Ibid p.332.

Legislation stemmed back to at least the first year of Henry IV attempting to improve the information available to those organising the king's grants of land or offices.[54] This act provided that if a petitioner for largesse did not provide full details of past gifts, and the value of the present gift desired, then the letters patent should be null and void. This was specifically stated to punish those who deceived the king. The interest of good government was plainly served by this measure, but it showed a statutory circumscription of the granting of power (the preamble recorded the king "saving always his Liberty.")[55]

The conciliar concern of 1438 referred to above would appear to have borne fruit in the shape of two further statutes regulating royal grants, of 1439. The first had as its target the petitioning of the king for antedated grants. The machinery adopted for blocking such grants reflected the administrative reality of the day. It did not prohibit the making of such petitions on pain of penalty: rather it ordered that the date that the warrant from the king was served on the chancellor should be entered in the chancery records. The chancellor made out the letters patent, which were not to bear date prior to that of the receipt of the king's warrant, on

54. 1 Hen.IV c.6 (1399), further expounded in 2 Hen.IV c.2 (1400).
55. S.R. vol.2, p.113.

pain of the letters patent being void.[56] It was the process of royal government that was being regulated, as was also the case with petitions for land to be granted by the chancellor or treasurer upon escheat to the king.

This second statute of 1439[57] concerning grants intended that the full process of inquisition into the king's good title had to be completed, and a further month allowed to elapse to permit objections, before land which had fallen in by escheat could be granted out once more. Again, letters patent to the contrary were to be void.

The particular references by Griffiths to the constraining efforts of the council in 1444[58] may be instanced in the legislation of that year concerning sheriffs. These officials held great sway in daily affairs, being armed with at least the appearance of royal authority in their actions. In the palatinates and farther flung shires they could be satraps indeed. It was recognised from the reign of Edward III the post of sheriff carried the capacity for overbearing behaviour and private enrichment at public expense, and that one method of controlling latent excesses was to limit tenure to no more than one year.

56. 18 Hen.VI c.1 (1439). On 11 April, 1447 Cardinal Beaufort, Bishop of Winchester died and Henry determined immediately that his successor should be William Wainfleet, although the Dean and Chapter of the Cathedral wished to hold a free election. To ensure the royal will was adhered to, letters patent were sealed by the Chancellor back dated by two or three days to 11 April, despite the clear terms of this statute then 8 years old : B. Wolffe Henry VI 1981, p.106.
57. 18 Hen.VI c.6 (1439). See ch.3 f.n.12 for a decision on this statute in the reign of Henry VIII.
58. Griffiths Henry VI pp.251 and 332.

The first statute on this topic, from 1340, set out that new sheriffs were to be appointed yearly at the beginning of Michaelmas term by the three judicial chiefs, the chancellor and the treasurer. In the preamble it was noted that some sheriffs "do so much trust to tarry in their Office by Procurement ...".[59] Statutes of similar tenor followed in 1354 and 1368.[60]

It would be no surprise that Henry VI in his fecklessness might overlook these statutes of eighty to one hundred years earlier. The response came in 1444 in the shape of a long statute, 23 Hen.VI c.7. It referred to the statutes of 1340 and 1368 and also a statute of the first year of Richard II (1377) forbidding a sheriff being reappointed for three years. Noting the large scale breaches of these statutes, and allowing an exception from its terms[61], the statute provided that persons in breach of the previously recited statutes should forfeit 200 pounds yearly for each year of breach. The modern problem of unavailability of locus standi for private individuals, leaving only the government (perhaps reluctantly) to enforce such legislation, was overcome, as was commonplace in this period by providing for an informer to sue in his own right and receive half the penalty, half to the king.

59. 14 Ed.III st.1 c.7, S.R. vol. I, p.283.
60. 28 Ed.III c.7, 42 Ed.III c.9.
61. S.R. vol. 2, p.333. "...such Counties only except, in which divers of the King's liege People be inheritable to the office of Sheriffs at this Day, and also such persons as have Estate of Freehold in the office of Sheriffs at this Day ..."

Of particular note, the act of 1444 provided:

> "... that every Pardon hereafter to be made for such Offence or Occupation, or Forfeiture of Sums before recited, shall be void, and not available, and all Patents made, or to be made, of any the said Offices for Term of Years, for Term of Life, or in Fee-Simple, or Fee-Tail, in to any of the King's liege People, (except before excepted) shall be void and of no value, by the same authority, any Clause or Word or Word of Non Obstante in any wise put or to be put in such Patents to be made notwithstanding." 62

With this reference to the actual machinery of pardon or dispensation, the phrase "Non Obstante", the line of contest was at last clearly drawn, not in the sense of King and parliament locked in struggle, but to question whether the king's legislative function in parliament, evidenced by statute, could immutably control the king's executive function in appointing and granting. It had been assumed until this time that the king could without question dispense with a statute by a writ Non Obstante, but here was a statute armed against the well intentioned depredations of an amiable and credulous king. Whether the statute worked as intended, that is to say, whether the king in parliament could control the executive acts of the king (themselves in defiance of legislation), had to wait until 1486 for judicial attention. There is no record of the council or parliament 63 employing this device again in this reign.

62. Ibid It is noteworthy that a statute of the last year of Henry V's reign, 9 Hen.V c.5 (1421) recognised the temporary need for the king to appoint sheriffs for a period longer than one year, such permission being given to the king by parliamentary imprimatur, "notwithstanding the said Statute of the said xiv year [1340:14 Ed.III st.1 c.7.]" (S.R. vol.2, p.206).
63. F.n.183 infra for the Case of Sheriffs. In 1485 Henry VII assented to legislation with a similar claim to limiting his dispensing power: see text at f.n.204 infra.

Henry VI, if not his successors, seems to have accepted that the statute had supervening authority. A pardon was provided in 1449 to persons who had remained as sheriffs over a year, but as 23 Hen.VI c.7 specifically forbade the king to pardon such offenders by executive fiat, the pardon of 1449 was provided by the act 28 Hen.VI c.3.[64] Parliament could temper a previous statute forbidding such indulgence by the king alone.

The two statutes of Richard II and one of Henry IV limiting customs officials' terms to government pleasure, disallowing grants for life or years, have been referred to above. At the inception of his personal rule Henry VI ignored the two former acts by appointing John Stoughton as the customer of the wool subsidy in Calais in December, 1437, when he had previously held office at pleasure.[65] (The act I Hen.IV c.13 referred only to customs officials within England, where the earlier statutes were general).

Griffiths noted the parliamentary anger at royal grants in defiance of these statutes, and that 31 Hen.VI c.5 was passed as a result in 1452 to reinforce the former acts. But as Griffiths further observed, this latter act was riddled with exceptions to groups and named officials.[66] The king and his favourites appeared to accept that parliament might control

64. S.R. vol. 2, p.355. The reference to 23 Hen.VI c.7 in the Statutes at Large is incorrect, referring to c.8 (Statutes at Large vol.I, p.547).
65. Griffiths Henry VI p.330.
66. Ibid p.367.

their conduct, so suitable provisos were built into the parliamentary instrument.

HENRY VI - Part III Insanity and Aftermath

The constitutional currents of Henry VI's rule, never placid, appeared to undergo a sea-change following the period of his insanity from November 1453 to December 1454 during which period the Duke of York was Protector. A burst of litigation affecting Crown rights followed this period, the match of the earlier fasciculus of cases in 1441 following Henry's assumption of personal rule.

The first case was decided in November 1456 in the Exchequer Chamber, and resoundingly returned the king's property to him. From the two versions translated in the Selden Society material and the translation of the record from the Memoranda Roll[67] it is apparent that on 20 September 1454 the then Treasurer of the Chamber and Custodian of the King's jewels, Richard Merston[68] was in possession of certain of the king's jewels. By 24 September they were out of his control and in the possession of Simon Eyre, a London alderman. It seems likely that Merston pledged them with one John [Thomas]

67. Simon Eyre's case (1456) YB 35 Hen.VI Mich.pl.33 f.25B, 51 S.S. pp.114, 118 (corresponding to the YB), 129, "Headnote" p.198, Jenk 83; 145 E.R. 59. Jenkin's seventeeth century note is of no historical value in unravelling the actual story.

68. One of the accounts refers to him as John Marston, but this arises from confusion between Richard Merston, treasurer and keeper from Easter 1453 to 30 April 1456, with his predecessor (and father?) John Merston: (1452-1461) C.P.R. Hen.VI p.293.

Shipton[69] in return for a loan, and Shipton in turn pawned them to Eyre for a sum given as 60 pounds, 135 pounds or 300 pounds[70] : in any case, considerable.

The eight serjeants created in 1453 all argued in this case which began in Michaelmas term 1456 before the barons of the Exchequer when the new treasurer and keeper of the king's jewels, William Grymmsby, sued Eyre on the king's behalf for the return of the jewels. The barons referred the case to the Exchequer Chamber.

Eyre set out as his basic defence a custom of London that if goods were pledged as security for a loan, the pledgee could retain possession of the goods, irrespective of whether the pledger had good title to the goods, until the loan was repaid. The attack on this claim was threefold : no such custom existed; if it existed as the defence claimed, by authority of king and parliament, then it should be formally proved, and the defence never showed such a statute; and finally, even if such a custom existed, it did not bind the king. It was this third point that produced the commentary of present interest.

Choke, king's serjeant, asserted the king's freedom from paying tolls and like customary fees. His second example was not of a custom at all, but of the of the king's prerogative of not having time run against him. Choke argued that the

69. The reference is probably to Thomas Shipton, who it seems was a royal official on the rise; by 1459 he was a clerk of the Chancery: (1452-1461) C.P.R. Hen.VI p.388.

70. Security over the king's jewels seems remarkably lax in this period. There is a reference in May 1455 to a silver sword being stolen from the king's chamber: (1452-1461) C.P.R. Hen.VI p.247.

king did not lose his right to assert his presentation of a cleric by a quare impedit after the six month period had elapsed.[71] This special position of the king was summed up in Choke's closing words, "although the custom may be good between commoners yet it shall not bind the King...".

Hindstone, the next king's serjeant, argued along similar lines, asserting the custom was of no avail against the king "for the King is above the law".[72] Neither Hindstone nor Littleton, the remaining king's serjeant for the king, offered further samples of law in the shape of statute not binding the king, as Choke implicitly had. Their examples were solely of customs, and frequently in the sense of local custom as aberration from the common law.

Nottingham AG offered an argument of interest as, in retrospect, it appears to boomerang on the king's position. Nottingham was arguing that the claim of a special custom for London (a prescription) was void. He referred to a recent case before Fortescue CJKB:

> "The defendant justified by a capias [writ directing arrest] directed to him from Windsor Castle and showed a prescription how by virtue of such capias it has been the custom from time beyond which etc. to arrest a man in whatever county in the realm he may be; and this was adjudged to be no prescription. So here etc." 73

A royal official armed with a royal warrant had arrested a man without conforming to the law. He argued that possession of the capias enabled him to effect the arrest

71. 51 S.S. pp.115 and 119-120. See text after ch.1 f.n.48. Choke did not actually refer to the statutory basis of quare impedit and the period of six months.
72. 51 S.S. p.120.
73. 51 S.S. p.117.

anywhere in the kingdom, and that there was a custom to that effect. The law was apparently that the wanted man had to be arrested in a county named in the capias, and Fortescue had not been prepared to alter that notion in the king's favour. Nottingham was arguing against the facile erection of special "prescriptions" as enclaves from the general law, but his example seems to the effect that the king should be bound by general law.[74]

Of the royal counsel, Hindstone sjt was alone in asserting that the king was above the law. The apparent incongruity of Hindstone's claim 150 years after such utterances had been commonplace[75] is reflected in the adoption by members of the bench of reasoning in the king's favour of a more sophisticated variety than the early Edwardian claim, "le Roy est prerogatyf."

Billing, Laken and Wangford sjts laboured on Eyre's behalf to show that such a custom of London existed, and might have parliamentary authority. The arguments looked thin, when onto the stage strode Nedeham [Needham], appearing for Eyre, despite his appointment as a King's serjeant. Confronting the arguments that status for this custom should be proved,

74. Nottingham's reference may be to (1452) YB 30 Hen.VI Hil.pl.9, f.2 which concerned a defendant who was declared an outlaw, and the object of a capias, but who was insufficiently identified in the capias to tell which of the three villages in the one parish he inhabited, so that for lack of clear identification he could defeat the capias. The act in question would appear to be the Statute of Additions, 1 Hen.V c.5 (1413), which specified clear references to occupations and dwelling places in criminal writs, with a direction to the clerks in chancery not to make omissions on pain of a fine to the king. See also the commentary by Elton referred to below at f.n.155.

75. See text at ch.1 f.nn.71 and 72.

Nedeham suggested that a king might have granted the custom to London "before time of memory", and added:

> "... then if it has such beginning before time of memory, as may well be, I say that the King shall be bound by it ...".76

This gave the opening to Boeffe sjt who followed to make the crucial assertion that not only might the custom have been granted by a king before time of memory, but that it might be granted "by authority of Parliament", and "then the King shall be as much bound by it as a stranger ...".[77]

Of the seven man bench, six found for the king. Moyle JCP, Haltoft B, Prysot [Prisot] CJCP, Arderne CB and Fortescue CJKB all found that the custom argued for Eyre did not exist, but that even if it did, it would not bind the king. Only Fortescue ventured a jurisprudential justification for this:

> "... for in such a case the King shall be in a more favourable position than any other common person." 78

Danby JCP restricted himself to finding the custom unproven, without opining on the relationship of the king to it. Danvers [Davers] JCP alone found for Eyre, declaring the custom to be good.[79] Inferentially, but without declaring this to be so, he must have believed the king to be bound by the custom.

76. 51 S.S. pp.124-125.
77. 51 S.S. p.125.
78. 51 S.S. p.128.
79. 51 S.S. p.126.

Moyle J had at least limited the king's extra-legal position to customs relating to persons or goods, saying "where the custom arises about land, the King shall be in no more favourable position than another person".[80] Prysot CJCP would appear to have denied even that concession[81], while Fortescue CJKB's concern for the royal position illustrated the limitation of theoretical tracts such as his De Laudibus Legum Angliae and Politique Laws of England.[82] In the former, Fortescue suggested that it only happened that a king was not free to rule tyranically "when the regal power is restrained by political law".[83] Fortescue urged that the English king must rule "politice et regaliter", the mark of which he saw as the English king's inability to alter the law unilaterally. He seems to have displayed little perception as a judge in Eyre's case that a necessary concomitant of this position was that the king be limited in a practical and explicable way by the law.

In June 1457, six months after Eyre's case was decided in Exchequer Chamber, the Court of Common Pleas heard the dispute between the king and Sir John Radclif over the right of presentation of the priest (the advowson) to the church of St. Mary in Diss, Norfolk. An argument in this case was whether the king was bound by the terms of the statute of

80. 51 S.S. p.125.
81. 51 S.S. p.127.
82. De Laudibus Legum Angliae (ed.) S.B. Chrimes 1942 A Learned Commendation of the Politique Laws of England first published in 1567.
83. De Laudibus p.27.

Westminster II c.5 regulating rights of presentation vesting in infants[84], and Radclif was to be the high point of pre-Tudor discussion of the relationship of king to statutes.

Many of the participants in Eyre's case appeared subsequently in R v. Radclif.[85] Since arguing in Eyre's case Nedeham [Needham] had been raised to the bench, and Radclif was the first reported case in which he appeared as judge. All six members of Common Pleas sat on the case, and it is one of the enduring ironies of Radclif and its fundamental role in this area of the common law[86] that four of the six, Nedeham, Moyle, Danby and Ashton JJ, addressed the relationship of king and statute, but only Ashton J's decision is cited in texts on the topic. Brooke began this selectivity in his Graunde Abridgement[87] just a century after Radclif, and doubtless because of the utility of using the

84. See text at ch.1, f.n.48. The obscurity of the Year Book report of Radclif (was the king claiming by prerogative or purchase?) and indeed most Year Book cases is explained in C.M.G. Ogilvie The King's Government and the Common Law 1471-1641 1958, pp.16-17: they were handbooks on pleadings and procedure. See also Baker "Renaissance" p.57, and see Baker's reference to judicial non-unanimity, relevant to Radclif, at pp.59-60.
85. (1457) YB 35 Hen.VI Trin.pl.1, f.60.
86. Eg. Willion v. Berkley (1562) 1 Plo.223; 75 E.R. 339 arguendo at 236; 360 and argument and judgments Magdalen College case (1616) 11 Co.Rep.66B; 77 E.R. 1235, 1 Rolle 151; 81 E.R. 394.
87. First published 1573. Cited in 1576 ed: "Parliament et Statutes" no.6. Brooke, Queen Mary's Chief Justice of Common Pleas , died in 1558. Brooke referred to Ashton and Prysot at 35 Hen.VI 62-63, but nothing from Prysot in the Maynard 1679 Year Book goes to the material Brooke cited. Note that Chrimes Fifteen Century wrote at p.260 n.5 "... we have to accept with caution, or reject with regret, some of the rubrics which the sixteenth-century compilers of abridgments applied to cases from the earlier Year Books".

Graunde Abridgement as a reference to the Year Books, Ashton J's pithy comment is still extracted by modern authors.[88]

The facts in Radclif are not clear from the Year Book report, and given the case's primary importance in the development of this part of the common law, a large scale effort to understand its background seems in order.[89] Sir John Radclif was heir to a line which had belatedly arrived in Norfolk in the early fifteenth century, Sir John's father and grandfather making their names fighting for Henry V in France. The father died in early 1440 leaving his heir John an infant. Something of the child's character may be seen early in his life : he had to be pardoned later in 1440 while still under age for entering on his lands without waiting to go thrcugh the complete procedure for installing a ward of the crown upon coming of age.

The young Radclif married Elizabeth Fitzwalter in 1444, giving him a further connection with property around Attleborough, the seat of the Radclifs. Elizabeth was the daughter of Walter Lord Fitzwalter and his wife Elizabeth. Walter died in 1431, leaving his property entailed to his

88. Chrimes Fifteenth Century p.35; H. Street Governmental Liability 1953, pp.143-144 part of a chapter more fully set out in "The Effect of Statutes Upon the Rights and Liabilities of the Crown" (1947-48) 7 U.Tor.L.J.357 at pp.360-361, and apparently relying on Street, Dickson J for the majority of the Canadian Supreme Court in R v. Eldorado Nuclear Ltd. (1983) 4 D.L.R. (4th) 193 at p.198.

89. The facts following have been gleaned from G.E. Cokayne (ed.) V. Gibbs The Complete Peerage vol. V, 1926, F. Blomefield An Essay Towards a Topographical History of the County of Norfolk, 1732 and L.T. Barrett Memorials of the Parochial Church of the Parish of Attleborough, 1848.

heirs male with remainders to the heirs of his body. Elizabeth, the daughter and heir was born in 1430, and her mother remarried in 1438 to Sir Thomas Cobham. The dowager Lady Fitzwalter died in 1464. In 1432 she had livery of a number of Norfolk manors numbering amongst them Diss, and a number of other manors together with advowsons, not including Diss. John Radclif, later to style himself Lord Fitzwalter on the strength of his wife's descent, moved to take seisin of the lands inherited by Elizabeth, presumably the same that her mother had taken livery of in 1432.

The following appeared in the Calendar of Close Rolls for 28 January 1445 at Westminster:

> "To the escheator in Essex. Order to take the fealty of John Radclyff, who has taken to wife Elizabeth daughter and heir of Walter Lord Fitz Waultier knight, and to give him and Elizabeth seisin of the lands of the said Walter; as he proved her age before Roger Legh late escheator.
>
> To the escheator in Norfolk and Suffolk. Like order...".90

The dispute over the right to the advowson of Diss may have arisen from uncertainty as to whether John Radclif and his wife Elizabeth had acquired seisin in 1445, or whether it remained in her mother Elizabeth as a life estate before the entail commenced. Thus on 31 July, 1464 after the death of the dowager Lady Fitzwalter, the Calendar of Fine Rolls noted an order to the escheators of Essex, Norfolk and Suffolk that the daughter Elizabeth have seisin of all the lands "which the said Elizabeth wife of Walter on her death held for life after

90. (1441-1447) C.C.R. Hen.VI p.247.

the death of the said Walter of the inheritance of Elizabeth wife of John ...".[91] The daughter Elizabeth received seisin alone, because her husband Sir John Radclif had been killed in a skirmish prior to the battle of Towton at Easter, 1461 fighting on the Yorkist side.

This legal confusion must also be seen in the light of mid-fifteenth century opportunism and faction-fighting. The king may have had a prerogative right of presentation to the advowson which vested in the infant Elizabeth Fitzwalter, and then after her marriage, in Elizabeth and John Radclif if he were an infant. But, as will be remembered from the Courtenay case[92], the Statute of Westminster II c.5 gave an infant on coming of age six months to remedy any usurpation of an advowson during his minority. It seems that the Crown had exercised its possible right over the church at Diss, or purchased a right not owned by the putative vendor, Sir Thomas Cobham in a political context which may be gleaned in two

91. (1461-1471) C.F.R. Ed.IV p.138. T.B. Pugh and C.D. Ross "The English Baronage and the Income Tax of 1436" (1953) 26 Bull.I.H.R. at p.19 noted that the keeping of daughter Elizabeth's lands had been sold to John Radclif's father in 1433 for 533 pounds, together with her marriage. But Pugh and Ross went on to note that most of the lands "were in the hands of the dowager Lady Fitz Walter ...". The Year Book report of Radclif refers to the king's title being based in purchase, Davers J referring (at f.62B) to the purchase of a grant from T.C. [Thomas Cobham]. The king's first two presentations, that of John Hamond and Edward Atherton, occurred in later 1438, the year Lady Fitzwalter married Sir Thomas Cobham. If the king did purchase the right of presentation from Sir Thomas Cobham, then the litigation takes on an interesting tripartite character, with Radclif contesting the king's capacity to take title from someone who had none. This scenario would account for Danby J's analysis, set out in the text at f.n.114, and Davers J's comments about purchase at f.n.116.

92. See text at ch.1 f.nn.43-49.

quotes from Lander:

> "The system by which the state ... diverted benefices to servants whom it could not afford to pay cash added to the mediocrity of religious life ... The deplorably weak Henry VI failed to keep these appointments, like many others, out of the political spoils system of the magnates."93

> "... rumours were spreading, encouraged if not originating with York's friends, that the king's ministers, having alienated the king's inheritance to themselves, were now turning their covetous eyes towards other men's estates and intended the utter destruction of their opponents."94

More recently Wolffe has drawn a picture of a headstrong and wilful Henry VI asserting his right to personal rule from late 1437, though only just sixteen years old. The careless and irresponsible attitude displayed by Henry VI to the dispersement of royal grants to court officials and favourites, and in the acquisition and sale of royal property[95] is relevant as background to the Radclif story.

Of particular relevance to Radclif as an example of Henry's behaviour cutting across property rights so that third parties would be affected by claims of prerogative capacity is the following story cited by Wolffe:

> "Richard Duke of York, absent as Henry's lieutenant in France and Normandy, wrote on 9 March 1445 to complain that in his absence Sir John Pauncefoot's feoffees had disinherited him of his manor and lordship of Crickhowell, by granting the king a reversion of it and that Henry had ratified and approved the arrangement. He now petitioned for leave to sue for his title in the high court of parliament, which was granted."96

93. J.R. Lander Conflict and Stability in Fifteenth Century England 1969, p.124.
94. J.R. Lander Crown and Nobility 1450-1509 1976, pp.100-101.
95. Wolffe Henry VI pp.106-117 and passim, and see Griffiths Henry VI referred to and quoted at f.nn.52 and 53 supra.
96. Wolffe Henry VI p.111.

It is worth noting that the king's involvement with the advowson of Diss dates to 1438, as he reached his apogee of personal placements to offices and positions. Edward Atherton, the second of the king's appointees in this story, was the clerk of the king's closet.

With this atmosphere in public life must be matched Sir John Radclif's less than retiring personality, illustrated by two excerpts from the Paston letters. Ralph Lord Cromwell wrote to John Paston about early 1455 regarding "a great straungenesse betwix my right trusty frend John Radcliff and you, without any matier or cause of substance as I am lerned ...".[97]

Dame Alice Ogard wrote to John Paston on 30 March, 1456 to inform him of "a contraversie mevyd be-twix my cosyn John Radeclyff of Attlyburgh and me for the advoweson of the chirch of Attylburgh, the whech is now voide, whereoff the title is myn veryly ..." The matter was going to arbitration with Fincham and Spelman of counsel acting for Dame Alice.[98]

The saga of appointments to the church in Diss forms the final necessary backdrop to the Year Book report of Sir John Radclif's legal contest with the king. The documentation on these appointments is at the least, confusing, being found in the Calendar of Patent Rolls (a royal document), the

97. N. Davies (ed.) Paston Letters and Papers of the Fifteenth Century, Part II, 1976, letter 515, p.110.
98. Ibid, letter 545, pp.138-139. On arbitration in this period see E. Powell "Settlement of Disputes by Arbitration in Fifteenth Century England" (1984) 2 Law and History Review p.21.

noticeboard of the Church of St. Mary in Diss, and Blomefield's History of Norfolk first published in 1732.

The list of rectors and patrons has obvious internal conflicts, which do however highlight what must have happened in 1457. Hubert de Thorley was appointed priest by Walter Fitzwalter in 1390[99], and was succeeded in 1424 by Richard Drurywal, also appointed by the Fitzwalter family.[100] Blomefield then claims that in 1429 the king appointed Edward Atherton. This seems very unlikely as the king could have had no interest in the advowson until the death of Lord Fitzwalter in 1431, leaving as his heir Elizabeth, a child less than two years old, possibly in wardship to the Crown, and with doubt existing as to the interest of the widow in the advowson.

The Calendar of Patent Rolls, a more reliable, primary source, gives 26 December, 1438 as the date from which Atherton's royally appointed incumbency ran.[101] The church noticeboard states that Richard Donyngton was appointed by the king in 1437 but this seems a mistake for 1457, the Patent Rolls and Blomefield both agreeing on November of that year for his installation. The Patent Rolls indicate the resignation of Drurywal [Duryvall] in 1438, and a tenure of less than four months for John Hamond, the first appointment by the king, before being replaced by Edward Atherton.[102]

Both Blomefield and the noticeboard then record that in 1452 Richard Tateshall was appointed by John Radclif. The

99. Blomefield Norfolk at p.17 (allowance is made for typographical errors in Blomefield), confirmed by (1405-1409) C.C.R. Hen.IV p.446.
100. Ibid.
101. (1436-1441) C.P.R. Hen.VI p.236.
102. Ibid p.203.

litigation early in Trinity Term, i.e. about June, 1457 would appear to have been provoked when the king countered Radclif's appointment of Tateshall with the nomination of John Kirkeby on 24 February, 1457 upon the death of the former royal incumbent, Edward Atherton.[103] What follows is a retelling of the Year Book report, in which the facts are obscure. The nomenclature of the Year Book has been retained.

Like R v. Courtenay[104] a century and a half earlier, Radclif involved a writ of Quare Impedit, in this case brought by the king against J. Radclif because of his alleged interference in a advowson claimed by the king.[105] On the basis that the advowson to the parish of Diss in Norfolk was part of the royal demesne, the king had E. [Edward Atherton?] installed as the priest, and after E. died, one J.S. [John Kirkeby]. Wangford sjt, opening counsel for Radclif, pointed out[106] that the king had no better title to appoint J.S. than his possession stemming from appointing E., and this had occurred while Radclif was under age, and that because of this the defendant, who had a title to the manor and appurtenant advowson through a fee tail, could claim the protection of the Statute of Westminster II.

103. (1452-1461) C.P.R. Hen.VI p.336.
104. Ch.1 f.n.43.
105. Royal practice appears to have been as Pollock and Maitland History vol. II p.661 described it two centuries earlier: "He[the King] had, however, an objectionable habit of using a Quo Warranto for land - objectionable, we say, because this compelled a defendant to disclose his title as against a plaintiff who had disclosed none." Plucknett Edward I p.40 citing Bracton explained why the king as plaintiff succeeded although the majority said "the plea is not good." The defendant had to make out his claim, not merely defend his title.
106. YB 35 Hen.VI 60B.

Wangford affirmed that the advowson was part of the Fitzwalter estate entailed to the heirs male and then heirs general. It seems implicit in Wangford's argument that the king did not purchase the advowson, and that Sir Thomas Cobham objected when the king appointed Edward Atherton in 1438, claiming that he, Cobham, had the right of appointment. It may be that not only did the king not purchase the property from Sir Thomas Cobham, but also that the king was exercising no right of wardship over Elizabeth, the daughter, and that her property was in the care of her mother and step-father. Plainly this litigation was the product of nearly 20 years dispute as to title to the advowson.

Littleton king's sjt, interposed[107] that because the king was now in possession, the only procedure by which a claim of disseisin could lie against the king was "by way of petition." It was plain from the outset that procedural defences were the ultimate royal bulwark.

Wangford returned to attack the royal "boot straps" argument. The king had no title to appoint J.S. save his show of possession in appointing E., and that had been no good title at all. The example was of the king granting A's land to B by letters patent on the supposition that he, the king, had title to the land. A would have an action against B. But even if the king had possession[108], Wangford pointed out[109]

107. Ibid.
108. Plucknett Concise History p.360. Seisin was established by showing one had made the last presentation.
109. YB 35 Hen.VI 61.

that this would not defeat the operation of the Statute of Westminster II c.5 against the king, because that statute "sera entend auxibien envers le Roy come ascun autre ... [will be heard against the King as well as any other ...]".

Choke king's sjt as concluding counsel for the king failed, as had Littleton, to refer to the statute, and expanded on the limited remedy available to the defendant, the petition of right.[110]

Laken [Laicon] sjt concluded for Radclif.[111] If the king had title or capacity by virtue of his "office", he could grant away A's land, and A would have no assize or entry, save only a petition of right. But in this case the king had neither title nor possession. Laken then referred to the fact of royal presentation while the defendant was under age. Not only did this offend the Statute of Westminster II, but also the common law: an infant should not be prejudiced. Unspoken were the competing claims between the infant defendant and the king confined in his constitutional nursery, protected by his prerogative against prejudicial action.

Nedeham J was the first to give judgment[112], and he alone found unequivocally for the defendant. The question was whether the statute provided a remedy against the king as it did against others. It was answered unflinchingly, "For when

110. Ibid.
111. At 61B.
112. Ibid. Nedeham J's references to the Statute of Merton (1236), 20 Hen.III c.5 were only "dicta" rather than the judicial decision to which Street refers, Government Liability p.144 and "Effect of Statutes" p.362.

a statute is made generally ... I say that the King will be said to be in the same degree with regard to that statute as another person." Nedeham J used the example of the Statute of Merton, which in part forbade the levying of penalties for unpaid rent against infant heirs to land. The statute was general, so it followed that the king might no more engage in usurious practice than another man: "... in like case here the statute is general, by which the King will be bound as well as another."

Moyle J began finding for the defendant[113] (he later changed ground) on the basis that the feoffment, i.e. presentation by the king was based in a disseisin, and the king could not be a disseisor: an interesting application of the maxim that the king could do no wrong.

Danby J found for the king[114], demolishing Moyle J's assumption on disseisin. Possession was the crucial aspect of an advowson, not seisin (though this was implicit rather than explicit in Danby J's reasoning). If a common person would be in possession by presentation, then so was the king, because "the King will not be in a worse condition than another."

Danby J devoted considerable dicta to the problem of statutes and the king. He perceived that possession was not enough, given the subsequent statutory regulation of the writ Quare Impedit. Westminster II c.5 had been specifically designed to preserve the rights of those not of full capacity

113. YB at 61B to 62.
114. At 62.

or without immediate possession against disseisors. The analysis emerged thus:

> "... the Statute is general, and when a Statute is general, the King will be bound by this as well as another person. As, if a Statute were made general, and a disseisor enfeoffed someone, the disseised could enter against the feoffee. And if someone disseised me and enfeoffed the King, I would be able to enter against the King; so it follows that the Statute is general, and so the Statute of Westminster II is general and does not make any exceptions, and through this the King will be as much bound as another person..."

However, Danby J concluded in the king's favour. The statute allowed a former infant six months after coming of age to challenge a presentation, but an adult had to challenge a usurpation within six months of the act. The statute appeared to have no application, as the king's action in appointing a priest [presumably John Kirkeby in February, 1457] did not take place while the defendant was an infant. [By inference, Radclif, whose birthdate is unknown, did not take legal action against the king's appointment of Edward Atherton in 1438 within six months of attaining his majority, although he may have challenged royal authority by appointing Richard Tateshall in 1452, the year after his wife turned 21].

Davers J also found for the king.[115] He did have possession from his presentation of E. If he had committed a wrong against Radclif, the remedy lay in a petition of right. The statute was of no assistance to Radclif because it dealt with fraudulent or negligent disposition of an infant's right in an advowson by a

115. At 62 and 62B.

guardian. That was not the case here. The king's claim to the advowson reached back to his [alleged?] purchase of the manor [of which the advowson of the church was part?] from Sir T. Cobham.[116]

Ashton J opened[117] with a claim that despite the king's inability to be a disseisor, he could enter land as a tortfeasor, because no action was maintainable against him. Only a petition of right was available. It therefore followed that:

> "I think that the remedy of the Statute of Westminster II cannot be held against the King: for I understand that if a remedy is provided by a Statute, it would not be held to have been made against the King, unless he were expressly mentioned. As if a Statute were made that if anyone did a certain thing, he would be attainted by this of felony; and then the King did that thing, he would still not be within the purview of the Statute unless he were expressly mentioned in the Statute: so it is here."

Ashton J pursued the distinction between possession and good title in relation to advowson by taking another hypothetical situation:

> "And also, if there were a new Statute that willed, that if the presentation by the King were made without title, he who had the right would have Scire facias against the incumbent of the King, and in that case the title of the King would be contested, and if it were found that the King didn't have right, his Clerk would be outsted: but it is not so here."

116. Only Davers J alluded explicitly during the course of Radclif to the possibility of purchase by the king: see f.n.91 supra. A century later, counsel for the (successful) defendants in Willion v. Berkley (1562) 1 Plo.223; 75 E.R.339 at 236; 360 were of the view that the element of purchase in Radclif meant that the king "was not so fully within the purview of the Act..." See also the hypothesis of Prysot CJCP in text after f.n.119 infra.

117. YB at 62B.

The king had not deprived anyone of possession.[118] In the final judgment, Prysot J listed[119] three heads of argument:

(1) whether the king was in possession by the original presentation;

(2) whether the king would be said to have been in possession by the presentation; and

(3) whether the remedy of the Statute of Westminster II regarding usurpations would be held against the king as it was against others.

Prysot CJ contemplated such a possibility by suggesting, without deciding, that in the third case, if the statute were so taken, the question would become whether the usurpation by the king would be within the purview of the statute in the light of his purchase [of the manor]. In deciding the first two points in the king's favour, the chief justice relied on the king's inability to be left in a worse position than a common person with respect to the benefits which flow from possession.

118. Ashton J was certainly acknowledging the theoretical power of parliament to control the king. In this he was in accord with Hankford JCP in the Prior of Montacute's case (1411) Trinity Term, printed only 51 S.S. p.7 at p.8 who said: "If the King's tenant dies, his heir being under age and the King seises, and grants the land by patent to a man to hold as long as in his hand etc. by the nonage of the infant etc. rendering a certain rent to the King annually, and then the King grants the rent to another by his patent; if afterwards the heir sues in Parliament to be restored to his land because he is of full age, if he be then restored to his land by Parliament, he can rightly enter his land without making any suit against the grantees of the King." This is not to claim a struggle for power between king and parliament, but it does seem reasonable to surmise that early in the Lancastrian period acceptance prevailed of the king's greater power in parliament then when he acted on his own.

119. Ibid.

The king had succeeded in four judgments, but Nedeham J had been bolstered by the dicta of Danby J as regards general statutes binding the king. Only Ashton J had made the reverse finding the basis of his judgment against the defendant. However, Moyle J then rendered a lengthy addendum.[120] In the first of three points, he thought Westminster II c.5 a novel statute if it required that the king's title be well examined before he relied on it to make a presentation of a parson. Moyle J warmed to the royal theme with his second point:

> "The king is not within the purview of the statute notwithstanding that the Statute is general, because the King is not the same as a common person."

Because of the perogative quæ nullum tempus occurrit Regi, Moyle J asserted that the provisions of the statute allowing an extension of time in which a dispossessed infant coming of age might bring a Quare Impedit did not operate in a suit against the king. This was plainly making a sword of a prerogative shield. Nullum tempus was intended as a procedural safeguard to the king, and not as a weapon of substantive law. Its place would have been, for example, in a suit where the king as plaintiff had only a specified period of time in which to bring action, and

120. At 62B to 63.

had fallen outside that time span.[121] However, for all the straining of this prerogative, it is possible to infer from Moyle J's use of it that the reason this general statute did not affect the king was because a prerogative stood in its path.

Viewed in context, Moyle J's analysis is more sophisticated than Ashton J's blanket denial of the operation of a general statute against the king. Moyle J concluded by noting that the only remedy against the king was by petition (see Davers and Ashton JJ supra).

The case finished with discussion by Danby and Moyle JJ, and Prysot CJ on the legal competence of dispossessed infants. The king had five of six judges decide in his favour, but on disparate grounds. These might be summed up as :

(1) the king is only amenable to suit by petition of right;

(2) an ordinary person in possession in these circumstances could claim the advowson - the king should not be in a position inferior to his subjects so he can claim the property; and

(3) the statute in question was irrelevant in the factual circumstances - with two judges concluding that in the event

121. See Thomas Brugge's lecture in Gray's Inn, Reading 1469 p.109, "If the king suffers a usurpation, he shall have quare impedit when he pleases for time does not run against the king ..." See also R v. Bishop of Hereford, Benson and Cornwall (1527) Spelman's Reports vol. I; 93 S.S. p.195. Radclif marks an advance in the definition and restriction of the prerogative. The king partly founded his claim in purchase, and in addition received the benefit of a well known procedural immunity, nullum tempus, rather than relying on the previous assertions of the thirteenth and fourteenth centuries to a vague "prerogative" right once the king had possession of the property.

of facts which attracted the statute, it would still not apply to the king.

As to the relationship of the king to statutes, only Ashton J insisted that the king had to be named to be affected. Moyle J elliptically referred to the inability of a general statute to detract from the prerogative. Neither of the serjeants appearing for the king dealt with the issue. On the other hand Wangford sjt insisted on the statute's application against the king and Laken sjt assumed that the royal presentation had offended the statute. Both Nedeham and Danby JJ insisted on the application of a general statute to the king, and given the nature of Westminster II c.5 and their examples arising from real property litigation, their general statements would have to be taken to apply at least to statutes affecting property rights. To that extent their thinking is not irreconcilable with Moyle J's.

Radclif's case appears to be rather slender authority on the subject of statutes and the Crown, although the reasoning on that subject deserves considerable attention. The case is of more general interest in revealing the best efforts of the curial system at a time when the first skirmishes of the Wars of the Roses had already been fought. The attitude of both the Crown and Radclif towards the advowson of Diss since 1438 would appear to be symptomatic of the disorder throughout the country. As the result in Radclif reveals, the available legal remedies were not capable of dealing with the strains engendered by such antipathies.

The competing factions in the Wars of the Roses were not motivated by any philosophical distinction. Lander has suggested (with a specific example) that peers began to side with the House of York for fear of losing property to Henry VI and his government.[122] Radclif's grievance with the Crown appears to have gone back to 1452 and possibly as far back as 1438. It is not improbable that his frustration over the advowson of Diss brought him into the tiny handful of nobles that threw in their lot with the Earl of March, in what proved to be the successful elevation of the Earl to become Edward IV.[123]

Henry VI's government may have attempted to mend fences late in the day. The following appears in the Patent Rolls under the privy seal, dated 12 November, 1460 :

> "Pardon to John Radcliff, son and heir of John Radclyff, knight, deceased, and to Elizabeth his wife, daughter and heir of Robert, late Lord Fitz Waultier, knight, of all intrusions into the advowson of the church of St. Mary, Dysse, co. Norfolk, parcel of the inheritance of Elizabeth, without due suit, livery or restitution thereof, and of all consequent actions, suits and demands, and of all trespasses, intrusions, impediments and offences."[124]

It was too late. Edward IV became king on 6 March, 1461 and Radclif died just a month later from wounds sustained in the Yorkist cause.

"To Kings belongs authority over all men, to subjects ownership"[125] . The prerogative embodied the legal recognition of that authority. Radclif illustrated that

122. Lander Crown and Nobility p.100 n.42.
123. Griffiths Henry VI p.354 refers to Henry's failure to formally raise Radclif to the nobility, consequent on his father's insistence that the government pay a large debt owing to him.
124. (1452-1461) C.P.R. Hen.VI p.634.
125. McIlwain Political Thought cited at ch.1., f.n.29.

while personal property rights were meant to be secure against royal usurpation, this theory could be dramatically upset by prerogative procedural advantage.

Three further reports of relevant litigation exist from the remaining years of Henry VI's reign, until Edward IV's accession in March, 1461. The first concerned the king's capacity to pardon a breach of statute after the event, the second concerned the extent of general words in the king's pardon, and the third related to the king's capacity to dispense with the application of a statute to an individual.

The statute 8 Hen.VI c.17 (1429) forbade wool to be shipped out of England to any continental port other than Calais, thus concentrating the king's customs collecting. The penalty for breach was double the value of the wool, and a third of this was to go to an informer upon conviction. In November, 1458 an informer, known only as J, came to Exchequer Chamber contesting the effect of the king's pardon to one H.[126] J sought the informer's bounty, but the assembled judges were unable to decide whether the king's pardon effectively over-rode J's "property right" in a fine never collected. However, both Prysot CJCP and Fortescue CJKB[127] were at pains to note the limits of the king's capacity to remit public obligations where third parties would be adversely affected.

Richard Quartermaynes had been appointed sheriff of

126. (1458) YB 37 Hen.VI Mich. pl.6, f.4; 51 S.S. p.144 ("Headnote" p.198).
127. 51 S.S. pp.146-147.

Oxfordshire and Berkshire by the Protector, Richard Duke of York, in November, 1454 during Henry VI's insanity. In 1455 he made a false return on a writ of exigent, so that two defendants escaped having to stand trial. On 26 January, 1458 Quartermaynes was amerced (summarily fined) fifty marks in penalty for this dereliction, but on 12 January, only a fortnight before, the king had pardoned Quartermaynes in general terms for "all manner of misprisions, contempts, offences and deceits".[128] Consequent on the amercement, Quartermaynes was imprisoned in the Fleet for non-payment, and sued out of a writ of habeas corpus pleading the king's pardon.

The muddle of Henry's administration was now no better nearly twenty years after the cases concerning exemptions granted to religious dignitaries. Both Choke king's serjeant and Nottingham AG are recorded in the two reports of seven proceedings concerning Quartermaynes in the Exchequer Chamber during 1458-1459 as impugning the king's general pardon. Their submission was that it was insufficiently specific to effect a pardon for a false return : in Nottingham's words, "for nothing can pass from the person of the King except by express words ...".[129] The judges assembled in the Chamber rejected this argument and upheld the general ambit of the pardon.

The royal capacity to dispense with a statute, ultimately

128. Quartermaynes' case (1458-1459) YB 36 Hen.VI pl.21, f.24B, YB 37 Hen.VI Pas.pl.9, f.21; 51 S.S. p.162 ("Headnote" at p.199) (translating 2nd YB report) and 51 S.S. p.167 Translation of the Record.
129. 51 S.S. p.164.

an evolutionary dead end, has already been referred to.[130] The last report in this study from the reign of Henry VI, only weeks before his fall, illustrates the issue with respect to the royal prerogative of issuing letters of protection from litigation. Letters of protection were held by all the judges in Common Pleas to infringe the bounds established by statutes of Richard II and Henry V.[131] Prysot CJCP would not allow "the statute to be made in vain"[132], and further stated that although the protection contained the phrase "notwithstanding any statute", it was of no effect, because "the King cannot take any one into protection against the law."

Laken sjt attempted to make the protection good by balancing the prerogative against private property rights: "the King can take a man into his protection by his prerogative, providing no one else is disinherited by this".[133] Choke king's sjt, whose presence and argument indicated yet another volte-face on the part of Henry's government, rebutted[134] Laken's claim by reference to the mischief reformed by the acts. Protections could be extended for a year under the prerogative as regulated by law (the statutes 13 Ric.II c.16 (1389) and 9 Hen.V st.1 c.3 (1421), but if they were allowed any longer it would lead to "mischief and inconvenience" which the statutes were designed to prevent as well as persons who would benefit by the sequestration of a convicted criminal's property being

130. See text at ch.1., f.n.109.
131. (1461) YB 39 Hen.VI Hil.pl.2, f.38B. see Chrimes Fifteenth Century pp.280-282.
132. YB 39 Hen.VI f.39B.
133. At f.40.
134. Ibid.

effectively disinherited.

The statutes regulated the royal prerogative of granting protections, so there was no issue over directly naming the king. Here were remedial statutes which counsel approached in a utilitarian fashion. By 1461 private property rights were no longer the sole boundary to royal activity: the regulation of other "mischiefs" by statute could bind the king, or at least limit his dispensing power.

It is possible to say, on the basis of these decisions in the last half decade of Henry VI's reign, that royal prerogatives in the form of procedural immunities held their ground against general statutes, but such statutes which dealt with general property rights would, in the absence of prerogative, bind the king. The unresolved problem, in the light of legal evolution, lay in Ashton J's reference in Radclif[135] to statutory "remedy", and Choke king sjt's citing of the "mischief" to be reformed by statute.[136] As the scope of legislation broadened from the twelfth century Henrician preoccupation with problems of real property possession and the thirteenth century Edwardian development of that theme to "title", courts would have to determine whether the king was bound by statutory "remedies" which related to social issues other than bare claims to property. Nedeham J's example of the Statute of Merton, remedying the common law's acceptance of inequity against infant heirs, pointed the way.

135. See text at f.n.117.
136. See text at f.n.134.

These late Henrician cases must also be seen in the context of two other issues:

(1) Specifically, the ambit of statutes: who was bound by them?

(2) Generally, what was the purpose of enactment; was it for the kingdom as a whole or for special interest groups?

As to the first question, Chrimes has listed a range of answers from Edward IV's reign.[137] In 1463, Laken sjt's argument was approved that an act of parliament bound every man, because every man was party to it.[138] Ten years later it was accepted that a general statute extended to every man[139], and later again, that every man to whom a statute was intended to extend, that is, whether the statute was general or not, was bound by it, because every man was a party to the passing of the statute.[140] It is worth remembering that in 1457 only Moyle J had said that the king was not bound by general statutes because he was not like common persons.[141] Nedeham and Danby JJ had both said that the king was bound by general statutes as much as "another person."[142] This reasoning is all the more remarkable given the personal political potency of royal office, even allowing for Henry VI's inadequacy. Only three years after Radclif the king's justices were summoned to the Council to give their opinion on the competing claims of Henry VI and Richard, Duke of York to the Crown. The justices (and

137. Chrimes Fifteenth Century p.269.
138. YB 3 Ed.IV Trin.pl.1, f.1.
139. YB 13 Ed.IV Pas.pl.4, f.8B.
140. YB 21 Ed.IV Mich.pl.6, f.44B. See infra f.n.163.
141. See text at f.n.120.
142. See text at f.nn.112 and 114.

subsequently the king's serjeants and Attorney) declined to offer advice because the matter "touched the Kyngs high estate and regalie, which is above the law and passed ther lernyng ...".[143]

This judicial uncertainty should be seen in the context of the "communalizing" of both the common law and statutes. The extension of the royal writ to the whole kingdom in the medieval period is a commonplace of English legal history, and the dwindling of pockets of immunity from the operation of general law in the fifteenth century is symptomatic of the process. The Rector of the Austin Friars and Eyre's cases had contained fading references to the exceptions preserved by the customs of London[144], but in 1473 the Chancellor told the king's council in Star Chamber that an alien would be bound by a statute if it were declaratory of old law e.g. the common law or the law of nature, but he would not be bound if the statute were introductory of new law.[145] It is possible to surmise that the operation of law is still at this time to some extent based on personal bonds rather than modern notions of territorial legislative competence : the alien was not bound by the king's new law because he was not the king's man. Another way of looking at the matter would be to see both aliens and the king as outside the ambit of statutes at least

143. (1460) R.P. vol. V, p.376.
144. See text at f.n.27 and after f.n.70 supra. See Plucknett Concise History p.318 on the fourteenth century acceptance of the status of London's customs.
145. YB 13 Ed.IV Pas.pl.5, f.9. See f.n. 157 infra for a contemporaneous reference to statutes introducing new law and how that might affect the king.

to a limited extent, because neither was subject to common law jurisdiction. That concept of jurisdiction was of course to change with the ensuing years.

With regard to the second question on the purpose of legislation, Chrimes noted the reference in fourteenth century enactments on occasion to the "estate of the realm and of the people", while on the other hand "all legislation did not necessarily affect the state or condition of the realm and of the people as a whole".[146] By the reign of Henry VIII (1509-1547) the proposals of Thomas Starkey in drafting legislation for Cromwell, Henry's minister, can be seen as reform legislation "inspired by 'commonwealth' ideas".[147] Though perhaps not explicit during the fifteenth century, the path was being traversed from the earlier medieval notion of legislation and customary law applicable to castes and identifiable groups, to the flowering in the Elizabethan period of the concept of the commonwealth. In the Elizabethan state, legislation would at least purport to regulate the ordering of society for the welfare of all, and be matched by a common law applicable to all: but whether that meant all subjects, or the whole kingdom (including aliens and the king) remained to be seen.

That the legal system, at least in the shape of reports of litigation at Westminster Hall, continued through the

146. Chrimes Fifteenth Century p.92.
147. G.R. Elton "Reform by Statute : Thomas Starkey's Dialogue and Thomas Cromwell's Policy" (1968) 54 Proceedings of the British Academy p.187.

abuses of the mid-fifteenth century is worthy of remark, and relevant as background to the decision in Radclif. In 1451 one of the Duke of Norfolk's retainers, Debenham, with two others wrote to John Paston that "the shereffe enformed us that he hath writyng from the Kyng that he shall make such a [jury] panell to acquyte the Lord Moleynes".[148] Hastings has found other examples of royal "labouring of juries", but noted that the kings concerned (Henry VI and Edward IV) were "stooping to employ a method used by [their] subjects rather than depending upon special royal prerogative."[149] Amongst the popular denunciations of the law in this period appeared this poem:

"Many lawys, and lytylle right;
Many actes of parlament,
And few kept wyth tru entent."[150]

Lander provides an excellent precis of the period, with its litigiousness, crude thuggery, and just as importantly, its conservative and procedurally obsessed legal system lurching in moribund manner to irrelevance.[151] Radclif is an encapsulation of the problems of the period. The inadequate reasoning of most of the bench together with the poor quality of the law report call for comparison with the jurisprudence in and reporting of Willion v. Berkley just over a century later.

The Yorkists and the first Tudor

Reference has already been made to the recognition of

148. Paston Letters, Letter 477,p.71.
149. M. Hastings The Court of Common Pleas 1947, p.95.
150. V.J. Scattergood Politics and Poetry in the Fifteenth Century 1971, p.322.
151. Lander Conflict and Stability pp.165-167.

statutes as both declaratory of existing law and introducing "novel ley."[152] This distinction and "common property" rights were both investigated for relevance to the royal relationship with statutes in an Exchequer Chamber decision, the Case of Additions[153] in 1465.[154] Choke JCP compared the statute under review, the Statute of Additions, providing procedural requirements[155], with the Statute of Safe-conducts.[156] Using cautious language Choke J suggested that some people thought the latter statute did not bind the king because it was in the affirmative. Though not expressed here as a definite rule, the point of the allusion became evident five years later when Choke J indicated[157] that .

152. See ch.1 f.n. 33, f.n.76 et seq., and ch.2 f.n.145.
153. YB (Long Quinto) 5 Ed.IV f.32B. Discussed by Chrimes Fifteenth Century pp.47-49 and 261.
154. YB (Long Quinto) 5 Ed.IV ff.33B to 34.
155. 1 Hen.V c.5 (1413). The statute provided that all writs should refer to the defendant by his name and in addition his estate or degree and his place of abode. In argument in Willion v. Berkley (1562) 1 Plo.223; 75 E.R. 339 at 236; 360 it is explained that the defendant had been indicted for trespass at the king's suit, but the indictment had failed to bear the addition of his estate and whereabouts. The defendant pleaded not guilty, was convicted, and was then successful on appeal by having the king found bound by the statute : the indictment was bad for lack of the addition. This decision was not as monomanically technical as may at first seem to the modern eye. Elton has explained (G.R. Elton "Henry VII : a restatement" in Studies in Tudor and Stuart Politics and Government 1974, vol. I p.78) that a serious problem existed in the fifteenth century of men being proclaimed outlaws outside their shires, so that they had no notice of the need to purge the offences which had led to outlawry. The Statute of Additions would appear to improve the lot of defendants for purposes of notice of charges and the possible change of status that would follow conviction.
156. 15 Hen.VI c.3 (1436).
157. (1470) YB 10 Ed.IV Pas.pl.18, f.7, Chrimes Fifteenth Century pp.261-2.

statutes in the affirmative were declaratory of existing law, while negative statutes were taken to introduce new law. Further in the 1465 case, Choke J thought the Statute of Additions could be treated as being on the same footing as the Statute of Safe-conducts, and therefore the king could ignore its provisions at his option.[158]

Illingworth CB disagreed, denying the analogy between the two statutes. The Statute of Safe-conducts was directed to the royal function of granting safe conducts, while the other statute was a general remedy. With regard to the Statute of Safe-conducts, he said "it is in his [the king's] election to use the law of his prerogative, or use the special law of the statute, because no man is prejudiced by this, for this law appertains to the King alone." But if a law, common law or statute law, affects a subject, the king must enforce it, for such a law is to the advantage of all, and the king cannot defeat a common right.[159]

Danby CJCP pursued this argument by stating that this "common law" of "addition" was as much every man's inheritance as the common law, "which the King cannot defeat of right without Parliament."[160] The entire Chamber then agreed that the king was bound by the provisions of the Statute of Additions. However, Markham CJKB had them all agree to make further enquiry of the king, "to be certain."

158. YB (Long Quinto) 5 Ed.IV f.34.
159. Ibid.
160. Illingworth CB, Markham CJKB, Danby CJCP, Choke JCP, Yelverton JKB and Sothill AG. This conclusion is in conformity with the result of the case in 1452: f.n.74 supra.

Here was a signpost to the resolution of the conflict between serjeants Laken and Choke four years earlier.[161] When could the king exercise his prerogative in defiance of a statute without "disinheriting" someone? Choke had answered that question in terms of "inconvenience" (a word which in law French meant "illogical" or "undesirable") but Illingworth CB and Danby CJCP now advanced on that generalisation. The "disinheritance" was not to be restricted to property rights or affirmed by "inconvenience". Statutory remedies, in this case procedural requirements to improve notice to defendants of the operation of the criminal law, were to be seen as a right vesting in all men, and with startling clarity, such rights might not be defeated "without Parliament".

In the Lent vacation of 1469 Thomas Brugge delivered a series of readings in Gray's Inn on the Statute of Westminster II (1285). One of these lectures concerned Chapter 5, dealing with remedies for improper dealings with advowsons. Brugge did not refer directly to Radclif, but on four separate occasions he cited the king's privileged position in respect of the statute, "for time does not run against the king."[162] The first of these citations is of interest as noting the prerogative of nullum tempus residing in the king personally, but not in "the committee of the king." The distinction appears to be being drawn between the individual who is the king, and the officials who worked the

161. Supra f.nn.133 and 134.
162. Brugge Reading 1469 pp.109, 112, 115 and 127.

machinery of royal government, the Crown. Apparently Brugge thought the prerogative personal rather than governmental.

Plucknett has idiosyncratically detailed two interesting but inconclusive cases from the late Yorkist period, the Abbot of Waltham's case[163] and the Abbot of Shrewsbury's case.[164] Both were heard in Exchequer Chamber arising from resolutions of convocation granting the king taxes to be gathered (in express words in Waltham) even if the king had granted a prior dispensation from such duties. Arguments ensued with that unusual quality seen in the Rector of Edington and Prior of Leeds cases[165] that the king, wanting to avoid his earlier grant of exemption and have his tax collected, asserted the primacy of convocation's words (in Leeds, express words) over the royal grant. Drawing the analogy from convocation to parliament in the Waltham case Catesby king's serjeant asserted "every Act of Parliament binds everyone to whom it extends, forasmuch as every man is party and privy to the Parliament, for the Commons have one or two from every county to bind or unbind the whole county."[166]

Catesby, and Pygot, also a king's sergeant, argued that the Abbot was estopped from claiming his grant of exemption,

163. (1481) YB 21 Ed.IV Mich. pl.6, f.44B, Plucknett Lancastrian Constitution pp.172 et seq.
164. (1484) YB 2 Ric.III Mich. pl.9, f.4; 64 S.S. Select Cases in the Exchequer Chamber, vol.II, p.102, "Headnote" p.200, Translation of the Record, p.104, Plucknett pp.177 et seq.
165. Supra f.nn.14 and 28.
166. YB 21 Ed.IV f.45.

because he had been a member of convocation. Pygot argued that the issue was not whether the king's grant of exemption was bound, but whether the Abbot was bound to pay. Nottingham, formerly king's attorney and now chief baron argued in very primitive fashion inter alia that the subsidy to the king was his inheritance which he could not lose by a grant of exemption.[167] This notion had been hit on the head forty years earlier by Newton CJCP.[168]

Catesby argued from prior instance that the king ought to accept a grant of taxation in the form in which it was granted. He took this sense of obligation, twice expressed, to its logical conclusion when he said:

> "... here the King will be bound by their action ..."[169] [icy le Roy serra lie per lour act]

but it is not clear whether "their" refers to the auditors in the example, or the legislators in convocation. The sense of obligation is the same in either case. Catesby's argument is in accord with many of the efforts by royal counsel over the preceding forty years to evade royal grants of exemption. His concept of royal acceptance and obligation is of sufficient interest to water down the extravagant claims made by Plucknett for Starkey sjt's argument on behalf of the Abbot, although Catesby was, admittedly, not as direct in dealing with the prerogative.

Plucknett applauded Starkey's argument because it appeared dressed in "public law" terms of the relative strengths of the prerogative and the resolution of

167. F.45B.
168. Supra text at f.nn. 17 and 19.
169. YB 21 Ed.IV f.46.

convocation.[170] Addressing the bench Starkey said:

> "... you ... are not here to argue for the King's lucre, but to administer justice between the party and the King ... and in this case the charter [ordering the exemption] should be allowed: otherwise you will have to affirm that the authority and jurisdiction of Convocation is higher and greater than the authority of the King in his prerogative, of which the contrary is true."

As his final example of the underdevelopment of public law in the fifteenth century, Plucknett cited the note form report of the Abbot of Shrewsbury's case[171] yet another attempt by the king to have a church levy collected by an official who had received a royal grant of exemption. It is not even apparent from this report that the convocation's levy attempted to over-ride royal grants of exemption specifically, as had been the case with Leeds and Waltham.[172]

Regarding the competing claims of convocation and the grant of exemption the report says only:

> "... concerning the special clause in the deed of grant that, as soon as the Bishop had nominated the collector and certified his name, although he, the collector, had been excused by the King, the Bishop is not bound to nominate another etc.; but this does not bind the King."[173]

This can only be regarded as, at best, delphic advice, but Plucknett was anxious to observe that this report, compared with those preceding, had none of the usual references to private law analogies. Here he saw modern public law in the making. But Plucknett was selective both

170. F.45B, Plucknett pp.173-174. Plucknett suggested that Starkey did not attain more than ordinary success at the Bar, but he was appointed Chief Baron in 1483.
171. Supra f.n.164.
172. Supra f.nn.28 and 163.
173. 64 S.S. p.104.

in his use of cases and his citation within cases as the foregoing analysis has shown. Some fifteenth century lawyers, but by no means all, were incapable of wrestling with problems of government without falling back on private law, but others only argued from the private law when it suited their client's cause. That some judges were incapable of expanding their horizons does not prove that the courts were entirely barren as regards public law prior to 1481.[174]

The very nub of this public law issue, "whether the King could give licences counter to a statute" was the subject of lengthy discussion in Exchequer Chamber in the year spanning Richard III's demise and Henry VII's ascent to the throne. A statute of 1431, 10 Hen.VI c.7 had buttressed the prohibition on shipping to the continent other than to Calais, set out in 8 Hen.VI c.17.[175] Irish merchants despatched freight to Sluys in Holland, but the ship called at Calais, where the treasurer, Sir Thomas Thwaites seized the cargo, claiming half for the king and half for himself as informer. The discussion in Exchequer Chamber was twice

175. See text at f.n.126.

174. As recently as 1977 a Justice of the High Court of Australia, when confronted with a ministerial offer to illegal immigrants to come forward to receive an amnesty, could say: "That however was a political and not a legal promise, not an offer capable of acceptance so as to produce some legal result." Salemi v. Mackellar (No.2) (1977) 137 C.L.R. 396 at p.459 per Aickin J. Black-letter "private" contract law was implicit in the remark, avoiding the "public law" concept of "legitimate expectation" which had existed for nearly a decade in Anglo-Australian administrative law: See generally Churches "Natural Justice".

reported [176], and made clear some law left very vague in the 1458 case concerning 8 Hen.VI c.17.[177] That discussion had turned on a pardon granted after the seizure of illegally shipped property by an informer. In the case of the merchants of Waterford, they were able to cite grants from Edward III, Edward IV and Richard III that they could ship Irish merchandise wherever they wished. The case thus rested on a prior grant of exemption, not an ex post facto pardon.

The assembled justices accepted that the Irish were bound by the statute made at Westminster, and they moved to the next issue:

> "... whether the King could give licences counter to a statute etc. especially where, as now, it is ordained by statute that the finder shall have a half and the King the other half."

This was answered:

> "... the King can quite well give a licence with the clause non obstante as may be seen by the statute of Henry IV [178] where it is ordained that there shall not be any letters patent made to anyone touching anything unless he makes special mention of the lands etc. and the values thereof are likewise recited in his letters; and yet with the clause non obstante it is good enough."179

The Chamber noted that the informer had an interest in cases such as this:

> "... the King ... cannot grant a pardon without [the consent of] the other party. But when the King has granted a pardon before any action or arrest has taken place, then it is otherwise ..."180

176. The Merchants of Waterford's case (1484) YB 2 Ric.III Mich.pl.26, f.11B; 64 S.S. p.94, "Headnote" p.199, (1485) YB 1 Hen.VII Mich.pl.2, f.2B. See Vinogradoff "Year Books" p.275.
177. Supra f.n.126.
178. 2 Hen.IV c.2, a further exposition of 1 Hen.IV c.6 referred to at f.n.54 supra.
179. 64 S.S. p.95.
180. 64 S.S. p.96.

It seemed that by late 1484 the justices would allow, in "dicta", a limitation on the royal power over statutes. That the curbing of pardons was expressed in relation to the property invested in an informer by his seizure of illicit goods is hardly surprising : the whole administration of such regulatory statutes revolved around informers, not high minded citizens moved by an altruistic sense of public duty.

This was recognised by the Exchequer Chamber the next year in the continued discussion of the Merchant's case when reference was made to the interest of informers in statutes dealing with the appointments of sheriffs, escheators and customs officials.[181] Starkey CB and other justices are of interest in perceiving 10 Hen.VI c.7 as being regulatory : the offence it created was not formerly a felony nor a trespass at common law. The king could grant an exemption prior to breach so that there was no offence. Starkey and the others were explicit in agreeing with the Chamber's position the previous year. The king could exempt prior to action being commenced by an informer, because then the informer had no interest as no offence existed. It was otherwise if the informer had commenced his suit. Then neither the king nor anyone else could interfere with the action.[182]

The process of royal dispensing with statutes non obstante was raised as a straight constitutional issue without reference to the rights of third parties in a particularly vivid fact situation in the Exchequer Chamber

181. YB 1 Hen.VII f.3.
182. Ibid.

in 1486 in the Case of Sheriffs[183], sometimes referred to as the Sheriff of Northumberland's case. Birdsall has written on this case at some length[184], and most recently Edie has commented on it[185], but neither writer dealt with the historical circumstances in which the case arose for discussion, although both referred to its subsequent impact.

It is apparent from the rather sparse Year Book reports of Sheriffs that either the reports are defective, or the quality of legal reasoning was inadequate. Certainly the "agreement" of the entire Chamber seems not to rest on the solid footing claimed by later observers. For all these criticisms, the case was of enormous significance over the following 200 years, becoming the fons if not the origo of the law on the dispensing power. Tudor and Stuart lawyers used it as the touchstone in all the major cases dealing with dispensations, and in some cases merely dealing with whether the Crown was bound by legislation, but its utility ended when the Bill of Rights in 1689 terminated the prerogative power of suspending and dispensing with statutes.

The statutory background to the regulation of sheriffs' appointments, culminating in the act 23 Hen.VI c.7 (1444) has been dealt with.[186] The exceptions to the statute[187],

183. (1486) YB 2 Hen.VII Mich.pl.20, f.6B; (64 S.S. p.126 on a separate issue).
184. P. Birdsall "Non Obstante" in Essays in Honour of C.H. McIlwain 1936, pp.42-49.
185. C.A. Edie "Tactics and Strategies: Parliament's Attack upon the Royal Dispensing Power 1597-1689" (1985) 29 Am.J. L.H. p.197 at p.201.
186. See text at f.nn.58 et seq. supra.
187. Set out in f.n. 61 supra.

compliance with which would have allowed appointment of a sheriff for more than one year, do not appear to have been complied with in the case of the shrievalty of Northumberland. For an appointment to the shrievalty for more than one year to be within the statute, a sheriff would have had to have been in office in Northumberland in 1444 by inheritance or freehold. This seems extremely unlikely, as John Heron of Chipchase, Robert Claxton and William Harding were sheriffs of Northumberland in 1443, 1444 and 1445 respectively.[188]

On 14 August, 1474 Edward IV appointed Henry Percy, 4th Earl of Northumberland, as sheriff of Northumberland for life, "rendering to the king 100 pounds yearly at the Exchequer without any account".[189] The record as available in the printed Calendar of Patent Rolls, contains no clause non obstante. Edward IV may have been oblivious to the act 23 Hen.VI c.7, or simply not to have bothered with a non obstante. The appointment was plainly contrary to the statute.

Edie has speculated[190] that the Case of Sheriffs came on early in the reign of Henry VII as that king set about testing the strength of the royal prerogative and putting it to new uses: Sheriffs would help determine the ambit of the dispensing power. Edie thought the litigation was brought by the king himself to force the Earl from his office, or in

188. C.H.Hunter Blair "The Sheriffs of Northumberland" (1942) 20 Archaeologia Aeliana 4th series, p.11 at pp.65-66.
189. (1467-1477) C.P.R. Ed.IV p.467.
190. Edie "Royal Dispensing Power" at p.201. As to the point of Henry VII testing the prerogative, see also Elton in "Henry VII: rapacity and remorse" in G.R. Elton Studies in Tudor and Stuart Politics and Government 1974, vol.1, particularly at p.47.

greater likelihood to force the Earl to give a financial accounting of the profits of the office.

Neither speculation seems likely in the light of the events surrounding the case. The Earl had been numbered with Richard III's forces, but had held back at the Battle of Bosworth in August, 1485. He had then been imprisoned for some months after Henry VII's accesssion, being released however in early 1486. Henry returned him by signed bill of 3 January, 1486 to all his positions of responsibility and power in the north of the kingdom, as lieutenant of the northern parts, with the same authority as had previously been confirmed upon the wardens-general of the marches.[191]

The Exchequer Chamber discussion is recorded as being in Michaelmas Term of 2 Henry VII, which is to say November, 1486. It seems unlikely that even if Henry VII had begun process against the Earl prior to the latter's rehabilitation in January 1486, that it would have been pursued to the Exchequer Chamber in November of that year. It is in any event extremely unlikely that Henry VII commenced the litigation, as it would not be in his interest to impugn the royal capacity for over-riding statutes non obstante unless he could find no other way of removing the Earl, and was determined to dislodge him from the office.

191. W.C.Richardson Tudor Chamber Administration 1485-1547 1952, p.134. See also P.M.Kendall Richard III 1955 (1972 ed.) pp.385-386 for references to the Earl's work with the city of York on Henry VII's behalf, both before and after January, 1486.

That line of enquiry is terminated with knowledge of Henry's appointment of the Earl on 12 February, 1488 as sheriff of Northumberland "during pleasure", once again "rendering 100 pounds yearly at the Exchequer without rendering any other account".[192] Once Henry VII is dismissed as the originator of the litigation, it can only be presumed that an informer, seeking half the penalty as provided in 23 Hen.VI c.7, took action against the Earl.[193]

Birdsall, and relying on him, Edie are in no doubt as to the decision of the Exchequer Chamber, finding unanimity among the justices for the proposition that the king's non obstante would always prevail over statutes. But if that was the decision, why did Henry VII find it necessary to reappoint the Earl? It has been suggested to the author that the Earl's grant failed with the death of Richard III, but there is no record of the Earl's reappointment on previous demises of the Crown. If this were the case, there would have been nothing to litigate on Henry VII's accession regarding the Earl as sheriff (unless an informer were attempting to pick up the penalty in respect of past infringement of the statute). The evidence seems to point to the Earl continuing in office under Edward IV's grant, until it was superseded in February, 1488 by that of Henry VII. There is, however, no record of Henry VII annulling the grant from Edward IV as might be expected if the Exchequer

192. (1485-1494) C.P.R. Hen.VII p.201. Henry VII had no compunction in granting Sir Richard Cotton the office of sheriff of Glamorganc and Morganc for life on 22 September, 1485: (1485-1494) C.P.R. Hen.VII p.20.

193. Such an informer is described in (1956) 75 S.S. Select Cases in the Council of Henry VII (ed.) C.G.Bayne pp.lvi-lvii.

Chamber decided that the original grant was good, unless the grant of 1488 automatically revoked the earlier letters patent. In short, the available evidence other than the Year Book report by no means points to a resolution of the Exchequer Chamber in favour of the supremacy of non obstante clauses.

Birdsall has translated the portion of the Year Book report relevant to the question of non obstante.[194] Two issues were before the Exchequer Chamber: whether Edward IV's creation of the Earl as sheriff for life was good; and secondly, the extent of the immunity from having to account to the king. The Year Book reads as follows:

> "And as to the first point the Justices held the patent good for it is such a thing as may well be granted for terms of life or inheritance, as divers counties have sheriffs by inheritance, and this commenced by grant of the king. Then was shown a presumption and then was shown a proviso for H. earl of N. so that the patent remains in force.
>
> Radclif [B] shows the statutes of 28 E.3, c.7 and 42 E.3, c.5 [sic] 195 that no sheriff shall be more than one year & c, though he had a Non Obstante. And not withstanding this, that the king shall always have his prerogative, as of the value and certainty of lands, and other things granted by the king, and of wools shipped, and of charters of murder, and several other cases where there are statutes that patents that lack these things shall be void; yet the patents of the king are good with a Non Obstante, but without Non Obstante are void by reason of the statute."

Birdsall asserted that the Earl's patent contained a non obstante clause explicitly setting aside the two statutes[196], but his evidence for such an assertion was Brooke's Graunde Abridgement in its 1573 Tottel edition, a

194. Non Obstante pp.43-44.
195. Birdsall noted this error, intending 42 Ed.III c.9, appeared in all editions of the Year Books.
196. Non Obstante p.45.

most uncertain source. The reference to the royal patent in the Calendar of Patent Rolls[197] makes no reference to any non obstante at all. But assuming that some general non obstante against the relevant statutes existed or can be inferred (to do otherwise makes nonsense of the case), there is no evidence from the Year Book report or the Calendar of Patent Rolls that such a non obstante was made against the statute 23 Hen.VI c.7 with its special clause attempting to prevail against the dispensing power, or, more importantly, that the Exchequer Chamber discussed the matter in the light of that statute.

Radclif B's remarks are directed specifically to the two Edwardian statutes concerning sheriffs, and his additional illustrations refer firstly to the two then recent statutes 2 Ric.III c.12 (Grants of land by the King must mention the true value and description of the land)[198] of 1484 and 1 Hen.VII c.3 (No wool to be shipped out of England to any port other than Calais, the one remaining English possession on the Continent) of 1485. The third illustration referred to statutes forbidding the king to provide pardons for murders in general terms, that is to say the specific instances requiring pardon were to be detailed, a statutory approach going back to at least the Statute of Northampton of 1328.[199] Nowhere does Radclif refer to the

197. See f.n.189 supra.
198. Radclif could also have been referring to 18 Hen.VI c.6 of 1439 mentioned supra f.n.57.
199. See ch.1 f.nn.83 et seq.

statute 23 Hen.VI c.7.[200] The crucial distinction between, on the one hand these three examples given by Radclif, together with the two Edwardian statutes concerning sheriffs, and on the other 23 Hen.VI c.7, is that only the latter contained the express intent to prevail against grants non obstante.

It has been inferred by Birdsall, because of the emphasis placed by Tudor and Stuart commentators on this case, that Radclif was analysing the position under 23 Hen.VI c.7. If this were the case, Radclif's words "no sheriff shall be more than one year & c, though he had a Non Obstante. And notwithstanding this, that the king shall always have his prerogative..." would support the view that the king could prevail over a statute even though that statute specifically blocked a future act of dispensation by the king. Radclif's words do make sense in the context of 23 Hen.VI c.7, but he does not refer to that statute, nor do his examples refer to statutes which expressly attempt to curb the dispensing power.

As for the supposed general agreement of the justices to the total supremacy of the non obstante power, Birdsall has taken the words used in the report of the opinion of the justices in general to indicate that the legal opinion of the day reflected a belief that the king had such unfettered power to choose his own agents. Birdsall thought the evidence was that such a power could be exercised

200. It may be that other contemporary reports of this case did note the Henrician statute. Fitzherbert's La Graunde Abridgement from the reign of Henry VIII referred to Radclif citing "23 H.VI cap.8" (sic) : f.47, "Graunt" no.33.

irrespective of statutes to the contrary, and that such statutes could always be dispensed with[201], "for it is such a thing as may well be granted for term of life or inheritance, as divers counties have sheriffs by inheritance, and this commenced by grant of the king."

Radclif B's reasoning simply did not confront the wording of the 1444 statute which specifically permitted a sheriff by inheritance to stay in office indefinitely, while forbidding the king to grant a term of office longer than one year. While ignoring the statute Radclif appeared to equate the "property" in office obtained by inheritance with that resulting from royal grant. The crucial statute had no reported reasoning applied to it.

There exists a Selden Society report of Sheriffs[202] based on a manuscript which differs from that used in the Tottel/Maynard Year Books, but unfortunately it deals exclusively with the second point of the Year Book report concerning the validity of the exemption granted the Earl from having to account to the king for the finances of the shrievalty providing he paid 100 pounds per annum. The Selden Society account of this matter is of interest as it shows the Chamber concluding that Edward IV's grant did not contain words making the exemption from accounting a hereditary right against the king's heirs, and in accordance with general theory, such a privilege in diminution of a future sovereign's rights could only pass by express words.

201. Non Obstante pp.46-47.
202. (1945) 64 S.S. Select Cases in the Exchequer Chamber vol.II p.126.

Nonetheless, the inference from this report is quite plain that the grant of office to the Earl was itself still in existence and this report also leaves little doubt that there was no argument that the Earl had lost office through the demise of the Crown.

Birdsall adopted the standard criticism of fifteenth century public law that Radclif B's analogies do not distinguish between the king's private and public functions.[203] He compared the statutory restrictions on the king granting land (that its true value and description must be given) which he assumed to be a "private" function, with other statutorily circumscribed functions which he thought "public": regulating trade; exercising mercy; and appointing officials, including determining the nature of their tenure. Birdsall missed the fundamentally public character of royal granting of land, which parliament saw fit to limit with 2 Ric.III c.12 and earlier Lancastrian legislation.

This non-distinction is not the point of constitutional interest in any case. Radclif B had bracketed statutes specifically dealing with royal actions, on the one hand, with, on the other, a statute constituting a general prohibition for the realm (1 Hen.VII c.3, that English wool be shipped only to Calais), which statute did not itself address the issue or whether the king could trump the prohibition with a non obstante. Furthermore, Radclif shone no light on a more sophisticated approach. He was unsubtle and mechanical : the prerogative should always prevail. No

203. Non Obstante pp.47-49.

thought was evidenced that Henry VI and Henry VII in their parliaments of 1444 and 1485 must have believed that words prohibiting non obstante patents must have meant something. At least by the end of the Tudor period the distinction referred to by commentators was between statutes intended to prevent mala prohibita (matters regulated for administrative purposes) on the one hand, and on the other, mala in se (matters inherently bad as offending natural law). It was to be suggested that the monarch could dispense with the former, but not the latter, a matter to be discussed in later chapters.

Sheriffs was argued at a time when the competing powers of parliament and the prerogative dispensing capacity were being increasingly evidenced in parliamentary language. 2 Ric.III c.12 (1484, granting of land) and 1 Hen.VII c.3 (1485, wool to Calais), lacking anti non obstante words, were not the only limiting or prohibitory statutes at the troubled cusp of the Yorkist and Tudor dynasties. 1 Hen.VII c.2 (1485) prescribed that all aliens should continue to pay double customs duty "any letters patent notwithstanding", but as Churchill has observed[204], Henry VII went on issuing letters patent of exemption to this statute, and ten years later parliament re-enacted the law (11 Hen.VII c.14).

On the other hand, another statute from 1485, 1 Hen.VII c.8 forbidding the importation of Gascon wine in other than British vessels concluded with the phrase "savying allwey to

204. Churchill "Aliens" p.416.

the King all his prerogatives", apparently implying an assumption of power in parliament to detract from those prerogatives, which in the case of this statute would be the dispensing and suspending power.[205]

Plainly there existed different estimations of the extent of legislative power over the king's executive actions. The Case of Sheriffs was important, but in the absence of a better report it appears unclear in its reasoning, or possibly resolved per incuriam because of the failure to refer to 23 Hen.VI c.7. Maitland might be allowed the last word. He noted that the Year Book report of Sheriffs did not bear out the later claims made for it.[206] However, the impact of that report lies in the assumption of its authority, accepted by all Tudor and Stuart jurists until the attack on the dispensing power in the reign of James II.

That the king might not avoid the provisions of an act of parliament by the terms of a grant was strongly pressed by Frowik, and Keble sjt in two inconclusive reports from 1494-1495.[207] If there were conflict between an act and letters patent, then, it was argued, the former had to prevail. Frowik said:

> "... if the King made a grant, and there was an omission of the form of performance of a condition contained within the act, these letters patent are void; for every one of the conditions contained within an act ought to be expressly within the grant."

205. See Churchill "Defence" p.414.
206. F.W. Maitland The Constitutional History of England 1963, p.304.
207. YBB 10 Hen.VII Mich.pl.20, f.9. (K.B.) per Frowick at f.9B; 10 Hen.VII Hil.pl.13, f.15 (Ex.Ch.) per Keble sjt at f.15B.

This argument took place in King's Bench, and may have been a part of the subsequent litigation which proceeded to the Exchequer Chamber early in 1495.

In the Chamber, reference was made to a parliamentary instrument that provided that where Henry VI made a grant by letters patent to a Provost of a certain place in Cambridge (the Provost being defendant in this case) of land to the value of 100 marks, there was a provision that the Bishop of Lincoln should assign (i.e. select) such land. The litigation went off on the question of whether the king had adhered to the terms of this enabling legislation, and whether a grant not in accordance with its terms was good.

The parliamentary instrument referred to was in effect a private act of parliament of 1447 in favour of the royal college of Eton.[208] The Commons and Lords agreed that the king might make grants to Eton by letters patent in a form set out in two schedules to the act. The first schedule referred to property which would pass to Eton in the future, some being property of the Priory of Deerhurst, which would devolve upon the death of the Prior. The second schedule provided that a small slice of this cake should be transferred to the College of St. Mary and St. Nicholas at Cambridge, the college founded by Henry VI that later became King's College.

The second schedule read as follows:

208. R.P. vol. V p.130B. I am indebted to Sir Geoffrey Elton and Dr. Owen of Clare College and King's College Cambridge, respectively, who pieced together the basic evidence in this case. The story was completed for me by Dr. F.P. Kelly of University of Adelaide Law School.

> "Provided also that, whenever the said Priory of Deerhurst shall fall vacant, whether it be through the death of the said present Prior or in any way whatsoever, then the Provost and Scholars of the Royal College of St. Mary and St. Nicholas of Cambridge are to have Manors, Lands and Tenements with appurtenances, parcels of the said Priory of Deerhurst or other possessions of the said Priory, to the value of 100 marks per annum, above charges and deductions for profits; to be held by themselves and their successors in perpetuity, to be limited and assigned [i.e. to be selected] by the Bishop of Lincoln for the time existing, or by his Deputy having sufficient authority in this matter, and to be certified in the Chancellery of our Lord the King by the said Bishop or by his Commissary in this matter by Letters sealed with his Seal. And that the said Provost and Scholars of the said royal college at Cambridge for the time being can enter upon the said Manors etc. or other possessions thus limited and assigned immediately after the limitation assignment and certification; and hold them for themselves and their successors in perpetuity without disturbing the general grant to Eton."209

It seems most likely that the 1495 litigation involved the Provost of King's College as defendant in an action by Eton College to claim the 100 marks worth of property which had after 1447 been granted to King's. The actual property was probably the manors and advowsons of Compton, Preston-upon-Stow and Welford-on-Avon.[210] Eton would be claiming all the property that had been Deerhurst Priory's, including the three above manors which had been granted to King's. The argument adopted by Eton would be that the procedure provided by parliament had not been followed in respect of the grant to King's. The king had selected the 100 marks worth of property from the total parcel passing to Eton, when the act had provided for the Bishop of Lincoln, the Visitor of King's, to do the selecting. So Keble sjt argued

209. R.P. vol. V pp.131B-132.
210. J. Saltmarsh "King's College" in Victoria History of the Counties of England 1959, pp.376 et seq.

for the plaintiff that the letters patent granting property to King's were void:

> "Thus it appears that the King hadn't pursued the form of this act in his grant : and also he hadn't pursued the substance : for the intent of those who made the act was, that this assignment will be certified in the Chancery ... Thus the King had varied in form, and also in substance from the act. But if the grant were to be good, the King ought to pursue the form of the act, and the matter of this also ..."211

King's College later provided a curious claim in respect of the Crown's dispensing power, which showed a clear but mistaken belief in the months after the Glorious Revolution and the Declaration of Rights of 1689 that the monarch was not bound by the Founder's Statutes of 1453. These statutes bound the fellows to vote for the candidate for Provost whom they considered fittest. There was no dispensation from the oath they took for this undertaking. In August 1689, Sir Isaac Newton, intent on becoming Provost, briefed the Attorney General to argue his cause before the Privy Council. It was submitted that all English sovereigns from 1453, including Henry VI, the founder, had ignored his statute by nominating their own choice for Provost. Saltmarsh has pointed out that whatever was the case with later monarchs, this was not true of Henry, as there was no vacancy in the Provostship between 1453 and Henry's death.[212]

Robert Constable, made serjeant in the call of November

211. YB 10 Hen.VII f.15B.
212. J. Saltmarsh "The Founder's Statutes of King's College, Cambridge" in J.C. Davies (ed.) Studies Presented to Sir Hilary Jenkinson 1957, p.337 at pp.356-357.

1495, delivered his readings on Prerogativa Regis to Lincoln's Inn in late 1495, and into 1496, reflecting the increased importance of the prerogative in the financial planning and administrative apparatus of Henry VII. The prerogative was an aging concept, but as the following lines from Constable reveal, the idiosyncracies of this rattling machinery were always to the king's advantage:

> "If it were ordained by parliament that the king will grant to me certain lands that are in his possession, in order to enforce the grant I will have a petition of grace ..."213

It is hardly surprising that public law concepts did not at this time have a court developed vocabulary. Even if parliament commanded the king to perform an action within his power, the issue was not primarily whether he was bound to comply, but that there was no court capable of making orders against him. Since the king could not, in accordance with feudal theory, be ordered by his own courts (except by waiver of this protection), an aggrieved party contesting the king's action could only approach him with a petition.

The remaining major litigation from Henry VII's reign concerning the relationship of the king to statutes is

213. R. Constable Prerogativa Regis (ed.) S.E. Thorne 1949, p.82, (my translation). At p.117 there is a reference to the binding power of a royal grant if it contains the words "non obstant aliquo statuto".

contained in Sir William Stonor's case[214], which commenced in 1495, and concluded in Easter term 1496[215] despite the apparent references in the reports to 1497. The act in question was 4 Hen.VII c.17 (1488) concerning the ability of lords to have writs of right to ward where tenants under feudal tenure died leaving infant heirs, the tenants having enfeoffed the land to the use of themselves and their heirs to defraud the superior lord of his feudal dues.[216] The bulk of discussion revolved on whether the statute created a "new prerogative" for the king, or at least allowed an old one, the right to feudal dues where a tenant died siesed of land, to be extended. To this end counsel for the king referred to the "intention" of the statute[217], but the reports are inconclusive, the first containing no judgments, and the opinions in Exchequer Chamber dividing evenly.

Some dicta are available, however, from both reports on the effect of statutes on the king. Hubbard [Hobart] King's Attorney, Mordant, a king's serjeant and Wood JCP

214. YB 12 Hen.VII Trin.pl.1, f.19; YB 13 Hen.VII Mich.pl.3, f.4 (Ex.Ch.); 64 S.S. Select Cases in Exchequer Chamber vol. II p.151, YB 13 Hen.VII Mich.pl.12, f.11, Keilwey 32; 72 E.R. 189, Keilwey 35; 72 E.R. 192. The case is analysed in great detail under its full title, Dormer v. Rex and Fortescue in E.W. Ives The Common Lawyers of Pre- Reformation England 1983, pp.248 et seq. See also discussion in Constable Prerogativa Regis of the issue in Stonor at p.20 n.48, p.53 n.134 and p.54 n.135.
215. Ives Common Lawyers p.248, n.6.
216. See J.H. Baker (1977) 94 S.S. p.cxciv.
217. YB 12 Hen.VII f.20 per Mordant king's sjt and Keble king's sjt and 64 S.S. p.163 per Kyngsmille sjt. Promotions in November 1495, i.e. during the course of argument in Stonor elevated many of the participants. Mordant and Kyngsmille had been apprentices and Keble only a serjeant. In the absence of exact dates of argument, all participants have been referred to in their higher stations.

asserted[218] the ability of the king to take the benefit of a statute. Serjeant Mordant's preliminary dicta[219] to this point are the strongest assertion of the king's immunity from the operation of statute since Ashton J in Radclif.[220]

> "... where a statute is made which restrains the liberty of all persons, the King will not be bound by such a statute unless he is named in it. As in the Statute of Quia Emptores all persons are bound except the King..."

Frowik sjt, arguing the case against the king, agreed that Quia Emptores did not bind the king[221], but this did not affect Frowik's presentation: the issue was whether the king had the power he sought at common law. Also noteworthy is Frowik's denial that the king could take the benefit of statutes without adhering to the terms in which the statute granted the new right.[222]

218. YB 12 Hen.VII ff.19B, 20, and 64 S.S. p.169. Street quoted Mordant : "Effect of Statutes" p.373 (the reference to 1597 is plainly a misprint for 1497) to the effect that the king could take the benefit of a statute although not named, "otherwise it will be understood that the king would not have assented to the said statute." Perhaps Mordant's argument simply reflected realpolitik.
219. Incorrectly cited in Street Governmental Liability p.144, n.1 and "Effect of Statutes" p.361 n.22 as "2 HVII 20". There are consequential date errors in Street at pp.154 and 375 respectively, referring to 1487 rather than 1497.
220. Supra f.n.117.
221. YB 12 Hen.VII f.21. Plucknett Edward I pp.102-107 referred to Quia Emptores 1290 having been desired by "magnates and other lords", and he alluded to royal licensing of sub-infeudation in contravention of the statute. However, such licensing did not contravene the intent of Quia Emptores, which like 4 Hen.VII c.17 was designed to stop sub-tenants evading their feudal dues. The royal immunity from Quia Emptores was referred to in an undated reading on Prerogativa Regis noted in Spelman's Reports, the reason being "the king is not named in the ...statute..." : 93 S.S. p.175.
222. YB 12 Hen.VII f.21B. This assertion does not have the judicial imprimatur that Street accorded it : Governmental Liability p.154 n.7.

The balance between the prerogative and private property rights was illustrated by Segiswyk, opening counsel in the Exchequer Chamber when he said:[223]

> "And the statute does not give the King any prerogative by express words, therefore he cannot have this by his prerogative, for it is a new thing given to lords which they did not have before."

Paston J had said earlier in the century that the king could not surrender his rights by general words[224], but similarly private interests were immune from any growth of royal powers in the absence of specific words in a statute.

Boteler sjt, in opposing the king's claim with a spurious reason for the creation of the statute, took up the argument made previously by Frowik for restricting the king's receipt of the benefit of a statute:

> The King cannot ... be in a more favourable position to have advantage by the statute if he does not fulfil all the conditions of the statute..."[225]

Here was a first recognition of the jurisprudential difficulty which flowed from analysis of the approach which gave the king the benefit of all statutes. On what basis should the king approbate and reprobate, the end product of the "royal benefit" argument? Boteler did not allow of any "prerogative" in the king to use the statute if he was not within its terms. To the contrary, Hubbard, Mordant and Keble[226] had supported the king taking advantage of the statute, though not strictly within its terms, on the grounds that the law looked more favourably on the king than

223. 64 S.S. p.162, and also Boteler sjt at p.167. See Ives Common Lawyers p.252.
224. Supra f.n.12.
225. 64 S.S. p.167.
226. YB 12 Hen.VII ff.19B, 20 and 20B.

common persons (Hubbard and Keble) and that the king would not have assented to the statute if he could not avail himself of it "and if he did not assent, the statute would not have been made" (Mordant).

Amongst the judges, Wood JCP found for the king with examples of statutes of which the king could take advantage though not named in them.[227] Wood J also indicated that the prerogative of nullum tempus could be used to defeat any statutory provisions containing a time factor.[228] In the diverse reasoning of the remaining judges, only Fineux CJKB alluded to material germane to the present discussion. He said that if the statute covered the entire ground of the case, there would be no room for an application of the prerogative, but that was not so here. It was necessary to the operation of the statute that feudal concepts be adopted, and with them the king's feudal rights must be incorporated.[229]

It remains only to refer to a "nota" in Keilwey recorded as being Hilary term of 13 Henry VII.[230] This is only two pages after his report of Sir William Stonor's case in Exchequer Chamber given as Michaelmas of 12 Henry VII, although the Year Book report is Michaelmas of 13 Henry VII. The account is as follows:

227. 64 S.S. p.169.
228. At p.170, and see Keble at YB 12 Hen.VII f.20B.
229. At p.174.
230. Keilwey 35; 72 E.R. 192. Ives Common Lawyers p.253 n.27 refers to the issue of a "general prohibition", but Keble's example has a more subtle regulatory flavour.

> "Note that Keble sjt said that it was clear law that if it were ordained by Act of Parliament that all dams [fish ponds] were to be pulled down, still the dams [fish ponds] of the King would not be pulled down, for he is not bound by these general words, and this he said before Fineux CJKB and Brian CJCP and no one denied it."

To the modern eye this seems an unusual example, but legislation had been passed in the reigns of Henry IV and V ordering the dismantling of weirs that blocked shipping and disturbed fish spawning : 1 Hen.IV c.12 (1399), 4 Hen.IV c.11 (1402) and 1 Hen.V c.2 (1413). This was early regulatory legislation of the sort that would later become town planning and environment legislation, vexing in the question of relationship to government. Keble probably used the example of weirs because in the year that Stonor was being argued, 1495, a statute 11 Hen.VII c.5 was passed dealing with the destruction of dams near Southampton. Fines of 40 pounds were prescribed for hindering demolition, and 100 pounds for building new weirs.[231]

Both Chief Justices presumably heard the matter in Exchequer Chamber. Keble argued in the Chamber in Stonor's case and although the Year Book report does not record this exercise in hypothesis, it was clearly relevant to that case. Keilwey, the reporter, was in fact only born in 1497: the early part of his reports was prepared by John Carrell[232], and "Carrell's technique, apparently, was to jot down a series of arguments, decisions or hypothetical issues

231. S.R. vol. 2 p.572.
232. L.W. Abbott Law Reporting in England 1485-1585 1973, p.39.

which arose in court or at extra-judicial conferences".[233]

Both Street[234] and the New South Wales Law Reform Commission[235] referred to the Chief Justices' agreement that general words in a statute did not bind the king. While Keilwey's note does appear to belong to the indecisive Stonor litigation, Keble's argument that general legislation did not affect royal property has been unduly magnified in importance. The "agreement" of the Chief Justices with the hypothesis was at best tacit and the argument was far removed from the core issue in Radclif and Additions of whether the king could ignore the terms of a statute to adversely affect a subject.

The final fifteenth century case concerning the king and statutes covers the reach of legislation with both a criminal and civil component. The statute 8 Hen.VI c.9 (1429) had provided (in s.1) for arrest, fine and ransom to the king of disseisors, who either forced landholders with good title off land by force of arms, or having come onto the land peaceably, held the land by force. Section 6 of this act provided for suit by the disseisee to recover his land, and in the event of success in litigation, the defendant disseisor to pay the fine to the king referred to in section 1. Section 7 provided that a disseisor or his

233. Ibid p.43.
234. Street Governmental Liability p.144, and "Effect of Statutes" p.361.
235. N.S.W. L.R.C. No. 24 (1975) Proceedings by and against the Crown para.14.3.

successor in possession for three or more years "be not endamaged by Force of this Statute."

In Easter term 1499 King's Bench heard an argument[236] concerning an indictment of a disseisor who had been in possession for more than three years. Segeswike moved to have the indictment struck out, as being outside the time allowed in the statute. Fineux CJKB, with whom Read and Tremayle JJKB agreed, did not rely on the doctrine that time did not run against the king. His exposition was a great deal less mechanical, and referring to the fact that the disseisor would be barred from having an action brought against him after three years, Fineux added:

> "... this will not excuse the punishment which he deserves at the hands of the king..."

The reference to the time limitation might work against a disseisee, "but it isn't a plea against the King."

At the close of the fifteenth century discussion still tended to centre on the king, a feudal lord with special property and procedural rights, rather than the Crown. The legislative revolution in the reign of Henry VII's son, and the consequent increase in parliamentary power would present new challenges to the solutions sought by the medieval lawyers. However, the King's College litigation of 1495 and the disseisor's case of 1499 reveal a more sophisticated concept of monarchy in the making : the king should, in grants affecting third parties, adhere to the constraints

236. (1499) YB 14 Hen.VII Pas.pl.5, f.28.

set by parliament, but in his role of guardian of public welfare he can prosecute malefactors irrespective of time limits set in general terms for the benefit of disseisors, and such disregard of time limitations is not anchored to the feudal prerogative of nullum tempus but is left at large, the king's position as chief executive implicit.

To conclude on this era, by 1500 it seemed accepted that the king could dispense with the operation of statutes, including those attempting to override his non obstante power, and his prerogative and property were secure from restriction by non-specific statutes. The prerogative thus secured was not clearly defined, and might vary from an "administrative" advantage over feudal property rights as in Courtenay, to procedural advantage in Radclif, to the recognition in the Stonor argument on Quia Emptores that it was a Crown function (whether necessary or merely advantageous) to permit sub-infeudation when it was forbidden to the nobility. Unlike the Statute of Merton on usury, and the Statute of Additions extending every man's "inheritance", Quia Emptores was an administrative statute which did not vest new "rights" in all, but regulated a practice deleterious to a very small section of the kingdom.

Ashton J on felonies in Radclif and Keble sjt on fishtraps in Stonor provided a first glimpse of an issue increasingly in contention in the twentieth century: the relationship of the Crown to the criminal law and regulatory statutes. No analysis had been essayed as to whether general statutes extended to the king because he was a party

to their making, although it had been argued on that basis that he should have the benefit of statutes, a matter which was not resolved.

Both dispensing, and the sanctity of prerogatives were subject to a still undefined concern for "common" legal rights which flowed from statutes. Whether such statutes had to be negative, creating "new law", or could be less specific in presentation to bind the king was also not clear, but a quarter of a century before Additions and its assertion of statutory rights inalienable except to parliamentary interference, Fortescue had argued in Prior of Leeds that rights vested in a prelate by the equivalent of statute could not be removed by unilateral royal action. Radclif was an example of theory being propounded in favour of general rights which bound the king, while the case was lost through the invocation of procedural prerogatives or perhaps simply the lack of relevance of the statute in question to the facts. The next century would provide a sharper focus on these issues thrown up, but as yet unresolved.

CHAPTER THREE

HENRY VIII AND HIS CHILDREN:

THE SIXTEENTH CENTURY

> "... whether kinges, princes, and other governours ought to be obedient and subjecte to the positive lawes of their countrey. To discusse this question, the right waye and meane is as in all other thinges, to resorte to the fountaynes and rootes, and not to depend on the ryvers and braunches. *** So if men should buylde upon thauthoritie that kinges and princes usurpe over their subjectes, and not seke from whens they have theyr autoritie, nor whether that which they use, be juste, ther could be nothing produced to let [hinder] their cruell tyrannye."
> J.Ponet Politike Power, 1556, folios ciiii and cv.

The 180 years between the accession of Henry VIII (1509) and the issuing of the Bill of Rights (1689) comprise the most overtly tumultuous period in English constitutional history. The concepts at the heart of this thesis, "Crown" and "statute", the prerogative power exerted by the former and the exercise of parliamentary capacity evidenced in the latter were the bullets of the vocal battles accompanying the more palpable conflicts of the seventeenth century. However, lawyers who served as propagandists in the ideological clashes of Stuart times had been preceded by a race of pragmatists[1] who had attempted to evolve

1. "Statesmen and jurists, all through the century, accepted the antithesis between political law, afforced by statutory implications, and regal power augmented by statutory declarations. Pragmatists that these men were, they were seldom ruffled by the illogical, the incompatible, or the incongruous." W.H. Dunham "Tudor Paradox" (1964) 3 J.B.S. p.24 at p.29.

new relevance for legal terms weighed down with a medieval inheritance.

The two great cases from this era, still cited, distinguished, misquoted and ill-understood belong to the period of evolution rather than that subsequent time of conflict. But Willion v. Berkley[2] and Warren v. Smith[3] better known as the Magdalen College Case had the advantage of being set-piece courtroom battles that invited good law reporting. The reports of the period indicate much other litigation referring to the relationship of Crown and statutes, and much division amongst senior lawyers as to the resolution of the problems raised, an appearance heightened by examination of the activities of Crown lawyers and officials.

The few and scanty reports on this subject from the time of Henry VIII indicate initially the continued assumption of limits on royal authority measured against private property. Thus Spelman noted that "The King cannot grant a thing which is to the disinheritance of another."[4] Writing in 1551 about the scope of royal proclamations three years after the repeal of the 1539 Statute of Proclamations (31 Hen.VIII c.8), the Venetian ambassador could add to the inability to disinherit, that a royal proclamation should have been "not in effect repugnant to the ancient

2. (1562) 1 Plo.233; 75 E.R. 339.
3. (1615) 11 Co.Rep. 66B; 77 E.R. 1235, (also reported at [1558-1774] All E.R.Rep.236), 1 Rolle 151; 81 E.R.394.
4. Spelman's Reports Vol.1; 93 S.S. p.149, undated.

statutes"[5], but parliament had insisted on inserting safeguards in that statute protecting property.

A continued, if slight judicial interest in the theory of parliamentary law making, showed when Coningsby J said in 1522, reiterating themes from the Yorkist period[6]:

> "This is an act of Parliament, which binds everybody; and all are privy to an act of Parliament."7

This case arose from the act 7 Hen.VIII c.11 (1515) which provided a general pardon for all outlaws, and "restored them to their goods and chattels". Must those who had taken the outlaws' goods restore them? Coningsby J suggested that the goods must be returned as the recipients were privy to this act of restoration. Brudenell CJ and Fitzjames sjt set off on different trains of thought which did not require the return of the goods. The act worked the king's pardon and its effect was as limited as the king's incapacity to interfere arbitrarily with private title to property. This reasoning was in conformity with Illingworth CB's comments in Additions to the effect that the king could use his prerogative or the statute covering the same ground so long as no common right was defeated. The reasoning also reflected the concern of the two chief justices seven years before Additions in 1458 that the royal pardon not adversely affect third party property rights.[8]

5. Cited in R.W. Heinze The Proclamations of the Tudor Kings 1976, p.193.
6. See ch.2 f.nn. 138 and 166.
7. (1522) Discussion in Serjeants' Inn, Spelman's Reports Vol.1, 93 S.S. p.170.
8. Ch.2 f.nn. 127 and 158.

This conference in 1522 marks the culmination of medieval thought on this topic. The modern notion of a statute encompassing an aspect of the prerogative and supplanting it had not been perceived.[9] An act delineating an executive function was construed by reference to the limits of the analogous royal power accepted at common law. Only Coningsby J had glimpsed parliament's sovereign capability of redrawing property rights which had previously been the limit of the king's pardoning power.

In less than a decade the work of the Reformation Parliament had begun marking out the omnicompetence of the king-in-parliament, and given practical expression to Christopher St German's theories enunciated from 1528 that that body was "the hyghe soueraygne over the people."[9A] Parliament busied itself with work of an unprecedented compass, in which process it plainly assumed it could control and channel executive power. Two statutes concerning the prerogative from this period were the subject of later litigation, which revealed the courts inconsistent in accepting what St German had understood in 1531:

> "..... I holde it nat best to reason or to make argumentes whether they had auctoritie to do what they didde or nat. For I suppose that no men wolde thinke, that they woulde do any thynge, that they had nat power

9. AG v De Keyser's Royal Hotel Ltd [1920] A.C.508.
9A. C. St German New Additions (1531) in (1974) 91 S.S. St German's Doctor and Student (eds) T.F.T. Plucknett and J.L. Barton, p.327.

to do."[9B]

A statute of 1533 concerning the allocation of the dispensing power was resolved in 1598 and again in 1617 in favour of the prerogative irrespective of the statute[9C], while an act of 1541 dealing with royal debt recovery was construed throughout the seventeenth and eighteenth centuries to have supplanted the prerogative of priority, only to have courts in the early nineteenth century decide that the prerogative remained intact.[9D]

These groups of decisions all reflected the ethos of the periods in which they were decided. Courts in the second half of Henry VIII's reign began to mirror the sweep of the king-in-parliament, and this perception of a new political order lasted with lawyers trained in Henry's time

9B. Ibid p.317. On St German's perception of parliamentary sovereignty see A. Fox and J.A. Guy Reassessing the Henrician Age : Humanism, Politics and Reform 1500-1550 1986, pp.111 and 168-169. See also St German Parliamentary Draft of 1531 in J.A. Guy Christopher St German on Chancery and Statute 1985, Selden Society Supplementary Series vol.6 pp.129-130 on 21 Hen.VIII c.13 (1529) restricting land passing to religious orders and binding the king's dispensing power, while expressly permitting the king to avoid the terms of the act for the sole purpose of establishing new religious foundations.

9C. Infra f.n.117, ch.6 f.n.15. A statute of 1529, 21 Hen.VIII c.13 had forbidden pluralities of religious benefices and absentee incumbents. Its passing in the face of opposition from the Lords Spiritual had marked an extension of parliament's sphere at the expense of convocation : J. A. Guy The Public Career of Sir Thomas More 1980, pp.119-120. The act declared void papal dispensations obtained in the future for pluralism, but Henry's government in 1533 had organised the passing of the papal function of ecclesiastical dispensation to the Archbishop of Canterbury, with a residual supervisory power in the king : 25 Hen.VIII c.21.

9D. Ch.6 f.n.60, ch.7 f.nn.66 and 67 (but note 69) and ch.8 f.nn. 3 and 5.

who sat on the early Elizabethan bench. A less familial partnership between sovereign and parliament in that reign would affect judicial attitudes to the relationship of statutes to royal power.

By 1532 it was assumed in Prior of Sheen v Swillington[9E] that the prerogative power of pardon had been circumscribed by statute. A decade later the theory of statutory enactment and the parties bound in consequence was raised in Common Pleas. The king granted an export licence "nonobstant the statutes then made and thereafter to be made". Subsequently parliament enacted that the licensed commodity should not be exported. Was the licence revoked by virtue of the act? Dyer's report states somewhat ambiguously that Baldwin CJ and Shelley J thought that it was, "for he is party to the act; and the king cannot dispense with a new law to be made by act of parliament before that act be made, as he may in things in future of which he hath the inheritance".[10] The first "he" in the quotation could refer to the king, without whose assent there would be no act, but even if, as is more likely, it referred to the recipient of the licence, the limitation on royal authority would be apparent.

Another undated note from Spelman made express that as a consequence of the statute 18 Hen.VI c.6 (1439)[11] the king was restricted in the mode in which he might grant land.[12]

9E. (1532) Spelman's Reports Vol.1; 93 S.S. p.191 at p.192.
10. Anon (1542) 1 Dyer 52A; 73 E.R. 114 at p.115.
11. See ch.2 fn.57.
12. Spelman's Reports Vol.1; 93 S.S. p.151, and see Fitzherbert sjt to the same effect in a brief note ibid p.168.

The statute provided that no land "seized unto the King's Hands upon Inquests" should be granted or let by the Chancellor, Treasurer or other royal official, until a month after the return from the inquest. This decision could be taken as the first unequivocal judicial finding that the king's granting capacity (and hence by inference his prerogative) could be and was limited by express words in a statute.

Amidst the Henrician turmoil the justices were summoned in 1540 (the year of Cromwell's execution) to tell the Council whether or not the king could send anyone to prison at his discretion. Serjeant Humfrey Browne was the object of allegations, particularly that he advised imprisoned felons to sell their goods to avoid forfeiture. The justices found that the king did have this arbitrary power, but circumscribed it with a limitation worthy of a Portia:

> "But whether the cause for which he sent him to prison is lawful or not, [is a question which] may be determined by the law; [for] the statute of Magna Carta is '<u>nullus liber homo capiatur etc. nec super eum mittemus</u> etc', from which it appears that the king cannot treat his subject contrary to the law."13

The relationship of king to parliament was the subject of at least one curial submission in the time of Edward VI. Saunders, a king's serjeant was contending in Exchequer Chamber over the statute 1 Ed.VI c.13 (1547), which provided

13. <u>Browne's case</u> (1540) Spelman's Reports Vol.1; 93 S.S. p.183 at p.184.

for forfeiture to the king of imported goods if agreement were not reached with customs for the payment of duty.[13A] Saunders argued that the statute should be construed according to the intent of the legislature. He continued that at common law grants were construed in favour of the grantee:

> "..... here the commons have given this subsidy to the King by the said statute, and the commons are the donors and grantors, and the king is the donee or grantee, in which case, the words of the said statute, which is the grant, ought to be taken most beneficially for the King."[13B]

There was no judicial analysis, as the king removed the matter from the Chamber, but Saunders' argument was diametrically opposed to the medieval concept of king as grantor of all legislation. Although Saunders dressed his submission in the colours of a parliamentary financial grant, the argument was in reality about a complex piece of statutory interpretation.

Both Dyer and Dalison[14] record a conference in Serjeants' Inn from the first year of Queen Mary's reign on a most delicate political topic. The queen had summoned her first parliament with a writ which omitted the words "supreme head of the church of England" from her title, these words having been incorporated by 26 Henry VIII c.1

13A. Reniger v. Fogossa (1550) 1 Plo.1; 75 E.R. 1 at 10;16.
13B. At 11;17.
14. Discussion in Serjeants Inn (1553) 1 Dyer 98A; 73 E.R. 213, Dalison 14; 123 E.R. 236.

(1534) and 35 Henry VIII c.3 (1543).[15] A majority of those present thought the omission did not affect the validity of the summons because the statutory words were affirmative, not negative: to translate Dalison's law French "because a statute in the affirmative binds [oblige] all subjects, but not the Queen unless in the negative or binding by special words [oblige per especial parolz]"[16] (emphasis added).

This report marks the first use in the law French of the word "oblige" rather than "lie", but both seem to carry the same meaning that any to whom they apply must submit to them.

One described as "Lord Cromwell's man" wrote a tract advising Mary that "by the laws she was not bound". This pamphleteer urged Mary to act the Conquerer "and do what she

15. Dyer records that the matter was also raised in Elizabeth's first parliament. The solution to the political aspect of the problem is the subject of Maitland's chapter "Elizabethan Gleanings" in Collected Papers 1911, Vol. 3, p.157.
16. This accorded with the fifteenth century common law, see ch. 2 f.n.157. Maitland's essay (supra f.n.15) adverted to the question of whether Henry VIII's affirmative statutes on title introduced "new" law or confirmed the old. The proponents of the new titular form claimed that the statutes only spelt out what had always been the case. A.Von Mehren in "The Judicial Conception of Legislation in Tudor England" (in Interpretation of Modern Legal Philosophies: Essays in Honor of Roscoe Pound (ed.) P.Sayre, 1947) analyses the tension in this period between the old concept of parliamentary law promulgation, as opposed to making. Brooke (died 1558) referred in his Abridgement to what Fitzherbert earlier in the century had ignored, the distinction between statutes declaring the common law, and those creating new law (von Mehren p.757). S.E. Thorne editing A Discourse upon the Exposicion and Understandinge of Statutes 1942, pp.36 et seq provides an invaluable commentary upon negative and positive statutes.

list". While the sentiments were absolutist, the reasoning, such as is available from Dunham's retelling of the tale, exposes a framework of constitutional restraint on kingship, in which Mary was exempt, by implication, from the operation of statutes, as being sui generis, because past statutes named only kings and not reigning queens. In any event Lord Chancellor Gardiner pronounced the tract horrendum dictum and Mary "took the said book and presently cast it into the fire".[17]

In the first year of Mary's reign other, parochial events were to lead to one of the great set pieces of litigation on this subject of the Crown and statutes. Henry, Lord Berkeley[18] and Richard Knight forcibly ejected Henry Willion, a farmer, from seven acres of wood at Weston in Hertfordshire. Willion brought an ejectione firmae against Berkeley and Knight in the Court of Common Pleas in the first year of Elizabeth's reign, and argument commenced in

17. Dunham "Tudor Paradox" p. 46 referring to a manuscript of William Fleetwood. Gardiner, Bishop of Winchester, and a renowned civil/canon lawyer of his time, is remembered for turning Cromwell's taunts, that the civil law provided for the prince's will to be law, telling Henry VIII that he was more secure if he made the laws his will. He also wrote to Protector Somerset regarding the dangers of the king attempting to command against an act of parliament, and of persons breaking the law with the king's consent. (J.A. Muller Stephen Gardiner and the Tudor Reaction 1926, pp.50-51 and 163).

18. Despite this litigation, known to his contemporaries as "Lord Henry the Harmless" L. Stone Family and Fortune : Studies in Aristocratic Finance in the Sixteenth and Seventeenth Centuries 1973, pp.243 et seq. on the Berkeley family.

early 1561 in Willion v. Berkley.[19]

In his pleading Willion claimed good title through his lease from Henry Cock who had purchased the land from the Earl of Pembroke. The Earl, then Sir William Herbert, had been seised of the land through its forming part of the manor of Weston, to which Edward VI granted him the reversion. That king had inherited the title from his father, Henry VIII.

The defendants' pleadings revealed the antecedents of the royal interest. As an indirect result of litigation in the time of Henry VII, William, Marquess of Berkeley was to hold the manor of Weston in fee tail, remainder to Henry VII. However, the remainder was entailed so that if the king's male line failed, it would revert to the rightful heirs of the Marquess. William Berkeley, the Marquess, died without heirs male, and consequently Henry VII was seised of

19. (1562) 1 Plo. 223; 75 E.R. 339. Considerable confusion exists as to the date to be ascribed to Willion v. Berkley, Street for example referring to 1559 (see ch.2 f.n.88 : Dickson J. also referred to the Court of Appeal hearing the case, which anachronism plainly intended the Court of Common Pleas). Plowden recorded the formal pleadings as occurring in Easter term of 1 Elizabeth. Since Elizabeth ascended the throne in November 1558, the reference must be to 1559. However, oral argument was recorded as taking place in Hilary and Easter terms of 3 Elizabeth; i.e. 1561. But the judgments were ultimately delivered in Trinity term of 4 Elizabeth which was mid-1562. The modern practice of referring to the date of judgment has been adopted here. Judgment was finally entered at the request of the successful defendants in 1563. Describing Lord Henry Berkeley's attempts to regain lands formerly belonging to the family, Stone was presumably referring to Willion v. Berkley when he wrote "One more [manor] was recovered after a protracted lawsuit in 1563 ..." Stone Family and Fortune p.254.
The Berkeley family name has three "e"s while the case is reported with only two "e"s in Plowden's Commentaries.

the remainder. The litigation under discussion arose from the grant of reversion by Edward VI, the consequent failure of the Tudor male line with the death of Edward VI, and the forcible entry onto the land of the Marquess' lawful, collateral heir.[20]

Counsel for the defendants (Serjeants Harper, Southcote, Walsh and Chomley) related the primary legal point to the statute de Donis Conditionalibus, Statute of Westminster II c.1. (1285). As Plowden's report puts the argument:

> "... in what capacity King Henry 7 took the remainder; and whether or not after issue had, he had power to alien, as every such donee had before the Statute de Donis Conditionalibus, or if he shall be bound and restrained by this Statute, as every other donee is, and if he shall, then it follows from thence that when the issues males coming from King Henry 7 were extinct, the Lord Berkley, now defendant, might enter."

The results of the king not being bound were immediately added:

> "And if so be that King Henry 7 may be said to have a fee-simple, and to have power to alien post prolem suscitatam, King Henry 8 shall also be deemed in the same case, and so shall King Edward 6 and then he by his letters-patent made to Sir William Herbert has lawfully given the said land in fee-simple,and from thence it will follow that the Lord

20. Stone Family and Fortune p.243 wrote of "the behaviour at the end of the [fifteenth] century of William, sixth Lord Berkeley. He had no children and was consumed with two driving passions : a lust for honours, and a hatred of Maurice, his brother and heir. He therefore traded his lands for titles and died in 1492 as a Marquis, leaving to Henry VII and his heirs male most of his vast estates ..." On the Berkeley passion for land, see J. Blow "Nibley Green 1470 : The Last Private Battle Fought in England" in C.M.Crowder (ed.) English Government and Society in the Fifteenth Century 1967, p.87.

> Berkley, now defendant might not enter, but was without remedy."21

Serjeants Harper and Southcote set off on a tack which ultimately proved unnecessary to the defendants' case and an irrelevancy to the modern theory of the relationship of Crown to statutes : the theory of the king's two bodies, natural and political.[22] The heart of the issue was the last point raised for the defendants: whether the statute de Donis was to be construed so as to bind the king. Counsel said:

> "that first the common law is to be considered, and the mischief that was before the statute; secondly, the purview and intent of the statute; and thirdly, the estate and prerogative of the King."23

These concepts were raked over in various ways. From the preamble to de Donis it was apparent that the mischief intended to be suppressed was that the will of the donor of entailed lands might be thwarted if the donee could alienate the land:

> "which being a great mischief, the King and the whole Parliament intended to remedy it, as the statute itself purports, which says, 'wherefore our lord the King perceiving how necessary and expedient it is to provide remedy ...'"

and then:

> "Which will of the donor to have the land continue in the issues, and to have the land back again after the issues were dead, was as great when the King was donee

21. 1 Plo. 233-234; 75 E.R. 355.
22. 1 Plo. 234; 75 E.R. 355 et seq. Maitland's essay "The Crown as Corporation" studies the development of this Tudor concept, and its subsequent impact which was in general anything but irrelevant to the later history of the Crown: (Collected Papers, Vol.3, pp.248 et seq.).
23. 1 Plo. 235; 75 E.R. 358. Plainly the ideas in Heydon's Case (1584) 3 Co. Rep. 7A; 76 E.R. 637 were not entirely novel on the delivery of that judgment.

> as when a common person was donee. So that there is no exception of the King either in the words or in the intent of the Act, but he is included in the purview of the Act, as others are, although he is not named by express words."24

It is noteworthy that counsel argued not merely for the inference of parliament's intention, from the mischief to be remedied, but specifically referred to the statute's preamble to show the king's role as part of parliament expressing the remedy prescribed by de Donis.

An old theme was returned to and played with gusto. Its opening bars read:

> "Yet the common law has so admeasured his [the king's] prerogatives that they shall not take away nor prejudice the inheritance of any."25

De Donis was seen as intended to save inheritances. The theme was expanded to run from the protection of inheritances to "the public good". In support of this

24. 1 Plo. 235-236; 75 E.R. 359.
25. Ibid.

expansion Radclif's Case and the Case of Additions[26] received considerable space. Statutes for "the public good" were to be expounded to include the king "notwithstanding he is not named", and the concept of "the public good" was specifically argued in relation to the decision in Radclif on Westminster II c.5, and the judgment of Nedeham J in Radclif referring to the Statute of Merton c.5. Similarly it was argued that the king was bound by the Statute of Merton c.10 because it was made "for the ease and convenience of subjects".

Defence counsel made a tactical concession. The king was not bound by statutes which were only intended to regulate subjects or provide punishments, "but otherwise it

26. 1 Plo. 236; 75 E.R. 360. See ch.2 f.nn.85 and 153 respectively. Note particularly the attention given by Nedeham J in Radclif to the Statute of Merton regarding usury: see ch.2 f.n.112. The equitable interpretation of statutes for the public good according to the intent of the makers (confining this "equity" in a fashion not seen in the former period of flexible interpretation : see ch.1 f.n.97) was not only a subsequent mark of Heydon's case, but had previously been dwelt on in Wimbish v. Tailbois (1546) 1 Plo. 39 at 58, 59; 75 E.R. 63 at 93, 95-96. For the history of this aspect of statutory interpretation see "The Equity of a Statute and Heydon's Case" S.E. Thorne (1936) 31 N.W.U.L.R. (Ill.L.R.) 202, and von Mehren "Legislation in Tudor England". See J.H. Baker in 94 S.S. at pp.34-36 on "The commonwealth and public good" in the first half of the sixteenth century. Note also the processes of selection of public as opposed to private acts : G.R.Elton "The Sessional Printing of Statutes, 1484-1547" in E.W. Ives (ed.) Wealth and Power in Tudor England 1978, p.68. Lord Keeper Nicholas Bacon opened parliament in 1571 with a reference to the distinction between "commonwealth" business and matters of state: W.T. MacCaffrey "Parliament : the Elizabethan Experience" in D.J. Guth and J.W. McKenna (eds) Tudor Rule and Revolution 1982, p.135. "Commonwealth" bills were in a sense private members' bills for the entire nation.

is if it concerns the safety of inheritances, or the public utility of the realm".[27]

Walsh sjt, however, asserted that de Donis bound the king because in a two tiered process he had expressed that to be his will. Firstly, he had bound himself by authority of parliament to the will of another, the donor, and he had accepted the will of the donor expressed in the fee-tail.[28]

The serjeants for the plaintiff, Puttrell, Bendloe and Carus, did not tackle the defendants' case directly. A tentative opening was made on the relationship of the king to de Donis with a claim that is worth citing in full, father as it is of prevailing notions to the present day:

> "For it is usual for the Legislature, in Acts of Restraint which they intend to bind the King, to name him expressly, and if he is not expressly named, it has always been taken heretofore that the Legislature intended only to bind the subjects, and to make the Act extend to them, and not to the King, for he is favoured in all expositions of Acts. And because it is not an Act without the King's assent, it is to be intended that when the King gives his assent, he does not mean to prejudice himself or to bar himself of his liberty and privilege, but he assents that it shall be a law among his subjects. And so inasmuch as the Act is made by the subjects, who, it is to be presumed, would not restrain the

27. 1 Plo. 236-237;75 E.R. 361.
28. Ibid . Von Mehren "Legislation in Tudor England" p.752 explained the use in Wimbish v. Tailbois supra f.n.26 of the fiction that everyone was present in parliament to give efficacy to the Statute of Uses: the feoffees to use were donors. The passing of the Statute of Uses (27 Hen.VIII c.10, 1535) is symptomatic of Henry's concept of the king-in-parliament. The government actively set out to curb uses from 1529, and finally obtained parliamentary imprimatur for radical change in 1535 : see Guy St German pp.75-80, citing particularly the work of Ives and Baker on the history of the Statute. By implication, serjeant Walsh in Willion was building on the foundation of Wimbish, and if the premise is accepted that the king was part of the statute-making structure of parliament, then he was bound by the donor's will under de Donis; see the judgment of Dyer CJ cited infra f.n.48.

> King, and also by the King himself, who cannot be presumed to mean to restrain himself, the expositors of Acts have well collected from the intent of them, that the King should be exempted out of the general words of restraint, unless he is expressly named and restrained."29 (emphasis added)

A little further in argument Puttrel sjt asserted of de Donis that the king "was not intended to be restrained by it".[30] It is noteworthy that while counsel for both the defendants and the plaintiff referred to "intention", counsel for the defendants were referring to "intention" in the context of the mischief rule : an attempt to infer parliament's intention vis a vis the king was made by reference to the wrong to be corrected. On the other hand, counsel for the plaintiff argued from examples of uncertain authority ("the sages of the law") to assert not the intent of the legislature to rectify the existing wrong, but the intent not to restrain the king in the absence of express words.

Counsel for the plaintiff relied on a line of argument that stretched back 250 years to Courtenay : the immunity of the king's special position (here left vague) from the operation of general statutes. Defence counsel, concerned with inferences to be drawn from the "mischief" rectified by a statute, were arguably in the mainstream of thought flowing from the Henrician revolution regarding the king-in-

29. 1 Plo. 239-240; 75 E.R. 365-366. See Street Governmental Liability pp.144-145 and "Effect of Statutes" pp.361-363 for an original analysis of the impact of this claim: see infra f.n.53.
30. 1 Plo. 240; 75 E.R. 366, incorrectly attributed by Street,"Effect of Statutes" p.361 n.29 to p.236 of Plowden.

parliament. St German, the perhaps unwitting stategist of parliamentary power, had written in 1528, the year before the Reformation Parliament met, that "bad" law "muste be broken by parliamente."[30A]

Medieval theory was argued in Willion as to what usual parliamentary practice was when a restraining act was intended to bind the king, but examples of legislation from the fifteenth century[31] indicate that the practice was to statutorily preserve the king's prerogatives from the effect of a statute, not to assume the king's general immunity.

Serjeant Bendloe illustrated the plaintiff's argument with an authoritative reference to Frowick's assertion in Stonor's case about the king not being bound by Quia Emptores. However, as indicated previously[32], in that action in Common Pleas, Frowick was at that time only a serjeant, not a judge; no decision of the court was reported; the comments concerned the quite different statutory style and provisions of Quia Emptores; and Frowick's comments were the purest dicta as he was not arguing that point, and was appearing against the king's interests. But that was only one more of the blurred antecedents associated with this, an argument of far reaching consequences.

The second string to the argument, that the king's assent to an act was his assent only to a law amongst his

30A. C. St German Doctor and Student in (1974) 91 S.S. St German's Doctor and Student (eds) T.F.T. Plucknett and J.L. Barton, p.116.
31. Ch.2 f.nn.6, 7 and 205.
32. Ch.2 f.n.221.

subjects was based in the medieval doctrine, as outlined in chapter one, that statutes were to be construed as though royal grants, always in the king's favour. However, this line of thought was rapidly aging. Henry VIII had ruled as "the king-in-parliament", and his revolutionary success had been a product of partnership with the legislature.[33] The bench had apparently already accepted the idea of a certain co-equality amongst the makers of an act, and a consequent privity to its effect.[34]

It should be pointed out immediately that the argument for the plaintiff that the king was not bound by the statute de Donis failed before the three man bench by two judgments to one. The sole decision favourable to the plaintiff was

33. G.R. Elton provided evidence that Henry's personal estimation of his importance in the order of things mellowed over the years, but from political opportunism. In 1542 he made his famous assertion that "we be informed by our judges that we at no time stand so highly in our estate royal as in the time of Parliament, wherein we as head and you as members are conjoined and knit together into one body politic." Henry had, on the other hand, told the Irish in 1520 that "of our absolute power we be above the laws...": "The Body of the Whole Realm" in G.R. Elton Studies in Tudor and Stuart Politics and Government vol.2, 1974, p.32. This change is no more than a reflection of the desire of governments in the common law world to be thought of as governed by the law and representative opinion. The reality, despite this laudable intent, will often consist of selective departures by government from adherence to the rule of law, culminating in the modern doctrine that in respect of general statutes it is the law that the government is presumed not bound. See infra f.n.70 for an Elizabethan example of good intent.

34. Supra f.n.7, and see Dunham "Tudor Paradox" pp.34-35.

that of Weston J, the most junior of the judges, who had enjoyed a meteoric rise as Mary's Solicitor General in 1557, been appointed a serjeant in the first months of the new reign (January, 1559) and queen's serjeant a month later, a success crowned by being named a judge of Common Pleas in October of the same year. On the relevant aspect of his judgment Weston J opened argument from premises of the king's being to some extent outside the working of the law:

> "For inasmuch as all justice, tranquillity, and repose is derived from the King, as the fountain thereof, the law shows him special favour in all his business and things, as being the cause and origin thereof."35

Weston J was combining the broadest, and vaguest, notions of the prerogative with the old medieval concept of the king being specially favoured in all his dealings.[36] It achieved its apotheosis near the conclusion of Weston J's judgment when he said, "but as to the King, nothing shall

35. 1 Plo. 242-243; 75 E.R. 370. These sentiments are in accord with William Stanford's words in An Exposition on the Royal Prerogative, written in 1548, where he described the king as "the preserver,nourisher and defender of all the people, being the rest of the same body... For which cause the laws do attribute unto him all honour, dignity, prerogative and preeminence, which prerogative doth not only extend to his own person but also to all other his possessions, goods and chattels". Cited in G.R.Elton The Tudor Constitution 1962, p.18. Stanford [Staunford, Staundford, Stamford] was a justice in Common Pleas from 1554 until his death in 1558. The Prerogative was, however, not published until 1567. In the Tottel edition of that year, at f.22r Stanford had "no little marvel" that in 1457 a court had appeared to find the king bound by a chapter of the Statute of Westminster I (1275) and treat him as a common person "since he is not named in the said statute."

36. Arising, as a matter of theory, from his perpetual infancy : see ch.1 f.nn.52 et seq.

ever be taken by equity against him in the construction of a statute."[37] This statement appears to have been an essay in relating the medieval lore, and strictness in the construing of statutes[37A], to the new doctrines of equitable interpretation of legislation which evolved in the wake of the Reformation Parliament.

This attempt to elevate the king above the then current notions of a statute's equity was as fundamentally dated and lacking in perception of the inter-relationship of legal and constitutional elements as the main thrust of Weston J's judgment, which was that the king had his prerogative and exemptions in each of the three components of the law : common law; customs; and statutes.[38] At common law the king had the great advantage that time did not run against him.[39] Further, citing Eyre's case, amongst others, no custom could restrain the liberty of the king, "and so cannot any statutes which don't make mention of the King in express terms. But yet the King, though not named in statutes, shall take advantage of them as another shall do ...". The final phrase in this quote would at least indicate that although Weston J thought the king could take benefit where he was not restrained, the benefit was only such "advantage ... as another" might have, that is to say that the king took his benefit as circumscribed by the statute.[40]

37. 1 Plo. 244; 75 E.R. 373.
37A. See ch.1 f.n.97.
38. 1 Plo. 243; 75 E.R. 370.
39. See ch.2 f.nn. 67 et seq.
40. 1 Plo. 243; 75 E.R. 372.

The key to Weston J's exposition was the king's "liberty". The examples on which the judgment rested[41] are mostly sunk in medieval obscurity, but can be explained on the theory of the preservation of the king's categorised prerogatives being immune from general statutes. Weston J built on these cases to erect an edifice of the king's general liberty from restraining statutes. There was no apparent recognition that all but the simplest declaratory statutes were altering and adjusting relationships within the community: some universal element of restraint was inevitable if legislation was to achieve its community-wide purpose.

The second judgment, that of Anthony Brown J (a catholic, now a puisne judge after having been Mary's chief justice in Common Pleas in 1558), was an elegant exercise in the studied and logical destruction of Weston J's exposition on the king's unrestrained liberty. The major premises from which Anthony Brown J worked may be set out briefly:

(1) "For the person of the King is not to be respected in gifts of land, but the quality of the estate is to be considered."42

(2) "Then as to the statute [de Donis], it was intended to redress a mischief and a grievance at the common law."43

41. 1 Plo. 243-244; 75 E.R. 372-373.
42. 1 Plo. 245; 75 E.R. 375.
43. Ibid.

(3) "And if the land had been given to the King and to the heirs of his body, before the statute [de Donis] he could not have aliened in fee before issue had, for such alienation would have been a wrong in another person, and so should it have been in the King, if it were adjudged an alienation in fee, and therefore he could not do it, for the King cannot do any wrong, nor will his prerogative be any warrant to him to do an injury to another. And the estate which the King had would not lawfully suffer such an alienation, for his estate was not large nor full enough to permit it, and his prerogative could not alter his estate, nor make it greater than the donor gave it to him."44

(4) "...sometimes it is not right but wrong to do that which the common law suffers to be done, or for which the common law has not provided a remedy. So was the alienation of the donee after issue had, before the Statute de Donis Conditionalibus, a great wrong, although the common law permitted it to be done."45

Anthony Brown J drew the conclusion:

"And he that will maintain that the King is in a degree to make such alienation, must at the same time maintain that the King may do wrong, and that the law suffers him to do wrong, which none can maintain; and it is a difficult argument to prove that a statute, which restrains men generally from doing wrong, leaves the King at liberty to do wrong."46

He followed this immediately with an attack on the necessity of a specific reference to the king in a statute:

"And as to what has been said, that the King shall not be restrained by the Act, unless he is specifically named in the Act, sir, if I should be inclined to admit the law to be so, yet here he is named, for the Act says, <u>wherefore the lord the King perceiving how necessary and useful it is to provide a remedy in the cases aforesaid, hath ordained that the will of the giver, etc. shall from henceforth be observed:</u> so that the King is named, and effectually

44. 1 Plo. 246; 75 E.R. 377. This passage puts in proper context the maxim that the king can do no wrong.
45. 1 Plo. 247; 75 E.R. 378.
46. 1 Plo. 248; 75 E.R. 380. These are the words quoted by Windeyer J in his dissent in <u>Downs</u> v. <u>Williams</u> (1971) 126 C.L.R. 61 at p.71, and quoted in part by Dickson J in <u>Eldorado</u> ch.2 f.n.88, (1983) 4 D.L.R. (4th) 193 at p.199.

> named as one that perceived the mischief, and saw that it was necessary and profitable to provide a remedy, and therefore he ordained a remedy; and when he ordained a remedy for the mischief, it is not to be presumed that he intended to be at liberty to do the mischief. Wherefore the King is named in the Act, and so named that every one may gather from thence that he was content to be bound, and that he is bound as another is." (emphasis in original)

Such an exposition relied on a contemporaneous understanding of statute making, rather than that which applied at the time of de Donis' enactment, but such an approach accords with both Tudor and modern thinking on statutory interpretation.

The final judgment was rendered by Dyer CJ, appointed king's serjeant in 1552, judge in Common Pleas in 1557, and chief justice from 1559. He examined at length the mischief which had prompted the statute.[47] Saying that the words used by "the makers of the Act ... have in them a kind of vehemence purporting great necessity of a variation", Dyer CJ launched into the most potent general theory expounded to date on why the king was bound by a statute such as de Donis:

> "For that which is necessary and useful to be reformed requires to be reformed in all, and not in part only, and the rest to be left unreformed, and therefore for the full and perfect reformation of this abuse, viz. as well in the King as in others, the Act has ordained that the will of the giver ... shall from henceforth be observed. So that the observance of the will of the donor is become the reformation of all that was amiss before, and the will of

47. 1 Plo. 250; 75 E.R. 383.

the donor is the effect of the statute."[48] (emphasis in original)

The Chief Justice conceded that "the King shall not be restrained by general words, without express restraint in the Act ...". But he was bound by de Donis, for its object was restitution, "and in restitutions the King has no favour, nor has his prerogative any exemption, but the party restored is favoured."[49]

The peroration of the judgment was a satisfying synthesis of his own and Anthony Brown J's leading points:

48. 1 Plo. 250; 75 E.R. 384. The words "therefore for the full and perfect reformation of this abuse ..." seemed to carry a liturgical tone (see the Prayer of Consecration in the Anglican Communion, Prayer Books of 1552 and 1559, "a full, perfect, and sufficient sacrifice ...". The words are not biblical, but Dyer CJ adopted Aquinas on the wrongfulness of suicide in Hales v. Petit (1562) 1 Plo. 253; 75 E.R. 387 (R.O'Sullivan The Spirit of the Common Law (ed.) B.A. Wortley, 1965, p.50). One is drawn to the possibility that in this period, aware of civil and canon law, Dyer CJ may have returned to Aquinas. However, the Summa Theologiae does not provide a decisive statement, rather being content with an explanation that a ruler should be directed by his laws, even though they cannot be enforced against him (Summa XXVIII, 1a, 2ae, Q96, A5). Aquinas was more outspoken against dispensations by the ruler from the application of laws (Summa XXVIII, 1a, 2ae, Q97, A4). This concern with the potential inequity and injustice in the dispensing power was also reflected in Tyndale's The Obedience of a Christian Man published in 1528, when he wrote, "As God maketh the King head over his realm, even so giveth he him commandment to execute the laws upon all men indifferently. For the law is God's, and not the King's. The King is but a servant, to execute the Law of God, and not to rule after his own imagination." Quoted by C. Cross in "Churchmen and the Royal Supremacy" in F.Heal and R.O'Day (eds) Church and Society in England : Henry VIII to James I 1977, p.16. It must be conceded that at the time of his writing Tyndale was not an influential figure at court, and was subsequently burnt as a heretic at Antwerp.

49. 1 Plo. 251-252; 75 E.R. 385-386.

> "For he that will maintain it to be reasonable that the King being donee shall be exempted, and that the makers of the Act did not intend to bind him, undertakes to prove that the makers of the Act thought it reasonable to suffer the King to violate the good intent of him that gave him the land, and to break his will, and to exceed the measure limited to him, and so to do an injury. And this cannot be taken to be meant to reform the abuse in all, viz. as well in the King as in others."[50]

The Court of Common Pleas had asserted resoundingly, both in its voting and reasoning, that the king was bound by the statute de Donis, thus moving in style from the corporate cohesion evidenced in medieval "common erudition". The suggestion from Fitzherbert J earlier in the century in his Natura Brevium, and cited by Serjeant Puttrel for the plaintiff[51], that the king was not bound by this statute "but that he is in like case as he was before the statute", had been decisively overthrown.

Willion v. Berkley has been the subject of such close attention for two principal reasons: its illustration of Tudor statutory construction and concepts in the context of the Crown and statutes; and its extraordinary passage in the modern common law.

This second point may be illuminated by quoting Baker on the Tudor and Stuart periods as the Dark Age of English legal history. He wrote:

50. 1 Plo. 252; 75 E.R. 386.
51. 1 Plo. 240; 75 E.R. 367, citing F.N.B., 1534, p.217C; see Fitzherbert Natura Brevium 1794 ed. p.235.

> "It is always difficult to resist the temptation merely to set out how the story unfolded itself, as if it were all preordained. The losing arguments are soon forgotten, because in law they have been shown to be false."[52]

But in the nineteenth century it was the argument of unsuccessful counsel, not even relied on by Weston J dissenting, that was taken up, to the effect that "it is inferred prima facie that the law made by the crown with the assent of Lords and Commons is made for subjects and not for the crown."[53] The explanation for such a volte-face lies simply in the difficulty of reading the old reports: as suggested in the appendix to Burrows Settlement Cases in 1786, the difficulty in finding the distinction between counsels' arguments and judicial opinions in Plowden's Commentaries could be compared to the search for a needle in a bundle of hay.[54] In any case, as Street has pointed out, counsel argued that the king assented to a bill becoming law among his subjects in the context of the king's assent not meaning to prejudice or bar himself of his liberties or privileges, which is to say that it was his prerogative that was not to be diminished merely by his consent to legislation.

52. J.H. Baker "The Dark Age of English Legal History, 1500-1700" in D. Jenkins (ed.) Legal History Conference, 1972 1975, p.3.
53. A.G v. Donaldson (1842) 10 M.&W. 117 at p.124; 152 E.R. 406 at p.409 per Alderson B, relying on and distorting the extract from losing counsel cited supra f.n.29.
54. The distinction has eluded historians as well as lawyers: see Kantorowicz King's Two Bodies pp.13 and 15.

Willion v. Berkley might be just an example of the damaging misreading of old law reports, but more importantly it may be used as a window into the public law of the sixteenth century. It should be remembered that neither Anthony Brown J, Dyer CJ nor counsel for the defendants (Serjeants Harper, Southcote and Walsh were all judges within half a decade) propounded a general, all embracing theory that the king was bound by all statutes. The propositions were more specific and restricted:

1) The king's prerogative could not, with respect to a statute, prejudice inheritances or the common good;

2) The will of the donor of an entailed estate bound the king, because he, the king, had subjected himself to such will by the authority of parliament (of which he formed part);

3) de Donis righted a wrong, and the king had to comply with the statute, or else he would be doing wrong; and

4) The intent of such reform must be total, and since it cannot be partial, it must embrace the king.

The great hurdle that separates Tudor statutory interpretation, and indeed consitutional theory from modern precepts is captured, if rather overstated in the light of modern scholarship, by von Mehren:

> "English jurisprudence in the Tudor period never accepted the modern theory of law as a conscious product of a sovereign legislature ..."55

The Court of Common Pleas in Willion v. Berkley could accept parliamentary sovereign will binding the monarch in the restriction of the king's receipt of the estate to the terms of the donation, in part spelt out by the statute

55. Von Mehren "Legislation in Tudor England" p.763.

de Donis. However, the change to more modern, embracing attitudes had eventually to be discernible, and as Radin wrote, the "notion that the act of sovereignty is primarily the act of legislation was already growing in 1600".[56] Such a situation would create a new question for the early Stuart period. If, as Coke was to tell James I, the king should not be under man, but under God and the Laws,[57] would "the Laws" include statutes as well as the customary, common law, or would the king, as maker of statutes, be placed beyond the law?

The vagaries of litigation would allow an investigation of some of these issues in the reign of James I : Elizabeth's four decades after Willion v. Berkley produced much inconclusive speculation by lawyers and theorists in this area, but little that was theoretically forward looking

56. M. Radin "Early Statutory Interpretation in England" (1943) 38 N.W.U.L.R. (Ill.L.R.) at p.23. Elton has written more recently that "the evidence has been accumulating and continues to accumulate, that the sixteenth century had a clear understanding of the notion of legislative sovereignty ..." "Tudor Government: The Points of Contact - Parliament" in G.R. Elton Studies in Tudor and Stuart Politics and Government 1983, vol. 3 p.5. This discussion should be considered in the light of materials at f.nn. ¶A-¶E, 26 and 30A supra. The question becomes who in the sixteenth century had a clear understanding of legislative sovereignty. Not all lawyers were so quick in their perception and the conclusions that might follow from it as politicians, parliamentarians and polemicists. It is probably also unwise to look at the sixteenth century in this matter as a continuum. Elizabeth's policy was by no means congruent with her father's, and if the notion of legislative sovereignty were growing by 1600, it would be in reaction, and however discreetly expressed, in opposition to royal policy.

57. Case of Prohibitions del Roy (1607) 12 Co. Rep. 63 at p.65; 77 E.R. 1342 at p.1343, citing Bracton: see ch.1 f.n.9.

or definitive, and there is some evidence that this fluidity suited Elizabeth's government better than clear statements of judicial principle.

In 1563 plague prevented a meeting in London of the chief justices and chief baron at which sheriffs were customarily selected. Sheriffs were in fact nominated, presumably by royal authority, and Dyer reported "it was holden that the Queen by her prerogative may make a sheriff without such election, notwithstanding any statute to the contrary."[58]

At about this time Sir Thomas Smith wrote in De Republica Anglorum[59] of parliament composed of the prince, nobility and commons, and statutes as "the Princes and whole realme's deede: whereupon justlie no man can

58. 2 Dyer 225B; 75 E.R. 498 at p.499. The statute was 14 Ed.III st. 1 c.7 (1340). The process of "pricking sheriffs" is described briefly by Maitland Constitutional History p.485. The list of candidates for office was meant to be drawn up by the Chancellor, Treasurer, and three judicial chiefs. This is in the mould of Sheriffs : ch.2 f.n.183, and is an example of the power of dispensing with statutes, described as "that fair jewel of the prerogative" in Churchill "Defence" p.412. G.R. Elton "The Rule of Law in Sixteenth-Century England" in Studies in Tudor and Stuart Politics and Government vol.1, 1974, p.276 trenchantly attacked Churchill's sources and findings. Elton wrote in defence of the dispensing power, reflecting on its utilitarian necessity to the Tudors as he estimated it. C.C.Weston and J.R. Greenberg Subjects and Sovereigns: The Grand Controversy over Legal Sovereignty in Stuart England 1981, pp.18-21 wrote at length on the accepted utility of royal dispensing with and particularly suspending of statutes. This debate will be examined further in chapter 6.

59. De Republica Anglorum was not printed until 1583, six years after Smith's death: D.R. Coquillette "The English Civilian Writers" (1981) 61 Boston U.L.R. 49.

complaine, but must accommodate himselfe to finde it good and obey it". He continued:

> "For everie Englishman is entended to bee there present, either in person or by procuration and attornies, of what preheminence, state, dignitie or qualitie soever he be, from the Prince (be he King or Queen) to the lowest person of Englande. And the consent of the Parliament is to be taken to be everie mans consent."60

Smith wrote with directness and lucidity about parliament, alluding to its sovereignty in terms uncluttered by the medieval search for security in adherence to God's law. None of Smith's predecessors in the field of political commentary, and few of his successors for many years would be able to match the pace of events in the evolution of parliament's powers.

Ponet [Poynet], published in protestant Strasbourg in 1556 during the reign of the catholic Mary, found it necessary that kings "be bounden to be subjecte and obedient" to God's laws and men's just ordinances. The example was from the criminal law: kings were not to kill subjects without law. Ponet concluded on the issue:

> "... kinges and princes ought, both by Goddes lawe, the lawe of nature, mannes lawes, and good reason, to be obedient and subjecte to the positive lawes of their countrey, and maie not breake them, and that they be not exempt from them, nor maie dispense with them, onless the makers of the lawes give them expresse autoritie so to doo."61

Charles Merbury published his Royall Monarchie in 1581, adverting at a time of popish peril to the danger of the Prince being subject to any power at home or abroad. Noting

60. De Republica Anglorum L. Alston (ed.), 1906, pp.48-49.
61. J. Ponet Politike Power 1556, folios cvi and cviii (unnumbered).

that some of his contemporaries maintained that the Prince should be subject to the "States and Peares of his Realme", Merbury said that this "Opinion (if it be not well tempered, and conveniently limited) was most prejudiciall unto th'estate of a Monarchie: perverting and converting the same into a meere Aristocratie"[62], a prescient view in the light of history after 1689. However, Merbury immediately added that the English Prince was subject to both God's and man's laws, effectively agreeing with Ponet a quarter century earlier. By "man's laws" Merbury presumably meant those laws affecting, rather than made by man. This would conform to the dated proposition that the Prince made the laws, parliament merely assisting.

Hesitancy between personal deference to Elizabeth and pride in the English belief in a "politic" monarchy showed itself again in the year of anxiety before the Armada sailed in Richard Crompton's A Declaration of the Ende of Traytors where he wrote of the coronation oath "and her Majestie is also well pleased, (albeit she be above her lawes in some respect) yet to be ordered and yielde to the same ..."[63]

In the decade after Crompton had been writing, late in Elizabeth's reign Richard Hooker wrote in his Ecclesiastical Polity", ... so is the power of the King over all and in all limited, that unto all his proceedings the law itself is a rule." Hooker was specific in his theory, where Ponet,

62. C. Merbury Royall Monarchie 1581, p.43.
63. R. Crompton A Declaration of the Ende of Traytors 1587, folio f1.

Merbury and Crompton had generalized or sounded wistful and had reflected Elizabeth's change of stance from that of her father. By comparison, Hooker bubbled with confidence: "... the axioms of our regal government are these: 'Lex facit regem' : the king's grant of any favour made contrary to the law is void : 'Rex nihil potest nisi quod iure potest'..."[64]

Contemporaneously with Smith, that is to say early in Elizabeth's reign, the young Thomas Egerton, later Lord Chancellor Ellesmere, was writing in his Discourse, a legal text rather than a political tract:

> "... it is easye to be knowne who shalbe bounden by an acte of Parlement & who not, for those whose presence is there requysyte are bounden, exceptiinge alwaies our soveraigne lorde the kynge, for he shall not be bounden onlesse he be named, but he shall take advantage of an

64. Dunham "Tudor Paradox" p.53.

estaut thoughe he be not named."[65]

Egerton annotated the fly leaf of his Fitzherbert's Natura Brevium, under the heading "Quant roy sera lye per statute [when the king will be bound by statute]" with similar sentiments.[66] The commentary opens with the concession that the king is bound by de Donis ("Le seigniour Berclayes case"), but for the rest is an assertion, based in cases largely relied on by plaintiff's counsel and Weston J[67] in Willion v. Berkley, that the king is not

65. Thorne Discourse p.110. Thorne, editing in 1942, suggested Egerton's authorship, and dated the work to pre-1571, and possibly pre-1567. Radin "Early Statutory Interpretation" writing in 1943 doubted Thorne's claim for Egerton (at p.17) and suggested (at p.18) that "the substance of the Discourse would indicate ... a composition under James rather than under Elizabeth." T.F.T. Plucknett in "Ellesmere on Statutes" (1944) 60 L.Q.R. 242 was certain of Egerton's claim, and paid tribute to Egerton's pioneering work on the theory of statutory interpretation. L.A. Knafla in his study of Egerton/Ellesmere, Law and Politics in Jacobean England, 1977 established the scholarly weight in favour of Egerton's authorship, and set the Discourse's composition at 1565 (at p.46). J.H. Baker has, however, privately indicated his doubts to the writer regarding Egerton's writing of the Discourse. Plucknett (supra p.245 n.9) noted that Plowden's Commentaries were not printed until 1571. Egerton would have been too young to be part of the circle of senior lawyers that saw the Commentaries circulate in manuscript, so the omission in the Discourse of reference to Willion v. Berkley is not necessarily surprising, and indeed points to an earlier, rather than later date of authorship. The outstanding Abridgement of the period was Brooke's, but he had died in 1558, so that Willion fell between his death and publication of the Abridgement in 1573, and was not included.

66. Thorne Discourse p.179. It seems accepted that this was Egerton's inscription, not of Fitzherbert's authorship as Street assumed : Governmental Liability p.144 n.1 and "Effect of Statutes" p.361.

67. See e.g. supra f.n.41.

bound by statutes. In short, the fly leaf is cluttered with a melange of empirical observations, set down at random, containing as sole common thread the king's liberty from individual general statutes. The only attempt at induced theory of general application emerges as a statement to the same effect as that quoted above in the Discourse.[68]

The backward looking lack of logical scheme, but unswerving devotion to the royal cause, mark Egerton as a royal official by disposition, and signpost a clear dissimilarity with the technique, if not the sentiments of the civilian legal commentaries exemplified by Bodin's work on royal sovereignty, first published in 1576, and in English in 1606.[69] Egerton's attitude revealed,

68. Supra f.n.65.
69. Jean Bodin The Six Books of the Commonwealth. Machiavelli's Prince, written sixty years earlier, doubtless influenced Bodin and some English writers until 1640. Bodin distanced his thinking from Machiavelli's : F.J.C. Hearnshaw "Bodin and the Genesis of the Doctrine of Sovereignty" in R.W. Seton-Watson (ed.) Tudor Studies 1924, p.109. Machiavelli had little to say on the issue in question save for a positivist summation : "In the actions of ... princes where there is no court of appeal, one judges by the result": The Prince ch. 18 "How Princes should honour their word". A. Esmein "Princeps legibus solutus est" in P. Vinogradoff (ed.) Essays in Legal History 1913 established (pp.210-211) that in the last decade of the sixteenth century Charondas le Caron challenged the breadth of claims for the king's elevation above the law. Le Caron was not alone amongst the civilians, Juan de Mariana asserting in 1599 that the king was never above the law, although his more famous countryman, Suarez, was to publish in his massive The Laws and God the Lawgiver in 1612 the statement, "The prince must be legibus solutus, free from the coercive power of the positive law" : Q. Skinner The Foundations of Modern Political Thought 1978, vol. II, pp.346-7 and 183-4 respectively. Of civilian writers who doubted the supremacy of the Prince above the law, perhaps the most influential was Duplessis-Mornay, one of the most trusted advisers to Henri IV of France : see H.J. Laski

69. continued.

(ed.) A Defence of Liberty against Tyrants 1924, p.59 (a translation with introduction of Vindiciae Contra Tyrannos by Junius Brutus, alias P. Duplessis-Mornay written about 1575, and translated into French and English in 1581). The relevant chapter, "Whether kings be above the law" is to be found at pp. 144-148. It is not apparent to what extent, if any, the common lawyers read the civilian writers, or noted events in France, but the curbing of all the Paris Parlement's effective powers of lawmaking in favour of unfettered royal proclamations was overt : see for example the addresses by French Chancellor L'Hopital in 1561 to the Parlement (Skinner supra pp.256-7) delivered after argument in Willion v. Berkley but before judgment. Drawing an even longer bow, it is worth noting the impact of the French civilians on historiography : see J.H. Franklin Jean Bodin and the Sixteenth Century Revolution in the Methodology of Law and History 1963. Given that today the common law is in part based in historical approach, it is noteworthy that the subject of Crown power, fiercely debated in the reigns of the first, second and fourth Stuart kings, was analysed both by reference to classical authors and the Year Books, the latter having been originally written as precedents for pleading. The civilians were, if nothing else, creating a climate for change in legal technique. The arguments over the extent, if any, of the impact of continental jurisprudence on Tudor constitutional law have been set out in D.R. Kelley "History, English Law and the Renaissance" (1974) 65 Past and Present p.24, C.Brooks and K. Sharpe in reply (1976) 72 Past and Present p.133 and D.R. Kelley rebutting at p.143. Whatever the impact of French thought, public political utterances from that nation are noteworthy. In 1586 the presiding officer in the Paris Parlement, de Harlay, addressed Henri IV: "Thus you must, if you wish to be regarded as a just and legitimate king, observe the laws of the State and of the kingdom. You could not disregard them without calling in question your own power and sovereignty." Henri IV said on another occasion: "The first rule of the king is to obey all the rules." Cited by A. Tunc "The Royal Will and the Rule of Law : A Survey of French Constitutionalism under the Ancien Regime" in A.E. Sutherland (ed.) Government under Law 1955, p.407.

however, a seed bed fertile to concepts of powerful, or indeed absolute monarchy.

In 1563 Sir William Cecil, effectively Elizabeth's chief minister for the bulk of her reign, had a bill drafted for an act to regulate the Privy Council in the event of the queen's death, in which event the Crown would in effect be in commission. The bill was not enacted, but Dunham thought it recorded Cecil's and other councillors' constitutional ideas. The bill provided that Privy Councillors were to govern "as they have usually done in the lives of the Kings or Queens of the realm, so as no act nor order by them shall be contrary or repugnant to the laws, statutes, and customs of this realm."[70]

Events surrounding the abuse of a statute passed in 1571 were to make these sentiments so much pious cant. Many of the leading men of the realm lined up to effectively expropriate church land in the last thirty years of Elizabeth's reign, in defiance of the act 13 Eliz. I c.10. As will be recounted in chapters 4 and 5, they relied on an unspoken theory that the queen was not bound by the statute. Nonetheless, it must be said that the fine sentiments that spanned the reign from William Cecil to Richard Hooker are noteworthy as expressions of a preferred position, and one not couched in Utopian terms. This perhaps makes the institutional lawbreaking with respect to church lands all the less palatable.

70. Dunham "Tudor Paradox" p.48.

For all that Willion v. Berkley has been subsequently misunderstood, the quality of Plowden's Commentaries was far superior to any others until Coke's discursive Reports appeared. Consequently ascertaining the meaning of many Elizabethan and Jacobean decisions is a labour of both forensic aptitude and guesswork.

Keilwey (as continued by Bendloe) reported a case in Common Pleas in 1563 involving a Quare Impedit complicated by Henrician legislation. Walsh J (successful counsel in Willion v. Berkley) made a point to the effect that the title received by the king, if affected by the statute in question, was not altered by virtue of the king's succession to the title.[71] This accords with the general tenor of majority opinion in Willion v. Berkley,[72] especially Walsh sjt and Anthony Brown J. The theoretical basis of this decision in the medieval doctrine of the sanctity of property as a limitation on the prerogative was again illustrated by Harper J in Humphry Nichols v. John Nichols.[73]

The remaining reports of litigation from Elizabeth's reign continue with sporadic, piecemeal and inconsistent references to the relationship of statutes to the monarch. At the conclusion of a case in 1566 dealing with whether general words in the king's patents should have special intendment, Chief Justice Dyer noted that "An act of

71. Beaupere v. Bishop of Norwich Keilwey 211; 72 E.R. 391 at p.392.
72. Supra f.nn.28 and 42.
73. (1574) 2 Plo. 477; 75 E.R. 711 at p.712.

parliament is a judgment, and binds the king".[74] In 1575 in Ludford v. Gretton the justices of Queen's Bench impliedly accepted that an act might be intended to reform a mischief pertaining to the king as in any other.[75]

The reading in the Middle Temple on the Statute of Westminster I in 1578-9 by James Morrice[76] is of particular interest in being the first recorded detailed analysis of the relationship of Crown to statutes outside litigation in Westminster Hall. Placed chronologically amongst a plethora of political writers whose generalisations did not match the sophisticated subtlety of Elizabethan power[77], Morrice wrestled with the issue over six folios.[78] Only Egerton had previously raised the topic outside litigation in legal, as opposed to political theory, but his discussion had been cursory at best.[79]

Under the general heading (in a footnote) "Whether ye king be bound bye law and how farr" Morrice essayed:

> "... to say that the Kynge is so a Superior over his Lawes and Actes of Parlyament (bycawse he hath powre to make them) as that he is not bounde to governe by the same, but as his Will and pleasure, is an Opinyon altogeather repugnant to the wise and Politicke State of guvernment established within this Realme which

74. Anon 3 Dyer 268B at f.269A; 73 E.R. 596 at p.597.
75. 2 Plo. 490 at p.492; 75 E.R. 730 at p.733.
76. J. Morrice Reading of the Middle Temple c.21 Eliz.R. British Museum, Additional Manuscript 36,081 ff.229-275, printed as an appendix to E.T. Lampson The Royal Prerogative 1485-1604 1938 unpublished Harvard University PhD thesis.
77. See f.nn.61-64 supra.
78. Morrice Reading in Middle Temple ff 243B-249B; Lampson Appendix pp.35-46.
79. See f.nn.65 and 68 supra.

> placeth the Royall Majestie of the Kynge as the Lewetenant of Almyghtie God..."[80]

A reference to the coronation oath binding the king to uphold the law was matched by the unbinding effect of the royal prerogative.[81] Under the more specific heading "When ye king shall be said to be bound by a stat." Morrice continued:

> "It is a generall Principle and Maxime in the Lawe that the Kynge is not bounde or restrayned by any Acte of Parlyament creatinge any newe Lawe, or changing the common Lawe or custome of the Realme, as concernynge his Rightes Inheritaunces or any other thinge whatsoever appropriate to his Majestie except he be eyther expresly named therein or secreatly included in the meanynge of the same".[82]

This has the superficial attraction of apparent dogmatism in favour of general Crown immunity, but it is of course hedged about with two sorts of qualifications already alluded to in Willion v. Berkley: the king's general immunity only extends to acts "concerning his rights, inheritances or any other thing whatsoever appropriate to his Majesty ...", and secondly the king may be bound by such legislation if the inference of such intent is sufficiently clear.

In regard to this second point, Morrice was quick to see the effect of the ruling in Willion v. Berkley that the king was named and hence bound, because amongst those named as enacting legislation.[83]

80. Morrice Reading in Middle Temple ff. 243B-244A; Lampson Appendix p.35.
81. Ibid f.244A; p.36.
82. Ibid f.244B; pp.36-37.
83. See Anthony Brown J in text after f.n.46 supra.

> "That is therefore noe good argument used in Lord Barklies case ... for the same Reason shoulde the Kynge be bounde and concluded by every Acte of Parlyament, which is mere contrary unto Lawe."84

As it happened, the Elizabethan government had already achieved a solution to this problem, by devising a "short form" enacting clause that referred only to parliament and not its individual estates, of which the monarch was one.[85] The "short form" was in use well before Morrice delivered his reading, being seen in 13 Eliz. I c.12 (1571) and 18 Eliz.I c.11.(1576), referring merely to two statutes cited in this thesis.

Morrice went on to concede that the king was bound by references that clearly implied that the king as law giver was to act in accordance with the statute : Magna Carta c.29 contained the usage "we" and so intended the king.[86] Referring to the Case of Additions[87] Morrice conflated the concept of the king's "majesty", i.e. governmental powers (indictments requiring additions were at the suit of the king), with that of benefits unremoveable from subjects except by parliament to find the necessary consequence of the king being bound.[88]

Although Morrice had attacked the logical consequence

84. Morrice Reading in Middle Temple f.245A; Lampson Appendix pp.37-38.
85. See f.nn.158-162 infra.
86. Morrice Reading in Middle Temple ff.245A-B; Lampson Appendix p.38.
87. See ch.2 f.n.153.
88. Morrice Reading in Middle Temple f.245B; Lampson Appendix p.39.

of Anthony Brown J's "catch all" technique in Willion v. Berkley, Morrice relied on that case as an illustration for the claim that:

> "...by some actes of parliament his Majestie is bounde and restrayned althoughe he be neyther expresly named or by the Matter thereof especially entended. By others agayne beinge precysely named he is not thereby restrayned but at his pryncly will and pleasure, his Royall Prerogatyve surmounting the force of the Lawe. The Kynge is then said bounde and Subiect unto Lawe even as every other person within his Realme when as comon Right and Equytie is by Acte of Parlyament restored and wronge and Iniurye by comon error crept in for Lawe abolyshed."[89]

The reading then focussed on the issue of the king's dispensing power.[90] Noting the restrictions on the pardoning power expressed in the Statute of Northampton (1328)[91] Morrice conceded that the king could "Lycence the things that his Majestie is eyther particularly or his Subjectes generally forbydden by the Lawe...".[92] While accepting that the pardoning power which reposed in the king's "Regalitie" over-rode the restriction in the statute on pardoning homicides other than for "Defence and mysfortune", Morrice cautioned careful use of the pardoning power.[93]

After a lengthy footnote reference to the Case of Sheriffs[94] Morrice proceeded to worry at the balance required between private and public interest in the exercise

89. Ibid ff.246B-247A; p.41.
90. "The Kinges powre to dispence with lawes & of ye clause of non obstante."
91. See ch.1 f.nn 83 and 84.
92. Morrice Reading in Middle Temple f.247B; Lampson Appendix p.42.
93. Ibid ff. 247B-248A; p.43.
94. Ibid f.248A; p.44.

of the dispensing power. This discussion preceded by twenty years the concerns so forcefully expressed in parliament and elsewhere at the conclusion of Elizabeth's reign regarding the abuse of public power for private gain.[95] What follows is a first addressing of an issue crucial to Elizabethan (and later) government. Indeed, it can be argued that under Elizabeth the Crown becomes for the first time a machine capable of operation by those "on the inside" for private enrichment, without any direct personal involvement by the monarch. To that extent the saga of church property leasing in defiance of Elizabethan statute, to unfold in the next chapter, makes a progression from the personal granting sprees of Henry VI.

Morrice wrote, relying on the words of Seneca to be adopted later as the summation of medieval public law:

> "But syns we fynd the Kynge at so greate Libertie in the principall cawses concernyng the Common wealth and agayne so absolutely restrayned wheare any particular benefite is given to the Subiecte shall we therefore thinke that the comon Lawe of the Realme hath lesse regarde to the publick estate then to the private profitt of some persons. Nay, but rather accordinge to the sayinge of Seneca, Ad Reges Potestas omnium pertinet ad singulos Proprietas [To kings belongs power over all men, to subjects ownership], The Lawe hath rightly distinguyshed betwene the souereigne Rule and Government of the Kynge, and the Rightes Liberties and Inheritances of the Subiecte. But althoughe the Prynce be not as aforesaid bounde or restrayned by many Actes of Parlyament in which he is not expressly named yet hath his Majestie always this Prerogatyue to be included and comprehended (although not named) within the meanyinge and entent of every beneficiall Lawe ... [96] otherwise his Majestie should be in wourse case then his Subiectes which may not be admitted."[97]

95. Reflected in Elizabeth's reply to the criticisms, in her Golden Speech: see ch.4 f.n. 82.
96. Morrice Reading in Middle Temple ff.248B-249A; Lampson Appendix p.45.
97. Ibid f.249A; p.46.

So this first discussion of private profit and public power, from which no definitive, prescriptive analysis emerged by which a general statute could be determined to bind the king or otherwise, finished with Morrice's only unconditional statement on the Crown and statutes: the king can take advantage of general, beneficial acts.

Elton, alone among historians the writer has encountered, has perceived the importance of the general constitutional issue of whether statutes bound the Crown. Having referred to Willion v. Berkley, Elton raised a manuscript account[98] of serjeant Francis Gawdy's activities in Common Pleas in 1582 in respect of 13 Eliz.I c.12 (1571), "An Act to Reform Certain Disorders Touching the Ministers of the Church."

This act was passed by "Authority of this present Parliament" (the short enacting clause containing no specific reference to the queen)[99] to regulate the type of person who might become a minister of religion, and the mode of appointment to such office. Section 7 provided that if an incumbent were deprived of his benefice, the patron could not present a new incumbent until six months after notice of the deprivation had been given by the

98. G.R. Elton "The English Parliament in the sixteenth century: estates and statutes" in A. Cosgrove and J.I. McGuire (eds) Parliament and Community 1983, Historical Studies XIV pp.88-91, in particular n.68.
99. See text at f.nn.158 et seq. infra. This was the statute arising from Bill B in the Alphabetical Bills of religion: J.E. Neale Elizabeth I and her Parliaments 1559-1581 1953, pp.204 et seq.

Ordinary to the patron. In such a situation, if the notice were not given and the living lapsed for want of presentation, the advowson reverting to the queen, could she present a new incumbent despite the Ordinary's failure to issue a notice?

Gawdy sjt obtained an advisory opinion in Easter Term, 1582 that the queen was bound by this proviso, and notice would have to be given. Later in the same year an actual case was brought which was decided in accordance with this opinion.

The 1571 act made no reference to the queen, but section 6 provided trenchantly "... all Tolerations, Dispensations, Qualifications and Licences whatsoever to be made to the contrary hereof, shall be merely void in Law, as if they never were."[100] Perhaps Common Pleas felt that any allowance made for the queen against the required procedure would offend this provision, but more likely they were following the trail laid by Anthony Brown J and Walsh J in 1562 and 1563 respectively, to the effect that the queen taking an estate did not affect statutory terms regulating that estate.[101]

Against the former speculation it must be noted that serious doubts were expressed late in Elizabeth's reign, by both would be circumscribers and exponents of royal prerogative, as to the capacity of parliament expressly to forbid the sovereign to use the dispensing power.[102] The

100. S.R. vol.4 p.547.
101. See f.nn. 42 and 71 supra.
102. See e.g. text at f.nn.131 and 133 infra.

important precedent up to this point was the Case of Sheriffs, the effect of which was assumed to render inoperative sections of a statute attempting to over-ride the non obstante power.

This otherwise unreported decision of 1582 is probably the reference indicated by Hobart AG in his argument in 1613 in the Magdalen College case where he noted in respect of this act:

> "...when a statute gives anything in a certain form, or annexes anything that restrains or modifies this, in such a case the King will have this in the same form and with the same restrictions as it is limited, the statute 13 El. cap.12 if a person does not adhere to the articles [of religion] he is deprived ipso facto but there is a proviso that the patron receives notice, 22 El. D. In such a case the King will not have any lapse [ie. right to appoint] before notice is given to the patron because if he would take advantage of the statute [ie. get to appoint after an incumbent is dismissed under the statute] he ought to pursue [ie. act in pursuance of or in accordance with] the statute."103

In Agard v. Candish[104] the barons of the Exchequer accepted the argument of Attorney General Popham, and Atkins that a statute of Edward IV which prescribed courts excluding the Exchequer, as the site for certain litigation, did not prevent the Exchequer hearing such a matter, because it was not prohibited by negative words, and furthermore, the queen was involved, and "general words don't bind the King". [It should be noted that a specific prerogative power existed in the right of the king to select the venue for

103. 1 Rolle 155-156; 81 E.R.397.
104. (1583) Savile 134; 123 E.R. 1055. The prerogative referred to here in the text was raised in argument in Magdalen College : ch.5 f.n.61.

litigation involving himself.]

Richard Cavendish presented both the queen and the judges in Common Pleas with a different problem in the Easter term of 1587: how far could the sovereign succeed in ordering subjects, and particularly those she perceived as servants, to break the law, or at least act contrary to rights apparently invested in third parties through force of law.

The judges had appointed someone with the authority to make out writs of supersedeas, when Elizabeth by letters patent commanded they give this (presumably profitable) function to Cavendish. The judges demurred, and more detailed letters patent followed. Still the judges of Common Pleas remained adamant against Cavendish receiving their imprimatur, despite expressing an intention "dutifully & en humble manner obeyer sa Majesty".[105] Elizabeth ordered the Chancellor, the Chief Justice of King's Bench and the Master of the Rolls to enquire why the judges had not complied with her order, and sent her counsel learned in the law to address this ad hoc tribunal.

The judges of Common Pleas admitted that they had not complied with the queen's instructions, but they said:

> "... that is no offence or contempt to her Majesty, because the commandments were against the law of the land, in which case it was said that no one is bound to obey such commandments..."[106]

Anderson, both Chief Justice of Common Pleas and the

105. Cavendish's case (1587) 1 Anderson 152; 123 E.R. 403 at 154; 404.
106. At 155; 405.

reporter of the incident, thought that the queen accepted the view of the judges: he said that at least they heard no more of the matter.

In early 1589 Buckberd [Bugberd] v. The Queen[107] was decided in Queen's Bench, and sealed by discussion "in Serjeants' Inn" the same Term. Yet another Quare Impedit concerning the right of presentation to a church, that of Rettington in Essex, had been decided in the queen's favour. A writ of error was brought questioning whether the queen was entitled to damages in this case. Argument largely revolved upon whether the queen could receive damages under the Statute of Westminster II c.5 for having been hindered in her presentation, when she in fact had rested her claim in her prerogative.

It was agreed that the queen could not receive damages under both the statute and the prerogative, but could she recover damages under one or the other? This question arose in the context of the right of presentation to the advowson passing by the prerogative to the queen. By inference it seemed one claim for damages could arise under the statute for the simple tort of presentation at a time that right vested in the monarch, while another claim under the

107. 1 Leon. 149; 74 E.R. 138, Cro. Eliz. 162; 78 E.R. 420. Leonard dates the case as "36 Eliz" i.e. 1594. This must be a misprint as it lies between cases from 1589, Croke agreed in that date, and Popham, Attorney General in the case, became Chief Justice of Queen's Bench in 1592. The date 1589 is thus to be preferred to 1594 employed by Street Governmental Liability p.154 and "Effect of Statutes" p.375.

prerogative would be for keeping the monarch out of the capacity to present for an extended period.

The importance of the case lies in its canvassing the issue of when and on what terms the monarch could take the benefit of statutes. Wray CJQB said:

> "It is but one statute, and therefore it shall be construed with one construction, and it should be a strange construction, that the King should be within one part of the statute, and out of the other."[108]

The effect of the decision was that as the queen had proceeded under the prerogative and her action did not fall within the terms of the statute, she could not take advantage of the statute's provisions. This was in accord with Frowik sjt's assertion nearly a century before that the king only took the benefit of a statute subject to the conditions set out therein.[108A]

Of equal interest is the appearance, for the first time on this topic, of Edward Coke. Still three years short of becoming Solicitor General, he acted as junior to Attorney General Popham, himself to be elevated in 1592 to Chief Justice of Queen's Bench. The difference in style of the two is an encapsulation of the law on this subject, and is

108. 1 Leon. 150; 74 E.R. 139. See Wray CJQB arguendo ibid, and Cro. Eliz. 162; 78 E.R. 420. See also Boswell's case (1605) 6 Co. Rep. 48B at f.51A; 77 E.R. 326 at p.330 for a general explanation of Buckberd, and Jenk. 281; 145 E.R. 202 at p.203: "The King shall have benefit of any statute although he be not named in it", a distortion based on argument for the Crown, typical of Jenkins.

108A. See ch.2 f.n.222.

illustrative given the impact of these two men on that law's development. Coke argued that the damages sought were in the nature of a penalty and cited authority.[109] He later contended that "where the King presents by lapse he is verus patronus hac vice [true patron for the time being]" and again cited authority.[110] Coke was arguing that the queen stood, in this fact situation, in the position of the advowson holder, who could sue for damages.

Attorney General Popham simply and unsuccessfully asserted that "the words of the statute are general, therefore the queen shall have the benefit of it, and of all statutes made for the benefit of the subjects, the King shall take advantage".[111] From Coke the attempt at measured argument supported by precedent and analogy with the position of a subject : from Popham AG blunt assertion, resting on the "royal mystique" which less often found a place in Coke's arguments in his fifteen years as Solicitor and then Attorney General[112], and against which he contended in his years as judge and commentator.

After conference it was clear that the queen had lost, four judges (including Anderson CJCP and Manwood CB) agreeing with Wray CJQB that the queen could not have damages, and only two judges doubting this result.

109. 1 Leon. 149; 74 E.R. 138.
110. 1 Leon. 149; 74 E.R. 139.
111. 1 Leon. 150; 74 E.R. 139.
112. Exceptions may be found in the ultimate results, if not the caveated layout, of Coke's opinion in the Case of a Fine Levied by the King, see ch.5 f.n.23, which proved so damaging to the main thrust of his work in this area, and in the Case of Non Obstante infra f.n.121. See ch.5 f.nn. 138 et seq.

As these references illustrate, Elizabeth's reign is littered with curial and professional commentary on the relationship of monarch to statutes. On the Crown side, much of this effort was devoted to destroying the simple clarity of majority reasoning in Willion v. Berkley, but Cavendish's case in 1587 raised a broader issue of general modern relevance, the capacity of the sovereign to order breach of the law. Litigation in 1592 showed that the machinery for making the Crown subject to, and comply with the law, was capable of being subverted by the power of the state. The Corsini case is a salutary reminder that the theory of Crown or governmental subservience to the law may have no practical bearing if the functionaries of the state are sufficiently ruthless to quash, sidestep or ignore curial rulings.

In early 1592 Dr. Julius Caesar, judge of the Admiralty Court, and later Master of the Rolls, gave judgment in a case concerning a privateer which in the course of pillaging Spanish shipping had looted property of neutral Italians, who came to court led by Filippo Corsini. Caesar's decision was not as favourable to the neutrals as the government would have liked, so the Privy Council had the Lord Treasurer (Burghley), the Lord Admiral (Howard) and Lord Buckhurst consider the matter. They quashed the Admiralty Court's decision, to the chagrin of Caesar who protested to Burghley:

> "Whensoever your lordship shall be resolved hereafter that any sentence of this court is unfit (for causes in policy and state to your good lordship best known) to be executed, it may please your lordship that the same may be done in court of justice by appeals, to the end that these extraordinary courses contrary to law, be not hereafter an utter overthrow of the whole profession of civil law within this land...."113

Caesar was concerned that political interference would bring the court system and himself as judge into disrepute.

Cavendish and Corsini serve to remind that the discussion by lawyers, whether as commentators, counsel or judges, of abstractions such as the state being under the law, may be swept aside in a moment's political expedience. Willion v. Berkley had for the first time set down clear reasoning on why the Crown was bound by general reforming statutes, but the decision was only of continuing value if, firstly, later courts followed or developed the line of reasoning, and secondly, the state complied with the order of those courts. The issue of statutes and the Crown becomes subsumed at this point into the broader problem of whether state executive authorities will accept the adjudication of the legal machinery, and more specifically, whether they will take the necessary executive steps to enforce

113. Lansdowne MS 140, f.85, cited in K.R. Andrews Elizabethan Privateering 1964, p.27. The writer wishes to thank Dr. P. O'Malley of La Trobe University for bringing the issue of Elizabethan privateering to his attention.

court rulings.[114]

Anderson CJCP was a litigant in 1597 in an action which produced the agreement of the barons of the Exchequer with Popham CJKB and other justices that "the King is bound by the Stat. de Donis Conditionalibus, as is adjudged in Plowden's Commentaries in the Lord Berkley's case ..."[115]

The extensive use of the dispensing power over statutes by the Tudor monarchs has been alluded to above.[116] Armiger v. Holland[117] was argued in Queen's Bench

114. One of the most celebrated examples of this problem is provided by the Cherokee Nation cases from the early 1830s when on three occasions the U.S. Supreme Court ruled against the State of Georgia, and on each occasion President Andrew Jackson refused to back the Court's ruling and force Georgia to comply. In the first case, Governor Troup of Georgia hung a Cherokee named Tassels in defiance of the Supreme Court, and on the third and most famous instance Jackson was reported, perhaps apocryphally, as saying "Well: John Marshall [Chief Justice of the United States] has made his decision : now let him enforce it." (R.P. Longaker "Andrew Jackson and the Judiciary" in F.O. Gatell (ed.) Essays on Jacksonian America 1970, pp. 121-124).

115. The Lord Anderson's Case 7 Co. Rep.21A; 77 E.R. 443 at p.444. See also the Case of Alton Woods (A.G. v. Busshop) (1600) 1 Co. Rep. 40B at ff.44B and 48A; 76 E.R. 89 at pp.102-103 and 109. That the king was bound by de Donis was advanced without authority being cited by Henry Yelverton in argument in the Lord Sheffield and Ratcliff's case (1623) Godbolt 301 at p.309; 78 E.R. 176 at p.181. Yelverton by this date had been both Solicitor and Attorney General, imprisoned, pardoned, and was to be appointed a justice of Common Pleas in 1625.

116. Supra f.nn. 58 and 102.

117. (1597) Cro.Eliz. 542; 78 E.R. 789, adjourned to (1598) Cro.Eliz.601; 78 E.R. 844, Moore (K.B.) 542; 72 E.R. 746. The English of Croke is referred to in the text, rather than Moore's Law French. Coke reported this as Holland's case 4 Co.Rep. 75A; 76 E.R. 1047 noting his appearance with Houghton as junior. Coke reported only on the concept of private (Special) as opposed to public (General) acts, noting that 13 Eliz.I c.10 (1571, the subject of ch.4) was a General Act.

in terminology of the dispensing power as related to the act 25 Hen. VIII c.21 (1533) which provided that an ecclesiastical living might be held in commendam (as if by an absentee landlord) only by dispensation from the Archbishop of Canterbury confirmed under the Great Seal. The queen had licensed a newly created bishop, Dr. May, to continue to hold his parsonage in commendam, but then she had presented Holland to the living (presumably an error reminiscent of the grants of Henry VI's reign). Holland was secure if the queen's licensing of Dr. May could be impugned as not in accord with the procedure established under the statute.

Coke (presumably Edward Coke, Attorney General since 1594, rather than W. Cooke in the list of counsel) proceeded to disparage the queen's action "for the dispensation by the Queen only is not sufficient". The issue, however, was not really the dispensing power, but whether the queen was restrained by the terms of the statute from exercising her prerogative rights over ecclesiastical livings. Francis Gawdy and Fenner JJ held "that the King had this prerogative at the common law ... then, although there be general negative words in the statute, the Queen shall never be restrained by them, unless she be expressly named; and this prerogative the statute never intended to take away from the Queen".

An interesting case, in which Coke was prepared to argue by implication that the queen was bound by a statute, when it suited the royal purpose. The decision reported by

Spelman from the reign of Henry VIII to the effect that a statute covering a Crown function circumscribed the sovereign in exercising that function[117A], which together with the legislative style of the 1530's had exemplified the partnership of king and parliament, was not followed in this case late in Elizabeth's reign, indicating a much more protective regard for royal rights in the face of parliamentary incursion. The "passive" construction of a statute in favour of the Crown because it was a grantee from parliament, argued in Reniger[117B], had been replaced half a century later by an aggressive assertion of the prerogative.

In about 1600 Coke penned some notes on the prerogative for Sir Robert Cecil. The comments on revenue raising ("impositions" as they would shortly be called in the celebrated case of the same name), patents for new inventions, and customs are worthy of note to the general student of the prerogative, but the first two comments are germane to the particular issue of dispensations, and indicate Coke's acceptance of a broad power in the Crown at the close of the Elizabethan period:

117A. F.n.12 supra.
117B. See f.n.13B supra.

"1. The sovereign may grant a dispensation of any penal statute, by a clause of non obstante,
2. If even an Act of Parliament contains a clause against non obstantes, a non obstante to that clause may be granted."[118]

Francis Bacon had written to the same effect shortly beforehand in his Maxims of the Law, citing the facts of the Case of Sheriffs and reasoning the over-riding power of royal dispensation "because it is an inseparable prerogative of the crown to dispense with politic statutes, and of that kind; and then the derogatory clause hurteth not."[119]

In his Reports Coke left at least three commentaries upon the dispensing power in the early years of James I's reign: The Case of Penal Statutes[120]; the Case of Non Obstante, or Dispensing Power[121]; and Calvin's case or the Case of the Postnati[122].

118. (1598-1601) C.S.P.D. Eliz. vol.5, uncertainly dated to 1600, p.521.
119. F. Bacon Works, J. Spedding, R.L. Ellis and D.D. Heath (eds) vol. VII, 1872, p.370. The editors date the Maxims to pre-1597.
120. (1604-1605) 7 Co.Rep. 36; 77 E.R. 465. See Edie "Royal Dispensing Power" p.208 for brief background.
121. Uncertain date, after 1604, 12 Co.Rep. 18; 77 E.R. 1300, see J.H. Baker "Coke's Note-Books and the Sources of his Reports" (1972) 30 C.L.J. 59 at pp.80 et seq.
122. (1608) 7 Co.Rep.1A; 77 E.R. 377 at 14A; 393. Note that the seventh volume of Coke's Reports has two cases paginated as "1A"; Calvin's is the first of them in the English Reports.

In Penal Statutes Coke reported that all the judges deliberated on a grant made by Elizabeth to her Lord Keeper of the penalty and benefit of a penal statute, and power to dispense with it, which grant the judges found "utterly against law." Coke reported that such statutes were made pro bono publico, and so their administration had to remain vested in the sovereign, not subjects.

Calvin's case saw Coke affirm in dicta his and Bacon's assessment of the dispensing power at the end of Elizabeth's reign, complete with reference to Sheriffs. However, Birdsall has referred to an edition of Coke's reports which cites another case, Grendon v. Bishop of Lincoln[123], as authority on the dispensing power.[124] This is an error, perpetuated by Weston and Greenberg[125] who wrote of a ruling in Grendon by the justices in Common Pleas. In fact the material on non obstante reported by Plowden in Grendon was submitted in writing to the court after the close of argument and the judges' views were apparent.[126]

The Case of Non Obstante did not deviate from the general propositions already advanced by Coke and Bacon by 1600. Even an act attempting to forbid a non obstante could be overborne, but this prerogative power applied only to

123. (1577) 2 Plo.493; 75 E.R.734, at 502; 747.
124. Birdsall Non Obstante p.53. The English Reports do not contain this reference in Coke's Reports, and original editions of Coke's Reports are not available to the writer to check if the reference was Coke's.
125. Subjects and Sovereigns p.26 and see n.60.
126. 2 Plo.502; 75 E.R. 746.

"politic statutes", to use Bacon's phrase. Coke set out in this report to explore just what the boundaries of this concept might be. He began by asserting "a good diversity when the King shall be bound by Act of Parliament", but then he accepted, "No Act can bind the King from any prerogative which is sole and inseparable to his person, but he may dispense with it by a non obstante ..."[127] Coke referred at length to Sheriffs, but the English Report version of his Reports has him mis-citing the statute in question as "23 H.6.cap.8." and referring to the Year Book citation as "2 H.7.66."

Statutes concerning the prerogative, as for example, staffing government posts, were equated by Coke with Bacon's "politic statutes". However, Coke went on to contrast such statutes with "things which are not incident solely and inseparably to the person of the King, but belong to every subject, and may be severed, there an Act of Parliament may absolutely bind the King..."[128] The examples which Coke employed were of the statute 1 Jac.1 c.3 (1604) and the Case of Ecclesiastical Persons[129] which both had the effect of proscribing leases being passed through the monarch to avoid a statutory restriction, 13 Eliz.I c.10

127. 12 Co.Rep.18; 77 E.R.1300.
128. 12 Co.Rep.19; 77 E.R. 1301. This important exception was missed by Holdsworth (H.E.L. 1945, 3rd ed. vol.5, p.475); Birdsall (Non Obstante pp.51-52); Weston and Greenberg (Subjects and Sovereigns p.11); and Edie ("Royal Dispensing Power" pp.201-202).
129. See ch.4 f.n.91.

(1571), a matter dealt with comprehensively in the next chapte

While Coke and Bacon wrestled with the problem of dispensations in commentary, opinions and reports, the political unit most affected by the dispensing power, parliament, ceased to be mute on the matter. The executive action of dispensation, fundamentally inimical to a sovereign parliament's statute making role attracted its most celebrated public reaction in Elizabeth's last parliament in 1601, in the attack on monopoly licences. As with many of the constitutional and legal issues of Elizabeth's reign, the problem had been constantly present, but dealt with politically. Thirty years earlier Robert Bell had attacked licences in favour of courtiers exempting them from the operation of certain statutes. This speech to the 1571 parliament caused Bell to be carpeted by some of the Council: word spread through the House of Commons that speaking against licences would draw the anger of queen and Council.[130]

In November 1601 a fierce debate took place in the House of Commons on the subject of monopolies, speaker after speaker attacking the breadth and diversity of the royal grants of monopoly. Mr. Francis Moore illustrated his point with a reference to the legal position of the Crown issuing dispensations non obstante:

130. Neale Elizabeth 1559-1581, pp.218-223.

> "We have a law for the true and faithful currying of leather; there is a patent sets all at liberty, notwithstanding the statute. And to what purpose is it to do anything by Act of Parliament when the Queen will undo the same by her prerogative?"131

However, five days later Moore confessed his interest in the particular problem of monopolies, rather than the general issue of the sanctity of parliament's enactments:

> "... I never meant ... to set limits and bounds to the Prerogative Royal"132.

In the same debate Sir George More of Losely in Surrey, later Chancellor of the Garter and Lieutenant of the Tower, despairingly acknowledged the tactically indefensible position in which the parliament, and in particular the Commons with their grievances, were placed by the non obstante power:

> "Admit we should make this Statute with a Non obstante, yet the Queen may grant a Patent with a Non obstante, to cross this Non obstante".133

131. 20 November, 1601, D'Ewes Journals p.645.
132. Ibid pp.653-654. Legislation on the subject finally emerged in 1624, see ch.5 f.n.50. During this debate in 1601 Bacon said, "For the prerogative royal of the prince, for my own part I ever allow of it, and it is such as I hope shall never be discussed." D'Ewes Journals p.644.
133. Ibid p.646. Three months later Sir George's despair would be matched by his rage on discovering his daughter Ann had secretly married the poet John Donne. More and Lord Ellesmere may not have seen eye to eye over the non obstante power, but More used his sister, wife of Ellesmere, to persuade Lord Ellesmere to dismiss Donne from his post as Ellesmere's private secretary. More had Donne briefly imprisoned : I. Walton, (ed.) C.H. Dick Lives 1899, p.15 and H. Grierson (ed.) The Poems of John Donne 1933, pp.xxx-xxxiii.

The next year the Queen's Bench decided in the Case of Monopolies[134] that the queen could not by licence grant a monopoly of card-selling and importing to an individual, because only parliament could restrain the exercise of any trade, and further, Coke reported, legislation existed to suppress the importation of playing cards which would be perverted from its intended benefit for all if an individual had monopoly control of sale, free of foreign competition, because he held the only dispensation from the acts of Edward IV against the importation of cards.

Coke reported this case in his eleventh volume of Reports, published in late 1615. Going to press thirteen years after the decision, Coke may well have relied on memory as well as have embellished his report to suit his political message. For example, he listed Dodderidge and

134. Otherwise known as Darcy v. Allein (1602) 11 Co.Rep. 84B; 77 E.R.1260, Moore (K.B.) 671; 72 E.R.830, Noy 173; 74 E.R.1131. Monopolies are explained in W.T. MacCaffrey "Place and Patronage in Elizabethan Politics" in S.T. Bindoff (ed.) Elizabethan Government and Society 1961, p.119 and Knafla Jacobean England pp.150-151. Scrutiny of the Acts of the Privy Council (23 Dec. 1600, p.55; 3 May 1601, p.333; 11 May 1601, p.346; 1 Aug. 1601, p.132; 30 Aug. 1601, p.195; 7 Oct. 1601, p.237 and 7 Aug. 1603, p.501) reveals that Allein was not the only discontented would-be breaker of Darcy's monopoly. The Privy Council wrote to the judges of Common Pleas on 7 Oct. 1601 asking them to stay a suit by one Turner against Darcy which the queen thought might call the royal prerogative into question. In an essay "Sir Edward Coke and the Conflict on Law and Order" by D. Little in his book Religion, Order, Law : A Study in Pre-Revolutionary England 1969, pp.195-200, Little examined Darcy v. Allein in the context of Coke's social and economic thought, factors which contributed to the complexity of Coke's position on "patriarchal" royal power. The history of Darcy and writings on the case are set out in Little. Coke was of course Attorney General, not a judge, as Little described him (p.200) when Darcy was decided.

Fuller, along with Fleming SG and himself as Attorney General for the plaintiff, that is, in support of the monopoly patent, and Altham amongst those appearing for the defendant, a haberdasher being sued by Darcy because he sold cards in contravention of Darcy's grant. Moore's report lists Dodderidge and Fuller for the defendant, and Altham for the plaintiff. Noy's report of Fuller's argument leaves no doubt that he acted for the defendant.

More importantly, Coke concluded his report of Monopolies only partially allowing the power of dispensation from acts dealing with mala prohibita. Such matters were those regulated in the interest of the commonwealth, as for instance customs administration and staffing of governmental offices. They were to be compared with mala in se, wrongs by the law of nature, as for example, murder, statutes dealing with which could not be dispensed with (although post facto pardons in respect of such offences could be granted).

Coke set about using this case to illustrate the point that was later to appear in his hitherto unremarked concluding thoughts in the Case of Non Obstante.[135] He had already begun developing the concept of pro bono publico in the Case of Ecclesiastical Persons and the Case of Penal Statutes[136] and was to take it further again in his report of the Magdalen College case[137] which was reported in the eleventh volume of

135. See f.nn.121 and 128 supra.
136. See Ch.4 f.n.99 and f.n. 120 supra respectively.
137. See Ch.5 f.nn. 123-131.

his Reports just before Monopolies. It is apparent from his report of Monopolies and Non Obstante that the ambit of dispensing power concerned him. A reasonable inference would be that Coke was determined to view the problem of dispensations from the subject's point of view, as well as the Crown's.

If the parameters of permissible Crown dispensing capacity were all acts concerning mala prohibita, or "politic statutes" then the subject was left in the parlous medieval political vacuum of having his life and property to an extent safeguarded against unilateral royal tampering, but not his enjoyment of commercial, political and social status and activities as provided in statutes. Darcy's patent may have impressed itself on Coke as an example of private profiteering through royal alteration of the rules as laid down by parliament for the whole community. His response was to claim a new limitation on the dispensing power. No longer, opined Coke, could the Crown dispense for all mala prohibita created by statute : this category would be further subdivided so that statutes made pro bono publico could not be dispensed with.

Lord Ellesmere savaged this distinction in his "Observations on Coke's Reports" in late 1615, referring to it as an invention, and asserting that the only reason for judgment was the other given in Coke's report, not this

concocted antithesis.[138] Coke was consistent in his concern, as indicated by the posthumous publishing of Non Obstante in the twelfth volume of Reports, but he did recant under the pressure of Ellesmere's scrutiny, when in 1616 he was fighting to retain his place on the bench, admitting "the right of the king to grant licences of sole importation non obstante the statute."[139]

It is no surprise that in April 1606 Lord Chancellor Ellesmere, in the early throes of a year and more long wrangle over whether legislation had utility if the king could dispense with it, addressed the Commons by reference to the Case of Sheriffs,[140] reiterating the king's primacy.

138. Reported in full in Knafla Jacobean England p.303, and the relevant passage in 77 E.R. 1265 n.G.
139. Cited in Birdsall Non Obstante p.62. Coke's general legal and political concern over the possible ambit of prerogative power dovetails with his more specific interest in economic deregulation and self-determination in the marketplace. Little Coke and Conflict makes this confluence of legal and economic issues the focus of his essay : see in particular p.204. Coke's appeal to the concept of pro bono publico drew in an open-ended discretionary power for the courts in the struggle with "the king's expanding sphere of patrimonial discretion" : Little Coke and Conflict p.170. For Jacobean litigation reflecting the point Coke was making, see ch.6 f.n. 38 and text preceding.
140. R. Bowyer Parliamentary Diary 1606-1607 (ed.) D.H. Willson pp.66, 135: cited in Weston and Greenberg Subjects and Sovereigns p.31. The present writer is indebted to these two authors for the analysis of the dispensing power which appears in chapter 2 of their book.

At about the same time Sir Walter Raleigh wrote in The Prince or Maxims of State various "rules and axioms for preserving of a kingdom." Number 12 was a duty in the king "To observe the Lawes of his Countrey and not to encounter them with his Prerogative, nor to use it at all where there is a Law, for that it maketh a secret and just grudge in the people's hearts, especially if it tender to take from them their commodities, and to bestow them upon other of his Courtiers and Ministers."[141]

Raleigh had a shrewd layman's eye for the pressing problem with the prerogative at this time : its use not for the general welfare, but for the advancement of private interests, or as Coke would later write, not pro bono publico but pro privato commodo. The crabbed pedantry of Ellesmere the aging Crown lawyer, juxtaposed with the insight of Raleigh the courtier into the reality of the prerogative's employment serve as a suitable scene changer. The excesses of Elizabeth's reign (in which both men had flourished) had been tempered only by the queen's political astuteness, during growing

141. Printed London, 1642, p.18. V. Morgan "Whose Prerogative in Late Sixteenth and Early Seventeenth Century England?" (1984) 5 J.L.H. p.39 paints a vivid picture of the use of the dispensing prerogative for private purposes in regard to University College appointments during the reigns of James I and Charles I. Morgan speculates that from the 1620s the concept of "public good" was being increasingly invoked by the executive to justify prerogative acts: p.47 n.71. A concept as flimsily based as Coke's "pro bono publico" was bound to be taken up by the arm of government against which it had originally been devised.

awareness of public power's abuse. Under James the consequent reaction was intended to make executive power responsible to a broader base than the king's person, his Council, or his courtiers and favourites. Coke would lead the charge in attempting to have the law effect this change, but the history of the Stuarts reveals that the law was only altered after the political spade work had been done by force of arms.

In the midst of the weighty pronouncement on Sheriffs (so slender a beam to support the legal and constitutional edifice built upon it) and the fears of private manipulation, one curious governmental document from 1598 reveals concern for the specific problem at hand. A bill had been discussed by the 1597 parliament concerning "Tillage and re-edifying of Houses and buildings"[142] which is presumably referred to in this anonymous note in the Calendar of State Papers Domestic:

> "Note of the course to be taken for recovering surrounded grounds until the late intended Act is established ... For better strengthening the decree of sewers, the bill may be extended to Her Majesty's own possessions, most of the grounds being of that quality."[143]

Proceeding from the preferred governmental position that the Crown was unburdened by general statutes, a government official was concerned that proposed regulatory legislation should encompass the queen's property, as it was the type intended to be covered by the act, and therefore the

142. See Bacon's address, 23 November 1597, D'Ewes Journals p.562.
143. (1598-1601) C.S.P.D. Eliz. vol.5, p.115, 3 Nov.1598.

bill should be "extended" to include the queen's property. Designing regulatory legislation of the town planning variety in such prescriptive fashion is a practicality of far greater future relevance than all the late Elizabethan and early Jacobean pondering on Sheriffs.

A new dynasty had commenced with the inherent tensions in Tudor government unresolved, and the personal beliefs of the new king limiting the chances of averting a clash between royal and parliamentary claims to power. The outstanding discussion of the relationship of the king to statutes in James I's reign was to be contained in the Magdalen College case[144], but it was preceded by a volume of parliamentry and curial discussion of the issue and some published commentary.

Writers still ranged from the analogies of medieval syllogism as in Forset's words "... no not the Soveraigne will infringe laws, no more than the soule will renounce reason"[145], to the more realistically (and hence dangerously) based law dictionary prepared by the civilian Dr. Cowell, The Interpreter. Cowell published his work in 1607, and his passages concerning royal power attracted the ire of the Commons when they convened in 1610. Cowell did not perceive the king as personally above the law, but only his sovereign

144. (1615) 11 Co. Rep. 66B; 77 E.R. 1235, 1 Rolle 151; 81 E.R. 394, the subject of ch.5.
145. E. Forset The Bodies Natural and Politique 1606, p.4.

power, of necessity. This may be analysed in the "rights" as opposed to "power" distinction of Wesley Hohfeld. The king had no legal "right" to disregard the law, but he had unlimited legal "power".[146]

The Commons argued at great length in 1610 the king's power concerning impositions, in the course of which debate Cowell was attacked, and King James agreed to order the suppression of The Interpreter. But this was only a sideshow to the discussion of the king's capacity to raise finance without the assistance of parliament. The prerogative in this area, and the issue of whether statutes concerning the collection of customs bound the king were the focus of dialogue, which on the part of those seeking to restrain the king was carefully modulated.

Thomas Hedley referred to doubts as to whether statutes could bind the king as the common law did.[147] Faced with general argument that statutes concerning taxation and customs on staple commodities bound the king and restrained him from raising money by prerogative powers, Solicitor General Francis Bacon and Attorney General Henry Hobart essayed some metaphors on the relationship of statutes to the prerogative. Thus Bacon

146. Coquillette "English Civilian Writers" pp.78-83.
147. E.R. Foster (ed.) Proceedings in Parliament 1610 vol.2, 1966, p.174.

(in note form):

> "Many authorities that kings shall not be bound by general words. Samson not to be bound by cobwebs but by cordes." 148

Hobart followed with:

> "You shall not cary from the King a direct prerogative by generall wordes." 149

and

> "The king is by no law restrained generally ... for general words in a statute do not bind the king ..."150

This was answered in a lengthy, restrained, well researched and carefully reasoned speech by Heneage Finch. The king was allowed his prerogative, but it was bounded by the law.[151] Finch then attacked the analogy made between royal grants by letters patent and statutes of general words:

> "... for it hath been objected ... the king's prerogative cannot be bound by general words, as where the King grants mineras quascunque, mines of gold and silver do not pass. [The Case of Mines (1565) 1 Plo. 310].
>
> But the answer to this I conceive to be very plain, for however that be a true rule in construction of the king's letters patents, which may be obtained upon misinformation and false suggestion, and so the king might otherwise be deceived, yet in an act of parliament where the whole kingdom is of his council, if the king be within the statute as in most statutes he is not except he be especially named, the words ought to receive their exposition according to their proper and natural signification according to the intent of the law makers and not by the rules of construction of letter patents ..."152

148. S.R. Gardiner (ed.) Parliamentary Debates in 1610 Camden Society 1862, p.70.
149. Ibid p.92.
150. Foster Proceedings 1610 p.200.
151. Ibid pp.234-237.
152. Ibid pp.240-241.

Finch went on to assert that an act of parliament had the power to bind the king's prerogative, but that some acts were not to be in any way binding on the king. Such acts were for the king's benefit "and are rather matter of advice to the king". Finch then examined the dispensing power non obstante exhaustively.[153] In this temperate address were contained many of the themes to be argued out shortly afterwards in the Magdalen College case.

Heinze has referred to a manuscript dated to 1612 which illustrated the tension between the concepts of the king's inherent powers and those matters which were within the purview of parliament and which could be regulated by statute, extending even to the king. The example is particularly stark, as in arguing the king's right to act by proclamation, a royal apologist has ignored the medieval concept of property rights in subjects as a restraint on the king. The apologist argued that the king had the right to collect customs on imported starch, and that starchmaking within the kingdom deprived the king of those revenues. It was then advanced that by proclamation, without parliament, the king could prohibit

153. Ibid pp.241-245. Edie "Royal Dispensing Power" pp.209-210 has examined the 1610 parliament's particular concern with the dispensing power in favour of individuals. She cited Nicholas Fuller "If the Law cannot bind the king" then statute is "to No Purpose". An anonymous speaker said "Noe good assurance and tie" could be made, but the king's prerogative would "be above it."

starchmaking within England because "to say and hold that the King cannot restrain the starchmakers to make starch but by parliament ... is to grant and admit that the subjects shall doo wrong to the King's inheritance and yet it shall rest in the will and election of the subjects whether the King shall have remedy for that wrong."[154]

In the twelve months before argument commenced in Magdalen College in late 1612 or early 1613, a widow had successfully contended[155] that the king was bound by 32 Hen. VIII c.28 (1540), a statute providing for the vesting of land title in a widow to spare her having to contest her title to land which had vested in her prior to her marriage. According to Coke's comments, a dealing in the land by the king did not save those with whom he subsequently dealt from the effect of the statute:

> "... albeit the King is not named in the act, yet he is bound by the act, because it is made to suppress a wrong ... and the King being God's Lieutenant cannot doe wrong ..."[156]

154. R.W. Heinze "Proclamations and parliamentary protest, 1539-1610" in D.J. Guth and J.W. McKenna (eds.) Tudor Rule and Revolution 1982, p.250, n.41.
155. Beaumont's case 2 Co. Inst. p.681.
156. This was written late in Coke's life, and he referred to the Magdalen College case and Willion v. Berkley in side notes. The reference to the king as God's Lieutenant was attributed to "YB 13 E IV 8" which is cited at ch.2 f.n.139. The Maynard Year Book contains no reference to God's Lieutenant. Coke referred to the king as God's Lieutenant in his 1615 report of Magdalen College, ch.5 f.n.74.

A footnote in the English Reports refers to a memorandum of Attorney General Noy on the same case, explaining by implication that the king was bound by the statute, or that at least legal rights were not altered by his involvement:

> "... because the act of parliament is general, and the king is not excepted; secondly an act of parliament is a judgment ..."157

The inconsistencies of Elizabethan judgments in this area had been the result partly of a preference for monarchical mystique over legal reasoning, (a preference fostered by Elizabeth and her ministers) but also of the uncertain extent of medieval rules of statutory interpretation, such as the differences between positive and negative statutes. The Magdalen College case was to be a test not only for the senior lawyers of the realm who had all matured in Elizabeth's reign, but also for conflicting legal and political concepts pitted in the presence of a new and vigorously enunciated monarchical absolutism.

As against such generalisation, a particularity of some interest lies in Elton's observations on enacting clauses in early Elizabethan legislation.[158] Such statutes opened

157. 73 E.R. 154n. Noy was Attorney General from 1631 to 1634.

158. G.R. Elton "Enacting Clauses and Legislative Initiative" (1980) 53 Bull.I.H.R. p.183 Elton elaborated on this in a later paper published in 1983: See f.n.98 supra. He referred to the twin problems of determining whether statutes bound the sovereign, and whether the sovereign could loose a subject from the bonds of statute. He also referred to Willion v. Berkley and the issue of enacting clauses.

with either an elaborate, or a short enacting clause, the former referring to "the queen's majesty, our sovereign lady" and itemising the other estates of parliament, while the latter merely enacted by the authority of parliament. Elton has observed that the elaborate enactment clause, specifically referring to the queen, tended to be used in private bills, while the anonymous clause merely naming parliament was employed in official bills, that is, those prepared by the government.

In a final footnote, Elton conjectured upon this distinction[159] that official opinion saw a benefit in excluding a monarch from being named at all in a statute so as to increase his freedom with respect to it. Elton referred to Egerton's Discourse[160] as an example at the appropriate time of the argument that the king was only bound if expressly named. The arguments of successful counsel and the judgment of Anthony Brown J in Willion v. Berkley[161] are even more apposite in showing that in the early Elizabethan period the notion was extant and accepted of the monarch being bound by legislation when named in the enacting clause.

It can only be a matter of speculation as to whether Elizabeth's government deliberately moved to the short clause for official bills to avoid the monarch being bound. However,

159. Ibid p.191 n.34.
160. The passage cited supra f.n.65.
161. Supra text after f.nn.24 and 46. But note Morrice's concern in 1578-9, f.n.84 supra.

in conformity with Elton's observations, an act to be of great moment in the development of this story, the act 13 Eliz.I c.10 (1571) concerning dilapidations of ecclesiastical properties, the subject of the Magdalen College case, was probably the result of private, rather than governmental initiative[162] and contained the long enacting clause naming the queen.

Two hundred and fifty years of barely overt struggle between competing views of Crown power were evident in late Elizabethan and early Jacobean theories and attitudes. Royal officials and royal judges in the past had taken contradictory stances, but the conflict in their ideas was now to be heightened by the absolutist theories of the new dynasty. The wording of statutes in 1340, 1444 and 1485[163] had shown a clear belief on the part of their draftsmen that express words in legislation could curb the annulling effect of non obstante. These presumably senior officials must have believed in the capacity of parliament to control royal actions relating to such legislation. But in 1486 it seems that another group of officials, the judges conferring in

162. Neale Elizabeth 1559-1581 pp.196 et seq. concerning the "alphabetical bills" on religion in the parliaments of 1566-1571. See f.n. 26 supra regarding "commonwealth" bills as opposed to government legislation.
163. See ch.1 f.n.104 and ch.2 f.nn. 62 and 204.

Exchequer Chamber, found that the king was free of such attempts at parliamentary control.[164]

That Henry VIII's parliaments were self-assured in their sovereignty is evident from the wording and intent of the statutes they enacted. Certainly the sense of community is heightened in the process of making, and the content of legislation of the latter Henrician period and in statutory interpretation then and the fifteen years after Henry's death to Willion. Statutes were perceived as improving the law, righting wrongs and past "mischief", but the great novelty that seemed to flow from the new partnership of king and parliament, even when its intimacy was lost in the second half of the sixteenth century, was the perception of the state as an engine. For the first time this state machine was of an intricacy that could be manipulated without reference to the person of the sovereign. Morrice, Coke and Raleigh expressed their fears of private interests being promoted under a shroud of community welfare : privato commodo surfacing in the wake of pro bono publico.[165]

Since at least 1340 the "hidden agenda" in the discussion of statutes and the Crown had been the issue of just who

164. Case of Sheriffs ch.2 f.n.183.
165. See f.n. 95 supra, f.nn. 136 and 137 supra and text following, ch.5 f.nn. 75 and 79, f.n. 141 supra, and ch.4 f.n. 49 and text following. Coke and Raleigh were displaying a pachydermous hypocrisy as will become apparent in the next two chapters.

determined the rules. This is not to posit a conflict between a popularly elected assembly, an independent judiciary and the executive, but to accept that royal officials instrumental in each division of government had the capacity for different views. Sheriffs in 1486 had marked a victorious alliance between officials in the judiciary and Crown spheres, exalting concepts of Crown independence over officials (and parliamentarians) using parliament to limit unilateral Crown activity. But events between 1530 and 1550 altered this equation in favour of a new alliance between Crown and parliament which could effect genuinely radical change.

The judiciary appeared to move with the tide, although the extra-judicial work of Marian judges clung to simple medieval authority[166], unwittingly heralding a new alliance of thought between judiciary and Crown officials that would become apparent during the lengthening years of Elizabeth's reign. Henry VIII's "parliamentary revolution" had contained insufficient momentum to constitute a true paradigm shift in constitutional and legal thought, as outlined by Kuhn.[167] Henry's younger daughter was subtly determined to maintain her position at the helm of this newly fashioned ship of state, without reliance on parliament where it could be avoided. The change of atmosphere is apparent in that Sheriffs was not

166. See ch.2 f.n. 87 (Brooke) and f.n. 35 supra (Stanford).
167. T. S. Kuhn The Structure of Scientific Revolutions 1970 2nd ed., see extracts in the Introduction to this thesis.

employed as an authority (as opposed to being cited in abridgements) for nearly a century, when Morrice used it in his Reading of 1578-9.[168] Bacon cited it late in Elizabeth's reign[169], Coke referred to it while limiting its impact sometime after 1604[170], and Ellesmere used it to harangue the Commons in 1606.[171] Thereafter it became the meat and drink of Stuart constitutional debate.

Coke, for all his defects, is singular among his contemporaries in loyally serving his queen while reasoning the consequences of following certain lines of authority. Other notable Crown lawyers thought it sufficient that the authority of precedent buttressed the ascendancy of State dogma, but Coke had a broader and more thoughtful horizon which is revealed in the story of the statute 13 Eliz.I c.10 in chapters four and five below.

168. F.n. 94 supra. Cited, for example, in Fitzherbert's La Graunde Abridgement, see ch.2 f.n.200.
169. F.n. 119 supra.
170. F.n. 127 supra and also f.n. 122.
171. F.n. 140 supra.

CHAPTER FOUR

AN EXCURSUS ON FINANCE AND CHURCH PROPERTY :

THE BACKGROUND TO MAGDALEN COLLEGE

> "The most important cause, and symptom, of the decay of any government or institution is the loss of prestige and respect among the public at large, and the loss of self-confidence among the leaders themselves in their capacity to rule. Just before he took office, President Nixon was warned by one of his closest advisers that 'the sense of institutions being legitimate - especially the institutions of government - is the glue that holds society together. When it weakens, things come unstuck.' The slow but inexorable erosion of this sense of trust may be observed in every sector of English governmental institutions in the late sixteenth and early seventeenth centuries. The credibility gap, as it is called today, manifested itself earliest in the Church, where the laity, from Queen Elizabeth downwards, conspired to treat the clergy, and especially the bishops, with a contempt unequalled before or since. There is no subsequent historical parallel to the simoniacal bargains with the Crown and the courtiers by which Elizabethan bishops were obliged to alienate the hereditary property of their sees in return for their appointments."
>
> L. Stone The Causes of the English Revolution 1529-1642 1972, p.79.

Requiring ready finance the government of Henry VIII had plundered the monasteries and sold much of this compulsorily acquired real estate to bidders with sufficient money. The habit persisted on the side of both government and satisfied purchasers into the reign of Elizabeth, but it adapted to the new era with embellishments of subtlety and refinement. Vast amounts of land vested in bishops as guardians for their dioceses, in deans and chapters of cathedrals, and in university colleges. This property was largely the result of testamentary dispositions designed to garner the testator the

best possible posthumous publicity, before the break with Rome, in heaven; and after that rupture, on earth. One approach common throughout the Tudor period was not to expropriate this church land, but merely to allow moneyed persons desirous of broad acres to acquire leases of inordinate periods over it, the terms often ranging up to 99 and more years.[1] The result was to deprive church institutions of the income produced by the land, (the rents paid being fixed and of small amount in a period of high inflation)[2] and to sever the close connection of ownership which would normally lead to the upkeep of the land and in particular the improvements on the land.

This first refinement over the method of brute expropriation was matched in Elizabeth's reign by two others. Firstly, the Crown itself generally made little money out of these transactions directly, but acted as the conduit through which the land passed on its way to court officials and others to whom the Crown might otherwise have had to pay income. The power of the Crown was thus enhanced, providing a considerable

1. F. Heal Of Prelates and Princes 1980 provides excellent general background for this chapter. For further examples see C.S. Knighton "Economics and Economies of a Royal Peculiar: Westminster Abbey 1540-1640" in R. O'Day and F. Heal Princes and Paupers in the English Church 1981, pp.54-55. A summary of the principal means of government inspired depredation other than that discussed here is to be found in C. Cross The Royal Supremacy in the Elizabethan Church 1969, pp.76-81.
2. F. Heal "Economic Problems of the Clergy" in F. Heal and R. O'Day (eds) Church and Society in England: Henry VIII to James I 1977, pp.108-109.

indirect benefit for no expenditure by the central government. Indeed it is reasonable to speculate that as the Elizabethan government determined to reduce the previously prodigious quantities of Crown lands being allocated to courtiers and officials (remembering Lord Keeper Bacon's address to the 1559 parliament on the "Marvellous decays and waste of the Revenue of the Crown"), the plundering of church lands formed the simple alternative.[3]

The second of these additional refinements lay in the appearance of voluntariness on the part of church officials parting with the leases being largely maintained. It was a commonplace that senior church positions were not filled unless the appointees promised to part with some of the patrimony that passed with the posts. Some churchmen were only too eager to strip their future sees in pursuit of preferment, while other bishops and deans vigorously protested this simoniacal practice, invariably to no avail.

The other avenue for lease gathering was possibly travelled in the wake of debt. The Magdalen College case for example may have arisen from that college's indebtedness to an Italian banker who settled the debt in exchange for some of the college's land in London, leased to him through the queen at a nominal rent.

3. K.S.H. Wyndham "Crown Land and Royal Patronage in Mid-Sixteenth Century England" (1980) 19 J.B.S. at pp.32-34 and see Heal Prelates and Princes p.214.

The simoniacal bargains with church dignitaries in the process of promotion serve to remind that Elizabeth was head of the Church of England: her government was ultimately responsible for the filling of church posts. This seems to explain the leasing of diocesan and cathedral land through her, but leaves as a mystery her involvement in a debt settlement between a Genoese financier and a Cambridge college. The legislation of Elizabeth's reign provides the first clues in the jigsaw which will solve this puzzle. The picture that emerges from the jigsaw reveals a flagrant contempt on the part of the government for the law as set down by parliament, a contempt which was recognised in the first parliament of the next reign, (in 1 Jac.1 c.3 of 1604) and finally damned as contrary to the law by King's Bench in 1615.

The act 1 Eliz.I c.19 of 1559 provided for a number of revenue collecting techniques to be exercised by the Crown over ecclesiastical land.[4] The purpose of the act was to enable the queen to compel an exchange of her right to spiritual revenues i.e. impropriated livings, known to be difficult to collect, for manorial land. This provision related only to diocesan land.[5] To prevent alienation of church-held land by long term leases which might intend to

4. Summarised by Cross Royal Supremacy pp.76 et seq.
5. Heal Prelates and Princes p.204 and Heal "The Bishops and the Act of Exchange of 1559" (1974) 17 History Journal p.227.

avoid exchanges with the queen, section 4 restricted the leasing of diocesan lands by archbishops and bishops, so that all such leases for more than 21 years or three lives had to be to the queen.

The intent to pass leases through the Crown was quite specific on the face of the statute. A long term lease other than to the Crown (which was not fettered by the statute from sub-letting or selling the lease) was to "be utterly void".[6] It is important to note that this act applied to bishops and archbishops only, so that other ecclesiastical bodies such as deans and chapters of cathedrals, university colleges and hospitals were not regulated by the act of 1559.

A number of historians, notably Christopher Hill, Lawrence Stone and Felicity Heal, have explored the despoiling of the Elizabethan church by the government hand in hand with the courtiers, and have dealt at length with the legislation supposedly regulating this trade, but none appears to have realised the constitutional issue raised by the Crown's

6. The reason for the specific exemption to the queen is not clear. Heal at least summed up its effect, if not its basis when she referred to it as "a clear assertion of the royal right to control the flow of patronage from Church to laity." Heal Prelates and Princes p.208. Concern over the length of ecclesiastical leases had been evidenced earlier in the legislative proposal for Edward VI's last parliament that such leases be limited to 21 years or not longer than the term of office of the lessor: Heal Prelates and Princes p.190.

relentless flouting of parliament's expressed will on this subject in an act of 1571, less than a decade after judgment in Willion v. Berkley. Extracts from Hill and Stone highlight the legal landscape insofar as it has presently been explored:

> "Archbishop Parker remonstrated against the act of 1559 which legitimized long leases to the crown. One of his last acts was to write to Elizabeth 'with some vehemency' against the plunder of the church. This almost-posthumous act of courage came to nothing, however: the letter was never sent, and the compliant Whitgift revealed its contents to Burghley, one of the 'great men' whom Parker had attacked as responsible for the policy. A similar ineffectiveness was shown by Grindal. He was very upset at the plundering of bishops' lands, and wrote a letter to Peter Martyr about it; but it did not stop him accepting his bishopric. In the Convocation of 1563 there was a pious resolution, drafted by Sandys of Worcester: 'Forasmuch as bishops are not born for themselves, but for their successors, and are only possessors for their own time, every bishop, by the subscription of his hand, promiseth that he shall not, either by lease, grant, or any other means, let, set, or alienate any of his manors, or whatsoever heretofore hath not been in lease, except only for his own time, and while he is bishop.' The resolution seems to have come to nothing; and Sandys' own later conduct is an ironical comment on the unimpeachable but impracticable sentiments here expressed. An Act of Parliament of 1571 (13 Eliz., c.10) sought to provide a remedy for fraudulent conveyances by bishops (or other clergy); and extended to deans and chapters, colleges, hospitals, and all clergy, the limitation of leases to twenty-one years or three lives." 7

After reviewing some of the more celebrated instances of pressure applied to the clergy by courtiers ardent for church land Stone wrote:

7. C. Hill Economic Problems of the Church 1956, p.30.

> "... enough has been said to show how important a feature of aristocratic income these leases sometimes were. But it was a source which was cut off sharp as soon as there ascended to the throne a monarch aware of the political theory which made bishops one of the prime supports of monarchy. An Act of King James's first parliament [1 Jac.1 c.3] forbade the granting of church leases for a longer period than twenty-one years or three lives, and the flow of imperious royal letters to the clergy ceased."[8]

Hill wrote of this early Jacobean act that it "took a decisive step when it forbade archbishops and bishops to alienate the lands of their sees even to the crown. By this means the king 'religiously stopped a leak which did much harm, and would else have done a great deal more'."[9]

But the leak had been commanded to stop over thirty years earlier when the statute 13 Eliz.I c.10, "... against Fraudes, defeating Remedies for Dilapidations..." had been "enacted by the Queen's most excellent Majesty, the Lords Spiritual and Temporal and the Commons, in this present Parliament assembled, and by the Authority of the same...".[10]

The relevant portion of this act lay in section 2 which observed that "long and unreasonable leases" made by "any Master and Fellows of any College, Dean and Chapter of any Cathedral or Collegiate Church, Master or Guardian of any Hospital ..."[11] were "the chiefest Causes of the

8. L. Stone The Crisis of the Aristocracy 1558-1641 1965, p.408.
9. Hill Economic Problems p.32, the quote being from Francis Bacon Works.
10. S.R. vol.4, p.544.
11. S.R. vol.4, p.545. The enacting clause referred to Archbishops and Bishops also being bound by this act.

Dilapidations and the Decay of all Spiritual Livings and Hospitality, and the utter Impoverishing of all Successors Incumbents ...". The section stipulated that all leases of ecclesiastical property "to any Person or Persons, Bodies Politic or Corporate (other than for the Term of one and twenty years, or three Lives, from the Time as any such Lease or Grant shall be made or granted ...) shall be utterly void and of none Effect, to all Intents, Constructions and Purposes, any Law, Custom or Usage to the contrary any ways notwithstanding". Section 4 of the act provided a shelter against this stricture for leases of church land already on foot.

Contemporary records provide only fleeting glimpses of this act's progress as a bill. It was apparently not one of the "alphabetical bills" on religion, held over from the 1566 parliament to 1571 and resented by Elizabeth as encroaching on the new-found prerogative in religious matters compulsorily acquired by her father from the Pope.

The tenacity with which this parvenu prerogative was defended has been catalogued by Neale. The queen was vigilant to observe bills commencing in the Commons which would encroach on governmental powers - the prerogative[12]

12. Neale Elizabeth 1559-1581 p.121.

- and to forbid debate on such bills if she so wished if there had been no prior consultation with her - rege non consulto.[13]

Nicholas Bacon, the Lord Keeper, addressed the following words to the opening of parliament in 1571, informing members that

> "... they should do well to meddle with no matters of state but such as should be proponed unto them, and to occupy themselves in other matters concerning the commonwealth." 14

Neale wrote of this speech:

> "The distinction drawn was between matters of state - or, as we should say, the prerogative - and commonwealth matters. Matters of state included the Church, where by the consitutional theory of the Reformation the Queen's supremacy was part of the royal prerogative ... On such matters the Queen was denying to Parliament the right of initiation." 15

Neale's account of the 1571 parliament gives no indication of the passing of the act against dilapidations of ecclesiastical property, but the implication is plain that Elizabeth would have regarded the legislation as an intrusion into her sphere of church administration. On the evidence it seems the bill was private in origin.[16] As the long preamble

13. Ibid p.167.
14. Ibid p.189 and see ch.3 f.n.26.
15. Ibid. Elton, however wrote of "Elizabeth's invention of a distinction between matters of state and matters of the commonwealth ..." : "Parliament in the Sixteenth Century" in G.R. Elton Studies in Tudor and Stuart Politics and Government 1983, vol.3, p.173. The point is that the ambit of parliamentary activity was being reduced, certainly as regards matters which might be initiated, by Elizabeth's determination.
16. See text at ch.3 f.nn.158-162.

naming the queen was employed, even the technical defence that Elton postulated for the Crown claiming that general acts did not refer to the monarch, and so did not bind the Crown, was not available for future avoidance of the 1571 act.

It must be observed that 13 Eliz.I c.10 covered all ecclesiastical land, where 1 Eliz.I c.19 had referred only to land vested in bishops and archbishops. This is an important distinction, as it is assumed by writers on this period that leasing of church property through the queen in the late sixteenth century occurred under the aegis of the 1559 act[17], which had not been repealed (at least specifically) by that of 1571. That this was not always the case is illustrated by the leasing of land belonging to or invested in the Dean and Chapter of Norwich, the Dean and Chapter of Peterborough, the Dean and Chapter of Salisbury, Magdalene College, Gonville and Caius College, and the hospital attached to the deanery of Windsor, to list but the examples used below.[18] Thus the specific exemption to the Crown to receive long leases may have remained, but only in respect of some church lands. It did not extend to property vested in colleges, hospitals and cathedral chapters.

The scanty records of proceedings in the parliament of

17. E.g. Heal Prelates and Princes pp.208, 214.
18. See instances at f.nn. infra: 26,32 and 111 (Norwich); 29 (Peterborough); 63 (Salisbury); ch.5 (Magdalene College, Cambridge); f.nn.64 infra (Gonville and Caius College); and 53 (Windsor Hospital).

1571 yield the following note which appears to relate to the bill under discussion:

> "A bill to meete with subtill practices of such corporacions of cathedrall churches as shall surrender their houses unto her Majestie's Landes and to take the same againe thereby to defeate leases by them made within a yeare, which statute did imply an explication of part of a statute made anno 31 Henry 8 etc." 19

Hooker's journal records the references to, if not the passage of the bill through April and May, 1571 and the place of the statute amongst the enacted legislation. The intention of the parliament (queen, lords and commons) was apparent, and unlike the act's predecessor there was no exemption expressed in favour of the Crown.

D'Ewes' Journals refer to the bill frequently as "of no great moment" [20] and do not mention it anywhere in conjunction with the "alphabetical" bills. The first reference by D'Ewes is to the first reading of the bill in the House of Lords:

> "On Thursday the 3d day of May, Five Bills of no great moment, had each of them one reading; of which the fourth being the Bill touching Dilapidations by Ecclesiastical persons, was read prima vice, and committed unto Viscount Hereford, Viscount Mountague, the Bishop of Winchester, the Bishop of Worcester, the Bishop of Ely, the Bishop of Rochester, the Bishop of Carlisle, the Bishop of Lincoln, the Lord Grey, the Lord Cobham, Doctor Lewes, and Doctor Yale.

19. T.E. Hartley (ed.) Proceedings in the Parliaments of Elizabeth I vol.I 1558-1581, 1981, p.208. (Anonymous Journal).
20. D'Ewes Journals pp.145, 146 and 187. D'Ewes account is not contemporary, but compiled in the seventeenth century from the records of contemporary notetakers.

> Nota, Though it be very usual in most of the Journals of Her Majesties Reign, for the Judges and sometimes for the Queens Learned Councel to be nominated joint Committees with the Lords, this present commitment foregoing is a very rare and unusual President, in respect that two Doctors only (as I conceive) of the Civil law, are made joint Committees as aforesaid. But the reasons of this here may well be, in respect that this Bill concerned Dilapidations, properly belonging to the Ecclesiastical Courts, in which they are for the most part best Experienced. And this may be a cause also, that the Spiritual Lords in this Committee are more than the Temporal, which is very seldom or rarely seen, but in some such like Case."21

No record has endured of Elizabeth's attitude to the issue of ecclesiastical property, but William Cecil, Lord Burghley, effectively her chief minister, in the latter part of 1572 penned a memorandum on reform of the church which contained as its fifth clause:

> "The whole clergy should be restrained from alienation of their lands and from unreasonable leases, wastes of woods and grants of reversions and advowsons to any person and namely to their wives and children, or to others for their use. And inquisition should be made in the register books what number of grants have been made within those 5 or 6 years to the disherison of the church and a resumption would be made thereof by Parliament." 22

An act, 14 Eliz.I c.11 was passed in 1572 which in sections 17 and 19 eased the restriction on leases of church lands : henceforth leases of houses in urban areas belonging

21. Ibid p.145.
22. Cited in C. Read Lord Burghley and Queen Elizabeth 1960, p.120.

to ecclesiastical bodies might be made for up to forty years, which relaxation is reflected in the church records of the day.[23] In 1576 parliament passed the statute 18 Eliz.I c.11 for the express purpose of amplifying 13 Eliz.I c.10. A loophole in the former provisions which allowed fraudulent renewal of pre-existing leases was blocked up, but 18 Eliz.I c.11 is notable in not referring to the sovereign, even in the enacting clause. The authority for both 13 Eliz.I c. 10 and 18 Eliz.I c.11 is given in the latter as merely "Parliament".[24] In the light of Elton's conjectures it may be that 18 Eliz. I c.11 resulted from a government bill. Far from naming the sovereign in the enacting clause as did 13 Eliz.I c.10 or naming him explicitly as being bound, as the statute 1 Jac.I c.3 was later to do, this statute of 1576 did not even contain a passing reference to the sovereign.

23. E.g. Sussex Record Society Vol.58, Chapter Acts 1545-1642 (for the Dean and Chapter of Chichester) pp.89, 97, 99 and 135, referring to the years 1574, 1578 and 1593. See Hunt v. Singleton (1597) Cro.Eliz.564; 78 E.R.809 where the Common Pleas found a lease void for breach of 13 Eliz.I c.10 and "not warranted" by 14 Eliz.I c.11.
24. See Ch.3 f. nn. 158-162.

It is noteworthy that examples of direct leases of non-episcopally held church property to individuals cease to spring from the pages of the record books from June, 1571 onward [25], but the Norwich Chapter Book in two lines for 25 August, 1581 reveals the pattern after 1571:

> "A lease granted to the Queens majesty of certain manors and parsonages for 100 years." [26]

Such leases through the queen are numerous throughout the remainder of the reign and a discernible number involve non-e piscopally held land. These leases arise most frequently in the context of the leasehold being passed on rapidly to a pressing courtier or government official. [27] Such activity was flagrantly in breach of the intention of parliament as expressed in the words of the act 13 Eliz. I c.10. The question was in the air but avoided for thirty years, whether 13 Eliz.I c.10 was binding on the queen. Against this specific issue must be measured Yelverton's concern regarding

25. Such leases, not contrary to 1 Eliz.I c.19, may for example be found, for the twelve months prior to the passing of 13 Eliz.I c.10, made by the Dean and Chapter of Chichester: Sussex Record Society vol.58, pp.73-77, and see leases made by the Dean and Chapter of Norwich for periods of 31 to 99 years in 1567 and 1568: (1953) 24 Norfolk Record Society, Norwich Chapter Books 1566-1649, pp.23 and 27.
26. 24 Norfolk Record Society p.33.
27. F. Heal "Economic Problems of the Clergy", R. O'Day "Ecclesiastical Patronage : Who Controlled the Church" and R. Houlbrooke "The Protestant Episcopate 1547-1603: The Pastoral Contribution" all in F. Heal and R. O'Day (eds) Church and Society in England : Henry VIII to James I 1977, pp.99, 137 and 78 respectively are valuable works on this subject written from social and economic angles different from the legal viewpoint in this thesis.

the prohibition on discussion of the prerogative in the parliament of 1571:

> "That it was fit for Princes to have their Prerogative; but yet the same to be straitned within reasonable Limits. That the Prince could not of herself make Laws: Neither might she, for the same Reason, break Laws." 28

Examples abound after 1571 of demands made on ecclesiastical bodies for leases of their lands, most often by royal command in favour of a royal official, but sometimes, as was to be the case with Magdalene College, by agreement between the parties with royal connivance. The adjective "royal" is used in this context to indicate the activities of those close to Elizabeth, either as courtiers or in the government. Elizabeth's attitude is not directly recorded but it must be inferentially ascertainable from the behaviour of her associates over whom she had total powers of discipline and dismissal.

A selection of those instances in which the church body objected to the demand on it, or another party contested the matter is sufficient to illustrate the contemporaneous doubts as to the legality of the royal commands.

28. Strype Annals of the Reformation 1725-1731, 2nd ed., vol.2, p.65. E. Foss The Judges of England vol.VI, 1857, p.203 thought this was William Yelverton, father of Christopher Yelverton JKB and grandfather of Henry Yelverton JCP in the following two reigns.

> "A letter to the Buisshoppe of Pitterburge, Lord Mordaunt, Sir Edward Mountague, Sir Edmunde Brudenell knightes, Thomas Tressam and John Hunt, esquiers, or any fyve or iiijer of them, to examyne the reasons of the Deane and Chapter of the said Church saying they pretend they cannot assent to a lease which is required by her Majesties letter to be granted to Mr. Hatton, Capten of the Guarde, and to signifie their opinions that her Majestie may be truly informed of the cause ..." 29

The Salisbury collection of correspondence evidences numerous versions of the Elizabethan offer that an ecclesiastic could not refuse. Unlike demands on other church lands, those made to bishops may have remained legitimised by the act 1 Eliz.I. c.19, but they reveal a ruthless cast of mind. In late 1575 Lord North commenced a letter to the Bishop of Ely in the most ingratiating terms and then continued, revealing further concern for the welfare of Christopher Hatton, the royal favourite:

> "Yowe remember howe tenderlye and hartelye her Maiestye wrote this summer unto yowe for a lease of Somersham for her selfe, and she forgetteth not your aunswere. Being nowe in the Courte I understande her Maiestye did very zelouslye recommende Mr. Hatton to be the Keeper of your house in Holborne, a man much favored of her Highnes, and much estemed of the best and honest sorte of Englande. Beside her Maiestye requeste was quallefied with so reasonable conditions, both for your ease and honor, as it is more than marvelous to knowe with what face yowe coulde denye her. Well! this laste denyall beinge added

29. (1574-5) Acts of the Privy Council 1571-1575 p.341. The dean and chapter seemed to have surmounted their difficulties over long term leases by the end of Elizabeth's reign when they were making such leases to Bishop Dove and his family, presumably through the medium of the Crown: W.Shiels "Some Problems of Government in a New Diocese: Peterborough 1560-1630" in R. O'Day and F. Heal Continuity and Change: Personnel and Administration of the Church of England 1500-1642 1976, p.170.

> to her former demandes, hath moved her Highnes to so greate dislykinge as she purposeth presentlye to send for yowe, and to here what account yowe can render for this strange dealinge towards your gratiouse soverayne ..." 30

This appeal to peer group estimation of the deserving qualities of Hatton and the possibility of royal disfavour was followed by over a page containing more overt suggestions of royal intercession against the bishop's interests. The letter finished:

> "Wherefore if yowe love peace, the preservation of your credit, and the continuance of her Maiestyes favoure, conforme your self and satisfie her requeste ..." 31

Not merely did some churchmen attempt to preserve the property in their care, but questions began to be raised at law as to the propriety of leasing church land via the Crown. In 1581 the Dean and Chapter of Norwich made a lease to the queen of land for 100 years.[32] Two years later she assigned the land to Henry Rice who sold the lease to Sir Thomas Shirley. Strype's account is not altogether clear,

30. HMC Series 9 (MSS of the Marquis of Salisbury) Vol.2, p.120.
31. Ibid pp.121-122. The story unfolding in this chapter explains the facts surrounding the passing of Bishopscourt in Holborn to Christopher Hatton, as recounted by A.L.Rowse The England of Elizabeth 1973, p.445, where he wrote that the queen forced Bishop Cox of Ely "to lease the manor, if not to Hatton, to the Crown and herself made the lease over to her useful favourite." See also E. St.J. Brooks Sir Christopher Hatton 1946, pp.149-151. The legal wrangle between the successive Bishops of Ely and Hatton's heirs was not resolved until 1697.
32. This may well be the lease referred to supra f.n.26, as no other lease for 100 years is recorded passing from this chapter to the queen in 1581.

but it seems that persons already leasing the land under question (presumably on valid short term leases) disputed Shirley's title to the land and in consequence Shirley took action for intrusion in the Exchequer Court.

"This Suit the Lord High Treasurer of England thought not fit to be suffered to procede..."[33], so Burghley, the Treasurer, ordered Shirley to post with him a bond of £20,000. Shirley complied with this demand, and Burghley, still seeking "for indifferent Ending of the Controversy" required "her Majestys Atturney General and her Solicitor, to consider of some good Course meet to be taken ...".[34]

Burghley was plainly anxious to minimise curial intervention in the now well entrenched procedure.[35] One senses a desire for continuity of a practice which was in the interests of those with court connections, which tempered Burghley's concern for ecclesiastical property expressed a decade earlier.[36] In the event, Popham AG and Egerton SG offered a written opinion that the deal should be sewn up more tightly, but still effected by a lease through the queen.[37]

33. Strype Annals vol. 3, p.247.
34. Ibid.
35. Was Burghley exercised in these events of about 1583 by Gawdy sjt's success in having the queen found bound the previous year by 13 Eliz.I c.12, a religious statute: see ch.3 f.nn.98 et seq?
36. Supra f.n.22.
37. Strype Annals vol.3, pp.247-248.

In 1594 the Bishop of Salisbury wrote to an intermediary objecting to Sir Walter Raleigh's request for leases over three manors, but eventually the bishop compromised, "I would be content for your sake to make a lease to the Queen of it ... or otherwise to take some other course, such as by law may be thought most fit ..."[38]

In December the same year William Wickham, about to be translated from the See of Lincoln to that of Winchester, temporised at the demands of Sir Robert Cecil, Burghley's son, for a lease of Winchester land to be promised to Sir Francis Carew through the queen. Cecil was withholding the necessary documents for Wickham's move. The bishop suggested that "I will be always found ready to submit myself to any her Majesty's commandment which may stand with a good conscience ..."[39]

The younger Cecil, more brazen than his father, and still short of being his political heir, was ruffling feathers in the dovecote of the episcopacy in this December of 1594. Richard Fletcher, Bishop of Worcester was outraged at Cecil's demands on behalf of Sir Edward Denny, expressed to be the queen's wish, but could only appeal to conscience.[40] It was Matthew Hutton, Bishop of Durham in the course of elevation to the Archdiocese of York, who was approached by

38. HMC Series 9, vol.4, p.508. This demand resulted in Raleigh's successful acquisition of Sherborne in Dorset.
39. HMC Series 9, vol.5, pp.41,46.
40. Ibid pp.31-32.

Cecil in late 1594 for leases and who firmly rejected the requests in a letter of 29th December.

This response drew a celebrated reply from Cecil and Sir John Wolley, Elizabeth's Latin Secretary, of 17 January, 1595. The letter, extracts from which are reprinted below, is worthy of juxtaposition with the outpourings of obeisance to Elizabeth and her age that flow from many historians, such as Neale, and most abundantly Rowse.

> "Our verie good Lord, Wee have receaved from you a letter of the xxixth of December, in aunswere of ours written by her Majestie's direction; wherein althoughe wee finde a course much contrarie to our expectacion, yet are wee of opinion that uppon better advise you will not be unwilling to chaunge your former opinion, espetiallie if wee (as your friends) doe both open unto you wherein you are mistaken, and give you caution what maie ensue if in such a case as this (where the Queene is interposed) you ground your proceedings uppon a false foundacion ...
>
> And where it seemeth by your man's reporte that yow thincke it mought be simonious inn theise cases to passe any suche promisses to the Queene, as though yow bargained for the Bushoprike, wee thincke it very absurde to make the personne of subject anie thing lyke; for he that can least distinguishe cannot but see also that the case is whollie changed when a Bushop is a suter for a Bushopricke by anie subjecte's mediacion, or takes a lyving upon condicion, and where a prince, that gives all, requires for some consideration but somewhat of him on whom (out of her owne free grace) shee is contented the whole shalbe conferred. To conclude : your Lordship shall do well to advise yourselfe of some better reasone if yow determyne to make denyall; for as nether her Majestie will require of yow anie thing unjust, nether wee wilbe wanting to yow in anie thing wherein wee maie safelie excuse yow, so wee cannot but admonishe yow that theese nyceties will hardlie bee admitted where suche a prince vouchsafes to intreate; ... And if you find by this anie cause to change your former answere (even for your owne good), then send us up your mynde as yow meane wee shall declare it; our love and care being suche of

> yow as wee have not thought it amisse to give yow this counsell, which proceeds from your friends, ...
> Your Lordship's verie loving frends,
> Ro. Cecyll. J.Wolley.
>
> It will not be amysse for yow to looke uppon this note, whereby yow maie call somewhat in minde done by yourselfe."[41] (emphasis added)

Hutton gave spirited defence to this unsubtle threat of blackmail, but in the end was only able to save face to the extent of withholding the leases, intended for Lord Cobham's son, until after he had been formally elected Archbishop.[42]

This large scale trade in land prompts enquiry as to the actual mechanics of the process. There is no evidence that the queen ever personally signed any letters of demand.[43] Burghley seems involved in most, but signed none. Others at court such as Sir Walter Raleigh signed many. Robert Cecil, of all involved, left the most documentation of his demands. Whoever wrote the letters, it seems that the elder Cecil was the member of Elizabeth's Council who advised on the filling of church offices: "It was for Burghley to deal with the 'packing and purchasing' that preceded high clerical appointments."[44]

The role and activities respectively of the Cecils _père et fils_ lead to a search of the administrative apparatus

41. (1843) 17 Surtees Society pp.93-95.
42. Stone _Crisis_ p.407.
43. She was however subjected to at least one direct reply of refusal for a demand for a lease : _infra_ f.n.53.
44. B.W. Beckingsale _Burghley Tudor Statesman 1520-1598_ 1967, p.230.

which they operated, looking for the actual functionaries who drafted the demands and kept the records of activities increasingly being called into question at law.[45]

Burghley's two principal secretaries were Sir Vincent Skinner and Sir Michael Hickes, both of whom served the younger Cecil also. Of Skinner a thumbnail sketch exists.[46] He held posts which carried the possibility of that peculation which the Elizabethans accepted in place of salary, but the leases of church lands which he took were of short duration, and he is not recorded as being involved in filling church offices. On the other hand Hickes was heavily involved in both State and church offices, as evidenced by his activities with Robert Cecil in filling bishoprics in 1594.[47]

Smith wrote of the evidence available on Hickes' last

45. By way of analogy, in 1560 Elizabeth established the office of Crown informer to attend to dispensations from statutes. The first appointee was John Martin: Edie "Royal Dispensing Power" p.203.
46. R.C. Barnett "Place, Profit and Power : A Study of the Servants of William Cecil, Elizabethan Statesman" (1969) 51 James Sprunt Studies in History and Political Science pp.129-132.
47. A.G.R. Smith Servant of the Cecils : The Life of Sir Michael Hickes 1977, pp.75-76.

years that it seemed

> "... to indicate that, three years before his death [1612], Hickes was still demanding his own price for the use of his influence on behalf of suitors for ecclesiastical benefices. It would appear that we must condemn him as an odious hypocrite, full of pious sentiments but very ready to feather his own nest by intrigues behind the scenes in the negotiations attending ecclesiastical promotions. That, however, would be an unfair judgment. As secretary to Burghley and confidant of Robert Cecil a large part of Hickes's life was devoted to dealing with suits and suitors. He expected gratuities and was used to manoeuvering in order to obtain his client's desires."48

Smith's defence of Hickes seems less than satisfactory in the light of contemporaneous doubts as to the morality and legality of what he was doing. The entrenching of an illegal modus operandi by an individual in concert with others, followed by adherence to the improper precedent hardly appears a satisfactory justification. While ecclesiastical leases were demanded of churchmen by members of a wide circle, given that the common feature of all was that they be passed through the Crown, there was most likely some central machinery, or at least a bureaucrat who recorded the involvement of the Crown. The circumstantial evidence would seem to indicate that Hickes was the man.

It seems likely that Hickes was, with Robert Cecil, if not the progenitor, then a sturdy sustainer of that immemorial tradition in government of rule by subterfuge, guile and chicanery. Cecil wrote to Hickes in 1592 of his part in the promotions of Attorney General Popham, Solicitor

48. Ibid p.162.

General Egerton and Edward Coke to the posts respectively of Chief Justice of Queen's Bench, Attorney General and Solicitor General, finishing the note with the words, "Burn this."[49]

The custom is sustained by Cecil's modern confreres in spirit: "Bill asks that copies not be taken and that it not be shown to any other officer (or person)" (Australian Trade Practices Commission, 1976) and "Mitchell [the Attorney-General of the United States] is definitely helping us, but cannot let it be known. Please destroy this, huh?" (Campaign to Re-elect the President, 1972).[50] The allusion to modern governmental misdeeds, and, in the epigraph of this chapter to U.S. President Nixon (Stone had published prior to Nixon's fall in 1974) are intended to highlight the atmosphere of private utility which permeated Elizabethan government. Behaviour, delinquent to the modern eye, was fundamental in establishing a governmental view of what the relationship should be between Crown and statutes, a view which became entrenched despite Coke's crusade to undermine it.

49. Ibid p.74.
50. V.G. Venturini Malpractice: The Administration of the Murphy Trade Practices Act 1980, pp. 314-315. Faith in the continuity of human affairs should be refreshed by noting that at the time of writing (early 1985) the "Bill" referred to in the Australian Trade Practices context is doing very well indeed. Attorney General Mitchell, less fortunate, was convicted and imprisoned for his law breaking.

In following the story of the ecclesiastical leases to its climax one is struck by the progressively subordinate role of the curial process, a subordination directed by Burghley's subtlety and Robert Cecil's ruthlessness in respect of the law on this issue. Burghley kept the question of whether the queen was bound by 13 Eliz.I c.10 out of the courts: the decision in Willion v. Berkley would have left as a sole defence to the Crown activities the claim that the queen had a prerogative to all dealings with the Church, which in the absence of express words was untrammelled.

The reference to "Crown activities" is advised. Where the royal position had previously been protected, but such privilege had been incapable of transmission to third parties[51], the Elizabethan government arrived at a point where those with Crown connections could all milk the system and take advantage of the purported immunity of the queen.

Amidst the growing clamour it was wise of Burghley to keep the issue out of court and in the hands of the two Crown-minded law officers, Popham and Egerton[52], but a legal resolution was becoming inescapable. Coke, Solicitor General in 1592 and promoted to Attorney General in April 1594 was to be a Crown law officer of a very different stamp from his

51. E.g. supra ch.1 f.nn.24 and 68, ch.2 f.n.2. Note Coke and Raleigh on private profit through abuse of the body politic : ch.3 f.nn.134-141.
52. See the material at ch.3 f.nn.65-68 and 111-112 and ch.5 f.n.17 for Popham and Egerton on the general issue of the Crown's position.

predecessors on the place of the Crown vis à vis the law. The issue of church lands was coming to a head as Coke settled himself into office.

In 1596 Dr. Robert Bennett, Dean of Windsor wrote directly to the queen in reference to her demand for a lease of the parsonage of Husborne.[53] The Dean was by turn obsequious, then blunt in his assertion that the queen's request was contrary to the law: "I cannot by the laws demise the lease as yet, neither by the local statutes for more years than one and twenty, unto which statutes I am straitly tied." Bennett was referring both to general legislation (presumably 13 Eliz.I c.10) and the local by-laws of the hospital of which he had charge and which owned the manor in question. Of the request for the lease Bennett wrote: "it tendeth to the ruin of the hospital..."

In the Salisbury correspondence, annexed to this brave attempt at diverting royal pressure is an anonymous reply to "the reasons of Dr. Bennett, why he cannot, or rather, will not yield to her Majesty's letter for the parsonage of Husborne", noting that Bennett had claimed "His promise is void against law because the statute maketh such bands and promises void ...".[54]

53. HMC Series 9 vol.6, p.550.
54. Ibid pp.550-551.

Bennett had not actually referred to the lease being void as against the statute : assuming the reference was not to the local by-laws, his critic was plainly aware of the existence and import of 13 Eliz.I c.10[55].

Bennett gave every appearance of a churchman who was prepared to put a stop to the haemorrhage of church property, and to suffer the resulting loss of promotional prospects. However, in a letter uncertainly dated 1598 to "Mr. Secretary Cecil" in probable response either to the demand for Husborne, or another lease over Sherborne[56], Bennett shamelessly grovelled to Cecil, expressing his sorrow at the base emotions which had "carried him so far to that undutiful regard of the Queen's will and pleasure."[57]

"For what shall it profit a man, if he shall gain the whole world, and lose his own soul?"[58] Robert Bolt in A Man for All Seasons had Sir Thomas More rhetorically pose

55. Popham CJ, Francis Gawdy and Clench JJ in Queen's Bench were clearly cognisant of the ambit of 13 Eliz.I c.10 in Dumper v. Syms (1598) Cro. Eliz. 815; 78 ER 1042 at 816; 1043, although that case did not involve the queen; similarly with Hunt in Common Pleas in 1597 : f.n.23 supra.
56. C.S.P.D. Eliz. vol. 5, pp.96-97, 19 September, 1598 Secretary Cecil to Dr. Bennett. This letter is pure horse trading, being an explicit example of promotion in the church hierarchy in exchange for church lands: "The matter for which you were moved concerning Sherborne is now like to be granted, for the Queen resolving on Mr.Cotton, I conceive he will not find the same scruple which you did, and therefore I hope will yield it." The remainder of the letter was an oblique warning to Bennett not to scandalise Cotton.
57. HMC Series 9, vol.14, p.87.
58. The Bible Mark 8, v.36.

this question to Richard Rich who had accepted the Attorney Generalship of Wales in exchange for tainted evidence. Dr. Bennett's price was a little down market from Richard Rich's: by September 1603 the new Bishop of Hereford was confirming leases on Cecil as "the recompense of my labours and charges at Windsor and the pledge of my thankful mind to yourself ...".[59]

Rumour ran both ahead and geographically wide of actuality: in August 1599 Dr. John Duport wrote to Cecil understanding that Bennett was to be elevated to the See of Ely. Duport "Begs his commendation to be Bennett's successor 'in the Windsor'."[60]

But a new factor had entered the trade in church lands : the presence of Edward Coke. Appointed Attorney General in April 1594 in the run up to Cecil's orgy of episcopacy packing, by February 1595 Coke was the subject of a letter from Lord Burghley to his son Cecil in respect of rents to be

59. HMC Series 9, vol.15, p.248. Bennett's rise is a splendid example of the manner in which quite different factors, depending upon vantage point, may be seen as the reason for episcopal promotion. Houlbrooke "Protestant Episcopate" p.85 referred to contemporary sources to find Bennett's success based in "a sermon he preached before the Queen which was described at the time as 'all needle-work'". The basis of Elizabeth's choice is, of course, immaterial. What matters for the purposes of this discussion is that courtiers and officials could put a finger on the artery of promotion unless they were paid off.
60. HMC Series 9, vol.14, p.110.

reserved on the nomination of the new bishops of Winchester and Durham. Burghley had discussed the matter with Coke, who complained of a lack of other counsellors: "there are many weighty causes of her majesty to be ordered".[61]

This initial reluctance to deal unilaterally with the issue of leases was soon shrugged off in the face of consumer pressure. In March 1595 Sir Edward Denny wrote to Sir Robert Cecil asking him "to instruct Mr. Attorney to peruse and despatch his (Denny's) leases, Mr. Attorney's answer being that he is the Queen's sworn man, and will not meddle any further therein without some notice from some of the Council that it is her Majesty's pleasure to take such leases."[62]

By August 1599 Coke had ceased to wait for instructions from the Council. He wrote to Sir Robert Cecil:

> "I have perused a book to be passed from the Bishop and Dean and Chapter of Sarum, but such a one, and is prime impressionis, for sure I am the like was never seen before, for they grant certain manors to her Majesty under condition that her majesty within three months shall grant some of those manors to Sir Walter Raleigh, and some others to a friend of their own and his heirs (and yet when anything is to be done to her Majesty they pretend sincerity of conscience); ... with other unreasonable and unreverent conditions and covenants, whereby such indignity is offered to her Majesty as is too presumptuous, and prejudical also, if it should be suffered : for first, to draw a book and without the privity of her majesty's counsel learned, to seal and deliver it; to bind her Majesty upon condition within three months to grant part to one and part to their friend, as though her Majesty that never wronged any would deal unjustly and were not to be trusted; ... Whereof I thought it my duty to inform

61. E. Foss Judges of England 1857, vol.6, pp.66-67 citing "Peck's Desid. Cur.B. v.6."
62. HMC Series 9, vol.5, p.130.

> you, for the danger may grow to her Majesty by this precedent. And therefore it is not amiss to cause their grant to her Majesty to be enrolled and to take a pause, that this course secundum ordinem Sarum be not permitted - 29 August, 1599."63

Still the trade thrived. A letter from Dr. Butler to the Earl of Cumberland in 1600 reveals just how common was the knowledge of the procedural loophole for acquiring church leases:

> "My request is that her Majesty will procure a lease of the lands of Mortimers of the Master and Fellows of Gonville and Caius' College for three score years or more, yielding to the said Master and Fellows the usual rent now paid. The rent of it to the College is 13£.6s.8d., and there is now five years of the old lease not yet expired. No college can grant a lease to any private person but only to her Majesty, and from her Grace to me or my assigns. [P.S.] - There is haste required, lest other suitors step in before me."64

Coke was not alone in questioning the activities of ecclesiastical bodies in respect of their lands and the medium of the Crown was not the only means adopted for defeating 13 Eliz.I c.10, as the devious passing of a lease from Queen's College, Cambridge to the financier Sir Horatio Pallavacino in 1598 illustrated.[65] The parliament of 1597 displayed some reaction to the current rapacity:

63. HMC Series 9, vol.9, pp.333-334.
64. HMC Series 9, vol.10, pp.449-450.
65. J.H. Gray The Queen's College 1899, pp.130-131, and see L. Stone An Elizabethan : Sir Horatio Palavicino 1956, p.273. Note also the dean and chapter of Peterborough conniving in leases forged by their receiver-general, Edward Baker in 1587-8 : Shiels "Peterborough 1560-1630" p.170.

> "Mr. Davies shewing many Corruptions in the masters of Colledges in the Universities of Oxford and Cambridge, in their abusing of the Possessions of the same Colledges contrary to the Intents of the Founders, converting the benefit of the same to their own private Commoditities, prayed the advice of this House for reformation, and having a Bill drawn to that purpose desired he might have assistance of some of the Members of this House being learned in the Laws, for the better digesting of the Bill against the next sitting of this Court. Wherein Mr. Speaker referred him to Mr. Francis Moore and Mr. Boise, with such other Members of the House as of the Temple together in the same House with the said Mr. Davies. Sir Edward Hobbie liking very well of the said Motion made by the said Mr. Davies, moved that like consideration may be had of Deans and Chapters as of the said Masters of Colledges."66

However, concern had not yet reached the level of consensus:

> "On Wednesday the 23th day of November, Four Bills of no great moment had each of them one reading; of which the last being the Bill concerning Leases made by Archbishops and Bishops was upon the second reading rejected upon the question for commitment, and so likewise upon the question of ingrossing."67

With Coke having raised his doubts after the 1597 parliament, the situation was now coming to a head. A resolution of the matter was required not merely with a view to future leasing activity, but to determine the certainty of the title to the multiplicity of ecclesiastical leases already passed through the queen. A test case could have been set up for resolution in the courts, but litigation once commenced has an uncontrollable quality, and the property interests of

66. D'Ewes Journals, p.559.
67. Ibid p.562. The bills referred to here and f.n. 66 may have been separate, but are both obviously concerned with leases of church land.

many wealthy families would hang on this determination. Even with Sir Thomas Egerton, now Lord Keeper and Sir John Popham as Chief Justice of Queen's Bench to attend to the Crown's needs, litigation was too perilous a voyage on which to embark.

A course which might have been adopted was to have the senior lawyers of the realm advise the House of Lords on the legality of the procedure then current. Such advice would have the advantage that it had of itself no legal effect. If the opinion ran against legality, then parliament could survey the options for remedy.

It is difficult to determine whether the parliament of 1601 took quite such a considered course. It seems from records of the debates ultimately to have determined on the path of legislation to strike down, or at least leave invalid title flowing from ecclesiastical leases passed through the Crown if the lessor did not have capacity under statute or law to make the lease. Discussion of the content of the legislation relating to this subject indicates a lack of prior agreement, and a tortuous path to a conclusion. On the 7th November, 1601 the "Bill for Assurance of Lands" was read a second time in the House of Lords and then committed to a committee headed by the Archbishop of Canterbury, containing three other bishops, nine lords, the lord treasurer,

Popham CJQB, Anderson CJCP, Peryam CB and Coke AG, this committee being "appointed to attend their Lordships".[68]

The text of this "Bill for Assurance of Lands" is no longer available, but its title indicates that it may have had the intention of shoring up courtiers' claims to church lands, a purpose completely contrary to the final form of the bill "for confirmation of Grants made to the Queens Majesty, and of Letters Patent made by her Highness to others"[69], which entered the Lords from the Commons on 19th November. Certainly this latter bill was enacted as 43 Eliz.I c.1 (1601), "An Act for Confirmation of Grants made to the Queen's Majesty, and c. and of Letters Patent made by her Highness to others", after provisos and amendments were added in conferences with Committees of the Lords and Commons.

Both Houses may have been approaching the general problem of church lands independently, the Commons on the 2nd November, 1601 giving a first reading to "The Bill for the explanation of such Statutes as touch Leases to be made by Archbishops and Bishops."[70] The bill was shortlived,

68. Ibid p.602.
69. Ibid p.605.
70. Ibid p.623.

being defeated at its second reading two days later, following a speech from Mr. Boise.[71]

Meanwhile the Bill for Assurance of Lands moved to the Commons on 12th November[72], only to suffer defeat at its third reading in the Lords on 21st November.[73] On the same date that this bill moved to the Commons, 12th November, that House gave a second reading to the bill for Confirmation of Grants (that bill's first appearance in D'Ewes' Journal) and committed the bill to two Privy Councillors of the House, Francis Moore and Laurence Tanfield.[74]

With the other two bills knocked out, or about to be rejected, this third bill was to occupy the floors of both Houses for over another month. Francis Moore suggested provisos and amendments to the bill (it was probably conceived with a broad sweep of protection for grants against the public good which was to be somewhat tempered in debate) and on 18th November, having received its second reading it was ordered engrossed[75], the next day being passed through the

71. Ibid pp.625-626. Perhaps the context of this chapter puts this bill in a different light from that assumed by J.E. Neale in Elizabeth I and her Parliaments 1584-1601 1957, pp.416-417. Neale made no reference to either the bill for Assurance of Lands or Confirmation of Grants. Boise [Boys] was steward to Archbishop Whitgift of Canterbury. Heal Prelates and Princes p.285 explains opposition to this bill (identical to the one defeated in 1597) stemming from an estimation that it favoured only courtier interests.
72. D'Ewes Journals p. 603.
73. Ibid p.605.
74. Ibid p.635.
75. Ibid p.642.

the Commons and despatched to the Lords.[76]

In the next few days, while the Lords terminated the bill for the Assurance of Lands and gave the Confirmation bill a second reading and into the custody of a committee[77], the Commons resounded to the famous debate on monopolies from 20th to 25th November.[78]

Lawrence Hide [Hyde] introduced a bill to curb monopolies and the speeches ranged back and forth, from Francis Bacon's toadying and attempt to suppress discussion of the prerogative, to Francis Moore's outspokenness and subsequent naughty school-boy retraction.[79] The debate reflected not only the attitude of many in the Commons to the non-accountable activity of the Crown, it also affected the Confirmations bill, which was intended to validate grants made by the queen from 1583 onward. A proviso in the final act specifically excluded grants of monopoly from validation.

Sir Robert Cecil managed to get the Commons back under control after consultation with the queen, and skittled Hyde's bill in exchange for "a Proclamation general" to deal with monopolies. Cecil listed many instances of monopolies,

76. Ibid pp.643 and 605.
77. Ibid p.606.
78. See ch.3 f.nn.131-133, and Neale Elizabeth 1584-1601 pp.376 et seq.
79. Ch.3 f.nn.131-132.

for example "The Patent for Cards shall be suspended and tryable by the Common Law"[80], and so it was the next year in the Case of Monopolies[81].

Hard on the heels of this irruption of self determination by the Commons upon the citadel of queenly prerogative and political irresponsibility followed Elizabeth's delivery to her Commons of what later became known as her Golden Speech. Now an aged woman, with only sixteen months to live and aware that this would probably be her last parliament, Elizabeth delivered a speech that not merely mended fences, but built a bridge into the future over which her reputation and that of her government has travelled, quite marvellously shorn of the less savoury aspects of the application of power.

This remarkable exercise in propaganda has always been associated with the debate on monopolies, but the references to grants are also germane to the problem of leases through the queen. The following weeks would show the parliament prepared to swallow confirmation of some of the latter grants, but not of monopolies by royal letters patent. Opinion might be hardening against this exercise of royal power, but Elizabeth ensured that no trace of its abuse could be sheeted home to her. The pound sterling (to mint an anachronism with apologies to Harry Truman) did not stop here:

80. D'Ewes Journals pp.652-653.
81. See ch.3 f.n.134.

> "Since I was Queen, yet did I never put my Pen to any Grant, but that upon pretext and semblance made unto me, that it was both good and beneficial to the Subjects in general, though a private profit to some of my antient Servants who had deserved well: ... That my Grants should be grievous to my People, and Oppressions to be Priviledged under colour of our Patents, our Kingly Dignity shall not suffer it; Yea, when I heard it I could give no rest to my thoughts until I had reformed it. Shall they think to escape unpunished, that have thus oppressed you, and have been respectless of their duty, and regardless of our Honour? No. Mr. Speaker, I assure you, were it not more for Conscience sake, than for any glory or encrease of Love, that I desire these Errors, Troubles, Vexations and Oppressions done by these Varlets and lewd Persons, not worthy the name of Subjects, should not escape without condign punishment. But I perceive they dealt with me like Physicians, who ministering a Drug make it more acceptable by giving it a good Aromatical Savour, or when they give Pills do gild them all over."82

The political truth was as summed up by MacCaffrey, who described distribution of various lands controlled by the Crown (although ignoring church leases), and then added "grants of monopoly, speculative and costly to exploit, were not prizes sought by the star players in the political game".[83] Monopolies were curbed by proclamation in 1601, litigated in 1602, and specifically excluded from validation in the 1601 act[84], while some grants of land through the queen which had weak titles were made good by that legislation if the grants had been made by the queen after 8th February, 1583.

82. D'Ewes Journals pp.659-660. Also reprinted in Neale Elizabeth 1584-1601 at pp.389-390. Neale is as laudatory as the present writer is sceptical of the Golden Speech.
83. MacCaffrey Place and Patronage p.120.
84. 43 Eliz.I c.1 s.8, S.R. vol.4, p.961.

It must be noted, however, before anything further is said of the 1601 act that a proviso was inserted into section 1 so that the validating or confirmatory effect of the act did not extend to "Conveiances or Estates hade or made by any Ecclesiastical person or persons or Bodies Politike or Corporate not havinge power or abilitie by the Lawes and Statutes of this Realme to make the same ...".[85] The perception of parliamentarians regarding the passing of ecclesiastical leases through the queen may reasonably be inferred from this reference covering conveyances either to or from the queen.

Nothing more was heard of the bill for Confirmation of Grants for a week after the Golden Speech, but on 7th December the Lords began four days of steady work on the bill, trying to ascertain the necessity of provisos and prepare for meeting with a committee of the Commons.[86] Attorney General Coke was in the thick of this committee work, along with the chief justices and their fellow judges.[87] On 11th December Coke and Dr. Carew represented the Lords at a conference with a Commons' committee.[88] Days passed in conference between the committees of the two houses, and then the ice broke in the bill's glacial passage. On 16th December the Lords

85. S.R. vol.4, p.959.
86. D'Ewes Journals pp.609-612.
87. Ibid pp.611-612.
88. Ibid p.681.

accepted the provisos and passed the bill, the Commons following that course the next day.[89] Lord Keeper Egerton concluded the session on 19th December with a reference to the queen perceiving "that private respects are privately masqued under public pretence".[90]

This exhaustive examination of the Act of Confirmation of Grants has been necessary to explain Coke's report of the Case of Ecclesiastical Persons.[91] Ascribing the case to Michaelmas term (about November) 1601 "in the High Court of Parliament" (one suspects a Cokeian flourish to give a little extra top-spin to this advisory opinion presumably the product of the Lord's committee referred to above) Coke wrote:

> "At a Parliament held in the same term upon consideration of a bill for confirmation of conveyances made by the subjects to the Queen, and of letters patents made by the Queen to subjects, it was resolved by the Chief Justices, Popham and Anderson, and by divers other justices assistant to the Lords of Parliament in the Upper House, that leases made to the Queen by colleges, deans and chapters, wardens of hospitals, or any other having spiritual or ecclesiastical livings, against the provision of the Act of 13 Eliz. cap.10 are restrained by the same Act, as well as leases made by common persons."

That Coke was an eye-witness of the making of this resolution seems incontrovertible[92], and despite his unusual reticence in listing himself on the committee, in all likelihood he was part of the deliberative body. It was not in

89. Ibid pp.613, 615-616 and 686-687.
90. Ibid p.619.
91. (1601) 5 Co.Rep. 14A; 77 E.R. 69.
92. See f.n.87 supra.

Coke's temperament to sit quietly watching others discuss matters on which he had strong views.

Street has written of this case that it cannot "be accepted as an authority because it was only heard in parliament on consideration of a bill for the confirmation of conveyances made by subjects to the queen."[93] To so disparage the impact of the Case of Ecclesiastical Persons is to take a strictly modernist and mechanical view of the utility of what is by analogy in twentieth century Australian terms a Crown Solicitor's or Solicitor General's opinion.

The fact that the senior "law deciders" of the realm, in conjunction with the Attorney General, decided ex-curially, that is, not in the context of specific litigation, that church leases through the queen were not a basis of title, and that parliament enacted that such inability to pass leases would not be made good in legislation, speaks volumes for the importance of the committee's deliberations. It also speaks to the necessity of Crown officials agreeing on a common line, at least as regarded ecclesiastical leases, where judiciary, parliament and conciliar officials had held disparate views for so long.[93A]

Coke advanced three reasons[94] for the leases through the queen being restrained by 13 Eliz.I c.10 : firstly the

93. Street Governmental Liability p.145 and "Effect of Statutes" p.363.
93A. See ch.3 f.nn. 163 and 164.
94. 5 Co.Rep. 14B; 77 E.R. 70.

ecclesiastical persons were prevented by the act from passing any estate. It was not a matter of the queen being bound or otherwise; rather, the churchmen had nothing they could give her.[95] Secondly, the act of Elizabeth's first year (1 Eliz.I c.19) "hath a special provision, that they [bishops] may make estates to the Queen; which proves, that if such provision had not been made for the Queen, for as much as the Act doth disable bishops to make estates, the Queen could not take an estate from them against the provision of the Act, but no such provision is in the said Act of 13 Eliz."

But thirdly, Coke turned to precedent and general theory and pronounced, "In divers cases the King is bound by Act of Parliament, although he be not named in it, nor bound by express words. And therefore all statutes which are made to suppress wrong, or to take away fraud, or to prevent the decay of religion, shall bind the King although he be not named: for religion, justice and truth are the sure supporters of the crowns and diadems of Kings."

The report cites Radclif and Willion v. Berkley as authorities, of the former Coke writing "And therefore it is agreed in 35 H.6 60 that the King shall be bound by the stat. of West. 2 cap. 5 which makes provision against tortious usurpations, although the King be not named in the Act."[96]

95. This is a particularly important limb of Coke's argument, as it remained sound irrespective of the law on Crown immunity from statutes. The reasoning can be seen in the proviso of the 1601 act referring to the incapacity of churchmen to make leases.
96. 5 Co.Rep.14B; 77 E.R. 70.

Coke was being less than frank about the extent of agreement on this subject in Radclif : the English Reports footnote the particular reference to Radclif as "35 H.6 61.a." at which only Wangford sjt's remarks are relevant.[97]

The relationship of Coke's report to the 1601 statute is further borne out by Coke writing that the Lords "Caused a clause to be added in the first branch of the Act of Confirmation that it should not extend to make any lease, grant, and c. good to the Queen by any ecclesiastical person, and c. who had not power by the laws and statutes of the realm to make it ...".[98]

The last sentence of Coke's report is a sally conforming to his later references to the public good outweighing the prerogative dispensing power: "The King being head of the commonwealth, cannot be an instrument to defeat the purview of an Act of Parliament made pro bono publico."[99]

The decade between Elizabeth's death and the commencement of argument in the Magdalen College case saw Coke's continued rise to eminence, but not unquestioned ascendancy. He was created Chief Justice of Common Pleas in 1606, but Egerton had

97. Ch.2 f.n.109. Without a set of Coke's original reports available the present writer is unaware whether this attribution is Coke's or a later editor's.
98. 5 Co.Rep. 15A-15B; 77 E.R. 71. See text at f.n.85 supra.
99. 5 Co.Rep. 15B; 77 E.R. 71. See Penal Statutes and Monopolies as examples of two later cases in which Coke discussed pro bono publico in this context : text at ch.3 f.n.136.

been promoted Lord Chancellor in 1603. The two men continued to embody different viewpoints on the Crown in the legal system, Egerton (Lord Ellesmere from July 1603) discouraging discussion of the prerogative, while Coke asserted with increasing urgency the paramountcy of the common law, which ordered the affairs of the State and all in it including the king.[100] Coke's law reporting, as evidenced by the Case of Ecclesiastical Persons[101], paralleled his judicial utterances.[102]

Coke is now remembered for some of his less personable behaviour such as vicious prosecution in treason trials, but by modern standards, and indeed those of any polity aspiring to principles of representative and responsible self-determination Coke had the endearing quality of pursuing his view of the law openly, seeking discussion where James I, Egerton and Bacon sought to exclude the topic of the prerogative from

100. W. Holdsworth Some Makers of English Law 1966 (The Tagore Lectures 1937-38) p.115. J.R. Tanner English Constitutional Conflicts of the Seventeenth Century 1961, p.37 saw the bench under Coke pursuing a policy of standing between the Crown and subjects.
101. Coke's Fifth Report was published in 1605, see J.H. Baker "Coke's Note-Books" p.73.
102. For example, Case of Prohibitions del Roy (1607), loc.cit. ch.3 f.n.57. This case was reported in the Twelfth Part of the Reports, not published until 1658, nearly a quarter of a century after Coke's death : Baker "Coke's Note Books" p.82. Baker thought it correct to assume that Coke had withheld publication in his own lifetime of this constitutional material as being impolitic: Baker supra p.83. See also material at f.n.99 supra.

parliament and Westminster Hall. The danger of anachronism is acknowledged at this juncture[103] : Coke was of course no democrat, but his desire for overt analysis of state power, and intuitive fear of the covert private abuse of that power, make him invaluable in setting the common law in directions less favourable to autocracy or oligarchy.

The comparison of Bacon, father of modern British science through his advocacy of empirical method, with Coke the sometimes suspect antiquarian, is worthy of contemplation. Bacon could not carry his theory of empiricism through to a survey of the prerogative : perhaps for personal psychological reasons he did not dare to explore the mystery of state authority. Coke seemed so effervescent in his personal security, and assumption of the State's inherent health, that he probed its workings from the most eminent legal stations, self-assured that he was not wounding, but reviving.

It is perfectly true that Elizabeth had forbidden debate on her prerogative without her prior consent[104] , but her political dexterity may be contrasted with her successor's in the pacifying words of Lord Keeper Egerton at the close of the

103. Particularly after dire criticism by Sir Geoffrey Elton of Clare College, Cambridge who was kind enough to read this chapter in draft at very short notice and offer very useful commentary. Little Coke and Conflict is able to put Coke's work into a coherent framework of economic thought which complements this writer's sole concern with a narrow legal issue.

104. See f.n.13 supra.

1601 parliament on 18th December. Speaking for the queen to the assembled lords and commons he said:

> "... touching your proceeding in the matter of her Prerogative, ... she is perswaded Subjects did never more dutifully; And that she understood you did but obiter touch her Prerogative, and not otherwise but by humble Petition ...".105

This last statement was a diplomatic fiction as the debate over monopolies less than four weeks earlier had clearly demonstrated. The Stuart kings were to be undone by their absolutist adherence to policy as laid down but flexibly imposed by the Tudors. This commentary is necessary to make relevant for the present purpose Holdsworth's statement that "Coke, throughout his life, had the outlook of a Tudor lawyer and statesman, and a Tudor lawyer and statesman of the Elizabethan age".[106]

That Coke was recognised as a hindrance to royal government by those who knew what was best for the kingdom by virtue of their place in it is revealed in Archbishop of Canterbury, George Abbott's letters of January 1612. He wrote to Lord Ellesmere in respect of proceedings against Legate and Wightman, subjects of heresy charges, expressing the king's desire for justice to be administered to the defendants with a

105. D'Ewes Journals p.618.
106. Makers of English Law pp.118-119.

pre-ordained result. Suggesting that the judges be hand-picked, Abbott added:

> "And as I conceived his Highness did not muche desire that the Lord Coke should be called there unto, least by his singularitie in opinion he should give stae to the businesse."107

Coke's intractability undoubtedly matched his arrogance. Abbott wrote the following day to Ellesmere:

> "Mr. Justice Williams was with mee the other day, who maketh no doubt but that the lawe is cleere to burne them. Hee told me also of his utter dislike of all the Lord Coke his courses, and that himself and Baron Altham did once very roundly let the Lord Coke knowe their minde, that he was not such a maister of the lawe as hee did take on him, to deliver what hee list for lawe, and to dispise all other. I finde the Kinges Atturney and Solicitor [Hobart and Bacon] to bee throughly resolved in this present businesse."108

For all his perception and determination on the law and the State, Coke had the personal weaknesses of his contemporaries which give him the appearance to modern eyes of a hypocrite. He probably was. His value in the development of the common law does not require that he be a hero, which he was not. Stone has recorded Coke's

107. Archbishop Abbott to Lord Chancellor Ellesmere, 21 January 1612. The Egerton Papers Camden Society, 1840, p.447. The date in the original was 21 January, 1611, but has been modernised here, as throughout the text, to compensate for a New Year which until well after James I's reign occurred on 1st April.
108. Ibid p.448.

receipt of £20 in 1602 to help ease a land purchase from the Crown.[109] MacCaffrey referred to such sums as "douceurs"[110], but "bribe" seems a simpler term.

That Coke received money on a land deal is not so jarring as his letter of 14 September, 1613 to Sir Henry Wyndham. Coke was Chief Justice of Common Pleas, and one month short of translation to the presidency of King's Bench where he would immediately be confronted with argument in the Magdalen College case, at the conclusion of which he would deliver a ringing denunciation of leases through the queen in contravention of 13 Eliz. I c.10. Coke wrote to Wyndham as follows:

> "Sir. Whereas I intended to have purchased the lease of the manor of Cressingham in Norfolk, made by the Deane and Chapter of Norwiche to the late Queene for one hundred yeares. Soe it is that I ame constrayned to borrowe greate summes of money to furnishe paimentes for thinges which of late I have entred into, by meanes whereof I ame at this present unprovided to undertake the buying of the lease aforesaide. Nowe, because I will no longer entertayne this your offer to your prejudice, doe set you at liberty with my good liking to sell the lease aforesaid to any to whom you will, and doe promise you to satisfye any with whom you shall deale about it, that it is a good lease in law and any may safely buy it. Soe I bidd you farewell.
>
> Your loving frende,
>
> Edw. Coke."[111]

There is no innocent explanation for this request. The dean and chapter would have had no cause to pass the lease through the queen except to avoid the act of 1571. They were

109. Stone English Revolution p.154, f.n.73.
110. See Place and Patronage p.111.
111. Egerton Papers p.462.

not constrained by the act of 1559 and not under the permissive grant in that statute to pass leases to the queen. Coke's flinty criticism of ecclesiastical leases through the Crown, and air of injured innocence from his earlier years as Attorney General[112] do not sit easily with this letter.

It is timely at this juncture to ponder whether Elizabeth knew what her government was doing to the statute 13 Eliz.I c.10. While it seems improbable in the extreme that church functionaries did not complain to her about the "dilapidation" of ecclesiastical land, it must be conceded that Elizabeth could have dispensed with the operation of the statute, an activity of which there is no sign. Dispensing would have required her personal involvement in a manner which accepting and assigning leases almost certainly did not.

Since it seems very unlikely that in a community so small (some 5 million people) the queen did not know of depredations on a grand scale committed by her intimates, the more probable explanation is that Elizabeth did not wish to be embarrassed by frequent dispensations from a statute close to the hearts of some parliamentarians, both commoners and bishops. Serving as a conduit for leases was a private law function, of its nature out of the public eye in a manner that dispensing was not. All that was required was that the matter not be tested

112. See Case of Ecclesiastical Persons f.n.91 supra and f.nn.62 and 63 referring to events in 1595 and 1599.

in litigation, which was achieved in Elizabeth's reign.

Perhaps the explanation in this regard for both Coke and his royal mistress (remembering Holdsworth's dictum regarding Coke as a lifetime Elizabethan)[113] was that each was a brilliant propagandist who crossed the chasm between private behaviour and public utterance with unblushing ease. Certainly Coke thought enough of the following anecdote to recite it at least twice : in his dying days on the bench in 1615 and in his last year in parliament in 1628:

> "... when I was the Queen's Attorney, she said unto me, I understand that my counsel will strongly urge, praerogativa Reginae, but my will is that they stand pro domina veritate rather than pro domina Regina, unless that domina Regina hath veritatem on her side : and she also used to give this in charge many times when anyone was called to any office by her, that they should ever stand pro veritate rather than pro Regina."[114]

There is a strong temptation to dismiss this as so much casuistry, flatulent with Coke's latin phraseology, a polishing of the Gloriana myth with the obvious motive of twisting the tails of James I and Charles I. But Coke had written to Burghley in 1595 that he had:

113. See f.n.106 supra.
114. Harris v. Austin (1615) 3 Bulstrode 36; 81 E.R. 31 at 44; 37 and for similar sentiments in 1628 see N.M. Fuidge "Queen Elizabeth I and the Petition of Right" (1975) 48 Bull. I.H.R. at p.46.

> "... received this commandment from her most excellent majestie, that I should not deal in any matter in her highness' name, but that the cause should be just and honourable, which commandment being to me suprema lex I have with all endeavor sought to follow it in all her majesties causes."115

The motive for such a tale addressed to Elizabeth's chief minister is less obvious. Perhaps it can serve only to reinforce the pervasive influence of the Crown at a personal level in this area. Swanson wrote of the Crown's legal advisers being selected on merit, unlike other Crown functionaries, because litigation required first rate counsel.[116] The inference was that Westminster Hall was such an objective test of analytic capacity that it would always reveal the best quality advocates. This accords with a view of the common law courts offering a developing dialectic to parallel the synthesis of the schoolmen and later theologians, but it ignores the fact that the courts were not administering a system of pure logic. As the careers of Popham, Egerton and Bacon reveal, Crown pressure could warp the rules of the game.

Coke's 1605 report of Ecclesiastical Persons gives the appearance of a conscious attempt to hammer out and publicise a consensus on statutes and the Crown to remedy the plurality of views among various officials: in particular it challenged the steady drift to an extra-legal position for the Crown

115. R.A. Swanson The Office of Attorney General in England 1558-1641 1976 Uni. Virginia Ph.D, p.194.
116. Ibid pp.76 et seq.

observable in late Elizabethan behaviour, and heightened by James' vigorously expressed beliefs. Coke was too abrasive to be the focus of an alliance that might have preserved his opinions in the face of expanding absolutism. Over nearly 400 years Coke's analysis of statutes and the Crown has been increasingly unacceptable; a public, historical defeat. Coke's private triumph lay in remaining constant to a view of the Crown under the law that in no way advanced him personally. Against the inconstancy and probable hypocrisy of his letters he is entitled to have history judge him by his actions : he was dismissed from office in 1616 for standing up to the Crown.

CHAPTER FIVE

THE MAGDALEN COLLEGE CASE

"The King has created the Lord Chancellor Visct. Brackley, for standing very stoutly for the maintenance of the prerogative."
9 November, 1616 Beecher to Carleton

"Orders given for a supersedeas against Sir Edw. Coke. Four P.'s Pride, Prohibition, Praemunire and Prerogative, have overcome him."
14 November, 1616 Chamberlain to Carleton

(1611-1618) C.S.P.D. vol.9, pp. 403, 404.

Lord Chancellor Audley, Sir Thomas More's successor in office, founded Magdalene College in the University of Cambridge, providing it with land to generate income. This included "the garden plot of seven acres"[1] of St. Katharine Christchurch. Audley further furnished the infant institution with protection in the form of a college statute that leases of college property for longer than ten years were to be void.[2] Audley had been to the forefront of those profiting from the English Reformation "carving for himself in the feast of abbey lands the first cut, and that a dainty morsel".[3] This acquisition occurred in 1533 and referred to the priory of Christchurch in Aldgate, London. It was part of this land that Audley endowed on Magdalene College.

Audley attempted to bestow on, and secure to a semi-religious institution property seized from the established religious order in a time of flux in the norms of government.

1. (1547-1580) C.S.P.D. Edward VI, Mary, Elizabeth p.493, 8 Jan. 1575.
2. (1580-1625) C.S.P.D. Addenda vol.12, p.250, 26 Nov. 1609.
3. Foss Judges, vol. V p.129 quoting Fuller.

The irony for Audley would be that the air of licence which attended the seizure of monastic land would infect with greed the reign of Elizabeth I: in little more than 40 years the land given to Magdalene to provide College income in perpetuity would be in the hands of private persons.

Lord Audley's best intentions were to be thwarted by the activities of a Genoese merchant, Benedict Spinola, matched with the practices in respect of college (along with general ecclesiastical) lands described in the previous chapter. Spinola appeared early in the documents of Elizabeth's reign in the general import/export business.[4] His merchant activities progressively became a front for money lending : more politely he was, with his numerous brothers, a financier.

The period 1572-1574 saw the queen become a leading consumer of Spinola's services, up to £ 28,000 on occasion.[5] In the midst of these financial manoeuvres of state, on 13 December, 1574 Magdalene College made a lease in perpetuity to the queen of ten acres of land in the parish of St. Botoloph without Aldgate, London at a rent of £ 15 per annum.

4. C.S.P.D. loc.cit. f.n.1, p.128, 21 Apr. 1559. Spinola's family may have had a long English connection. A Benedict Spynell of Genoa appeared in litigation from 1485: 64 S.S. Select-Cases in Exchequer Chamber vol. II p.97.
5. (1572-4) C.S.P.F. p.516 no.1458, 20 June 1574; C.S.P.D. loc.cit. f.n.1. pp.462, 482; HMC Series 9, vol.2, pp.18, 55,61, 63 and 70. Even larger sums flowed between the queen and Spinola and the better known Sir Horatio Pallavicino in 1579 and 1580, HMC pp.300, 355 and 356. See also F.C. Dietz English Public Finance 1558-1641 1964, pp.15 n.21 and 449.

The deceit of the lease was immediately apparent in its provision for invalidity if the queen did not convey the land to Spinola by 1 April, 1575. In fact it only took six weeks for the queen to grant the lease in perpetuity to Spinola at a rent of £ 25 per annum.

Why the College leased valuable land in London to Spinola via the queen is not immediately apparent. In the absence of express evidence a first reasonable assumption would be that the College owed Spinola money which, unable to repay, it settled by a lease in perpetuity at a low rental. However, in the light of Crown officials' behaviour referred to in chapter four, a second hypothesis would have to consider whether the lease served the Crown's rather than the College's purpose. The Crown was in considerable debt to Spinola at about the relevant period, late 1574. Roger Kelke, the Master, and the Fellows of the College leased the land to the queen on 13 December, 1574 and she granted it to Spinola on 29 January, 1575.[6] On 26 January, 1575 Kelke wrote to Lord Burghley to the effect that "The College have acted according to his request respecting Mr. Spinola".[7] This followed a report on 21 January, 1575 by Thomas Wattes to Burghley on "the result of his inquiries respecting the parsonage and garden of St. Katherine, Christchurch [part of the relevant land] belonging to Magdalene College, and now let on lease to Mr. Benedict Spinola"[8], a report made

6. (1572-1575) vol.6 C.P.R. pp.460, 462 and see 491, numbers 2841, 2851 and 2990.
7. C.S.P.D. loc.cit. f.n.1, p.494, annotated "Magdalene College".
8. Ibid p.493.

eight days before the formal transfer of the lease to Spinola. A final surmise might involve the interest of the College and the Crown both being served by the deal.

The first obvious motivation for direct Crown involvement (as opposed to mere service as a channel for avoiding 13 Eliz.I c.10) would be the money owned Spinola, which might to some extent be settled by this lease. However, it should also be noted that Spinola was an important agent of the English Government and the lease could simply be for work done. Thus on 10 January 1575 Spinola wrote to Burghley with news from Italy, requesting that the money owed by the queen to the Genoese be paid, as he had made representations in that regard to his fellow Genoese merchants.[9] The correspondence between Don Guerau de Spes, Spanish Ambassador to England; the Duke of Alba, Spanish commander in the Netherlands; and the King of Spain makes clear the Spanish perception of Spinola: "He is a great spy"[10], his actions in respect of plundered Spanish property "barefaced robbery".[11]

In 1580 Spinola sold his interest in the land to Edward, Earl of Oxford. In 1591 the Earl sold his interest in some of the land to John Wolley and Francis Trentham, but he also leased some of the land to Edward Hamond for 51 years, who the next year assigned his interest to one Masham.

9. (1575-7) C.S.P.F. p.3 no.9.
10. (1568-1579) C.S.P.S. p.93 no.67, Guerau de Spes to Alba, Dec.1568.
11. Ibid p.408 no. 343, Letter of Intelligence (unsigned) to Alba from London, 30 August, 1572. See also ibid pp.163, 171-172, 363 and 684.

He died in 1604, and shortly thereafter his widow, and administrator of his estate, Alice, married Sir Francis Castillion [Sir Richard Castleton].

Kelke, the Master of Magdalene, had a number of successors before the position was filled by Dr. Barnaby Gooch [Googe or Gouge]. In 1606 Gooch received rent from one of the Earl of Oxford's under tenants, Hamond, while the Earl in the role of property developer constructed 130 houses on the land worth over £ 10,000. However, by 1607 it was plain that the College wished to assert title to the land with which it now had only a tenuous connection. A test case was set up following on the College's leasing of Hamond-Masham-Castillion's section of the Earl's land to one John Smith, who was the senior Fellow and President of the College. Smith fictitiously took possession of the land, while Castillion further leased the land to one John Warren, who was then notionally ejected by Smith. Warren brought an ejectio firmae against Smith. The decision in this suit would determine who had the title to make these leases, the

College or the Earl.[12]

It remains only to observe of the statutory position that the lease of College land to the queen and then Spinola in 1574-1575 fell clearly within the prohibition intended by 13 Eliz.I c.10.

The key to the legal argument lay in the original grant by the College to the queen. If that grant, in contravention of the terms of 13 Eliz.I c.10 were still good, the Earl's title was firmly based. Consequently, the College was forced to argue that the queen had been bound by the statute, and that the grant had been void for illegality. This was the

12. The facts are extracted from C.S.P.D. and C.P.R. supra f.nn.1,2 and 6; the two published reports of the Magdalen College case (1615) 11 Co.Rep.66B; 77 E.R. 1235, sub nom Warren v. Smith 1 Rolle 151; 81 E.R. 394; the manuscript report of that case by Turnour HLS MS 109, f.23r; the report of the sequel in Chancery, the Earl of Oxford's case (1615) 1 Ch.Rep.1; 21 E.R. 485 and the summary of facts by Knafla Jacobean England p.133. The Earl of Oxford's case indicates that the reasons motivating the College's original leasing may have been more complicated than set out above, but they are sufficient for present purposes. See also D.M. Kerly An Historical Sketch of the Equitable Jurisdiction of the Court of Chancery 1890, p.111. The greatest detail in both argument and judgments is contained in Rolle and Turnour, which unlike Coke and the Chancery Reports have not been officially translated from law French to English. Reliance is placed of necessity on the writer's own translations, made with the assistance of J.H. Baker's Manual of Law French 1979. Baker suggested (at p.10) that law French may have ceased as the oral medium in court over two centuries before Warren v. Smith, but was still the basis of reports, a practice Baker justified (p.11). One cannot but remark this adherence to an otherwise dead language for technical purposes, when the language of lawyers' daily speech with all its precision and flexibility was being gloriously preserved in the works of Shakespeare, Donne, Jonson and Milton. The Cambridge college is spelt "Magdalene" but Coke dropped the final "e" in his report.

heart of the argument which came on in King's Bench in late 1612 or early 1613[13], and was reported as Warren v. Smith, or the Magdalen College case. The litigation entered English legal history however, because of its progress after judgment in King's Bench. The Earl's massive capitalization of his holding, coupled with the fact that the College's success in King's Bench depended on pleading that a contract which it had engineered and entered was illegal, could hardly fail to attract the eye of equity in Chancery. The Earl of Oxford's case[14] would become famous for signalling the triumph of the Chancellor's court over the common law tribunals.

In the Magdalen College litigation the opening salvo for the plaintiff, Warren, was fired in the King's Bench by Laurence Hyde (subsequently knighted and Attorney to King James' Queen). Two relatively simple points were made. Firstly, the king was not included in the category of "person or persons, bodies politic or corporate", so that 13 Eliz.I c.10 did not entail an absolute disabling of grants

13. The published reports of Coke and Rolle state that argument commenced in Easter Term of 1613. However, the first counsel they listed appearing is George Croke. Turnour's manuscript report concurs in Croke's Easter appearance, but recounts Hyde and Maningham's prior arguments. These otherwise unreported arguments refer to comments made by Fleming CJKB and Dodderidge J. Fleming CJ died on 7 August, 1613, and Dodderidge J had been elevated to the bench on 25 November 1612. It is noteworthy that of the compliant King's Bench of January 1612 which Archbishop Abbott referred to in the letters cited ch.4, f.nn. 107 and 108, by the time Coke succeeded to the chief justiceship in October, 1613, only Sir John Croke remained.
14. F.n.12 supra. See, however, Baker infra f.n.111, "Dark Age".

such as that made by the College. This distinguished the Case of Ecclesiastical Persons in which total disability was assumed. Secondly, referring to Willion v. Berkley, the queen was not included within the general words of acts which restrained the prerogative.[15]

Maningham replied for the defendant, asserting that the queen was a body politic, and that even if not, since the act was for the advancement of religion it must be liberally and equitably construed, as shown in the Case of Ecclesiastical Persons. Lord Berkley's case was used to illustrate that the king cannot be an instrument for fraud, and then followed the proposition that the king's act will be void rather than that he do wrong.[16]

The most interesting novelty to emerge from Turnour's manuscript report, which after this point closely parallels Rolle's report, is the hearsay accorded to Fleming CJ that

> "... he said that he had heard Popham [CJKB] say that his opinion never was as it is reported in the Case of Ecclesiastical Persons, nor was any such resolution given in Parliament."[17]

Fleming CJ's remark spotlights those criticisms of Coke's Reports, beginning with Ellesmere's in Coke's lifetime, that he did not allow accuracy to stand in the

15. Turnour HLS MS.109, f.23r.
16. Turnour f.23v.
17. Turnour f.24r. Hobart AG doubted Ecclesiastical Persons, and there were apparently subsequent judicial and parliamentary resolutions ignoring it: see f.nn. 56 and 99 infra. See however, 11 Co.Rep. 74B; 77 E.R. 1247 and 1 Rolle 167; 81 E.R. 406.

path of personal predilection and dogma.[18] (Did Coke only exacerbate the problem by reporting that Sir Thomas Egerton, then Lord Keeper of the Great Seal, agreed with the justices in Ecclesiastical Persons?[19]) Perhaps the popular epigram that went the rounds at the time of Coke's dismissal from the bench in 1616 sums up the contemporary appreciation of his proclivity for idiosyncratic reporting:

> "Coke could cook law books
> But he couldn't cook by the books.
> He could only cook books for Cokes."[20]

For all that Ecclesiastical Persons served as a springboard for the defence in Warren v. Smith, and for Coke's political philosophy in judgment, it is difficult to sustain an accusation against Coke of premeditated distortion of the law. The statute 43 Eliz.I c.1 bore out the content of his report.[21] Ecclesiastical Persons was reported briefly by Jenkins, a Welsh judge of strong royalist sympathies[22] to the effect that, in respect of leases from religious and charitable bodies, and the statute 13 Eliz.I c.10, "... the King is disabled to take any estate from them ..."

18. Knafla Jacobean England p.129; C.Ogilvie King's Government p.140; and L. Radzinowicz. A History of English Criminal Law Vol.1, 1967, p.694.
19. 5 Co.Rep. 14B; 77 E.R. 70.
20. C.D. Bowen The Lion and the Throne 1957, p.336 (original in Latin).
21. See ch.4 f.nn.85 and 98.
22. Jenk. 255; 145 E.R. 182. Jenkins incorrectly dated the case to 1597. See preface to his Centuries, first published in 1661, for his pro-royalist sentiments.

Further in Coke's defence, it should be noted that between this case and Warren v. Smith lay his report of the Case of a Fine Levied by the King.[23] Land had been entailed to the Earl of Gloucester, one of King James' ancestors, and the king had sold parcels of this inherited land. This was in simple contravention of the statute de Donis. The question arose as to the validity of these sales. In late 1604 the king sought an opinion from Popham CJKB and Attorney General Coke.

Firstly it was found that the king was bound by de Donis : Lord Berkley's case. But in the relentless pursuit of balance in English land law between restraints on and inducements to alienability of land, the restrictions of de Donis had been set off by subsequent statutes[24] which enabled a tenant in tail to take prescribed action ("levying a fine") to bar the entail and then alienate the land. The "ratio" (this was only an opinion) of the Case of a Fine Levied by the King is that the king might take the benefit of such statutes.[25]

The remainder of the opinion is an "obiter dictum", which has, however, had lasting impact matched only by that

23. (1604-7) 7 Co.Rep.32A; 77 E.R. 459.
24. 4 Hen. VII c.24 (1488), 32 Hen. VIII c.26 (1540).
25. Coke relied on Stonor, Radclif and Berkley with references that are both inexact and lacking in conviction considering the ratio of those decisions. In his brief report of unsuccessful argument in Magdalen College, Coke wrote (at 11 Co. Rep. 68A-68B;77ER 1238) "..... and be the statute affirmative, or be it negative, which is stronger, it shall not bind the King unless he is specially named, but he shall take benefit of a statute although he be not named...." The reference to "benefit" has no relevance to Magdalen College and was not raised in the reports of Rolle or Turnour.

of losing counsel in Willion v. Berkley[26], and is made no more authoritative for the fact that Coke reported that in 1607 he, as Chief Justice of Common Pleas, Fleming CJKB and Tanfield CB affirmed the opinion. The king's ability to benefit from statutes was buttressed by reference to the fact that the original entailed gift had been made to a subject: he should not "be in worse condition than if he had not been King". Willion v. Berkley was then explained as showing that the king was bound by de Donis because it related to him in his natural capacity. It need only be noted that this was not the "principal reason of the judgment in the Lord Berkley's case"[27]. In this context, and of only obscure relevance to the opinion, Coke's report then added:

> "... when the King claims a thing in respect of his Royal and politic capacity, there a General Act shall not bind him, unless he be expressly named, unless it be in special cases."28

Jenkins made the same assertion in his report in the Eight Centuries of Cases, but he excised the qualification that Coke had appended, so that it read:

> "The King is not bound by any statute, if he be not expressly named to be so bound."29

26. See ch.3 f.n.53.
27. Anthony Brown J and Dyer CJ opened their judgments on the subject: Plo 244-245; 75 E.R. 374-375, Plo. 250; 75 E.R. 383, but see text at ch.3, f.nn.42-50 for the major reasons.
28. 7 Co.Rep. 32B; 77 E.R. 460. Coke's language clearly relates to his and Bacon's attempts to define the prerogative of dispensation: ch.3 f.nn.118-129.
29. Jenk. 307; 145 E.R. 224-225.

The crowning touch was to add, "It is a maxim in law". In its more portentous, original law French form, Jenkin's "maxim" stalked the texts[30], until in 1946 the Privy Council advised in a decision of great import in the British Commonwealth:

> "The maxim of the law in early times was that no statute bound the Crown unless the Crown was expressly named therein, 'Roy n'est lie par ascun statute si il ne soit expressement nosme'."[31]

Among the non sequiturs constructed from statutes which Jenkins connected to his "maxim" was a reference to an act of 1623.[32] Not only was this not a contemporaneous recording of the case, Jenkins did not publish his Eight Centuries until 1661, that is after the restoration of the monarchy, and after he had suffered lengthy imprisonment for his royalist pamphleteering and activities. This was hardly the earliest of "early times", but it may be noted that Jenkins pressed on to a second maxim, "that the King can do no wrong", as a result of which "the statute of West. 2 [13 Ed.I c.5] for usurpations to churches, binds the King; for usurpation is a wrong".[33]

But to return to Warren v. Smith, in Easter term 1613 George Croke (brother of Sir John Croke on the bench, and memorable as one of the five judges later finding against the king in the Case of Ship Money[34]) argued for the

30. E.g. Chitty's Prerogatives of the Crown 1820 p.382, Broom's Legal Maxims 1924, 9th ed., p.51.
31. Province of Bombay v. Municipal Corporation of Bombay [1947] A.C. 58 at p.61.
32. Jenk. 307; 145 E.R. 225.
33. Jenk. 308; 145 E.R. 225.
34. Otherwise known as R v. Hampden (1637) 3 St.Tr. 825.

plaintiff. Hyde's first point was reiterated: the queen was not included in the rubric of bodies politic and corporate, "for it will not be assumed that the makers [of the act] would array her with persons of such base quality".[35] Secondly, the king will not be included in the general words of a statute except for three instances:

(A) where the statute is made to avoid wrong;
(B) where the statute is made to avoid general inconvenience; and
(C) where the statute is an expounding and limitation of the common law.

Croke broke new ground with a pernicious piece of reasoning. The statute in question was made against dilapidations, and therefore given the grant by the College to the queen, if she is bound by the statute she will be taken for a dilapidator, which is dishonourable, especially as (citing authority) the king is the chief maintainer of religion.[36] Croke concluded by alluding to the king's procedural advantages and questioning his capacity to build necessary fortifications if he were bound by the act, and so incapable of acquiring some estate in land as he had formerly.[37] Despite concessional references to Radclif's and Lord Berkley's cases, Croke never confronted the crucial question of why 13 Eliz.I c.10 did not fall amongst his three instances in which statutes would bind the king.

35. Turnour f.24r.
36. Turnour f.24r.
37. Turnour f.24r, 1 Rolle 151; 81 E.R. 394. In so far as the fortifications might be necessary for the defence of the realm, the king would appear to have had quite sufficient prerogative powers: see the case of The King's Prerogative in Saltpetre (1606) 12 Co.Rep. 12; 77 E.R. 1294, although this conference at Serjeants' Inn was not reported until after Coke's death in 1634.

The argument of Henry Yelverton for the defendant[38] indicated that the synthesis of the court room was starting to be felt. Citing Radclif on Westminster II c.5, and its references to the Statute of Merton and infant usury, Yelverton asserted that 13 Eliz.I c.10 had been passed to remedy a wrong, and hence the king was bound.[39] Attacking the argument that the king would lose his liberty of building a castle at his pleasure, Yelverton said that "the pleasure of the king will not be preferred before the inheritance of his subjects" and the liberty of building castles was fixed by the common law, everyone's inheritance[40], (as regulated by this statute, thus falling under Croke's third exception for statutes binding the king).

Yelverton then asserted that the king was being used in this instance to do wrong and evade the statute.[41] However, in more conciliatory vein he continued, to the effect that general words do not bind the king where the act concerns his possessions, prerogatives or actions, or where the statute is penal, but, emphasised, where the statute is made

38. Swanson Attorney General noted that Attorneys General could appear for private clients, but not against the Crown. He instanced examples of both Attorneys and Solicitors General prudently refusing private clients where an appearance would lose favour with the Crown : p.154. Henry Yelverton seems to have lacked this horse sense to judge by one of Swanson's examples (p.211) but his appearance in Warren v. Smith, if not against the Crown, then certainly against the Crown interest, commenced prior to his call to office under the Crown. Yelverton was created Solicitor General shortly after this appearance, on 29 October, 1613. He had to return to conclude argument for the defendant in 1614.
39. Turnour f.24v, 1 Rolle 153; 81 E.R. 395.
40. Turnour f.24v.
41. Turnour f.24v.

to counter wrong, general words do bind the king.[42]

Important distinctions in Croke's and Yelverton's presentations are obvious. Each applied a presumption to the relationship of the king to statutes, allowing for categorised exceptions, but the thrust of the presumptions was in completely contrary directions. Thus Croke asserted the general immunity of the king from statutes with exceptions for statutes dealing with perceived wrongs, while Yelverton took the binding effect of such statutes as his starting point, and allowed some exceptions reflecting the king's privileged legal position.

In Michaelmas term (2nd to 25th November), Hobart [Hubbard] the Attorney General came on to argue for the plaintiff, a position from which he could urge on the court the plenitude of the king's position. The bench had been diminished by the death on 7 August, 1613 of Fleming CJ, and Coke's translation to King's Bench occurred on 25 October, 1613. Magdalen College must have been amongst Hobart's last important appearances in the king's interest, as on 26 November, 1613 he succeeded Coke as Chief Justice of Common Pleas.

A new tone entered the proceedings with the appearance of Hobart. The Attorney General was both thorough and

42. Turnour f.24v, 1 Rolle 154; 81 E.R. 396.

obtuse.[43] Every alleyway was explored for its possibilities, every line of legal reasoning pursued to a conclusion.

Hobart first asserted the king's immunity from the operation of 13 Eliz.I c.10 on the reasoning that, with four exceptions, the Crown (the concept he employed rather than king or queen) was not bound by general restrictions of the common law: specifically, he would list four instances in which the king would be bound though not named. Hobart explained that his first two exceptions related to the king accepting property and grants in such new form as they might be altered by statute. The second related to litigation concerning 13 Eliz.I c.12, detailed elsewhere.[44] The third and fourth exceptions are of relevance, however, as a first discussion of the modern concept of "necessary implication".[45] Rolle's report refers firstly to actions

43. Francis Bacon, yearning for promotion to the office of Attorney General, had described Hobart as "timid and scrupulous" : Foss Judges vol. VI p.79. Bacon himself was promoted from Solicitor to Attorney General in the Michaelmas shuffle of 1613. It is of interest, but inexplicable that Bacon did not argue in Magdalen College. Bacon originally urged his own services as chief justice of King's Bench, suggesting that James I would then have "a Chief Justice which is sure to your Prerogative", but later he more subtly suggested Coke's promotion on the grounds that "It will strengthen the King's causes greatly among the judges; for my Lord Coke will think himself near a Privy Counsellor's place, and thereupon become obsequious...": Foss Judges vol. VI pp. 78-79.
44. See ch. 3 text at f.n. 103.
45. E.g. Bombay supra f.n. 31 in which the Privy Council said that a necessary implication was only that which was logically imperative.

ordained under an act "appropriate only to the King", and secondly to the king being bound if the act would otherwise be rendered useless.[46] Turnour actually used the expression of the king being "necessariment entend per reason dauter parolls [necessarily intended by reason of other words]".[47]

A fifth exception to the major premise was then admitted: "... if a statute were made to reform a clear wrong, in such a case the King will be bound, if the statute is not contrary to a prerogative of the King, but if it is contrary to a prerogative of the King, then he will not be bound by general words".[48] The ensuing discussion of Radclif's case makes plain the seventeenth century, as opposed to modern, appreciation of just how divided that decision was. Hobart was driven to confront the opinion of Danby J "and the other justices". In Turnour's words:

> "... he denied the opinion of Danby J fo.62 [YB 35 Hen. VI 60 at 62], [that] if a statute were made generally to the effect that if a disseisor enfeoffed another man, the disseisee will be able to enter on the feoffee in the case where the feoffee is the king... [because] the disseisee will [not] enter on him [the king], for a personal inherent prerogative will not be reduced by the generality of the words in a statute, and therefore if [a] statute were made in precise words that an action will lie against King, the statute would be void inasmuch as a royal prerogative will not be subtracted from the King although he be named ..... [t]he King will never be bound by this [statute] although it be for the remedy of a wrong, for bringing an action against the King fundamentally touches his prerogative."[49]

46. 1 Rolle 156; 81 E.R. 397.
47. Turnour f.25r.
48. 1 Rolle 156; 81 E.R. 397.
49. Turnour ff.25r-v. Danby J's words are quoted in the text in ch.2 f.n. 114.

The Attorney dramatically, and without relevant authority, increased the claims of royal exemption from the operation of statutes. Not content that the prerogative be secure from general statutes (as conceded by Yelverton), Hobart urged its inviolable paramountcy in the face of specific statutes.[50] Such a claim allowed the battery of royal procedural advantages to be wheeled into battle. Hobart did not, however, address the question of whether royal immunities based in procedural advantages should flow to third parties to royal agreements, such as the Earl of Oxford and his under-tenants in this case.

But Hobart excelled himself in his general reasons for

50. C.H. McIlwain has referred to the Statute of Monopolies of 1623 as "the first statutory invasion of the prerogative" : Constitutionalism Ancient and Modern 1940, p.138, which would appear to bear out Hobart's claim in 1613, but in the Case of Ship Money (R v. Hampden) (1637) 3 St. Tr. 825 in Exchequer Chamber, Hutton JCP gave examples dating to 1351 of statutes invading the prerogative (at 1195), and note Davenport CB (at 1215). Coke allowed for the possibility of the king dispensing with a statute that intruded on his "sole and inseparable" prerogative: Case of Non Obstante ch. 3 f.n.127, but that is different from claiming the act void for attempting to regulate the prerogative. The parliament of 1610 was the forum for debate on the nature of different prerogatives, public and personal, Wentworth referring to statutes which had restrained the prerogative: S.R. Gardiner (ed.) Parliamentary Debates 1610 Camden Society, 1862, pp. 37-39. It was in this parliament that Hobart, speaking as Attorney General, implied that the prerogative of levying a customs duty could be abridged by statute: Swanson Attorney General 249-250. On the inviolability of the prerogative from statutes Weston and Greenberg Subjects and Sovereigns p.11 n.12 cited inter alia Coke's report of Non Obstante, Hobart A.G. in the 1610 parliament, Morrice, Reading in Middle Temple f. 259, Cowell, Bacon and Sir Thomas Smith. The statute of 1444 concerning sheriffs, 23 Hen.VI c.7, discussed at length in ch. 2, was an explicit curbing of the prerogative predating McIlwain's "first invasion" by 180 years.

asserting the king's not being bound by statutes in which he was not named. Firstly, "it is against his dignity to be shuffled in among the common people within the words 'all persons, bodies politic and corporate'".[51] Secondly, and perhaps with more colour than compelling logic, the law reposes great confidence and trust in the king that he will not do any wrong: "Socrates esteant accuse pur drunkenness, dixit you shall as soon make drunkenness seem no vice, as see Socrates drunk" for he was the most just man in the world,[52] and this can be said of the king.

The third and fourth reasons were argued from the vaguest general propositions, but the fifth and final one was an appeal based in administrative reality and bearing relevance for a later era:

> "Fifth Reason (which is the great reason) ..... if the King were to be included in a general law the King could be greatly deceived by this, when the King's counsel aren't in attendance, and the committees [of Parliament] don't understand this."[53]

In Turnour's words:

> "Fifthly, if general words were to extend to the King he would be easily deceived, for all times the counsel of the King cannot be so vigilant as to provide for him."[54]

It remains only to note that Hobart was aware that the Case of Ecclesiastical Persons was against him "but the opinion in Parliament was dubious", and he claimed that in 1606/7 the opinion of various justices in parliament had been with him.[55] Turnour reported more fully with

51. Turnour f.25v.
52. 1 Rolle 156; 81 E.R. 398 and see Turnour supra.
53. 1 Rolle 157; 81 E.R. 398.
54. Turnour f.25v.
55. 1 Rolle 158; 81 E.R. 399.

regard to Ecclesiastical Persons:

> "... he [Hobart] said that wasn't a judgment but only a resolution of some justices in Parliament, against which he put the opinion of Walmsley [JCP] and Altham [B] and other committees of Parliament that hold that on a conveyance being made by the college to the Earl of Arundell that there was no need of an Act of Parliament for the assurance of the conveyance made to the King inasmuch as he was not bound by the statute of 13 Eliz."56

Hobart ranged widely over the other points raised in the litigation, and at his conclusion very little of the plaintiff's case remained to be made. George Croke returned briefly to argue, without adding anything of substance. In Hilary term 1614 Montague, king's serjeant, closed for the plaintiff, and of his seven points reported by Turnour relating to the king and statutes, only the third and fourth served as new ammunition in this case. Montague said:

> "Thirdly, on account that general laws do not extend to particular purposes, as the Statute of Mortmain will not exend to the customs of London 28 [Lib] Ass. Fourthly, as how the general words in a patent will not extend to the prejudice of the King, so it is with the general words of a Statute."57

This fourth point was a reiteration of the old medieval concept, and the third reflected the dependence of the royal immunity school on empirical support snatched from any available source. Reliance on the Liber Assisarum of Edward

56. Turnour f.25v. This opinion of Altham B, Walmsley JCP and others must have been given after February 1607 when Altham ascended the bench. See f.n.99 infra for a similar claim.
57. Turnour f.27v.

III showed a complete disregard for such progress in the theory of legislation as had emerged in the succeeding two and a half centuries: note particularly Sir Thomas Smith's understanding of the general impact of statutes early in Elizabeth's reign.[58]

The argument for the defendant in Michaelmas term 1613 had been concluded by Davenport [Damport] (with George Croke to be one of the five judges against the king in the Case of Ship Money) and Crew [Crue], the former asserting that where the mischief to be remedied by an act was equal in respect of the king and common persons, then the king was bound, but not so if a royal prerogative were affected, or the statute were penal.[59] Davenport thought the "better opinion" in both Radclif and Willion v. Berkley was that the king was bound by the respective statutes. Thomas (not Ranulph) Crew fleshed out these points. The statute under review was made to remedy a wrong, and further, "if this devise will allow the college to make conveyance by the hands of the king the statute of 13 Eliz. will serve a small purpose and such mischief and inconvenience there mentioned will not be remedied".[60] Crew also conceded, citing examples, that statutes which did not name the king did not

58. See ch.3 f.n.60. See also von Mehren "Legislation in Tudor England" p. 754 citing The Prior of Castleacre's case (1506) YB 21 Hen. VII 1.
59. 1 Rolle 161; 81 E.R. 401.
60. Turnour f.27r.

detract from his prerogatives, such as nullum tempus, his right to select the court in which he sued [61], and his right to feudal aids. [62]

Perhaps the most interesting feature of Crew's advocacy was the reference, in a generalisation, to foreign jurisprudence and a comparison of the position elsewhere of kings with that of a king under the common law. Employing a Latin tag, Crew said:

> "In other countries it can be said 'the precepts of the King are binding on their laws', but we can say 'the precepts of our laws are binding on our King'."63

The comparison in itself is no more than a variation of Fortescue's proud boasts of the fifteenth century concerning England as a constitutional monarchy. [64] However, it is worth citing as the sole allusion before King's Bench to the contemporary hostility between the civilian lawyers, depicted as apostles of prerogative power and bearers of foreign law, and the common lawyers, self proclaimed defenders of the national legal heritage. [65]

Crew's aphorism represented a belated attempt in protracted litigation to break out of the tightening circle of inductive thinking. Working from a limited stock of relevant case law, counsel had spawned progeny such as might

61. See text at ch.3 f.n.104.
62. Turnour f.27r-v.
63. 1 Rolle 163; 81 E.R. 402. This harks back to Bishop Gardiner in the reign of Henry VIII : ch 3 f.n.17.
64. See ch.2 f.n.83.
65. But note the division in civilian and continental theorists' ranks in the last decades of the sixteenth century: ch.3 f.n.69. Note that James I, as James VI of Scotland adopted a Thomist position in 1598: infra f.n.73.

be expected from too small a gene pool. As often as not counsel had avoided such general precepts as were available in Radclif's and Lord Berkley's cases in favour of some doubtful premise which then served no better purpose than as a mutagen to further distort the law.

The synthesis produced by the confrontation of oral argument produced an increasingly elaborate mysticism of barely connected concepts rather than a satisfactory general theory. This may be unfair to counsel for the defence. Their key weapon was the notion of a wrong-rectifying statute intrinsically binding the king. Such arguments for binding the Crown were to fail in the long term with the move to the literal reading of statutes, relatively devoid of inferential interpretation and refusing speculation on the intent of the makers of a statute.[66]

It remains only to note that Yelverton, now Solicitor General, briefly concluded argument for the defendant in Hilary term 1614. Coke's report of argument in the Magdalen College case is short but he does elaborate on the argument for stability, not referred to by Rolle or Turnour. The grants were made "by the advice of men well learned in the law, and of the counsel learned of the said late Queen, and of the King also, and the change of such a common and constant opinion, upon which the estates and interests of so many men depend, will be the occasion of great vexations,

66. See Street Governmental Liability p.147 and "Effect of Statutes" p.367, and the authorities there cited at n.4 and n.71.

suits in law, and the ruin of many ..."[67] The report of this argument may reflect Coke's publication of the case in 1615, after argument had been heard in the Chancery in the Earl of Oxford's case.

In Easter term 1615 the four judges in King's Bench, Coke CJ, John Croke, Dodderidge and Haughton JJ rendered judgment. Only two reports are available, Coke and Rolle's, as Turnour provided no conclusion to his extensive coverage of argument, merely a bridging reference to the subsequent litigation in Exchequer Chamber and Chancery. Coke's report is plainly not a verbatim account of four separate opinions, but rather a flowing, anecdotal amalgam of legal reasoning, cajolery and political philosophy, but as it is the English version normally referred to in preference to Rolle's law French, the judgment may be best analysed with reference to Coke.

It was a period of religious turmoil, when a man of Coke's "establishment" religious leanings viewed the security of the State religion as fundamental to the welfare of the commonwealth. Coke's differences with King James, Ellesmere and Bacon over (inter alia) the extent and nature of the royal prerogative were coming to a head when the decision was given in Magdalen College, a case which could be viewed as providing further proof of Coke's apparent

67. 11 Co.Rep. 68B; 77 E.R. 1239. Note the material on "benefit", supra f.n.25.

determination to place the king under the law. Coke's report of this case was published before the year's end, and its style should be appreciated in the context of a decision that was likely to prove unpalatable to the king, and which was consequently dressed in rhetorical flourishes on a theme that Coke and James saw absolutely eye to eye on: the need to sustain in good health the State religion.

The report opens with the statute of 13 Eliz.I c.10 being put in the perspective of the Church's welfare. Without at this stage going to the technical point that the statute existed to redress a wrong, Coke painted a dramatic picture of the effect of the statutes's circumvention. The persecutions of Diocletian and Julian the Apostate had led to a decline in theological studies:

> "And therefore it was unanimously resolved, that general statutes, which provide necessary and profitable remedy for the maintenance of religion, the advancement of good learning, and for the relief of the poor, shall be extended generally according to their words; and God forbid that by any construction, the Queen, who made the Act with the consent of the Lords and Commons, should be exempted out of this Act of 13 Eliz. which provides necessary and profitable remedy for the maintenance of religion, the advancement of good literature, and the relief of the poor."68 (emphasis added)

68. 11 Co.Rep.70A-70B; 77 E.R. 1241. Coke's references to religion, learning and the poor are almost an exact paraphrase of William Cecil's letter to the Scottish lords of the Congregation in 1559, but a politician first, Cecil preceded those three concepts with two others when he wrote of the possible employment of church land: "I like no spoil, but I allow to have good things put to good uses, as to the enriching of the Crown, to the help of the youth of the nobility, to the maintenance of the ministry of the Church, of learning in schools, and to relieve the poor members of Christ...". Cited by Heal "Act of Exchange of 1559" p. 234, from (1558-9) C.S.P.F. no.1086.

Far from this being a unanimous resolution, Rolle's report carries none of the rhetoric concerning religion, but Dodderidge J is reported as saying:

> ".... and therefore when the statute is made to redress an outstanding wrong and the King assents to this and by this gives life to it, he is bound by his assent ...."

because amongst other attributes he is pater patriae and his love is more than paternal or conjugal.[69]

Coke continued to flag his report with reminders of the symbiosis of Church and Crown[70]; steadily he built his case on religion, learning and the poor, against the maintenance of which "the law will never make construction".[71] The conclusion emerged inexorably, in an air of logical satisfaction, at least in Coke's report if not Rolle's:

> "... but it was never seen, that a general Act, made for the maintenance of religion, advancement of learning, and relief of the poor, should be by construction of law so expounded, that a by-way should be left open, by which the said great and dangerous mischiefs should remain, and the necessary and profitable remedy suppressed; for the office of the Judge is, to make such construction as will suppress the mischief and advance the remedy, and to suppress all evasions for the continuance of the mischief; and such by-way shall never be left open by construction, although it be for the King's benefit ..."[72]

Coke deduced from the "consequences" that it was the intention of the makers of the act that the queen be bound. He then moved to his second reason, couched in phrases that would appease a king who had called himself a "little God"

69. 1 Rolle 165-166; 81 E.R. 404.
70. 11 Co.Rep. 70B; 77 E.R. 1241, 11 Co.Rep. 71B-72A; 77 E.R. 1243.
71. 11 Co.Rep. 70B; 77 E.R. 1242, and see 11 Co.Rep. 71A-B; 77 E.R. 1242.
72. 11 Co.Rep. 71B; 77 E.R. 1242, and see infra f.n.79.

who could suspend "general laws made publicly in Parliament upon causes known only to him."[73] :

> "... the King shall not be exempted by construction of law out of the general words of Acts made to suppress wrong, because he is the fountain of justice and common right, and the King being God's lieutenant cannot do a wrong ... the Act which provides a necessary and profitable remedy for the preservation of [a right], and to suppress wrong, shall bind the King, as appears in the Lord Berkley's case ..."[74]

Coke's report then worked the comparison from Willion v. Berkley to the instant case. Both concerned:-

(1) an act to suppress wrong;

(2) the acts provided remedies for the public good; and

(3) the acts existed to preserve property rights, and

therefore both acts bound the king.[75] Coke added that the whole bench concurred in reasoning that a statute made to remedy a wrong should bind the king, thus resolving the doubt in Radclif's case.[76]

73. Bowen Lion and Throne pp.197, 255 and see Bowen p. 263 for other versions of the meeting between James and Coke when the latter asserted the king was under God and the Laws : Case of Prohibitions ch.3 f.n.57. In 1598 James had written in The Trew Law of Free Monarchies that although "the King is aboue the law, as both the author and giuer of strength thereto; yet a good king will not onely delight to rule his subiects by the lawe, but even will conform himselfe in his owne acions thereunto, alwaies keeping that ground, that the health of the common-wealth be his chiefe lawe ..." C.H. McIlwain (ed.) Political Works of James I 1918 p.63.
74. 11 Co.Rep. 72A; 77 E.R. 1243. Haughton J alluded to the king's inability to be a wrongdoer: 1 Rolle 165; 81 E.R. 404.
75. 11 Co.Rep. 72B; 77 E.R. 1244. The only reference in Rolle to the public good is attributed to Coke CJ: 1 Rolle 167; 81 E.R. 405. See text infra at f.nn.123-131.
76. 11 Co.Rep. 72B; 77 E.R. 1244. Rolle recorded Haughton J as making the point, and Coke CJ and Dodderidge J concurring : 1 Rolle 165; 81 E.R. 404.

The third and fourth points in Coke's report are not relevant to this enquiry, but in his fifth point Coke returned to the intention of the statute's makers. This intent was compared with that of the College Master and Fellows who

> "... endeavoured, that the Queen who was the fountain of justice, should thereby be made the instrument of injury and wrong, and of a violation of a pious and excellent law, which she herself, for [religion, learning and the poor] had made."77

Intention led to the general problem of statutory construction, and Coke's report built sententiously on Heydon's case.[78] The ensuing words may have been a pointed reminder to King James that Coke was not merely mouthing his personal sentiments; he was attempting to reflect the political structure of the nation:

> "The office of judges is always to make such construction as to suppress the mischief, and advance the remedy; and to suppress subtle inventions and evasions for the continuance of the mischief, et pro privato commodo, and to add force and life to the cure and remedy according to the true intention of the makers of the Act pro bono publico."79

Having led through general discussion on these points, Coke's report set about a leisurely summing up, out of which only one novelty emerged, as follows:

> "That where the King has any prerogative, estate, right, title or interest, that by the general words of an Act he shall not be barred of them. ... But in the case at

77. 11 Co.Rep. 73B; 77 E.R. 1245-1246, and 1 Rolle 169; 81 E.R. 407 per Coke CJ. See also Haughton J, with whom Coke CJ and Dodderidge J agreed, that even if the king were not bound by the statute of 13 Eliz. I c.10, the statute could not be avoided by an agreement, the consideration for which was the College's debt to Spinola: 1 Rolle 168; 81 E.R. 406.
78. (1584) 3 Co.Rep. 7A; 76 E.R. 637. See ch.3 f.n.23.
79. 11 Co.Rep. 73B; 77 E.R. 1246, and see 1 Rolle 166; 81 E.R. 405 where Dodderidge J used the words "It is the office of every judge..."

> Bar, the King is not excluded of any estate, right, title, interest or prerogative that he had before the Act in the said house ..."[80]

Yelverton, Davenport and Crew in arguing that the king was bound by 13 Eliz.I c.10 had conceded this point[81]; Attorney General Hobart had pressed for it.[82] The case law examined in court ranging back to Radclif's case bore out the concept: as seen in chapter one, it had a heritage stretching to 1311 in Courtenay's case. The exemption of the king from the operation of general statutes with respect solely to his prerogatives [taking that to include all aspects of his privileged legal position] served at least as backdrop to the rule as understood to this time.

Coke doubtless felt the necessity of referring to this idea, the heartland of the principle, but it appears in his report tacked onto the intricacy of law built up on Radclif and Willion v. Berkley. Rolle's report reveals no mention by Coke CJ of the saving of the king's prerogative, although Haughton[83], Dodderidge[84] and Croke JJ[85] all did: Haughton J allied the "interest of the state" with the royal prerogative. The exposition in Coke's report became the basis for abridgement extracts and later text writers when referring to Magdalen College. Better than any man alive in 1615 Coke knew the ways of abridgement compilers: with what

80. 11 Co.Rep. 74B-75A; 77 E.R. 1247-1248.
81. Supra f.nn. 42, 59, 61 and 62.
82. Supra f.n.48.
83. 1 Rolle 164-165; 81 E.R. 403-404.
84. 1 Rolle 165; 81 E.R. 404.
85. 1 Rolle 166; 81 E.R. 405.

misgivings he may have slipped the passage in near the tail of his report.

The inclusion of this dicta doomed his best intentions to failure. Magdalen College was condensed to two points: statutes in favour of religion, learning and the poor bound the Crown; and general statutes did not impinge upon the royal prerogative.[86] The former point, intended originally as rhetorical colour, lost relevance in the passage of time as too specific and was discarded, while the second acted as a trojan horse.

Exceptions to general concepts in the common law require constant scrutiny. In this case the exception ultimately devoured the concept of the general application of statutes, which could have grown out of the Elizabethan era to encompass the Crown. Instead of general statutes becoming all-embracing, the Crown became immune from the operation of such statutes without reference to its prerogative, estate, right, title or interest.

All this lay in the future. King's Bench had found resoundingly for the defendant Smith, and through him Dr. Gooch. Magdalene College could assert title to the land in Covent Garden on the basis of the invalidity of its original grant to the queen conditional upon her transfer to Spinola. But the Earl of Oxford, having purchased from Spinola, now had £ 10,000 worth of property development on the site.

86. E.g. Viner's Abridgement 1744, vol.19, pp.533-534, Statutes (E10), 9 and 12, Bacon's Abridgement 7th ed., 1832, vol. 6, p.462, Chitty's Prerogatives of the Crown 1820, pp. 382-383.

King's Bench may have seemed less than a sympathetic tribunal after Fleming CJ's death and Coke's appointment.[87] Plaintiff's counsel must have sensed the impending loss, for it is recorded that between argument and judgment [that is in the year between Hilary term 1614 and Easter term 1615]

> "Montague the King's Serjeant, moved the Court in this case, being a case of very great consequence, to have the same, by the Court to be adjourned into the Exchequer Chamber, to receive there a final judgment; upon the arguments of all the Judges."[88]

Coke CJ and Dodderidge J explained why this was not possible before judgment had been given, and the remainder of the bench concurred. It is apparent that late in 1615 after the decision in King's Bench the plaintiff did attempt to bring a writ of error in the Exchequer Chamber, the one judicial body which could alter the law as set down in King's Bench. Chancellor Ellesmere was to write in his Observacions Upon Cookes Reportes shortly after Coke had published his eleventh report containing the Magdalen College case:

87. See Turnour f.27v where Coke CJ agreed with Crew in argument on restricting the royal immunity, rather than with Croke J. It may be that Magdalen College is a real showcase of the influence of personality on judging. But for Fleming CJKB's unexpected death the case would almost certainly have been decided with at least Fleming CJ and Croke J finding the Crown not bound by 13 Eliz.I c.10. Both were tending that way in argument before Coke's advent, and Fleming, when Chief Baron, had written the famous decision in the Case of Impositions (1606) 2 St.Tr. 371 at pp.387 et seq., an apology for the royal prerogative of raising money without parliamentary sanction. Fleming found the imposition to be on currants, not on the merchant importing them: a decision worthy of the most delphic judgments of modern courts construing written constitutions.

88. Warrain v. Smith (1614-1615) 2 Bulst. 146; 80 E.R. 1021.

> "While the arguments were even warm in the judges mouths, the case was likewise warm in the press and published, even though there was a writ of error presently brought upon the said judgment in the Exchequer Chamber which yet dependeth; though by the confidence used by the reporter in setting down the case, the party is much discouraged in his prosecution."89

Whether or not the Earl of Oxford standing behind the plaintiff Warren thought his chance of having the law restated in Exchequer Chamber was slim because of Coke's report, strategy demanded a testing of the equitable relief available in Chancery. But at least initial argument was heard in Exchequer Chamber, a fact not previously noted, but evidenced by two manuscripts of argument for the plaintiff. Serjeant Francis Moore and Robert Heath appear to have been anonymously but separately reported.[90] Elsewhere it has been suggested that the judgment of King's Bench "was affirmed by all the Judges that argued thereupon in the Exchequer [Chamber]."[91]

Heath was the junior of the two, and after the fashion of the time would have spoken first. He recognised the

89. Observacions f.47v, quoted in Knafla Jacobean England p.133 and in a reprinting of Ellesmere's tracts in Knafla at p.315.
90. HLS MS 1081, f.48v re Moore paralleling HLS MS 1080, f.82. Moore had been created a serjeant in Michaelmas Term 1614. He had spoken against the queen's monopoly licences in 1601. HLS MS 2068 re Heath whose rise in the years after Magdalen College was spectacular: he was the creature of the royal favourite, Buckingham: see Swanson Attorney General pp.117-118.
91. Magdalene College Library; Henry Smyth's Vice Chancellor's Book, f.3v, set out in the Appendix. The writer's thanks are due to Dr. E. Duffy, the Magdalene College historian, for this material.

impact that Willion v. Berkley had had on King's Bench and attempted to distinguish it by referring to the circumscribed nature of the estate granted the queen in this case, but which was not "exceeded", as had been the case in Willion v. Berkley.[92] This reasoning relied solely on property law and did not stray into the jurisprudence of public law, notably the key point of Willion v. Berkley that the statute was made to rectify a wrong and so bound the king.

The most interesting feature of Heath's argument was the statement that a restrictive statute did not bind the king without "expresse parolls ou necessary Implicacion [express words or necessary implication]."[93] Attorney General Hobart had already alluded to the concepts involved in a necessary implication[94], but Heath's was the first use of the rubric in its modern form, predating Story J in U.S. v. Hoar[95] whom Street had thought its creator[96], by over two hundred years.

Heath moved to conclude on this point by referring to the great trust reposed by the law in the king, which presupposed that he would not wrong or injure others. Heath's final remarks help to explain the parliamentary activities which resulted in the consultative opinions reported by Coke in the Case of Ecclesiastical Persons[97]

92. See f.n.90, Heath f.2v.
93. Ibid f.3r.
94. Supra f.nn.45-47.
95. (1821) 2 Mason 311.
96. Street Governmental Liability p. 147 and "Effect of Statutes" p.367.
97. Ch.4 f.n.91.

and the Case of a Fine Levied by the King.[98] He said that in

> "..... 7 Jac [1610] in Parliament it was moved that where the Queen received land from Merton College in Oxford a private Act was required confirming this to the King; and it was there resolved that that was needless for the King wasn't within the statute of 13 Eliz cap. 10 ..."[99]

In passing, Heath referred to Coke's record of Magdalen College in the eleventh volume of his reports, further indication that the Exchequer Chamber action opened subsequently to the publication of Coke's report.

Francis Moore bore out the reference to Coke's report in the context of the king's mind being free from impurity. If the statute were designed to rectify a mischief, that had no bearing on the king for mischief could not be conceived in his mind.[100] A very different tack was trimmed to the jurisprudential zephyr of non obstante. Referring to the Case of Sheriffs[101], which Moore said decided the king's capacity to appoint sheriffs for more than a year in contravention of statute, and also to some lines from Seneca[102], Moore concluded on the non-binding nature of statutes on kings:

> "... which proves the great prerogative that the King had in ancient times: the statutes were only the grant of the King with the consent of the others ..."[103]

Moore moved to distinguish Radclif and Willion v. Berkley

98. Supra f.n.23.
99. Heath f.3v. For an analogous claim see f.n.56.
100. Moore ff.50v-51r.
101. (1486) YB 2 Hen. VII 6B, ch.2 f.n. 183.
102. "[Caesar's] watchfulness guards all men's sleep, his toil all men's ease, his industry all men's dissipations, his work all men's vacation." Consolation to Polybius VII, 2 in Seneca Moral Essays trans. J.W. Basore 1935, pp.374-375.
103. Moore f.51v.

which had been relied on to such effect in King's Bench. Noting that Radclif had been "resolved" at 11 Co.Rep. 72B, Moore said of that case that there

> "... the king is bound by the statute of Westminster II c. 5 of usurpations, which I agree with as this was malum in se and wrong at common law which isn't so in our case. The second case is of Lord Berkley in Plowden's Commentaries that the King is bound by the statute de Donis. As to this he is bound where he is a donee as in this case of Plowden's Commentaries, otherwise not."[104]

Again the attempt to distinguish Willion v. Berkley by reference to property concepts, avoiding any notion of public law.

Moore's final point of relevance was a claim that

> "... the interest of the subject will be saved notwithstanding the general words of the statute, so a fortiori the prerogative of the King will be saved."[105]

This reasoning rested on the same premise as Montague's point before King's Bench[106] to the effect that general statutes might be limited by custom. As revealed in Tudor commentary[107], such a claim was already out of step with constitutional developments, and quite irrelevant to the future.

This is the last of the available discussion in the Magdalen College case on the relationship of the king to statutes. What next transpired is neatly captured in Turnour's manuscript report. After the decision in King's Bench:

104. Moore f.52v.
105. Moore f.53r.
106. Supra f.n.57.
107. E.g. ch.3, f.n.60.

"A writ of error was brought in the Exchequer Chamber and during the discussion on the writ of error a bill was exhibited in the Chancery by the Earl of Oxford and others concerning land which depended on the same title and was comprised within the same conveyance.[108] And Dr. Gooche, who was defendant in the bill (together with the other fellows) demurred on the bill forasmuch as he had obtained a judgment in writ, and thus by the statute of 4H IV it ought not to be called in question in any English court.[109] And this demurrer was referred to one of the Masters in Chancery and was certified to be insufficient, after which it was ordered that they should put instead another case, which they refused to do, because Dr. Gooche was held at the Fleet [Prison], and now on a habeas corpus it was returned that he was committed for not obeying an order in Chancery and the court [King's Bench in which Gooche presented his writ of habeas corpus] admitted this and commanded that a copy of the return bill and answer be brought to them, and Coke CJ referred to the Court of King's Bench as the school of the law which ought to correct the abuses of other courts and ...[although] this suit in Chancery was amongst other persons and for other lands, still, because they [the lands] depended on the same title there cannot be any proceeding in Chancery.[110]

108. The Earl of Oxford's case (1615) 1 Ch.Rep. 1; 21 E.R. 485. The Chancellor's decision was almost entirely devoted to the reasoning in support of his claim to jurisdiction, his only refererence to the subject of the Crown and statutes being to the property and persons involved, "they resting secure on its Passing thro' the Crown, the greatest Protection": 1 Ch.Rep. 2; 21 E.R. 485.

109. J.H. Baker "The Common Lawyers and the Chancery: 1616" (1969) 4 Irish Jurist 368 at p.377 et seq. and Knafla Jacobean England at pp.172-173 explain the relevance of the statutes 27 Ed. III, st. 1 c.1 and 4 Hen. IV c.23 in the context of this case and whether Chancery could entertain a suit arising from facts on which King's Bench had already delivered judgment.

110. See also The King and Doctor Gouge (1615) 3 Bulst. 115; 81 E.R. 98 and Doctor Googe and Smiths Case (1615) 1 Rolle 277; 81 E.R. 487 (Smith had been committed to the Fleet with Gooch). The suit in Chancery was in respect of land that had passed in a claim from the Earl of Oxford to John Wolley and Francis Trentham and then to Thomas Wood, rather than the land disputed in King's Bench which had passed from Wolley and Trentham to Hamond, then Masham and then Castillion: see text preceding f.n.12 supra and manuscript set out in the Appendix.

> And then on another day this case was moved by Bawtrey sjt, and it seemed to him that the return was inadequate, for it appeared from the return that he [Dr. Gooch] was committed for not yielding to a bill in accordance with an order made, ... and the court was in doubt at first what to do inasmuch as it didn't appear to them that their judgment was drawn in question because this suit in Chancery was amongst other parties and for other lands ... and Coke CJ said that Dr. Gooche could well have an action on the statutes of 4H IV and 27E III on proceedings against a judgment given, unless they [the proceedings] were only for error or attaint."111

The members of King's Bench may have been smarting under the de facto reversal of their decision by the Chancellor. In Dr. Gooch's habeas corpus action, Dodderidge J was moved to say

> "As to our judgment formerly given here in this case, [Warren v. Smith] there never was any learned man (if he were an honest man) that was of another opinion than we were of, in the giving of this judgment (unless he was a timeserver)."112

The reasoning in the Magdalen College case remained, for all the Chancellor's reversing the effect of the decision.

The work of abridgement writers and the effluxion of time may have concealed from modern lawyers the clear principle for which Magdalen College stood, but contemporary comment revealed the perception of its importance. In July 1616 Sherburn enclosed in a letter to Carleton a copy of a

111. Turnour ff.102v-103r. Knafla Jacobean England p. 172 suggested that Coke CJ and Dodderidge J did not carry a majority of King's Bench for the release of Gooch and Smith. Baker "Common Lawyers and Chancery" p.378 elaborated on the fate of Gooch and Smith, but accepted that Coke did not choose this occasion to resist the claims of Chancery. Elsewhere Baker has pointed out that all of the law and much of the equity were with Coke in this case of Chancery supporting a plaintiff who did not seek equitable relief until judgment in law was given against him: "Dark Age" p.4.

112. 3 Bulst. 116; 81 E.R. 99.

tract signed by one Nicholas Geffer [Jeffes] which read as follows:

> "Accusations and articles of capital injustice, praemunire, and high treason, against Sir Edw. Coke, for the judgment given by him in the King's Bench, 13 Jac. I, to the diminution of the King's prerogative, classing His Majesty with his own subjects, supporting his conclusions by forging seditious reports, and by his judgment, disabling the King from giving or receiving grants. If his offences be examined, they will be found greater than Cardinal Wolsey's."113

Some thirteen years later, at a time of increasing conflict between royal and parliamentary views of the law, the memory of Magdalen College excited Jeffes to place a sign on the gate of Westminster Hall calling the decision of King's Bench treasonous, and referring to Sir Edward Coke as "traitor, perjured Judge". Jeffes was convicted of criminal libel for his trouble, pilloried and fined £ 1,000.[114]

Not only a milestone in the commentary on the relationship of statutes to the Crown, and a benchmark in the relative powers of King's Bench and Chancery, the Magdalene College litigation provided role reversals in the lives of some of the participants. Francis Moore, who had made the most outspoken attacks to date in parliament on the dispensing power of the Crown over statutes, as a newly created serjeant defended the Crown immunity before the Exchequer Chamber on the non obstante precedents and by reference to the Latin author, Seneca, amongst those in vogue with the civilians. The argument "for the Crown" had been opened in the King's Bench by Laurence Hyde, who in

113. (1611-1618) C.S.P.D. vol.9, p.380.
114. (1629) Cro. Car. 175; 79 E.R. 753, 3 St.Tr. 1375.

1601 had brought in the Bill for "An Act for the explanation of the Common Law in certain cases of Letters Patents"[115] which had occasioned Moore's remarks.

Dr. Barnaby Gooch as Master of Magdalene College had been imprisoned in the process of having the king found subject to the statute of 13 Eliz.I c.10, but his activities as a civil lawyer were bent to the support of Crown claims. As a member of parliament in 1621 he advocated adjournment in order to prevent further discussion of grievances against the government.[116] In the same parliament he announced that "the King cannot do a man wrong because there is none higher to complain".[117] But Gooch's civilian proclivities did not prevent him attempting (unsuccessfully) to have the 1621 parliament overturn by legislation Chancery's ruling in favour of the Earl of Oxford. Magdalen College and the act 13 Eliz.I c.10 received considerable attention in this parliament, but to no lasting effect.[118]

By 1628 a last ditch attempt to retrieve the land was being made by a new Master of Magdalene, who was happy, with the Fellows, to load Gooch with the blame for "contumacy", and petition Charles I for a rehearing in Chancery.

115. Ch.4, text before f.n.79.
116. B.P. Levack The Civil Lawyers in England 1603-1641 1973, p.47.
117. Ibid p.109, and see brief biography p.233.
118. W. Notestein et al (eds) Commons Debates 1621 vol.2, pp.117, 353-4, 383 and 391, vol.3, pp.158-9, 197-8, 293-4 and 308, vol.4, pp.35, 89, 299-300, 317 and 364-5, vol.5, pp.139, 175, 366 and 370, vol.7, pp. 46-51 and 174-176.

The entries in College records show that the king did so direct the Lord Keeper, Thomas Coventry, who acted on the College's claim that all the evidence had not been heard in the first action, by demanding a reply from Thomas Wood, the recipient of some of the land that had passed from the Earl of Oxford, to John Wolley and Francis Trentham, and dispersed through them. The last documentary evidence showed that Wood refused to attend a re-hearing in Chancery during the five months leading up to the end of Michaelmas Term 1628.[119]

Crew and Moore with their respective common law "crown restricting", and civilian "absolutist" allusions offered the briefest view of legal systems in competition. The common law/civilian friction was to hover on the question of the relationship of the king to statutes until the creation of the Commonwealth. Dr. Cowell, a leading civil lawyer had written in The Interpreter of 1607:

> "... either the king is above the Parliament, that is, the positive lawes of his kingdome, or els that he is not an absolute king ... simply to binde the prince to

119. Magdalene College Library: Henry Smyth's Vice Chancellor's Book, ff.3v-4r, set out in the Appendix. The College took badly this loss of land "by fraude" (Doctor Googe's petition to parliament, 4 May, 1621, Notestein vol.3 p.158). It was later written that "Dr. Roger Kelke ... ruined [Magdalene College] by an unreasonable grant of an estate in St. Botulph's parish without Aldgate to the queen, etc, which could never afterwards be retrieved". T. Baker History of the College of St. John the Evangelist, Cambridge (ed.) J.E.B. Mayor), 1869, pt.I p.173. The sense of deprivation regarding land now of great value has not been lost. Telephone conversation with the Master of Magdalene, and an interview with the College historian, Dr. Duffy in June, 1985 reveal that the events of 1574-1628 are to the present Senior Common Room as but yesterday.

> or by these laws, were repugnant to the nature and constitution of an absolute monarchy."120

In the escalating animosity evidenced during James' reign (he had to agree to a public burning of Cowell's Interpreter[121]) the law was still the primary battlefield. With Coke commanding the heights of the common law, secure in his depth of antiquarian knowledge, the civil lawyers offered an opportunity for the royal absolutists to establish a new line of thinking. The close alliance of interest between the law propounded in the courts, and political theory in this early Stuart period has subsequently been matched only in the late Stuart struggle over the Crown's suspending and dispensing power, and with the modern concern over the control of discretionary administrative functions. Perhaps the reason for Coke's ultimate defeat as exemplified in the modern common law may be seen in the comment of a modern editor on Bodin, already cited above:

> "... no one in the middle ages asked 'What is a state and how is it constructed?' but only 'who are the rulers and what are their powers?'."122

Coke's report of Magdalen College appeared essentially backward looking, trenched in past law and relying on Year Book references in this delicate area to establish the king's responsibility to religion and charities; the power of his prerogative was to be untrammelled by general

120. J. Cowell The Interpreter 1607, under "Parlament."
121. See text ch.3 at f.n.146.
122. M.J. Tooley editing Bodin Six Books of the Commonwealth, p.xiv; see ch.1 f.n.31.

statutes. Coke's three references in Magdalen College to "pro bono publico", which might have formed the basis of a discussion of the general application of statutes and the rights of individual members of the State, were delivered in the context of the protection of religion[123], and principles of statutory interpretation.[124] Some abridgement and text writers did record as a result that statutes made for the public good bound the Crown[125], but twentieth century courts ignored this condensation on the grounds that all statutes are presumed to be made for the public good.[126]

Writing on this subject Street could say[127] that the only authority for acts for the public good binding the king was counsel in Willion v. Berkley, but this may be unduly restrictive of Coke's intent, as Rolle's report shows that Coke's judgment bracketed concepts of public welfare with that of statutes created to repress wrongs and fraud binding all persons, including the king.[128] He had previously reported in the Case of Ecclesiastical Persons that the king could not be made an instrument for the defeat of an act made pro bono publico[129], revealing the crucial

123. 11 Co.Rep. 72B and 75A; 77 E.R. 1244 and 1248.
124. 11 Co.Rep. 73B; 77 E.R. 1246.
125. E.g. Chitty's Prerogatives of the Crown 1820, p.382, Bacon's Abridgement 1832, 7th ed., vol.6, p.462, Broom's Legal Maxims 1924, 9th ed., p.52.
126. Street supra f.n.66.
127. Ibid, p.147 and p.367.
128. 1 Rolle 167; 81 E.R. 405-406, and see text supra f.n.75 for Coke's report.
129. Ch.4 f.n.99.

distinction between his own perception and that of his contemporaries such as Egerton (and doubtless Bacon).[130] Although immunity from statutory operation might benefit the king, it was more important to stop members of the public evading the law through the use of that immunity.[131] King James of course took a contrary view. In his speech in Star Chamber in June 1616 concerning the Case of Commendams, setting in train Coke's dismissal, James warned the judges against hearing arguments that concerned the prerogative or "mystery of State", "for so may you wound the King through the sides of a priuate person".[132]

Coke's place in the development of common law jurisprudence reveals the irony of his position, and the reasons that his views on statutes and the Crown would fail spectacularly in the long term, unlike some of his other contributions to the law. His greatness lies in his speaking on constitutional matters to times long after his own, but his thinking was developed and expressed through the medium of case law already becoming outdated in his own day.

The case law of the Tudor period had been in large measure a harvest of the preceding two hundred years of Year Book learning. It might be seen as the law of the Gemeinschaft [Community] in which the "peacekeeping and

130. See ch.3 f.nn.65-68 and supra f.n.43.
131. Supra f.n.72.
132 McIlwain James I pp.332-333.

social harmonizing function is much emphasized".[133]

Professor Kamenka's comparison is worth noting:

> "the almost overwhelming strength of this Gemeinschaft strain in traditional Chinese legal practice, with its emphasis on the emperor and the magistrate as the father of his people ... is widely recognized; it was very much the medieval world-picture in Europe ..."[134]

Kamenka concluded:

> "The Gemeinschaft is not clear, in fact, it is systematically unclear, about what is often taken to be a fundamental characteristic or even definition of justice in modern positivist thought - justice as action according to rule. It elevates the situational ethic against the ethic of rules and principles."[135]

This Gemeinschaft law is clearly relevant to the views then being argued for the Crown. Coke's genius was to write on statutes and the Crown for the coming period of Gesellschaft [Association] which "emphasizes formal procedure, impartiality, adjudicative justice, precise legal provisions and definitions, and the rationality and predictability of legal administration".[136] The key to Coke's undoing lay, however, in this passage from Kamenka:

133. E. Kamenka "What is Justice" in Justice (eds) E. Kamenka and A.E-S. Tay 1979, p.5.
134. Ibid p.6. Dodderidge had argued for the defendant ie. against the prerogative in Darcy v. Allein (ch.3 f.n.134). John Manningham recorded in his diary (ed. R.P. Sorlien 1976, p.100): "When Mr. Dodrige in his argument of Mr. Darsies patentes, and soe of the prerogative in general, he began his speache from Godes government." Dodderidge J saw the king as pater patriae (supra f.n.69) and Coke CJ described him as God's lieutenenant (supra f.n. 74), all examples of the uncertainty of Gemeinschaft concepts, which were argued, successfully however, by Coke and Dodderidge to place the king in a most un-Gemeinschaft position - under the law.
135. Kamenka Justice p.7.
136. Ibid p.8.

> "[The Gesellschaft's] model for all law is contract and the quid pro quo associated with commercial exchange, which also demands rationality and predictability [but it] has difficulty with the state or state instrumentalities ..."137

In attempting to put the Crown under the law, Coke was in line (at least in this regard) with the general trend of Gemeinschaft to Gesellschaft, unlike his great common law contemporaries who with him crossed the cusp from the Tudor to the Stuart dynasty, notably Popham, Egerton/Ellesmere and Bacon. However, for all the common law's subsequent emphasis on reciprocity and predictability, it was to be "soft" on the State, and Coke's work would be consequently devalued.

Coke had, amongst other things, revolutionised law reporting, set in train the modern law on natural justice

137. Ibid. An example of this difficulty and Coke's confidence in facing it, with brother judges (in this case Walmesley J) in opposition, may be seen in H.J. Cook "Against Common Right and Reason: The College of Physicians versus Dr. Thomas Bonham" (1985) 29 Am.J.L.H. at pp.313-315. Both Cook, ibid and Plucknett "Bonham's case and Judicial Review" (1926) 40 H.L.R. at p.33 noted Walmesley J's assumption of royal paternalism. Those tending to oppose Coke's attempts at rationalising the position of the Crown also tended to adhere to the language of Gemeinschaft and remain bound by the concepts of that language, without evolving new approaches as Coke and some others did.

(if not mandamus)[138], perhaps most importantly denied the validity of the oath ex officio under which suspects could be questioned as to their beliefs without being confronted with a charge[139], argued or reported on all the great constitutional issues of the day from prohibitions, to impositions and dispensing and suspending of statutes, and was engaged in a decisive battle for supremacy between King's Bench and Chancery. It may be unfair to chastise with hindsight Coke's failure to relate his concern with absolutist monarchical claims (for which he was to be removed from office within eighteen months of the decision in Magdalen College) to forward looking political theory. There was such little theory available to those who would restrain the claims made for the king, save the atavistic common law.

Coke and his contemporaries were wrenching at a past tradition already changing when they set out to quote individual opinions from the Year Books, particularly those of the fifteenth century, as authoritative. As Baker has noted, comparing old and new concepts of judging:

138. R.H. Howell "An Historical Account of the Rise and Fall of Mandamus" (1985) 15 V.U.W.L.R. 127. At p.135 Howell confronts Coke's loyalty to the common law over the arguments for the prerogative he ran as counsel for the Crown. If Coke's behaviour on the bench does show a clear preference, the posthumous publication of the constitutional opinions in the Twelfth Report indicates a rather tortured mind in Coke's last years as Attorney-General.

139. Bowen Lion and Throne pp. 255-257 and Holdsworth H.E.L. 1931, 5th ed., vol. I, pp.609-610. Coke's denial of the oath ex officio in 1607, reported at 12 Co.Rep. 26 is a further indication of Coke's change from an executive oriented stance.

> "A medieval judge, ... had no more individual authority to declare the law than an individual serjeant, or a reader lecturing in the Temple. Certainly he had no authority to question what the profession in general thought the law to be ... Common erudition did not emanate from the judges alone: it was inherited wisdom, refined in the inns of court as well as in Westminster Hall, accepted by virtue of its inherent rightness rather than because a court had declared it to be right."140

The reliance on and reference to Radclif in the Magdalen College case distorted the subtlety of the disputation (and indecision) in Radclif. But this process had begun with Brooke in the mid-sixteenth century and has continued with commentators and judges to the present day. For Coke to write:

> "Let us now peruse our ancient authors, for out of the old fields must come the new corne".141

was perhaps too glib, but the best that could be aimed for in the prevailing professional, as opposed to historical, discipline.

As noted elsewhere, the period around 1600 was one in which parliamentary sovereignty was first being perceived, or at least enjoying a renaissance after first seeing the light of day in the Reformation Parliament.[142] Matching this was a growing perception of a different role for the judiciary from that which had prevailed when only "common erudition" had to be sought. Whether the debates and disputes over royal authority from 1600 onwards were spurred by the new availability of both parliament and courts as fora for testing political philosophies, or whether the

140. Baker "Renaissance" p.57.
141. 4 Co.Inst. p.109.
142. See ch.3 f.n. 56 referring to Radin and Elton.

pressure to test such ideas, as evidenced in the writers of tracts and speeches in the Commons, caused parliament and the courts to take on a new role is not clear. Certainly common lawyers fed both the momentum of events and occupied places at the bar, on the bench and in the Commons where arguments on the relationship of Crown and subject were led, the like of which had never previously been heard.

The fascination of Coke is in his personal evolution through this period of marked change. In a public career that included fourteen years as a Crown law officer, ten years as chief justice and seven years as parliamentarian (ignoring his period in parliament while Solicitor General) Coke did not hold to monolithic views. Neither did he evolve to a standpoint totally inimical to the Crown, although Ellesmere and Bacon would reprove him for being careless of Crown interests.[143]

Coke was not alone in developing a more complex personal political philosophy, but his strength of personality, employing the vehicle of his law reporting, would make him a dominant protagonist of his day. Coke was the great individualist operating in a collectivist milieu. The era is marked by its other strong personalities, but only Coke was so obviously striving for a new synthesis, and so confident of the course set. Well may Williams J and Altham B have reproved Coke for delivering his opinions as

143. It is noteworthy that Coke and those lawyers later reckoned to be "parliament men" were not single, let alone bloodyminded in their attempts to limit royal authority: C.W. Brooks "The Common Lawyers in England" in W. Prest (ed.) Lawyers in Early Modern Europe and America 1981, p.59.

incontrovertibly the law[144], ignoring the common erudition of his contemporaries. But to some extent it seems that it was only Coke amongst the lawyers who realised that the common erudition of the Year Books had never been tested in a political furnace such as the Stuarts created: the imprecision and irresolution of that learning was fatally flawed and incapable of being passed intact in an era of religious divisions and new commercial requirements. Magdalen College showed Coke with masterly confidence persuading his brethren to his viewpoint.

The use in this period by Coke and others of courts as marketplaces for political ideas was to remain a strand of the judicial fabric overtly in the United States of America, less so in other common law countries with written constitutions, and it would remain subdued in British judicial technique. As to the immediate subject of review, the future in seventeenth century political philosophy lay with Thomas Hobbes, and his absolutist view of a monarch above the law was in direct conflict with Coke's.[145] Events as they affected the common law would, however, take rather more subtle turns.

144. See ch.4 f.n.108.
145. See text ch.6 f.n.89.

CHAPTER SIX

FROM MAGDALEN COLLEGE TO THE BILL OF RIGHTS:1615 - 1689

> I aske no dispensation now
> To falsifie a teare, or sigh, or vow,
> I do not sue from thee to draw
> A non obstante on natures law,
> These are prerogatives, they inhere
> In thee and thine; none should forsweare
> Except that hee Loves minion were.
>
> from Loves Exchange
> John Donne *

Frequent reference has already been made to the power in the king to dispense with the application of statutes: the formula non obstante [notwithstanding]. The primary subject of this work is the question of the active reach of general parliamentary enactments: do they extend to bind the Crown? Non obstante involved the separate but related issue, the Crown's capacity to affect the application of statutes. However, the common basis in claims of royal pre-eminence over statutes, and the use of non obstante arguments in the case for the king not being bound by statutes make it relevant to study the dispensing power until its abolition by the Declaration of Rights and the Bill of Rights of 1689.[1] Churchill, Birdsall and Edie have

* Donne was private secretary to the Lord Keeper, Sir Thomas Egerton, from 1598 to 1601 when he was dismissed for marrying in secret Ann, the daughter of Sir George More. See ch.3 f.n. 133.

1. The Declaration of Rights and the Bill of Rights (1 W. & M. sess.2 c.2 1689) were similarly worded, but only the latter had statutory format : L.G. Schwoerer The Declaration of Rights, 1689 1981, pp. 11 and 267 et seq.

written at length on this topic[2], but some of the cases concerning non obstante from the time of Magdalen College may be referred to here in detail. In Easter Term 1615 King's Bench not only gave judgment in Warren v Smith, (the Magdalen College case) but also in R v Bishop of Norwich, Zakar [Sakar, Saker] and others[3], involving the king's capacity to dispense with 31 Eliz.I c.6 (1589) prohibiting simony. The terms of 31 Eliz.I c.6 provided for simoniacal appointments to be void, and the guilty party to be incapable of ecclesiastical appointment thereafter as a disabled person. It was found that Zakar, who had become the incumbent in a parish in exchange for payment, could not be re-granted the benefice with a dispensation from the king from the operation of the statute.[4]

2. Churchill "Tudors and Stuarts", "Aliens", "Defence" and "Ecclesiastical Affairs"; Birdsall "Non Obstante"; and Edie "Royal Dispensing Power" and "Revolution and the Rule of Law: The End of the Dispensing Power, 1689" (1977) 10 Eighteenth Century Studies p. 434. See also the extensive commentary in Coke on Littleton Vol.I 19th ed., 1832, p.120 A n.4.
3. (1615) 3 Bulst. 88; 81 E.R. 75, Hob. 75; 80 E.R. 224, Cro.Jac. 385; 79 E.R. 329.
4. Churchill surveyed the Dispensation Roll for 1595, and found that twenty years prior to Zakar's case dispensations for simony in breach of 31 Eliz.I c.6 were accepted administrative practice: "Tudors and Stuarts" p.413. Churchill found no evidence of such dispensations in the Rolls of 1637 and 1691. This may be seen as further evidence of a "devil may care" attitude to the rule of law, or at least the application of statutes by Elizabethan government. Certainly it seems, that government kept this matter from litigation. The evidence (albeit slender) is that following the curial decision of 1615 against dispensations for simony, Stuart kings did not attempt this activity, in which Elizabeth's government had indulged, no doubt to its profit: Churchill "Tudors and Stuarts" p.412. Zakar's behaviour ran true to form. Despite the clear and unanimous order of King's Bench in Easter term 1615, Zakar remained in the vicarage, pulling up floorboards and wrecking the house, presumably to sell the timber. King's Bench had to convene twice in the first half of 1616 to order Zakar out of the living: 3 Bulst. 91; 81 E.R.78.

The court reasoned from the otherwise unreported advisory opinion for the king concerning Sir Arthur Ingram in which "Egerton Lord Chancellor and Coke Chief Justice"[5] and "all ... the judges"[6] resolved that the king could not grant a non obstante enabling Ingram to remain in the office of cofferer, as he had bought the position and was thus in contravention of 5 Ed.VI c.16 (1552), a statute making illegal the purchase of Crown offices. The connecting link between Zakar and Ingram which distinguished their cases from the earlier famous non obstante in the Case of Sheriffs[7] was explained in one of the last cases on dispensation, Godden v. Hales.[8] The activities forbidden by 5 Ed.VI c.16 and 31 Eliz.I c.6, trading in temporal and spiritual offices, were not in 1686 argued to be mala in se [inherently wrong], but rather to disable a person so that he could not be a candidate for office.[9] This approach used the terminology of the statutes themselves, and surmounted the problem of trying to analyse what matters prohibited by statute were mala in se or merely mala prohibita, but the effect was to treat these disabling matters as being mala in se. A comparison was inferentially made in Godden v. Hales with the case of administrative statutes regulating

5. Hob. 75; 80 E.R. 224, Coke on Littleton vol. 2, 19th ed., 1832, p.234A.
6. 3 Bulst.91; 81 E.R.78. Cro.Jac.386; 79 E.R.330 refers to a conference between the Lord Chancellor, Coke CJ and the other justices upon a request for advice from the king.
7. (1487) YB 2 Hen.VII 6B, ch.2 f.n.183.
8. (1686) 11 St.Tr.1166, 2 Show. K.B. 475; 89 E.R. 1050, Comb. 21; 90 E.R.318.
9. Infra text after f.n.77.

appointments to the office of sheriff.[10]

Limits had been placed on the dispensing power in the fifteenth century in terms of the "mischief" the statute was intended to reform, or the increase it provided in everyman's "inheritance".[11] The seventeenth century introduced the concept of mala in se as a limit on the king, complementing the theory instanced in Dr. Bonham's case[12] that parliament could not make a statute in conflict with natural law as recognised in the common law.

The change of tack is worth noting, as Coke had in the past agreed that the king had an unfettered prerogative to appoint his own officials. The limitation inherent in Ingram was that the king could only select his officials from the class of those subjects not proscribed by statute on the basis of being incapacitated, effectively for having acted in a manner mala in se.[13] Speaking in King's Bench in Zakar, Coke CJ said of Ingram and 5 Ed.VI c.16, "... we also resolved, that the King was bound by this statute."[14]

In late 1612 (approximately contemporaneous with argument in Magdalen College) the litigation known as Colt and Glover v. Bishop of Coventry and Lichfield[15] began

10. See text infra at f.nn. 28 to 36 on the subsequent case of clerks to the Court of Wards.
11. See ch.2. f.nn.134 and 159.
12. (1608) 8 Co.Rep.113B at 118A; 77 E.R.646 at 652.
13. This is explicit in Cro.Jac.386; 79 E.R. 330 where purchasers of offices are referred to by Coke CJ as "disabled", which accords with the wording of the statute.
14. 3 Bulst.91; 81 E.R.78.
15. Hob.140; 80 E.R.290, 1 Rolle 451; 81 E.R.600, Moore (K.B.) 898; 72 E.R.982.

in Common Pleas, and under the name by which it was to become better remembered, in Hobart's words, "The great case of The Commendam in the Chequer-Chamber, [was] adjourned thither out of the Common Pleas."[16] Involved in the case were not merely issues of statutory interpretation and the relationship of the statutes concerned to the common law, but complicated issues of ecclesiastical law based in the Henrician revolution and the accession of the monarch to the Pope's supervening role in ecclesiastical functions in England.

Henry VIII and parliament had legislated against the perceived evils of one man being incumbent in a plurality of religious benefices (commendams), and absentee incumbents in general (21 Hen.VIII c. 13, of 1529). However, four years later legislation passed empowering the Archbishop of Canterbury, subject to the supervening authority of the Crown, to grant dispensations of this and other religious legislation (25 Hen.VIII c.21 of 1533, amended by 28 Hen.VIII c.16 of 1536). The Bishop of Coventry and Lichfield, Bishop Neile, was appointed in December 1610 while holding the benefice to Clifton Camvill. In March 1612 the king by letters patent granted the bishop dispensation from the restrictions of 21 Hen.VIII c.13 without reference to the Archbishop's role under the two subsequent statutes. The plaintiffs Colt and Glover claimed title to present to the benefice, and amongst the grounds advanced for the

16. Hob.140; 80 E.R. 290. Common Pleas did not have King's Bench's scruples about a case proceeding before judgment to the Exchequer Chamber: text at ch.5 f.n.88.

failure of the bishop's title was the invalidity of the royal dispensation.[17]

The twelve judges and barons in Exchequer Chamber came to a variety of conclusions based on an even wider range of reasons. Argument in the Chamber (including the opposing views of two civilians, Doctors Talbot and Martin) had lasted from early 1614 to Easter Term 1616, and the judgments were strung out fom that date until their inconclusive close in late 1617. In the three published reports, Moore, Hobart, and Rolle, there is no reference to the participation of Coke, sitting as Chief Justice in King's Bench throughout the period of argument, although Hobart refers to twelve judgments.[18]

Commendams was the case which led to Coke's ultimate downfall. James I, realizing that the very question was being argued of whether his prerogative would extend to permit a benefice to remain with an absentee curate in contravention of a statute, through Attorney General Bacon, ordered Coke to halt proceedings until the twelve judges had consulted with the king. The events of June 1616 form a

17. The matter had seemingly been resolved in the Crown's favour in 1597-8: Armiger v. Holland ch.3 f.n.117. Coke AG had argued against the residual prerogative of dispensation: 25 Hen.VIII c.21 had also prescribed involvement by the Archbishop, and Coke had urged that the queen should be bound by this procedure rather than merely dispensing with the statute against pluralities, 21 Hen.VIII c.13. The court found against Coke. See S.R. vol.3 p. 466 for the relevant ss. 3 and 4 of 25 Hen.VIII c.21, which plainly show the dispensing power to be the Archbishop's, except where the matter had a fee of over four pounds, in which case the king was to have an additional supervisory capacity.
18. Hob.143; 80 E.R.292.

lamentable history as Coke sought to prevent the king discussing the case with judges individually, while James was determined that the prerogative should not be the subject of litigation.[19] Coke's inflexibility in this area now made his dismissal inevitable. His strong views on the subject of absentee parsons expressed in Magdalen College (but after hearing argument in Commendams) could only hasten his end, as a meddler in Church affairs:

> "... for a person who has cure of souls, and is non-resident, non est dispensator sed dissipator, non speculator sed spiculator [is not a sentry, but is engaged in sharp practice] ..."[20]

Montague, arguing as king's serjeant prior to his elevation, (replacing Coke as Chief Justice of King's Bench, where Montague delivered a judgment in Commendams) suggested blandly that "notwithstanding the statute [25 Hen.VIII c.21] the King can dispense" because of his royal prerogative to grant commendams irrespective of any statute and his position in place of the Pope as Head of the Church.[21]

Altham B giving judgment in Michaelmas Term 1616 employed principles of statutory interpretation:

19. For James' speech on this matter in Star Chamber see McIlwain James I pp. 326 et seq and Bowen Lion and Throne pp.319 et seq.
20. 11 Co.Rep. 70 B; 77 E.R.1242, 1 Rolle 167; 81 E.R.405. Ellesmere reacted strongly to these words in his Observacions upon Cookes Reportes: cited in Knafla Jacobean England pp.301-302.
21. 1 Rolle 457; 81 E.R. 604.

> "Concerning the alteration that the statute of 25 H VIII [of dispensations in the power of the Archbishop of Canterbury] had made, it seemed that the statute did not detract from the prerogative of the King i.e. his power of dispensation that he had before the statute, for general words don't bind him/it [car generall parolls ne luy lieront]."22

Warburton JCP said in early 1617 in a dictum (he found for the plaintiff):

> "The King can dispense with the taking of [pluralities] and 25 H VIII is in the affirmative and therefore it doesn't subtract from his power, but he can still grant a commendam."23

In Easter Term 1617 Hobart CJCP also found for the plaintiff. His dicta reveal a different perception of the Act of Dispensations from that of Warburton JCP. It is apparent from Moore's, and Hobart's own reports (both devoted largely to Hobart's judgment) that Hobart viewed the act 25 Hen.VIII c.21 as providing a sole means of allowing dispensations from the rigours of the ecclesiastical statutes.[24] This did not hinder him from saying:

> "... even though the words of the statute are in the negative (i.e. not otherwise) still the interest of the King and his own right and power remain in him unreduced by the statute ..."25

22. 1 Rolle 468; 81 E.R.612. The sense of the statement is clearly that this statute did not detract from this pre-existing prerogative.
23. 1 Rolle 472; 81 E.R.615.
24. Hob. 146; 80 E.R.295, Moore 902; 72 E.R.985.
25. 1 Rolle 475; 81 E.R.617.

In Hobart's own report he continues, recording himself thus:

> "[The King's] power remains full and perfect as before, and he may still grant them [dispensations] as King ... The Queen made sheriffs without the Judges, notwithstanding the statute of 9 E.2 [26] ... The office of alnage granted by the Queen, without the bill of the treasurer, it is good with a non obstante against the stat. of 31 H.6 cap.5 for these statutes, and the like, were made to put things in ordinary form; and to ease the Soveraign of labour, but not to deprive him of power."27

Hobart's words serve as a suitable preamble to a report in the form of a Crown Law opinion which followed the Case of Commendams. A statute, 32 Hen.VIII c.46 (1540) provided that there should be two clerks of the Court of Wards.[28] John Hare and his son Nicholas, as clerks of the court[29], had joint patents containing "an express provision,

26. See ch.3 f.n.58, referring to a later Edwardian statute to the same effect.
27. Hob.146; 80 E.R.295-296. Alnage was the function of measuring and inspecting woollen cloth. Regarding 31 Hen.VI c.5 see ch.2 f.n.66. It is apparent from Churchill's survey of the Dispensation Rolls for 1637 and 1691 ("Tudors and Stuarts" pp.413-414) that the practice of dispensations from 21 Hen.VIII c.13 prohibiting plurality of livings continued unabated, but under the aegis of 25 Hen.VIII c.21 which expressly provided for dispensing by the Crown and Archbishop. Churchill was concerned that despite the provisions of the Bill of Rights, this dispensing activity ony ceased with the accession of Queen Anne in 1702. Churchill (at p.414) thought this a result of the Crown's post-Reformation authority in ecclesiastical affairs, but missed the fact that the dispensations were being performed and recorded under statutory authority (25 Hen.VIII c.21), not the prerogative.
28. The operation and statutory fabric of the Court of Wards is explained in H.E. Bell The Court of Wards and Liveries 1953.
29. The familial attachment of the Hares to the office of clerk in this court is dealt with by Bell Court of Wards pp.26-28, at which pages Bell also refers to the zealous work of John Hare.

that if one of them should die, that the other should enjoy the whole non obstant the statute ..."[30] The father, John Hare, died and Sir Steven Leisure [Liesure] moved to be granted the other clerkship prescribed by statute.[31]

Whether or not the non obstante in the joint patents should prevail was referred by the king for opinion to Viscount Wallingford, Hobart CJCP and Sir James Ley.[32] They found that

> "... [the office of clerk being] meerly ministerial, the King was not bound to the number, but might with a non obstante dispence with it, as he might give alnage without the nomination of the treasurer, name sheriffs, without Judges [etc.] But the auditors place being judicial and appointed to be two, cannot be less, because the subject hath interest in the judicature, which must be committed neither to more nor less than the law of their creation hath established."[33]

Birdsall in his essay on non obstante made much of this case[34], while overstating its uniqueness, and failing to highlight the ultimate fallacy of these distinctions, the reason they would all ultimately fail: by 1689 it was

30. Hare v. Liesure (1618) Hob 214; 80 E.R.361.
31. (1611-1618) C.S.P.D. James I pp.519-520, 4 Feb. 1618. Leisure [Le Sieur] unsuccessfully sought the office as recompense for thirty years work as an ambassador.
32. Ley, Attorney to the Court of Wards, had previously sat on the Irish King's Bench, and was appointed Chief Justice of the English King's Bench in 1621. Wallingford, formerly William Knollys, was Master of the Court of Wards, a State official rather than a lawyer. He was dismissed later in 1618 for maladministration: Bell Court of Wards p.19. Hobart's mother had been a Hare: Swanson Attorney General p.42.
33. Hob.214; 80 E.R.361. Bell Court of Wards p.24 recounted the role of the auditors as the court's chief financial officers. Bell noted (pp. 24-25) that until 1589 there was only one auditor, yet another example of cavalier appreciation of statute by the Elizabethans when viewed in the light of Jacobean analysis.
34. However, he was mistaken in his reference to a decision of "the justices": Birdsall "Non Obstante" p.66.

finally accepted that all electors were responsible for and had an interest in all legislation. The concept of the subject's "inheritance" from the Case of Additions[35] as a measure of things not to be tampered with by the king, was further refined, but taken nowhere near a conclusive analysis by Hare v. Leisure.

Birdsall wrote of the opinion:

> "The unique value of this case for our purposes is its clearcut confrontation of the absolute administrative rights of the king with the equally absolute rights of the subject. It is the only case which discusses these absolute rights directly in relation to each other and attempts to resolve what seems a fundamental contradiction by defining the limits of each ... On the one hand, the administrative authority of the king is absolute only so long as it is only ministerial, purely administrative, and does not trench upon the subject's interest, while on the other hand the subject's interest does not extend ... to 'public' statutes."[36]

Ingram's, Zakar's and Hare's cases are capable of reasonable reconciliation with what Coke and Bacon had earlier suggested as the limit of Crown discretion when dealing with statutes.[37] The interests of subjects could not be ignored once recognised. They might extend as far as constraining the king's choice of officers. Statutes dealing with Crown employment would normally be regarded as "administrative", "public", or "politic", to use both Birdsall's and Bacon's expressions. However, the prerogative of dispensation ceased to be inviolable when measured against mala in se, disability

35. YB (Long Quinto) 5 Ed.IV 32B. See text at ch.2 f.nn.153 et seq.
36. Birdsall "Non Obstante" pp.67-68.
37. See ch.3 f.nn. 118-129.

specified by a statute, or the interests of subjects.[38]

Seventeenth century litigation saw both the subjective first and last of these concepts used as flexible tools, and attempts made to define them. James II's government finally foundered because his dispensation in respect of a statute that Bacon would have classed as "politic" was too remote from the wishes of the politically powerful in the kingdom. Though eleven out of twelve judges in 1686 held James to have the power to dispense with an act forbidding Roman Catholics to hold Crown office, the legal fabric was strained beyond repair by James' action.[39] The subjective checks on the dispensing power proved inadequate to this pressure, and it was swept away except insofar as it was expressly regulated by parliament. Even "politic" statutes now became creatures of the whole polity, not just the Crown.[40]

38. This reflects exactly the point being made by Coke in his posthumously reported account of the Case of Non Obstante and his report in 1615 of the Case of Monopolies, remembering Ellesmere's attack on the latter: text at ch.3 f.nn.128, 137-139. It is apparent that Sheriffs might well have been resolved differently 130 years after its decision, on the basis that it was in the interest of subjects to reduce the tendency toward corruption among sheriffs by adhering to the statutory framework of one year appointments.
39. Godden v. Hales supra f.n.8.
40. Of the trend of events under the Stuarts in general terms, Weston and Greenberg Subjects and Sovereigns p.17 wrote "... the political nation undertook to wrest from the king the discretionary authority that had been the hallmark of gubernaculum and make that authority its own."

Bacon as the Lord Chancellor may have been responsible for a decision in Chancery in late 1618, indirectly reported in Viner's Abridgement of 1748 under the heading "In what Cases a Man shall be relieved against a Statute". After an introduction to the aid afforded by a Court of Equity against a statute where fraud in a transaction was unknown to one of the parties, the report reads:

> "As if after the 13 Eliz. cap.10 a Dean and Chapter had leased lands to the King for a valuable Consideration, at which Time the Law was taken, that the King was not bound by the Statute, so that such Lease was good, and the King assign'd it over, and now the Law is taken that the Law is contrary, scilicet, that the King is bound by the Statute; yet this shall be made good by this Court against the Statute, because he could not know the the Law in a Matter so doubtful. Mich. 16 Jac. B.R. in Chancery, between Long and the Dean and Chapter of Bristol ..."[41]

Long's case affirmed Ellesmere's position in the Earl of Oxford's case[42], with equitable relief being granted against the effect of the statute, which still applied at law to the king.[43]

41. Viner's Abridgement 1748, vol.4, p.395.
42. Ch.5 f.n.12.
43. In 1618, Ranulphe Crew sjt unsuccessfully argued before Bacon LC in Rouswell v. Ivory that "if the King makes a non obstante against the common law it is void, but a non obstante against an Act of Parliament is good, and therefore, if the Chancellor binds the common law, he may bind a statute": (1975) 92 S.S. Hale's Prerogative of the King (ed.) D.E.C. Yale p.liv. This must have been the high point of claims for the equitable interpretation of statutes. Baker "Dark Age" p.4 quotes Twisden J from a manuscript report of R v. Standish (1670): "The reason Ellesmere gave, [in the Earl of Oxford's case] that they would not undo the judgment but only examine the corrupt conscience of the party, is an eluding of the statute".

The last years of James I's reign left little mark on the topic of statutes and the Crown from either courts or commentators: perhaps James' injunctions against discussion of the prerogative were taking effect, or his government had learnt from Elizabethan experience to keep the more contentious cases concerning governmental power out of court. Sir William Jones reported himself saying in Common Pleas in 1622 that while the king could only lose his title to property by express words in a statute, nonetheless he only took a title to property as large as a statute allowed him. Thus in Willion v. Berkley the king only had a fee tail with the consequent limitations. Magdalen College reflected the king's inability to take a title larger than the donor could give.[44]

Sir John Davies, a Crown lawyer, wrote about the same time that "By the positive Law the King himself was pleased to limit and stint his absolute power, and to tye himself to the ordinary rules of the law, in common and ordinary cases..." However, Davies then regurgitated James I's theory on the two Prerogatives, absolute and ordinary.[45] The next seventy years would see those demanding a broader based government invest and capture the citadel of absolute Prerogative.

44. Standen v. University of Oxford and Whitton (1622) Jones W. 18 at 21; 82 E.R.11 at 13.
45. J. Davies The Question Concerning Impositions (c.1623) published 1656, pp.30-31. Coke had agreed in the 1621 parliament: "I will not examine the Kinges Prerogative. There is a Prerogative disputable and a Prerogative indisputable, as to make warre and Peace; the other concernes meum et tuum and are bounded by Lawe." Notestein Commons Debates 1621 vol 4, p.79, cited in F.D. Wormuth The Royal Prerogative 1939 p.56.

James' reign finished with political events poised to overtake the compromises of the law. Only a handful of judicial references are available on the topic of statutes binding the Crown between the accession of Charles I and the flight into exile of James II, and none were cited on this issue after their time. This theoretical issue, reflective of so much of the Stuarts' troubles, was superseded by the onrush of events, the clash of arms, and its being overshadowed by the problems of non obstante.

In 1628 in King's Bench Sir William Jones said that three particular statutes regarding commerce and finance did not bind the king because he was not named in them, but the statement emerged explicitly in the context of whether specific royal prerogatives were reduced by any of the three statutes.[46]

The great Case of Ship-Money (R v. Hampden)[47] was heard in Exchequer Chamber in 1637. Seven out of twelve judges held that the king could levy "ship-money" without the authority of parliament. The minority, Brampston CJKB, Davenport CB, Hutton JCP, G. Croke JKB and Denham B conceded that the prerogative of seizing private property to assist in the resistance of attack on the nation was inalienable, but "minor" prerogatives could be overborne by legislation.

46. Awdley v. Halsey (1628) Jones W. 202 at 203; 82 E.R.107 at 108.
47. (1637) 3 St.Tr.825.

Croke J referred to Magdalen College and Lord Berkley's case[48]: the prerogative could not be used to do wrong, which would include impeding the operation of a statute which bound the king. Hutton JCP illustrated that some procedural prerogatives such as nullum tempus had been restrained by statute for nearly 300 years.[49] But amongst the majority Sir William Jones ran together the general saving of royal prerequisites in royal grants with the king's power of dispensing non obstante to conclude: "his person and royal prerogative cannot be restrained by Parliament", a sweeping extension upon the statement only a paragraph earlier: "general words of a statute extend not to a particular prerogative."[50]

The disturbing possibilities loosed by Ship-Money caused a non-lawyer, Henry Parker, to write a monograph, The Case of Ship-Money in 1640. Parker mused over the uncertainty among the judges as to the very nature of the prerogative. He lit on the notion of the prerogative's immutability in the face of statute, but in the context of how the prerogative was to be defined: was it law, or supra-legal?[51] This was followed some pages later by a generalisation of astonishing insight, coming as it did less than forty years after Elizabeth's death. In words worthy of Coke's darkest concern for the ordering of English government, Parker wrote:

48. 3 St.Tr.p.1161.
49. 3 St.Tr.p.1195.
50. 3 St.Tr.p.1190.
51. H. Parker The Case of Ship-Money 1640, p.14.

> "The Sunne is not more visible then this truth, our best Kings, King Charles, King James, Queene Elizabeth, and all the whole ascending line, have done undue illegal things at some times, contrary to the rights and Franchises of England, being misinformed, but having consulted with the Judges, or States in Parliament, they have all retracted, and confessed their error. Nay there is nothing more knowne, or universally assented to then this, that Kings may be bad; and it is more probable and naturall that evill may bee expected from good Princes, then good from bad ... There is no Tyranny more abhorred then that which hath a controlling power over all law, and knowes no bounds but its owne will..."[52]

Ascough's case[53], removed from the Court of Wards to the King's Bench, was the last reported case on this matter prior to the Civil War. Ascough held land by knight's service, but devised the land under the Statute of Charitable Uses.[54] The question arose of whether as a consequence the king was barred of his primer seisin in the estate.[55] Referring to feudal prerogative rights, the bench said that the statute "shall not bar the King from his interest of wardship, livery or primer seisin, because general words, where the King is not named, shall never bind or bar him".

The removal of Charles I's head in 1649 was a more drastic short term solution for the nation's political problems than the deposition and replacement of his son forty years later, but the latter event paved the way for large scale and widely accepted change in the political, and certainly legal role of the monarch which the former event

52. Ibid pp.21-22.
53. (1639) Cro. Car. 526; 79 E.R. 1055.
54. 43 Eliz.I c.4 (1601) (drafted by Francis Moore).
55. Bramston CJ, George Croke, Heath and Berkeley JJ.

did not. The unilateral non obstante power of the monarch was finally abolished in 1689, but the years leading up to that event contained litigation revealing just how uncertain was the application of this discretionary power.

Custodes and Rickabye[56] was heard in the Upper (formerly King's) Bench in 1652, concerning the efficacy of the late king's pardon for murder. Chief Justice Rolle wanted to review this pardon effected some twenty years earlier, as a means of analysing the dispensing power of the Crown.[57] The court referred to four statutes of Edward III beginning with the Statute of Northampton expressly regulating the power of pardon. It was held the king could not have pardoned with a non obstante against the statutes because statutes to reform public abuses and for the benefit of the commonwealth could not be over-ridden.[58] Furthermore, the king had bound himself by his express words in the statutes and so could not go back on the anti non obstante provisions in them, for which assertion Willion v. Berkley[59] and "the statute of 1 Jac. concerning bishops" was cited.

56. (1652) Style 375; 82 E.R. 790.
57. Edie "Royal Dispensing Power" p.216 n.39.
58. Style 377; 82 E.R. 792. Hare v. Leisure on the non-dispensability of statutes for the administration of justice was referred to: Style 375; 82 E.R. 790.
59. Style 377; 82 E.R. 792. Charles I's defeat and execution certainly worked a short term revision of thinking on the dispensing power, David Jenkins, the royalist judge imprisoned in the Tower, writing in 1647 "...the Courts of Law at Westminster are above the king, for they make of no effect the Kings Charters, which are passed against the Law: and the King is Subject to law, and sworne to maintain it." Lex Terrae p.23 (left) misprint intending p.22. (Of course this begged the question as to whether the dispensing power was part of the "Law" to which the king was subject.)

The last two cases exactly to the point of this work prior to the Glorious Revolution and the Bill of Rights were also heard under the Commonwealth. In 1656 the Court of Exchequer decided a case[60] involving the statutory basis of the king's preferment in the recovery of debt.[61] One Harrison was in debt to both Andrew and Fielder, but the former debt, though later in time, was recognised in a bond under judgment. Fielder assigned his debt to the king (whether Charles I, the Crown or the Commonwealth is not clear) and the question arose of the priority to payment.

The court found for Andrew, Parker B, saying:

> "The King has many prerogatives pro bono publico; but in the case in question, the statute of 33 H 8 abridges the prerogative, and controls the common law: affirmative statutes do not alter the common law, but negative statutes do; and here is a negative implied."[62]

Nicholas B added:

> "Before the statute of 33 H 8 the King was not bound, but the statute has made an alteration, though it found in the affirmative, for it enacts a new thing ..."

60. AG v. Andrew (1656) Hard 23; 145 E.R. 360.
61. 33 Hen.VIII c. 39 s.74 (1541). This section would again be the subject of litigation in the late eighteenth and early nineteenth centuries: see ch.7 f.nn. 66 and 67, ch.8 f.nn. 3 and 5. The text of the section reads as follows: "That if any suit be commenced or taken, or any process be hereafter awarded, for the King for the recovery of any of the King's debts, the same suit and process shall be preferred before the suit of any person, and the King shall have first execution against any defendant, of and for his said debts, before any other person, so always that the King's said suit be taken and commenced, or process awarded for the said debt at the suit of the King, before judgment given for the other person."
62. Hard 27; 145 E.R. 362-363.

The modern notion of statutory encapsulation of the prerogative[63] is here plain to see. The barons of Exchequer found in this situation that the prerogative was curtailed by the general import of a statute, the specific words of which did not necessarily reduce the general ambit of the prerogative, but which altered the common law, as negative statutes did.[64]

In 1658 the Upper (King's) Bench is reported as stating in Wildmore's case[65] that the king can take advantage of any statute without being singled out or named. The report, the facts of which are elusive, finishes with the blunt assertion:

> "Lou Roy sera lie quant nest nosme, Co 5. 14. b. [The King will be bound when he isn't named, Case of Ecclesiastical Persons 5 Co. Rep. 14B]."

This decision, though not published until 1684, was delivered three years prior to Jenkin's publication of the opinion in the Case of a Fine Levied by the King of 1604/1607, and was an explicit negating of the proposition since adopted from Jenkins as a maxim.[66]

63. AG v. De Keyser's Royal Hotel Ltd. [1920] A.C. 508.
64. See ch.2 f.n.157 and ch.3 f.n. 16 on negative statutes binding the Crown.
65. 2 Sid. 68 at 69; 82 E.R. 1261 at 1262.
66. Ch.5 f.n.30.

Sir Matthew Hale provided some of the last commentary on the dispensing power in his Prerogatives of the King written either during the Interregnum or soon after the Restoration in 1660.[67] After explaining the Case of Sheriffs, Hale wrote:

> "But the king cannot dispense with malum in se nor with the penalty, though he may after pardon it ...[68] And ... he cannot [dispense] with any law that abridges the jurisdiction of any court, be it common law or statute, and therefore that grant to the Cardinal [authority cited] that he might sue for his debts in the spiritual court was in law void, and the subject ought to have prohibition."69

More importantly as regards statutes binding the king, Hale considered "the power which the law hath over the king or his actions.

(1) Regularly the king is subject to the first power of the laws whereby he is bound in conscience to observe all such laws as either by the common law or statutes extend to him, there being divers laws out of which he is exempted either by usage or a reasonable interpretation and exposition of the general words thereof. Vide Coke 5 Rep., fo.14 [Case of Ecclesiastical Persons].

(2) Regularly the king is not subject to the penalty of law, at least where the penalty is personal. So that acts by him done or omitted contrary to the tenor of

67. Yale 92 S.S., pp. xxiii-xxvi.
68. Authority cited.
69. Hale's Prerogatives 92 S.S. 178.

those laws or customs, which he is bound to observe in conscience, yet make him not liable to any personal loss or damage, in case there be no express clause to that effect annexed to a new law, whereunto, as before, he ought to be a party.

(3) Regularly in those laws whereby a contract is made void as being made against the prohibition of a law, then it binds the king in [such] case, [except where] either by usage or the necessary construction of the law he be not to be construed within it."[70]

Hale is the only commentator who has found a basis for assuming the king to be bound by legislation while allowing his possible non-inclusion for "necessary construction."

The great litigation of the restoration period concerning the dispensing power, Thomas v. Sorrell[71] lasted eight years before King's Bench and Exchequer Chamber. Contemporaneously the Sun King, Louis XIV of France could state in an ordinance:

> "Let it not be said that the sovereign is not subjected to the laws of his State; the contrary proposition is a truth of natural laws; what brings perfect felicity to a kingdom is the fact that the king is obeyed by his subjects and that he himself obeys the law."72

70. 92 S.S. 176-177.
71. (1667-1675) Vaughan 330; 124 E.R. 1098, 1 Lev.217; 83 E.R. 376, 2 Keble 245 et passim; 84 E.R. 152 et passim, 3 Keble 76 et passim; 84 E.R. 603 et passim.
72. Tunc Royal Will p.408.

This sweeping assertion of the French position contrasts with the minutiae of English law as evidenced in Thomas v. Sorrell. James I had granted a dispensation from a statute of Edward VI requiring the holding of a licence to sell wine. Sorrell was a "succcessor in title" to this now aging dispensation, which he claimed relieved him from similar obligations under a new statute of Charles II. Thomas informed on Sorrell, leading ultimately to all twelve judges opining on the matter.

The informer lost his case, and the dispensation was accepted because it did not attempt to relieve a malum in se. But though this case was resolved on its facts, the need for clarity in this area of public law was apparent. Ellis JCP said, "When the statute makes anything tortious for the publick good, the King cannot dispence it."[73] But an opaque film hung over the concept of what was harmful to the public good. The crux of Thomas v. Sorrell was whether too many wine shops constituted a nuisance, and by their decisions the judges accepted that allowing additional, unlicensed wine shops in contravention of statute did not seem a thing so inherently bad that the king could not allow it.

Only Vaughan CJCP concerned himself with issues deeper than the superficial distinction between mala in se and mala prohibita: the chief justice was concerned to actually define the mala in se that the king could not dispense, and it was apparent, although not necessary to his decision,

73. 3 Keble 145; 84 E.R. 644.

that Vaughan was looking wider than his brethren. Certainly Vaughan saw the possibility of parliament stipulating whether a statute was curbing a thing inherently wrong, which is to say he thought that parliament could control the use of the dispensing power.[74]

The climax to the issue of the dispensing power, and the consequent fall of James II in the Glorious Revolution, came with the decisions in 1686 in Godden v. Hales[75] and finally, the following year the Case of the Seven Bishops.[76] In the former, Hales was a Roman Catholic commissioned as a colonel by James in contravention of the legislation designed to stop Catholics holding commissioned rank. Hales refused to take the required oath under the Test Act, 25 Car.II c.2 (1673), saying that the king had given him a dispensation from the requirement. Hales' coachman, Godden, informed on him, and eleven of twelve judges found that the dispensing power extended sufficiently far to protect Hales.

Northey for the informant had argued that the king could not dispense with an act of public concern because of the interest which each subject had in such an act.[77] Northey based himself squarely on the precedents of Ingram's[78] and Zakar's[79] cases, asserting that the king could not make good a man's disability. The court however, found otherwise.

74. See in general Vaughan 330; 124 E.R. 1098 passim.
75. Supra f.n.8.
76. (1687) 12 St.Tr.453.
77. 11 St.Tr.pp.1187-1188, 2 Show. K.B.476; 89 E.R.1050.
78. Supra f.nn. 5 and 6.
79. Supra f.n.3.

Edie has essayed that the judges "were on very solid legal ground in upholding the king's authority to grant dispensations in particular cases"[80], but a perusal of the law in Coke's day shows that it was then at least sufficiently sophisticated to have found the "communal" interest in the Test Act which disallowed a dispensing function.[81] It would not be unfair to say that the eleven judges were obtuse if not plainly biased: certainly they were handpicked, having previously had to take an oath to James that they would find in favour of this particular dispensing.[82]

Following this legal victory, James set about suspending, not merely dispensing from the obligations of, the laws penalising Catholics. The Archbishop of Canterbury and six bishops protested the reading in churches of the proclamation of this suspension, and were charged with seditious libel. The jury in the Case of the Seven Bishops brought to an end James' luck with the law, and their acquitting the bishops was seen as a verdict against

80. Edie "Royal Dispensing Power" p.231.
81. See ch.3 f.nn. 118-129. Note that John Brydall Jura Coronae 1680 p.84 wrote of the dispensing power in wide terms, but at pp.84-85 he used Ingram's case to support the proposition: "When an Act of Parliament is made that disableth any Person, or maketh anything void or tortious for the good of the Church or Commonwealth, in this Law all the Subjects have an interest, and the King himself cannot dispense therewith ... ". At p.88 Brydall noted the exemption of the king out of an act of parliament because he is not included in general words: this exemption of the king was, however, stated to be "in respect of the Dignity and Excellency of his Person," that is to say, it was seen as personal and not governmental.
82. Edie "Royal Dispensing Power" p.227.

the prerogative; the Glorious Revolution followed within six months.

Edie and Schwoerer have detailed the events of 1689 as the convention parliament struggled to find a new political basis for the nation.[83] The Commons were adamant that the dispensing and suspending power in the monarch must be abolished, while the Lords were reluctant to take such a step, although in the ultimate agreeing with the Commons.

In fact what really happened was that the unilaterial executive action of foreclosing a statute was removed in favour of a capacity to dispense or suspend if the statute itself provided for it : what the Commons stated was "that the pretended Power of dispensing or suspending of laws, by Regal Authority, without Consent of Parliament, is illegal."[84] (emphasis added) It would still be possible to dispense with legislation in the future, in fact on a broader basis than in the past, and with none of the niceties of shading regarding mala prohibita where the subject had an interest, providing the sovereign parliament expressly allowed for such a measure. Of decreasing relevance to administration of the law in the future was that all grants non obstante issued prior to the commencement of the parliamentary session in 1689 which had formulated the Bill of Rights were to remain effective.

83. Edie "End of the Dispensing Power"; Schwoerer Declaration of Rights
84. Cited in Edie "End of the Dispensing Power" p.440.

Given the relationship between non obstante and the problem of whether statutes bound the Crown, it is worth quoting Edie's summation of parliament's realisation that abolishing the dispensing power was not enough. It had existed for a reason in the past (administrative necessity when parliaments met very infrequently) but circumstances were now altered:

> "Non obstante had been necessary because statutes were out-dated, ill-drawn, ill-advised, or in the Lords' own word, useless. But it was no longer possible to trust the king to remedy the defects. Convenient, expedient, the non obstante might be, but dangerous too, the Lords knew. Parliament itself must assume responsibiity for the laws it made. Defective laws must be redrawn, useless ones repealed. Parliament met often now; it could be done, and was. Through the 1690s old laws were brought up to date and, when necessary, rewritten."85

For all this momentous political upheaval, the problem of statutes and the Crown remained a point of lawyers' law, and the period was one one still wedded to the equitable interpretation of statutes. As Matthew Hale wrote[86], the king was exempted out of the operation of statutes by "usage" or "reasonable interpretation" or "necessary construction". It remained to be seen what a new age of

85. Edie "End of the Dispensing Power" p.450. A neat example of the attitudinal changes that affected the utility of legislation, and its social legitimacy, may be seen in a reference in Godden v. Hales (11 St.Tr. p.1194 per Powys S.G. arguendo) to a statute of 4 Henry IV c.31(1402) barring Welshmen from becoming judges, having to be non obstanted. The statute had descended from an era when the Welsh were plainly regarded by the English as reprehensible in the extreme (a glance at the Lancastrian statute book proves the point) but two centuries later this was not the case. However, it became for parliament to repeal the derelict and irrelevant legislation, rather than await royal dispensing.

86. See f.n.70 supra.

commercial expansion, favouring Gesellschaft reciprocity, and politically based in an assertive post Bill of Rights parliament, would do with the uncertainties of the Crown's position under the common law: a position of apparent administrative indifference to the law under the dispensations of Tudor and Stuart officials, and a position which allowed administration and executive function to remain the preserve of a clique largely beyond public scrutiny, and until 1689, parliamentary directives.

In the midst of these troubled times England had thrown up two political philosophers of note: Thomas Hobbes and John Locke. The latter, writing his most famous material at the time of, or immediately after the events of 1689 was less dogmatic than Hobbes, but was really writing for the oligarchy establishing itself in parliament as the true rulers of the nation. Locke thought that the king was accountable and subordinate to parliament only so far as he consented[87], a sterile argument given the nature of what William and Mary had already agreed to in the Bill of Rights.

Hobbes was dead a decade at the time of the Glorious Revolution, but had left behind a potent philosophy built on the Roman law of the Digest: "princeps legibus solutus est"[88]. In his Dialogue between a Philosopher and a Student of the Common Laws of England written in the decade after the Restoration, Hobbes had said the king could not be

87. J. Locke Two Treatises on Government 1690, vol.II para. 152, pp. 414-415 (ed.) P.Laslett, 1960.
88. Justinian 2.4. (Ulpianus) 1.

bound by his laws because of the impossibility of enforcing upon him[89] a rather flintier positivist approach than that subsequently argued by Locke.

This failure to perceive the subtleties of the common law, particularly on the reach of royal immunities to third parties, is also reflected in the Leviathan of 1651. However, the argument there that the sovereign is not subject to the civil law since he can make new laws and repeal old ones, and is thus only bound by old laws to the extent of his will to continue them[90], speaks to a later time when the United Kingdom parliament, operating without the check of a written constitution, would be truly sovereign. Hobbes wrote in absolute terms, without concession to the intricacies beloved of the common lawyer. His work had no immediate impact on the area of law under discussion, and a century would pass before another philosopher, Bentham, would assault the common law.

89. J. Cropsey (ed.) 1971, p.76.
90. M.M. Goldsmith Hobbes's Science of Politics 1966, p.196.

CHAPTER SEVEN

THE CENTURY SUCCEEDING THE BILL OF RIGHTS: 1689-1790

> " The flight of James II at last revealed to Englishmen that the Stuarts were an anachronism and that the Middle Ages could no longer be permitted to rule them from the grave. They had to adjust not only their institutions, but their thoughts, to an age in which the guiding principle was not authority but reason."
>
> C.H.S. Fifoot Lord Mansfield 1936 p.1.

> "Alone in a changing world, the law cherished its recollection of antiquity. The shadow of Coke was cast across its pages. The profession was preoccupied with the law of Crime and of Property, and, while Hale had done something to rationalize the one and the other had been expanded under the influence of Bridgeman and Nottingham, each was dominated by medieval conceptions."
>
> Ibid p.6.

The benchmarks on this topic had until 1688, with one exception, involved religious affairs and church administration. Courtenay[1] (1311), Radclif[2] (1457), Colt and Glover/The Case of Commendams[3] (1616-1617) all involved presentations to benefices: Magdalen College [4] (1615) concerned a statute designed to preserve ecclesiastical property from neglect. Only Willion v. Berkley[5] (1562) was devoted to the secular problem of whether entailing under de Donis bound the king. However, the seventeenth century prior to the Glorious Revolution had provided examples (Awdley[6] and Andrew[7]) of commercial problems involving the king, and the eighteenth century would see a turning from the former ecclesiastical preoccupation, to matters more readily digestible to the modern mind.

1. Ch.1, f.n. 43.
2. Ch.2, f.n. 85.
3. Ch.6, f.n. 15.
4. Ch.5, f.n. 12.
5. Ch.3, f.n. 19.
6. Ch.6, f.n. 46.
7. Ch.6, f.n. 59.

In 1686 Shower argued in the Exchequer that although the king was not bound by any of the statutes of bankruptcy and so was not prejudiced by them, his prerogative of priority was not increased.[8] Shower's obscure report seems to indicate that the court found the king had priority over other creditors even when that meant tracing the debtor's claims in a bankrupt's estate. Such a finding seems superficially to acccord with the exercise of the prerogative untrammelled by statute, but it raises the issue of whether the king was gaining an advantage that he would not have had at common law, where when he had not been amongst the creditors of his debtor's debtor, the estate would have been consumed, leaving nothing to trace at a later date.

That the king was not bound by the Statutes of Frauds appears in the Exchequer's decision in R v. Lady Portington.[9] Ann Barlow had devised land to Lady Portington for the good of her, Ann's, soul. King's Bench would not find this a superstitious use. As superstitious uses were now void, the law would have taken no notice of this one. This result was challenged by discovery being sought in the Exchequer.

If the Crown could establish that this was a devise to a superstitious use, it could reargue that the devise was void, and assert its right to distribute the lands as it saw fit. The Crown was successful because it was able to use parol evidence to prove the superstitious use, in

8. AG v. Capell 2 Show. KB 480; 89 E.R. 1053. The principal bankruptcy statutes were 13 Eliz.1 c.7 (1571) 1 Jac.I c.15 (1604) and 21 Jac.I c. 19 (1625).
9. (1693) 1 Salk. 162; 91 E.R. 151.

contravention of the terms of the Statute of Frauds[10] which forbade (inter alia) the bringing of an action against an administrator or executor except on the basis of written evidence.

The report of Lady Portington's case would be impossible to understand in the absence of Lord Chancellor Hardwicke's comments, obiter, half a century later in Addlington v. Cann.[11] Referring to the finding in the Court of Exchequer that the Statute of Frauds did not bind the king, but governed conduct only between subjects, Hardwicke L.C. said:

> "I own, I am doubtful as to this doctrine, that the King is not bound by a statute unless he is expressly named."12

However, he immediately added that a decision existed (which he did not cite) holding that the king was not bound by section 16 of the Statutes of Frauds which provided that no writ of fieri facias or other writ of execution should operate before the date of receipt by the sheriff.

10. 29 Car. II c.3 s.4 (1677).
11. (1744) 3 Atk. 141 at 147 and 153; 26 E.R. 885 at 888 and 891.
12. Ibid 154; 891. Earlier the Lord Chancellor had noted, "There are three cases where a statute shall bind the king, though he is not named.

    First, he is included in the 13th of Elizabeth [13 Eliz.1 c. 10] for restraining college leases under the general words body politick or corporate.

    Secondly, he shall not be exempted by construction of law out of the general words of acts made to suppress wrong.

    Thirdly, the general words of statutes which tend to perform the will of a founder or donor shall bind the king though not named. See Magdalen Coll. Case, 11 Co.66b." Ibid 147;888.

Hardwicke's description fits Capell's case[13], in which, as with subsequent cases asserting the Crown prerogative of priority in bankruptcies[14], it was not only the statutes of bankrupts that did not bind the king, but by implication section 16 of the Statute of Frauds. If the king could not avoid the provisions of section 16, he would not have the machinery available to exert his priority over creditors earlier in time.

In the new commercial milieu, the combination of the royal exemption from statutes of bankruptcy and the Statute of Frauds could have a more disconcerting and unexpected effect than the immunity in the old area of ecclesiastical affairs. The above cases also illustrate the progression to the simplified rule that statutes do not bind the king if he is not named, dropping the rider that he was only exempt if he possessed a prerogative in the matter. Not only was there no apparent prerogative in the area of section 16 of the Statute of Frauds (there was merely practice common to both Crown and subject alike) but the Crown priority in debts, the prerogative basis of exemption from the statutes of bankrupts, had been in large measure consumed by the act 33 Hen.VIII, c.39 s. 35 (1541), giving preference to royal process, a fact alluded to by Strange arguendo in Mann's case.[15]

13. F.n. 8 supra.
14. E.g. R v. Mann (1726) 2 Strange 749; 93 E.R. 826, Bootle arguendo at 751; 827, Strange arguendo at 754; 829 and Brassey v. Dawson (1734) 7 Mod. 182; 87 E.R. 1177, per Hardwicke CJKB at 186; 1179 to 1180.
15. F.n. 14 supra, 2 Strange 755; 93 E.R. 829 to 830, and see Uppom v. Sumner (1788) 2 Black W. 1294; 96 E.R. 758.

The last three ecclesiastical cases concerning statutes and the Crown were litigated in the first three decades of this period. Crooke's case[16], R v. Bishop of London, Dr Lancaster and Dr Birch[17] and R v. Archbishop of Armagh[18] are more complicated than previous contests over presentations, because they involved statutes of Charles II and James II for the uniting of parishes, and the order of presentation between the patrons of the former individual parishes.

In the first of these cases, Shower argued successfully for Crooke at Doctors' Commons before a civilian, Dr. Newton. Relying on Magdalen College, Shower established that the king was bound by statute though not named, where a contrary holding would result in the king doing wrong. Of more specific importance was Shower's argument that the king's general prerogative of priority did not avail him, because without the legislation he would have had no specific interest in this parish at all. The king was the patron of the less valuable living making up the new composite parish, and the act provided that the patron of the more expensive living should have first presentation in the newly created parish.[19] Shower said:

16. (1691) 1 Show. KB 208; 89 E.R. 540.
17. (1693-1694) 1 Show. KB 413,441,493; 89 E.R. 673,688,714, 4 Mod. 200; 87 E.R. 347, 3 Lev. 377; 83 E.R. 738, 2 Salkeld 540; 91 E.R. 457, Comberbach 300; 90 E.R. 490 (KB) Shower 164; 1 E.R. 112 (HL).
18. (1721) 8 Mod. 5; 88 E.R. 5, 1 Strange 516; 93 E.R. 671.
19. 1 Show. KB 210 to 211; 89 E.R. 542.

> "The King takes a benefit by this clause; it is plain that he is bound, for otherwise he could not have any presentment to this church aforesaid at all; and if he takes he must take it under the modes and qualifications that the Act gives it him. **** but it seems very hard to say, that the King is not bound, because not included, because not named, and yet he shall be included as to benefit. If they [the King and his presentee] have any right, the King can only have it by this Act of Parliament, and then they must have it as this Act of Parliament gives it. **** I do affirm positively that an Act of Parliament which gives a right to the King shall bind him, as to the manner of enjoying or using that right, as well as a subject."

The Bishop of London's case[20] consisted of two actions. The first, involving the bishop's presentation of Dr Lancaster to the parish of St. Martin in the Fields, decided in 1693, contested the king's general prerogative power to present to a benefice after he had raised the incumbent (Dr Tennison) to the episcopate. It was found in both King's Bench and the House of Lords that he had such power, necessarily depriving the patron of his capacity to present. The case is relevant to the topic in hand only because Levinz sjt, in arguing that the king and queen did not have this prerogative, referred[21] to Courtenay's case[22] in Maynard's republication of the Year Books (in 1679), this being its first and last exhumation in the nominate and later law reports.

The other portion of the Bishop of London's case was decided in 1694 and involved Dr Birch, who had been presented to the parish of St. James by the bishop. The statute of 1 Jac.II c. 22 (1685) had provided for the

20. F.n. 17 supra.
21. 1 Show. KB 462; 89 E.R. 699, 3 Lev. 379; 83 E.R. 739.
22. Ch. 1 f.n. 43 and see YB 5 Ed.II f.148 for another aspect of that litigation.

creation of this parish from a portion of St. Martin in the Fields. The patrons of St. James were to be the bishop and Lord Jermyn, taking turns at presenting to the parish. The act provided "that the bishop shall present after the decease of Dr Tennison [the then incumbent of St. Martin's] or the next avoidance [vacancy]".

The Crown (personified by William and Mary) sued the bishop, asserting its inherent right to present to a parish where avoidance occurred by elevation of the incumbent. It was contended that this prerogative to present on cession continued unabated by the words of the statute providing for the bishop's power of presentation on avoidance.

The case was widely reported, indicating the interest it aroused. Shower's reports provide the greatest detail, and display him arguing that the king was bound by this act. The king, he said, was bound by general words of a wrong-rectifying statute, because he could not do wrong: Willion v. Berkley, Magdalen College and Coke's Institutes were the main authorities cited.[23] More novel was Shower's exposition on legislative theory and interpretation. It was contended that the king had lost his prerogative right because "here the King himself gives the first presentation right to the Bishop of London; for the King and people all together are grantors".[24] Custom could not stand against an act of parliament "because it is a matter of record, and the

23. 1 Show. KB 419,420; 89 E.R. 677.
24. 1 Show. KB 418; 89 E.R. 676 and see argument in the House of Lords, Shower 179; 1 E.R. 121.

highest record that we know of".[25] Finally Shower told the King's Bench:

> "My Lord, you will consider the reason how the King comes to be exempt out of an Act of Parliament; it can only be by construction of law; now that construction shall never be against the express words, sense, and reason of the Act, either plainly expressed in it, or plainly inferable from it; now, here are the express words, and the intent of the Act both concurring..."[26]

Cooper, arguing that the king was not bound, asserted that if the Lord Jermyn were attainted of treason or felony the king would present in the place of him and his successors. The specious analogy was drawn between this prerogative right, and the question of the king's prerogative right to present on cession vis a vis this statute: "and I see no reason of difference, why the rule of law about the King's prerogative should not operate as strongly upon this latter title, as it does upon the other." The two prerogatives were quite different, the former involving the king standing in place of the appointing authority, the latter concerning the king's capacity to over-ride powers of presentation vested in others.

Sir Henry Gold [Gould, grandfather of Henry Fielding the novelist] argued as their majesties serjeant-at-law that firstly, the "prerogative is a favourite of the law".[28] Secondly, the king is only bound by an act which shows a particular intention so to bind, and thirdly, general words do not oust the king of his prerogative.[29]

25. 1 Show. KB 421; 89 E.R. 678.
26. 1 Show. KB 422; 89 E.R. 679.
27. 1 Show. KB 455; 89 E.R. 696.
28. 1 Show. KB 482; 89 E.R. 708.
29. 1 Show. KB 482-483; 89 E.R. 709.

This protracted litigation had begun in King's Bench led by Holt CJ in 1692 and concluded there in 1694. The court found unanimously for the king's prerogative of presentation. Giles Eyre J said:

> "For where the King claims a thing, with respect to his Royal public capacity, there I think it is a certain rule of law, that general words in an Act of Parliament without naming him, will not bind him [citing Case of a Fine Levied by the King, and cases in Magdalen College and Willion v. Berkley]."30

Samuel Eyre J expanded on the past learning to find the royal exemption from the operation of statutes itself a prerogative.

> "We have a rule in law, that the King is not bound by an Act of Parliament unless he be particularly named, for the law gives him that prerogative, for the dignity of his person, that he shall not be by construction of law included in common words, much less where his prerogatives are concerned."31 (emphasis added)

He agreed with Coke's subjective tests regarding statutes and wrongs, frauds and religion[32], so illustrating the potential weakness of that approach when balanced against the test of securing the king's prerogatives.

The appeal to the House of Lords failed (such an appeal was a novelty of the period), but is of interest in the occasional references by counsel to the troubled and still near pre-Williamite Stuart past. It was asserted for the Bishop of London and Dr Birch that "All Prerogatives are founded upon some Reason of Benefit to the People, either in respect of the Government in general, or else of some particular Subjects".[33] It was declared that Justice Hutton

30. 1 Show. KB 490; 89 E.R. 712-713.
31. 1 Show. KB 496; 89 E.R. 715.
32. 1 Show. KB 497; 89 E.R. 715.
33. Shower 167; 1 E.R. 113.

had denied the existence of the prerogative of presentation on cession, and he "was an ingenious Man, a good Lawyer, and a true English Judge, that argued against Ship-money...".[34] Counsel also queried why the king's counsel were careful to insert savings in private Acts for sales of estates and paying of debts, if the king would in any case be unaffected by such legislation.

This last great litigation on the prerogative right of presentation finished with the existence of the prerogative affirmed, its operation in spite of this act confirmed, and the rule of construction regarding the non-application of general statutes to the king now for the first time elevated to a prerogative.

R v. Archbishop of Armagh and Jackson[35] involved a uniting statute similar to that in the Bishop of London's case, but because the king's incumbent died rather than being elevated, no question of the prerogative of presentation was argued, and King's Bench found the Crown bound by legislative provision empowering the archbishop to present:

> "I think this statute will extend to the Crown, because it does not deprive the Crown of any prior right, but only new - models it, and therefore differs from Dr Birch's case, where the ancient prerogative of the Crown was to be destroyed."[36]
>
> per Robert Eyre J.

34. Shower 167; 1 E.R. 114. (Emphasis in original)
35. (1721) 8 Mod. 5; 88 E.R. 5, 1 Strange 516; 93 E.R. 671.
36. 1 Strange 518; 93 E.R. 673.

Tutchin's case[37] and R. v. Bewdley[38] concerned the capacity of the Crown to take advantage of statutes of jeofails and amendments as well as the question of whether these acts bound the Crown. It was to the Crown's advantage to be able to alter the wording of process in accordance with the provisions of these statutes. It is therefore not surprising to find Sir Peter King (later Lord Chancellor) arguing that the Crown could not be excluded out of general statutes made for the benefit of prosecutors: the Crown was only outside the operations of these statutes if it would be otherwise debarred of a precedent right or prerogative.[39]

The most comprehensive survey of the problem in the eighteenth century appears under the Fieldingesque appellation of AG v. Lancelot Allgood[40], a judgment delivered and reported by Parker CB. If argued within a year of delivery of judgment in 1743, "Mr. Solicitor General" presenting the Crown case must have been the celebrated William Murray, who later as Lord Mansfield left no reported decisions on this aspect of the law.

The Crown had sued the defendant for intrusion. The common law had provided, in general and not only with respect to royal realty, that if a defendant pleaded not guilty to an information of intrusion, he should lose his possession of the land the subject of dispute while the litigation was in progress. The Exchequer reasoned

37. (1704) 6 Mod. 268; 87 E.R. 1014, 1 Salkeld 51; 91 E.R. 50. Powys JKB at 6 Mod. 282; 87 E.R. 1024 thought the case did not raise the issue under discussion, and see 287; 1028.
38. (1712) 1 P. Wms 207; 24 E.R. 357.
39. 1 P. Wms 217; 24 E.R. 360.
40. (1743) Parker 1; 145 E.R. 696.

this case on the basis that this aspect of the common law as it pertained to the king when he laid an information of intrusion was a prerogative.[41] It was in reality no more than a "right" which the king shared with his subjects. The issue then became one of determining whether the Statute 4 Ann. c.16 (1706) (already the subject of obscure analysis in Bewdley) bound the king. Section 4 of this act provided that a defendant could "plead as many several matters as he shall think necessary for his defence". Did this act expressed in general terms cut down the common law right when exercised by the king, a right deemed in this case a prerogative?

Parker CB reviewed some of the authorities[42], noting that "General words, where the King is not named, shall never bind or bar him" and in particular he referred to Magdalen College. He found Coke's reasoning inapposite in this case because the common law rule now superseded by statute had "prevailed for centuries" and so it was not possible to impute the wrongfulness to it that Coke had referred to.[43] This effectively destroyed the utility of Coke's reasoning without reliance being placed on the modern criticisms concerning statutes being made for the public good. If the common law was assumed not to have allowed "wrongs", then statutes were never passed overruling aspects of it to prevent "wrongs", and so that basis for binding the king failed.

41. Parker 2; 145 E.R. 696.
42. Parker 4-6; 145 E.R. 697. The cases cited for the negative effect of "general words" were no more than a century old.
43. Parker 7; 145 E.R. 698.

No reference was made to Willion v. Berkley where Anthony Brown J had referred to a "great wrong" permitted to be done by the common law, and remedied by de Donis.[44] Exchequer found the king not bound by 4 Ann. c.16 s.4 (ie. defendants not capable of taking advantage of the statute when the object of a royal information), a decision agreed in the following year by Common Pleas in a quare impedit suit.[45] This latter case, R v. Archbishop of York, is notable for argument to the effect that procedural matters based in statute in civil suits should affect the king, although by inference such procedural matters in prosecutions should not restrict the king. The aridity and paucity of reasoning is worthy of comparison with that earlier criminal case, Additions[46], where fifteenth century judges had been diligent to find universal rights incapable of unilateral upset by the Crown.

Bruse v. Harcourt (AG)[47] was a first review of the problem of whether the Crown could be bound by an act creating a statutory offence. The barons of the Exchequer were confronted with a seizure of French wine under the statute 3 Ann. c.13 (1705) which prohibited all trade and commerce with France, and expressly embargoed the importation of French wine into England on pain of forfeiture, extending to the vessel carrying the goods.

44. See ch.3, f.n.45.
45. R v. Archbishop of York and Hayes (1744) Willes 533; 125 E.R. 1306.
46. Ch.2, f.n.153.
47. (1709) Parker 274; 145 E.R. 778.

The French wine seized was valued at £1600 and had been purchased in Holland for the use of the queen and her family.

All the barons agreed "that the dispensing power was abolished by the statute 1 W. & M. [c.2, the Bill of Rights]"[48], but Lovell B was in the minority in finding for the plaintiff, who had laid the information seeking the portion of seized goods allowed under the act as an inducement to informers. This aspect of the legislation helped Lovell B deal with the concept of the queen forfeiting property to herself. Lovell B said:

> "... that the act was an absolute prohibition, without regard to person or quality, and extended to the Queen as well as to her subjects: and as to the objection, that the Queen could not forfeit to herself, he answered, that the forfeiture was formally to the Queen, but substantially to the Queen and informer, each a moiety."[49]

The remainder of the court, Price and Bury BB and Ward CB, disagreed, and revealed the warping effect of personalised royal metaphysics on legal reasoning. All three relied on the fact that the wine was for "the use of Her Majesty and her family". Price B referred to the plaintiff's appropriate remedy being "by petition", and with a favourite literalist technique Ward CB looked not to the intent of the legislation (to apply financial pressure on France with whom a prolonged war was being fought) but to the difficulty of forfeiting the vessel carrying the wine if it had been a British man of war.

48. Parker 275; 145 E.R. 778.
49. Ibid.

Over thirty years after the Bill of Rights the case of Sloane v. Pawlett[50] raised the issue of the king's dispensing power for indeterminate discussion in King's Bench. The statute 13 and 14 Car.II c. 3 (1662) provided for a militia composed of horsemen, called on the basis of property value. Charles II had granted an exemption from this service to the members of the Royal College of Physicians. The act was enforced by Lords Lieutenants and the deputies, of whom Lord Pawlett was one. When Sir Hans Sloane, the President of the Royal College, (his collection formed the basis of the British Museum) refused to appear with a horse as summoned, Lord Pawlett distrained upon his goods as provided under the act, and seized a silver tankard.

Baines argued for the plaintiff[51] that the royal capacity to exempt from the penal provisions of a statute was a prerogative, "and it is certain, that in the most minute cases of the King's prerogative it cannot be taken away by any general words in an Act of Parliament".[52] Baines continued without reference to the Bill of Rights (the dispensation pre-dated the Bill's destruction of the non-obstante power):

> "If the King should be included within the general words of this Act, yet in this charter [to the Royal College of Physicians] there is a special non obstante of any law or statute to the contrary; and when an Act expressly declares that the King's grant shall be void, though there be a clause non obstante in the patent, yet the King may dispense with such an Act, if there be in the patent a clause non obstante of that statute."53

50. (1721) 8 Mod. 12; 88 E.R. 10.
51. 8 Mod. 13-16; 88 E.R. 11-13.
52. 8 Mod. 14; 88 E.R. 12.
53. 8 Mod. 15; 88 E.R. 12.

Reeves and Wearg argued for Pawlett, referring to the "Bill of Rights, [Petition of Right] in the third year of Charles the First [1628]"[54] condemning exemptions such as this. The English Reports carry as a note to a former edition of the Modern Reports that Reeves argued:

> "The prerogative of the King relating to dispensations has of late years been disallowed; and it is expressly declared by the Bill of Rights, 1 & 2 Will. and Mary c.2, that such dispensations are void. No power of exemption is reserved to the King by 13 & 14 Car. 2 c. 3. Goodwin v. Hales, which allowed a dispensation of the Test Act, and many other cases, have of late years been denied for law."55

Reeves' argument is valuable in reminding future generations of lawyers that Baines' propositions do not have universal application; but Reeves' submission was too narrow because, as noted in chapter 6, a valid dispensation issued before 1689 remained good after the Bill of Rights. It was not necessary that the 1662 statute provide a power of exemption. However, harking back to the pre-1689 discussions for limiting the dispensing power, Chief Justice Pratt opined "that the King by his prerogative could not dispense with an Act of Parliament which was made for the public good of the whole nation".[56]

The Chief Justice mused on whether the act had divested the king of any of his prerogative, but finished an inconclusive judgment, which was adjourned for further (unreported) argument, by returning to the fifteenth

54. 8 Mod. 17; 88 E.R. 14.
55. 88 E.R. 14, n.(b).
56. 8 Mod. 18; 88 E.R. 15.

century concept of the subjects' "statutory interests" , wider than mere physical property, which the king could not impinge upon without parliamentary approval.[57] Pratt CJ concluded:

> "... it would be very hard if the King had power to lessen the tax imposed upon one man, and charge it upon another. Besides, the King cannot exempt in any case where the subject has an interest; as where particular persons are bound by prescription or tenure to repair bridges, the King cannot exempt them from repairing, because all the subjects have a common benefit to pass and repass over public bridges."58

In 1740 the Court of Common Pleas decided the case of Huggins v. Bambridge[59] in favour of the defendant reclaiming the £ 2,500 of an agreed £ 5,000 he had paid the plaintiff for the office of Warden of the Fleet Prison. The warden, John Huggins, was to surrender his office to the king and procure the subsequent grant of the wardenship to the would-be purchaser, Thomas Bambridge. This scheme was declared void under the act 5 & 6 Ed.VI c.16, the same statute which had ensnared Sir Arthur Ingram the previous century.[60]

57. See Case of Additions, discussed in ch.2, f.n.153.
58. 8 Mod. 19; 88 E.R. 15. It would be unfair to label Pratt CJ's analysis as primitive merely because he employed Gemeinschaft (Medieval/community) notions to grapple with this public law problem: private law was still awaiting the ministrations of Lord Mansfield. The idea of communal fairness on which the Chief Justice was relying has been used to good effect in a modern bureaucratic/administrative setting: see for example Chastain v. B. C. Hydro and Power Authority (1972) 32 D L R (3d) 443 at 454 (British Columbia Supreme Court) where McIntyre J (now of the Canadian Supreme Court) found, on the basis of the equality demanded of common carriers since the Year Books, that the government run power authority owed a duty of equal treatment to consumers.
59. Willes 241; 125 E.R. 1152.
60. See ch.6, f.nn.5 and 6.

That act made exception for offices held on estate of inheritance, and it was argued that, as the office in this case had reverted to the king, subsequent dealing in the wardenship fell within the exceptions to 5 & 6 Ed.VI c. 16, having passed through a "state of inheritance" in the king.

Willes CJ scotched this:

> "Now, according to this construction, the King, if the inheritance be in him, is a person mentioned in the exception. But that cannot be; because to be sure there is no forfeiture upon the Crown: for the King is not within any statute unless particularly named, nor can he forfeit any thing, nor can he be supposed to be guilty of any corruption or misbehaviour."61 (emphasis added)

The generalised exclusion formula (the king was not named) was applied to remove the king from the purview of the whole statute including exemptions. A similar result was achieved to that in Ingram by the quite different process of statutory interpretation, rather than discussion of prerogative powers as they impinged on subjects.

Sloane and Huggins, separated by only two decades, exemplify how the courts could cast about for rationale in this field, ranging from a jurisprudential desire for fairness in allocating community burdens, to simplistic statutory construction albeit with a desirable aim. Huggins is also noteworthy as a case in which a litigant was not able to take an immunity argued to exist in the Crown, admittedly for the simple reason that the "exemption" was not allowed to the Crown in this matter.

61. Willes 246; 125 E.R. 1155.

The last direct report on this subject in the period of this chapter is Lord Chancellor Hardwicke's acceptance in 1745 that the statutes of bankrupts do not bind the Crown, leaving the Crown free to pursue a debtor although he had complied with bankruptcy procedure.[62] The weight of precedent from bankruptcy cases such as R v. Pixley[63] must have cancelled Hardwicke's doubts expressed only the year before regarding the maxim that statutes did not bind the king unless he was expressly named[64], or perhaps there was an implicit acceptance that in the case of bankruptcy statutes there was a prerogative of Crown priority which could only be encroached upon by specific words.

Late in the period of this chapter Crown priority in debt and its relationship to 33 Hen.VIII c.39 s.74, already litigated in Andrew[65], was the subject of judicial thought ranging from the acute to woolly in Common Pleas and then King's Bench. Gould JCP, giving judgment for the whole court, without difficulty found s.74 in part declaratory of the "old prerogative law" and otherwise restrictive of it.[66] In Rorke v. Dayrell[67] Buller JKB was able to find the statute abridged the prerogative, so that the king lost his priority if another creditor of the king's debtor already had judgment. Compared with Buller J's precision of

62. Anon.1 Atk. 262; 26 E.R. 167.
63. (1725) Bunb. 202; 145 E.R. 647.
64. In Addlington v. Cann supra f.n.12.
65. See ch.6 f.n.59.
66. Uppom v. Sumner (1778) 2 Black.W. 1294; 96 E.R. 758 at 1295; 759.
67. (1791) 4 T.R. 402; 100 E.R. 1087 at 413; 1092.

thought, Lord Kenyon CJKB ploughed around in a swamp of verbiage[68] all apparently designed to make obeisance to the prerogative, even though Kenyon agreed with the rest of his court that the Crown lost priority in these circumstances. A century on from the Bill of Rights Ashhurst JKB saluted the heyday of Stuart claims by implying that parliament could only curb powers that had come to the king under statute, not the old "unwritten" prerogatives.[69]

The irony of eighteenth century exposition on the subject of statutes and the Crown is that it condensed relatively sophisticated rules regarding the preservation of the prerogative down to an oversimplified maxim of statutory interpretation (and quite discarded the aspect of wrong-rectifying statutes and the Crown), and then referred to this cobbled up maxim of interpretation as a "prerogative" when the concept of the prerogative in general was for the first time in legal analysis being viewed objectively as an aspect of public law, and not something foreign to legal techniques.

Levinz sjt for example argued, "The King's prerogative is part of the common law...".[70] Strange referred in 1726[71] to Capel's case in the reign of James II, saying, "...

68. At 410; 1091 et seq.
69. At 412; 1092.
70. Bishop of London and Dr Lancaster's case (1693) 3 Lev. 377 at 379; 83 E.R. 738 at 739.
71. R v. Mann (1726) 2 Strange 749 at 754; 93 E.R. 826 at 829. See also the final paragraph of Strange's argument that summed up his opponent's case as "an unprecedented attempt to stretch the prerogative of the Crown to the subversion of the liberty and property of the subject." (at 758; 831).

though everybody knows matters of prerogative went very high at the time". In R v. Bishop of London and Dr Birch[72] Shower argued with respect to ecclesiastical presentations:

> "And we are not here in the consideration of a prerogative incident to the Crown for the benefit of the Government; nor is it a prerogative which respects the continuance or improvement of the Treasury ..."

Shower's account of the argument in the Bishop of London's case in the House of Lords contained the claim, quoted above, that "All Prerogatives are founded upon some Reason of Benefit to the People, either in respect of the Government in general, or else of some particular Subjects".[73]

While memories of Stuart claims to autocracy watered a desire to understand and limit the prerogative, nothing grew from this kernel of concern on the subject of statutes and the Crown, for the soil of public law remained untilled and arid, bereft of comprehensive and broad analysis. Symptomatic of the sterility were four judgments[74] in two years at the end of the period reviewed in this chapter. They comprise the first discussion of "The Shield of the Crown", but in their muddle of views (tempered by the occasional sound view of "the Crown" and "the public interest" being coterminous for the purpose of rating) they reveal a paucity of coherent thought. The problem of just

72. (1694) 1 Show. KB 413 at 416; 89 E.R. 673 at 675.
73. (1694) Shower 164 at 167; 1 E.R. 112 at 113; quoted supra at f.n. 33.
74. Lord Amherst v. Lord Summers (1788) 2 T.R. 372; 100 E.R. 200, R v. Hurdis (1789) 3 T.R. 497; 100 E.R. 697, R v. Cook (1790) 3 T.R. 519; 100 E.R. 710, Eckersall v. Briggs (1790) 4 T.R. 6; 100 E.R. 864.

who or what comprises the Crown was to be an important adjunct to the issue of statutes and the Crown in the succeeding 200 years, but it also serves as an indicator of the level of insight into public law.

The remaining eighteenth century writing on the subject of statutes and the Crown is contained in the burgeoning work of compendium writers. Hawkins' Pleas of the Crown contained the throwaway line that the king was not bound by a statute which did not expressly name him.[75] The authorities cited do not bear out the proposition, but it is concomitant with the generalisation of the latter seventeenth century, first propounded by Jenkins[76] and developed by Samuel Eyre J.[77] The Abridgments of Viner[78] and Bacon[79] did not attempt to provide a coherent theory from the melange of case law. The contradictions of hundreds of years of reported law are strewn about without rhyme or reason; Viner cited Hawkins'assertion that the king is not bound by statutes which do not expressly name him[80], giving the incomplete generalisation further credence.

Only Blackstone attempted to extract with some flexibility theories from the cases. At first blush it seemed he also propounded the concept of a king unfettered

75. Vol. II, 1716-1721, p. 411, c.42, s.3.
76. Ch.5, f.n. 29.
77. Supra f.n. 31.
78. Vol. 19, 1744, p. 532 et seq., E. 10.
79. 3rd Ed., 1758, p. 198 et seq., para. 5.
80. Viner, Vol. 19, p. 532, E.10, note para. 2.

except by express words. In a chapter on the machinery of parliament, Blackstone wrote, "An act of parliament ... hath power to bind ... even the king himself, if particularly named therein", and followed that in a chapter on the king's prerogative with the following:

> "... the king is not bound by any act of parliament, unless he be named therein by special and particular words."

However, the succeeding sentences cited Magdalen College as authority for constraining the immunity, by reference to the rights of the Crown, and the policy of the legislation relative to public rights and the prevention of wrongs. Blackstone concluded by citing the Case of a Fine as authority that the king could take the benefit of any act, although he was not named in it.[81]

Fifoot's metaphor for Coke's influence on eighteenth century law, quoted in the epigraph to this chapter, is completely apposite in this area of public law. Only the shadow was left of Coke's subtlety and policital acumen in trying to develop an open class of statutes which might bind the Crown, and which might be added to in the effluxion of time. The bulk of eighteenth century judges and many counsel exhibited an organic attachment to the legal past, an attachment that is particularly obvious when viewed with hindsight over a number of centuries.

81. Commentaries Vol. I, 1765, pp. 178 and 253-254.

The Bill of Rights in 1689 had commenced the most momentous alteration in English public law to that date. It was a watershed, marking the crisis point at which the political nation would no longer stand for the interventionist use of the prerogative by the Stuart kings. In conformity with the spirit of 1689, the Act of Settlement in 1701 at last provided security of tenure for judges so that they could only be removed for misbehaviour or incapacity by parliament. The Stuart propensity for meddling in the administration of justice, to the point of removing judges, was at last curbed. But for all that this period was a watershed, it must be remembered that the spirit of the Glorious Revolution was that of compromise. William and Anne carried on at a personal level the Stuart devotion to the prerogative.

In 1708 Anne with-held the royal assent from the Scottish Militia Bill, in what was to be the last occasion of the sovereign's personal intervention in the legislative process. At the end of her reign she used her prerogative power to create twelve peers to ensure the passing of legislation for the Treaty of Utrecht. With the benefit of hindsight these actions are known to be the last spasms of prerogative intrusion into the creation of legislation, but this terminality was not so obvious in the closing days of the Stuarts and the early Hanoverian years.

Despite the depth of crisis in 1689, the effect of subsequent compromise rather than wholesale revolution was

to leave the prerogative and associated notions in relatively good health. Certainly, they were not sufficiently the objects of communal opprobrium to swing a conservative legal profession into actively limiting them. This partially explains why Kuhn's concept of crisis and consequent paradigm shift do not provide a template for the working of public law after 1689. Kuhn's use of political analogy, for example, presupposes wholesale shift, rather than the tepid change wrought in the English constitution.

> "Political revolutions aim to change political institutions in ways that those institutions themselves prohibited. Their success therefore necessitates the partial relinquishment of one set of institutions in favor of another...
>
> "Like the choice between competing political institutions, that between competing paradigms proves to be a choice between incompatible modes of community life."82

Shower, assisted by Strange and Levinz, argued as counsel for a rational and sceptical view of the prerogative in the wake of the pre-Williamite Stuart years[83]; Lord Chancellor Hardwicke expressed doubts on the bench about Crown immunity.[84] But the remainder of the legal profession was unswayed by the potential weather change effected in constitutional law by the Bill of Rights. Within half a decade of its coming into force, a king's serjeant was arguing the prerogative's place as the darling of the law,

82. Kuhn Scientific Revolutions pp. 93, 94.
83. See f.nn. 70-73 supra in particular. Note Shower supra f.n.26 taking analysis to a pitch where the concept of what would later be "necessary intendment" could serve as a rational tool for curbing royal immunity.
84. See f.n. 12 supra.

while the bench for the first time raised the canon of construction effecting royal immunity to the status of a prerogative.[85] Baines went so far in argument as to completely forget the Bill of Rights.[86]

Four quotations from Kuhn, in which references to science and scientists may serve as a metaphor for lawyers and their work, illustrate the psychological and social process at work here:

> "No part of the aim of normal science is to call forth new sorts of phenomena; indeed those that will not fit the box are often not seen at all."
>
> "As in manufacture so in science - retooling is an extravagance to be reserved for the occasion that demands it. The significance of crises is the indication they provide that an occasion for retooling has arrived."
>
> "As in political revolutions, so in paradigm, choice - there is no standard higher than the assent of the relevant community."
>
> "... the unparalleled insulation of mature scientific communities from the demands of the laity and of everyday life.
> ... there are no other professional communities in which individual creative work is so exclusively addressed to and evaluated by other members of the profession."87

The evidence seems to indicate that in the half century after the crisis that forced James II's abdication, the legal profession, the "relevant community" for determining legal issues, was unmoved by the crisis felt in the political community. This is something of a measure of the insularity of the legal profession. The steam having been taken out of the crisis by the signing of the Bill of

85. See f.nn. 28 and 31 supra.
86. See f.n. 53 supra.
87. Kuhn Scientific Revolutions pp. 24, 76, 94 and 164.

Rights, the legal profession, by and large, saw no necessity for retooling its approach to the prerogative and royal immunities. The ramifications of a Crown with newly limited capacity made no impact on the lawyers.

The analogy with science also raises the point that reported case law on this subject is only available for some fifty years after the Bill of Rights, effectively coming to a stop with Parker CB's simplifying "codification" in Allgood in 1743, and starting again fifty years later in the different commercial and administrative atmosphere at the end of the century. "Experiments" in the law cannot be performed at will. Litigation of a particular topic is in large measure adventitious, and requires above all litigants with a cause they are willing to pursue. That degree of willingness will often depend on the attitude of the legal profession toward a matter: areas of law wax and wane in popularity as a ground for litigation, as evidenced by fasciculi of cases on certain topics[88]: the absence of case law is, of course, more difficult to notice. To that extent, it may not be mere happenstance that Lord Mansfield left no reported decisions on this subject.

Eighteenth century rationalism in the hands of the lawyers may have boiled away some of the uncertainties about

88. For example, five cases may be found in the All England Reports around 1938 dealing with the esoteric problem of the presumption of a yearly term in a contract of employment: see S. C. Churches "The Presumption of a Yearly Term".

the presumption, while driving away potential litigants, but in the process it diverted public law from the direction of constitutional development. The legal community had isolated itself as a discrete unit, separate and unaccountable to the remainder of the political community.

An Historical Survey of the Presumption in the Common Law that General Statutes do not bind the Crown

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Volume 2

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CHAPTER EIGHT

FROM 1790 TO 1986 IN ENGLAND

"Touch upon the King before a Lawyer and you may be sure of rhetoric at any time, if not of sense."

Bentham's Comments on the Commentaries, 1774-1776 (ed.) C.W. Everett 1928, p.132.

Eighteenth century reported case law on this subject had evidenced the move to commercial concerns and the use of procedural ploys in disputes over property. England was just starting to digest the effects of the Industrial Revolution, the protracted war with France, enormous growth in trade, and consequent on these factors, a progressively larger role for the State, as the first relevant case reports on the nineteenth century were being published. Legislation was growing in volume, more interventionist in its impact and universal in its effect : in short Benthamite utilitarianism was coming of age. The process was a gradual one, but was well underway in the half century before 1900. Dicey suggested that the period 1865 to 1900 was one of "collectivism"[1] and a perusal of indices to statute books of Victoria's reign will illustrate the twentieth century's communal legislative concerns as the child, albeit grown to adulthood, of the immediately preceding era.

Rarely in the period under review in this chapter would contests be, as they so often had been in the past, between Crown and subject for a right to property, whether corporeal or

1. A.V. Dicey Law and Public Opinion in England in the Nineteenth Century 1905, p.64.

incorporeal. The focus of attention would now be, as had so evidently started to be the case in the eighteenth century, the problem of priority between Crown and subject in bankruptcies and liquidations; whether statutes affecting the procedure in litigation bound the Crown; and of progressive concern into the final decades of the twentieth century, whether the Crown would have to comply with general statutes for social ordering e.g. Health, Fair Trading, Rent, Housing or Town Planning Acts.

Coupled with this change in the emphasis of legislation being reviewed for its possible reach, was the burgeoning quality of the Crown itself: the functionaries administering the legislation of the new social orderliness argued that, as they were the limbs of government, they should have the immunities inherent in the Crown. Not only were the guardians and officials of the new order frequently able to win their exemption from regulatory control while in performance of or associated with governmental functions, but a major issue for the courts would be the claims by third parties to partake of Crown immunities, by virtue of various relationships with the Crown, "public" activities, or "prejudices" that might injure the Crown.

Of the first seven reported cases on the subject in the nineteenth century, three concerned the issue of priority under 33 Hen.VIII c.39 s.74, the subject of litigation before both Common Pleas and King's Bench in the final

quarter of the preceding century.[2] In 1807 and 1818 the barons in Exchequer set off on an interpretation of this Tudor reshaping of the prerogative, with a view to enforcing the Crown's priority irrespective of the wording of the statute.[3] Mcdonald CB's determination to favour the prerogative is particularly marked in Wells[4], and his successors in Exchequer in 1818 were anxious to find themselves bound by this precedent, and distinguish the decisions of King's Bench and Common Pleas to the contrary as being the product of courts not so well acquainted with the prerogative in this area, as was the Court of Exchequer.

Between these two decisions, in 1812 King's Bench[5] side-stepped the issue by noting the plaint should have been brought in one of the other courts at Westminster, but counsel for the defendant, arguing in the Crown interest, asserted that the section worked as a restraining clause. The rule was argued that the prerogative of the Crown was not taken away except by clear and unambiguous words, and in accordance with this rule the statute had worked a restraint. However, counsel refused to accept a literal interpretation of the section, as having priority to property by virtue of first judgment against a debtor did not necessarily give precedence between subject and

2. See ch.7 f.nn. 66 and 67. The section is set out at ch.6 f.n. 61. Curiously the best judicial analysis and explanation of the section had to wait until 1915 in Scotland: Lord Commissioners of the Admiralty v. Dunlop (Blair's Trustee) 1916 SC 247 per Lord Johnston at 259.
3. R v. Wells and Allnutt (1807) 16 East 278; 104 E.R. 1094 R v. Sloper and Allen (1818) 6 Price 114; 146 E.R. 758.
4. At 281-282; 1096.
5. Thurston v. Mills (1812) 16 East 254, 104 E.R. 1085.

subject: execution on the judgment affected rights between creditors, and the clear inference was that the king should not be in a worse position than a subject, irrespective of the clear and literal words of the statute.

The trend of litigation from this point tended to concern with regulatory legislation in the utilitarian mould. While it was intended to improve conditions for the populace as a whole, it did not necessarily involve the righting of a "wrong" permitted at common law: such statutes merely reflected the legislature's estimation that the community would be better ordered by the changes commanded in the legislation. The problem of the relationship of regulatory, rather than remedial, legislation to the Crown had been raised as early as the fifteenth century[6], and inspired a realisation in at least one quarter of Elizabethan government, habituated to arguing the sovereign's immunity from general statutes, that it was necessary that some legislation affect Crown property, by express words if necessary, in order that the legislation be properly effective.[7]

The first modern case dealing with such a law was decided in the Exchequer in 1818, but was preceded in 1813 by a juridical comedy in the Admiralty court under the title The Swift.[8] The Navigation Act of 1663 (15 Car.II c.7) was designed to foster English trade and English maritime enterprise by stipulating that all cargoes to British

6. See ch. 2 f.n. 231.
7. See ch. 3 f.n. 142.
8. (1813) 1 Dods 320, 165 E.R. 1325.

colonies had to come direct from British ports. In the event of breach, the entire cargo and vessel were to be confiscated, one third to "His Majesty", and one third to the Governor of the colony where the incident occurred, one third to an informer, in the event of detection by that means.

In 1810 the Swift arrived in Honduras from Britain with a load of government stores, some perishable, for the garrison. There being a surplus for the needs of the troops, the assistant commissary in Honduras chartered the Swift to take the excess perishables to the garrison in Jamaica. When she arrived in Kingston, a customs official seized her as being in contravention of the Navigation Act. The Vice-Admiralty court in Jamaica condemned the ship and cargo. An appeal was mounted by the ship owner, and a government official in Kingston appealed in respect of the cargo, claiming it was the property of His Majesty. If the appeal were disallowed, the Crown, in the dual role of His Majesty and the Governor of Jamaica, stood to keep two thirds of the value of the cargo, with one third going to the informing officer.

With various Crown interests in competition, the matter was argued for the informing seizor by Swabey and Lushington, on the basis that the Navigation laws "were as binding upon the King as upon any of this subjects."[9] On the basis of Addlington, Lady Portington, Ecclesiastical Persons, Blackstone's Commentaries and

9. At 322; 1326.

Bacon's Abridgement it was submitted that all acts, made for the public good, include and bind the king even though he is not particularly named in them. Counsel must have sensed the pending counter argument of governmental necessity, for remarkably, 124 years after the Bill of Rights, they asserted "That the King can only dispense with statutes which regard his own personal benefit, and not those which relate to the public weal..."

The opposing advocates submitted that the king was not bound by a statute lacking express words, which would take away a prerogative or right of the Crown. This was at least the limited form of the presumption still found in Bacon and Blackstone[10], and cited here by Crown counsel.[11] The Navigation Act was passed "for the encouragement of trade" which was for the general good, but it did not bind the king "because the law will not presume the King to be engaged in trade."[12] This pious, and irrelevant, deference to a sovereign, the nominal head of a government administering land in all quarters of the globe, was exceeded in the presentation of the next point in argument.

For all the attacks by Bentham, Blackstone had been sufficient child of eighteenth century rationalism to refer to the king as the "executive power", but in 1813 the reasonable point that a statute prescribing forfeiture to the Crown should not bind the king was argued on the ground that inclusion would be "indecorous, and would trench upon

10. See ch. 7 f.nn. 79 and 81.
11. 1 Dods 327-8; 165 E.R. 1329-30.
12. At 331; 1331.

the respect due to the person and dignity of the King."[13] Only secondly was it submitted that "it would frequently lead to this absurdity, that the King must forfeit to himself" (ignoring the one third of the confiscation to the informer). The decision regarding brandy for personal use of Queen Anne, Bruse v Harcourt[14], was raised, though in reply Swabey and Lushington noted the case referred only to private property of the sovereign and "could be of no importance in a national point of view."[15] Regarding the purpose of the Navigation Act and the effect of transporting government stores without adhering to the act's restrictions, Crown counsel argued "that it would be indecorous to suppose the King would do anything which might be injurious to the public welfare."[16] Swabey and Lushington noted that the impeccability of the king was personal, and not capable of being passed to his agents.

The court commenced judgment by observing that the authorities on this subject were imprecise.[17] The description of legislation as pro bono publico or for the prevention of fraud was seen as too wide: in a post-Benthamite world which statutes would not fit this description? The case was not a suitable vehicle on its facts for persuading the court to confront the possibility that in the new world of legislation classified as utilitarian, the Crown ought to be bound by most statutes.

13. At 332; 1331.
14. See ch. 7 f.n.47.
15. 1 Dods 333; 165 E.R. 1331.
16. At 332; 1331.
17. At 339, 1334.

With a guess hazarded to the future " ... if the King traded, as some sovereigns do, he might fall within the operation of these statutes," the court fell back on the prerogative, but did not use the established rubric for pleading royal immunity from statutes.

The prerogative was here classified as a "public service" - distributing supplies for the maintenance of the public defence. The court opined that "public policy and convenience" inclined to support this prerogative[18], noting that while they "will neither constitute nor overthrow the law, they are good interpreters of that which is doubtful."[19] The court was careful to note that it would be vigilant to stop third parties fraudulently sheltering behind the royal immunity, and the judgment closed on the note that it was to "the advantage of the public that the cargo should be imported."[20]

Some months before its enforcing of the prerogative of priority in the face of the terms of 33 Hen.VIII c.39 s.74 in 1818[21], the Exchequer Court was able to prove itself consistent in its self appointed role of guardian of the royal legal position, which had grown out of its long standing care for the royal financial position. The act 56 Geo.III c.50 had been passed in 1815 "that the regulation of legal process should be so regulated as to be consistent with good husbandry ..." The act worked in favour of rural landlords by forbidding sheriffs to sell farm produce under

18. At 343; 1335
19. At 344; 1336
20. At 345; 1336
21. R v. Sloper and Allen supra f.n. 3.

a writ of execution where an agreement existed between the debtor-tenant and the landlord to the effect that farm produce should be used to pay the landlord.

The facts in R(in aid of Osborne) v. Osbourne[22] are unfortunately very obscure, but the Crown seems to have appeared to assist a creditor, Osborne, in his attempts to make the sheriff, Osbourne, sell produce in defiance of the words of the statute. Alternatively, the Crown appeared with the sheriff, Osbourne, in the action against Osborne, the debtor-tenant, or the landlord, separate creditors with the Crown being a creditor. This second scenario does not sit easily with the tone of the proceedings, which are to the effect that as the creditor had the produce seized under "prerogative process", the process itself should, as part of the prerogative, be exempt from the general words of the statute.

Winter argued for the sheriff's right to sell the seized goods subject to the statutory condition in favour of the landlord. He noted the competing presumptions that the Crown should not be ousted of a prerogative without express words in a statute (citing Ecclesiastical Persons) and that statutes suppressing wrongs bound the Crown (citing Magdalen College). This was an act for the public good, to the advantage not merely of landlords, but for the general encouragement of agriculture.[23] Dauncey replied for the Crown and "relied on the prerogative of the Crown ... which ... could not be abridged by the operation of statutes,

22. (1818) 6 Price 94; 146 E.R. 752.
23. At 96; 752.

intended to suppress private wrongs working injury between subject and subject."[24] He contended that the Statute of Frauds, and acts concerning bankrupts were just as much intended to rectify wrongs, but in the light of eighteenth century authority they did not bind the Crown.

Richards CB found that as neither the Crown nor Crown process was alluded to, the act did not bind the Crown or affect the prerogative process. If the facts refer to the Crown as creditor, using a prerogative process unique to itself for debt recovery, this judgment is digestible as being at least within authority. If, on the other hand, the facts consist of a general creditor attempting to take precedence over the landlord in defiance of the statute, by pleading that the process of recovery involved the use of the royal machinery of judicial administration, "prerogative process", (and this is the tenor of the report) the judgment becomes an outrageous obfuscation of the whole intention of the statute. The likeliest basis for the claim of prerogative lay not in priority or any other true prerogative, but the misapprehension that the status quo ante a statute regarding procedure shared by subject and sovereign was a "right" in the sovereign capable only of being altered or removed by express words.

It is noteworthy that the eighteenth century courts had been fond of condensing the problem of statutes and the Crown down to a general simple rule, "no binding effect without express words". This desire for simple "codification" became an ever stronger thread in nineteenth

24. At 97; 753.

and twentieth century judging, but at the time of Osbourne the rubric applied by the courts did not even contain the standard saw of statutory interpretation adding "necessary implication" as an alternative to "express words". This wider concept, which could have forced the Exchequer to see the folly of its decision, was first employed in judgment by Story J of the United States Supreme Court while on Federal circuit in 1821.[25]

Having thus criticised the Exchequer court for over-zealous care of Crown interests, it is only fair to note that contemporaneously with Osbourne it twice turned its back with some vehemence on attempts by counsel to extend Crown immunity from the operation of statutes to third parties. In R v. Ridge[26] the Crown came into possession of a bill of exchange which had been discounted by the drawer to a banker for more than the rate of interest permitted by the statute 12 Anne c.16 (1713) against usury. To the claim that later Crown possession laundered the taint of illegality from the discounting by the banker, Garrow B said:

> "... it would be most unfortunate if that were so; for then the grossest usurer would have nothing to do but get his bills seized under an extent, and then all his illegal transactions would be rendered available in the hands of the Crown. That is too monstrous a proposition for serious consideration ..."27

25. US v. Hoar (1821) 2 Mason 311.
26. (1817) 4 Price 50; 146 E.R. 390.
27. At 57; 393.

In R v. Morrall[28] the defendant's creditor was in debt to the Crown. The debt between Morrall and his creditor was out of time under the Statute of Limitations (1624), but an attempt was made to get around this by claiming that the Crown was adversely affected if it could not claim through its debtor to the ultimate debtor, Morrall. Richards CB agreed that between the Crown and its immediate debtor the Statute of Limitations had no application, but he went on to say that the Crown is only entitled to its debtor's rights "and cannot create or revive any right in the person of its debtor, if none ever existed, or it has become extinct."

> "If the Crown could thus put its debtor in a better situation than he was in before, by such a process as this, the consequences would be monstrous ... and the mischief ... incalculable."[29]

Garrow B added:

> "Disposed, to the fullest extent, to protect the rights of the Crown, charged as it is with important trusts for the benefit of the community, of which it is the representative, I think that duty best performed by not carrying its claims beyond the line prescribed by justice."

The judgment was concluded with epithets of "inconvenient", "unjust" and "too gross an absurdity"[30] : a line had been drawn against the claims of third parties to swing on the Crown's coat-tails, a line which would be progressively blurred over the succeeding 170 years.

Between this period and 1842 a number of reported cases appear on the subject of statutes and the Crown, which mirror

28. (1818) 6 Price 23; 146 E.R. 730.
29. At 28; 731.
30. At 30; 732.

the texts and digests produced in the same period in moving to progressively simpler statements of Crown immunity. In some cases decision is given without reference to any authorities, but just on the assumption of the Crown's privileged position, despite argument at some length by counsel.[31] Lambert, in which it was decided that the Statute of Limitations (21 Jac.I c.16 s.3, 1624) did not necessitate the Crown endorsing a note evidencing debt within the general statutory time limit for the note to remain valid, is of interest for two points raised by Tindal arguendo.[32]

Firstly, he relied on Willion v. Berkley for the proposition that the king is not restrained of a liberty or right which he formerly had, by the general words of a statute.[33] Secondly, referring to a transfer of the note by the Crown to a third party, Tindal argued that time had ceased to run altogether in terms of the requirement of endorsement on the note: "The grantee of the Crown must have the same privilege, otherwise the King's grant would be rendered inoperative." This can in fact be understood in terms of the time requirement being frozen only while the note was in the hands of the Crown, and recommencing when back in the hands of a subject, but the general wording

31. Lambert v. Taylor (1825) 4 B & C 138; 107 E.R. 1010, Smithett v. Blythe (1830) 1 B & D 509; 109 E.R. 876, this latter being a rating case.
32. 4 B & C 144, 107 E.R. 1013.
33. The reference is to 1 Plo. 240, where unsuccessful counsel are arguing: see ch. 3 f.n. 29.

opened up a topic of serious concern in the modern era: the extent of Crown immunity when subjects stood to take advantage as third parties to transactions.

The revival of interest in Willion v. Berkley is notable, particularly this reference to losing counsel. Some eighteenth century abridgement compilers had referred to Brooke's Abridgement, but Brooke had died four years before Willion[34], and Coke's Reports tended to crush with sheer volume the few reports that preceded, if they were not noted in Brooke. Willion was almost unreferred to in eighteenth century case law, and only Comyns' and Bacon's compilations relied on losing counsel at page 240 of Plowden for the general proposition concerning the king's immunity. Their 5th and 7th editions respectively of 1822 and 1832 repeated this misleading reference.[35]

Chitty's Prerogatives of the Crown of 1820 regurgitated the mass of case law thrown down in eighteenth century digests, but at least tried to extract general principles.[36] The king was not to be bound by general statutes, but there was an "important exception", that the king was bound by statutes for the public good, and those intended to prevent wrongs. Developing this theme, Chitty noted that where an act gave a new estate or right to the king, "it shall bind him as to the manner of enjoying and using the right, as well as a subject." He then returned to royal immunity,

34. See ch. 3 f.n. 65.
35. Comyns' Digest 1822 5th ed., vol. 5 p. 317, Bacon's Abridgement 1832, 7th ed., p. 463 ("Plow" misprinted as "Blow")
36. Chitty Prerogatives pp. 382-3.

which was preserved in the case of prerogatives, interests or remedies of the Crown in the absence of express words. Lord Chancellor Hardwicke's doubts as to the non-application of the Statute of Frauds to the king were referred to while observing that the prerogative barrier accounted for statutes of limitation, bankruptcy, insolvency, set-off and Frauds not extending to the king.

Chitty had made no great progress on the compilers of the previous century, but two tests emerged in the period immediately succeeding Chitty's which did try to address the uncertainties caused by competing presumptions progressively taking on the guise of maxims. Successful codification requires the dispassionate viewing of competing concepts removed from litigation over particular facts, but nineteenth century judicial certitude seemed to be setting the presumptions fast in their muddle. Dwarris, writing in 1830, offered a hope that a commentator might help steer a course out of the logjam.

In his text, a trail blazer on statutes[37], Dwarris cited the general rule and its exceptions, noting that they "certainly open the door to great latitude of construction, and leave the rights of the crown very unsettled in such matters." He then summed up:

> "The sensible conclusion seems to be, that in such cases he may be precluded of such inferior claims as might belong indifferently to the King or to a subject ... but not stripped of any part of his ancient prerogative, nor of those rights which are incommunicable, and are appropriated to him as essential to his regal capacity."

37. F.W.L. Dwarris General Treatise on Statutes: Their Rules of Construction 1830, vol. II pp. 668-670.

Dwarris had confronted and refuted the extravagent claims for the ambit of the "pseudo-prerogative" in Osbourne in 1818 and earlier cases, and rounded off this thoughtful exercise with the first modern English reference to "necessary implication" : if a statute dealt with a power solely in the king, then the statute would be meaningless unless the king were bound. Dwarris implied the connection between the king not being bound and the concept of dispensing with the statute, which was forbidden.

Wooddesson, an Oxford Professor whose Vinerian Lectures on the Laws of England were published in the United States in 1842, merely cited[38] the general precepts (including losing counsel in Willion) and plagiarised the material from Dwarris concerning secure royal rights being only those incommunicable and unique to the Crown.[39] However, Wooddesson placed the relationship of Crown and statutes in a broader constitutional context, noting that the issue of whether an act would bind the king "may be a reason of withholding of his assent." The last such refusal had occurred in 1708[40], but such speculation sharpens appreciation of the "political" and constitutional impact of the legal presumption.

In 1834 the Exchequer Chamber found that the statute of

38. R. Wooddesson Lectures on the Laws of England 1842, vol. I pp. 84-85.
39. An obscure footnote in Dwarris Statutes p. 669 may indicate that Dwarris took this material from an earlier work by Wooddesson.
40. See text in ch. 7 after f.n. 81.

1830 (11 Geo.IV and 1 Will.IV c.70 s.8) which gave jurisdiction to the Chamber in respect of "writs of error upon any judgment" must include criminal matters on indictment, so binding the king as the prosecutor to suffer appeals to Exchequer Chamber.[41] Argument for the king being within the statute was comprehensive and thorough. Crompton did not notice that it was unsuccessful counsel in Willion that had been cited in Comyns' Digest as authority that the king should not be restrained of liberty or right, but he added, "The authorities which support this position are mostly taken from times in which the prerogative was highly favoured."[42] Tindal CJ, for the whole court, said:

> "In the case, therefore, of an Act of Parliament passed expressly for the further advancement of justice, and in its particular enactment using terms so comprehensive as to include all cases brought up by writ of error, we think there is neither authority nor principle for implying the exception of criminal cases, upon the ground that the King, as the public prosecutor, is not expressly mentioned in the Act."[43]

The court in its decision relied on no authorities, but used basic principles to cut through the confusion of precedents to arrive at a position similar to that in the Case of Additions nearly four hundred years earlier, a decision referred to but not relied on by Crompton arguendo.

Wooddesson, published in 1842, had been in the rear of a string of commentators relying on losing counsel in Willion, but in the same year the vastly more

41. R v. Wright (1834) 1 Ad. & E 434; 110 E.R. 1273.
42. At 437; 1275.
43. At 447, 1278.

influential decision in AG v. Donaldson (No. 2)[44] was decided in Exchequer based in the same source. Donaldson was one of the commissioners of sewers who attempted to levy rates on Kensington Palace (for the purpose of argument, royal property) and in so doing committed an act which would constitute a trespass unless he could come under the umbrella of 23 Hen.VIII c.5 s.11 (1531) which protected persons collecting taxes under authority of commissions of sewers from being sued in trespass. When the Attorney General first laid an information for intrusion, Donaldson and his colleagues sought leave to plead more than one matter, as allowed under 4 Anne c.16 s.4. But Parke B followed AG v. Allgood[45] to the effect that as the Crown had laid this information, its position should not be diminished by allowing the defendants a procedural right created under statute, greater than that allowed at common law where only one matter could be pleaded.[46] The newly developed concept of preserved royal rights being only those not shared with subjects was not submitted or referred to.

The main action came on in 1842 before Alderson B. Dundas for the commissioners argued from Willion and Ecclesiastical Persons that acts for the public good bound the Crown, but to no avail. Alderson B merely cited Willion without a page reference to the effect that

44. (1842) 10 M & W 117, 117; 152 E.R. 406.
45. See ch. 7 f.n. 40.
46. AG v. Donaldson (No. 1) (1841) 7 M & W 422; 151 E.R. 830.

it was "a well established rule, generally speaking" that the king was not included in a statute, for the law was made by the Crown with the assent of Lords and Commons, and the law was made for subjects and not for the Crown.[47] As previously noted[48], the baron was relying on losing counsel in Willion, and presumably relying on abridgements rather than reading of the text, he had distorted the actual reasoning employed by counsel. Certainly he was unaware of how irrelevant that reasoning was in a constitution in which the sovereign could no longer refuse to assent to a bill when so advised by her ministers.

Alderson B blithely found the defendants incapable of taking the protection of a Henrician regulatory statute because the Crown was the other party. Donaldson revealed the folly of nineteenth century formalism in full, Gesellschaft, flower. A branch of government, the commissioners of sewers, was locked in litigation with the Crown, nominal owner of Kensington Palace. Despite the specialised facts of a rating case, raising the issue of whether a branch of government could or should levy an impost on another section of government, irrespective of the prerogative, Donaldson gave Alderson B a platform from which he preached a gospel of the greatest simplicity as to why no general statutes bound the Crown.

The baron completely ignored the new right invested in

47. AG v. Donaldson (No. 2) 10 M & W 123-4; 152 E.R. 408-9.
48. See ch. 3 f.nn. 29 and 53.

commissioners if acting in accordance with statutory power, and treated the pre-1531 position as if that status quo were itself a prerogative. This was in accord with eighteenth century imprecision on this subject, in particular Allgood[49], which Alderson B referred to. He concluded with a reference to another eighteenth century case, Tuchin[50], which he cited as authority that the king was not comprehended within the term "party" in any statute adjusting procedure. The baron was unwittingly adopting not merely vanquished counsel in Willion, but Hobart AG's unsuccessful argument in Magdalen College that the king should not be shuffled in with the common people by such words as "all persons."[51] The decision in Donaldson, together with its sparse reasoning, was probably more cited than any other in the century leading up to Bombay[52] in 1946.

The second half of the nineteenth century produced a wealth of reported litigation on the subject. The period shows an almost complete retreat by the bench in the face of Crown claims, and an acceptance of the general proposition that the Crown was not bound unless named in the legislation. Some of the cases can be explained in terms of notorious Crown prerogatives such as nullum tempus being preserved, even though the judgments were not so reasoned.

49. Ch. 7 f.n. 40.
50. Ch. 7 f.n. 37.
51. Ch. 5 f.n. 51.
52. Province of Bombay v. Municipal Corporation of Bombay [1947] AC 58.

Similarly, the rating and taxing decisions exempting the Crown are largely in accord with common sense, but the generalised reasoning used in these judgments affected the vision of judges dealing with more sophisticated problems, particularly those involving regulatory statutes, or statutes affecting the status quo as it applied to Crown and subjects equally. By the turn of the century the simplified proposition, shorn of any of Coke's references to the prerogative or wrong-rectifying as balancing mechanisms, had been entrenched as a maxim. Fleshed out by a reference to "necessary intention" as a potential means for binding the Crown, the rubric was no longer merely a presumption of statutory interpretation but now, on occasion, was referred to as constituting a prerogative in its own right. The cases decided between 1848 and 1893 set the tone for the progressively hidebound approach of the succeeding century.

The Second Half of the Nineteenth Century

In 1848 the judges in Exchequer Chamber gave a decision in Baron de Bode v. The Queen which stood out against what was to become the prevailing tide. It was in fact the penultimate English decision[53] to determine that rights shared by Crown and subjects could be equally impinged upon by a generally worded statute. The problem was essentially the same as that in Wright[54] : whether procedure statutorily

53. (1848) 13 QB 364; 116 E.R. 1302. Moresby in 1919 (f.n. 181 infra) is the last example.
54. Supra f.n. 41.

prescribed for determination of litigious matters had to be adhered to where the Crown was a party. The Baron de Bode was pursuing, by a Petition of Right (the only procedure available against the Crown) money which he claimed the government owed him. This money was portion of that raised by commissioners, appointed under an act of 1818, from the French government to liquidate claims of British subjects arisen during the Napoleonic Wars.

With regard to the matter going to the Exchequer Chamber for determination, the Attorney General Sir John Jervis argued before the Chamber on the jurisdictional point, allowing that the Crown was bound by de Donis and the Statute of Westminster II c.5, "But the Crown has never been held to be included in the statutes for regulating legal proceedings ..."[55] He based this assertion on Coke's admission that the provision of Magna Carta fixing Common Pleas to a certain place did not bind the Crown, and neither did the Statutes of Sewers, Frauds, Amendments or Bankrupts.

This was an indigestible mish-mash rather than a coherent chain of authority, and Wilde CJ for the Chamber had no trouble disposing of the Attorney General's argument. The Chief Justice said that if the Crown had a special prerogative, then general words in a statute would not take it away, "But this is not such a prerogative; and, in cases of writs of error, the Crown and the subjects are, as to the Court to which they are to be brought by the common law,

55. At 375; 1306.

on the same footing."[56]

The decision in Re Cuckfield Burial Board[57] remained in conformity with this approach limiting royal immunity. Section 7 of the Land Clauses Consolidation Act, 1845 enabled a tenant in tail to sell or convey for public purpose, entailed land which but for the act would have been untransmittable by the tenant in tail. The land in question was desired by the Cuckfield Burial Board for a cemetery, but it had been settled on the ancestor of the tenant in tail by a private act of 1555 which specified that the entail was not to be barred, and which contained an ultimate reservation to the Crown upon failure of male issue.[58]

56. At 378-9; 1307-8. Now that Willion v. Berkley was no longer cited, having been consumed by the erroneous assertion in Donaldson, and the Case of Additions was to be heard of no more after Wright, it is worth noting in regard to Baron de Bode, the last British decision to find a general act altering the procedure of the administration of justice to bind the Crown, that counsel for the victorious defendant in Willion had made a clarion call in addressing the Case of Additions, noting that it was argued in that case "that an indictment is the King's suit, and that the King is not bound by the statute to give an addition, but it is at the King's election ... but it is there held that the King is bound by the statute ... for of this law every man shall take advantage." Counsel vested every man's right in the law in the strongest legal terminology available : it belonged to everyman, and so the King could not defeat it without parliament. (1 Plo.236; 75 E.R. 360). Measured against that rhetoric, the modern saga of the presumption is a tale of loss of fundamental principles.

57. (1854) 19 Beav. 153; 52 E.R. 307.

58. The act was couched in vigorous terms, proclaiming "that no feoffment, discontinuance, fine or recovery ... or any other Act or Acts, thereafter to be made ... of the said premises ... should bind or conclude in right, or put from entry, the said Queen Mary, her heirs or successors ..."

Romilly MR found that the general act of 1845 overrode the private act, to the extent that the tenant in tail could bar his heirs in tail by conveying the land. This applied "to all remaindermen except the Crown, which cannot be bound by any Act without being named." In consequence the tenant in tail had to seek Crown consent before he could convey the land to the Burial Board. The Crown had a clear interest in the land, an interest created by the private act, and the Master of the Rolls' decision falls within the narrowest circumscription of the royal immunity from general statutes: an interest or estate peculiar to the Crown and not shared by subjects was not affected by general statutory provisions.[59] But the judgment was not reasoned that way, and the throwaway line quoted above was merely the first of such simplifications in the following forty years, simplifications which could rarely fall back on the justification of Cuckfield.

Between 1857 and 1859 Lord Campbell CJ led Queen's Bench in three decisions which were technically strict, but which showed, at least in the first, some sympathy for the deleterious effect of the Crown's immunity on the rest of the community. R v. Beadle[60] involved a victorious, twice prosecuted defendant, unsuccessfully seeking costs against the Crown, because the information was laid by an excise officer, Beadle, rather than the Crown itself. The statute

59. Ignoring the larger constitutional point of the incapacity of the British parliament to bind itself as the Marian act had attempted.
60. (1857) 7 E & B 492; 119 E.R. 1329.

of 1849 providing for costs referred to "parties", and Creasy argued that this should embrace the Crown as "the object of the enactment is the furtherance of justice": he cited Baron de Bode. Lord Campbell noted that an act of 1855 provided for costs to be paid only in the event of suit by the Attorney General, or Lord Advocate in Scotland. This suit had been at the hands of an excise officer, and the Crown in such a position was not bound by the statute, although Lord Campbell referred to the need for reform in this matter to obtain justice.

In Moore v. Smith[61] the court seemed to do a volte face, finding that the Crown could receive, but impliedly might also have to pay costs, under a statute of 1857. The distinction was drawn with Beadle that here the act referred to "any information or complaint", which was sufficient to stretch "all parties" to include the Crown. The decision is short on reasoning and on the facts is authority only for the Crown taking advantage of statutes.

In the same year Queen's Bench extended the immunity of the Crown to one of the Queen's coachmen, so that he did not have to pay a toll as prescribed in statute for general road users.[62] The bulk of the case turned on who might take Crown immunity, but that immunity was assumed throughout to rest on the prerogative, which had always exempted the sovereign from tolls. The prerogative, the protection of which was the original rationale for Crown immunity from

61. (1859) 1 El & El 597; 120 E.R. 1034.
62. Westover v. Perkins (1859) 2 El & El 57; 121 E.R. 22.

statutes, (and reasoned as such for the last time by Exchequer Chamber in Baron de Bode) may be seen in Westover as something quite removed by the mid-nineteenth century from the broader problem of when statutes in general bound the Crown. By inference, this latter issue was no longer perceived in the light of the prerogative, although when the prerogative was raised, as in Westover, on the unspoken assumption of the ancient principles, a general statute did not curb the existing exclusive royal right.

In 1864-1865 the Exchequer Chamber, followed by the House of Lords, gave judgment in Mersey Docks and Harbour Board Trustees v. Cameron[63], the ratio of which concerned finding that the Trustees could not take the shield of the Crown.[64] The judgment of Blackburn J, the locus classicus of both benches, stated boldly with regard to the Elizabethan rating act under discussion (the act of 1601 raising money by local communities for the indigent):

> "The Crown, not being named in the Statute of Elizabeth, is not bound by it: and consequently the overseers cannot impose a rate on the Sovereign in respect of lands occupied by Her Majesty, nor on those occupied by her servants for Her Majesty."65

The overseers referred to were the duly authorised officials of the local municipality whose function was to rate occupiers. Here was a foretaste of a problem that

63. (1864-5) 11 HLC 443; 11 E.R. 1405.
64. Lord Cranworth's usage of this expression (at 508; 1430) is the first that this writer has come across.
65. At 463; 1413.

would grow in size: the relationship of the Crown to subordinate units of government invested with statutory powers. For all that, Cameron was still a revenue case, and unspoken but everpresent was the commonsense argument that underlay the prerogative position: the apparent foolishness of one arm of government being taxed by another.

These same considerations underlay Queen's Bench decision in The Mayor et al Weymouth v. Nugent[66] resulting from the collector of wharfage dues for Weymouth attempting to impose duty on a consignment of stone unloaded in Weymouth harbour. The collector was empowered to make such impost by an act of 1825, which stipulated that the money raised was to be employed in the upkeep of the harbour. The respondent was an officer of the Royal Engineers who received the stone when it was unloaded, and intended it solely for the purposes of governmental construction work. The collector attempted to impose a duty of 2s6d on the stone, which Cockburn CJ, giving judgment for the court, found inapplicable.

Argument in this case is worthy of examination. In a matter involving civil engineering being performed by the government, in the year that Dicey thought marked the slide

66. (1865) 6 B & S 22; 122 E.R. 1106.

into "collectivism"[67], Blackburn J[68] asked Lush, counsel for the borough of Weymouth, "Suppose Her Majesty went into the harbour in her yacht."[69] (The act also imposed harbour duties for vessels entering the port). The last case with even a scintilla of personal royal involvement had been Westover in 1859, but Blackburn J was still concerned to argue the Crown personified in a case which clearly related only to the government.

Lush argued from basic principles and an understanding of statutory evolution that counsel would rarely display thereafter:

> "The maxim, that the Crown is not bound by an statute unless expressly named to be so bound, was adopted when Acts of Parliament were framed in a short form and construed by intendment; that rule of construction is unnecessary when there is a redundancy of enactments. Moreover, the maxim only applies where by a general statute some prerogative right, title or interest, is devested or taken from the Crown":70

67. Supra f.n. 1.
68. Lord Blackburn, as he was to become, was with Willes J responsible for placing the law of torts in the public sector, particularly as it reflected statutory duty, on a coherent and socially relevant basis in the third quarter of the nineteenth century: see S.C. Churches "'Bona Fide' Police Torts and Crown Immunity: A Paradigm of the Case for Judge Made Law" (1980) 6 U.Tas. L.R. 294 particularly at f.nn. 59-72. Willes J had jointly led Common Pleas in the renaissance of the demand for natural justice in Cooper v Wandsworth Board of Works (1863) 14 CB (NS) 180; 143 E.R. 414: see Churches "Natural Justice" at pp. 414-415, but just as Bentham had predicted a century earlier (see the epigraph to this chapter), neither of these two most illustrious Victorian jurists could keep their otherwise firm grasp on sensibility when the Crown's position was argued. Weymouth was decided the year after Tobin v The Queen (1864) 16 CB (NS) 310; 143 E.R. 1148, a case concerning the amenability of the Crown to suit, which the writer has elsewhere analysed as wrongly decided (Churches "Police Torts" pp. 300-302), but which displays the stranglehold of Crown thinking on the bench at this time.
69. 6 B & S at 25; 122 E.R. at 1107.
70. At 28; 1108.

he cited Bacon's Abridgement and Wright.[71]

Cockburn CJ noted that it was "part of the prerogative of the Crown to enjoy immunity from toll", and Blackburn J asserted that the Poor Law Act of 1601 (the subject of the Cameron litigation) despite its comprehensive terms, did not charge the Queen.[72] The Solicitor General opened by quoting the two sides of the presumption: statutes for the public good, religion, justice and preventing wrong bound the king, but general statutes which would devest the king of any prerogative, right, title or interest did not affect him. He then cited Donaldson as modern authority for the latter clause, quoting Alderson B's "rule of construction" that statutes are inferred to be made for the subjects, not the Crown. The Solicitor General topped off this reference by quoting a page number for Plowden's report of Willion, the purported authority for Alderson B's "rule of construction". Unfortunately for the Solicitor General, he had evidently been reading Abridgements rather than Plowden, for he quoted Plowden at p.236 B, which contained successful counsel's argument, with concessions about which statutes did not bind the Crown[73] nothing at all like Alderson B's "rule".

Cockburn CJ gave judgment for Queen's Bench[74], and in correctly recognising the Crown prerogative of exemption from tolls, he proceeded to raise the presumption of statutory construction in favour of the Crown to the status of a prerogative in its own right, for only the second time

71. Supra f.n. 41.
72. At 29-30; 1109.
73. See ch. 3 f.n. 27.
74. At 34-35; 1110-1111.

in the reported decisions.[75] The Chief Justice also noted the existence of specific provisions in the 1825 act declaring the Crown exempt from their effect: such exemptions had been inserted ex abundante cautela and no inference could be drawn that the remainder of the act bound the Crown.

The inevitable erosion of complicated and contradictory presumptions in favour of a simple rubric, coupled with the growing Victorian concern for the Crown position led to a condition where the rights of subjects invested in legislation[76] were disregarded if the Crown were a litigant. In the future it would matter not at all that a case involved not even the penumbra of the prerogative: all that now mattered was whether the Crown was named on the face of the statute. If not, it could treat the status quo ante as its playground. The Crown was no longer confined to its medieval constitutional nursery[77], but rather it now operated in an indeterminate legislative retrospective.

The decision in 1870 of Willes J in AG v. Edmunds[78] marked the triumph of canonical form over less certain but more technical substance. The Debtors Act of 1869 had

75. The first occasion was in 1695, see ch. 7 f.n. 30.
76. Not to be imprisoned for debt; to know that all new habitations have been inspected for minimum sanitary standards; that scales used to weigh for purposes of calculating charge are accurate, to offer three examples that arose in the next quarter of a century.
77. See text ch. 1 after f.n. 56.
78. (1870) 22 LTR (NS) 667.

abolished imprisonment for debt, with six exceptions that were not relevant to this case. Edmunds, a Crown debtor, had been imprisoned, and pleaded the 1869 act. Argument is scanty in the Law Times Reports, but Archibald for the Crown is noted as submitting "that the act was not intended to apply to any process in Crown suits, or in any way to affect the prerogative of Her Majesty. The Crown was not referred to either in express terms or by necessary implication in the Act". It is noteworthy that Archibald referred to "intention" and "prerogative". The act was a tabula rasa regarding the former, and bore no relationship to the latter. The nearest Crown prerogative was that of priority in debt, not to lock Crown debtors up. Willes J agreed with Archibald's reference to express words and necessary implication, concluding:

> "The question was whether there was any universal change, so as to absorb and extinguish the Crown of its general prerogative."

Just what this prerogative was was never specified, but by inference it must have been the de facto prerogative of immunity from the operation of general statutes referred to by Cockburn CJ in the Mayor of Weymouth's case.

Six years later Channell argued in the case of another imprisoned Crown debtor, citing Magdalen College and Wright for the proposition that "Unless the Crown has some prerogative, estate, right, title or interest, the doctrine that it is not barred by general words of a statute does not apply."[79] During argument Lord Coleridge CJ assumed

79. In re Arthur Heavens Smith (1876) 46 LJQB 73 at 74. This is a fuller account than that in 2 Ex.D. 47.

the correctness of Edmunds and gave judgment that this Crown debt was not covered by the Debtors Act. Pollock B agreed, adding, "It would be very dangerous if any doubt were allowed to go forth on the subject."[80]

The great danger conceived by Pollock B can only be an object of speculation. An imagined army of unjailed Crown debtors probably posed a threat to public order in the magnitude of the "pernicious result" predicted by Erle CJ in Tobin[81] if the Crown exposed itself to action in tort, as later became commonplace under Crown Liability Acts.[82]

In the same year Queen's Bench Division disposed of litigation that revealed a crying need for administrative overhaul in the disciplining form of an Ombudsman or Parliamentary Commissioner. As the law of private obligations attained the apogee of its orderliness with a mechanical lack of interest in the social status of litigants, Rustomjee v. The Queen[83] reveals a court so intensely aware of the royal mystique, that the report could be taken for heavy irony, particularly on the part of Blackburn J, if it were not for the conclusion reached.

80. 46 LJQB at 75. This displayed none of the perception exhibited by the baron's father, Pollock CB who said in argument in AG v. Radloff (1834) 10 Ex 84; 156 E.R. 366, the same year as Wright, and in conformity with that case and Baron de Bode (at 94; 370) "The Crown is not bound with reference to matters affecting its property or person, but is bound with respect to the practice in the administration of justice."
81. (1864) 16 CB (NS) 310; 143 E.R. 1148, at 367-368; 1170.
82. Churches "Police Torts" p.302.
83. (1876) 1 QBD 487.

Rustomjee was a merchant trading under the British flag in China in the years leading up to the Opium War of 1842. It was estimated at the time that the Chinese trading cartel, the Hong, owed British merchants $3,000,000 for goods confiscated (including opium) which sum the Emperor of China paid Queen Victoria at the cessation of hostilities under the Treaty of Nanking, the intention being that the British Government distribute this sum rateably amongst the merchants concerned. Over thirty years later Rustomjee had still not been paid by the British Government, and his sole means of seeking legal redress was a petition of right.

Amongst the arguments used for the Crown, Bowen, who had also appeared for the Crown in Smith, submitted that the Crown could not now be made to disgorge the money to such as Rustomjee, as the cause of action (if there were one) had arisen over thirty years ago, and the Crown could take advantage of the Statute of Limitations.[84]

Blackburn J seemed uninterested in the distinction between the Crown being bound, and the Crown taking advantage of the statute, a distinction which had admittedly not been pursued in litigation since Coke's opinion in the Case of a Fine Levied by the King.[85] In argument, Blackburn J replied to Bowen, "The Statute of Limitations has relation only to actions between subject and subject, the Crown cannot be bound by it." Cockburn CJ in his

84. At 491. He cited inter alia Chitty Prerogatives.
85. See ch. 5 f.n. 25.

judgment agreed with Blackburn J. The latter suggested that only one or two hundred years earlier counsel would have been sent to the Tower for arguing that Her Majesty was the agent of the merchant - creditors.

Blackburn J finished by denying the Crown the capacity to take advantage of the Statute of Limitations:

> "With regard to the Statute of Limitations ... There seems to be no pretence for saying that the statute applies at all to the Crown. It would, no doubt, be very proper, and right, and judicious for the legislature to pass an Act to say that in future some Statute of Limitations shall apply, but it has not been done yet."86

Far from this sweeping (and in the light of prior and subsequent decisions incorrect) removal of the shield provided by the Statute of Limitations leaving the Crown exposed to Rustomjee's claim, the court (Cockburn CJ, Blackburn and Lush JJ) were at one in finding the money held by the Crown under the prerogative of the treaty making power incapable of being the object of litigation. Thirty four years after the Treaty of Nanking the applicant for this act of grace was informed by the bench that if his claim had any merit, then the appropriate officers of state would see to his payments.

In the same year, 1876, the House of Lords limited the range of beneficiaries of Crown prerogative action taken in the face of legal rights as between subject and subject. The occasion was not one involving statutes, but rather the settled law that the Crown was not bound by a grant of letters patent (issued by itself) for a patent invention.[87]

86. At 496.
87. Dixon v. London Small Arms Co Ltd (1876) 1 App.Cas.632.

The Lords agreed that agents, servants or officers of the Crown might take advantage of the Crown's prerogative immunity, but this protection from the effect of letters patent did not extend to private contractors who were in contractual relationship with the Crown to provide it with goods. Thus Lord Chancellor Cairns:

> "... it would be impossible that the Crown could communicate to them [private contractors] a privilege which was only a privilege attaching upon the Crown itself, and those who might be the agents, servants, or officers of the Crown."88

and Lord Hatherley:

> "... the privilege which would have attached to the Crown for its own manufacture cannot be considered to attach to a person who, on his own behalf, enters into this contract and undertakes to supply the Crown with these articles."89

The concept of the Crown being outside the ambit of letters patent is directly analogous to the Crown's immunity from the reach of general statutes (whether that immunity is taken to be total or extending only to cover exclusive royal interests), and Dixon is a fact situation on all fours with later cases concerning the extension of the Crown's immunity from statutes to third parties in contractual relations with the Crown. In Dixon, where the patent invention was a Martini breech action, and the challenged manufacture was of 13,875 Martini-Henry rifles contracted for by the Crown, the House of Lords decisively over-ruled the Court of Appeal[90], which had held that it mattered not whether the rifles were manufactured by servants of the Crown, or under contract to

88. At 645.
89. At 651.
90. (1876) 1 QBD 384.

the Crown. The Court of Appeal had commenced by observing that the Crown was not bound by the general terms of the patent legislation. In the latest of the very few cases to consider Dixon, Pfizer Corporation v. Ministry of Health[91], Lord Reid observed[92] that the Patent, Designs and Trade Marks Act, 1883 had been passed to alter the law in Dixon. Section 27 expressly bound the Crown, but vested administrative discretions to exempt Crown contractors from the terms of the statute.

This case law from Edmunds on in 1870, with its obsessive concern for the singularity and distinction of the Crown, was worked out in the midst of, and appears to be a reaction to, a pronounced paradigm shift in public administration. Following the 1867 franchise reform, legislation providing an administrative framework of reform of public health (1875), education (1870), the civil service (1870) and the administration of justice itself (1873) followed in steady succession the reforms of the army pushed through by Edward Cardwell, the Secretary of State for War, between 1868 and 1874. Dixon had of course revolved around the Martini-Henry breechloading rifles ordered by Cardwell for the army in 1874.

The corporate attitude of the courts to the level of change going on around them is nicely illustrated by Thomas v. The Queen[93]. The plaintiff was engaged in litigation

91. [1965] 1 All E.R. 450.
92. At 453.
93. (1874) 10 LRQB 44.

with the Crown over the supply of war matériel contracted for by the Department of War. The Common Law Procedure Act, 1854 had set out procedure for obtaining discovery of documents. Thomas tried to obtain documents necessary to his case from the Crown, by arguing that section 7 of the Petition of Rights Act, 1860 picked up the procedure of the 1854 Act and made it applicable to the Crown. Section 7 provided that the means of procuring and taking evidence provided by statutes already in force, in personal actions between subject and subject, were to apply to petitions of right. It is hard to conceive of a clearer case for a statute binding the Crown by necessary implication, as petitions of right were the sole means of seeking redress from the Crown at law.

Holker SG and Bowen argued that there would have to be direct words to affect rights of the Crown. Additions, Wright and de Bode as examples of cases dealing with legal procedure, where no question of exclusive royal rights arose, and the Crown had had to comply with statutory requirements, had long been forgotten. Cockburn CJ gave the briefest possible judgment on behalf of the court, for the Crown, saying that the suit was untenable as there was no statutory provision regarding this procedural problem for an officer to answer the suit as there was in the case of corporations. But the mentality at work is captured in one line from Quain J arguendo, in response to plaintiff counsel's opening that the litigation was really with the War Department. Quain J said:

"We do not know what the War Department means."[94] After six years of well publicised reform of the army by Cardwell as Secretary of State for War, this made of judicial ignorance a self indulgent conceit which simply impeded the search for justice in suits against the government.

The following decade threw up four reported cases on statutes and the Crown, three of them involving the Crown prerogative of priority in the face of mid-Victorian commerce regulating statutes in the shape of the Companies Act, 1862 and the Bankruptcy Act, 1869. In re Henley & Co.[95] and In re Oriental Bank Corporation ex parte the Crown[96] the question was simply whether the

94. At 45. This is not so say that there are not serious linguistic and definitional problems in this area. For example, much of the Law Reform Commission of Canada's Working Paper No. 40 The Legal Status of the Federal Administration reflects the uncertain overlap in common law analysis of "administration", "government" and "Crown": see particularly pp 8-11 and 87. However, Quain J's facile interpolation did nothing to assist an understanding of how suits might be brought against Departments of State, an understanding which had had at least its rudiments supplied in Cameron only a decade earlier. Lord Cranworth had spoken of the shield of the Crown extending to the Crown's servants (amongst whom he had listed the great Departments of State), the Post Office, Horse Guards, the Admiralty and also the Police, and administration of Buildings for Assize, Judges' Lodgings, County Courts and Jails: see supra f.n. 64. By inference, the War Department was identified with the Crown for the purposes of litigious procedure.
It is only fair to note that fifteen years after Quain J's admission of judicial ignorance, Field J said in a natural justice case: "We must recollect that we are dealing with a new judicial body called a 'Department' ... " Parsons v. Lakenheath School Board (1889) 58 LJQB 371 at 372.

95. (1878) 9 Ch. D. 469.

96. (1884) 28 Ch. D. 643.

Crown had to come in as a creditor at corporate winding up under the provisions of the Companies Act, 1862, pari passu with other creditors, or whether it retained a priority over all other company creditors in defiance of the legislation.

In Henley, counsel for the Crown argued[97] from Maxwell's Interpretation of Statutes: "The Crown is not reached except by express words or by necessary implication in any case where it would be ousted of an existing prerogative." The broader, general proposition of Crown immunity unrelated to the prerogative which was becoming accepted was not submitted. In the circumstances, as events turned out, it was unnecessary, as the Crown had its prerogative of priority as a creditor to rely on. But as the Crown was attempting to claim taxes from Henley & Co., counsel's reliance on a public interest argument is of interest: "It is essential for the benefit of the public at large that the rights of the Crown as to levying taxes should be preserved."[98]

Counsel for the liquidator opened with a quite contrary submission as to public interest:

> "If the Crown is held to have priority in this case, the effect will be to prevent justice being done between one subject and another for the benefit, as it is said, of all the subjects of the realm."[99]

For the first time in nearly three hundred years, public policy was being openly argued on the subject of statutes and the Crown, rather than constituting the hidden agenda.

97. At 470.
98. At 471.
99. At 472.

Was pro bono publico to be seen in advantage to the national treasury, or in seeing that individual creditors each had a fair share of the corporate remains? Claims of reliance on Uppom v. Sumner[100] were drawing too long a bow: the Henrician statute there reviewed had dealt comprehensively with Crown priority as it related to various legal steps in the process of execution on a debt. This was not the case with the winding up provisions of the Companies Act, 1862.

Vice Chancellor Malins thought Uppom v. Sumner still good law, but did not rely on it. He found for the liquidator and in so doing, turned many of the assumptions that underlay the prevailing presumption on their heads. Inevitably, the presumption that general statutes did not bind the Crown was turned turtle. Specifically, Malins VC found by an implied expressio unius that if the Crown had its priority expressly retained in a statute in pari materia, namely the Bankruptcy Act of 1869 (which in relevant sections was only a restatement of legislation prior to the Companies Act, 1862) then he could infer that the Crown did not retain its priority under the Companies Act.[101] Previous judgments had reasoned that the statutory preservation of Crown prerogative was only inserted ex abundante cautela. In fact, under the Bankruptcy Act, 1869 the Crown priority was remodelled to a single year's taxes.

100. See ch. 7 f.nn. 15 and 66.
101. At 478-9.

Malins VC elsewhere displayed an attitude to the creation of legislation and the welfare of individual subjects that placed him completely at variance with all his Crown-minded contemporaries on the bench.[102] He presumed that if it were intended that the Crown retain priority, the Law Officers would have seen to it (reversing Hobart AG's argument about the counsel of the Crown in Magdalen College).[103] Furthermore, the Crown consented to the act, and Malins VC inferred that it intended to be included in the scheme for paying out on a winding up, thus reversing the presumption set out by Alderson B in Donaldson.[104]

Given the prevailing attitude of the decade it is hardly surprising that the Court of Appeal reversed the Vice Chancellor's decision. Each of the Lord Justices of Appeal, James, Brett and Cotton, divided his brief judgment into two parts: firstly, that the Crown was not bound by the Companies Act because not expressly mentioned; and secondly, that even if the Crown came into the assets of the company at winding up, rather than taking its fill prior to winding up, its prerogative of priority would involve it being paid first, ahead of the other creditors.[105] Brett LJ expanded on this marginally by stating that it was a prerogative of the Crown not to be bound by a statute in which it was not specially mentioned, and Cotton LJ conceded the possibility

102. At 477.
103. See ch. 5 f.nn. 53 and 54.
104. Supra f.n. 47.
105. At 481-483.

of "necessary implication". In Oriental Bank[106] Chitty J was content to endorse the presumption in simple form with these two codicils: the presumption was a prerogative, and the Crown might be bound by necessary implication.

The Court of Appeal (Jessel MR with James and Bramwell LJJ concurring) came to a similar result regarding the Bankruptcy Act, 1869 in Bonham.[107] The approach was more elliptical; discursive after the pre-1870 fashion. Bacon's regurgitation of Magdalen College was quoted: statutes of beneficent purpose bound the Crown, but the Crown was not deprived of a prerogative by a general statute. As a complete non sequitur to these two non-syllogistic premises, Donaldson was cited to clinch the case for the Crown not being bound. The odour permeates Bonham that not merely the prerogative of priority was secure against the Bankruptcy Act, but the whole status quo ante the Bankruptcy Act when viewed from the Crown's corner of the ring.

In 1883 the House of Lords was treated to the spectacle of the Law Officers from both south and north of the border, together with one A.V. Dicey, arguing that a court house erected by the county to house the hearing of cases by Justices of the Peace was rateable under the Income Tax Legislation. In Coomber[108], as in Cameron[109] the issue at stake was the extent of the Crown itself. Lord Cranworth in Cameron, adopting Blackburn J below, had already

106. Supra f.n. 96 at p.647-8.
107. Ex parte Post Master General; In re Bonham (1879) 10 Ch.D. 595.
108. Coomber v. Justices of the County of Berkshire (1883) 9 App. Cas. 61.
109. Supra f.n. 63.

stipulated that court houses were run as an arm of government and so constituted the Crown for the purposes of immunity. Lord Blackburn (as he now was) in Coomber affirmed that the operation of the court house was a function of government, and as such there was an implied exemption from rating by virtue of the prerogative.[110] Lord Watson referred to the Crown's "privilege" which remained intact unless taken away by express terms or necessary implication in a statute. Lord Watson preferred this concept to that of the Crown merely being named in a statute.[111] Despite the trend of the times, the old lore surrounding the prerogative was not entirely dead: certain fact situations had the effect of summoning it up again.

It is ironic that Dicey should have argued the central government's capacity to tax a subordinate echelon of governments's provision of a governmental service, and have lost in the House of Lords, only two years prior to the publication of his Introduction to the Study of the Law of the Constitution.[112] This work had as its theme government, and government officials, under the law, but Coomber and the other cases in the fin de siècle period illustrate the defects in Dicey's pronouncements, made as they were from a private law standpoint, without examining the limitations placed on his desiderata by the supra-legal advantages of the Crown. Just one hundred years after the publication of Law of the Constitution a Law Reform Commission of Canada

110. At 65-67.
111. At 76-77.
112. A.V. Dicey, 1885.

Working Paper contained the following:

> "The contribution of Dicey was to understand and rationalize the evolution that took place over two hundred years (1688-1889) and to formulate a legal rule better suited to the liberal society of his time. The Diceyan thesis may thus be seen as a historical review leading to the making of a new departure based on the supremacy of Parliament."113

The working paper went on to note the continuing post-Dicey confusion between administration and the Crown, and that the presumption that the Crown was not bound by statutes was an example that the Crown is still "above the law". For all that, Coomber, in common with all revenue cases involving the Crown, provided a difficult fact situation that did nothing to clarify thought in other situations where there was no question of the Crown taxing itself.

Two issues were to haunt this sliver of the common law over the next century. Firstly, the failure to recognise the "rights" vested in the entire community by remedial, planning and generally collectivist legislation was the product of treating the position prior to the passing of a statute as a "prerogative" vested in the Crown, to be given precedence over the rights of the community at large. Secondly, the Crown was never analysed by court lawyers to the point of distinguishing "the Crown", "the government" (with many attributes of the Crown, and particularly the old "active", as opposed to procedural, prerogatives in the area of defence and security) and "the administration". This last merely comprised the government's employees, whose activities, if unchecked by statutes applying to the rest of

113. Legal Status of Federal Administration p.11.

the community, could only give the appearance of injustice, particularly when an administrator passed his immunity to a member of the community, or took that immunity with him in his persona as member of the community, inevitably thwarting the intention of legislators.

Gorton (1887)[114] and Justices of Kent (1889)[115] parade the harrowing spectre that the bench was making of this subject. The Public Health Act, 1875 placed an obligation on local communities to legislate with by-laws, and then administer such laws, to effect sanitary drainage and the adequate inspection of new dwellings. A Manchester prison, falling within the jurisdiction of the Gorton Local Board, was vested in Prison Commissioners, and in 1886 new staff quarters were completed at the prison. The Local Board insisted on its right of inspection and litigated the matter.

Queen's Bench Divison found that the Prison Commissioners constituted the Crown for the purpose of this action. Day J found that the property was provided by the Crown, for the purposes of the Crown, occupied by servants of the Crown, and under the control of the Crown, not the local authority. The Prison Commissioners did not have to allow the inspection, as the Crown was not bound except by express words or necessary implication, and this latter concept was raised only if the "legislation would be unmeaning."[116]

114. Gorton Local Board v. Prison Commissioners (1887), reported [1904] 2 KB 165n.
115. R v. Justices of Kent (1889) 24 QBD 181.
116. At 167n.

Wills J (not to be confused with Willes JCP, who had committed suicide in 1872) agreed:

> "In my judgment, however anxious one may naturally be to confine the application of the prerogative within its legitimate limits, it seems to me that it is clear, from authority and from principles which are established beyond cavil and dispute, that the Crown is not bound unless it is expressly or by necessary implication named."117

The "prerogative" had not been raised by counsel: the reference by Wills J revealed the drift of his concern. While Cameron, Mayor of Weymouth and Coomber had involved the issue of different echelons of government taxing each other, Gorton for the first time turned on an arm of goverment claiming immunity from compliance with regulatory legislation aimed at community welfare. The earlier cases had not been dissected in terms of competing tiers of government, but had at least the justification that a subordinate level of government taxing a superior flew in the face of common sense. Those cases, the nearest analogues to Gorton, hardly supply authority and principle "beyond cavil and dispute", but Wills J was plainly not intent on an analysis of the theory of government. This bench felt safer applying the simplest formulae than analysing the changing world around them. It is however only fair to point out that both Day and Wills JJ referred to the intention of the legislation being performed by another means: the Crown authorities had powers of inspection under the Prisons Act, 1865.

117. At 168n.

Justices of Kent took the presumption to a new nadir of unconcern for the individual's position, a point on the azimuth of curial analysis which has been little improved upon in the succeeding century. The justices of the peace had been in the process of hearing a charge against Nicholls, the postmaster at Down in Kent, under s.25 of the Weights and Measures Act, 1878. The report concerned a writ of prohibition against the justices, in which the Attorney General successfully contended that they had no jurisdiction to hear the charge.

Nicholls ran a bakery out of the same premises as the post office. An inspector of weights and measures found that the post office scales in the shop were incorrect, and as it was an offence of strict liability to have incorrect measures on premises where trade was going on, he prosecuted Nicholls. Webster AG took out a writ of prohibition in the Queen's Bench Division, arguing that as the scales were the property of the Crown, and the Crown was not bound by the Weights and Measures Act, the justices lacked jurisdiction.

> "Then arises the question whether the legislature ever intended that weights and measures supplied by the Post Office, and seen and kept correct from time to time by government inspection, should be included within the provisions of the Act, and be subject to the jurisdiction of the inspector of weights and measures. I am clearly of the opinion that the legislature did not so intend."118

The presumption regarding general statutes and the Crown had now reached the stage where the bench presumed the legislature knew this canon of construction, and that its collective will was manifested by the failure to

118. 24 QBD at 184.

specifically bind the Crown. Certainly the bench would use the presumption as well as the plain words of the statute to pronounce the intent of parliament.

Mathew J was more concerned with ongoing, if fraudulent, work of the post office, and the paradox of the Crown forfeiting the scales to itself if the justices convicted, than with the plain consumer protection intention of the legislation: he opined that other remedies were open to the public if the post master used the false scales for his bakery.[119] The advantage of having a "Crown connection" was plain to see: the shield of the Crown had taken on new possibilities since the Admiralty Court in 1813 had promised vigilance against fraudulent use of the Crown immunity.[120]

The two remaining nineteenth century cases concerned the Prescription Act, 1832. Section 3 of that act provided for an easement of light to vest in a servient tenement after twenty years ownership, and receipt of a regular amount of light through lack of change in the buildings on the dominant tenement. No prescriptive right to light ("ancient lights") existed with respect to the land in either case because of the custom of London.

Perry v. Eames[121] concerned land in Bassinghall Street purchased in 1820 with money voted by parliament for the purposes of a Bankruptcy Court. Legal title was vested in five persons, the equitable interest being in the Crown. In

119. At 185.
120. Supra f.n. 20.
121. [1891] 1 Ch. D. 658.

1886 the site was sold to the Corporation of the City of London, and in 1890 it was vested in Eames under a building agreement. He pulled down the old Bankruptcy Court and commenced construction of new buildings. The plaintiffs sought to restrain Eames from building higher than the Bankruptcy Court had been, claiming a right to ancient lights. The question for the court was whether the plaintiffs could claim any prescriptive right over the use of the Bankruptcy Court site prior to 1886, that land having been beneficial Crown property from 1820 to 1886.

Counsel for the defendant Eames argued what they referred to as "the general rule", that the Crown was not bound by a statute unless expressly mentioned or referred to by necessary implication. The second string to their argument was the sanctity of the king's prerogatives etc from general legislation, for which proposition Magdalen College was cited. Counsel were not submitting the position prior to the Prescription Act as a "prerogative". Rather, they submitted that "At common law no prescription could be maintained against the King, and this privilege extended to his lessee."[122] However, the point was missed that with respect to land in London, the Crown was in an identical position to subjects: the custom of London forbade the creation of an easement of light by prescription. Plaintiff's counsel argued that the defendant could not take advantage of the right of the Crown, if it were accepted that the Crown had not been bound by the statute.[123]

122. At 661.
123. At 662.

Chitty J relied on defence counsels' subsidiary argument based on Magdalen College. No reference in judgment was made to which "prerogative, estate, right, title or interest" of the Crown was to be preserved in the face of the 1832 act, but counsel had submitted that no prescription ran against the Crown, presumably a derivative of the procedural prerogative that time did not run against the King. Chitty J opined that "the prerogative of the Crown takes these cases out of the operation" of the statute[124], but in the context it is fair to infer that he was referring to the prerogative of immunity from prescription, not a "prerogative" of not being bound by the general words of the statute.

The remaining interest in the case lies in the finding that the plaintiffs, seeking to retain their former quantum of light, could not plead such enjoyment for the twenty years required for statutory prescription. The court found that the plaintiffs could not have begun accruing time toward the twenty years until the Crown relinquished its rights in the property, which occurred in 1886. To do otherwise would be to diminish the interest disposable by the Crown. Land subject to an easement to allow light onto its neighbours would be a lesser commodity than unencumbered land. Therefore, the purchaser from the Crown in 1886 took the land unencumbered at the moment of purchase, and to that extent availed himself of Crown immunity.

124. At 669.

Two years later, in 1893, a case passed through Chancery Division on its way to the Court of Appeal, where it was determined that lessees of the Crown had to take the Crown immunity from the Prescription Act, 1832. Maple & Co. purchased an existing lease of Crown land in 1891, and the next year entered into an agreement with the Crown to take a fresh lease of the land on condition that they erected new and taller buildings on the land. Land adjacent to this leased Crown land had been owned since 1852 by a Mr. Wheaton. It was not disputed that the windows in his premises were "ancient lights", but he attempted to block construction of Maple & Co's proposed building by claiming that the Crown Land, leasehold since 1815 and transferred to Maple & Co. in 1891, was subject to the terms of the 1832 act, so that a prescriptive right to light vested in Wheaton's property.

Kekewich J found at first instance that "according to the common interpretation of the statute" the Crown, not being mentioned, could not be bound by s.3 of the statute, but the lessees of the Crown were bound.[125] Lindley, Lopes and A.L. Smith LJJ each independently agreed with Kekewich J as to the first point, but found that the Crown lessee took advantage of the Crown's immunity. Lindley LJ bluntly found the Crown "never bound" by an act "unless the intention of the Legislature to bind the Crown is clear and unmistakeable..."[126] Lopes LJ said that the Crown had

125. Wheaton v. Maple & Co [1893] 3 Ch. 48 at 55-56.
126. At 64.

to be "named" to be bound[127], and A.L. Smith LJ thought this the "well known rule".[128] Each of the Lords Justice of Appeal then found the lessee of the Crown outside the act, because the easement proposed by the act had to be "absolute and indefeasible" and it was a logical impossibility to satisfy this requirement if the lessee were bound, while the Crown, as reversioner, was not so affected.[129]

Forty or so years of enormous change in English public life, ending in about 1875, and usually referred to in histories of England as "The Age of Reform" had not produced a correlative analysis of public law stances and assumptions whenever the "Crown" was invoked in issue. The failure of court lawyers and their acolytes to analyse the nature of the Crown, while "codifying" its immunities, is provocative of speculation, but causation will not be found in individual social factors. However, two major forces were at work: the commercial requirement for certainty; and the growing personal aura of the monarch even as it was recognized that her constitutional power was negligible.

Regarding the first, it has been written, drawing on Weber, that "bourgeois interests ... had to demand an unambiguous and clear legal system that would be free of irrational administrative arbitrariness as well as of irrational disturbance by concrete privileges, that would also offer firm guarantees of the legally binding nature

127. At 67-68.
128. At 71.
129. At 64, 68 and 72.

of contracts and that, in consequence of all these features, would function in a calculable way."[130] So as nineteenth century judicial style moved to the "formal mode", drawing solely on legal sources and eschewing extraneous materials such as the effects of a decision, the problem of the Crown's privileged position at law was dealt with by seeking absolute solutions, rather than leaving discretion in judges to determine on the facts whether or not the Crown should be bound by a statute.

As to the second factor, Blackburn's performance in Mayor of Weymouth[131] and Rustomjee[132] illustrates a refusal to depersonalise the Crown, let alone examine the reality of government and administration in a period of marked expansion and rapid change in the public sector. Cases such as Thomas[133] and Coomber[134] reveal confusion over the nature of government; Gorton[135] and Justices of Kent[136] manifest a lack of concern for the community protection intended to be afforded by regulatory legislation, when placed in the balance against the Crown's position.

130. M. Rheinstein (ed.) Max Weber on Law in Economy and Society 1954, p. 63.
131. Supra f.n. 66.
132. Supra f.n. 83.
133. Supra f.n. 93.
134. Supra f.n. 108.
135. Supra f.n. 114.
136. Supra f.n. 115.

Two texts from the final decades of the nineteenth century demonstrate how far analysis had drifted in the fifty years since Dwarris and Wooddesson were published.[137] The pressures at work late in the century, referred to immediately above, when matched against the now ancient lore concerning statutes and the personal sovereign (much of which was sui generis in response to political considerations) produced a plethora of cases from which no clear principle was drawn. The crucial contribution of Dwarris and Wooddesson, the recognition that as regards inferior rights shared between sovereign and subject, the sovereign should be bound by general statutes, had disappeared. While the courts had now clearly settled for a simple codification in favour of Crown immunity from the operation of general statutes, the text writers, who might be expected to seek out and establish the principle behind the trend of case law, did nothing of the sort.

Wilberforce[138] and Craies[139] each presented at length the case law to the effect that the Crown was unaffected by statutes, and then traversed the assertions from Coke as to when the king should be bound. Wilberforce asserted that "the rule itself cannot now be questioned, recognised as it has been by judicial authority in all ages, accepted not only under the Tudors and Stuarts, but by the American Republic."[140] This was immediately succeeded by the

137. Supra f.nn. 37 and 39.
138. E. Wilberforce Statute Law 1881, pp 36-42.
139. W.F. Craies (ed.) Hardcastle Construction and Effect of Statutory Law 2nd ed., 1892, pp 401-421. (H. Hardcastle 1st ed. 1879 not available to the writer.)
140. Wilberforce Statute Law p.37.

well worn words from Donaldson[141] to the effect that law was made for subjects and not for the Crown. Although Alderson B had cited Willion as his authority he had given no page reference: Wilberforce supplied it as "Plowden p.236" where successful counsel for the defendants said nothing of the sort. This mistake seems to have come about through an uninquiring acceptance of eighteenth century commentators uncorroborated by reference to the original source.

Wilberforce acknowledged[142] that the rule allowed numerous exceptions, and was unable to state the rationale or the raison d' etre of the rule, but instead, as his predecessors had done, threw down an anecdotal melange of case instances. Wilberforce's were at least largely nine teenth century, rather than the hoary chestnuts of the eighteenth century commentators. Two of the obscure examples employed by Wilberforce illustrate the paucity of his analysis, which did not even extend to whether a prerogative was potentially trenched upon by a statute. Both Mountjoy v. Wood[143] and AG v. Constable[144] involved prerogatives: respectively, the right to move cases concerning Crown revenue into the Exchequer Court; and the right to intervene in actions affecting Crown rights. The County Court Act, 1847 and the Judicature Act, 1873 not being expressed to bind the Crown, had been held incapable of curbing the respective Crown prerogatives. Wilberforce

141. Supra f.n. 47.
142. Wilberforce Statute Law p.37.
143. (1856) 1 H & N 58; 156 E.R. 1117.
144. (1879) 4 Ex D 172.

came nowhere near more subtle distinctions such as that involving rights exclusive to the Crown not shared with subjects, let alone examining the concept of the Crown itself.

The remainder of this portion of the text dealt with those cases based on Ecclesiastical Persons and Magdalen College that found the Crown bound by statutes. Wilberforce admitted the difficulty of reconciling rule and exceptions, and concluded by enjoining his readers to "take both the rule and the exceptions to it as we find them, and as they have been established by a long series of decisions."[145]

Craies editing Hardcastle afforded lengthy treatment to the subject, but though he was more systematic than Wilberforce, in the end he was no more purposeful in presenting a cogent principle of the relationship of statutes to the Crown. Craies began by citing Reniger v. Fogossa[146] as authority that statutes were construed in the king's favour, but noting Plowden's explanation that this was because subjects made statutes, and the king was a grantee. Craies appeared not to notice that this was in direct opposition to the proposition that he quoted[147] from Willion, only twelve years after Reniger, to the effect that the king assented to statutes becoming law among his subjects. Craies also failed to note that he was quoting

145. Wilberforce Statute Law p.42.
146. Hardcastle Statutory Law p. 402. For Reniger see ch.3 f.n. 13A.
147. Hardcastle Statutory Law p. 403.

losing counsel. On the same page the broad immunity of Donaldson was quoted alongside the limited immunity relating only to rights of the king, citing Bonham relating back via Bacon to Magdalen College. Craies failed to highlight the contrariety.

Craies seemed, at least inferentially, to be reluctant to endorse the prevailing contemporary attitude of general exemption to the Crown of statutory compliance. His examples are invariably of cases such as Perry v. Eames in which a prerogative was at stake (in that case nullum tempus occurit regi), or where a clear Crown right existed, such as that in Cuckfield Burial Board, invested by private act.[148] Craies completely mistook the ratio of the House of Lords in Dixon v. London Small Arms Co and the impact of R v. Wright, but he completed his survey by covering the Cokeian exceptions by which the king was bound by statutes.[149] He concluded on an indecisive note similar to Wilberforce: there was a paucity of case law supporting Coke's scenerios in which the king was bound without being named, but on the other hand his propositions had not been decisively rebutted. The coming century would see to that concern.

148. Ibid pp. 412 and 417-8.
149. Ibid p.419.

The Twentieth Century

A new century and a new reign commenced in January, 1901. Dicey's Law of the Constitution, first published in 1885 and into its seventh edition by 1908, is symptomatic of the self congratulatory good feelings and lack of insight in this period. Thus:

> "...Parliament has looked with disfavour and jealousy on all exemptions of officials from the ordinary liabilities of citizens or from the jurisdiction of the ordinary Courts ...[150];
> "... the refusal to look upon an agent or servant of the State as standing, from a legal point of view, in a different position from the servant of any other employer, or as placed under obligations or entitled to immunities different from those imposed upon or granted to an ordinary citizen, has certainly saved England from the development of the arbitary prerogatives of the Crown...."151; and "Droit administratif.....rests upon ideas absolutely foreign to English law: the one...is that the relation of individuals to the State is governed by principles essentially different from those rules of private law which govern the rights of private persons towards their neighbours..."152

That losing counsel in Coomber[153] should subsequently make these banal statements appears an act of dissimulation, but the failure to note the existence of general Crown immunities, let alone the development of the immunity of the Crown from general statutes in the second half of the nineteenth century was more than a minor peccadillo in a treatise such as this. Dicey appears to have been blinded by his determination to assert, if not prove, that the common law had no "administrative" element.

150. Dicey Law of the Constitution 7th ed., 1908 p.405.
151. Ibid pp.390-1.
152. Ibid p.383.
153. Supra f.n.108.

A small fasciculus of relevant reports marked the second, third and fourth years of Edward VII's reign. In the first, Hornsey UDC v. Hennell[154], and third, Cooper v. Hawkins[155], Lord Alverstone CJ led King's Bench Divison in finding the Crown unfettered by statutory provisions in fact situations with military overtones. Hornsey additionally involved a rating issue. The intermediate case, Thomas v. Pritchard[156], saw Lord Alverstone find the Crown was bound, but the effect of the decision was in no way a diminution of the Crown position: the Crown was held able to receive costs under legislation dealing with summary jurisdiction.

Hornsey concerned land occupied by the Crown for military purposes. S.150 of the Public Health Act, 1875 did not refer to the Crown, and in consequence the Crown was not liable to contribute rates levied by that section for paving streets adjacent to rated property. However, Lord Alverstone was at pains to place "the principle" of the Crown not being bound in its contextual light, that pecuniary burdens were not cast on Crown property without express words or necessary implication[157]. The interpretation point that other sections bound the Crown, raising conflicting inferences of expressio unius and ex abundante cautela was settled resolutely[158] by reference to

154. [1902] 2 KB 73.
155. [1904] 2 KB 164.
156. [1903] 1 KB 209.
157. [1902] 2 KB at 80.
158. At 80-81.

Smithett[159], Mayor of Weymouth[160] and Coomber[161]; and for the first time a Scottish case, Lord Advocate and Barbour v. Lang[162] was referred to, it being a very similar rating case concerning military land.

From the well trodden paths of rating decisions, the King's Bench Division moved late the following year, 1903, to deal with a quintessentially twentieth century problem, reports of which have since appeared in common law jurisdictions all over the world: were the government and its employees bound to adhere to legislation governing the use of motor vehicles on public roads? Improvements to the internal combustion engine had increased the potential and demand for vehicular speed beyond anything envisaged for road vehicles in 1865 when the Locomotive Act was passed, providing a limit of two miles per hour in urban areas, and four miles per hour in the country.

In Cooper[163] the question was argued as to whether a driver of a vehicle owned by the Crown, while on military duty, the driver being a servant of the Crown and under the direction of the Crown, was obliged to restrict the speed of the vehicle he controlled in accordance with the Locomotive Act. Sir Edward Carson SG submitted[164]:

159. Supra f.n.31.
160. Supra f.n.66, text after f.n.75.
161. Supra f.n.108.
162. (1866) 5 M 84 (3rd Series of Cases in Court of Session).
163. Reported in 1904, but decided in 1903.
164. [1904] 2 KB at 165.

> "In Willion v Berkley it is laid down that it is usual for the legislature in Acts of Restraint which they intend to bind the King to name him expressly, and if he is not expressly named it has always been taken heretofore that the Legislature only intended to bind the subjects, and to make the Act extend to them and not to the King, for he is favoured in all expositions of Acts."165

Lord Alverstone agreed with himself in Hornsey, presumably on the "principle" that the Crown was not bound unless referred to. Russell KC's reliance on Comyns' Digest and Bacon's Abridgement as authority that legislation for the public good bound the king was destroyed by Lord Alverstone citing Gorton where he said, more public good was involved in the statute than the public safety aspect of the Locomotive Act.[166] Further, the driver was performing a military duty, and such duty might require a speed in excess of 2 m.p.h.[167] It was forty years too early for Alverstone to ask himself reflexively whether the military duty did not itself have to be lawful to have any standing to over-ride legislation. This is not to say that the duty might not be legitimate in the light of necessity (driving to a blazing munitions depot for example) but a military duty, the result of command, is not now, and was not then, ipso facto

165. The Solicitor General's submission after the preparatory words "it is laid down that" are a direct quote from unsuccessful counsel in Willion at 1 Plo.239;75 E.R. 356-6.
166. [1904] 2 KB at 170.
167. At 172.

legal.[168]

Wills J found the Crown not bound, by relying on his own judgment in Gorton and worrying over whether military functions might otherwise be curtailed. He then found a new reason for Crown immunity from statutory operation : the Locomotive Act allowed for by-laws to provide further restrictions and liabilities. These by-laws would not be promulgated by the Crown itself, and so Wills J argued that it would not have assented to them. It would be improper for a subordinate division of government to bind the Crown without the Crown even having assented to the instrument. Therefore it followed that the Crown was not bound by the head act, on the basis of hypothetical subordinate legislation which had nothing to do with the instant

168. Dicey Law of the Constitution p.341 contained the following disparagement of French Law: "The fourth and most despotic characteristic of droit administratif lies in its tendency to protect from the supervision or control of the ordinary law Courts any servant of the State who is guilty of an act, however illegal, whilst acting in bona fide obedience to the orders of his superiors and, as far as intention goes, in the mere discharge of his offical duties."
See also the case note by Glanville Williams (1948) 64 L.Q.R. at p.192, and by the same author Crown Proceedings 1948, pp.49-52 on "necessary implication" (where the learned author may infer too much from the judgment of Lord Alverstone CJ) and the persons protected by the Crown's immunity.

case.[169] Channell J agreed with his brethren.

Between Hornsey and Cooper the King's Bench Division decided in Thomas v. Pritchard[170] that a court of summary jurisdiction could give costs for or against the Crown under any of the revenue statutes by virtue of the Summary Jurisdiction Acts of 1848 and 1879. Lord Alverstone referred to Beadle[171] and Moore[172], and on the strength of the limited reasoning in the latter, he found a necessary implication that the Crown was within the compass of the Summary Jurisdiction Acts.[173] In Moore the implication had arisen because all cases of appeals included those brought by the Crown, and similarly in Thomas all parties bringing proceedings could receive costs or have costs awarded against them, and the Crown was within the statutes as it was a party that could bring proceedings.

169. [1904] 2 KB at 172. The Court provided no analysis as to why the Crown immunity was presumed to extend to the driver. Unlike the "passive" employee in Justices of Kent, here the driver was an active law-breaker.
In Chare v. Hart (1919) 88 LJKB 833 King's Bench Division dealt with a wartime case which reflected Wills J's twin concerns for military capacity in the face of a possibly supervening statute, and Crown immunity despite Council by-laws attempting to dictate the form of permissible behaviour. While these concerns had been hypothetical in Cooper, the necessity of getting hay to troops in France in 1918 was an additional reason in Chare to that of the non-binding effect of Worcester County Council's by-laws under the Locomotive Act, 1889 for finding the driver of a string of hay wagons exceeding in number the permitted three, acting under military command, to be immune from the effect of the by-laws. Under the general "maxim" the head act was presumed not to bind the Crown and no more could subordinate legislation under that act.
170. Supra f.n.156.
171. Supra f.n.60.
172. Supra f.n.61.
173. [1903] 1 KB at 213.

As in Moore, so on the facts of Thomas the Crown received costs, although in both cases the court found the Crown within the statute to the extent of being bound to its disadvantage, not just for its benefit. In neither instance did the court refer to the concept of the Crown taking the benefit of all statutes whether named or not.

Both Moore and Thomas beg the question of the meaning of "necessary implication". In both, the Crown was in the class of litigants named in the statutes as being open to an award of costs for or against them, but the Crown merely being within the category covered by an act does not advance the query as to whether the act of necessity binds the Crown. This would be so, if for example, the Crown constituted the only member of the class referred to, but as only one of a wider number there is no reason in logic that the statutes in question should bind the Crown to its disadvantage, that is, to pay costs. The decisions in Moore and Thomas reach beyond the limits to which logic will take them, while providing a leavening in favour of the public against Crown immunity from the operation of statutes.

In April 1903, after the decision in Thomas but before that in Cooper, the Law Quarterly Review ran the first general criticism of the presumption of Crown statutory immunity to be seen in England. It reads as follows:

> "Thomas v Pritchard [citation], following Moore v Smith [citation] in effect decides that the Crown may be bound by an Act in which the Crown is not expressly named, if from the nature of the enactment it may be reasonably inferred or implied that the enactment was intended by Parliament to bind the Crown. The

> conclusion is sensible enough, but raises the question whether the time has not come when the rule, that the Crown is not bound unless it be expressly or impliedly named, should be treated as obsolete. Such a rule of construction may have been proper in the time say of Edward VI, when there might really be an opposition between the personal interest of a king and the interest of the subject. It is inappropriate and misguiding in the reign of Edward VII, when the king represents in all proceedings the interest of the nation."[174]

This anonymous, brief and broad attack attracted no judicial attention in subsequent reported cases. No body of dissent concerning the presumption in favour of the Crown grew out of this sally. The next commentator in the field, G.S. Robertson, was content to ride the prevailing judicial wave[175], an acrobatic feat which in so far as it revealed a conspection of any historical background to the presumption involved citing a dissenting judgment and two losing counsel.[176] The cast of Robertson's mind is revealed most tellingly when he puzzles over Reid v. Stearn[177] a case concerning the Interpleader Act, 1831 and whether the Crown as party to a suit could be compelled by the court to be subjected to the procedures set out in the act. Stuart V-C in Reid had clearly seen a right vesting in subjects, stemming from the statute, to have all litigants, including the Crown, adhere to the statutory procedure.

174. (1903) 19 L.Q.R. pp.131-132. The note is anonymous, but the editor at the time was Sir Frederick Pollock.
175. G. S. Robertson Civil Law and Proceedings by and against the Crown 1908, pp.566-567 concerning statutes of limitation on time serve as examples.
176. Ibid p.567 citing Weston J in Willion, Coke's report of argument in Magdalen College and Popham AG in Buckberd : see ch.3 f.nn.40 and 111, and ch.5 f.n.25 regarding the Crown taking the benefit of all statutes.
177. (1860) 1 L.T.539, Robertson p.610. The Interpleader Act was not directly pleaded in the case.

Robertson wrote:

> "It is not easy to understand this decision, inasmuch as the Interpleader Act, 1831 (1 & 2 Will. IV c. 58), which regulated interpleader proceedings before the Judicature Acts, clearly did not bind the Crown."[178]

The Exchequer Chamber's decision in Wright quarter of a century prior to Reid had pointed the way to a liberal construction of statutes concerning litigious procedure. By the opening decade of the twentieth century concern for the rights of subjects under legislation had been swamped by all-embracing presumption of Crown immunity.

Just before the publication of Robertson's text, the Privy Council advised in an appeal from New South Wales[179] that the Crown in right of New South Wales was not affected by the Life Fire and Marine Insurance Act, 1902 of that state, because the Crown was not named in it, nor was there any clear indication of an intention to bind it. The act purported to protect the proceeds of a life assurance policy from payment of the deceased's debts. Counsel for the unsuccessful respondent looked to the object and purpose of the legislation. He submitted that the policy of the legislation was to protect the beneficiaries of the life assurance policy from claims by the assured's creditors.[180]

Counsel contended that there was an implication that

178. Supra f.n.43.
179. AG (NSW) v. Curator of Intestate Estates [1907] AC 519 at 523. This NSW appellate decision is inserted in this chapter as the English Law Lords constituting the Judicial Committee were applying English common law. The same reasoning is employed for placing other Privy Council decisions in this chapter.
180. At 520.

the Crown was bound, and so incapable of claiming against the proceeds of the deceased Crown debtor's insurance. This implication had its basis in Coke's old concept enshrined in eighteenth century abridgement writers that statutes did not bind the Crown where a prerogative would be affected, but did bind the Crown if they were for the public good. The references to legislative policy had laid the foundation for this claim, but after opposing counsel had rebutted by citing AG v. Donaldson, the Judicial Committee found for the Crown because otherwise it would be disadvantaged by losing its right to payment of the debt, as well as "the clearly prerogative right to priority of payment."

The respondent Curator thus lost in the final analysis by reference to the by then superseded doctrine of the prerogative being the bastion against general statutes affecting Crown capacities. The Judicial Committee failed to advert to the fact that the Crown prerogative of precedence as a creditor only related to such funds as were available. This prerogative was really irrelevant to the question of whether the act left the insurance money in the fund from which creditors might draw. Despite the best efforts of counsel, the bench failed to perceive the necessity of universal application of regulatory legislation.

War is not merely the locomotive of history, as Trotsky noted; it performs the same function for litigation. The topic of statutes and the Crown lay dormant until cases

began to surface in the aftermath of World War I. Soon after the cessation of hostilities Rowlatt J was confronted with a fact situation that plainly attracted his sympathy to the widest application of legislation.[181] The Duchy of Lancaster, a department of the Crown, in its capacity of landlord was suing a tenant, Moresby, for rent owed during 1917 and 1918. In this period the premises under lease had been appropriated by the Office of Works for the use of His Majesty's Air Board.

The defendant pleaded the Courts (Emergency Powers) Act, 1917 c.25, sub-section 1 (2) of which provided for relief from contractual obligations at the discretion of the Court where acquisition or user of property by the Crown for war purposes would result in serious hardship if the terms of the contract were still on foot. The plaintiff argued that the Crown was not bound by this act. The note form of the report begins:

> "Rowlatt J said that in his opinion the action was utterly unconscionable. The Office of Works was a department of the Crown, and it seemed to him monstrous when one department of the Crown took possession of premises belonging to His Majesty in right of the Duchy of Lancaster so that the lessees of the Duchy could not receive their rent that proceedings should be taken by the Duchy, which was another department of the Crown, to recover the rent."

The report continues:

> "...he had....to consider whether the Courts (Emergency Powers) Act, 1917, bound the Crown. That statute dealt with cases where the circumstances showed great hardship, and where the normal conduct of affairs was rendered impossible by the action of the Government. He thought that this Act belonged to the class of statutes which bound the Crown as being one for the

181. AG (Duchy of Lancaster) v Moresby and others [1919] W.N. 69. Chare v. Hart f.n.169 supra had been decided on 13 December, 1918.

> suppression of wrong. See Craies' Statute Law, 4th ed., p.361."[182]

The decision was a victory for common sense, but it relied on outmoded theory to achieve its end. One senses that it was the Crown behaviour rather than the wrong rectified by the statute that attracted Rowlatt J's reaction. There was no explanation as to why this legislation should be treated as universal in its ambit, while, for example, the New South Wales insurance legislation in Curator of Intestate Estates should not bind the Crown. What degree of "wrongfulness" being rectified would attract Crown submission? As courts were already well down the road to strict literalist interpretations of legislation, eschewing examination of policy, the old Cokeian approach was doomed to wither on the vine.

In 1920 the House of Lords unanimously decided another case concerning the nascent air force in favour of the respondent subject, an incorporated hotel.[183] In 1916 the Crown took possession of a hotel belonging to the respondent, for the purpose of housing Royal Flying Corps personnel. The question to be decided by the Lords was whether the compulsory acquisition of the hotel was effected under the force of statutes that provided for compensation in such cases, or whether the Crown had acquired the property under the prerogative (private property subject to

182. At 70.
183. AG v. De Keyser's Royal Hotel Ltd [1920] AC 508.

acquisition for the defence of the realm) in which case no legal machinery existed for forcing compensation.

The legislation in question was the Defence Act, 1842 and the Defence of the Realm Consolidation Act, 1914, and it was not contended for the Crown that these statutes did not bind it. The Lords either reasoned or inferred by reference to necessary implication that if a statute covered the ground of a prerogative, the prerogative was curtailed and the power could only be exercised in accordance with the conditions set by the statute.[184] Lords Dunedin, Atkinson and Parmoor all looked to the constitutional machinery at work in this situation. The first two saw the Crown limited by being a party to the legislation, which was enacted by the Crown-in-Parliament[185], while Lord Parmoor said "the Executive no longer derives its authority from the Royal Prerogative of the Crown but from Parliament."[186]

Lord Moulton took a quite different tack by finding the prerogative untramelled. However, he went to the policy of the legislation, saying:

> "It has indicated unmistakably that it is the intention of the nation that the powers of the Crown in these respects should be exercised in the equitable manner set forth in the statute, so that the burden shall not fall on the individual, but shall be borne by the community."187

Only Lord Parmoor took the construction and constitutional argument to a fully reasoned conclusion,

184. Per Lord Dunedin at 526; Lord Atkinson at 538-540; Lord Parmoor at 576, only Lord Parmoor expressly referring to necessary implication.
185. At 526 and 539 respectively.
186. At 575.
187. At 554.

relying on Bacon's Abridgement (itself based on Coke) for the proposition that this legislation abridged the prerogative "because it was made for the advancement of justice and to prevent injury and wrong." This was placed in the context of legislation allowing the Executive to take possession at a time of public exigency.

The irony of De Keyser is that it involved an obvious statutory intrusion into the royal prerogative, the original bastion in the fourteenth century against statutory control of the king. The Lords were prepared to find a necessary implication that the Crown had to accede to statutory conditions demanding compensation for appropriation of property, by analysis of constitutional machinery or policy, but there was no explanation then or later as to why general legislation not specifically intruding on the prerogative should not bind the Crown. The constitutional workings, and the benevolent intention of such legislation would always equate with the Defence Acts in De Keyser. As a matter of logic the position of general legislation would seem even stronger, as it would not be pitted against an existing Crown power, but the Defence Acts attracted an expansive interpretation because by covering the ground of prerogative, they highlighted the concept of "necessary implication".

De Keyser was firmly in line with the Cromwellian period decision of AG v. Andrew[188], discarding only the

188. See ch.6 f.n.60.

reference to negative and positive statutes and replacing them with a more rational analysis of policy and legislative machinery. Andrew had superseded the earlier decisions of 1522, 1597 and 1617 in which the prerogative was assumed still to constrain statutes on the same ground[189], reflecting the less monarchically focussed thought of the 1650's as opposed to the first half of Henry VIII's reign or the latter part of Elizabeth's, or James I's reigns. De Keyser and Moresby might have ushered in a new era after the Great War of courts recognising the pervasive influence of government and seeing to a consequent wide embrace of statutes, but it was not to be. The House of Lords confirmed the De Keyser approach on the prerogative three years later in Food Controller v. Cork[190], but the reasoning that the Crown priority in debt had been abrogated by the Companies Act, 1908 developed no new following.[191]

The first of three remaining reports[192] from the post World War I period went in favour of the Crown, but in equitable circumstances. The Commissioners of His Majesty's Works and Public Buildings had been renting premises from Pontypridd Masonic Hall Co. Ltd. for some years, and on discovering they had been overpaying, they sued for recovery. The defendants argued that the Statute of

189. See ch.3 f.nn.9, and 117 and ch.6 f.n.17.
190. [1923] AC 647.
191. See Lord Atkinson at 663 on the intent of the legislature, and Lord Wrenbury at 670 (with whom Lord Carson agreed) referring to the Crown's assent to the legislation.
192. Commissioners of His Majesty's Works and Public Buildings v. Pontypridd Masonic Hall Co. Ltd. [1920] 2 KB 233.

Limitations (21 Jac.I c.16, 1624) precluded the Crown from bringing this action after so many years had passed. Counsel for the plaintiff argued that the "principle" was "that where the Crown is not named in a statute it is not bound thereby".[193] He cited no authority. Defence counsel did not rebut this proposition, but contented himself with contesting the plaintiff's ability to adopt the shield of the Crown. Referring to no authority, Bankes LJ (sitting in King's Bench Division) found the plaintiffs not bound by the Statute of Limitations.

The second of these remaining reports[194] arose from a collision in 1917 between HMS Salome and the Loredano. As his second ground for finding in favour of the Crown, Duke P found[195] that the belated prosecution of the claim by the Crown was not impeded by the terms of limitation in the Maritime Conventions Act, 1911, because that act incorporated the terms of the Merchant Shipping Act, 1894, including s.741, "This Act shall not, except where specially provided, apply to ships belonging to Her Majesty."

It was quite unnecessary for Duke P to have given any other basis for his decision, but nothing daunted, he said of AG (NSW) v. Curator of Intestate Estates[196], cited by Sir Ernest Pollock in argument,

> "That is a statement, in a carefully limited form, of the prerogative of the Crown with regard to the exemption from the operation of statutes, not in particular statutes of limitation."

193. At 234.
194. The Loredano [1922] P 209.
195. At 212.
196. F.n.179 supra.

and later,

> "The prerogative of the Crown is saved by operation of law, and the statute is construed with reference to the principle."197

No longer need the Crown dance behind the uncertain veils of statutory construction : Duke P's judgment raised the Crown protective device to the more judicially enticing level of a prerogative in its own right. Heads had been delivered on platters to the Crown in 1695, 1865, 1870, 1878 and 1884 in at least partial reliance on this concocted prerogative[198], but Duke P's Crown orientation is all the more depressing for appearing only two years after Lord Moulton had looked to the policy of legislation to spread the burden of defence costs throughout the community.[199] Counsel for the defendant owners of the Loredano had argued that it was inequitable for the Crown to launch a claim in avoidance of statutory limitation, as the defendant could not counterclaim as it could if the action had been commenced within the statutory period. Duke P answered:

> "That is true, but the same argument, of want of equity, might be raised in a hundred cases where the interests of the State are held to be superior to the interests of individual claimants."200

197. [1922] P at 211.
198. See Bishop of London and Dr Birch ch.7 f.n.30; Mayor of Weymouth f.n.75 supra; Edmunds text after f.n.78 supra; Henley and Orient Bank text before and after f.n.106 supra.
199. F.n.187 supra, in De Keyser.
200. [1922] P at 212. Public policy, as ever an unruly horse had been argued in this area since at least 1878 : Henley f.n. 98 supra where counsel was ad idem with Duke P. In Lord Commissioners of the Admiralty v. Dunlop in 1915 (supra f.n.2) the Lord Ordinary, Lord Anderson said (1916 SC at 248) : "Why should individuals be made to suffer for the good, especially in a case like the present, where the general benefit is infinitesimal but the individual loss substantial?"

Commentators and digests in the 1920's adopted postures ranging from the bare and fragmented setting out of cases[201] to the futile attempt to explain the Cokeian parameters of the issue (the prerogative secure on one side; statutes rectifying wrongs binding the Crown on the other) by simple foot-noted reference to recent cases.[202] Mew's Digest perhaps revealed a hidden assumption when it claimed an Irish case as authority that the Crown could take advantage of a statute without being bound by the restrictions in that statute.[203] R v. Cruise stood for the exact opposite of this assertion.

Broom's Legal Maxims was irredeemably marked by using as its heading in block capitals the fallacious statement published by Jenkins in the Restoration period, "Roy nest lie per ascun Statut, si il ne soit expressement nosme."[204] Broom's standing is not improved by immediately quoting Donaldson, relying on losing counsel in Willion, to the effect that legislation was made by the Crown for subjects. On the other hand, The Civil Servant in the Law and Constitution[205] noted that cases such as Justices of Kent and Cooper had extended Crown immunity to employees in the context of regulatory legislation. Emden observed the legislature's reaction later in 1903 after Cooper had been decided:

201. Mew's Digest of English Case Law to 1924 2nd ed., 1925, vol. VI col. 1475 et seq.
202. Broom's Legal Maxims 9th ed. 1924, ed. W.J.Byrne pp. 51-53. (1st ed. 1845 not available to the writer.)
203. [1852] 2 Ir.Ch.R.(N.S.) 65.
204. See ch.5 f.n.29 regarding Jenkins.
205. C. S. Emden The Civil Servant in the Law and Constitution 1923, p.16.

> "...the Motor Car Act, 1903, provides, in sect.16, that the Act shall apply to persons in the public service of the Crown [which] shows that the legislature has appreciated that the Crown servant is in some instances shielded by the Crown's immunity..."

The blythe assumption evident in The Loredano that the courts administered law, unfairly favouring the State, was challenged in Cayzer, Irvine and Co Ltd v. Board of Trade[206], a case arising from the requisitioning of the plaintiff's vessel and its subsequent loss through war risks in 1917. A claim was made in late 1923, more than the six year period stipulated on the Statute of Limitations, 1624. The Crown claimed the benefit of the statute. Counsel at first instance for the claimants referred[207] to Blackburn J in Rustomjee[208] as authority that the Statute of Limitations related only to actions between subject and subject. Counsel continued, "If the Crown is not bound by the Statute of Limitations it is not just that it should be allowed to rely upon it."

Rowlatt J could find no quality in the Crown which excluded the Crown from the benefit of the statute[209], a sensible observation in itself. The anomaly arose in the context of the Crown not being bound by the act. On appeal Sir John Simon KC highlighted this anomaly[210] and observed that the text writers claiming the Crown's capacity to take

206. [1927] 1 KB 269.
207. At 271-2.
208. F.n.86 supra.
209. At 274.
210. At 275-277.

statutory benefit had no better basis than unsuccessful counsel in Magdalen College. The Court of Appeal decided on another ground[211] but Scrutton LJ noted with approval Sir John Simon's attack on the notion of benefit. He understood the "rumor mill" basis of the claim. Unsuccessful argument in Magdalen College had not even been relevant to that case, but it had "been taken out by a text-writer and repeated for centuries until it was believed that it must have some foundation". Scrutton LJ went on to note that the Case of a Fine[212] was only an opinion, and in the absence of argument in open court, hardly an authority on this subject.

Sir Ivor Jennings wrote a brief note based on Scrutton LJ's doubts as to the basis of the claims for statutory benefit.[213]

A chorus of four cases decided between 1931 and 1935[214] on the Rent Restriction Acts of 1920 and 1923, together with a canon of decisions in 1947 and 1949[215] exposed the presumption of Crown statutory immunity as firstly incapable of sustaining the logical extensions which would signify its sure foundation in the common law, and secondly defying reasoning and common sense, always a dangerous position for the law to be in. It was common ground in all

211. At 294-295.
212. See ch.5 f.n.25.
213. W. I. Jennings "Case Note" (1927) 43 L.Q.R. 157.
214. Clark v. Downes [1931] All ER Rep. 157; Wirral Estates Ltd v. Shaw [1932] 2 KB 247; Clark v. Mead (1933) 149 LT 308; Wheeler v. Wirral Estates Ltd. [1935] 1 KB 294.
215. Rudler v. Franks [1947] 1 KB 530, Territorial Forces Association v. Philpot [1947] 2 All E.R. 376, and Territorial and Auxiliary Forces Association of the County of London v. Nichols [1949] 1 KB 35.

seven cases that the Rent Restriction legislation did not bind the Crown. It followed that real property of which the Crown was landlord was not affected by the acts. But what happened to the property when it was sold by the Crown; and in particular, was an exisiting tenancy subjected to legislation which had not applied prior to the sale?

To be unfettered by the legislation left the Crown free to raise rents and evict tenants in a manner otherwise forbidden, and it was argued that if this Crown advantage did not pass to a purchaser, at least in respect of a tenancy on foot, the value of the land would be diminished and the Crown would receive a lower sale price. The crucial words are those of Romer LJ at the conclusion of his judgment in the Divisional Court in the first of these cases:

> "The Acts not binding the Crown, it is the duty of the courts so to construe the Acts that the Crown and its property are in no way prejudicially affected by the Acts. If the learned county court judge is right and these houses became subject to the operation of the Acts, the moment they passed out of the ownership of the Crown it follows that the reversion to the houses while in the possession of the Crown was worth considerably less than it would have been but for the Acts. The Acts so construed, therefore, would prejudicially affect the property of the Crown."216

This went well beyond the reasoning in the nearest analogous case, Wheaton v. Maple & Co.[217] where the Crown remained as reversioner. A new rubric had arrived,

216. Clark v. Downes [1931] All ER Rep. at 160. The only previous use of the word "prejudice" in this context was in unsuccessful argument in Willion, in the passage which had caused so much other trouble : see ch.3 f.n.29.

217. F.n.125 supra.

demanding the protection of the Crown from the prejudicial effects of legislation, without the question even being asked of whether regulatory legislation of this sort, designed to improve community conditions, could have a prejudicial effect. The only theoretical disadvantage to the Crown arose from the fact that a lacuna existed in the law in the Crown's favour which resulted in a market benefit to the Crown. It was a very narrow minded approach that saw any infraction on this market benefit as a "prejudice".

Romer LJ's formula had the fundamental defect of being open-ended : at what point after alienation of Crown property would application of the statutes cease to "prejudice" the Crown's interest in the best market price? The next four years saw the courts wrestle with this problem. In Wirral Estates Ltd v. Shaw Talbot J, at first instance, wondered if Romer LJ had not been "going beyond what is necessary for the maintenance of the prerogative doctrine with regard to the operation of statutes upon the Crown."[218] He observed that if the Lord Justice were taken literally, then no matter how many future sales of the reversion, or how many new tenancies, the Rent Restriction Acts would not apply to the property. Talbot J was not prepared to accept such a proposition : Romer LJ's formula already seemed to him "to be rather an extreme application

218. [1932] 2 KB 247 at 251. Another judicial essay in treating the presumption as a prerogative, and repeated on the same page.

of the doctrine with regard to the effect of statutes on the Crown."

The Court of Appeal (Lord Hanworth MR, Lawrence and Romer LJJ) agreed with Talbot J that the Crown immunity could not inure for subsequent purchasers after the initial sale by the Crown. It subsisted only for the course of the tenancy created by the Crown and on foot at the time of sale by the Crown. Lawrence LJ thought the presumption a "prerogative immunity of the Crown"[219], and Romer LJ reiterated his concept of "prejudice".[220]

The following year the Divisional Court (Acton and Finlay JJ) misconceived the ambit of the Romer formula, and held that a new landlord could fix rents in respect of a new tenancy in defiance of the Rent Restriction Acts because of a continuing immunity inherited from the Crown.[221] In other words, the fear of prejudicing the Crown's sale value of its reversion, coupled with the determination in all these cases that the presumption/prerogative applied in rem and not in personam led the court to allow an indefinite immunity from statutory regulation to the property.

Lord Wright and his brethren put a halt to this very shortly. His Lordship limited the Crown immunity after sale of the reversion to a tenancy on foot, agreeing with Talbot J in Wirral Estates Ltd v. Shaw. His Lordship continued:

219. At 261.
220. At 263.
221. Clark v. Mead (1933) 149 LT 308.

> "The immunity is in this as in other cases limited to the period of Crown occupation and user, and to whatever other period is justified by the decision in Wirral Estates Ltd v. Shaw. It cannot extend to the possibility of a remote prejudice or exclude a legitimate application of the terms of an Act after the Crown's interest has ceased."[222]

Having confirmed "prejudice" in the lexicon of Crown immunity, he pronounced Clark v. Mead to be wrongly decided, and Slesser LJ and Talbot J agreed with him, the latter affirming[223] his notion of Crown immunity from statutes as a prerogative.

The apotheosis of Crown immunity from the Rent Restriction Acts came with Lord Goddard CJ's decision in Rudler v. Franks[224], in which Humphreys and Lewis JJ concurred. The matter came up as a case stated at a time of considerable upheaval in and commentary on the matter of Crown immunities in general, but Goddard LCJ had no hesitation in pronouncing the Wiltshire justices mistaken in applying the Rent Restrictions Acts to the effect that the appellant/landlord (himself a tenant of the head-landlord/Crown) had not been able to exercise his powers under the Small Tenants Recovery Act, 1838 to evict his sub-tenant, the respondent. Lord Goddard affirmed that the Rent Restriction Acts did not bind the Crown : the Crown was not named and "upon all the well known rules of construction is not affected by the Acts."[225] In dicta he noted that the immunity was not restricted to land owned by the Crown. It would extend for the life of the tenancy created by the

222. Wheeler v. Wirral Estates Ltd [1935] 1 KB 294 at 304.
223. At 309.
224. [1947] 1 KB 530.
225. At 532.

Crown. But in this instance, the Crown title still being in existence, the property attracted the Crown immunity from the Rent Restriction Acts, and the appellant/landlord could ignore their strictures and evict the sub-tenant.

His Lordship commenced this heartless and technical resistance to the universal application of the Rent Restriction Acts with a pleasant little homily to the justices, the gist of which was that this bit of the law was a particularly deep mystery, reserved for the Head-Shaman and Magi, and it was to be expected that the lay justices not only did not understand it but had never heard of it:

> "I am not at all surprised that the justices decided as they did, because I think it must be a surprise for anyone to learn that if the property sought to be recovered is Crown property, notwithstanding that the tenancy is a sub-tenancy created by the tenant of the Crown, the Rent Restriction Acts do not apply to the cottage or house so long as the property remains Crown property."

Prior to these five Rent Restrictions Act cases, few decisions favoured the Crown under the presumption that did not at least impliedly rest on the preservation of a Crown prerogative. For example, the prerogative of nullum tempus lay in the background of all the post - World War I limitation legislation cases. Edmunds, Smith, Gorton, Justices of Kent[226] and Cooper had been isolated examples of courts exalting the Crown at the expense of the universal application of regulatory legislation, in effect raising up the status quo ante the legislation as a "prerogative right" of the Crown.

226. F.nn.78, 79, 114, 115 and 155 supra.

This approach had first been evident in Allgood[227] in 1743, but that case, dealing with a statute for the administration of justice, had effectively been over-ruled by Wright in 1834 and Baron de Bode in 1848, only to be resurrected again with Edmunds in 1870. Edmunds was one of the four cases that revived the "prerogative" of Crown statutory immunity between 1865 and 1884, 170 years after its first appearance.[228] There is obviously at least a subliminal connection in these cases from the latter third of the nineteenth century in which the common thread is a bootstraps argument that the Crown was not deprived of a prerogative or right by general legislation, that the status quo ante a statute was a "right" resting in the Crown, and that consequently no general statute bound the Crown, which concept in itself then became a "prerogative" buttressing the argument.

Beginning with Clark v. Downes in 1931, the English courts applied the presumption unfeelingly and mechanically against remedial and ameliorative legislation. The presumption began to be freely spoken of as a prerogative and the Crown was to be guarded against "prejudice" which transpired to be no more than the possible loss of its market advantage if it were forced to comply with legislation. Perhaps most dauntingly, Goddard LCJ delivered his assumption of Crown immunity in January 1947 as the Attlee Labour Government was initiating another of those

227. Ch.7 f.n.40.
228. See f.n.198 supra.

changes in attitude to the Crown that did not quite constitute a paradigm shift. However, as will be seen, Goddard was not alone in being out of step with the spirit of the Crown Proceedings Act, 1947. At least in subsequent cases the luckless victims of this Crown immunity were present to argue their case : the respondent cottager in Rudler v. Franks was neither present nor represented.

Goddard had been unsuccessful counsel for the bank in Administrator of Austrian Property v. Russian Bank for Foreign Trade[229] when the Court of Appeal found that the Administrator was an agent of the Crown, and like the Crown, was not bound by the Limitations Act. Scrutton LJ referred to this immunity as being "under the prerogative."[230] The sole remaining report pre-World War II, Attorney General v Cornwall County Council[231], went off expressly on the Crown's prerogative immunity from paying tolls, with the result that neither the Crown nor its officers, nor civilians employed by the Crown were bound by legislation vesting a ferry in the defendant council and setting the scale of fares. Neither express words nor an adequate inference from the act existed, despite counsel's reference to the immunity from taxation vested in the owner of the ferry and consequent claim that the Crown, being

229. (1931) 48 TLR 37.
230. At 39.
231. (1933) 97 JP and LGR 281.

bound to that extent, was bound by all the terms of the act.

Another war brought another Courts (Emergency Powers) Act, that of 1939. This act provided that even after judgment signed on a debt, the creditor could not proceeed to execution without the leave of the court. In AG v. Hancock[232] Wrottesley J had to determine whether this act bound the Crown so that it was hindered in enforcing the judgment it had received in respect of income tax owed by the defendant.

The judgment commenced by citing Maxwell on Statutes, 8th edition, and Craies, 4th edition, the first implicitly and the second explicity referring to losing counsel in Willion to the effect that statutes were made by the king for subjects. In measured tones that marked this thoughtful judgment, Wrottesley J thought the learned authors guilty of "over statement", and addressed the three issues of the Crown's redoubt from general statutes, rights, interests and prerogatives; the fact that the Crown was a party to the legislation; and that the Crown was affected when the language of the statute created the "necessary implication".[233]

This was more sophisticated reasoning than previous mechanical exercises, but it was still hardly definitive. His Lordship examined some of the landmark cases from the second half of Victoria's reign onward. He never quite

232. [1940] 1 All E.R. 32, [1940] 1 KB 427. References following to the All ER, but the judgment in KB is, if not identical, a close paraphrase.
233. At 34.

grasped the nettle that most of the cases, including the first two that he cited, Bonham[234] and Henley[235], involved a recognised Crown prerogative. His three subsequent cases, Edmunds[236], Smith[237] and Wirral Estates Ltd v. Shaw[238] did not fit the pattern. This perturbed Wrottesley J to the extent that he recited the policy of the Debtors Act, 1869, the subject of Edmunds and Smith: "the abolition of imprisonment for debt as such must be regarded as being a great step forward" and yet "the Crown preserved its right, if it liked, to imprison its debtors for debt."[239] This was a clear, if implicit acceptance that the status quo ante a statute might be considered a "right" in the Crown to be preserved in the face of all but specific statutory reference, even though this "right" had had no element of Crown exclusivity or prerogative prior to the statute, when the Crown's position had been shared with subjects. For example, prior to 1869, both Crown and subjects as creditors could have taken action to have their debtors locked up.

It is notable that Wrottesley J cited Wirral Estates Ltd v. Shaw without analysing the Crown "right" being preserved. He later referred individually to the legislation covered by his case examples, but left out the Rent Restriction Acts. Hancock, involving a Crown debt,

234. F.n.107 supra.
235. F.n.95 supra.
236. F.n.78 supra.
237. F.n.79 supra.
238. F.n.214 supra.
239. [1940] 1 All ER at 36.

plainly related to a Crown "right", if not a prerogative. While that allowed for analogy with the Bankruptcy and Companies Acts, the substance of Bonham and Henley, the assertion that "the Debtors Act" was "not very far away from the present cast"[240] appears gratuitous in the context of a Crown "right". It does however become a valid, if unfortunate, analogy if it is taken to mean that statutes providing for procedure and administration of justice (for example, the Debtors Act, 1869 and the Courts (Emergency Powers) Act, 1939) might be ignored by the Crown.

Wrottesley J tried to interpret his five examples within the Cokeian framework of "public good" on one side and "prerogative" on the other, a scheme to which he adhered rather than the by then apparently established rubric of the Crown not being bound if not named. Thus he found that a "right" existed in all his examples which transcended the universality of the relevant legislation, despite the fact that it was all "clearly for the public benefit."[241] In closing, his Lordship pondered whether the reasoning in Magdalen College had any weight, as the crux of the matter was that the act 13 Eliz.I c.10 forbade the master and fellows of the college divesting college property, so that the statute did not relate to the Crown. Coke had addressed this issue in Ecclesiastical Persons.[242] Given the

240. At 39.
241. At 36.
242. See ch.4 f.n.95.

trade in church leases through the queen for thirty years, it is ingenuous to argue that the rest of Coke's reasoning was irrelevant or superfluous.

Twice in the final two pages of the report Wrottesley J referred to the limits on Crown immunity in terms of property, rights, interests or prerogative. Even allowing for the uncertainty as to just what constituted "interests", Hancock represented a return to the bounds of the presumption as set out in the authorities pre-1850.

The remaining reported wartime decision on the presumption was AG v. Randall[243] in which the Court of Appeal (Morton J, with whom Scott and du Parcq LJJ agreed) followed Edmunds and approved Hancock in finding that a Crown debtor could be arrested, because the Debtors Act, 1869, did not bind the Crown. The judgment referred to the rights and prerogatives of the Crown being secure against general statutes, but did not explain the nature of such rights and prerogatives in respect of this statute.

Randall attracted a rare, and brief case note on this subject in the Law Quarterly Review.[244] The policy of the Debtors Act, 1869 being quite clear, and Wrottesley J having discussed that policy as recently as December 1939, while fellow-travelling with his brethren to defeat that policy in respect of the Crown, the anonymous case-note writer then

243. [1944] KB 709.
244. (1945) 61 L.Q.R.12, (ed. A. L. Goodhart).

decided that it was up to parliament rather than the bench to determine whether the ameliorative principles of the Debtors Act should apply to the Crown or not. The triumph of literalism and mechanically applied formulae had arrived when a court-invented device blocked the application of the perceived policy of a statute, and the only remedy published was that parliament would have to decide whether it was desirable for the Crown to have the power of arresting debtors, i.e. to have the power of breaching the wording of the statute obviously intended for the benefit of the whole community. In fact, it would have been appropriate to hark back to Wrottesley J's comments on Magdalen College[245] and argue that all debtors in England now fell into the category of the unarrestable and unjailable in respect of their debts, and whether the Crown was a creditor or not mattered not a whit. There is, however, no published report of such an argument.

The Presumption Since the Second World War

In November, 1936 the Acting Hydraulic Engineer of the Municipal Corporation of the City of Bombay wrote to the Executive Engineer of the Presidency (Province) of Bombay, setting out a proposal to run water pipes underground through land, the property of the Crown in right of the Province of Bombay. Such are the acorns of important litigation. At the time it was written, this letter would

245. Text at f.n.242 supra.

have seemed as remote from determination of constitutional principal as Spinolas's lease of land from Magdalene College had been 360 years previously. The Acting Hydraulic Engineer's letter eventually led to litigation, which under the full title of The Province of Bombay v. The Municipal Corporation of the City of Bombay and Madhusudan Damodar Bhat[246], was finally decided in the Privy Council on 10th October, 1946, just a decade after the correspondence began between the engineers representing the two tiers of government.

The Municipal Corporation of the City of Bombay was constituted under the City of Bombay Municipal Act, 1888. Section 222 of that act empowered the City Commissioner to "carry any municipal drain....through or under any land whatsoever" within his jurisdiction. Section 265 extended the power in respect of drains to cover the laying of pipes and watermains. The City Commissioner, the municipal chief executive empowered to undertake this construction work, was not an elected official, but was appointed by the government of the Province of Bombay under s.54 of the 1888 act. The relations between municipality and province under this act had always been amicable.[247] At the time of the

246. [1947] AC 58. In this case the Privy Council was technically an Indian appellate court, but the Judicial Committee pronounced the law in this area to be the same in England and India. A majority of the members were English Law Lords.

247. D. A. Pinto The Mayor, the Commissioner and the Metropolitan Administration (Bombay) 1984, pp.123, 226-227 and 243.

correspondence between the appellant and the respondents, 1936-1937, the City Commissioner was an Englishman named Taunton[248], which makes further unlikely the possibility of the ensuing litigation having arisen from an exercise in Indian nationalism in the municipality attempting to challenge the Crown government of the province.

In response to the letter from the Acting Hydraulic Engineer of November, 1936 proposing the laying of the pipe under Crown land, the province agreed, subject to a number of conditions including nominal rental and removal of the pipe on a year's notice. The municipality would not agree to these conditions. The province refused to waive the conditions. On 28th September, 1937 Taunton, the Municipal Commissioner, wrote to the province's Executive Engineeer announcing his intention "to carry out the above work in exercise of the powers vested in me under Section 222(1) and 265 of the City of Bombay Municipal Act. ....This notice is given to you as the authorised officer of Government, the owners of the land in which the work is to be executed."[249]

The solicitor for the province suggested that the matter go to court as a case stated, but it was not until March, 1943 that the parties agreed on the case to be stated

248. Ibid p.118. By the time the litigation began he had been replaced by M.D.Bhat.

249. The correspondence is printed in full, and appears together with the written submissions of counsel to the Privy Council in Privy Council Printed Papers in Appeals 1946 Judgment Nos. 37-41, vol.27. The writer thanks Mr.D.H.O.Owen, Registrar of the Privy Council, and his staff, who were most helpful in finding and copying these papers in June, 1985.

to the High Court of Judicature at Bombay, and for the first time the constitutional issue was raised fair and square:

> "Whether the Crown is bound by Sections 222(1) and 265 of the City of Bombay Municipal Act."

It is important to recognise that this was essentially a dispute within the government. At issue was the capacity of a subordinate level of government to use or control the property of a superior tier. Bombay has been treated as of universal application because of the breadth of Privy Council prose, but its context was a very narrow one indeed, and ignoring the rating and taxing cases involving arms of government as on special ground, the only fact situation analogous to Bombay had been Gorton[250], criticised above.

The High Court in Bombay, consisting of Beaumont CJ and Rajadhyaksha J, found for the defendant municipality and Commissioner in July, 1943.[251] The principal arguments used by the court, and later attacked by the appellant before the Judicial Committee[252] were:-

(1) an expressio unius argument that as the Crown was expressly exempted from certain sections of the act regarding land ownership, it should be bound by the remaining provisions;

(2) that it was for the public good that the Crown be bound by the provisions under review; and

250. See f.nn.114 et seq supra.
251. (1944) 31 AIR (Bombay) 26. The decision is referred to in ch. 9.
252. Printed Papers in Appeals 1946, P.C. Appeal No. 55 of 1945, pp.4-6 of appellant's argument.

(3) disagreeing with Day J in Gorton on the limits of "necessary implication", these provisions bound the Crown because otherwise the litigation could not operate with "reasonable efficiency".

The written submissions and reasons for the respondents in the Privy Council were signed by Cyril Radcliffe, the leading advocate of his day, and W.W.K. Page, although oral argument was finally presented in July, 1946 by Page and Jopling. The written reasons for upholding the decision of the High Court were brief and in effect only twofold:-

(1) the statutory provisions were binding on the Crown "by necessary implication"; and

(2) there was a presumption that the Crown was bound because the act was made for the public good.[253]

The Judicial Committee, consisting of Lords MacMillan, Simonds and du Parcq, Mr.M.R.Jayakar and Sir Madhavan Nair, delivered its decision on 10th October, 1946. Sir John Beaumont CJ could not have escaped noticing the wholesale destruction of his reasoning in the High Court : he was sitting in a differently constituted panel of the Judicial Committee that day, handing down judgment.

Lord du Parcq, delivering the decision reversing the High Court's ruling, was "not in doubt" as to the general principle to be applied in determining whether the Crown was bound by a general statute:

253. Ibid p.4 of respondent's argument.

> "The maxim of the law in early times was that no statute bound the Crown unless the Crown was expressly named therein, 'Roy n'est lie per ascun statute si il ne soit expressement nosme.'"[254]

The antecedents of this dubious piece of antiquarianism have already been attacked above.[255] It had its origins in Jenkins' truncated version of the "dicta" in an opinion recorded by Coke. Less than twenty years prior to Bombay,[256] Scrutton LJ had observed the poor authority constituted by the Case of a Fine Levied by the King, but the Judicial Committee failed to realise the basis of the "maxim" in this early Jacobean opinion.

Lord du Parcq allowed an exception to this immunity, where the "very terms of the statute" manifested an intention that the Crown was bound. It would then be bound by "necessary implication." However, he then attacked the Chief Justice's concept of inferring Crown subjection to legislation by reference to operational efficiency and smoothness of legislation.[257]

His Lordship proceeded to examine the argument that the Crown was bound by the statutes "for the public good". It was allowed as "early authority" but could no longer be regarded as sound except in a limited sense.[258] The sense intended became apparent in the key words of the whole decision:

254. [1947] AC at 61.
255. See ch.5 text at f.nn.25 to 33.
256. F.n.212 supra.
257. [1947] AC 61-62.
258. At 62-63.

> "If it can be affirmed that, at the time when the statute was passed and received the royal sanction, it was apparent from its terms that its beneficent purpose must be wholly frustrated unless the Crown were bound, then it may be inferred that the Crown agreed to be bound."259

Such was the withered, although not sterile, progeny of the union of "necessary implication" and "for the public good". Hancock and Gorton[260] were placed in the ancestral chain of authority that showed the Crown was not bound "although the statute in question was clearly for the public benefit".

Gorton had already been cited to illustrate that the legislature had confidence that employees of the central government could perform a function as well as those of local authorities. But in Gorton, the function of building inspection, in particular of prisons, was invested by the legislature in Crown prison officers under separate prison legislation. Nothing like that existed in Bombay to facilitate the provision of water to consumers by the provincial government : the City of Bombay Municipal Act invested all authority over water and drains in the municipal authorities, and no other legislative provisions existed. This reduces to pure speculation the Judicial Committee's suggestion that:

> "...the view taken by the High Court appears to ignore the possibility that the legislature may have expected that the Crown would be prepared to co-operate with the corporation so far as its own duty to safeguard a wider public interest made co-operation possible and politic, and may well have thought that to compel the Crown's subservience to the corporation beyond that point would be unwise."261

259. At 63.
260. F.nn.232-242 and 116-117 supra analysing and finding wanting these two cases.
261. [1947] AC at 62.

This appears to have been written in a state of suspended reality as regards the relationship of the executive to the legislature, and is made harder to digest coming the page after discussion of "necessary implication" in which it was agreed the Crown might be bound by assenting to a law. The Crown has always had the whip hand in the Westminster system as regards the making of legislation, both in fact and theory, and discussion of the legislature compelling the Crown's subservience was idle.

The doctrine of "necessary implication" by reference to entire frustration having been enunciated, Lord du Parcq followed up by saying:

> "....if it be the intention of the legislature that the Crown shall be bound, nothing is easier than to say so in plain words."

It is an unfortunate irony that Lord Goddard CJ, delivering judgment in Rudler only three months later, explicitly referred[262] to the arcane quality of the presumption and absolved the Wiltshire justices from culpability for not recognising it or its effects. While allowing for the wisdom and input of parliamentary counsel, is it reasonable to assume a greater knowledge of legal arcana amongst legislators than the Wiltshire justices?

Lord du Parcq moved to a conclusion by firmly ruling two Scottish decisions as being at variance with the law of England.[263] Somerville v. Lord Advocate and Magistrates

262. Text after f.n.225 supra.
263. [1947] AC at 63-64.

of Edinburgh v. Lord Advocate[264] were analysed by reference to a passage from the latter, the gist of which was that while taxing and penal statutes were presumed not to bind the Crown, a statute "having for its object the benefit of the public generally" would raise the likelihood that the Crown consented to be bound. Of this, Lord du Parcq said:

> "The view expressed in the Scottish cases has not been adopted in England, and does not seem to their Lordships to be in accordance with a body of English authority which, where an ancient doctrine of the common law of England is in question, ought in their Lordships' opinion to prevail."[265]

It must be observed that the passage from Magistrates of Edinburgh was addressing the problem of regulatory statutes. Prior to the four Rent Restriction Act cases of the early 1930's, only five reported English decisions had dealt with regulatory legislation, those cases falling between 1870 and 1903[266], and they have beeen criticised above. Up to and including Baron de Bode in 1848 the English courts pursued a line not unlike that subsequently taken in Scotland. Not only was Lord du Parcq's "ancient doctrine" on shaky ground, but the possibilities flowing from statutes "for the public good" had been discarded, despite "early authority" which was not traced and analysed.

The judgment in its "well-settled proposition of law" was buttressed by reference to Hornsey and Cooper; but the

264. (1893) 20 R 1050 and 1912 SC 1085 respectively, discussed in ch.9.
265. [1947] AC at 64.
266. See f.n.226 supra.

former was a rating case, and the latter one of the handful of arguably deviant English cases on regulatory statutes in the late Victorian, early Edwardian period. Suffice to say, the Judicial Committee slated the argument for the Crown being bound by an expressio unius reference to some sections specifically excluding application to the Crown.[267] With all its defects, its assumptions, paucity of reasoning and lack of historical research, this was to be the locus classicus of the post-War period.

The report of Bombay and the Crown Proceedings Act both appeared in 1947. The act, c.44 for that year, was a first legislative attempt in the United Kingdom to place the Crown on an equal litigious footing with subjects. In the area of statutory interpretation and the consequent determination of persons bound by statutes, the act was timid in the extreme. Paragraph 40(2)(f) provided:

> "Except as therein otherwise expressly provided, nothing in this Act shall affect any rules of evidence or any presumption relating to the extent to which the Crown is bound by any Act of Parliament."

This left the common law on this subject untouched by legislative intrusion, but sub-section 31(1) was much more assertive on the subject of statutory benefit to the Crown:

> "This Act shall not prejudice the right of the Crown to take advantage of an Act of Parliament although not named therein; and it is hereby declared that in any civil proceedings against the Crown the provisions of any Act of Parliament which could, if the proceedings were between subjects, be relied upon by the defendant

267. [1947] AC at 65.

> as a defence to the proceedings, whether in whole or in part, or otherwise, may, subject to any express provision to the contrary, be so relied upon by the Crown."

For all this apparent entrenching of the common law position, sub-section 26(2) of the Crown Proceedings Act did reverse the line of decisions beginning with Edmunds and most recently affirmed in Randall regarding the Crown power of imprisonment for debt continuing despite the words of the Debtors Act, 1869. The portions of that act concerning imprisonment were made specifically applicable to the Crown.

The Crown Proceedings Act, 1947 followed well over twenty years pressure and agitation, beginning with a Parliamentary Crown Proceedings Committee in 1921 which produced a bill in 1927, unsuccessful in its passage.[268] With academic interest aroused in this field, the decision in Bombay and the pusillanimous treatment of statutes and the Crown in an act, the object of which was "to put the Crown, so far as may be in matters of litigation in the same position as the subject"[269] drew brisk fire in legal writing

268. H. Street "Crown Proceedings Act, 1947" (1948) 11 M.L.R. 129.

269. Hansard, Parliamentary Debates, House of Lords, vol.146, no.39, 4 March, 1947, 2nd reading per Viscount Jowett LC. Neither in Committee of the Lords (Parliamentary Debates, House of Lords, vol.146, at col.393, 13 March, 1947) nor of the Commons (Parliamentary Debates, House of Commons, vol.429 at col.2652, 11 July, 1947) was there discussion of the portion of the bill to emerge as paragraph 40 (2) (f), originally embodied in clause 36. However, Mr Joynson-Hicks attacked the Crown's continuing immunity from the Statute of Limitations, saying (Commons vol.439 col.1721) "It seems that that is unfair to the citizen and an improper principal of law." Mr Foster (at cols 1730-1) added an attack on the Crown immunity from the Housing Act, 1936 and the Employers' Liability Act, 1880. Neither speech affected the course of the bill, or subsequent jurisprudence.

during the period 1947-1950. In England the attack was embodied in the writing of Harry Street, Glanville Williams and Wolfgang Friedmann. The charge was however, led by an anonymous writer in the Law Times.[270] This writer's short essay focussed on the latter day importance of the concept of "necessary implication", the destruction in Bombay of the argument that statutes "for the public good" bound the Crown, and the legislative provisions of the Crown Proceedings Act. The writer argued that sub-section 31(1), dealing with benefit of statutes to the Crown, was effective only in allowing a statutory defence to the Crown in civil proceedings when it was not named: "....it remains doubtful whether in other circumstances the Crown can claim the benefit of a statute in which it is not named."[271]

Then followed the outstanding analysis of this topic, to that time or since, Street's article "The Effect of Statutes upon the Rights and Liabilities of the Crown."[272] The theme of this work, substantially reproduced in his book published in 1953, Governmental Liability, was that the role of legislation in the modern period had changed radically, and the literal interpretation of statutes without reference to their policy was defeating the aim of legislators. Statutes now reflected "the positive tasks of government...the promotion of the welfare of the people..."[273], and courts and legislatures must now see to

270. Anon. "The Application of Statutes of the Crown" 4 Oct. 1947, vol. 204 L.T. 186.
271. 204 L.T. at p. 187.
272. (1947-1948) 7 U. Toronto L.J. 357.
273. At p.357.

the demolition of old rules of Crown advantage which no longer had social relevance.[274]

Where the present writer has concentrated on the rise of the presumption to be a prerogative in its own right, the concern over prejudice to improperly understood Crown rights, and the collapse of the historically correct notion that only Crown prerogatives and rights peculiar to the Crown were immune from the operation of general statutes (all transitions in interpretative emphasis which occurred between 1870 and 1940) Street concentrated[275] on the use of the interpretative tool "necessary implication". He dated its first modern appearance to the American decision in US v. Hoar[276], where it was allied with the purpose of the statute as an aid to determining whether government was bound. Street catalogued its pre-eminence in applying the presumption, from Willes J's usage in Edmunds in 1870 and the later much quoted judgment of Day J in Gorton. The present writer is of the opinion that the references to "necessary implication" arise from its standard interpretative conjunction with "express words" and that its manipulation merely reflects the deeper changes of attitude and consequent machinery alterations referred to earlier in this paragraph. The emphasis by Street on Edmunds and Gorton is in accord with this theory : in them is conjoined this linguistic and jurisprudential shift.

Contemporaneously, Street wrote elsewhere of the

274. At p.384.
275. At pp.367-369.
276. (1821) 2 Mason 311.

unjustified retention of the presumption in the Crown's favour in the Crown Proceedings Act [277], while Williams asserted:

> "There is much to be said for abolishing the presumption that the Crown is not bound by statutes...."[278]

Williams was rather more agressive in his book, Crown Proceedings published the same year. Reviewing Cooper, Williams observed "the gap made in the 'rule of law'"; "Ludicrous" appears as a possible adjective for the decision; and Lord Alverstone CJ's judgment is described as "very dark" and lacking in "satisfactory reason".[279] Williams is trenchant on the failure to be moved by the policy of a statute, and the imprecise extension of the immunity to third parties in litigation.[280] The following serves as Williams' summary of the matter:

> "Law reform is in the air, and although the rule of construction is well settled, a few words of criticism of it may not be out of place.
> The rule originated in the Middle Ages, when it perhaps had some justification. Its survival, however, is due to little but the vis inertiae."[281]

Friedmann, published in 1950, amplified Street's concern with the development of administrative and regulatory statutes, to the extent that public welfare was now openly protected by a myriad of statutes creating offences of strict liability, which did not, however, extend to the Crown.[282] Friedmann could see no reason for

277. Street "Crown Proceedings" (1948) 11 M.L.R. at p.134 n.32.
278. Case-note (1948) 64 L.Q.R. at p.193.
279. Williams Crown Proceedings pp.49-50.
280. At pp. 52 and 54, n.64.
281. At. p.53.
282. W.G.Friedmann "Public Welfare Offences, Statutory Duties, and the Legal Status of the Crown" (1950) 13 M.L.R. 24 at pp. 27-28.

regulatory legislation providing penal sanctions not binding the Crown (he had analysed the Australian High Court decision in Cain v. Doyle[283] to that effect), he pronounced Bombay objectionable, and asserted that the two related problems of penal liability of the Crown, and the binding force of statutes, pointed to "the need for a more articulate theory of State." Then followed a sentence that encapsulates the historical reasons for the development of the presumption, reasons that evidence the lack of a paradigm shift in constitutional law of sufficient magnitude to move the lawyers:

> "The historic continuity of the development from the absolute monarchy to modern constitutional democracy, as well as the disinclination of British jurisprudence to formulate general theories of law, has been in the way of such a development."[284]

Friedmann concluded:

> ".....the rule that Crown is not bound by statute except when specifically mentioned or by necesssary implication, is socially and politically objectionable, nor is it legally compelling. It is the exception to the rule which should be developed by the courts, not the rule itself. The application of the rule should be limited to such cases where an overwhelming public interest demands that the Crown should be exempt."[285]

So ended the brief Golden Period of criticism of the presumption: the impact on both courts and parliament in the United Kingdom, and indeed elsewhere was negligible. The presumption wallowed on into the second half of the twentieth century, its seaworthiness having just been attacked, uncertainty existing as to where it had come from, and very little judicial thought being applied to the

283. (1946) 72 CLR 409. See ch.9 f.n.212.
284. 13 M.L.R. p.32.
285. Ibid p.35.

damage that might be done by a maxim adrift, bearing no relationship to the law developing around it, and lacking jurisprudential spirit at the helm.

During this salvo of literary attacks on the presumption, only one reported case of consequence appeared[286]; once again the Crown successfully claimed its immunity from the Rent Restriction Acts; and as in Rudler the Crown actively played the role of Dickensian landlord. Unfettered by the restraints of legislation obviously aimed to better the lot of persons in need of cheap rental premises, the Crown evicted the tenants. At least Nichols was decided in summer, unlike the mid-winter decision and consequent eviction in Rudler.

The Association was a military reserve unit that took the shield of the Crown. It held property for the primary purpose of housing military officers, but when space was vacant, it took in civilians as tenants. The Association gave Nichols, a tenant, notice to quit in terms beyond the bounds of the Rent Restriction Acts. Nichols gave evidence at the trial, when he contested his eviction, that he

286. Territorial and Auxiliary Forces Association of the County of London v. Nichols [1949] 1 KB 35. Exactly six months after Rudler had been decided, Denning J (as he then was) gave brief judgment in Territorial Forces Association v. Philpot [1947] 2 All ER 376, finding on the basis of Clark v. Downes that Crown property was outside the Rent Restriction Acts, so that the defendant tenant did not have the protection of that legislation and could be evicted.

could have rented other premises, and would have, if he had known that he was not safeguarded by the Rent Restriction Act.[287]

Counsel for Nichols argued cogently from the eighteenth century Abridgement concepts. These acts were passed for the public good and prevention of injury to the public and hence bound the Crown unless some prerogative, right, title or interest of the Crown would be divested by their application. That was not so in this case, and so the acts should bind the Crown.[288] Counsel for the Association found the old rubrics

> "of doubtful authority in view of the number of Acts of Parliament passed for the public benefit and for the prevention of injury and wrong by which the Crown has been held not to be bound."[289]

He then proceeded to assert Crown immunity in any case, even if this recent collective authority should be analysed as incorrect, by noting "the prerogative, rights and property of the Crown are all involved .....". The ageing litany had always been "prerogative, right, title or interest", plainly relating to matters exclusive to the Crown and not shared with subjects : property, which the Crown held subject to the full rigour of the common law (particularly after the Crown Proceedings Act made litigation against the Crown possible) had not been hitherto a basis for attracting Crown immunity, but this was symptomatic of the presumption's growth through inexact word usage.

287. At 36-37.
288. At 37-38.
289. At 39.

Counsel for the Association referred to public benefit legislation in Cooper, Gorton, Hornsey and Justices of Kent, but counsel in reply noted that this was:

> ".....because in the context it could not have been intended that the Crown should be bound or because the prerogative was invaded or because there was a pecuniary obligation imposed on the Crown."290

Scott LJ gave judgment for the Court of Appeal crushingly in the Association's favour. The awfulness of the logic more than matched successful counsel's worst endeavours, and added one more flimsy, ill-thought-out report to the illusion of authority buttressing the burgeoning presumption. Making the twin errors of asserting an unargued consequence from counsel's presentation (rather than perceiving the possibility that relatively recent cases might have been wrongly decided), and failing to note a Crown prerogative relating to his example of the Income Tax Act, Scott LJ said:

> "It is difficult to suppose at the present day that any public statute is not in theory at least directed to the welfare of the public; and Mr. Pritt's argument on this point, if accepted, would compel us to say that such statutes as the Income Tax Act, 1842, and the Public Health Acts (none of which are binding on the Crown) are not for the public benefit. But if the ancient rule ever had in fact the wide meaning claimed for it, we can only conclude that it has been 'eaten away' by exceptions."291

To quote Starke J of the Australian High Court in a not dissimilar post-War case[292], well may Nichols and his fellow evictees have declared, in the light of the Crown

290. At 43.
291. At 45.
292. Cain v. Doyle (1946) 72 CLR 409 at 421.

behaviour which ignored the statutes, that the Rent Restriction Acts

> "keep the word of promise to our ear,
> and break it to our hope."

Street had only shortly before this decision suggested that, even in the absence of legislative reform, the position was not beyond hope, as the House of Lords had never pronounced on the subject, and consequently was in a position to set the law on this subject on a socially suitable footing.[293] In fact the House of Lords took two oblique slices at the presumption in 1954 and 1955, but neither decision rested on facts that allowed for a clear and bold analysis of the issue. In the run up to these decisions, in May, 1953 the Privy Council, Lords Porter, Tucker and Asquith sitting on the Judicial Committee with Mr.L.M.D.de Silva, found for the Crown in an appeal from Ceylon (as it then was known). Crown goods were not liable for warehouse rent legislatively provided for, and without even referring to a legislative enshrining of Crown immunity from general statutes (Interpretation Ordinance (Ceylon) s.3), the Judicial Committee opined, without elaboration "...the Crown enjoys immunity normally from statutory provisions."[294]

293. Street "Effect of Statutes" p.382. This was written at a time when House of Lords decisions still bound the House. Street was not strictly accurate, as the House of Lords had decided directly on the presumption once, in favour of the Crown, in the Bishop of London's case (1694) Show 164; 1 E.R. 112, but Shower's report is solely of argument, merely noting the decision in favour of the Crown : see ch.7 f.nn.33 and 34. Cameron and Coomber (f.nn. 63 and 108 supra) had assumed the presumption while analysing which bodies might take the shield of the Crown.

294. AG (Ceylon) v. A.D. Silva [1953] AC 461 at 476.

The first of the two cases to end up in the House of Lords, Bank voor Handel en Scheepvaart v. Slatford, was decided by Devlin J at first instance in January, 1952.[295] At issue was the taxability of income earned on assets held during World War II by the Custodian of Enemy Property, a United Kingdom civil servant. Devlin J noted the agreement between the parties that the Income Tax Acts did not bind the Crown.[296] The dispute was over whether the Custodian received the income for a Crown purpose or not. In the background was the fact that the Custodian was a creature of statute, under which he collected, secured and invested assets : in these matters he was directed by parliament. But the disbursement of assets at the conclusion of hostilities was, it was argued, a matter for direction by the executive government under the Crown prerogative concerning the making of war and peace, as the Trading with the Enemy Act, 1939, expressly preserved the prerogative. Hence Devlin J's reflection on argument, "The two things exist together, the machinery of the prerogative, if the Crown chooses to exercise it, and the machinery set up by Parliament, of which the custodian is the hub."[297]

Devlin J found for non-taxability of the assets, because the Custodian had Crown status, or at least received the income from the assets for a Crown purpose. The second defendant, the Administrator of Hungarian Property, who claimed a share of the assets, and was, like the Custodian,

295. [1952] 1 All ER 314.
296. At 316.
297. At 321.

a Crown employee, appealed. This resulted in the spectacle of the Attorney General and three juniors effectively arguing the Crown case (i.e. appearing for the Administrator and the Custodian) before the Court of Appeal, a case which included the taxability of the income earned on the seized assets. Crown counsel therefore introduced into play that the maxim, the Crown is not bound by a statute unless expressly named therein, was too widely expressed.[298]

Denning LJ picked up this ball with enthusiasm and ran with it. Taking as his text the celebrated words of unsuccessful counsel in Willion v. Berkley[299], Denning moved play away from Alderson B's emphasis on the law being made by the Crown for subjects, not the Crown.[300] Rather, Denning concentrated on counsel's concept that the king "does not mean to prejudice himself", a concept for which he claimed the support of Magdalen College as well as Willion.

298. Bank voor Handel etc. v. Slatford [1952] 2 All E.R. 956 at 969 per Denning LJ (CA).

299. Ibid. The argument is quoted in full in the emphasised portion of text at ch.3 f.n.29. Denning was reasoning this case just four years after Street had published his paper pointing out that this portion of Plowden's report was the losing argument : "Effect of Statutes" p.362-363. Less than two and a half years later Lord Keith of Avonholm noted that the "rule" laid down by Alderson B in Donaldson "... based on Plowden, has not escaped criticism from more modern authority." (Madras Electric Supply Corporation Ltd. v. Boarland [1955] AC 667 at 694). Lord Keith was presumably referring to Street's exposure of Donaldson as being based, asymmetrically, on losing counsel in Willion : see ch. 3 f.nn.29 and 53. Even though Denning had moved away from Donaldson, he was still relying on unsuccessful argument for his reasoning.

300. See f.nn. 47 and 48 supra.

The passage cited has been set out above.[301] The verbs used in Coke's report at this point are not "prejudiced", but "barred" and "excluded", and they were both specifically tied to the regalities of "prerogative, estate, right, title or interest". It was quite incorrect to extend these limited exclusionary concepts to the point that any Crown position or property affected at all by statute was immune from the impact of that legislation, but that became the end product of the "prejudice" argument.

Denning used the word "prejudice" or its grammatical derivatives thirteen times in one and half pages of the All England Reports. This employment had its purpose in answering the question whether the Crown would be prejudiced if the Custodian were made liable to pay income tax. Denning arrived straight at his answer, that in fact the Crown would be prejudiced if it did not tax income which would otherwise be returned to private individuals. He noted that the opposite result was achieved by using the "inaccurate maxim" that the Income Tax Acts do not bind the Crown.[302]

Denning asserted:

> "....the activity must be such that the Crown purposes would be prejudiced unless immunity were afforded to it. This appears from all the cases. It was the basis of the decision in the Magdalen College Case, where there was no prejudice to the Crown...."

The reefs and perils of inductive analysis had ensnared the

301. Denning referred to 11 Co. Rep 74B, but the relevant material runs on to 75A, and has been quoted at ch.5 f.n.80.

302. [1952] 2 All ER at 970.

then Lord Justice. The word "prejudice" appears in none of the reports of Magdalen College. The concept nearest that which Denning was striving to prove was that adumbrated by Coke in Ecclesiastical Persons, but dealing with the same statute against dilapidation by long term leases. Coke had firstly found church leases through the Crown struck down by the statute because they were none of the Crown's business : under the act churchmen had no long term leases they could give the queen.[303] Denning failed to assess the facts of Magdalen College in full.

The act 13 Eliz.I c.10 was, if not a Rent Restriction Act, then certainly a Lease Restriction Act. The Crown was quite as much prejudiced by the act of 1571 applying to it, as it would have been if its sub-tenants and successors in title in Clark v. Downes, Wirral Estates v. Shaw and Rudler v. Franks[304] had had to comply with the Rent Restriction Acts. In Magdalen College the Crown was "prejudiced" by not being able take church leases that it wanted and pass them on to whomever it cared to favour. Furthermore, Denning never asked himself why there was no prejudice to the Crown in Willion v. Berkley. There, the land entailed to the Crown had been granted in reversion to Sir William Herbert, who had sold it to Henry Cock, who leased it to Willion. The Crown was no more prejudiced than in Magdalen College or the Rent Restriction Act cases listed above, but in those

303. Ch.4 f.n.95.
304. F.nn.216, 218 and 224 supra respectively.

latter cases the Crown was held not bound by the acts. In Willion there was of course a residual right in the Berkeley family to the entailed land, but that depended on the application of the statute de Donis. The ultimate tenants in the Rent Restriction cases had quite as much legitimate expectation that their tenancies were protected by universally applicable legislation.

Denning illustrated "prejudice to Crown purposes" by reference to the Austrian Administrator, Bombay and Nichols. The first clearly turned on the Crown purpose of the collection of debts to give effect to a peace treaty, but the other two examples smacked of assuming a conclusion in order to prove it. Certainly they are on Denning's reasoning, as blind to social consequence as the straight "Crown is not bound" school. Denning never explained why it would be prejudice in Bombay for the Crown in right of the Province to have to allow the construction of waterworks on its land in compliance with legislation which it, the Province, had promulgated, empowering a subordinate unit of government to perform the vital task of ensuring urban water supplies and drainage. With regard to Nichols, Denning urged the necessity of a power of eviction in the Assocation, without which "The defence of the realm would be prejudiced", the same reasoning that he had used in Philpot.

The path of "prejudice" was at least more sophisticated than the simplistic maxim of general statutes not binding the Crown, but it rested on policy considerations which literalist technique had been weeding out of statutory interpretation

since the latter half of the nineteenth century. "Prejudice" not only allowed Denning's pro-Government attitudes free reign (possible defence needs in the shape of housing for instructors rather than the actual eviction of tenants), it proved an inadequate analytical tool when he could not fit Clark v. Downes and Rudler v. Franks into his system. The conundrum of third parties arousing Crown prejudice was put aside by noting that the Crown Lessees (Protection of Sub-Tenants) Act, 1952 effectively overruled the two cases.[305] But of course their reasoning remained unchallenged.

Evershed MR had agreed that:

> "....the commonly used formula that the Income Tax Acts do not bind the Crown conceals the true principle, which is that, in the absence of express provision to the contrary, the Crown and the rights of the Crown are not thereby prejudiced."[306]

The bank appealed this decision that income earned on its assets be taxed. The House of Lords found in its favour by three to two.[307] The dissenters, Lords Morton and Keith of Avonholm held that the income was not Crown income or received for government purposes, while the majority, Lords Reid, Tucker and Asquith found that the Custodian was a Crown servant or

305. [1952] 2 All ER at 970-971. Denning's concern for hypothetical defence capacity in the face of present statutory breach and disadvantage to subjects exactly reflects George Croke's unsuccessful argument in Magdalen College (ch.5, f.n.37) that if the Crown were bound by 13 Eliz.I c.10 it would not have property available which it would have otherwise had for defence needs. The obvious answer to this is that the Crown always has sufficient legal power to deal with the property aspects of military emergencies when they arise.

306. At 969.

307. Bank voor Handel en Scheepvaart v. Administrator of Hungarian Property [1954] AC 584.

agent, and though not beneficially entitled to the income, the Crown had sufficient interest under the Trading with the Enemy Act, 1939 to have allowed it to invoke immunity from tax if it so wished. This being the case, the bank could take the benefits of that putative immunity. The word "prejudice" appeared only twice in the lengthy report.[308] The Denning approach had not founded a school of thought, although Heald AG did argue that generally statutes do not apply to the Crown if they "adversely" affect its interests : the Crown would not be bound by anything to its "disadvantage" in an act of parliament.[309]

Russell QC for the bank/appellant was arguing that the Crown, in the guise of the Custodian, was not bound by the Income Tax Acts to pay tax on income generated by the assets: "....the Crown is not bound by statutes save by express mention or necessary implication."[310] The biter was certainly being bitten when private individuals pleaded the presumption in its mechanical simplicity, while the Attorney General was pleading that this maxim (as it was now referred to) was too widely stated.[311]

In argument Russell relied, inter alia, on Coomber to keep

308. Per Lord Reid at 618, and per Lord Keith of Avonholm, dissenting at 637.
309. At 595 arguendo.
310. At 592 arguendo.
311. See f.n.298 supra in Court of Appeal.

the shield of the Crown over the Custodian even if he were not strictly a servant or agent of the Crown. Russell argued that on his functions the Custodian was "an instrument of the executive government fulfilling government purposes, an instrument of the Crown on Crown business."[312] This approach looked to the unity of government, and as it was successful, leaves the possibility that Bombay, if reargued, could be differently decided on the basis of the Municipality performing governmental functions under statutory authority. Such an argument would confront the courts with the one way traffic at present prevailing in respect of Crown personality and the presumption. In Bank voor Handel the Custodian, fulfilling a government purpose, attracted Crown immunity from the Income Tax Acts, but in Bombay the Municipality, carrying out government functions, was unable to bind the echelon of government higher than itself, and so was thwarted in the performance of its statutory duties.

A line from Russell in reply, arguing for the full width of Crown immunity, was intriguing. Noting the restraint in the Trading with the Enemy Act, 1939 on how the Crown might dispose of the assets in question, Russell said:

> "It is irrelevant that the ways in which the Crown could deal with it were in some degree restrained, for any property held by the Crown is held in a way restricted by the law of England."[313]

Quite so. The common law had always applied to Crown

312. [1954] AC at 593 arguendo.
313. At 601 arguendo.

property : why as a matter of general jurisprudence should, for example, the Rent Restriction Acts not bind the Crown, particularly as there was no aspect of prerogative involved.

Lord Reid, one of the majority, opted for a wide application of the Crown's immunity from statute, without finding it necessary to analyse that immunity. In the specific context of the Custodian's relationship to the Crown, he found no "support for the argument that immunity cannot be claimed by the Crown unless the Crown alone is interested in the benefit which it will bring."[314] This was followed by assertions that could create a very wide ambit of immunity from statutes:

> "If an Act of Parliament does not bind the Crown then the Crown can claim immunity from its provisions whether its interest to obtain immunity in a particular case is large or small or direct or indirect."*****
> "....a Crown servant fulfilling a Crown purpose can claim that [statutory] immunity whether or not the resulting financial benefit is to go to the Crown."[315]

The only limitation clear to the eye in this prescription is the reference to a Crown servant having to be involved : these concepts have to be read in the context of Bank voor Handel.

It remains only to note that Lord Tucker approved the Administrator of Austrian Property[316] and Nichols.

The second House of Lords decision on the presumption in this period arose from the sale by the Madras Electric Supply Corporation of its business to the Crown. British

314. At 618.
315. At 619.
316. At 628.

Income Tax legislation provided that a particular tax, in this case amounting to £850,000, was payable if the company had sold its business to "another person" within the meaning of the relevant part of the legislation. The company contested its liability to this taxation on the ground that the business had been sold to the Crown which was not "another person" : the general wording of the legislation did not embrace the Crown, which on this argument, could not be taken to be referred to at all. This submission failed before the trial judge[317], the three members of the Court of Appeal[318] and the five Law Lords.[319] In short, in this situation, the Crown was not at all burdened if the legislation was held to refer to it : it was in fact advantaged by receiving the revenue.

Upjohn J at first instance in June 1953 had the Court of Appeal judgment in Bank voor Handel before him. On that authority legislation that did not expressly refer to the Crown could not prejudice any of the rights of the Crown. Upjohn J then suggested that the wealth of cases on Crown immunity from taxation by virtue of its prerogative indicated that the Crown was not exempt from revenue legislation just because it was not construed to be a person[320] : the prerogative had a role to play.

317. Boarland (Inspector of Taxes) v. Madras Electric Supply Corporation [1953] 2 All ER 467.
318. Boarland v. Madras Electric Supply Corporation [1954] 1 All ER 52.
319. Madras Electric Supply Corporation v. Boarland [1955] AC 667.
320. [1953] 2 All ER at 471.

Argument before the Court of Appeal had the ironic quality already seen in Bank voor Handel[321] of the Attorney General arguing that the "maxim" was too widely stated, and that the Crown was only immune from paying tax under revenue legislation by virtue of the prerogative. Junior counsel went further and said the Crown was bound by the legislation but the prerogative precluded it from actually paying tax.[322] Hodson LJ rested his judgment on the fact that the inclusion of the Crown by this particular provision did not prejudice it.[323]

Argument and judgments in the House of Lords revealed just how complicated and convoluted the law on this subject had become. Tucker QC for the appellant company referred in passing to prejudice, but then tackled head on the Crown argument that only the prerogative functions and roles of the Crown were exempt from the general application of statutes. Tucker argued that only construction excluded the Crown from statutory purview, and that if a statute were construed to apply by virtue of express words or necessary implication, then the prerogative was of no avail.[324] This was perfectly true, but ignored the historical basis of the presumption, of which De Keyser was the true descendant, while the simple modern "maxim" was merely a truncated version of the old presumption referring to the prerogative. Tucker in fact asserted the modern form of the presumption :

321. See f.n.311 supra.
322. [1954] 1 All ER at 57 per Singleton LJ.
323. At 59.
324. [1955] AC at 671 arguendo.

"If the Crown is not named in a statute it is not bound by it."[325]

Sir Lionel Heald QC, who had argued previously as Attorney General in Bank voor Handel and Madras Electric had now been replaced as first law officer by Sir Reginald Manningham - Buller, later Viscount Dilhorne. The new Attorney General moved to correct Tucker's generalisation with an accurate historical assessment:

> "Nor is it established by the authorities that general words in an Act of Parliament are not apt to include the Crown. General words do not suffice to cut down the prerogative ..."[326]

A few lines later the Attorney General continued:

> "The prerogative only arises when the Act, on its true construction, might apply to the Crown, which can then invoke the prerogative in order to defeat the operation of the Act in relation to itself."

This was historically sound in outline, but the use of the work "invoke" led to considerable jostling in the judgments as to the kinetics of the prerogative and statutes : was the prerogative raised by the Crown, or was it applied by the Court as a matter of construction? Manningham - Buller's argument shortly became clear : the prerogative was not applied as a matter of construction. It only mattered if the statute were construed as extending to the Crown. The Attorney-General submitted:

325. At 672 arguendo, and see Diplock QC at 673 arguendo.
326. At 674 arguendo.

> "It is not sought to challenge the proposition that the prerogative can be limited by the express words of an Act, but it cannot be cut down by general words. General words do not bind the Crown, which is not the same thing as saying that they do not include it. Where general words are used the prerogative is not restricted."327

Stamp, following, explained that the prerogative prevailed, not by altering the words of a statute, but by overruling them, so that the Crown is, in the case of revenue law, protected against assessment.[328]

In reply Tucker went to the heart of the constitutional matter:

> "The argument that the Crown is within the interpretation of the Act but escapes from it by the prerogative is contrary to sections 1 and 2 of the Bill of Rights (1 W & M., sess. 2 c. 2)."329

At last, after two and two thirds centuries, someone had noticed the propinquity of arguments for the Crown's dispensing power over statutes to the concept of the Crown being outside the operation of statutes by virtue of the prerogative. Although Lord Reid, with the other Lords, found against the company, he said:

> "I do not think that it has ever been suggested, at least since 1688, that, if an Act in its terms and on its true construction applied to the Crown, its operation can be prevented by the royal prerogative."330

But counsel were agreed that there was some measure of Crown immunity from general statutes. They were only arguing over the quantum of that immunity and its machinery. For all Tuckers' historical attack, his position of the widest

327. At 677 arguendo.
328. At 678 arguendo.
329. At 679 arguendo.
330. At 687.

immunity possible was untenable on an historical evaluation compared with the Crown's submission of immunity related solely to the prerogative.

Lord Oaksey found it unnecessary to determine whether the Crown's immunity from paying tax arose from construction of the statute or from the prerogative. The Crown was a successor in title to the business of the company, and the consequence was that the company had to pay a tax on the sale of the business.

Lord Tucker spoke to the same effect, but did lend support to the position advanced by the Crown, that immunity from statutes was related to specific prerogatives. He said:

> "It is beyond dispute that the Income Tax Acts do not operate to charge the Crown with payment of tax - in other words, the immunity derived from the prerogative has not been affected by express words or necessary implication."[331]

Lord MacDermott found the distinction between immunity based on prerogative or construction to be unnecessary hair-splitting. He pronounced that whatever past views, in 1955 it was "a rule of construction" ..... "that in an Act of Parliament general words shall not bind the Crown to its prejudice unless by express provision or necessary implication."[332]

Lord Reid, though finding against the company, was concerned at the possibilities raised by Crown argument concerning the prerogative.[333] In a page in which he

331. At 691.
332. At 685.
333. See text supra after f.n.326.

referred to "prejudice" three time, Lord Reid made plain his dissatisfaction with the idea of the Crown turning statutes on and off at will by use of the prerogative. He referred inferentially to the Bill of Rights[334] and said:

> "It is not a matter of the king preventing the operation of an Act which extends to the Crown, but of the scope of provisions which prejudice the Crown being so limited that they never extend to the Crown."

On the following page it became apparent that the verb "invoke" when applied to the prerogative concerned him, but he then cited approvingly from Wrottesley J's judgment in Hancock, an interesting selection as it fell amongst a plethora of Rent Restriction cases and the like referring to "prejudice" or the simplified modern maxim: The quotation from Hancock read:

> "... the rule is now well laid down and clear that if an Act of Parliament would otherwise devest the Crown of its property, rights, interests or prerogative, it is not be construed as applying to the Crown unless the Crown is mentioned either expressly or by necessary implication."

Lord Reid further indicated his opposition to the idea of the Crown turning an act on and off in its application to the Crown and affirmed his support for the "old fashioned" presumption as enunciated in Hancock: ".....the real question is what the proper construction is of the statutory provision, taking into account the royal prerogative..."[335]

Lord Keith of Avonholm was the last to address, and demonstrated a grasp of the presumption's history. He knew that Donaldson and its precarious basis in Willion had

334. See f.n. 330 supra.
335. [1955] AC at 689.

recently been criticised, and that the simple "modern" statement of the Crown's immunity from statutes as argued by the company left "all the previous decisions ... unexplained in their reference and reliance on the prerogative."[336]

Then followed a reference to words in a statute capable of applying to the Crown being overridden by the "exercise of the prerogative." His Lordship asserted:

> "The conception of the prerogative, in my view, is of something that stands outside the statute, on which the Crown can rely, to control the operation of the statute so far as it prejudices the Crown."

The use of the concepts "excercising the prerogative" and "controlling the operation of the Statute" seem to have Lord Keith subscribing to the Crown use of the prerogative to turn statutes on or off. However that maybe, in the context of his judgment, "prejudice" was plainly related to existing Crown prerogatives, and the analysis leaves Lord Keith in the "old fashioned" presumption camp.

His reference to "exercise of the prerogative" seems to have led Hogg[337] into thinking that he subscribed to the notion of the Crown's statutory immunity as a branch of the prerogative in its own right.[338] A close reading of Lord Keith's speech makes clear that he thought nothing of the sort : he believed that aspects of the royal prerogative could be raised by the Crown to block a general statute from binding the Crown, not that the Crown's right of immunity

336. At 694.
337. P.W.Hogg Liability of the Crown 1971 p.167 n.3.
338. See text supra at f.nn.223 and 228. The last reference to this concept had been in 1935.

was a prerogative. Similarly, Hogg's reference to Lord Reid is incorrect : he did not refer to the rule as a "prerogative", albeit ultimately a rule of construction.

There were thus now two House of Lords decisions in the field. Neither offered a ringing declaration of principle, but both arose from argument which had the entertaining quality of the Crown arguing against the general tide of the preceding eighty years, submitting that the presumption of Crown immunity should be limited to prerogatives. Bank voor Handel may have widened the possible class of situations in which Crown immunity could apply, without necssarily increasing the possibility of private persons taking that immunity. On the presumption itself, little appeared except that Lord Tucker approved Nichols with its paucity of reasoning and acceptance of the "modern" maxim.

On the other hand, in Madras Electric Lord Tucker accepted the existence of a prerogative in the case of revenue legislation as the reason for the Crown's exemption. Lord Reid plainly saw the existence of prerogatives as the reason for Crown exemption from statutes and referred to a passage to that effect in Hancock, which with Moresby had been one of the few cases since 1870 to rely on the old concepts concerning the immunity. Lord Keith reasoned from history and logic to a similar conclusion that the immunity only worked in the presence of prerogatives.

Madras Electric therefore stands as authority of the ultimate British appellate court that the presumption should not be wide open, as counsel for the appellant company had pleaded, with the Crown immune from all but express or necessary implied inclusion in statutes. That immunity should be limited to "prerogatives", which on the basis of previous learning would have to include "titles, rights and interests", and such immunity might in turn be overcome by express words or necessary implication. However, it must also be conceded that Lord Reid and Lord MacDermott had relied on the concept of "prejudice", raised phoenix-like from the dead in 1931, 370 years after it had won counsel no success, but by 1955 regularly appearing as a steady support for at least some measure of Crown immunity from statutes.[339]

The next eight years produced only skirmishes in this area of the common Law in England. In 1955 the Privy Council found that the express words excluding application to the Crown in the Canada Shipping Act worked to prevent the section limiting damages in the event of liability from extending to the Crown. This was despite the argument of counsel, and a majority of the Canadian Supreme Court, to the effect that the Crown had a "prerogative" to take the benefit of a section limiting liability.[340]

339. See f.n.216 supra.
340. Nisbet Shipping Co Ltd v. The Queen [1955] 3 All E.R. 161, and see P. Brett "The Case of the Statutory Petard" (1956) 29 A.L.J. 635.

In re Azoff-Don Commercial Bank[341] and In re M[342] reflected the same general principle that the Crown was susceptible to control by express words. These two cases in fact followed De Keyser into the heart land of the presumption's origin, that a statute might expressly or impliedly cover the field of a prerogative, in which case the statute prevailed over the prerogative, and the Crown, in pursuing the power or function formerly performed under the prerogative, now had to comply with any terms for performance set out in the statute.

A Privy Council advising in 1962 and a Court of Appeal decision in 1964 both relied on perfunctory argument about the state of the presumption. The former[343], on appeal from Tanganyika, involved counsel conceding that the relevant English legislation did not bind the Crown in England, but trying to match the Bombay test by finding a necessary implication from different circumstances pertaining in Tanganyika, that there the Crown was bound. The Judicial Committee crushed this, and in so doing quoted Bombay, beginning with the fallacious statement "The maxim of the law in early times ...".[344] In the latter case[345], the B.B.C. wished to avoid a tax on profits of trade, and argued, in passing, that the Crown was immune from the

341. [1954] 1 Ch 315.
342. [1961] 1 Ch 328. See B.S. Markesinis "The Royal Prerogative Revisited" (1973) 32 C.L.J. 287 at 304.
343. Premchand Nathu & Co Ltd v. Land Officer [1963] AC 177.
344. At 188. See f.n.255 supra.
345. British Broadcasting Corporation v. Johns [1965] 1 Ch 32.

operation of any statute unless named therein. Willmer LJ accepted this without question[346], although the court was not prepared to extend the shield of the Crown to the Corporation.

In 1963, Lord Denning, now Master of the Rolls, led the Court of Appeal in a finding that depended on none of his preoccupation with "prejudice" from a decade earlier, a preoccupation which had at least led him to express the view that the "modern" maxim was "inaccurate".[347] In Ministry of Agriculture, Fisheries and Food v. Jenkins[348] Denning pronounced the Crown not bound by the Town and County Planning Act, 1947 c.51 "on general principles" : there was no express or implied inclusion.[349] Consequently the Crown did not need planning permission under the act in respect of its own interest in Crown Lands to turn that land to a new purpose, afforestation. Support was gained for this "general principle" from paragraph 87(2) (b) of the act which ensured that Crown tenants had to obtain planning permission, tacitly conceding the common law's extension of Crown immunity seen in Wirral Estates v. Shaw and Wheeler v. Wirral Estates.[350]

In the same year the Court of Appeal made a determination of the widest reach of the presumption of any judgment to that time.[351] Eight telephone instrument

346. At 60. See Diplock LJ at 79.
347. See f.n.302 supra.
348. [1963] 2 QB 317.
349. At 325, Danckwerts LJ taking the same approach at 326.
350. F.n.214 supra.
351. In re Telephone Apparatus Manufacturers [1963] 1 WLR 463.

manufacturers had banded together to enter into an agreement with the Postmaster-General as to the basis on which the eight would, between themselves, supply the telephone instruments required by the government. The eight then entered into an agreement amongst themselves, expressed to be made in consideration of the Crown agreement, this second agreement being concerned with the machinery of how choice would be allocated amongst themselves for a sole supplier, or alternatively the allocation of quotas for supplying the Crown.

This pattern of behaviour had every appearance of collusive trading, with competition subordinated to the welfare of the eight participants. Such conduct could hardly fail to attract the attention of the Registrar of Restrictive Practices and the Restrictive Practices Court, set up under the Restrictive Practices Act, 1956 c.68. Paragraph 6(1)(3) of that act provided that registration of agreements was necessary (with consequent regulation) where two or more parties made an agreement regarding "The persons or classes of persons to, for or from whom, or the areas or places in or from which, goods are to be supplied or acquired, or any such process applied." This paragraph plainly covered the activity envisaged in the two agreements.

Section 20 of the act provided a power in the Restrictive Practices Court to void agreements containing restrictions "contrary to the public interest". Under section 21 all restrictions (such as the agreement that the Crown had to buy telephone apparatus from one of the eight

manufacturers) were deemed to be "contrary to the public interest" unless they fell within certain categories. One of these exempting categories was set out in paragraph (d) as a restriction which was reasonably necessary to enable parties to an agreement to negotiate fair terms for the supply of goods to a person, not a party to the agreement, who controlled a preponderant part of the market for the goods, the subject of the agreement. Such was, of course, the case with the Postmaster - General regarding the second agreement and the market for telephone apparatus, in the days before privatisation of telecommunications.

The eight manufacturers did not register the two agreements, and the Registrar of Restrictive Practices set about trying to impose the act on the eight. It was, however, conceded immediately that the first agreement, between the eight manufacturers and the Postmaster-General, was not affected by the act:

> "... the Act of 1956 ... does not apply to the Crown. This is admitted. It follows that the emanation of the Crown constituted by the Postmaster-General is free to make his arrangements with his suppliers without regard to the prohibition of restrictive practices prescribed by the Act."352

As regards the second agreement (that amongst the eight) the Registrar was successful before Wilberforce J at first instance.[353] The exact mechanics of the decision are not altogether clear, although the final reasoning and result are common sense enough. His Lordship accepted the

352. At 475 per Harman LJ.
353. [1962] 1 WLR 596.

authority of Hancock and quoted[354] the passage concerning statutes not applying to the Crown if Crown property, right, interests or prerogatives would be devested.[355] He then illustrated this approach with the unlikely example of Clark v. Downes. But the heart of Wilberforce J's reasoning lay in his finding no basis for saying that "registration of the [second] agreement would prejudice the interests of the Crown".[356] Under the first agreement, between the Crown and the group of eight, the Postmaster-General's interest could not be put any higher than that a committee be established, but the judge said that how that committee worked under the second agreement was a matter solely for the contractors, with which the Postmaster-General was in no way concerned.

His Lordship confronted the consequences of his decision, referring to the argument that the first agreement imposed a contractual obligation to set up a committee, and that the Restrictive Practices Court might prevent the contractors performing that obligation if they could not take Crown immunity. Wilberforce J found that even if the Court declared the restrictions in the agreement contrary to public policy, and so void, the committee with its secretary would still be in existence, and that was the extent of the Crown's contractual interest, not whether the quota scheme could be operated under the second agreement.

354. At 606.
355. Quoted in text after f.n.334 supra.
356. [1962] 1 WLR at 607.

The Court of Appeal unanimously overturned the decision at first instance, and based its reasoning in large part on the concept of "prejudice" to Crown interest, Willmer LJ employing the word or a derivative eight times, and Upjohn LJ four times. The gravamen of the three judgments was that the Crown would be prejudiced in respect of its rights or interests if the eight manufacturers were prevented from continuing their collusive behaviour and could only provide the name of the successful Crown provisioner from amongst themselves by unanimous vote. If the second agreement had to be registered, then it might be that the Crown would not get what it had bargained for. However, in practice, such an eventuality was not ordained by the second agreement being registered. Nonetheless it was the possibility of that agreement being struck down as contrary to public interest[357], resulting in the further possiblility that the first agreement with the Crown could not be performed as intended, that was at the heart of the Court Appeal's finding.

The irony of argument in the Telephone case was even more extreme than in the Bank voor Handel and Madras Electric cases. It left no doubt as to which party was primarily concerned to obtain the advantage of Crown immunity from statutory regulation. In the words of Willmer LJ:

> "... we found ourselves in a curious situation, in that it was the contractors who submitted that the interests of the Crown (in the shape of the Postmaster-General) would be prejudicially affected, whereas counsel for the registrar was concerned to argue

357. Per Willmer LJ [1963] 1 WLR at 474 and per Upjohn LJ at 482-483.

that they would not."[358]

The Court of Appeal was in fact concerned to save the Crown from being restricted by the public interest provisions of the Restrictive Practices Act, but in so doing the Court had no regard to the public interest invested in seeing that manufacture and distribution were genuinely competitive. This "public interest" consisted of a general concern that the common weal was enhanced by competitive practices. It must have been a particular concern to the manufacturers of telephone apparatus who had been frozen out of dealing with the government by the two agreements.

The first, and fundamental, flaw in the Telephone case is that, given the express statutory consideration of public interest, counsel for the Registrar (the administering arm of the Crown) should never have conceded that the statute did not bind the Crown. This proposition should have been tested, as the Attorneys-General did in Bank voor Handel and Madras Electric. Once the initial proposition was accepted without limitation, it was so much more difficult to get the Court of Appeal to realise that the prejudice that they saw to the Crown was a restraint from allowing eight manufacturers to organise themselves collusively in defiance of the statute.

358. At 473.

The agreements were "presumed to have been entered into for the benefit" of the Crown[359], and interference with the second agreement would "frustrate" the first agreement and so "interfere with the freedom of contract of the Crown."[360] But this was not so, as the Crown could unilaterally choose a supplier in the event of failure by the committee to agree among themselves on a name.[361] This was adverted to by Harman LJ[362], who nonetheless thought that the manufacturers should effectively take the shield of the Crown, because if their agreement were stuck down they would be in breach of contract and liable in damages. This would seem to be a complete non sequitur in the light of the public law issues at hand, which condensed to the question of how far the Crown and those with whom it dealt contractually should be immune from legislation specifically framed for the public welfare. Harman LJ justified his position by reference to the "policy of the Crown", and the supposed advantage to the Postmaster-General "to be relieved of the detailed work of scanning competitive estimates ..."[363]

It is never clear from the judgments in the Court of Appeal which Crown interests are being saved from prejudice by this approach. Save for the reference to the Postmaster-General being relieved of detailed work, it seems much clearer that the manufacturers and not the Crown were being

359. At 475 per Willmer LJ.
360. At 477 per Harman LJ.
361. At 467, clause 4(1) of the first agreement.
362. At 478, and per Upjohn LJ at 480-481.
363. At 477.

spared "prejudice".[364] Fundamental issues in this case were completely fudged. No one asked the simple question of why it was prejudicial to the Crown to be bound by a statute for the better regulation of the entire community. Coke's first line of attack in regard to the statute of 13 Eliz.I c.10 was apposite here also. The primary issue was not whether the Crown was prejudiced but the necessary behaviour of persons in conformity with the statute before they engaged in dealings with the Crown. Just as Coke opined the churchmen had no capacity to grant long leases, to the Crown or anyone else, so the telephone manufacturers had only such capacity to collude before contracting (or in the light of contracting) with the Crown, as was left to them by the working of the Restrictive Practices Act and the determination of the Restrictive Practices Court under that act.

The result of the Court of Appeal's decision was that the discretion vested in the Restrictive Practices Court to determine whether an agreement was in the public interest or not was usurped by the executive government. On the basis of Crown policy, to save the executive labour, the Crown, assisted by the Court of Appeal, effectively dispensed with the Restrictive Practices Act in favour of the eight manufacturers. Well may Lord Reid have referred only eight years earlier to arguments unheard of since 1688. It is

364. At 478 per Harman LJ and 481 per Upjohn LJ. Nearly 350 years earlier Hobart CJCP had justified an ecclesiastical statute as existing "to ease the Soveraign of labour, but not to deprive him of [the dispensing] power." See ch. 6 f.n.27.

unfortunate that no small telephone manufacturer challenged the Court of Appeal decision as Godden, Hales' coachman, challenged James II's dispensing with the Test Act.

The Telephone case is also worthy of comparison with Dixon[365] eighty seven years earlier in the Court of Appeal and the House of Lords.[366] In that case the Court of Appeal had found that a manufacturer making rifles for the Crown under contract was entitled to the Crown's immunity from restriction on the use of a patent. In the words of James LJ:

> ".... what was done was done by the authority, and the express authority, for the use and for the benefit, of the Crown, it is, in my mind, merely saying that it was done by the Crown."[367]

The House of Lords specifically denied this extension of the Crown shield to mere contractors as opposed to servants, agents or officials. However, it is notable that the Lords left extant the concept of the Crown's "use and benefit"[368], which concept was no more than the obverse of the coin of "prejudice". The difference between the Court of Appeal and the Lords was really over proximity to the Crown and capacity for control by the Crown in the provision of "use and benefit" to the Crown.

Dixon was not cited in any of the Crown/statute "prejudice" cases from the concept's resurrection in 1931, but it is illustrative of the trap in the use of "prejudice". "Use and benefit" might come to the Crown with

365. F.n.90 supra.
366. F.n.87 supra.
367. (1876) 1 QBD at 395.
368. (1876) 1 App. Cas. 632 per Lord O'Hagan at 656.

or without control by the Crown, but "prejudice" was like the ripples of a pond. Attention was inexorably shifted from how had the Crown obtained a benefit (was it vicariously through contract, or innately through the Crown's very status) to whether the Crown position was in any sense reduced, irrespective of whether the prejudice arose from the possible limitation of third parties by statutory control so that the Crown could not enjoy the fruit of its statutory immunity.

The Rent Restriction Acts cases and Telephone are perfect examples of the hazard in this approach. In the former, the Crown would have suffered the prejudice of its remainder in a leasehold diminishing to normal market value if the Crown were bound, that is to say the Crown benefit was created by the legislative provision that fixed rents (except for the Crown). In the latter, the Crown prejudice forestalled was that of the Postmaster-General actually having to make a choice between suppliers of telephone apparatus. This situation is not as gross as that pertaining under the Rent Restriction Acts where the Crown position was financially enhanced by freedom from legislative fetters. In the Telephone case the Court merely sanctified the status quo ante in which the Crown was free to save itself the effort of serving the public to the fullest extent (by examining rival tenders) and accept supply as a result of collusion.

Coke's perception and moderation (that mischief addressed by legislation must be blocked up, even though exemption "be for the King's benefit")[369] was effectively dead, and third parties had now only to manoeuvre themselves into a position in which the Crown would be restricted compared with its position prior to the legislation in question in order to be able to don the Crown's statutory immunity.[370] Anthony Brown J, in the majority in Willion, and Hobart AG conceding in Magdalen College[371] had recognised that after the passing of legislation, royal action took place in the context of the newly ordered legislative world : estates were limited and procedures were modified irrespective of royal interaction. But Telephone destroyed this perception, and summed up a century long judicial drift given real motive force over the last thirty of those years by the concept "prejudice". All that now mattered was that the Crown be as unfettered as it had been prior to the passing of any legislation.

After the first flush of reform-oriented writing on this topic, which lasted for three years after the passing of the Crown Proceedings Act, 1947, scholarly commentary in the main retreated from the prescriptive, to the merely descriptive. Maxwell on Statutes in 1953[372] was voluminous in its case law references, but offered no analysis of why

369. See ch.5 f.nn.72 and 77.
370. See ch.3 f.n.42.
371. See ch.5 f.n.44.
372. Maxwell on Statutes 10th ed., 1953, pp. 135-143.

the presumption existed, or indeed exactly what the presumption looked like at the time of writing. The cases simply collected in a vast geological accretion of the preceding nine editions of Maxwell. Coke was cited on statutes for the public good and so forth binding the Crown[373], but the Court of Appeal had swept away such notions in 1949.[374] No reference was made to the new watchword "prejudice".

In the light of the Rent Restriction cases beginning with Clark v. Downes in 1931, their launching of the concept "prejudice", and their reliance on Crown immunity from statutes passing with land in rem (cases referred to in Maxwell), the following extract is eye-catching[375]:

> "The Crown is not bound by section 150, Public Health Act, 1875 (c.55), and, therefore, is not liable for the cost of paving a street on which property in its occupation abuts. [376]
> But, if the tax attached to the land, and not to its owner or occupier, this rule would not be applicable and land charged with it in the hands of a subject

373. At p. 141.
374. See f.n.291 supra. Craies on Statute Law 6th ed. 1963 and 7th ed. 1971 were in the same mould. In the latter edition, at pp. 426 and 439-444 the concepts from Magdalen College were given extensive coverage. It was stated in both 1963 and 1971 that while there was only sparse authority for following Coke, no decisions had denied or overruled him. This was simply wrong in the light of Nichols in 1949. Despite citations of Randall, Edmunds, the Rent Restriction cases and Bombay (7th ed. pp. 424-425) there was no reference to "prejudice" and no analysis of the modern case law against Coke's prescriptions. One pruning for the better occurred between these two editions, with S.G.G. Edgar, editor of both, deleting from the 7th ed. the quotation as authority in the 6th ed. (p.423) of the celebrated passage from losing counsel in Willion at Plowden p.240.
375. Maxwell on Statutes at p.138.
376. Hornsey f.n. 154 supra.

> would not become excepted on vesting in the sovereign [377]."

But no comment was made about the apparent asymmetry of Colchester and the Rent Restriction decisions.

Halsbury[378] was similar to Maxwell, if pithier. The latter reflected the more florid style of texts on statutory interpretation of which it was representative while the former, unlike the rival English and Empire Digest, offered some commentary, if not critique. The demise of Coke's notions of when the Crown was to be bound was noted, as was also the case in Wade's brief coverage.[379] Wade at least explained why the Crown always took advantage of statutes with a correct historical summary:

> "There is no reason why the Crown's exemption from the burden of a statute should prevent its taking the benefit, since the exemption was originally a limited rule for the protection of the Crown's executive powers and prerogatives rather than a rule that statutes did not concern the Crown."[380]

377. Colchester v. Kewney (1867) L.R. 1 Ex 368. The Court of Exchequer (Pollock CB, Martin, Bramwell and Channell BB) said (per Channell B at pp. 380-381), "It may be observed that the effect of holding that the Crown must pay the land tax chargeable on land which it may purchase is not really to tax the Crown, but merely to make the Crown pay the market price for land purchased. If the tax had been previously redeemed, of course the purchase money would have been larger, and the difference between the purchase money in the two cases would be gained by the Crown at the expense of the other proprietors of the district, not at the expense of the public revenue, whenever it purchased lands on which the tax had not been redeemed, if the exemption claimed were to be allowed." Seventy years before the Rent Restriction cases a court was concerned about prejudice other than to the Crown, and even worried over the constitutional position of Crown financial gain other than through parliamentary vote.
378. Laws of England 3rd ed., 1972, Vol.36, pp. 430-432.
379. H.W.R. Wade Administrative Law 4th ed., 1977 pp. 681-683.
380. At p. 682.

However, despite this realisation, he mounted no criticism of the development of the presumption.

The standard texts and digests proffered a melange of the current accepted wisdom without post mortem of centuries old concepts still kicking in their coffin. Assessment of the presumption's social utility was left to a handful of academics who kept alive the flame which Street had lit in 1947 and rekindled with Governmental Liability in 1953. The impact of their combined criticism on court-room lawyers appears to have been exactly nil.

Williams continued his crusading zeal in the Criminal Law published in 1961, the same year that the ninth edition of Megarry's The Rent Acts came out, listing a number of decisions for Crown immunity from Rent Restriction Acts not available in the authorised reports.[381] Brammall editing observed that the Crown Lessees (Protection of Sub-Tenants) Act, 1952 c.40 applied the Rent Restriction Acts to premises vested in the Crown, but then spent more than a page enlarging lacunae in this legislative attempt to keep the Crown within the bounds of statutory reform.[382] Williams, on the other hand, adopted a completely different philosophy as a text writer : intervention. Describing the effect of the presumption as "pernicious"[383], he continued:

381. R.E.Megarry The Rent Acts 9th ed. 1961, p.106 nn. 8,9 and 10.
382. Ibid.
383. G. Williams Criminal Law, The General Part 2nd ed. 1961 p.794.

> "....the proper principle in the modern State should surely be that the Crown is bound by statutes, unless expressly declared not to be bound, or unless public policy requires exemption."384

Hogg devoted thirty eight pages of his 1971 Liability of the Crown to the relationship of Crown to statutes, concluding with four pages of evaluation in which the development of the presumption was tried and found wanting.[385] The leading case, Bombay, clarified the law by applying the presumption to all statutes, but it left indeterminate the concept of "necessary implication". The presumption worked to exempt the Crown from the operation of statutes without any deliberate decision having been taken to that effect by parliament or the draftsman. Both governmental activity and social welfare legislation had multiplied in the preceding century, and because of the presumption, some members of the community were denied the benefit of such legislation as Rent Restriction Acts merely because of their relationship to the Crown. It is true that the Crown may require special powers and immunities to proceed with executive government, but these would, if demonstrably necessary, be granted specifically by parliament. Hogg concluded:

> "In a system of responsible government on the British model the executive branch of government is seldom denied the legislation it needs. But when powers and immunities are granted by Parliament, a powerful tradition exists that their scope be carefully defined. The judge-made presumption, by contrast, affords a crude and all embracing immunity from statute without regard for the purpose of the statute or the need for immunity (except insofar as these matters are relevant to necessary implication.) This wide immunity is

384. At p. 795.
385. Hogg Liability of the Crown pp. 199-203.

> simply not needed by an executive which controls the legisature, and because it is not needed it conflicts with the basic constitutional assumption that the Crown should be under the law. It follows that, in my view, the presumption that the Crown is not bound by statutes should be abrogated by Parliament, or at least confined to statutes affecting the prerogative."386

In the present decade two senior English academics have attacked the presumption. Jackson wrote of the "particularly absurd results" which may flow from the presumption.[387] Zellick referred to his academic forebears to attack the retention of the presumption in the Crown Proceedings Act, 1947. He discerned improvement "if the rule were that the Crown is bound by every statute in the absence of express words to the contrary."[388]

The remaining English cases have not developed the jurisprudence of the presumption, but they do reflect the blanket acceptance of at least Crown immunity from statutes, if not the immunity in persons related to the Crown, seen in counsels' presentations from the period after 1954-1955 when Attorneys-General were appearing in the Court of Appeal and

386. At 202-203. See also C.H.H. McNairn Governmental and Intergovernmental Immunity in Australia and Canada 1978 p.22. The contempt which court-room lawyers are capable of expressing towards academic work is illustrated by the remark of Begg J (as he then was) in Connell v. Commonwealth [1979] 1 NSW LR 653 at 659, when dealing with the law on vicarious liability for military tortfeasors. When referred to Hogg's book, Begg J spurned his suggestions for reform, saying they were "based to a degree upon sociological approaches rather than strict principles of law."

387. P. Jackson "The Crown : Some Recent Proceedings" (1982) 7 Holdsworth L.R. 91 at p.94.

388. G. Zellick "Government Beyond Law" [1985] Public Law 283 at p.287. Zellick cited Hogg as the author of the words quoted, but they are in fact from Williams Crown Proceedings p.53.

the House of Lords to argue limits upon the presumption.[389]

In Wood v. Leeds Area Health Authority[390] Sir John Donaldson, then of the Queen's Bench Division, presided over a National Industrial Relations Court which found that as the Contracts of Employment Act, 1972 was silent about the position of Crown servants "the general rule prevails, namely, that it does not apply to them."[391] The appellant had applied under the 1972 act to an industrial tribunal, claiming that he was entitled to higher wages than he was being paid. The tribunal found that because the act did not extend to Crown servants, in which class the appellant fell, it had no jurisdiction to hear his claim. The court confirmed the tribunal's finding, so the appellant was deprived of legal access for his claim. He had appeared for himself before the court, and as a layman, was hardly in a position to quote Wright[392] or Additions[393] as precedents of statutes for the furtherance of justice binding the Crown. It could not even have been argued that the statute was deflected by the Crown prerogative concerning Crown servants, for that was only of dismissal, not as to terms of employment.

In 1976 Lawton LJ in the Court of Appeal adverted in dicta to the Crown's capacity to take advantage of orders promulgated under the Counter-Inflation (Temporary

389. See f.nn.311 and 326 supra.
390. [1974] ICR 535.
391. At 539.
392. See f.n.41 supra.
393. See ch. 2 f.n.153.

Provisions) Act, 1972.[394] The order in question prohibited increases in rents in the renewal of leases provided the premises were occupied by the tenant for the purposes of a business carried on by him. The Court of Appeal in this case decided that the Crown had to pay the increased rent requested for a new lease, because the work of the Ministry on the premises was not for the purposes of a business carried on by the Crown. The Court of Appeal found that if the occupation had been for "business" the Crown could have taken advantage of the statutory order.

The majority in the successful appeal to the House of Lords, and in particular Lord Diplock in his leading judgment, took a markedly realistic attitude toward "the Crown" and the process of government in the United Kingdom. They were not prepared to sustain mythology to leave the Crown disadvantaged by its different modus operandi : the new rents would have been of the order of 1,000% higher than the old.

The unique quality of some Crown functions, such as immigration control, did not deter Woolf J in 1980 from drawing an analogy between the role of an immigration officer and that of a night club doorman.[395] Where the Race Relations Act, 1968 had explicitly stated that it bound the Crown, section 75 of the Race Relations Act, 1976 made the

394. Town Investments Ltd. v. Department of the Environment [1976] 3 All ER 479 at 489-490, successfully appealed without reference to the point of the Crown taking advantage of statutes : [1978] AC 359.

395. Home Office v. Commission for Racial Equality [1982] 1 QB 385 at 394-395.

general provisions of that act applicable to the Crown "as it applies to an act done by a private person." The court was not deflected from finding that the Commission for Racial Equality could proceed with its proposed investigation of Home Office immigration control methods.

In the last English case available to date on the presumption, the Court of Appeal relied on Clark v. Downes and the indistinguishability of the Rent Restriction Acts from the Housing Act, 1961 to hold the Department of Transport exempt from statutory requirements to keep a dwelling house and its installations in repair and working order.[396] Counsel for the tenant had conceded that the Crown was only bound by express words or necessary implication[397] but hoped to find the requisite implication by reliance on Magdalen College and the concept of a wrong rectifying statute binding the Crown. Parker LJ (giving the judgment for himself and Sir George Waller) found that Bombay had disposed of that classification. However, he went on:

> "Even if the classification still stood, there was no doubt that sections 32 and 33 of the 1961 Act did not come within it.
> There was no valid distinction between the Housing Act 1961 and the Rent Restriction Acts 1920 and 1923 which in Clark v. Downes ((1931) 145 LT 20) were held not to bind the Crown."

This unfortunately says nothing of why Parker LJ thought Clark v. Downes was decided as it was, if it overrode,

396. Department of Transport v. Egoroff [1986] TLR 226.
397. The TLR carries the words "of necessary implication", but the Times report of 6 May, 1986 uses the normal wording.

without necessarily supplanting, the concept of a wrong rectifying statute binding the Crown. Since "prejudice" to the Crown was at the heart of Clark v. Downes, it seems that, at least inferentially, the Crown was now to be spared the rigours of repairing dwelling houses it owned as landlord : such effort would, in this instance, have "prejudiced" the Department of Transport.

The years after 1945 might have seen a turn around in the relationship of statutes and the Crown. The reference to statutory immunity was at least not referred to again as a prerogative after 1935[398], but the concept of "prejudice" put down roots and flourished, to the extent that it was included in the "Crown benefit" provision of the Crown Proceedings Act, 1947, sub-section 31(1). That act revealed a chronic incapacity for wholesale reform. Having as its object the placing of the Crown on an equal footing with subjects in litigation, it expressly enforced the common law inequality in respect of statutes. The paradigm shift which the act might both have represented and brought about was immediately derailed. Court lawyers took their cue not to temper the recent excesses concerning the presumption. The moderate line evidenced in Hancock in 1940 was not developed, although the case was casually cited as support for the extreme version of the presumption.

The 1947 act was not merely pusillanimous in its lack of adherence to a philosophy, it reflected the common law

398. See f.n.223 supra.

penchant for limited and piecemeal reform. In so far as Crown immunity from statutes was recognised as a problem, it was seen in the light of Randall, the last English case to be decided prior to the act. Randall had exposed the embarrassing capacity of the Crown to imprison debtors three quarters of a century after the capacity for such incarceration had apparently been abolished. Instead of addressing the general issue, the 1947 act made the Debtors Act, 1869 as regards imprisonment, apply to the Crown.

But that had become the twentieth century pattern. With widely varying degrees of expedition the United Kingdom parliament moved to deal with some, but not all, the gaps in statutory coverage expressed by the courts' application of the presumption. The Motor Car Act, 1903 and the Bankruptcy Act, 1914 were early examples of the enforced equal application of statutes. The position under the Debtors Act was amended in 1947, and the Crown Lessees (Protection of Sub-Tenants) Act followed in 1952, rectifying the specific issue raised by the Rent Restriction Acts. The jurisprudence of the cases under those acts took root in the fertile soil of the Court of Appeal's approach to the Housing Act : the Crown could no longer evict without reference to statutory protection for tenants, but its wayward habits as landlord continued in its failure to adhere to statutory requirements of maintenance for dwellinghouses.

This legislative intervention, with further offerings such as the Law Reform (Limitations of Actions) Act, 1954

and the Rights of Light Act, 1959 proved a most unsatisfactory coda to the presumption. If the British parliament will not pass a comprehensive reform of the presumption in all embracing terms, then it is at least still open to the House of Lords to address the issue. Jettisoning the entire presumption would be uncharacteristically forthright, but, as will be explained in chapter ten, it is not satisfactory that Crown statutory immunity be merely returned to its former pasture of the Crown's prerogatives and established rights. However, whether a limited return to Cokeian principles is made, or more sweeping reform effected, it is crucial that the presumption be disarmed of its most fearsome weapon, "prejudice", and its scale trimmed so that the status quo ante every statute is not perceived as the Crown's "right" to continued enjoyment.

Irony lards the comparison between the latest English decision on the presumption, Egoroff, and Magdalen College 370 years earlier. The standard text dealing with the Housing Act, 1961 is The Law of Dilapidations[399], in which the only reference to the Crown is the assumption that it owes the normal duties in respect of occupier's liability under the Crown Proceedings Act.[400] But the act 13 Eliz.I c.10 had also been concerned to prevent "dilapidations" : one is entitled to wonder what Coke would think of a community, supposedly devoted to rationality and professionalism in government, which embraces the simple

399. W. A. West The Law of Dilapidations 7th ed. 1974.
400. At p.303.

unfeeling unfairness of Egoroff and its twentieth century antecedents.

The last word might be left with Mr. Foster, speaking in the debate on the Crown Proceedings Bill in 1947. He said:

> ".... the Crown is not touched by statutes which do not mention it specifically. ***** That means that the Crown is not bound by statutes which impose a special responsibility, let us say, for the possession of property and which do not specifically mention the Crown. Let us take a concrete example. The Housing Act, 1936, imposes on landlords the duty of seeing that houses are reasonably fit for human habitation - a very wise and salutary position. It does not affect the Crown. Therefore, if the Crown is the landlord of some property and has broken this very salutary proposition by letting the house while it is not fit for human habitation and as a result the tenant is injured, it will be impossible under the Bill for the subject to bring an action against the Crown. I would like the Attorney General to look at that point, and if I am right, I am sure he will admit that justice demands that the Crown should be affected by that."401

401. Parliamentary Debates, House of Commons, vol. 439 cols 1730-1731.

CHAPTER NINE

THE PRESUMPTION IN THE COMMON LAW OUTSIDE ENGLAND : SCOTLAND, IRELAND AND AUSTRALIA AS EXAMPLES

"Any general immunity of the Crown deriving from doctrines such as 'the King can do no wrong' and 'the King cannot be sued in his own courts' is entirely inappropriate for a modern democratic society. These ideas were advanced by royal sycophants in England, especially in Stuart times, often based on the absurd 'divine right of Kings'. They were embraced by judges during the period when the judges were dependent upon royal pleasure for their continuance in office." per Murphy J, Re Toohey; ex parte Northern Land Council (1981) 151 CLR 170 at 230.

Scotland

The law of Scotland contained no doctrine of royal immunity from general statutes prior to the Act of Union, 1707, although land held by the king as feudal overlord, as opposed to land purchased commercially, was not subject to rating.[1] The nineteenth century saw a small body of case law on this subject in Scotland, covering the range of situations from the Crown attempting to tax or enforce an obligation on a subordinate tier of government, to such a subordinate tier, invested with statutory power, attempting to impose on the Crown. The two leading cases, bracketing the turn of the century[2], were far more restrained in their acceptance of Crown immunity than the contemporary English cases, but argument for the Crown throughout the century is noteable for its extremism.

1. Per Lord Cullen in Lord Advocate v. Strathclyde Regional Council 1987 SCLR 171 at 180, and see Lord Curriehill in Advocate General v. Magistrates of Inverness (1856) 18 D 366 at 372; Lord Deas in Lord Advocate and Barbour v. Lang (1866) 5 M 84 at 92 and argument in Somerville v. Lord Advocate (1893) 20 R 1050 at 1057 and Magistrates of Edinburgh v. Lord Advocate 1912 SC 1085 at 1090.
2. Sommerville and Magistrates of Edinburgh supra f.n.1.

Thus, when Mr. Brice, the keeper of the government's naval store at Leith objected to the store being rated for taxation, counsel argued the broadest immunity for the Crown from the operation of statutes : there had to be express words.[3] In England, the eighteenth century Abridgements and their rubrics for inclusion and exclusion of the Crown would be quoted for some time after this. Nonetheless, the court found that while the king was exempt from personal taxes, land acquired by him according to the law of the land was rateable. This result equated with that in the English Exchequer decision of Colchester[4] half a century later, and was justified, as was to be the decision in Colchester, by emphasis on the position of subjects rather than the Crown : "third parties must not be hurt by the acquisitions of the King; but they would be so in this country, if lands newly acquired by him were to be exempted from cess."[5]

Brice had involved taxation by the Crown. By 1850 there existed a clear line of authority that municipalities, acting under statutory (but general) authority, could not rate Crown property.[6] In 1850 argument for the Crown and Lord Jeffrey's decision both came perilously close to finding the Crown immunity from statutes a prerogative[7], but this was specifically in the context of taxing statutes.

The Glasgow Police Act set about municipal functions on

3. Brice v. Veitch (1810) FC (NS)II 387, at 388.
4. Ch.8 f.n.377.
5. Per the Lord Justice - Clerk, Brice v. Veitch at 390.
6. Advocate General v. Commissioner of Police for the City of Edinburgh (1850) 12 D 456, and cases cited therein.
7. At 459, 460 respectively.

a different basis from that which pertained in Edinburgh. Rather than attempt to raise money by rating, in Glasgow the legislation cast an obligation on property owners to keep the footpaths outside their premises in good repair. The municipal authority in Glasgow proceeded to try and enforce this statutory obligation on Major Barbour, officer in charge of the army barracks in Glasgow.

In 1866 the Court of Session found by three judges to one in favour of the Crown's immunity from performing this requirement.[8] The perilous proximity in Edinburgh of statutory immunity being treated as a prerogative became by 1866 a fait accompli for counsel and Lord Ardmillan.[9] Counsel for the Crown argued the broadest possible immunity:

> " ... in virtue of its prerogative it [the Crown] is not bound by any statute which affects its interests in any way, unless it consents specially to waive its exemption. It matters not what form the burden assumes; there is nothing magical in the word 'tax'."

The majority did not need to go so far in their judgments. Rather, they accepted that an obligation to perform work could not for practical purposes be distinguished from a taxing to pay for the work, so that an immunity from the latter must extend to the former.

Lord Deas was not moved[10] by Lord Curriehill's dissenting concern for the policy of the legislation, that proper footpaths should be maintained. Lord Ardmillan engaged in a completely fallacious analogy between the subject's right to be free of parliamentary taxation in the

8. Lord Advocate and Barbour v. Lang (1866) 5 M 84.
9. At 89 and 93 respectively.
10. At 93.

absence of duly enacted legislation, and the Crown's immunity unless it were named in such legislation : fallacious because it rested on the premise that statutes were made for subjects and not the Crown. On the other hand, Lord Curriehill, alone dissenting, liberally interpreted the requirement that the Crown be named in an act to be bound. The Crown fell within the class of those required to do the work (it was named on the statutory valuation roll as owner) and so was named by implication.[11]

In 1868 the House of Lords determined a Scottish appeal as mirror image to Cameron[12] decided only three years earlier. It was assumed that the Crown was not bound in Scotland or England when not named in a statute[13], but the University of Edinburgh, attempting to claim immunity from a rating statute, was held incapable of taking the shield of the Crown. However, the previous decade the Scottish Exchequer Court had adopted a view concerning a prisoner and the Crown quite different from the English development soon after in Edmunds[14] and its successors of the Crown having a "right" to ignore the working of an act, irrespective of the rights which that act attempted to vest in the entire community.

A poacher named Fraser had been ordered to pay "double

11. At 92.
12. Ch.8 f.n.63.
13. Greig v. University of Edinburgh (1868) 6 M 97 per Lord Chancellor Cairns at 98.
14. Ch.8 f.n.78.

assessment" by way of compensation to the Crown. He defaulted, and was imprisoned as a civil debtor. Under a Scottish Statute (the Act of Grace) pre-dating the Act of Union, the incarcerator in such a position had to pay the gaoler for the prisoner's food if the prisoner were indigent. The prison authorities litigated to claim this money from the Crown, arguing the Scottish position in respect of the pre-Union Act of Grace as follows:

> " ... the Act of Grace ... was a Statute of the Scotch Parliament, in which the King was present, and who must have been held to consent to the Crown rights being effected, where they were not specially exempted."15

This, it will be noted, is exactly in accord with the majority view in Willion[16], and set completely at odds with the English view in Donaldson fourteen years earlier, based on unsuccessful argument in Willion.

Lord Curriehill, with whom Lords Woods, Neaves and Mackenzie agreed, allowed the Crown's immunity from statutory "tax of burden" in the absence of express binding words. He then went on to explain that the imprisoning of debtors was an optional remedy available to creditors, but under the Act of Grace, if they exercised the option they had to comply with the condition of funding an indigent prisoner's food. As Lord Curriehill put it:

> "And the Crown, although it cannot avail itself of the remedy of using such diligence otherways than under the condition which the law annexes to that remedy, is not thereby subjected to a burden or a tax. The Crown's proper rights as a creditor are not interfered with. If the condition is not complied with, and the debtor

15. Advocate General v. The Magistrates of Inverness (1856) 18 D 366 at 369.
16. See in particular Anthony Brown J quoted in text after ch.3 f.n.46.

> set at liberty, the Crown's debt remains entire as before."[17]

This approach harmonized completely with assertions of the English position from the late fifteenth, sixteenth and seventeenth centuries[18], and also the Irish case only four years earlier of Cruise[19], that the Crown took the benefit of statutes subject to any conditions imposed therein.

It had been determined in 1850 that the Post Office building in Edinburgh did not attract rating for the purpose of funding the municipal police force.[20] The Post Office was again the focus of litigation concluding in the Crown's favour in 1893, but the victory was on a narrow ground, with powerful dicta being issued to limit Crown immunity from statutes.[21]

The Edinburgh Police Act, 1879 provided that any person proposing to erect a building, or alter an existing building had to obtain planning permission from a municipal official. There was a monetary penalty for breach, and a municipal court had power under the statute to injunct work on a building until the permit was obtained. In 1891 the Crown commenced additions to the Edinburgh Post Office without the statutory permit, and the municipal court prosecutor petitioned that court for both an injunction against the Crown and the statutory penalty.

17. (1856) 18 D at 372.
18. See ch.2 f.n.222, ch.3 f.n.107 and ch.7 f.n.16 respectively.
19. See ch.8 f.n.203.
20. F.n.6 supra.
21. Somerville supra f.n.1.

Of nine consulted judges, and the four judges advising (comprising the court which made the final ruling) only two, Lords Young and Kincairney (amongst the nine consulted) found unequivocally that the Crown was bound. However, it is apparent that the majority rested entirely on the Crown not being subject to the municipal court's jurisdiction. A heavy stream of dicta flowed through the judgments to the effect that the Crown was bound to comply with this sort of legislation.

Counsel for the Crown had argued two points of particular interest : firstly, this act being of local application had not attracted the attention of Crown officers, and any assent to obligations by the Crown were the result of negligence.[22] Secondly, if the Crown were bound, its officers would be responsible to mere municipal officers in performing their functions.[23] Opposing counsel quoted Broom and Dwarris to the effect that the "modern doctrine" was that general statutes bound the king of "such inferior claims as might belong indifferently to him or to a subject", but they did not impinge on his "ancient prerogative" or "rights which are incommunicable and appropriate to him as essential to his regal capacity."[24] Colchester v. Kewney[25] was then cited : it appears never to have been cited in English cases dealing with this issue.

22. (1893) 20 R at 1055. The haunting refrain of unsuccessful argument by Hobart AG in Magdalen College ch.3 f.nn.53 and 54 referring to the "King's counsel".
23. 20 R at 1055.
24. At 1056.
25. See ch.8 f.n.377.

Counsel warmed to their task with the following words, all too relevant on the eve of a century's collectivist legislation:

> "It was, in truth, a travesty of the doctrine of prerogative to attempt to include within it the appellant's demand. For a novel right would hence forward be part of "the ancient prerogative", viz. a right to disregard all municipal and parliamentary checks against danger, injury, or disease within a community, a right, in short, to use property within the bounds of a city in a manner which could be prevented in the case of every subject of the Crown."26

This was followed by an analysis of the concept of "burden":

> "Now, it could not be said that the exercise of the jurisdiction of the Dean of Guild [municipal] Court involved the imposition of a tax. It was true that in a loose or metaphorical sense it might be said to impose a burden, in that the warrant of the Dean of Guild [permit of the municipal officer] was necessary as a condition of using the property in a particular way; but that was not a tax. If the proprietor did not choose to comply with the condition, preferring to leave his property in its original state, he was not taxed, since his property remained to him unimpaired."27

Of the nine consulted judges, four concurred with Lord Kyllachy that the Crown officers were not subject to the supervision of the municipal administrative/judicial system. Lords Trayner and Wellwood wrote separate opinions to the same effect, and only Lord Young (in a one line opinion) and Lord Kincairney dissented. However, the opinions of Lords Kyllachy, Trayner and Wellwood each explicitly referred to the Crown having to abide by the statutory requirement for planning permission, the Crown succeeding in this litigation solely on the aspect of jurisdiction. Lord Trayner observed that the full application of Crown immunity from

26. At 1057.
27. At 1058.

statutes lay in respect of prerogatives, and the Crown had a prerogative to decline to appear before courts without voluntary submission [this has of course been altered by Crown Proceeedings Acts and their analogues].[28]

As regarded the pith of the case, Lord Trayner castigated as extravagent the respondent municipality's argument that the Crown could avoid the legislative safeguards for health and danger on property:

> "It is not said that the Crown is above the law; it is only said that the Crown cannot be called to answer for its proceedings in the Dean of Guild Court. The Court of Session is competent and ready to deal with questions regarding the Crown's rights when such questions are brought before it."[29]

Lords Wellwood and Kyllachy opined to the same effect.[30] Lord Kincairney, dissenting, noted the applicability of the arguments in this case to "the whole class of statutes made in the public interest, which have been so frequent in recent times; such, for example, as the statutes affecting the public health and local government, in which there are various provisions which might be applicable to Crown property."[31] His Lordship then referred to Bacon's Abridgement on acts for the public good binding the king, and Dwarris to the same effect. He concluded that this was an act for the public benefit and bound the Crown.[32] The dissenter concluded that the municipal court had general competence, and appeal could immediately be brought before the Court of Session. He would not allow the jurisdictional

28. At 1061
29. At 1062.
30. At 1064, and 1066-1067 respectively.
31. At 1069.
32. At 1071.

point to be used to block Crown amenability to the statute for practical purposes.[33]

Of the four judges at final advising, the Lord President (Robertson) and Lord Adam agreed with Lord Trayner's opinion, and Lord M'Laren agreed with both Lords Trayner and Kyllachy. However, both Lords M'Laren and Kinnear were at pains to point out that they found for the Crown solely on the jurisdictional point. Lord M'Laren thought a statutory obligation (generally expressed) independent of jurisdictional enforcement might be binding on a public department, but he did not anticipate any difficulty in practice, "still less injustice":

> " ... because it is not to be supposed that the Departments of State, in expending the money voted by Parliament for public buildings, would refuse to recognise the duty of conforming to sanitary requirements prescribed by Acts of Parliament."[34]

Gorton[35], justifying just such a refusal of recognition to a statutory duty, had in fact been decided six years earlier, but was not reported until 1904. Both Gorton and Somerville contained statements of pious hope in the good intentions of government to see that the spirit of legislation was followed after the courts had signposted lacunae for the Crown to slip through. Such optimism had less legal compulsion than a mere spes in the light of twentieth century Crown activity in the field of housing.

In Somerville, Lord M'Laren concluded by opining that it was undesirable to contemplate the Crown, even in its

33. At 1074.
34. At 1076.
35. Ch.8 f.n.114.

guise of "public service" and "administrative departments" being prosecuted for a penalty. Lord Kinnear did not want the judgment seen as allowing officials of the Crown to disregard building regulations over property which the Crown held in the same manner as subjects held. The Crown could, in his opinion, be restrained from building if it breached the statutory provisions, in a court which had the appropriate jurisdiction.

The consensus was plain among thirteen Scottish judges that the Crown ought to adhere to regulatory provisions as set forth in statutory form. The disagreement amongst this band of brothers resisting the tide of English Crown - mindedness[36] was solely as to the machinery of enforcement : only a superior court could adjudicate the Crown's liability in the majority view. Whether the Crown could be liable to penalty as prescribed in a statute remained a vexed question.

The observations of the thirteen judges in Somerville was not quite the Last Supper of the independent Scottish view of this area of the common law. The decision in 1912 of the three judges sitting in the First Division on Magistrates of Edinburgh v. Lord Advocate[37] provided further dicta buttressing the views in Somerville : it was in reality only dicta in both cases that was the object of the Privy Council's scorn in Bombay.[38]

36. See Wheaton v. Maple & Co. at ch.8 f.nn.125 et seq. decided the same year as Somerville for the simplified presumption as a curial assumption.
37. F.n.1 supra.
38. See ch.8 f.n.265.

Magistrates of Edinburgh was, like Somerville, a contest for control between tiers of government : municipality versus the Crown. The General Post Office building had been the subject of Somerville; in Magistrates of Edinburgh it was to be a building in the Botanical Gardens, which were Crown property. Subsequent to Somerville, the municipal authorities had received new statutory powers in the shape of the Edinburgh Corporation Act, 1906, under which the Corporation could prevent new building within thirty feet of the median line of city streets. However, this act specifically exempted from its terms "every building, structure or work" vested in the Crown.

The Commissioners of Works, as managers of the Gardens, applied to the municipal authority for permission to build the first wing of a new building closer than thirty feet to the median line of a street. The plan presented showed a second wing proposed for similar siting. Two years after the original application the Commissioners returned to apply for permission to finish the building. The Corporation moved to block the erection of this second wing, applying to the Lord Ordinary (Lord Ormidale) to interdict the building work. This the Lord Ordinary did, on the basis that the exemption to the Crown was only in respect of existing buildings presently vesting, not proposed structures. The Lord Ordinary in a two page opinion[39] nowhere referred to the issue of statutes and the Crown. He can only have reached the conclusion that the Corporation was empowered to

39. 1912 SC at 1088-1089.

block Crown building plans if he assumed that the Crown had to comply with, that is to say, was bound by, the general provisions of the act. On the basis of his reasoning with respect to exemption only in respect of existing structures, it would be logical to find the Crown bound in respect of proposed buildings on the basis, albeit unexpressed, of expressio unius.

It was argued for the reclaimer (the Lord Advocate appealing on behalf of the Commissioners of Works) that "... it was a rule of universal application that the Crown was excepted from the operation of any statute in which it was not expressly mentioned [authority cited]. The Crown had been held to be unaffected by bye-laws made by a corporation under the Public Health Acts, [authority cited] and a fortiori it was unaffected by mere building restrictions."[40]

Counsel for the respondent municipal authority replied to the effect that "There was no rule in the law of Scotland that the Crown was exempt from the operation of a statute in which it was not expressly mentioned; and this was especially the case with regard to land such as this, which

40. At 1089. The authority cited for the first part of this argument was variously Maxwell 4th ed., Hornsey, Cooper, Cuckfield, Coomber, Somerville and the 1903 Motor Car Act s.16. For the second proposition Gorton was cited. Somerville was of course not authority for the first, general, assertion, and for the reasons given in ch.8, only Cooper and Gorton furnished anything like general propositions for a rule that the Crown was not bound by general regulatory statutes. The facile citing of Gorton failed to reflect the facts of that case in which the bench adverted to a legislative scheme of inspection which could be applied in the alternative to the Public Health Act.

was not held jure coronae but had been acquired for public purposes from a private owner."[41]

The three judges in the first division agreed with counsel for the respondent on this matter, the Lord President, Lord Dunedin delivering a speech lacking the dogmatic simplicity sought by English judges since Donaldson seventy years ealier. It was this speech which served as the focus for the Privy Council's dismissal of the "Scottish aberration" in Bombay. Lord Dunedin's speech may be condensed in point form as follows:

1. He agreed in general with Lord Kyllachy in Somerville[42];
2. The Crown would never be bound by taxing or penal statutes in the absence of express words[43];
3. A statute for the general public benefit will create a likelihood that the Crown will consent to be bound[44];
4. Such is the case here where the act refers to all land in the city, and the Crown land is not held jure coronae, but has been acquired for the use of a public department;

41. At 1090.
42. At 1090-1091. Lord Kyllachy had been one of the seven out of nine consulted judges in Somerville who had opined the Crown ought to adhere to the statutory prescription, but that the municipal court was lacking in jurisdiction to enforce on the Crown. His essay on the future of the relationship of Crown to regulatory statutes was completely lacking in prescience, in the light of twentieth century case law in England and elsewhere : "But I should doubt whether the Crown will be found to maintain that it can build to what height it pleases, or with what air-spaces if pleases, or with what sanitary arrangements or absence of sanitary arrangements it pleases." (at (1893) 20 R p.1066)
43. At 1091. The Motor Car Act was used as an example with respect to penal provisions. Lord Dunedin's supposition regarding penal clauses was in conformity with successful counsel in Willion in 1561 : see ch.3 f.n.27.
44. At 1091. The object of a statute being "the benefit of the public generally" also harks back to successful counsel in Willion : ch.3 text after f.n.25. Note also Coke's work in respect of pro bono publico : see ch.5 f.n.129 and references given there.

5. However, all legislation is primarily for the subject and not the Crown45;
6. Despite this "presumption" there is in this case "no antecedent improbability of the Crown being bound" (this is a simple assertion) and the probability becomes a certainty when the statute contains a savings clause dealing with Crown rights as is the case here.

However, Lord Dunedin upheld the appeal on the ground that the savings clause operated in respect of proposed, as well as existing, structures on Crown land.

Lord Kinnear was substantially if briefly of the same opinion, although referring to the exempting process claimed by the Crown as its "prerogative".[46] Lord Johnston simply assumed that the Crown was subject to the act, but that in this case the municipal authority was estopped from blocking Crown building plans because of prior notice upon which no action was taken.[47]

Magistrates of Edinburgh in 1912 was to be the penultimate occasion (save for Moresby in 1919) on which a court in the United Kingdom would assume that the Crown was bound by regulatory legislation. In less than a decade inferior Scottish courts had adopted the English line of blanket Crown immunity save in the face of express words or necessary implication. It is difficult to estimate just what occasioned this sea change, but the cases reflecting the change were decided immediately after World War I, and

45. At 1091. The ghost of Donaldson stalks even this judgment otherwise full of sixteenth century commonsense.
46. At 1092.
47. At 1094.

concerned the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, the first of the duo of Rent Restriction Acts that the English courts would deal with between 1931 and 1949 to such alarming effect.[48] Although the decisions in the Sheriff-Substitute's, and Sheriff's courts in Lanarkshire from 1920 and 1921 were not cited in the later English decisions, they signposted the path to protection of the State in the face of regulatory requirements.

Baker's case[49] was an unreported decision of a Sheriff-Substitute to the effect that the Rent Restriction Act of 1920 did not bind the Crown. It was followed a year later by Barlow's case[50], arising from the eviction of a former military policeman by the War Department from a house owned by the Department. Barlow, the tenant, claimed a right to remain in residence under the provisions of the Rent Restriction Act. Sheriff-Substitute Fyfe found the Crown not bound by the act, referring to Baker as a precedent, so that Barlow had no statutory protection against eviction. Barlow appealed to Sheriff Mackenzie.

In a field noted for its Crown bias, Sheriff Mackenzie's judgment sets new standards for abuse of precedent and lopsided reasoning. He opened with a reference to the maxim "Roy n'est lie per ascun statute si il ne soit expressement nosme." The maxim was thought to

48. See ch.8 f.nn.214, 224 and 286.
49. Lord Advocate v. Baker unreported decision of Sheriff-Substitute of Lanarkshire, 17 Dec. 1920, cited in Barlow [1924] SLT (Sh.Ct.Rep.) 72.
50. Lord Advocate v. Barlow [1924] SLT (Sh.Ct.Rep.) 72, decided in 1921.

apply in Scotland in the light of "recent expressions of judicial opinion, (Somerville v. Lord Advocate 20 R 1050, per Lord Kyllachy at p.1064; Magistrates of Edinburgh v. Lord Advocate, 1912 SC 1085, per Lord President Dunedin at p.1091 ..."[51]

The reference to Lord Kyllachy was simply wrong. The words at the cited page appearing to state the rule of Crown immunity related only to the submissions made on behalf of the Crown. Lord Kyllachy said of these submissions, "I am of opinion that this contention of the [Crown] is stated too broadly." The support sought and claimed from Lord President Dunedin was entirely illusory. At the cited page Lord Dunedin made a bow to Donaldson with the phrase that "all legislation [is] for the subject and not for the Crown", but to fail to refer to Lord Dunedin's notion of public benefit as a test of Crown statutory burden was simple intellectual dishonesty.

Sheriff Mackenzie acknowledged the qualifications on the maxim, referring to Bacon's Abridgement on acts for the public good, and the prerogative, interests, and remedies of the Crown as a shield against the operation of general statutes. Cooper was inexplicably pronounced to be in accordance with this latter limitation. The crux of Sheriff Mackenzie's decision was as follows:-

> "Now the purpose and effect of the Rent Restriction Act is to restrict lessors in the exercise of their ordinary contractual rights, and if the Act be held to bind the Crown, public departments may be seriously hampered in their administration of Crown property and in the performance of their public duties. It is not,

51. At 73.

> I think, easily to be assumed that the Legislature intended an Act of this kind to bind the Crown. No doubt the Act may be said to have been passed for the public benefit, as all Acts of Parliament are, but I cannot regard it as an Act made for the public good in the sense of the passage which I have quoted from Bacon's Abridgement ... It would rather appear to me to be an Act which would 'abridge the Crown of its interests,' to use the language of Mr. Chitty."52

It is possible in strict logic to strike down the argument for acts pro bono publico binding the Crown, with its lineage from Willion through Coke, Bacon's Abridgement and down to Lord Dunedin, on the basis that all acts are intended for the public good, and so this classification provides no basis for discrimination. But to attack with logic a 360 year old concept in the same breath that the Crown is defended against having to comply with statutory requirements on the basis of illogical mystique is simply unacceptable. No explanation was attempted as to why the restriction of freedom on a landlord was too great for the Crown-as-landlord, unlike all other landlords. Landlords were going to have to plan for the future in the light of the act and the protection it afforded tenants. It is never clear why departments of State, when acting as landlords, should escape the burden of such planning. Their freedom of action in respect of tenants might be circumscribed, but with adequate forethought applied within the framework of the new legislation, it is hard to believe that departments would be "seriously hampered" in their functions.

The only clue provided by Sheriff Mackenzie to his paradoxical reasons lay in the words "abridge the Crown of

52. Ibid.

its interest." The singularity of the Crown in the Sheriff's vision was brought into focus. The general beneficence of all legislation was assumed, and from that assumption a logical consequence drawn (not, one notes, an imperative conclusion : the Sheriff along with all his judicial brethren was incapable of addressing the possibility that as all legislation was for the common good, all legislation ought to bind the Crown, except perhaps for compelling reasons of absolute necessity.)

On the other hand, the universality of rights being affected by legislation must not be allowed a logical conclusion that might affect the Crown. What were these sacrosanct Crown interests that might be abridged? The Sheriff can only be referring to the Crown's capacity to evict tenants from Crown premises in a summary manner circumscribed by the Rent Restriction Act. This "interest" as it existed prior to the act was in no way a prerogative power or special regalian right : departments of State which owned property let it under general legal conditions applying to landlord and tenants, such conditions being prescribed by common law and statute. It is true that many of the rent restriction cases arose, as did Barlow, from the placement of tenants under war time regulations, but that did not alter the legal basis long term on which such tenants were to be dealt. It is ironic that the Rent Restrictions Acts of 1920 and 1923 were passed to deal with a landlords' market caused largely by the placement of Crown personnel during the Great War, but all the reported cases

show the Crown being exempt from this important social legislation.

In the final analysis the only "Crown interest" being "abridged" by the 1920 act was the Crown's position prior to the legislation to evict tenants at will. Sheriff Mackenzie was protecting nothing more than his brethren south of the border had started safeguarding and would continue to do : the Crown's imagined "right" to the status quo ante the passing of a statute.

The digests remain silent on further Scottish cases dealing with statutes and the Crown, but a decision in the Outer House in 1986 leaves no doubt of how complete was the collapse of turn of the century Scottish mistrust of the English simplified maxim of Crown immunity from general statutes. Lord Advocate v. Strathclyde Regional Council[53] involved an attempt by a municipal council to stop a private contractor working for the Ministry of Defence from blocking a road.

Section 87 of the Roads (Scotland) Act 1984 provided in part:

> " ... where a structure has been erected, deposited or placed on a road otherwise than under or by virtue of an enactment the roads authority may, by notice, require that within such period as may be specified in the notice the person having control or possession of the structure -
> (a) shall remove it; and
> (b) if the authority consider reinstatement of the road to be requisite, shall carry out such reinstatement."

53. 1987 SCLR 171.

The respondent Strathclyde Regional Council served such a notice on Tarmac Construction Ltd in March 1986 in respect of a fence and building materials which the company had placed across a road near a nuclear submarine base on which the company was working. The petitioner Lord Advocate represented the Ministry of Defence, who had instructed the company to perform the work, and the petitioner sought to have the respondent's notice struck out.

The relevant part of the petitioner's action sought "Declarator that sections ... 87 ... of the Roads (Scotland) Act 1984 have no application to any relevant works carried out by or on behalf of the Crown in the exercise of the royal prerogative and in defence of the realm."[54] The report does not carry counsels' arguments, but the capacious judgment of Lord Cullen gives extensive treatment to submissions. In the course of argument it seems that senior counsel for the Lord Advocate, Mr. Bruce QC, was driven to a fall back position of arguing that none of the provisions of the act in question bound the Crown. The standard form, "twentieth century English" presumption was submitted, with the additional claims that (1) the presumption applied with greater force where the legislation contained provisions creating offences (as was the case here for obstructing roads), and (2) if the Crown were bound, then it would be bound in exercising its prerogative powers.[55] The Crown's

54. At 172, and see reiteration on the same page in the grounds of challenge for reference to "the royal prerogative and in the defence of the realm."
55. At 175.

position was thus all or nothing on this submission, which never adverted to the true origin of the presumption in which the king could be bound in his actions by a statute up to the point at which the statute impinged on the prerogative.

In short, counsel's thesis was that the act must be treated in totality, and for the purposes of construction in respect of the Crown, the sections creating offences could not be excised from Section 87 empowering the local council to order the clearing of the road. As to the second point regarding the prerogative:

> " ... if the Crown was subject to the notice under section 87 it could be affected in the exercise of its prerogative powers, for example, when acting in the defence of the realm by marching soldiers along the road. Thus it could not be said that the effect of the Crown being subject to section 87 was merely to affect it in the same sense as the public at large."

This reasoning had a nexus with the totality of statute approach : inflexibility. With the searching eye of a fundamentalist preacher, counsel had detected the lurking situation ethic and abjured the heresy. His approach was identical to that of Denning in Philpot and commenting on Nichols[56] ; potential defence requirements were to be given weight in the scales over the practical social demands of the case in hand. Just as Crown tenants could be evicted now under a power extended to ensure their capacity for eviction in the event of housing requirements for the military in a putative war, so a road could be blocked to the public in the present because it might be required for infantry to

56. See ch.8 f.n.286, and text after 304.

march along at some time in an undetermined future. The hypothesis of foot-soldiers slogging along a road past a nuclear submarine base seems peculiarly inapposite, over 370 years after George Croke unsuccessfully first ran the argument based on the defence of the realm.[57]

Counsel for the respondent Council, Mr. Jones, submitted that section 87, along with other relevant sections of the act, bound the Crown, and that the issue was not the interpretation of the statute, but its effect on the prerogative.[58] Counsel relied on Somerville, principally Lord Kyllachy's judgment, buttressed by that of Lord Kincairney for this central submission. Somerville was hailed as a necessary precursor to an understanding of the later Magistrates of Edinburgh, which served to found the argument that section 87 "formed one of a set of provisions which were intended for the benefit of the public generally."[59]

Respondent's counsel then took the point that, whatever the position of the Crown, the relevant sections could be enforced against Tarmac Construction Ltd because it was an independent contractor and was not entitled to defy statutory provisions in blocking the highway. "The Crown's immunity could not be transmitted to such an independent contractor."[60] Wade and Bradley on Administrative Law and

57. See ch.5 f.n.37.
58. 1987 SCLR at 176.
59. At 178.
60. At 179.

Cameron were called in aid. Dixon, already ignored in Telephone[61], was not cited on this issue of independent contractors and Crown immunities, but counsel's submissions were in accord with it.

The petitioner's junior counsel, Mr. Clarke, in reply submitted that whether the Crown was bound or not by a statute was determined by a rule of construction : binding only occurred by express words to that effect or necessary implication. Counsel then effectively contradicted himself by quoting Lord Trayner in Somerville, and citing Lord Kyllachy to the same effect, that in Somerville the Crown could rely on its prerogative as to which courts it appeared in, and that prerogative had not been curbed by statute so as to affect the result in Somerville. The facts in Strathclyde were then taken to a new position analogous to the claims made for the prerogative : the unique quality of the Crown's defence function. Indeed, this was nothing but the prerogative argument under different nomenclature : the Crown prerogative (other than legal immunities and preferences) relates by definition to unique Crown functions. Counsel sought to distinguish dicta in Somerville and Magistrates of Edinburgh as applying only to situations where the Crown and subjects were in like position. In the instant case, the obstruction of a road was to be presumed to be "in the public interest" and was related to "a defence establishment."[62]

61. See ch.8 f.nn.365 et seq.
62. 1987 SCLR at 180.

This argument, not directly relied on in judgment, requires the robust disposal employed by Woolf J in Commission for Racial Equality.[63] Defence is as unique to the Crown as immigration control, but is capable of analogy. A private concern setting up security measures for itself, or indeed other parties, would not be able to plead hypothetical necessity to justify a breach of the statute.

Counsel concluded with the assertion that Crown immunity applied to Tarmac Construction Ltd because "The Crown could only act through its agents and its immunity applied to those who were acting at its direction."

Lord Cullen opened his judgment immediately agreeing with the petitioner's reply on this aspect of the case:

> "I see no reason why [Crown] immunity should not apply in respect of the actions of Tarmac Construction Ltd so long as they were acting at the direction of representatives of the Crown."[64]

Both petitioner's counsel and Lord Cullen ignored the crucial distinction in the common law between contractors and employees, which rests on the capacity for control; to direct not merely the desired result but how it is to be brought about. The work contracted for in Strathclyde was the fencing of a submarine base : it is very unlikely that the Crown instructed the contractors to block the adjacent road while constructing the fence. The report of the case would seem to indicate the decision to obstruct the road

63. See ch.8 f.n.395.
64. Ibid. See ch.8, text at f.nn.365-368 for a critique of this position.

was taken by the contractors in the interest of their efficiency.[65]

Having determined that the company as contractor could take such immunity as the Crown had, Lord Cullen devoted the remainder of a six page judgment to determining that Scottish Law on this subject was identical with that of England. He saw the leading Scottish authorities, Somerville and Magistrates of Edinburgh as reflecting earlier English decisions with their references to "binding where the act is for the public good" and "binding all except the prerogative." However, Bombay had clearly enunciated the modern English position. Scottish law did not differ from the English in this matter : Somerville and Magistrates of Edinburgh merely missed the contemporaneous thrust of change in the English decisions (for example Gorton, decided before Somerville, was not reported till afterwards). The rule as proclaimed in Bombay should therefore prevail, and the Crown was not bound by this act either expressly or by necessary implication.

An Excursus on the Principle of Government Effectiveness

Unless Strathclyde is successfully appealed it will stand as reasoned authority of at least a single judge that the modern English presumption in its simplified form is the law of Scotland. The references in the case to "defence",

65. 1987 SCLR at 172, the grounds of challenge, para (b).

in the context of defence of the realm do open a remaining point of interest. As a subsidiary argument to the acceptance of Bombay Lord Cullen said:

> "I can, moreover, conceive circumstances in the light of which the Crown might well have been opposed to consenting to be bound by its terms. For example, if the Crown had been bound, it would have meant that the Crown would have exposed itself to the risk of being required by a roads authority to remove structures which had been placed temporarily on the road in order to carry out some manoeuvre in defence of the realm."[66]

His Lordship added that this was merely an illustration relevant to the construction of the section, and that counsel for the petitioner had not contended that the Crown was exempt from the operation of section 87 because its activities on the road were in defence of the realm.

The hypothesis cited by his Lordship, immediately before this statement of extenuation, of a possible future "manoeuvre in defence of the realm" is all the more remarkable.[67] Bruce QC had led this hypothesis ; his junior Clarke referred to it rather elliptically by talking about the road blockage occurring in connection with "a defence establishment"[68] and so being in the "public interest."

This raises the utility of references to the prerogative in this modern context. If the modern simplified presumption is to be applied, then references to the prerogative have no place. If a return were made to a

66. At 184.
67. See text after f.n.55 supra, 1987 SCLR at 176.
68. See f.n.62 supra.

more narrow ambit of Crown immunity from statutes, would it be satisfactory to discuss the prerogative as a point of limitation? In the past it has meant unique regalian rights and powers and now it really refers to necessary governmental powers, most obviously defence, although the array of "prerogative immunities" in the law must be remembered. It may be appropriate to look to the law of contract for an analogy to make the Crown's position more suitable for modern conditions. "The principle of Government effectiveness"[69] is applied to limit a government's capacity to bind itself contractually so that it cannot perform necessary discretionary functions under statute or general executive power.

Statutes concern general and public obligations, while contracts raise private obligations, but in both situations the commitment raised in a government may well be at odds with a discretionary governmental power. A tightrope must be walked between imposing an over-riding obligation or finding the inherent governmental power which inevitably undermines even the capacity on the part of government to enter into fresh commitments. In the words of Mason J (as he then was) in Ansett Transport Industries (Operations) Pty Ltd v. The Commonwealth :

> "Public confidence in government dealings and contracts would be greatly disturbed if all contracts which affect public welfare or fetter future executive action were held not to be binding on the government or on

69. M. Aronson and H. Whitmore Public Torts and Contracts 1982 pp.194-202, citing Mitchell as the originator of the phrase. The following commentary should be seen in the context of the criticism of Duke P's state-mindedness in the Loredano, see ch.8 f.nn.199 and 200.

public authorities."[70]

The analogy is clearly not on all fours : the Australian High Court was wrestling in that case with a contract supported by statute which intruded into a discretion to be exercised "in the public interest or for the public good."[71] Nonetheless, the search for balance is there plain to see. When should specific obligation on government restrict a general power or capacity in government; and in determining how far government can be restrained, should the intrusion into a general power, such as defence capacity, be actual to the case, or merely potential? It is the writer's submission that a limited solution to the issue of statutes and the Crown might be found by looking to the "principle of Government effectiveness", so that the Crown could only plead immunity from the operation of a statute if its effectiveness to govern were substantially impinged upon, and such limitation of capacity were real on the facts of the case, not merely a hypothesis. The machinery in a particular act should always be examined to determine the extent and reality of clashing interests. Under sub-section 59(2) of the Roads (Scotland) Act in Strathclyde, the Crown could have sought written permission for the highway obstruction.

The position of contractors with the Crown could also

70. (1977) 139 CLR 54 at 74. His Honour was dissenting from the majority view, which was that a contract, authorised by statute, could be upheld to the point of fettering executive power. The dissent was technical, and related to the special facts of Ansett.

71. At 75 per Mason J.

be more rationally approached by looking at, if not analogy with, private obligations that affect the government. In Telephone[72] the Court of Appeal specifically adverted unfavourably to the possibility of damages running against a supplier unable to take Crown immunity and so incapable of fulfilling a contract requiring breach of a statute. The fact situation in Strathclyde was similar on this matter. Telephone and Strathclyde involved a contract between Crown and private entity, dependent at least in part on the Crown's immunity from a statute. Of the simpler fact situation involving only a contract with the Crown, which however intruded on a government power, Aronson and Whitmore wrote:

> "There are powers of a regulatory nature (akin to the legislative power) which are required to be exercised continuously again and again for the benefit of the public ... power to control and regulate roads [ironically in Strathclyde a power vested in a subordinate level of government], open spaces, public amusements and so on ... It is clear now from the cases that contracts may be entered into which impinge upon the future exercise of these powers for the public good. But surely it is no answer to say that the contract never was a contract because of the fettering of the power. The contract should be recognised but such a contract should never be enforceable by way of injunction or by order for specific performance because that would fetter the future exercise of power. Damages would be an appropriate remedy, however, and the award of damages would support the idea of government fairness."[73]

Going to the decision making process facing a court having to choose between private obligation and exercise of public power (although not discussing actual as opposed to potential clashes), Aronson and Whitmore continued:

72. See ch.8 text after f.n.362.
73. Aronson and Whitmore Public Torts and Contracts p.200.

> "When do [the courts] decide that there is an overriding consideration of "public good" which will rule out injunctive relief or specific performance. In some cases the answer might be obvious. This would be so when the "public good" cannot be seen to favour one method of exercise of power over another, or where there is an obvious and provable attempt by the public authority to escape the consequences of a contract which has turned out to be unfavourable. In both these cases the contract should be specifically enforced. This might involve a court in examining motives or purpose but this is done regularly in the judicial review of administrative action ...
> *** Finally, it should be repeated that under current theory a contract which fetters future exercise of powers for the public good is void and thus the doctrine of frustration can have no application."74

There can be no pretence of easy comparison between private, contractual, obligations on the Crown, and those that flow from statute. However, in assessing whether the Crown should be bound by statute, similar questions of adjudication may arise, for example, in the broader context of choosing between adherence to a specific statutory regime or permitting freedom from restraint in the interest of a supervening governmental power. The writer's thesis is, in short, that the Crown's position vis a vis every statute, should, in the absence of more elaborate change, be determined on the facts of the case, the Crown being bound unless a court finds the actual, not hypothetical, requirements of "governmental effectiveness" or "executive necessity" to override the benefit to the public in the Crown adhering to the statute.[75]

74. Ibid p.202.
75. The distinction between the hypothesis in Cooper (ch.8 f.n.163) and the reality in Chare (ch.8 f.n.169) serves to illustrate the point. Under the regime prescribed here, a court could well have found for the Crown's immunity in Chare.

As regards contractors with the Crown in the Telephone and Strathclyde situation, if the contract cannot be performed as anticipated it seems most unfair that damages should automatically run against the private entity. Motive might be an issue in determining damages : if the contractor engaged with the Crown specifically on the understanding between the two parties that a statute could be flouted by using purported Crown immunity as a sword and not a shield, then the contractor should not be in a position to claim damages. If he acted solely on Crown advice without being consciously aware of relying on purported Crown immunity, his claim for payment or damages might have more weight (but see next paragraph).

If the contract becomes not merely more difficult and expensive to perform, as it would have in Strathclyde if the Crown had been bound by the Roads (Scotland) Act, but becomes impossible because of a statute barring the path to performance, the question will be whether the contract is frustrated, or simply unenforceable for illegality.[76] This will reduce to the question of whether the statute came into force before or after the contract came into existence. If afterwards, there exists supervening prohibition which goes to frustration. If, as in Telephone and Strathclyde, the statute preceded the contract, the effect of this antecedent prohibition creating illegality will depend principally on the state of knowledge of the private contractor (the Crown is hardly likely to be able to plead mistake of law).

76. G.H. Treitel The Law of Contract 6th ed., 1983 p.668.

The case law indicates little likelihood of the contractor enforcing the contract for payment or damages, but equally he should be free of Crown attempts to claim damages against him.[77]

Scottish Commentators

Scottish commentary upon the presumption is taken by later writers to begin with Mitchell in 1957.[78] He traced the less than close embrace of nineteenth century Scottish judges for the presumption, particularly as it developed late in the century. Noting that the Privy Council in Bombay had distinguished between English and Scots law in this respect, Mitchell concluded:

> "In view then of the manner and causes of the reception of the doctrine into Scots law, there seems to be no reason for the further reception of the broader doctrine, and the authority of Magistrates of Edinburgh v. Lord Advocate should be regarded as undiminished."[79]

Mitchell's thesis was that the presumption had crept into Scots law after the Act of Union in 1707 had prescribed the Crown's financial advantages in Scotland to be the same as in England. As a result, the Crown in Scotland began claiming immunity in respect of Crown property from revenue statutes designed to furnish local government units with income. This claim of immunity was the thin end of the wedge. The "broader doctrine" referred to by Mitchell above was the Bombay simplified maxim.

77. Ibid pp.364-366.
78. J.D.B. Mitchell "The Royal Prerogative in Modern Scots Law" [1957] P.L. 304 at pp.310 to 315.
79. At p.315.

A decade and then two decades after Mitchell, Walker advanced the proposition without elaboration that the Crown was not "bound by statutes unless the particular statute clearly makes the Crown liable."[80] This represented a complete overthrow of the Scottish case law by the reworked English maxim, and was made all the worse by citing Somerville and Magistrates of Edinburgh as authority.

In the 1987 Session Cases Law Reports at the conclusion of Strathclyde[81] appears a brief Commentary. The writer reflected on the development of the presumption in Scotland, noting that Lord Dunedin in Magistrates of Edinburgh had referred (in accordance with Scottish authority) to possible distinctions between land held in right of the Crown, as opposed to that merely purchased for a public purpose, while also discussing the nature of different statutory obligations and their possible impact on Crown powers and interests. The writer doubted that Lord Dunedin's dicta coped with a distinction between the different fact situations of a statute impinging on Crown activity carried on in common with subjects, and a Crown activity exclusive to the Crown "and which may require to be exempted from the statutory rules that apply to the public at large."[82]

The writer continued:

> "Today there is little doubt that the Crown should not enjoy as broad an immunity from statutory obligations as the rule of English law permits. But it may be commented that the legal overkill that exists in

80. D.M. Walker Delict 1966, p.75, and to the same intent in Principles of Scottish Private Law Vol.I 1975, 2nd ed. p.433.
81. 1987 SCLR 185, by A.W.B.
82. At 186.

> respect of this and other aspects of the Crown's position is better remedied by the legislature than by judicial decision."

The present writer wholeheartedly concurs with the first of these statements, but is not so sure that legislatures are in general disposed to alter the prevailing position. The question of suitable machinery for change will arise in the final chapter of this thesis.

The latest commentary on the presumption in Scotland has been prepared for, but not yet published by the Stair Encyclopedia. The author, N.J. Adamson QC[83] was plainly not entirely accepting of the Strathclyde surrender. While referring to the shibboleth that legislation was made for the subject and not the Crown as the source of the English rule[84], Adamson opined that "the English prerogative doctrine introduced in relation to fiscal matters does not necessarily extend to other kinds of statutes."[85]

Adamson noted the disapproval in Bombay of Lord Dunedin's dictum in Magistrates of Edinburgh as a statement of English law, but thought the different evolution in Scotland and England on this topic to be expected given the different histories of the prerogative.[86] The crucial passage in this critique then follows:

> "There may still be room for development in a suitable case in the direction of modifying the rigidity of the English criterion of 'necessary implication' by reference to the more flexible Scottish criterion of 'no antecedent unlikelihood'."

83. With whom the present writer was put in contact by the Scottish Law Commission, and who was kind enough to provide a draft of his work for the Stair Encyclopedia.
84. N.J. Adamson, as yet unpublished material for Stair Encyclopedia, para 52.
85. Ibid.
86. Ibid.

This has the superficial appearance of a wistful desire to exchange the rigid objectivity of the English test of "necessary implication" for the "soft" subjectivity of "no antecedent unlikelihood". Given that this was written after Strathclyde was decided, one could be forgiven for hearing, in echo from the eighteenth century, the tough-booted tramp of Cumberland's troops imposing English authority on a myth of the king over the water. But a footnote reference to the above quoted sentence reveals that Adamson has not been dreaming a Celtic fantasy of preserving Scottish law against the incursions of the southern neighbour. The aspiration is, in the light of the analogy cited, on a grander but more realistic scale. As the Scottish law on Crown privilege over documents, less Crown-biased than in England, finally prevailed in the House of Lords as the law for the United Kingdom, so the Scottish approach of "no antecedent unlikelihood" might temper the rigors of the English approach.[87]

Adamson noted the profusion of devices for either applying statutes to the Crown, or, in Scotland, ensuring by express words that the Crown remained immune. The text is also of interest in citing Dixon on the position of contractors[88], a case deserving of greater discussion.

87. Adamson n. 134. It was observed in chaper 8 that the presumption still awaited a clear exposition by the House of Lords. Adamson's submission that Strathclyde might be distinguished as relying on the prerogative of defence does seem optimistic : see text after f.n.66 supra. In Strathclyde Lord Cullen embraced Bombay open-armed, irrespective of defence.

88. Adamson n.140.

Scottish law regarding the presumption is thus poised in an interesting position which may only be resolved by a Scottish appeal to the House of Lords, and then preferably in a fact situation lacking reference to the prerogative. If Strathclyde is accepted as authority, the English maxim may be said to have swallowed the Scottish approach, but Somerville and Magistrates of Edinburgh are still technically superior authorities to Strathclyde, and could serve as the springboards to a House of Lords appeal. To influence the law for both England and Scotland, such an appeal would have to be mounted with great persuasion and tenacity to overcome the apparent weight of a century's dull precedents. Both the history of the presumption and the sociological reality of its application would need to inform argument.

Ireland

Litigation involving the presumption and Irish circumstances stretched back at least to Pilkington v. Bathe[89] in 1441, but that case was decided in the Exchequer Chamber. R v. Cruise[90], decided in the Irish chancery court in 1852, to the effect that the Crown had to comply with the terms of a statute to obtain its benefit, was the first of a small number of cases in the Irish courts reported on this topic.

89. See text after ch.2 f.n.38.
90. See ch.8 f.n.203.

The Irish Master of the Rolls had to deal with a most unusual defence based on the presumption in January 1900.[91] The Corporation of Drogheda had received land from James I in 1619 specifically to generate income of L 54 per annum to be distributed in perpetuity to church personnel. In 1895 the Corporation stopped making the payments, contending that under the Irish Church Act, 1869, the annuity payable by the Corporation vested in a Commission set up under this act. The Corporation was hoping to claim that its benefactor, the Crown, was bound in respect of this annuity, so that the Corporation as recipient and distributor should be consequently bound in respect of the payments out of income generated. It was true that the preamble referred to the Queen's interest in church offices being taken over by this act, but the Master of the Rolls noted that in the relevant section "the Crown is not named" and "the question is, whether in any other part of the Act the Crown is named in such a way as to bind it, and so vest the annuity."[92]

The Corporation's defence was entirely misconceived, as the grant and annuity were not the sort of property named in the act. It was, however, an interesting attempt at a party other than the Crown attempting to manipulate the Crown's relationship to a statute. The case presumably arose from a Roman Catholic Corporation trying to stop payment of the annuity to the Anglican vicar of the church nominated in James I's grant.

91. AG v. The Mayor of Drogheda [1900] 1 IR 404.
92. At 414.

The presumption in twentieth century Ireland has followed a predictable pattern and path, through Bankruptcy Acts, limitations and tenancy protection. The pattern was in no wise broken by Ireland's independence and progressive moves to republican status. The bulk of the reported cases revolve around the activities of the Land Commission. In re Maloney, a Bankrupt[93] Johnston J found that the simplified English maxim could be relied on by the Land Commission, acting on behalf of the Minister of Finance to defeat the priority provisions of the bankruptcy legislation. The same judge found the Minister of Finance not statute barred in his ability to effect a set-off, as the Local Government (Ireland) Act, 1898 did not bind him as representing the State.[94]

Two cases in 1938 and another in 1945 dealing, at least in part, with the Irish rent restriction legislation (Increase of Rent and Mortgage Interest (Restrictions) Act, 1923, analogous to the United Kingdom legislation of the same year) were the remaining reported decisions on the presumption in Eire. In Ruane[95] and Cork[96] it was accepted on the basis of English precedents such as Clark v. Downes and Wirral Estates v. Shaw that the 1923 rent restriction legislation, if unadorned, would not bind the State. But paragraph 4(1)(e) specifically exempted Government

93. [1926] IR 202 at 206.
94. Galway County Council v. Minister of Finance [1931] IR 215 at 232.
95. Irish Land Commission and Board of Public Works v. Ruane [1938] IR 148.
96. Cork County Council v. Commissioner of Public Works [1945] IR 561.

Departments from the act's general restrictions on eviction, provided that the premises were to be used for a statutory purpose. In Ruane Johnston and Gavan Duffy JJ held that the tenant's family (the defendant himself having died before judgment) could not be evicted from premises owned by the Board of Public Works, as the house was not required for a statutory purpose, and in the light of the exempting section, Government Departments did not necessarily take the "shield of the State" amounting to immunity from statute.

Cork involved a more complicated, rating question. Murnaghan J, who had agreed with his brethren O'Byrne and Black JJ as regarded the Commissioner of Public Works as landlord under the 1923 act, dissented and found the State bound by the provisions of the Local Government (Rates on Small Dwellings) Act, 1928. Murnaghan J quoted from one of his earlier judgments dealing with the 1923 legislation[97]:

> "I think that our legislature did not wish to depend upon any shadowy prerogative and wanted to make it clear that Government Departments were bound by the Rent Restriction Acts, and that the Legislature in this connection was thinking of Government Departments as landlords."

In other words, Murnaghan J would not accept the ex abundante cautela argument which prevailed in England. He further could not believe that the legislature intended to deprive local councils of rates from cottages owned by the State.[98]

On the other hand, O'Byrne and Black JJ[99] each decided in favour of State immunity from the operation of the 1928 act by reference to the precedent of the first common law

97. Cork at 575, quoting from Fitzsimons v. Menkin [1938] IR 805 at 815.
98. Cork at 574.
99. At 577 and 587 respectively.

republic, the United States, and US v. Hoar.[100] J.M. Kelly, commenting on the status of the presumption in republican Eire by referring to the State's "prerogative right not to be bound by the statutes of its own Parliament"[101], noted the broad reliance of these two judges on the American precedent rather than Article 49 of the Irish Constitution vesting in the Irish Government all "powers, functions, rights and prerogatives" previously available to wielders of executive power in Eire. The reference to the presumption as a "prerogative" in this text occurred over thirty years after the last judicial utterance to that effect in England[102], but Kelly was not alone in this regard amongst text writers outside England.

Northern Ireland

The post-World War II period produced two reported cases concerning the presumption in Northern Ireland. The first, Morton and others v. The Air Ministry[103] revealed the weakness of statutory provisions of some clarity when confronted with a determined judge. The Trade Disputes and Trade Unions Act (Northern Ireland), 1927 provided that no "local or public authority" should in any way discriminate between employees on the basis of the presence or absence of union membership. Morton was amongst those employed as

100. (1821) 2 Mason 311.
101. J.M. Kelly Fundamental Rights in the Irish Law and Constitution 2nd ed., 1968, p.326, and see p.325.
102. See ch.8 f.n.223.
103. [1946] NILR 136.

skilled labour in a Government aircraft factory during the war who had not come via the usual union/apprenticeship route. At war's end he and others like him were dismissed to make way for new union trained workers. Morton argued that the Government, running the aircraft factory from which he had been dismissed, was bound by the anti-discrimination legislation, and so incapable of sacking him for being a non-unionist.

Black J adopted the standard simplified English maxim[104], but as is so often the case with the presumption, produced additional reasons for his decision. He referred to the Crown's "exceptional and privileged position" in respect of employment[105], without actually referring to it as a prerogative. But a statute dealing with employment conditions would have to refer to the Crown clearly for the Crown to be bound.

The next impediment raised was that of a subordinate echelon of government attempting to bind a superior. This echoed on a grander scale the English and Scottish cases dealing with rates imposed by councils on Crown property, and more proximately, the problem of council engendered by-laws attempting to bind the Crown.[106] Black J thought that in the absence of very clear intention, he should be slow to find an act of the Northern Ireland Parliament to have the

104. At 141-142.
105. At 143.
106. Note that in both Cooper and Chare (ch.8 f.n.169) the head act did not bind the Crown. The real test regarding tiers of government would come if a municipality, acting under a statute binding the Crown, attempted to create by-laws which named the Crown as bound.

scope and intention of interfering "with the administration of the great departments of the Imperial Government ...".[107] He did not state whether such legislation was within the competence of the subordinate legislature, but the issue adverted to is cognate with that in federations : do subordinate levels of government have the constitutional capacity to bind superiors? This is the major question to be answered before the entrails of a statute are poked over for signs as to whether an intention to bind either or both subordinate and superior tiers of government is evinced.

Black J returned to the theme of protection for the unspoken prerogative, and concluded against the Crown in the form of the Air Ministry being bound. It was free to discriminate against employees, contrary to the terms of the statute.

The remaining case, Minister of Agriculture v. Mackle[108], involved a fact situation more extreme than a struggle between tiers of government, or even the situation in the Swift[109] in which different echelons of the Crown were locked in suit with each other. Mackle involved an official of the Ministry of Agriculture lawfully seizing cattle under import restriction regulations, only to be met with a claim by the sometime owner, Mackle that another official of the same Ministry had purchased the cattle from him prior to the purported seizure. The Ministry thus had two separate claims to the cattle, but Mackle succeeded in obtaining his purchase price in a case stated to Lord

107. At 143.
108. [1952] NILR 161.
109. Ch.8 f.n.8.

MacDermott CJ and Curran J. He successfully argued that property had already passed to the Ministry at the time of the attempted seizure.

One would have thought no further argument or reasoning necessary, but in conformity with a fact situation suitable for Spike Milligan's Puckoon, the Chief Justice proceeded to explore whether the Crown could, in effect, seize its own property. He decided it could not because the relevant statute empowering seizure showed no intention to bind the Crown.[110] This finding must have been unnecessary as Mackle was entitled to payment if seizure took place after both the contract with and delivery to the Ministry. The legislation did not provide for seizure to have a "retrospective" effect, i.e. the imported goods were not deemed illicit at the point of entry and incapable of sale. But this reasoning provides one of the few justifiable if unnecessary instances of a third party arguing the Crown's immunity from statute.

Australia

English common law had been translated to Australia's shores for just over a century, when the first reported decision on statutes and the Crown was given by an Irish born product of Trinity College, Dublin. The decision in

110. At 165. The fact situation concocted by the Chief Justice was at least benign, unlike the wretched position of which the Duchy of Lancaster tried to take advantage in Moresby: ch.8 f.n.181.

AG v. Goldsborough[111] serves as a reminder of the potency inherent in judicial personality. Since Coke's day, the few judges with a dispassionate eye for the Crown's claims have decided on statutes and the Crown all too infrequently. Such is the nature of litigation. Of Higinbotham CJ who decided Goldsborough at first instance (the Victorian Full Court allowed an appeal on an aspect unrelated to this work) it has been said that "deep within him, was the democrat who lived in hopes of social justice."[112]

Goldsborough and Co. were the successors in title to one Williams, in respect of land that Williams had commenced leasing from the Victorian Government in 1862. He bought the land in 1868, but although he signed a condition allowing the Government a right of resumption, he did so only under protest, saying he had been unaware of such a condition at the time of contracting. In 1872, under further petitioning from Williams, the Minister of Lands ordered the condition to be expunged from the Register Book : this was done by effecting a new grant. In 1878, suffering a change of heart, the Government lodged a caveat over Williams' land, offering to lift the caveat if Williams accepted the former condition. He would not, and in 1888 sold the land to Goldsborough & Co., whereupon the Attorney General launched a suit praying that the grant of 1872 be annulled and the land returned to the Government.

111. (1889) 15 VLR 638.
112. V. Palmer National Portraits reprinted 1962, p.90.

While the original condition had provided for compensation in the form of the purchase price and interest, in the atmosphere of land boom in Melbourne in 1888, such redress would have been derisory, and all the more so in the context of the profit waiting to be made by the friend of, or in Government, for whom the land was intended. The litigation of 1889 needs to be put in perspective against the events of the period and the atmosphere of hysteria over rising land prices. In 1888, for example, a syndicate offered £300,000 to buy St. Paul's Anglican Cathedral site, knock down the partly erected edifice and build an office block instead. "The proposal was defeated by only one vote on the Cathedral Board of Management."[113] The Government which launched the litigation under discussion was led by Gillies and his deputy Deakin, the latter a barrister and journalist of note, and later to become an Australian Prime Minister. "Radical yet not radical, Deakin soon showed that as a Cabinet Minister he was not the man to prosecute the authors of financial disaster with any vigour."[114]

While reported English cases on the subject such as Telephone reveal a desire on the part of both private individuals and persons in government to side step the spirit of the law, Australian litigation and extracurial manoeuvering both on occasion show a blunter side to the use of the presumption to defeat the intent of statute law. One of the arguments mounted in Goldsborough was that the Crown

113. M.M. Cannon Land Boomers reprinted 1976, p.15.
114. Ibid pp.57-58

(in right of Victoria) was not bound by the Transfer of Land Statute (Act No.301 Vic.) with the result that the Crown could alter the register or ignore it, in defiance of the scheme in that act; impose a condition of resumption on the defendant; and follow through by forced acquisition compensated with apparent propriety, but in reality inadequate cash. This was not quite attempted theft in the name of the Crown, but very close to it.

Higinbotham CJ would have none of the Government claim. He held the Crown bound by the act, although it was not expressly declared to be bound. He said:

> "The objects of this Act as stated in the preamble are: 'To give certainty to the title in estates in land and to facilitate the proof thereof, and also to render the dealings with the land more simple and less expensive'. All these are objects of public and general as well as high utility, and the Crown is ordinarily bound by Acts passed for the public good though it is not named : Plowd, 136-7; Magdalen College Case [authority cited]. Moreover, the Crown shares with the subject the benefits and the aid of this Act, and it is reasonable that the Crown should also be bound by its conditions."115

The motivation for arguing the presumption in Goldsborough had been archetypally antipodean - greed - rough and uncouth, but concealed with a veneer of law. On the other hand, the facts in the new Australian High Court's first essay at the relationship of statutes to the Crown were quintessentially Australian of the period, involving the carting away of nightsoil without a licence, contrary to

115. (1889) 15 VLR at 654. The reference to Plowden should be "236-7", and refers to successful counsel's argument in Willion : see ch.3 f.n.27.

the provisions of the Police Offences Act, 1890 of Victoria. The facts in Roberts v. Ahern[116] provided a rich lode in which all the major aspects of the presumption could be mined.

The licensing provision which had been breached was effected by the Borough of Inglewood in Victoria, but Roberts' defence was that he was removing the nightsoil from Commonwealth premises, to wit, the Post Office in Inglewood. His counsel argued that such work related to Commonwealth property could not be bound by statute law which had to be given effect by municipal by-laws. In argument, questions of discretion and necessity were submitted for Roberts, the appellant/defendant, but Isaac Isaacs KC, arguing for the application of the Police Act and its licensing provisions took a very different tack. Isaacs rested his case on Dixon[117], correctly reasoning on the basis of that House of Lords' decision, that if Roberts were merely the employee of a contractor with the Commonwealth Government, rather than in a chain of direct employment and command, then Roberts could not take such immunity as might exist for the Commonwealth Crown.

Isaacs grew to maturity as a barrister working in the

116. (1904) 1 CLR 406. Other High Court decisions bear names evocative of their facts: e.g. The King v. Sutton (infra f.n. 135) is often referred to as the Wire Netting case and Australian Workers Union v. Adelaide Milling-Co (1919) 26 CLR 460 is known as the Wheat Lumpers' case. A robust consistency should give Roberts v. Ahern the subsidiary appellation the Privy Pan Handlers' case, or possibly Night Soil Shifters.

117. See ch.8 f.n.87.

Victorian Supreme Court presided over by Higinbotham, and was a prosecuting and reforming Solicitor and then Attorney General in the Victorian Government in the 1890's, dealing with the fraudulent land boomers in a manner of which Deakin had been incapable. Probably Isaacs' only contemporaries possessed of an equally sharp eye for attempts to manipulate the class of those who received Crown immunity, were Higgins J, later of the High Court, and Andrew Inglis Clarke of the Tasmanian Supreme Court, who regrettably left no reported decisions on the presumption. He revealed his attitude of realism in dealing with Crown immunities by being the sole dissentient in Enever[118], in which the High Court established the rule that the Crown was not liable for the tortious acts of police officers committed in the course of their employment.

The common law fallacy that police officers were not directed in their functions, and so not able to pass liability for their torts on a normal employer/employee basis must be seen in the light of the very real distinction in Dixon, reflecting the depth of common law feeling between on the one hand an employee who may be directed in the manner of performance, and on the other, a contractor who has merely to provide a finished product or achieve an agreed aim, by his own lawful means. Isaacs was arguing in Roberts that the defendant nightsoil remover was not an

118. [1905] Tas. L.R. 70, see Churches "Police Torts" at pp.302 and 304.

employee of the Commonwealth Crown, and so unable to take cover behind its shield.

Mitchell KC opened for the defendant, asserting that the Police Offences Act would not bind the Crown as repesented by the State, because it was not specifically named : Cooper and Gorton (the reports of which could only just have reached Melbourne in time for argument) were cited as authority.[119] The federal aspect of the problem then presented itself for the first time in Australia. Of course Roberts involved three tiers of government : municipal licensing under State law and an alleged offence related to Commonwealth activity. Griffith CJ, arguendo, did not believe that a municipal authority could bind the State without specific authority, but he then evinced a firm belief that if the Crown in right of the State of Victoria were bound by implication in this act, the Crown in right of the Commonwealth was likewise bound.[120]

The argument then veered onto the question of the Commonwealth's capacity to resist State statutory requirements. O'Connor J raised the issue of necessity, but in the context of municipal by-laws for public health or safety binding the Commonwealth.[121] This is the first occasion on which this writer is aware of the concept of necessity being argued in such unadorned language. "Necessity" is of course at the heart of the competing

119. 1 CLR at 407.
120. At 408.
121. At 409.

arguments dating back to Magdalen College, but hitherto always cloaked in the discrete language of that case. If a Crown prerogative might be affected by a general statute, the Crown's immunity rested on the "necessity" of the Crown's function, which existed for the benefit of the common weal. On the other hand, if a statute were rectifying wrong or designed for the public welfare, then "necessity" of command might be imputed to it.

O'Connor J had touched on a new, uncluttered standard, but it evaporated almost immediately, Griffith CJ however addressing the issue of whether the test of compliance in "emergency" should be subjective or objective. He revealed his "Crown" bias by phrasing his question in terms of the Commonwealth determining when an emergency existed.[122] O'Connor J had framed his question in terms of necessity of subordinate governmental control. Mitchell KC answered Griffith CJ's question affirming a subjective test reposing in the Commonwealth of when an emergency existed, not an objective test resting in the courts.

Isaacs KC opened with an immediate attack on the defendant's capacity to take the Crown's immunity. He did not concern himself with whether the Crown was Victorian or Commonwealth, nor the basis of that immunity. As far as Isaacs was concerned, Dixon knocked the defendant out of the ring. Exchange between Isaacs and Griffith CJ added a geographical dimension. Even if Roberts were a Commonwealth employee, the Commonwealth Crown's immunity extended only to

122. At 410.

Commonwealth property, not to the carting of the Commonwealth's night soil down a public street.[123]

Griffth CJ managed to cloud the air in argument and the judgment of the court, but fortunately not Isaac's presentation, with an entirely misconceived allusion to Roberts' situation, and that of an act unlawful at common law legitimated by statute.[124] Unruffled, Isaacs attacked the effective dispensing power being argued for the Commonwealth Crown (he did not allude specifically to dispensation) and addressed the geographic issue:

> "If the Crown can authorize an act otherwise unlawful to be done by a contract, then a contract to make up goods, the Crown supplying all the material and the contractor supplying only the labour, would give the immunity of the Crown to the contractor. A general principle cannot be laid down that authority given by the Crown in any manner whatever for the doing of an act protects the person who does the act. This act having been done in the street, and away from Crown premises, is unlawful, whether the person doing it was a servant of the Crown or not."[125]

Just three quarters of a century later in Bradken[126] the High Court would allow Crown immunity to a contractor with a far flimsier connection to the Crown than in Isaacs' example, principally on the basis of English "prejudice" evolved between the World Wars.

Mitchell KC in reply retreated to an argument based on military necessity. He actually submitted the example of soldiers being ordered to perform the act in question as an argument for the Crown not being bound.[127] This demands an

123. At 411.
124. At 412 arguendo, 420 in judgment.
125. At 413.
126. (1979) 145 CLR 107.
127. At 415.

imagination more fertile than that required for troops marching in a mechanised era around a Scottish submarine base as posited in Strathclyde. In Roberts Mitchell conjures up a vision of soldiers under orders bearing privy pans from a Commonwealth post office down a road invested in the State Crown. The argument was as fatuous as it was irrelevant, and would in any case depend on the orders being lawful, thus rendering the example nugatory.

Mitchell fudged a reply to O'Connor J's question as to whether the Commonwealth was bound by State law as to the use of roads.[128] Where he had, quite properly in his client's interest, argued the full ambit of Commonwealth statutory immunity, he now retreated to a submission that the Commonwealth was not bound "if the infringement of the regulations is necessary for Commonwealth purposes. For instance, it might be necessary for persons on Commonwealth business to travel at an extraordinary speed."[129]

Isaacs had not argued the machinery of Crown immunity, and accordingly Griffith CJ's judgment for the Court was in this respect rather ragged. He reasoned that if the Victorian Government were not bound by the Police Offences Act, then no more could the Commonwealth be bound. Neither Crown was bound because of the "general rule" : there was no intention on the face of the statute to bind the Crown.

128. At 415.
129. At 415-416. By analogy with the subsequent High Court decision in Pirrie v. McFarlane in 1925 (f.n. 170 infra) in which the Commonwealth was found bound by State traffic legislation, Mitchell ought to have lost on this submission.

Griffith CJ found this rule "based on the Royal prerogative", but found a "more satisfactory basis" for the rule "having regard to modern developments of constitutional law" in the reasoning of Donaldson.[130] He quoted the famous words of Alderson B to the effect that statutes were made by the Crown for subjects, not the Crown[131], but as discussed in chapter eight, they had rather less to do with "modern developments of constitutional law" than being a high sounding, vacuous solecism.

The Chief Justice then attempted to buttress Donaldson by reference to the American decision of Hoar[132], but Story J's words "... the general words of a Statute ought not to include the government unless that construction be clear and indisputable upon the text of the Act" had to be seen in the light of preceding words in the same paragraph, which showed that "text" included "context", because Story J referred to "the nature of the mischief to be redressed."

Griffith CJ concluded by denying Isaacs' arguments based on Dixon, but the judgment is far from convincing, and rested on extending immunities in a quite untoward way. He spoke of an extension of protection to agents of all varieties when "an act unlawful at common law is made lawful by Statute ..."[133] which was anything but the case in Roberts. Griffith CJ was sufficiently Crown minded not merely to want all those acting for the Crown, whether as employees, agents or contractors, to have Crown immunity,

130. At 417. Just eighteen months prior to the decision in Roberts, W.H. Greaves CJ in Barbados was confronted with a Crown claim to be outside by-laws promulgated under the Public Health Act, 1898, so that sewage might be discharged from a prison, openly creating a health risk. The case was fully argued, Donaldson and other leading cases being cited. The Chief Justice found that the statute was not detracting from a Crown prerogative, and applying the Cokeian tests descended through Bacon's Abridgement and Bonham, he held it to be rectifying wrong, and so binding on the Crown : Brewster v. Lash (1903) 2 Barbados LR 72. The comparison with Roberts neatly illustrates the room for judicial discretion in this area. The balance is always between Crown interests and those of the public. Roberts illustrates the ossifying desire for certainty and Crown mindedness overwhelming an appreciation of the public's welfare.
131. See ch.8 f.n.47.
132. Supra f.n.100.
133. 1 CLR at 420.

but to justify the necessity of this effective, although unstated, over-ruling of Dixon by asserting "the Executive Government cannot be controlled either in its choice of agents or in the form of their appointment or mode of their remuneration."[134] This ignored the fact that no one was attempting to "control" the Commonwealth Government in its employment relations or otherwise. The argument for the informant really condensed to the reasonable point that persons acting for the Commonwealth (even if Commonwealth employees) once off Commonwealth premises had to obey the law prevailing for the rest of the community. But the High Court found otherwise, and Roberts the nightsoil carter was allowed to take Commonwealth immunity from the State act and the municipal regulation under it.

With Roberts the High Court had adumbrated, if not enunciated, the major themes on this topic for the ensuing eighty years. The presumption should be applied in simplified maxim form, justified by the fallacy of Donaldson and resting on post-1870 English cases and a cavalier treatment of Story J in Hoar. The federal theme, not strictly relevant to this study, but inextricably cobbled onto it, became a circus of inconsistency. The High Court wrestled with fact situations of State or Commonwealth statute law which sometimes expressly bound the Crown, the State, the Commonwealth or both, or specifically exempted the Crown. Meanwhile one Crown or another, frequently in the

134. At 421.

company of its associates : employees, agents, contractors, or sometimes just people seeking shelter from the law, struggled to be free of the statutory coils.

The expanded full High Court (now containing Isaacs as a Justice) in Sutton[135] found the defendant, a carrier under contract with the New South Wales Government, to be bound by the Customs Act 1901 of the Commonwealth in his task of carrying away from a wharf wire netting belonging to the State Government. All five members of the bench were agreed in the result, which while not directly contradicting Roberts finding of Commonwealth, and Commonwealth contractors' immunity from State law, did not sit easily with it.

The presumption of Crown immunity from general statutes was explained by reference to Donaldson and Hoar.[136] Griffith CJ set about distinguishing Crowns (in Roberts the Commonwealth was immune if the State was immune) on the basis of "exclusive control".[137] The Commonwealth Crown, having exclusive control of customs, was not bound by customs legislation, but the State Crowns were bound. He went on to reason from the effects of immunity that State Governments in this situation were no better placed than private citizens:

> "Notwithstanding the paramount control as to external trade given in express words to the Commonwealth, the States would retain concurrent power to introduce

135. The King v. Sutton (1908) 5 CLR 789.
136. Per Griffith CJ at 795-6 quoting himself for the Court in Roberts, Barton J at 800, and O'Connor J at 806, again quoting Roberts.
137. At 797.

> goods the introduction of which is prohibited by the Commonwealth law."[138]

Bearing in mind the Chief Justice's equation of the State Governments and private citizens, this analysis is effectively of the dispensing effect of the presumption, and its impact if allowed a wide ambit. The fruit of this insight would prove very bitter in the years to come.

Barton J was even more acerbic in his assessment of the dispensing effect if State Crowns were to be immune, and used this potential effect to support his claims of legislative intention:

> "It is possible to suppose that the intention of Parliament was to licence the wholesale importation of goods by States the sum of whose operations extends to every port and throughout this vast area."[139]

His subsequent deduction of the impossibility of the Commonwealth Parliament having sanctioned a state of law which "once it reached its full operation, could only be productive of chaotic conditions ..." is worth bearing in mind in the light of the High Court's expansion of the recipients of Crown statutory immunity in the later twentieth century.

Isaacs J (as he then was) found the argument for State immunity irrelevant in the light of the fact of Commonwealth control of external trade[140], and Higgins J looked to the dispensing effect if the States were not bound : opium, Kanakas and infected substances all might be imported, though the power in the Commonwealth under which the statute

138. At 798.
139. At 801.
140. At 814.

was passed was "designed for the good of the people of Australia."[141]

In the next two cases the New South Wales Government was found immune from State legislation on the first occasion[142], and bound on the second.[143] In Kelly, the Full Court of the New South Wales Supreme Court found by majority that the defendant, Hart, could take the Crown's immunity from the provisions of the Police Offences Act, 1901, prohibiting Sunday trading. Street and Sly JJ did so on the ground that Roberts had provided a broad shield of the Crown for those related to the Crown, and Hart fell within the appropriate degree of proximity. In fact Kelly only stirs water already muddied in Roberts, because Hart's relationship to the New South Wales Railways Commissioners was never clear. It never seems to have been more than a licence under contract to operate a shop in a station, with clauses covering the Commissioners' powers over goods for sale, prices, hours etc. Street J (as he then was) found this to be a "contract of service"[144] and Sly J thought him a lessee with delegated powers.[145]

Simpson J found Hart liable to the effect of the statute on a narrow ground that the Railway Commissioners could not authorise him to trade with persons having no connection with the railway. However, in dicta Simpson J

141. At 815.
142. Kelly v. Hart (1908) 8 SR (NSW) 272.
143. Sydney Harbour Trust Commissioners v. Ryan (1911) 13 CLR 358.
144. 8 SR (NSW) at 282.
145. At 285.

thought that the New South Wales Crown might be bound by the statute because it was passed for the maintenance of religion[146], possibly the first time Coke's rubric from Magdalen College had been used in nearly 300 years in a context involving religion. Simpson J even thought this factor might overcome the presumption in Donaldson. Street J relied on Roberts and Hoar, and expressly denied the utility of the reference to Magdalen College.[147] Sly J leaves the reader wondering what purpose was served by poring over the presumption other than serving lawyers' delight in playing with mysteries : as far as he was concerned, the Railway Commissioners were empowered to trade on Sunday under the Railway Act, and no further enquiry was needed.[148]

Ryan on the other hand reflected a judicial perception in the High Court that the presumption of Crown statutory immunity should not be allowed to run unchecked. The Sydney Harbour Trust Commissioners in their guise of the Crown in right of New South Wales argued that they were not bound by the Employers' Liability Act, 1897 (NSW). This act had abolished the doctrine of common employment as a defence : the Commissioners were hoping to escape liability to their workmen and leave them in the archaic position of claiming in tort against each other for injury.

Where Simpson and Street JJ had differed in Kelly over whether a Sunday Trading statute fell within Coke's

146. At 275.
147. At 279.
148. At 283.

exhortation concerning religion, Griffith CJ in Ryan relied on the rather broader and potentially more relevant class of statutes referred to in Magdalen College, those which bound the king because they were passed to suppress wrong. The Chief Justice also cited Willion, without noting that the reference to the Statute of Merton binding the king appeared in successful counsel's argument.[149]

In finding the New South Wales Crown and its emanations bound by the Employers' Liability Act, Griffith CJ went to some pains to reason the process of limitation on Crown immunity:

> "The doctrine that the Crown is not bound by a Statute unless specifically named or included by necessary implication has been sometimes misunderstood and extended beyond the purposes for which it was laid down. I accept the proposition laid down in Hardcastle on Statutes (1st ed.) p.180 (Craies p.361): It 'does not mean that the King, looked upon as a mere individual, may not be in certain cases precluded by Statutes, which do not specifically name him "of such inferior rights as belong indifferently to the King or to a subject, such as the title to an advowson or a landed estate"; what it does mean is that the king cannot in any case whatever be stripped by a Statute, which does not specifically name him, of any part of his ancient prerogative, or of those rights which are incommunicable and are appropriated to him as essential to his regal capacity.'"[150]

Barton J was quite as assertive in his insistence that despite the general principle in Donaldson, some general statutes did bind the king. He cited Comyns and Bacon to establish that such statutes were those passed for the public good, religion, justice, remedying of wrong, the prevention of fraud or tortious usurpation.[151] He and

149. 13 CLR at 365.
150. Ibid.
151. At 370-371.

O'Connor J agreed with Griffith CJ that the Employers' Liability Act bound the Crown in right of New South Wales, the jurisdiction in which it was passed.

The distinction between the public welfare aims of privy pan disposal under the Police Offences Act in Roberts and the destruction of the defence of common employment by the Employers' Liability Act in Ryan seven years later before the identically constituted bench may elude the more modern eye. The only visible distinction is that Ryan concerned the statutory rectification of a fault in the common law, such as Anthony Brown J referred to[152], while Roberts dealt with regulatory legislation, which may have gone to public welfare in a sociological sense, but did not directly overthrow a particular common law doctrine. The distinction has no basis in reality : as early as the reign of Elizabeth I a governmental official had recognised the importance of having the Crown bound in respect of regulatory legislation.[153] A comparison of Roberts and Ryan merely serves to illuminate the High Court's limited horizon in respect of analogies : changing social trends did not permit an extended reading of the old cases or commentaries.

A fourth tier of government, and a third Crown emanation were dealt with by the High Court (Isaacs, Gavan

152. See ch.3 f.n.45.
153. See ch.3 f.n.143.

Duffy and Rich JJ) in 1918.[154] The Victorian Stamps Act required a licence and fee from companies contracting for insurance with "persons" outside Victoria. The appellant company took insurance cover with the "Imperial Government" under "His Majesty's Government's War Risks Insurance Scheme", that is to say with the United Kingdom Government. However, the Court found that the Imperial government was not a "person" for the purposes of the State legislation, with the result that the appellant did not have to comply with the statutory scheme of licensing. This was so, even though a contrary finding would not have impinged upon, or prejudiced directly, the Crown in right of the United Kingdom (although it may have reduced business by deterring potential Victorian customers).

Isaacs and Rich JJ cited Curator of Intestate Estates as authority on statutes lacking clear intention to bind the Crown not encompassing it. This joint judgment destroyed the view of Cussen J in the Victorian Supreme Court, below, that when the Imperial Government acted as trader it lost its "Crown" quality. All three judges reflected the war-time pressure to accept the "indivisibility of the Crown."

The Full Court of the New South Wales Supreme Court and a single judge in the Victorian Supreme Court followed

154. Broken Hill Associated Smelters Pty Ltd v. Collector of Imposts (Victoria) (1918) 25 CLR 61. Gavan Duffy J (as he then was) was the half brother of Gavan Duffy J (as he then was) in the Irish case Ruane f.n.95 supra.

with decisions in 1920 and 1924 respectively which both relied on Ryan to narrow the ambit of Crown immunity from statutes. Both cases dealt with governmental activity in a commercial milieu, away from any claim of prerogative capacity.

Notwithstanding the drubbing they received from the High Court in Ryan, the Sydney Harbour Trust Commissioners surfaced in the Full Court of the New South Wales Supreme Court in 1920[155], arguing that they were not bound by the provisions of the State's Liquor Act. The plaintiff was the licensee of a hotel, and had to provide a set sum towards a fund to compensate licensees and owners of hotels closed under the act. The act, however, further provided that a licensee/lessee should be able to recover two thirds of the sum owed to the compensation fund from the owner/lessor of the licensed premises. The Commissioners, an emanation of the Crown in right of New South Wales, were owners of the hotel of which Lowden, the plaintiff, was licensee. When Lowden was levied for his contribution to the compensation fund, he claimed the two thirds provided for under the act from the lessor, but the Commissioners argued that, as the Crown, they were not bound by the act, and so did not have to pay the amount prescribed to the licensee.

A comparison of the statutes involved in Roberts, Ryan and Lowden is instructive in illustrating the technical difference between legislation designed to rectify a wrong

155. Lowden v. Sydney Harbour Trust Commissioners (1920) 21 SR (NSW) 59.

permitted by the common law, or at least a lacuna, and that designed to set up a regulatory scheme, as referred to above.[156] The legislation in Lowden, the Liquor Act, fell in the second category, but differed from that in Roberts in not being for public health or simple physical welfare of all the populace. It consisted of a financial scheme to compensate liquor licensees forced out of business by executive action under legislative authority, but it was still regulatory in form. The subtle distinction between, on the one hand, wrong rectifying statutes, and on the other, regulatory legislation, was an unacknowledged factor in decisions throughout the common law world from the late nineteenth century. The old commentators had provided for wrong rectifying statutes to bind the Crown : they had said nothing about regulatory legislation, not having perceived its generic status.

This understandable shortfall on the part of the commentators did not faze Cullen CJ, with whom Ferguson and Wade JJ agreed, in Lowden. The Chief Justice was of the view that Ryan, almost in its entirety applied in this instance. The crucial factor was that the presumption "is not a rule of universal application. Each case must be examined to see whether the omission of reference to the Crown carries the consequence that the Crown has not been bound."[157] Cullen CJ proceeded to quote Griffith CJ at length in Ryan[158] on the concept of inferior rights shared

156. See f.n.152 supra.
157. 21 SR (NSW) at 63.
158. Passage quoted at f.n.150 supra, 21 SR (NSW) at 63-64.

between king and subjects.

In opening his reasoning, even before citing reliance on Ryan, Cullen CJ had looked to the consequences if the Commissioners were not bound by the Liquor Act : "the position so set up would be an exceedingly anomalous one ...".[159] If the Commissioners were not bound, they would be the only landlords of licensed premises in New South Wales exempt from the provision of the Act:

> "Their property, as hotel property, would get all the benefit of the restriction of competition flowing from the closing of several houses ... the Harbour Trust as landlord of such property would have that anomalous advantage over other persons owning such property..."[160]

The Chief Justice noted, without deciding, the argument that if the Commissioners of the Harbour Trust were not bound by the act, neither were their tenants. He observed

> "... that the Trust was as much liable to the remedied legislation known as the Employers' Liability Act passed for the benefit of workmen as any other employer in the State. Why should it not be held equally liable to remedial legislation intended for the protection of the public morality ...".[161]

His Honour did not bother with fine distinctions between statutes rectifying the common law and those merely regulatory, although to classify the latter as "remedial" he had to engage in subjective determination of the good purpose intended by the act.

In 1924 Mann J (as he then was) of the Victorian Supreme Court reached a similar conclusion based on Ryan in The King v. Hay[162], a case in which the Crown in right of

159. 21 SR (NSW) at 62.
160. Ibid.
161. At 64.
162. [1924] VLR 97.

Victoria sued the defendant for ninety pounds, being the sum claimed, eponymously enough, on forty five tons of hay. The defendant claimed never to have taken possession of the hay, and submitted that as the contract for sale was verbal and for more than an amount of ten pounds, it was not enforceable because it infringed the Goods Act 1915 (Vic.) s.9, which reproduced the provision of the Statute of Frauds requiring contracts for ten pounds and more to be evidenced in writing.

Mann J observed that both Griffith CJ and Barton J in Ryan relied on Comyns and Bacon, who exempted from the presumption, inter alia, statutes "to prevent fraud." The Statute of Frauds had been passed for that purpose, and s.9 of the Goods Act should therefore fall outside the presumption. Furthermore, in conformity with Ryan, the Goods Act was dealing with "inferior rights" and not affecting any ancient prerogatives. Mann J observed that R v. Lady Portington[163] as explained in Addlington v. Cann and Andrews[164] was the only case he could find stating the Crown was not bound by the Statute of Frauds (he missed Capell's case[165] which inferentially raised the same proposition). His Honour summarised the effect of Lady Portington's case as consistent with later authority:

> " ... the requirements of the Statute of Frauds as to the form necessary for the making of wills and the creation of trusts are not to operate so as to defeat any prerogative of the Crown."166

163. See ch.7 f.n.9.
164. See ch.7 f.n.11.
165. See ch.7 f.nn.8, 13 and 14.
166. [1924] VLR at 100. Mann J observed Hardwicke LC's doubts about the presumption expressed in Addlington.

The Crown was bound by the Goods Act (no prerogative being affected in the instant case), and consequently the oral contract remained unenforceable.

At a time when English decisions on the presumption were, with the exception of Moresby[167], becoming set fast in the "simplified" mode, the Australian case law was refreshingly discriminating in determining what amounted to a presumption of Crown liability when confronted with modern regulatory legislation, and in the absence of arguments about the prerogative. Cullen CJ's abhorrence of commercial advantage to the Crown if not bound is particularly striking in the light of the happy English acceptance of such advantage in the rent restriction cases only a decade later.[168]

In curial analysis of the presumption Australia's federal constitution was a two edged sword. On the one hand, some executive powers and concerns were removed to the province of one Crown solely, the national government. It is noteable that Ryan, Lowden and Hay involved State legislation and whether the State Crown was bound. Argument was uncluttered by reference to defence prerogatives or military necessity. On the other hand, the Constitution created an arena in which State and Commonwealth governments would struggle for dominance, and part of that struggle would involve avoiding the impact of another

167. See ch.8 f.n.181.
168. See ch.8 f.n.216.

jurisdiction's legislation if possible. The presumption would be called in aid in the battles to follow, and the thoughtful analysis of Ryan would all too often be subsumed and overwhelmed by constitutional arguments in the High Court when State and Commonwealth governments were locked in litigation. The pace of constitutional conflict picked up after Engineers[169] was decided in 1920, overthrowing the doctrine of implied immunity of instrumentalities.

Roberts and Sutton had been decided with no more serious constitutional reference than "exclusive control". It would become apparent that many areas of executive power, either inherent or legislatively granted, were not definitively exclusive. Society required complex management, and the capacity for control was now clearly divided between two tiers of government. As if to ensure no easy solution to conflicts between State and Commonwealth governments, the Constitution provided in s.109 for determination of conflict between the two echelons in respect of legislation only. When executive direction was given pursuant to legislation of indeterminate bounds, the point of inconsistency or conflict between the two levels of government often lay in administrative acts rather than comparison of statutes, and the Constitution was not ideally equipped for this situation. In such circumstances Pirrie v. McFarlane[170] was argued and decided in the High Court in 1925.

169. Amalgamated Society of Engineers v. Adelaide Steamship Co (1920) 28 CLR 129.
170. (1925) 36 CLR 170.

Leading Air-Craftsman McFarlane was driving through Melbourne in a Royal Australian Air Force car, on the orders of an Air Force Flight Lieutenant, in order to pick up Air Force personnel from a railway station. Police Constable Pirrie demanded to see McFarlane's driving licence. McFarlane said he did not have one, and Pirrie charged him with the offence of driving without holding a licence, contrary to s.6 of the Motor Car Act, 1915 (Vic.).

The High Court had to determine whether State legislation governing the use of roads bound the Commonwealth Crown in the form of one of its employees. The last time the question of State legislation binding the Commonwealth Crown had arisen was in Roberts, but Pirrie contained a number of significant factual variations from the position in Roberts. Most significantly in Pirrie, the Victorian Motor Car Act provided in s.24 that "It is hereby declared that this Act applies to persons in the public service of the Crown as well as to other persons." The Police Offences Act in Roberts had contained no such express provision, but the Motor Car Act did not specify which Crown it applied to. Secondly, in Roberts, the appellant was not an employee of the Commonwealth, whereas the respondent was in Pirrie, although Roberts did not go off on that point. Thirdly, Pirrie was decided in relationship to the exclusive Commonwealth defence power, and whether legislation under that power was inconsistent with, and consequently prevailed over State road law. Roberts had been much more simply decided by reference to the presumption. There had been

little constitutional analysis save Isaacs' concern as to activity ancillary to a Commonwealth power taking effect in a place governed by State law.[171]

The High Court found by majority (Knox CJ, Higgins and Starke JJ; Isaacs and Rich JJ dissenting) that the Commonwealth Crown, in the form of its Air Force personnel, was bound by the Victorian act. Knox CJ did not find it necessary to refer to the presumption at all. He simply relied on the lack of inconsistency between the Victorian legislation and the various Commonwealth defence provisions under review. The Commonwealth had the capacity to legislate in the field of defence to override State legislation, but it had not done so in the instant case.[172] The Chief Justice crushed the "bootstraps" argument inherent in hypothetical references to the military, such as in Cooper[173], Roberts[174] or Strathclyde[175]: it was not just any order of an officer that might be called in aid to evidence inconsistency, or prove necessity. It had to be a lawful command.[176]

Necessity ought to be proved on separate, objective grounds (the facts in Chare[177] serve as an example), and the fact that the prerogative regarding defence was not pleaded in Pirrie seems to illustrate that once legislation covers the field of a prerogative, it is not open to argue that the

171. See f.n.123 supra.
172. 36 CLR at 183.
173. See ch.8 f.n.163.
174. See f.n.127 supra.
175. See text after f.n.55 supra.
176. 36 CLR at 182. His Honour emphasised "lawful".
177. See ch.8 f.n.169.

prerogative comes into conflict with other legislation.[178] Knox CJ restricted himself to whether Commonwealth and State legislation were inconsistent. Since the former specifically prescribed that defence force personnel were subject to civilian law, of which Victorian road legislation formed part, any order given by a superior Commonwealth officer would have to be consistent with the State law to carry the lawful force of command. The facts in Pirrie did not betoken dire military necessity, and Knox CJ did not address the issue.

Higgins and Starke JJ noted the existence of the presumption in a constitutional context, without analysing it. Higgins alone of the bench referred to Roberts, but in a context that indicated his thinking that this case would now have to be considered in the light of Engineers.[179] His most striking assertion was that the Victorian legislation would bind the Commonwealth irrespective of the existence of s.24, expressly binding the Crown.[180] He reasoned this on simple federalist principles. The old saw from Donaldson was quoted as the basis for Cooper. Higgins observed that that case was decided on 15th July 1903 and the amending act to make the British Locomotives Act binding on the Crown was passed on 14th August 1903. But he noted that this analogue with the Victorian statute was not passed in a federal structure. He cited Sutton to justify the claim that the

178. See Williams J in Gulson, text after f.n.197 infra.
179. 36 CLR at 213.
180. At 217.

presumption operated only in respect of the legislating Crown, in this case Victorian, and it had abrogated its immunity by specific words. Higgins J reasoned from the imperative universality of legislation : "for [motor traffic] regulation to be effective all the traffic must be bound."[181] The facts of Pirrie allowed him to find all traffic bound without examining the presumption itself. One is left wondering if his Honour would at least have found the Crown bound by such legislation as being nécessary for the public good.

Starke J also cited Sutton and a Canadian Supreme Court decision, Gauthier v. The King[182], as authority that the presumption only operated in respect of the legislating Crown. The remainder of his judgment examined Commonwealth and State legislative powers, and the legislation under review in this case. He found no inconsistency, and referred to claims that Commonwealth defence capacity would be paralyzed and impaired by necessary compliance with the Motor Car Act as "Extravagant arguments".[183]

It was Isaacs J, with whose dissent Rich J agreed, who provided these extravagant arguments, twenty seven pages of them. Isaacs lost the battle for a presumption that the Commonwealth Crown was not bound by State legislation, but he won the war (although not perhaps the one he thought he was fighting) : from the years at the close of World War II

181. At 218, emphasis in original.
182. (1918) 56 Can. S.C.R. 176.
183. 36 CLR at 228.

the High Court veered to his viewpoint by finding State Crowns not bound by Commonwealth legislation. Isaacs J referred to the presumption only obliquely : without the express words of s.24 the Motor Car Act would not bind the Victorian Crown.[184] The whole thrust of his judgment rested on the exclusive Commonwealth legislative power over defence, which must be untramelled by State legislation. The opening page of his Honour's judgment[185] made clear his reliance in arguing Roberts on Dixon, which he cited in Pirrie in a context implying the presumption covering the Commonwealth against State statutes.

The other point of interest in the first page, before consideration of the presumption was drowned under federal concerns, was the argument for an unfettered Commonwealth executive by reference to necessity. Reasoning for non-control of Commonwealth officers, Isaacs J wrote:

> "There is no reason to fear that Commonwealth officials would hold the lives and limbs of their fellow citizens less sacred than does the Police Commissioner of a State or the fire brigade of a city."

The point of licensing, which Isaacs J missed, was quite unrelated to the good intent of individuals. It was to ensure the technical capability of drivers. But his Honour's reference did elliptically make the point that a defence against Crown liability to a statute might lie in necessity. If that were the case, what need was there for the paraphenalia of the presumption?

184. At 198.
185. At 185.

The question of whether one Crown's legislation bound another within the Australian Federation was a constitutional issue further complicated by State and Commonwealth legislative provisions attempting to place the various Crowns in as near the position of a subject as possible in litigation. Much of the case law on the presumption in Australia, and Canada, is really involved with analysing intergovernmental immunity or lack thereof, and references to the presumption in such contests between tiers of government tend to be a bare counterpoint only. Although the legislation dealing with governmental liability, particularly in tort, plainly affects the outcome of many cases referring to the presumption, it is beyond the scope of this work to do more than refer to it. Suffice to say that McNairn dealt with the subject comprehensively up to the time of publication of his book in 1978, and Aronson and Whitmore followed in 1982.[186]

The present writer would criticise this work only by reference to McNairn's claim that if Crown liability acts override the prerogative regarding discovery of documents, on the basis of putting the Crown on the same litigious footing as subjects, then such acts should also operate to make the Crown liable to all legislation which applies to subjects. McNairn argued this on the basis that

186. McNairn Governmental Immunity, ch.2 "Governmental and Intergovernmental Immunity in a Federal System" pp.23 et seq, and specifically regarding Crown liability legislation see pp.69-80, Aronson and Whitmore Public Torts and Contracts pp.3-20.

" ... governmental immunity from statute ... also has its source in the royal prerogative ...".[187] The idea of State and Commonwealth Crown liability acts operating to subject governments to the ordinary operation of all statutes seems entirely sensible and in accord with the spirit of such liability acts, but Australian courts have only recently and cautiously been moved by this spirit, and the presumption of immunity is a tool of construction, not of the prerogative, even though it takes on the appearance of a prerogative in its operation.

Only two reported decisions on the presumption arise between Pirrie and the last year of World War II. In Hodge v. Gray[188] the defendant refused to give a share of winnings in a Queensland Government run lottery to the plaintiff, with whom he had shared the cost of tickets, on the basis that the Gaming Act, 1850 made agreements for wagers null and void, and that the Suppression of Gambling Act, 1895 made the lottery unlawful. Woolcock J found the lottery to be specifically sanctioned by the Criminal Code, but he went on, one would think quite otiosely, to find the lottery lawful, and consequently the agreement between Hodge and Gray enforceable, because the Suppression of Gambling Act

187. Ibid p.71. McNairn opened his work by referring to the presumption as an aspect of the prerogative (p.3) which this writer views as incorrect : see ch.8 f.n. 398 and references consequent thereon. See also McNairn in (1978) 56 Can. B.R. 145 at 149, n.15. The present writer sees the authorities there listed as either subsequently over-ruled, or misinterpreted.

188. 23 QJPR 7, noted in (1929) 3 ALJ 59.

did not bind the Crown, lacking express words or necessary information.

In Dalgety & Co Ltd v. The Crown[189] it was submitted that the Western Australian Government was not bound by the Bills of Exchange Act, 1909 of the Commonwealth. No constitutional argument about State subjection to Commonwealth legislation was offered. The State Government claimed only that it was entitled to keep the proceeds of cheques given to it in settlement of a debt. The cheques were crossed "not negotiable" and s.87 of the Bills of Exchange Act provided that the recipient of such a cheque could take no better title than that of the person giving it to him. The cheques had in fact been fraudulently drawn by a Dalgety employee, and made out to fictitious payees. The employee then further forged and endorsed the cheques to pay them to the Government to diminish a debt. Obviously he had no good title, but the Crown in right of Western Australia argued that it was not bound by the act, and so could have good title to the cheques, and keep the proceeds.

Counsel for Dalgety cited Goldsborough, Magdalen College, Curator of Intestate Estates and Hay[190], but Dwyer J resolved the matter against the Crown without referring to authority.[191] He acknowledged the presumption in the form of the simplified maxim, but thought the act in

189. (1942) 44 WALR 49.
190. At 57.
191. At 62-63. Dwyer J became Chief Justice of Western Australia in 1945.

question declared rights concerning dealings with monetary instruments. It did not affect existing rights, and particularly not the prerogative. If the Government chose to deal in cheques, it must accept the totality of the system of which it was taking advantage. Dwyer J delivered an implicit denunciation of the dispensing effect of the presumption:

> "To import afterwards a previously unspecified condition or an unexpressed exception in [Crown officials'] favour is, I think, tantamount to making a new special law for themselves for their own benefit. The Crown need not concern itself with cheques at all; if it does issue, take, or use them it must, in my opinion, be held to be dealing with them according to the law relating to cheques".

The war years brought with them the sort of government regulation associated with twentieth century total warfare. Regulation took place under the Commonwealth defence power, and was intended to affect many areas of civilian life in which State Governments were involved. Inevitably the question arose as to whether Commonwealth regulations bound a State Government. Landlord and tenant law had already been a focus for decisions in favour of Crown immunity in England, Scotland and Ireland. Commonwealth wartime housing regulations now gave the Australian High Court an opportunity to opine on the matter, albeit in a context clouded by the federal issue. In fact the bulk of Australian cases concerning the presumption for the next two decades and more would concern housing, or local government regulations.

A Western Australian sergeant of police, Gulson, was a tenant in premises owned by the State Government, which served him with an eviction notice. Gulson resisted the eviction, claiming that the State as landlord was acting without reference to the provisions of the National Security (Landlord and Tenant) Regulations of the Commonwealth, promulgated under the National Security Act, 1939 (Cth). Neither the act nor the regulations purported to bind the Crown expressly, either at State or Commonwealth level. It was accepted in evidence that the State Government had ignored the provisions of the Commonwealth regulation in its attempted eviction. A magistrate dismissed the State's attempts at recovering the premises on the ground that the State was bound by the regulations. The Full Court of the Western Australian Supreme Court concurred in this finding. The State appealed to the High Court.[192]

The Court found by majority (Rich, Starke and Williams JJ; Latham CJ and McTiernan J dissenting) that the regulations did not bind the State Government. The reasoning of the majority is disparate, and befuddled by the obscurities of the Australian constitutional sacred cow : Engineers, itself sired by the Imperial Great White Elephant, "Indivisibility of the Crown". These mythical beasts threw off their halters and in Gulson produced splendidly incestuous, ironic progeny. The whole point of Engineers had been to strike down the doctrine of "implied immunities of instrumentalities" under which valid

192. Minister for Works (W.A.) v. Gulson (1944) 69 CLR 338.

Commonwealth legislation did not extend to state officials, and State law did not bind Commonwealth instrumentalities. Under the battle cry of "Crown indivisibility" and in the name of Engineers, the majority in Gulson used the presumption to effect just what Engineers tried to halt : State immunity from Commonwealth regulation.

Rich J agreed with Williams J, but pronounced that the theory of the unity of the Crown resulted in the following propositions:

> " ... first, the Crown in all its capacities is prima facie not bound by a Statute made in any part of the Empire unless this is provided for expressly or by necessary implication, and second, a provision that a statute binds the Crown binds it prima facie in all its capacities unless a contrary intention appears."193

Rich J thus propounded the presumption in the form of the modern simple maxim, but gave it the widest possible geographical ambit. His second proposition was the logical concomitant of Crown indivisibility, but could not be sustained by Pirrie as Rich J claimed, at least as regards reasoning, not merely the result. It is important to remember that the majority in Pirrie rested on the ground of constitutional capacity, not the presumption. Knox CJ did not refer to the presumption, and Higgins and Starke JJ each cited Sutton as authority that the presumption only operated in respect of the legislating Crown.

The factual distinctions between Pirrie and Gulson are not sufficient to exonerate Starke J from a charge of inconsistency. The major difference was that Pirrie concerned the reach of State legislation to the

193. At 356.

Commonwealth, while Gulson dealt with the reverse. Starke J was consistent to the extent of finding for the State in each case, but his reasoning over one page in Gulson[194] involved a sea-change; it is certainly unclear. He cited the presumption in simple maxim form; referred to Sutton without elaboration; noted that a rule of construction was not inflexible; opined that the the construction of the regulations under review depended on the language used in relation to the subject matter and then cited the fallacious maxim from Donaldson.

Out of this pot-pourri emerged Starke J's conclusion that the regulations used general words and that they concerned "the relationship of landlord and tenant between subject and subject". This quite extraordinary assertion regarding an area where the Crown in right of Western Australia was operating in the market place in commercial dealings with subjects, was buttressed by two arguments, which might be labelled "necessity", and "the dignity of the Crown".

It is noteworthy that as the simplified maxim has taken hold in the twentieth century, the examination of the prerogative has no longer been necessary. However, courts, seemingly unsure of the ambit of the new streamlined presumption, turned for support to executive necessity. This had been almost invariably, except perhaps in Chare[195], hypothetical necessity.

194. At 358-359.
195. See ch.8 f.n.169.

In Gulson, Starke J could not refer to the commonplace of military necessity, as such a function was in the exclusive province of the Commonwealth, so he observed that the regulations made no provision "for determination of tenancies in cases in which the premises are urgently required, as in this case, for public purposes." At least this was necessity on the facts of the case, rather than a hypothesis, but it was reasoning solely on the facts of the instant case and was incapable of supporting a body of case law as precedent. Starke J ignored the fact that the Commonwealth Parliament had a public purpose in mind when it passed the head act, a purpose with which the regulations were in conformity. The State Government's desire to rehouse prison warders in what had formerly been gaol premises hardly constituted a compelling reason for not applying a Commonwealth regulation to the State.

Starke J further observed that the regulations imposed a restriction on sale of rental premises; prohibited discrimination by landlords against families; required eviction orders to be approved by the court and prohibited contracting out "all which provisions are singularly inapt if applied to political bodies such as the States and inconsistent, as I think, with their constitutional position." It is sad that such troglodyte reasoning in respect both of the presumption and the Australian Constitution should have swung the High Court into the path of error; sadder that it has been subsequently used in High Court decisions of general importance.

Williams J also referred to the presumption in its modern simple style, but noted that counsel for the Commonwealth, intervening, had submitted the presumption in its former, narrow form relating to prerogatives and unique regalian rights.[196] However Williams J then cited Gorton, Cooper and Wirral Estates Ltd v. Shaw as authority that the old form of the presumption allied Crown property with the prerogative as a bar to legislative reach.[197] His Honour then side stepped in his apparent direction by holding that the National Security Act did bind the Crown (which Crown he did not say) on the basis of De Keyser's Royal Hotel Ltd : legislation for the defence and security of the realm was intended to bind the Crown. However, Williams J then resumed course by finding that regulations under this act were themselves subject to the presumption, and they contained neither express words nor necessary implication to bind the Crown. Since to be intra vires the regulations could be doing no more than giving effect to the legislation, the dichotomy drawn by his Honour seems remarkable.

Williams J then agreed with a New South Wales judgment that Sutton was to be seen in the light that a Commonwealth act only bound a State Crown "by the implication of necessary intention to be gathered from the purpose and provisions of the Act to that effect."[198] In the light of the extracts from each of the five judgments in Sutton

196. 69 CLR at 363.
197. At 364. The first explicit English reference to "property" in this context had fallen from Wrottesley J in Hancock in 1940 : ch.8 f.n.233.
198. At 365.

utilised by McTiernan J in Gulson in his dissenting opinion, this concept of Williams J must have been categorically wrong. However, with a last bow to Engineers, he cited the presumption in narrow form, expanded to include Crown property, and geographically ballooned to encompass the Crown throughout the Empire.[199]

In the minority, Latham CJ cited the simple maxim and then alluded to Donaldson.[200] He summarised the effect of Sutton as that the presumption of Crown immunity from statutes applied only in respect of the community for which the parliament was legislating. He quoted O'Connor J in Sutton (a passage also quoted by McTiernan J dissenting) to the effect that the presumption was "applicable in the inquiry whether a Commonwealth Act binds the king as representing the Commonwealth. But where the inquiry is whether the Commonwealth Act binds the king as representing one of the States it can have no relevancy."[201] Latham CJ proceeded to lash at the "indivisibility of the Crown" as "verbally impressive mysticism"[202] and referred in passing to the presumption in modern simple form as a "prerogative".[203] He found Sutton clear authority that whether a statute of one echelon of the Australian federation bound another was to be determined "independently of any presumption as to the Crown prima facie not being bound in either case."[204]

199. At 366-367.
200. At 347.
201. At 348, quoting Sutton per O'Connor J at 5 CLR 806.
202. 69 CLR at 350.
203. At 352, inverted commas in original.
204. At 352-353.

As a result of that stance, the Chief Justice found it unnecessary to choose between the simple maxim form of the presumption and the older, narrow style submitted by Sugerman KC for the Commonwealth, citing Ryan in an interesting offer to limit the Crown's immunity.[205] (Sugerman was of course only attempting to limit the State Crown's immunity from Commonwealth legislation). Latham CJ was happy to quote Dwyer J in the Full Court below[206], the same judge who, two years ealier, had found resoundingly against Crown immunity from the Bill of Exchange Act in Dalgety. The Chief Justice plainly approved the appeal to the commonsense estimate of a statute's necessary reach:

> "If war-time necessities require that some protection in the way of fixation of rent, security of tenure, and so forth, should be given to tenants, I can find no real reason why tenants of properties belonging to a State should be in any different position from other tenants. To leave any considerable body of tenants without protection would prejudice the stability of the whole protective structure. It is notorious that the State, through the various instrumentalities, for example those dealing with housing schemes, farm settlements, and similar matters, has a large number of tenants, probably far beyond those holding from any person."[207]

After the experience with tenancy statutes in the British Isles, it was entirely appropriate that litigation over such legislation should usher in a segregated view of the ambit of statutes within the Australian federation. Sergeant Gulson was at least spared being informed that he

205. At 353.
206. Minister for Works v. Gulson (1944) 45 WALR 90.
207. Quoted at 69 CLR 353-354.

must be evicted to save the Western Australian Government from the "prejudice" of having to treat its tenants in accordance with the law that protected other lessees. "Prejudice" was a late flower in this area of Australian jurisprudence, but one that would bear heavy fruit. Conversely, the Commonwealth Government argued previously to the British Government that the presumption should be applied, not as the modern maxim, but in its narrow form only in respect of prerogatives and unique regalian rights[208], a strikingly self-denying ordinance if superior courts in either country cared to remember the submission.

But the outstanding aspect of Gulson is its quiet cutting of the ties to the old, narrow presumption, apparently in the cause of constitutional order. From the High Court decision in Ryan in 1911 there had appeared to be authority at the highest level in Australia (but noting the formerly supervening authority of the Privy Council) that the Crown could not claim immunity from statutes by reference to the simplified maxim as it had taken hold in England from 1870. Lowden, Hay and Dalgety had shown State Supreme Courts facilitating the application of statutes to the Crown by the discriminating application of the presumption in its old form, combined with forthright assertions that the Crown must bear the weight of statutory regulation when it engaged in activities which were the normal province of the citizenry.

208. See ch.8 f.nn.298, 311, 321, 326 and 327 referring to argument of Crown counsel in Bank voor Handel in 1952, and Madras Electric in 1954 and 1955.

Pirrie had done nothing to change this realistic attitude, but Gulson was decided nearly twenty years after the High Court had last looked at the problem, and while few decisions from this crucial period of transition for the presumption in England (the rebirth of "prejudice") were cited in argument[209], and only one of them in judgment[210], the simplified maxim seems to have seized the minds of the High Court Justices. Only Sugerman KC for the Commonwealth argued the narrow form, citing Ryan and Hay. Counsel for Gulson restricted himself to the constitutional ground, and Dunphy KC for the Western Australian Crown ran out a melange of twenty three cases each illustrating that the Crown was not bound by the statute in question, but lacking any coherent theme to explain why the Crown was not bound. Fourteen of the twenty three were English from 1870 and later. There was no examination of whether they related to a prerogative in each case or not, but Dunphy was successful with his scattergun technique where he had not succeeded in Dalgety. The High Court took a significant, if almost unobstrusive step in the direction of the simplified maxim.

The War had imposed a necessity throughout the common law world of protected housing for families dismembered by war service : the cessation of hostilities brought a fresh requirement, also given wide legislative expression, that

209. AG v. Hancock ch.8 f.n.232; In re Hutley's Legal Charge [1941] Ch 369; Clarke v. Downes ch.8 f.n.214 and Wirrall (sic) Estates Ltd v. Shaw ch.8 f.n.218.
210. Wirrall (sic) Estates Ltd v. Shaw per Williams J, 69 CLR at 364.

the diminishing places in wartime industries be distributed equitably as munitions plants closed down. Morton[211] had concerned a Northern Ireland statute making work selection on the basis of union membership illegal, against which a Ministerial directive ran directly counter. The Australian High Court decision in Cain v. Doyle[212] concerned Commonwealth legislation, apparently all-embracing as the statute had been in Morton, designed to secure stability of employment for returned servicemen. As had been the case in Morton, a Ministerial directive was promulgated in respect of the manner in which government factories were to dispose of employees "surplus to requirements." Against this directive of 2nd August, 1945[213], the Re-establishment and Employment Act, 1945 clearly showed the Commonwealth draftsman's appreciation of Gulson. In s.10, "employer" was defined to include the Crown in right of both Commonwealth and States, and s.18 provided that an employee covered by the act should not be dismissed without reasonable cause : "Penalty : One hundred pounds".

A reinstated returned serviceman named Wright was a person covered by the act. Upon his dismissal without cause in May 1946, from a Commonwealth owned factory, Cain, an official in the Returned Serviceman's League laid an information against Doyle, manager of the factory in which Wright had been working, alleging that Doyle had aided and abetted the Commonwealth, Doyle's employer, in a breach of

211. F.n.103 supra.
212. (1946) 72 CLR 409.
213. At 411.

s.18 of the act. In the event, this attempted prosecution proved bull-headed in terms of the employee, Wright's, interests. The use of a prerogative writ, most obviously mandamus, would have served to test the Commonwealth Crown's directives and actions when pitted against a statute specifically binding that Crown. Like the contemporaneous Morton in Northern Ireland, Cain v. Doyle was a dispensation case in modern clothing, and in both cases an executive edict was followed by administrators and upheld by the courts because the factories concerned were operated and owned by the Crown.

In the Australian case, the High Court (Latham CJ, Rich, Starke and Dixon JJ; Williams J dissenting) upheld the decision of the magistrate, who had dismissed the information against Doyle because his alleged offence of aiding and abetting his employer, the Commonwealth, in breach s.18 of the act, required that the Commonwealth be liable in respect of the primary offence. By taking the prosecution road and opting for a punitive approach, Cain, custodian of Wright's legal position, offered up a gift to the gods of legal academia, but sacrificed Wright's position, which would have been more successfully protected by the curial direction consequent on a prerogative writ.

The concept of the Crown being criminally liable to the laws which it was bound to enforce was too distressing for the majority of the High Court, while the language of the judgments did not dismiss out of hand the Crown's duty to adhere to legislation. Certainly the ground traversed in

the case was assumed to be novel, neither Friedmann[214] nor Hogg[215] finding any case prior to Cain v. Doyle dealing with a prosecution of the Crown. But Bruse v. Harcourt[216] in 1709 had preceded Cain v. Doyle by over two centuries. Bruse, concerning a prohibition against trade in French wine, had raised the aspect of a penalty (forfeiture of goods and vessel) partly payable to the informer, so that, as Lovell B dissenting noted, the case could not be dismissed out of hand on the ground that the Crown could not forfeit to itself. The legislation in Cain contained a not dissimilar provision with the intention of compensating a wrongfully dismissed employee:

> "Section 19(1) provides that where an employee is convicted of an offence under this division, (a) the Court may order that a portion of the fine imposed shall be paid to the employee; and (b) whether or not an order has been made to this effect the Court may order that the employer shall pay to the employee such compensation as the Court thinks reasonable."[217]

But this regulatory scheme of compensation, on a quite different social and moral plane from the inducement to informers in Bruse, was incapable of moving the Australian

214. Friedmann "Public Welfare Offences" p.24.
215. Hogg Liability of the Crown p.177.
216. See ch.7 f.n.47. The Scottish case Somerville in 1893 (supra f.n. 21) went off on a jurisdiction point in the Crown's favour, amidst a wealth of dicta finding the Crown "obliged" to comply with planning legislation. Justices of Kent in 1889 (ch.8 f.nn. 118-120) also showed certain similarities with Cain, although Queens's Bench Division never accepted that the Crown, the Crown's scales, or the Crown's part time post master, Nicholls, could be bound by general regulatory legislation. Even though the case had not been in the form of a prosecution of the Crown, Mathew J had seen a paradox if the Crown forfeited the scales to itself consequent upon a conviction of Nicholls.
217. 72 CLR at 429 per Williams J (emphasis added).

High Court to curb the Crown's abrogation of the employee's rights under legislation in Cain.

For all the High Court's reticence, however, academic writers have remained interested in Cain, although with the passing of the years Hogg[218], and then McNairn[219] were not as enthralled with the possibilities of the case as Friedmann had been in 1950.[220] So enthusiastic was he that he spoke of a "bare majority" of justices confirming the order of the magistrate dismissing the information[221], but the actual vote was four to one, with Williams J the sole dissentient finding unequivocally that the Crown could be, and on the facts was liable to the criminal sanctions consequent on a breach of a statutory provision.

Given that s.10 of the Re-establishment and Employment Act specifically defined "employer" to include the Crown in all of its Australian capacities (Commonwealth, State and statutory authorities) it is at first glance difficult to see the necessity for any reference to the presumption at all, but Williams J, dissenting, wished to highlight the intention of parliamentary counsel in deliberately naming the Crown in this 1945 act, passed the year after Gulson. Williams J said:

> "It is clear that the Crown must be expressly named or a necessary implication to that effect must appear in a statute before it can be bound in respect of its prerogatives, rights, immunities or property."[222]

218. Hogg Liability of the Crown pp.176-177.
219. McNairn Governmental Immunity pp.88-91.
220. Friedmann "Public Welfare Offences" pp.24-26.
221. Ibid p.24.
222. 72 CLR at 428.

Williams J cited Gulson and the recently decided English case Randall as authority for this assertion of the old, narrow presumption, broadened to include "property". Williams J alone in Gulson had advanced the presumption in this form[223], and in Randall the Court of Appeal cited Hancock from 1940 regarding Crown immunity from statutes in respect of its "property, interest, prerogative or rights."[224]

The majority of the Court reasoned that the Crown was not bound by the particular penal sanctions of this act. Only Starke J joined Williams J in reasoning to the contrary. The crux of Williams J's dissent reads as follows:

> "There is no scintilla of indication of any intention in the Act that the Crown should be subject to the obligations of an employer but not liable to the express statutory remedies in breach. Such an intention would produce the effect that the Crown could not be convicted of an offence and the employee could not recover compensation."[225]

The bifurcation in reasoning to which Williams J referred is to be found in the judgments of Latham CJ[226] and Dixon J[227] (as he then was), with whom Rich J agreed. Friedmann[228] and McNairn[229] have since analysed this distinction and found it wanting.

The Chief Justice had found the Crown incapable of

223. See f.n. 197 supra.
224. See ch.8 f.n. 233.
225. 72 CLR at 432. This echoed Lovell B's dissent in Bruse : ch.7 f.n. 49.
226. 72 CLR at 419.
227. At 245.
228. Friedmann "Public Welfare Offences" p. 26.
229. McNairn Governmental Immunity p. 90.

fining itself, and in any case it had the power to remit fines. The latter point was of course immaterial in the context of compensation being paid to an employee out of the fine, or compensation in any case irrespective of the quantum of the fine, providing there was a conviction. Dixon J was in concurrence with the Chief Justice's reasoning on this point, but Friedmann analysed the social utility of convictions for "administrative or social welfare offences" : what mattered was not financial burden but social stigma.

Latham CJ alone of the Court thought that the nature of the prosecution process precluded the Commonwealth being bound by penal sanctions[230], but unnoticed by the three principal commentators referred to above, the Chief Justice softened his attitude in the remaining page of his judgment, so that he finished tacitly agreeing with Dixon J that there was insufficiently clearly expressed intention in the penal provisions of s.18 to bind the Crown. They were both in agreement that the Commonwealth was obliged by the statute to adhere to certain standards in respect of employees (Dixon J specifically referring to the civil remedy of mandamus)[231] but that it was a matter of interpretation as to whether penal provisions reached the Crown. In this case, both judges agreed that they did not. In the words of Dixon J:

230. 72 CLR at 417-418.
231. At 425.

> " ... where it is uncertain whether the legislature adverted to the special position of the Crown, it is the very case in which the presumptive rule of interpretation should prevail and the application of the penalty clause should be restricted to the subject to the exclusion of the Crown."232

One is left to ponder how explicit words have to be to encompass the Crown for the purposes of prosecution : including the Crown within a class of persons affected is insufficient on the majority reasoning in Cain.

Both McNairn and Friedmann attacked this judicial raising of the height of the presumption. Friedmann observed that the argument concerning the juristic discomfort of the Crown both paying and receiving fines depended on the concept of "the unity and indivisibility of the Crown" which ought to be discarded. This injunction serves to remind that the unity of the Crown has been a one way legal street. In the police tort cases the Crown has been held not liable for the acts of police because the legislature and executive are held to be quite separate organs.[233]

Starke J delivered a judgment which, in two powerful pages was, on its reasoning, a dissent from the majority, but which agreed that the information was correctly dismissed by the magistrate because there was no evidence of Doyle's involvement in aiding and abetting any offence which might have been committed by the Commonwealth.[234] But the nub of Starke J's judgment was that "Sovereign bodies could create rights and obligations against themselves and submit

232. 72 CLR at 426.
233. Churches "Police Torts" nn. 90 and 92.
234. 72 CLR at 422.

the determination of those rights and obligations to the jurisdiction of the Courts and provide means for enforcing them"[235], and the provision under review indicated that the Commonwealth Crown, as sovereign, had done exactly that.

> "Section 18 should be given its plain and ordinary meaning in the English language unless some gross or manifest absurdity is thereby produced. And in my judgment as at present advised, there is no convincing reason for limiting the penalty prescribed by s.18 to subjects."[236]

Having dealt with the concept of penalties applying to the Crown by straightforward statutory interpretation, Starke J then analysed the result that would follow on a rejection of the clear wording of the statute:

> " ... if the duties imposed upon Governments cannot be enforced against them the right of reinstatement and preference contemplated by the Act is seriously affected. Well may servicemen and women declare that the provisions of s.18 and other sections
> 'keep the word of promise to our ear,
> and break it to our hope.'"[237]

This is a devastating, if allusive commentary on the successful argument for the Commonwealth, given that the full quotation from Macbeth reads:

> "And be these juggling fiends no more believ'd,
> That palter with us in a double sense;
> That keep the word of promise to our ear,
> And break it to our hope!"[238]

Of course, only two years earlier Starke J, had been notably unconcerned as to Police Sergeant Gulson's expectations regarding his rental premises being juggled with by the Western Australian Minister for Works.[239] Starke J's

235. At 420.
236. At 421.
237. Ibid.
238. W. Shakespeare Macbeth Act V scene 8.
239. See text after f.n. 194 supra.

position can no doubt be justified by observing that it was not the Western Australian minister who raised the expectation, but the Commonwealth Parliament and Executive, but that does not sit easily with Starke J's enunciation of the doctrine of indivisibility of the Crown, upon which his judgment in Gulson rested.

It is not mala fides in counsel that causes them to present a case in every legitimate way that advantages their client. Barwick KC was appearing for Doyle and the Commonwealth interest in his first reported argument on the subject of statutes and the Crown. No one could accuse him of paltering, but in Cain Barwick showed a readiness to avoid analysis of the central issue, in favour of raising procedural hurdles to the appellant's case, combined with an appeal to archaic doctrines of Crown immunity which had no relevance to the brave new world in which the Government ran munitions factories in a close fitting legislative environment.

The key issue was that the act on its face bound the Crown : what was the extent of that binding effect? Barwick said:

> "It is conceded that the Act binds the Crown, whatever that expression may mean. The circumstances that a particular Act binds the Crown does not mean of necessity that the Crown is liable to be sued in respect of breaches of the Act, or the duty that is imposed by the Act."240

Barwick proceeded to assert that the act bound the Crown as an obligation, but, in defiance of the clear wording of the statute, that the act did not provide for the Crown to be

240. 72 CLR at 414, arguendo.

liable to prosecution. This is exactly the line which Latham CJ and Dixon J accepted.

Barwick based his assertion on the twin but contrasting pillars of practicality and medieval notions of Crown status. On the one hand there was no jurisdiction in State courts to recover a fine against the Commonwealth, and "the only method by which the penalty could be collected would be by imprisonment in default of payment."[241] This was the usual conjuring up of the worst case hypothesis. On the other hand, Barwick argued that the "strongest and clearest indication"[242] was required to overcome the general principle that the king can do no wrong, which doctrine Barwick found established in two lines of thought:

> "(i) that it is part of the King's dignity and his sovereignty to be immune from process in his courts and, because he is not liable to process, there cannot be a wrong without a remedy, therefore there can be no wrong by the King; and (ii) there cannot be an imputation of wrong to the King. There is an infallibility with respect to the Crown and because wrong cannot be imputed to him he cannot be proceeded against in his courts."[243]

Contemporaneously with Friedmann's 1950 article arguing for a practical approach to Crown adherence to statutes in the light of modern conditions, Sawer had attacked the 1864 decision in Tobin v. The Queen[244], relied on in police tort cases, which distinguished between the directory effects of Executive instruction, and statute proceeding from the Legislature. He referred to Erle CJ's concept of government

241. Ibid, arguendo.
242. At 415, arguendo.
243. At 414-415, arguendo.
244. (1864) 16 CB (NS) 310. See ch.8 f.n. 68.

as "feudal" and "naive".[245] The former word, although in the context of argument, not the latter, seems entirely appropriate to this aspect of Barwick's argument. The most influential modern Australian decisions on the presumption would be handed down during Barwick's tenure as Chief Justice of the High Court. His argument in Cain provided no basis for assuming that thirty five years later that Court would have removed its thinking from "feudal" generalisations.

The irony in Cain is that over 200 years after Bruse, the reasoning so closely, if unwittingly, parallels that case. The Crown could not be bound by penal sanctions because of procedural difficulties, and the additional impediment of the Crown forfeiting to itself. But at least in Bruse, decided twenty years after the Bill of Rights, the court addressed the abolition of the dispensing power. The result in Cain was to enforce de facto a dispensing of the Commonwealth act in favour of Crown factory managers under authority of an executive direction.

Little academic writing has emerged in Australia on this topic, Hogg's Liability of the Crown in 1971 (based on his Ph.D. thesis for Monash University, Melbourne in 1969) being the only monograph to deal with the matter comprehensively. However, in the war-time and immediate post-War years two short but stimulating case notes observed

245. G. Sawer "Crown Liability in Tort and the Exercise of Discretions" (1951) 5 Res Judicatae 14 at pp. 17 and 18.

the then apparent rift between Australian and English case law on the presumption.

In the first[246], Vickers-Willis observed that Hancock in 1940, and Hutley following it the year after, rested on aspects of the Crown's position or property being immune from general statutes. On the other hand the Australian High Court in Ryan (which decision State Supreme Courts expressly followed in Lowden and Hay) cited Craies as authority that the Crown could be deprived by general statutes "of such inferior rights as belong to the king or the subject ...". Vickers-Willis recorded that Craies cited Willion and Magdalen College as authority for this proposition, but while those decisions are in conformity with it, they are not the source of the concept, which was in fact the result of Dwarris' inspired writing in 1830.[247]

This error caused Vickers-Willis to detail an unnecessary reconciliation of Magdalen College with Ryan and Hutley on the fallacious basis that none of these cases involved Crown rights which had been created prior to the passing of the relevant legislation in each case. This is a fallacy in the light of Ryan's reasoning, because if a statute had set out to affect existing rights shared alike by Crown and subject, then they should be equally affected. Only regalian "incommunicable" rights should be protected against the effect of statutes, and this was clearly not so

246. C. Vickers-Willis "The Crown and Statutes" (1941) 2 Res Judicatae 241.
247. See ch.8 f.n.37.

in Hutley[248] where Morton J (as he then was) held that the Possession of Mortgaged Land (Emergency Provisions) Act, 1939, did not bind the Crown so that it could repossess mortgaged land. Vickers-Willis touched on the crucial point in the "old style" presumption that allowed Hancock on its facts to fall within the concept of protected exclusive regalian rights : a prerogative was involved in Hancock (although which one was not specified)[249], and prerogatives were of their very nature exclusive to the Crown, which the other concepts such as "property", "rights" and "interests" were not.

Gough and Derham followed this six years later with a case note on Gulson[250] approving the approach in Ryan as "sensible" and attacking Hancock and Hutley. The writers expressed concern that Williams and Rich JJ in Gulson were muddying the clear water of Ryan. They perceived that Williams J's inclusion of "property" in the list of Crown bulwarks against statutory inclusion posed a threat to the principle in Ryan, because property, unlike the prerogative, was owned by Crown and subjects.

The two writers submitted that on the authorities

> "notwithstanding the dicta of Williams and Rich JJ, it is open to the High Court to follow the clear and simple principle of Ryan's Case and to reject the cumbrous and almost inapplicable doctrine of the Hutley and Hancock Cases."251

The pair then concluded trenchantly:

248. Re Hutley's Legal Charge [1941] Ch.369.
249. Vickers-Willis "Crown and Statutes" at p.243.
250. J. Gough and D.P. Derham "Gulson" (1947) 3 Res Judicatae 92.
251. At 93.

> "It should be one of the first duties of parliaments to insist that every statute has an express provision about its relation to the Crown, in spite of the occasional desire of departments to leave the point in doubt. But pending this reform in legislative practice, it would seem unfortunate for the High Court to drift into adopting an obscure rule which adds to the privileges and immunities of the Executive, when a clear rule limiting those privileges can be obtained from Australian decisions of high authority."252

Ryan had never been over-ruled, and Pirrie, Gulson and Cain in the High Court had each gone off on special facts, the first two involving federal constitutional aspects and the third, the special problem (as presented by Barwick KC) of criminal sanctions and the Crown. Gulson and Cain had revealed a drift from the clarity of Ryan, Lowden and Hay (only Starke J, dissenting in his reasoning in Cain, looked to the social consequences of the Crown immunity as the courts had in Ryan and its successors) but as Gough and Derham expressed the matter in 1947, Ryan was still sound law, and marked a distinction with the less savoury development of the presumption in England.

But unknown to Gough and Derham as they were preparing their brief note, six days before the High Court brought down its decision in Cain on 16 October, 1946, the Privy Council had given its advice in Bombay. The Privy Council was at this time the ultimate court in the Australian appellate hierarchy, and the impact of Bombay was to completely drain the clear water of Ryan and replace it with substance of equal clarity, but of a content vastly more in

252. Ibid.

favour of the Crown : the simple maxim that the Crown was immune from statutory operation in the absence of express words or necessary implication in the form of a logical imperative. Within eighteen months of Bombay, the Full Court of the New South Wales Supreme Court had taken the opportunity to effectively annul the impact of Ryan and follow the Privy Council. Australian jurisprudence on this subject never recovered from the impact.

In North Sydney Municipal Council v. Housing Commission of New South Wales[253] it was accepted that the Housing Commission constituted the Crown in right of New South Wales. It owned land in the plaintiff Council's municipality and was in the process of erecting buildings on the land in defiance of the planning provisions of the Local Government Act, 1919 (NSW) when the plaintiff sought an injunction to restrain the building.

Hardie KC and Walsh for the defendant and Wallace KC and Asprey all became Presidents or members of the New South Wales Court of Appeal; Walsh became in addition a Justice of the High Court. The Court was a powerful one, comprising Jordan CJ, Street J (Jordan's successor) and Roper CJ in Eq.

Defending counsel argued straight out of Bombay that there was no express or implied intention that the act should bind the Crown, and the fact that some sections were

253. (1948) 48 SR (NSW) 281.

so expressed indicated that other sections should not affect the Government. Counsel for the plaintiff argued that the legislature had not contemplated buildings being erected in defiance of the act, and the Housing Commission was not carrying out an "inalienable function of government" but was engaging in activity open to the whole community. It was submitted that Bombay was distinguishable on its facts, although both cases involved two tiers of government. The distinction must have lain in the positive actions pursued by the Bombay Municipality, as opposed to the merely regulatory functions attempted by the North Sydney Council.

Jordan CJ delivered a judgment in which Street J and Roper CJ in Eq. concurred. The short form modern maxim was firmly entrenched and it was noted that Bombay had put an end to the concept of statutes "for the public good" binding the Crown. Sutton and Gorton were cited as examples of when Crown exemption would or would not make operation of legislation impossible or at least highly inconvenient, thus raising the concept of "necessary implication."[254]

Jordan CJ then set out to bag Griffith CJ in Ryan without even pretended recourse to the supervening effect of Bombay. He quoted Griffith CJ to the effect that when government engaged in enterprises formerly only carried out by individuals it was governed by the laws concerning such

254. At 285.

activities as if it were a subject.[255] In a statement of rank judicial insubordination, Jordan CJ then said:

> "Assuming, as in this Court we must, that the case was rightly decided, I think it clear that the passage which I have quoted, if treated as a proposition of general application, is much too widely stated ..."[256]

He concluded on this matter by completely denying that the Crown was only exempt from statutes when performing functions which were inalienably governmental.[257] But Dwarris' 1830 concept of incommunicable regalian rights had been the best condensation of Coke's intentions to that date. In terms of the reality of modern government it required, and requires, only the addition of actual necessity, as evaluated by a court, not the executive, to give a boundary to the presumption of universal application. Jordan CJ, however, spotted the flaw in the concept, when looked at from a mechanistic judicial viewpoint, that it had no direct judicial authority. The Chief Justice swooped and pounced : Lowden was doubted in the light of Bombay, and Ryan was effectively destroyed as authority.

It is worth noting in passing that Ryan, Lowden and Hay were not decided by reference to "prerogative rights" as Hogg stated[258], but by considering that the Crown activities

255. At 286.
256. Ibid.
257. Ibid at 287.
258. Hogg Liability of the Crown p.168 at n.10.

involved in those cases were not inalienable to the Crown, and were in fact the result of engaging in activity which in former times had been the province of subjects.

The constitutional problems posed by federalism continued to dominate litigation concerning statutes and the Crown in the immediate post-War era. Essendon[259], Uther[260] and Bogle[261], concerning whether legislation of one tier of government affected another, did not advance analysis of the presumption. Williams J, dissenting in Bogle, was of interest in that six years after Bombay he discussed the indivisibility of the Crown in terms of Her Majesty only being bound "in respect of her prerogative, rights or property" where a statute contained express words or a necessary implication.[262] Williams J cited Gulson as authority for this proposition. He had been the only judge to decide in these terms in Gulson. Bombay had of course dispensed with references to the prerogative.

259. Essendon Corporation v. Criterion Theatres Ltd (1947) 74 CLR 1.
260. Uther v. Federal Commissioner of Taxation (1947) 74 CLR 508.
261. Commonwealth v. Bogle (1953) 89 CLR 229. These three cases are discussed in Hogg Liability of the Crown pp.188-199 and McNairn Governmental Immunity pp.28-33. Commonwelath v. Cigamatic (1962) 108 CLR 372 overruled Uther, with a decision that a State Parliament could not legislate to intrude on a Commonwealth prerogative of priority in winding up. The Commonwealth Companies Act and the Companies Codes of the respective States have now dealt with this matter comprehensively.
262. 89 CLR at 254.

Undaunted, Williams J was still referring to "the Royal prerogative" in this context in 1956 in Kaye[263], and citing Bombay as authority. Kaye, unlike Bombay, Gulson and other cases from the post-War period, actually did refer to a prerogative, that of the Crown's capacity to dismiss Crown employees at will. The other judgment, that of Dixon CJ, Fullagar, Kitto and Taylor JJ, did not even refer expressly to the presumption or its Tasmanian statutory form. The Crown had a "right" which had not been specifically taken away.

A variation on the constitutional theme was worked out in the Full Court of the New South Wales Supreme Court in 1951 when Street CJ and Owen J (Herron J dissenting) found that the Landlord and Tenant (Amendment) Act, 1948 (NSW) bound the Queensland Crown.[264] The Commonwealth's defence power had waned since the cessation of hostilities in 1945, and with it the Commonwealth's legislative capacity in respect of housing. This New South Wales act was passed to provide a scheme for protection of lessees in the absence

263. Kaye v. AG (Tas) (1956) 94 CLR 193 at 204. It must be noted in this context, however, that Kaye concerned a Tasmanian statutory form of the common law presumption, Acts Interpretation Act 1931 (Tas.) s.6 (6), which reads as follows: "No Act shall be binding on the Crown or derogate from any prerogative right of the Crown unless express words are included therein for that purpose."

264. Public Curator of Queensland v. Morris (1951) 51 SR (NSW) 402.

of the former Commonwealth legislation, which was the genesis of the State act.[265]

S.5 of the New South Wales act provided:

"The Act shall not bind
(a) The Crown in right of the Commonwealth or of the State; or
(b) the Housing Commission of New South Wales."

Herron J's dissent in finding rental property in New South Wales owned by the Queensland Crown to be unfettered by the provision of the New South Wales act was in conformity with Rich and Williams JJ of the majority in Gulson : the presumption of Crown immunity extended to other Crowns and the words in s.5 were only inserted ex abundante cautela. Herron J analysed the presumption at length, citing Street's seminal article and noting the nineteenth century drift by the courts from the consideration of a statute's policy in favour of literal interpretation.[266] His Honour confused Willes J in Edmund with Wills J in Gorton and Cooper, but then in words prefatory to his analysis of Bombay, he observed that "necessary implication" had ousted any requirement for reference to the prerogative.[267] This makes all the more puzzling the citing on the following page of cases resting on the prerogative, but even allowing these examples an uncertain status in limbo, his Honour thought the inclusive rubric stretching back to Coke of statutes for the maintenance of religion, learning or the poor, or to

265. At 405-408 per Street CJ.
266. At 412.
267. At 415.

prevent wrong or fraud, binding the Crown required analysis in the light of Bombay.[268] After a thoughtful and learned opening on the medieval roots of the presumption in the competing rights of king and subjects, Herron J's dissent petered away in the sands of the Privy Council advice.

Street CJ took the opposing view that in the light of s.5 other Crowns were bound, and Owen J concurred on the basis that in Gulson the High Court gave no decisive reasoning on whether the presumption worked in favour of non-legislating Crowns, so that Sutton should be applied,[269] and the Queensland Crown should be bound.

In 1955 the High Court was confronted with an eviction of a tenant by the New South Wales Commissioner for Railways without adherence to the provisions for notice contained in s.62 of the Landlord and Tenant (Amendment) Act, 1948 (NSW).[270] Separate transport legislation provided that "for the purpose of any act the Commissioner for Railways shall be deemed a statutory body representing the Crown." The majority, Williams, Webb and Taylor JJ, had no difficulty in concluding that in consequence of this deeming provision, the Commissioner became the Crown for the purposes of s.5 of

268. At 417.
269. At 411.
270. Wynyard Investments Pty Ltd v. Commissioner for Railways (NSW) (1955) 93 CLR 376.

the Landlord and Tenant (Amendment) Act referred to above. Therefore there was specific statutory exemption for the Commissioner, who could evict tenants without reference to the protective legislation. However, they added that irrespective of s.5,

> " ... the commissioner as representing the Crown could still rely on the general doctrine that the Crown is not bound by any statute except by express mention or necessary implication. The Crown is bound by necessary implication where it is manifest from the very terms of the statute that it was intended by the legislature that the Crown should be bound."271

Bombay was cited as authority.

Kitto J, with whom Fullagar J agreed, dissented, refusing to accept that the Commissioner was entitled to the Crown immunity from general statutes. He found the deeming provision inapposite to enable the Commissioner to rely on immunities that flowed to the Crown from statutory construction.[272] The nub of his argument was that the Commissioner was not the Crown, or its agent, in respect of dealings with the subject land.

Given these findings, Kitto J set out to determine whether the Commissioner could shield behind the Crown on any other basis to obtain exemption from compliance with the act. It is this analysis which makes Kitto J's dissent of considerable interest. It serves as a canon, although not a coda, explicitly to Bank voor Handel decided the previous

271. 93 CLR at 398.
272. At 400-401.

year in the House of Lords, and implicitly to Madras Electric decided earlier in 1955. Kitto J focussed on what was involved in binding the Crown to enable him to determine when the presumption should work to exempt the Crown.

Citing Lord Reid in Bank voor Handel[273], Kitto J said:

> " ... to hold that a given statutory provision binds the Crown is to hold that it operates to destroy or curtail or impair some interest or purpose of [the central government of the Commonwealth or a State.]"[274]

Appealing to both the majority and minority of the House of Lords, and the Court of Appeal in Bank voor Handel, Kitto J continued:

> "Where the immunity is claimed by a subject of the Crown ... the question to be decided ... must always be whether the operation of the provision upon the subject would mean some impairment of the existing legal situation of the Sovereign."

Kitto J saw the nub of Bank voor Handel as whether the taxing of income in the hands of a Crown official would "prejudice ... interests or purposes of the Sovereign."

On the next page[275] his Honour explored "adverse affect" to exercises of Crown authority or proprietory rights or interest, and the imposition of burdens on Crown functions. But then followed two sentences, claiming support from Bank voor Handel, the first of which does not sit easily with that decision:

> "But the immunity of the Crown can never inure for the benefit of a subject. Whoever asserts it must assert it on behalf of and for the benefit of the Crown."[276]

273. [1954] AC 584 at 618.
274. 93 CLR at 393.
275. At 394.
276. At 395.

The first of these sentences is, if not a contradiction of the majority in Bank voor Handel, then a contrariety to it. Kitto J cited Lord Morton[277] and Lord Reid[278] in his support, but neither the dissent of the former, nor the reference to the latter goes this far. The gravamen of Bank voor Handel is not that Crown immunity can never inure for a subject's advantage (the bank took advantage of the Crown's position in that case) but that the issue of whether Crown immunity from statutes exists must be calculated solely with regard to Crown advantage or prejudice. A subject might take benefit riding on the Crown's coat-tails. This is explicit in the reasoning of Lord Reid.[279]

But this lapse in expression did not affect Kitto J's reasoning on the facts of Wynyard, and he remained otherwise totally in conformity with the spirit of Bank voor Handel, that impairment of a Crown function was grounds for blocking the application of a general statute to the Crown. The summation of Kitto J's reasoning lies in the following words:

> "The object in view is to ascertain whether the Crown has such an interest in that which would be interfered with if the provision in question were held to bind the corporation that the interference would be, for a legal reason, an interference with some right, interest,

277. [1954] AC at 607.
278. At 615.
279. At 618 and 619, quoted in ch.8 f.nn.314 and 315.

> power, authority, privilege, immunity or purpose belonging to or appertaining to the Crown. In the present case this means that the object of the examination must be to discover whether the recovery of possession with which the Landlord and Tenant (Amendment) Act interferes if the Act binds the Commissioner for Railways, would be, in some legal sense, a recovery for the Crown."280

Kitto J found the Commissioner not to be the Crown or holding the land for a Crown purpose. The answer to the above examination was therefore that a Crown interest or purpose was not being defeated by the application of the act, so the Commissioner ought to comply with its terms.

It will be noted that although the analysis of Madras Electric[281] in chapter eight was in terms of the relationship of the prerogative to the presumption, the result of that case was in conformity with the reasoning of Bank voor Handel and Kitto J (with Fullagar J agreeing) in Wynyard. In Madras Electric there was no prejudice to the Crown in having the statute apply to the company, so the company was bound, and had to pay the tax. As will be seen, however, this line of reasoning was to build up a store of trouble in those relations between Crown and subject where the Crown would be prejudiced by the operation of a statute, but the subject claimed to take the benefit of the Crown's immunity on the basis of a contractual relationship with the Crown, not because of the process of a Crown function as in Bank voor Handel.

In conclusion on Wynyard, the majority appeared to have swallowed the modern, streamlined maxim whole, thus

280. 93 CLR at 396-397.
281. Ch.8 f.nn.317 et seq.

signalling the High Court's acceptance of the demise of Ryan and the paramountcy of Bombay. But Kitto J had related his reasoning throughout to "prejudice" and had connected that concept to a list of Crown qualities which were really an expanded version of Coke's prerogatives and other regalian rights. The list is noteworthy for being concerned with governmental function and capacity, not with property or status quo ante the passing of a statute. Though his Honour was dissenting, his judgment stands high, given that he had taken a completely different path from the majority.

Kitto J's dissent also highlighted the fact that Bombay had expressly knocked out the former inclusive standard for a statute binding the Crown, "the public good", but in substituting the new inclusive standard, "express words or necessary implication" it had not addressed the other side of Coke's coin, the exclusionary standard under which a statute would not bind the Crown if it trenched on a prerogative, right or interest of the Crown. Kitto J was not discounting the authority of Bombay with his approach, but he reflected the fact that in the shadow of the apparently definitive black and white Bombay standard there still stood a subsidiary test of uncertain utility. This uncertainty was about to be exposed by State Supreme Court judges.

In 1960 the Landlord and Tenant Act 1899 (NSW) was amended by the insertion of s.2A which compelled a landlord, when acting in respect of low rental housing, to pursue ejectment of a tenant in a court of petty sessions rather

than the Supreme Court. The amendment had the purpose of lightening the financial load of tenants in low cost housing.

The Housing Commission of New South Wales attempted to take proceedings for ejectment against a tenant in the State Supreme Court, and the tenant challenged this action on the ground that the Housing Commission was bound to comply with the amending statute.[282] Brereton J delivered a judgment finding the Crown, in the guise of the Housing Commission, to be bound by the act. The decision gives the appearance of a black powder naval battle : an impenetrable confusion of smoke, shot through with flashes of brilliance. It is, in its disregard for judicial authority and hierarchy, swashbuckling, verging on the piratical. As a single judge of the New South Wales Supreme Court, Brereton J was bound by the Supreme Court's Full Court decisions, those of the High Court, and of the Privy Council, but he made no reference at any stage to Bombay, indeed contradicted its reasoning, when the Full Court[283] and a High Court majority[284] had expressly approved Bombay over other approaches.

Even allowing that counsel of the calibre of W.P. Deane, at the time of writing a member of the High Court bench, was appearing for the defendant tenant and so had no cause to refer to Bombay and its Australian progeny, it is hard to believe that the decision was merely per incuriam. Assuming that a list of relevant authorities including

282. Housing Commission of New South Wales v. Panayides [1963] NSWR 48.
283. North Sydney Municipal Council f.n.253 supra.
284. Wynyard f.n.271 supra.

Bombay was submitted, Brereton J's blind eye was magnificently Nelsonian. If Bombay and its successors were argued (there is no record of argument in the report) the judgment was pure Farragut : "Damn the torpedoes."

Asserting that the Housing Commission was the Crown for the purpose of the decision Brereton J stated:

> "The principle that the Crown is not bound by statute unless expressly mentioned is subject to certain exceptions, first formulated, it would seem, in the Magdalen College Cambridge Case ..."[285]

He then proceeded to quote at length from this case to no particular effect, but Chitty and Bacon's Abridgement were then called in aid. The common theme was that statutes for the public good bound the Crown, while the King's prerogatives, rights and interests could not be divested by general statutes. Bonham was cited as additional support for the first of these propositions, and buttressing the line from Magdalen College that statutes designed to prevent wrong bound the Crown.

Brereton J then admitted that he had not "found it possible to deduce any guiding principle."[286] His Honour observed that Coke's exceptions to the rule of Crown statutory immunity had not been applied in recent times. With a devastatingly accurate historical summary Brereton J summed up what ought to have been the presumption's fate, and got the law completely wrong:

> "It would appear that [Coke's exceptions] were evolved at a time when the struggle for power between the Crown and Parliament was developing and that as that struggle

285. [1963] NSWR at 49.
286. At 50.

> was progressively resolved in favour of Parliament they fell into desuetude."[287]

In the next paragraph his Honour set about, apparently unwittingly, confounding the Privy Council:

> "It is important however to notice that the principle is not as sometimes stated that the Crown is not bound by any statute unless by express mention or necessary implication."

It was rather, Brereton J asserted quoting Bacon, that the King's prerogative, right, title or interest could not be divested except by express words. He then opined that all the cases of Crown exemption fell into one of eight prerogative or Crown proprietary interests that he listed. (Many of the English cases decided since 1870 do not fit into these concepts).

Warming to his theme that s.2A did not impinge on a Crown prerogative or proprietary interest, his Honour noted that the Supreme Court's jurisdiction was a creature of statute, not the prerogative. He asked rhetorically "if a court, originally of unlimited jurisdiction, had its jurisdiction curtailed by Statute, is the Crown not bound thereby?"[288] In one sentence Brereton J had touched on Coke's crucial argument in Ecclesiastical Persons[289] : if the world picture were changed by statute, the Crown had to operate in that new world, be it one in which church officials could no longer make out long term leases, or the New South Wales Supreme Court's jurisdiction to hear ejectment cases was diminished. His Honour was in no doubt

287. At 51.
288. At 52.
289. See ch.4 f.n.95.

that ejectment proceedings against this tenant had to be taken by the Housing Commission in Petty Sessions in accordance with s.2A.

Panayides was affirmed on other grounds by the Full Court of the Supreme Court, but three years later the High Court was dealing with s.2A in a Commonwealth-State constitutional conflict and moved to crush this independence of thought. Barwick CJ opined that "the rule to be applied universally as of this time in the construction of statutes, is that the Crown is not included in the operation of a statute unless by express words or necessary implication."[290] The Chief Justice adopted the approach, conforming with Gulson, that the State Crown was not precluded from pursuing an action of ejectment in the Supreme Court, and the presumption must work in favour of the Commonwealth Crown also.

Menzies J delivered a knockout blow to Brereton J's argument that the Supreme Court's jurisdiction in ejectment was altered. He described s.2A as "a law prohibiting persons within the description to be found therein from resorting to the jurisdiction of the Court and not a section depriving the Supreme Court of jurisdiction with the consequence that the Commonwealth would have sued in a court without any jurisdiction to entertain its action."[291]

A few months prior to Rhind Street J (as he then was) gave judgment in a case with facts akin to Bombay. A

290. Commonwealth v. Rhind (1966) 119 CLR 584 at 598.
291. At 606. The section is set out in the judgment of Owen J at 608 and bears out Menzies J's analysis.

municipal council wished to use its powers under the Local Government Act 1919 (NSW) to dam a culvert on the State Crown's property.[292] The question was whether the council could exercise this power on Crown land. Street J delivered a judgment of impeccable orthodoxy in which he quoted from Wynyard, North Sydney Municipal Council and Bombay[293] as the prelude to discussing whether the Council's statutory power to construct drainage works bound the Crown. Four times in less than a page[294] his Honour affirmed that mere convenience to the Council in exercising its power on Crown land was not enough. For the Crown to be bound, and the Council to have power to perform this work under the statute, the operation of the statute would have to be wholly frustrated if the Crown were not bound, and that was not the case here.

The Queensland Acts Interpretation Act 1954, s.13, was identical with the Tasmanian provision codifying the common law presumption[295] except for the opening words, which in Queensland were "No Act herafter passed shall be binding...". Both the Tasmanian and Queensland acts contained the double-barrelled concept of acts not binding

292. Randwick Municipal Council v. Commissioner for Government Transport (1966) 13 LGRA 126. At the time of writing Sir Laurence Street is Chief Justice of New South Wales, and son of Sir Kenneth Street referred to in North Sydney Municipal Council, f.n.253 supra and Public Curator of Queensland, f.n.264 supra. Sir Kenneth was in turn son of Sir Philip Street, a member of the bench in Kelly f.n.142 supra and later Chief Justice of New South Wales.

293. At 130.

294. At 131-132.

295. See f.n.263 supra.

the Crown, or derogating from any prerogative right of the Crown. Given that the Tasmanian act dated from 1931, that is before Bombay with its apparent disposal of regard for the prerogative, this is understandable in the island State's provision, but it indicates a plagiarist lack of thought in the Queensland provision enacted in 1954.

In 1969 the Full Court of the Queensland Supreme Court had cause to construe s.13 in its application to the offical management provisions of the Companies Act 1961 (Qld).[296] Cold Road Pty Ltd had been placed under official management in March, 1968, but in July 1968 an arm of the Queensland Government took legal proceedings against the company by way of complaint for failure to pay road levies. S.199 of the Companies Act provided that once the procedure was in motion for placing a company under official management, no court proceedings could issue against it until it ceased to be under official management.

The company argued that this section precluded the Government from issuing its complaint. The Queensland Crown relied on the Acts Interpretation Act to establish that it was not constrained by s.199 of the Companies Act. The company argued that the provision of the Companies Act dealing with winding up, which specifically bound the Crown, should be read back into the provisions of the act dealing with official management. But although some of the provisions concerning winding up were explicitly applicable to official management, the court was not prepared to read

296. Murray v. Cold Road Pty Ltd ex parte Cold Road Pty Ltd [1969] QWN (QLR) 29.

in the all-embracing concept of binding the Crown. Part IX of the Companies Act dealing with offical management simply lacked express words binding the Crown.

The court noted that s.13 of the Acts Interpretation Act only referred to "express words":

> "One would suppose that the intention of that section was to exclude the doctrine, prevailing up to that time, that the Crown could be bound by statute if it so appeared by necessary implication."297

The judgment concluded:

> "It may be highly undesirable that [s.199 not bind the Crown] and it may follow that the Crown, having enacted the provisions for official management, is in itself in a situation in which it can wreck the official management of any company of which it happens to be a creditor, but that again, is not a matter with which the Court is concerned."298

Even though winding up provisions in all the State Companies Acts from 1961-1962 bound the respective State Crowns, the federal nature of the Australian polity left open the question of whether other Crowns were bound, particularly as regards priority in debt payment, the hardy perennial which blossomed also in the analogous parts of companies legislation dealing with schemes of arrangement[299] and official management. The Commonwealth Companies Act 1981 and its State counterparts, the Companies Codes 1981-1982, have surmounted this hurdle with each Crown attempting to the extent of its legislative capacity to bind itself and the other Australian Crowns in respect of termination of companies or other arrangements imposed

297. At 31.
298. At 32.
299. Walker v. Commissioner for Payroll Tax (1973) 3 ATR 673.

by creditors.[300] In addition the Commonwealth passed the Crown Debts (Priority) Act 1981 to provide that the Commonwealth Crown would be bound by the various State Companies Codes in respect of provisions making the Crown rank equally with other creditors. The only exception was that the Commonwealth Crown retained its priority in respect of PAYE and withholding tax.

The first reported essay in this field from South Australia concerned a claim by the State Government on the estate of a deceased who had died in the course of a road accident which inflicted damage on Crown property.[301] At common law there was no capacity, in Crown or subjects, to sue the estate of a deceased in tort. This was altered by the Common Law Procedure Act 1833 c.42 (Imp.), which provided for action in respect of damage to property to lie against a deceased estate up to six months after the administration of the estate commenced. The South Australian Survival of Causes of Action Act 1940 repealed and subsumed the former Imperial statute, preserving the six month period, but extending the possible actions in tort to personal injury.

The accident causing the damage to government property and the death of Pinchbeck occurred on 23rd February, 1967. Letters of administration were granted on 1st June 1967, but

300. Companies Act 1981 (Cth) and Companies Codes of the respective States : Part VIII Arrangements and Reconstructions, s.314 (except for Queensland); Part X Receivers and Managers, s.322; Part XI Official Management, s.334; Part XII Winding Up, s.358.

301. Minister of Works v. Pinchbeck [1969] SASR 240.

the suit was not commenced until 19th July, 1968, that is to say more than twice the six months period allowed for commencing actions in tort against an estate. The defendant argued that the suit was not within time, but the appellant Minister argued that the Crown could take advantage of the statutory provisions that created a right to sue an estate which had not existed at common law, but that, as time did not run against the Crown, the Crown was not bound by the time limits in the statute.

Bray CJ opened his judgment by accepting the maxims nullum tempus and roy n'est lie per ascun statute si il ne soit expressement nosme, and the authority of Bombay, but pronounced that these general principles were not involved in this case : "rather I think that it depends on a more limited proposition that when a statute creates a new right the Crown as well as the subject can take advantage of it but only in the same way and subject to the same limitations..."[302] Viner's Abridgement, 2nd edition,[303] Crooke's case from the seventeenth century and Cruise[304] from nineteenth century Ireland were called in aid, but then the Chief Justice said:

> "...it seems to me almost absurd to think that when a new statute grants new rights or extends existing rights subject to limitations and conditions the Crown can, like the subject, take the substantive benefit of the statute but, unlike the subject, ignore the limitations and conditions."

302. At 242.
303. See ch.7 f.n.19, last sentence quoted by Bray CJ, who noted that Shower was reporting his argument as counsel.
304. See F.n. 90 supra and ch.8 f.n.203.

As he put it after examining the legislation:

> "Neither statute took anything away from the Crown; both gave something to the Crown and to everyone else but sub modo."[305]

The Chief Justice's decision is of interest for one further reason. Having determined that the Crown was bound by this statutory time limitation on principles that did not clash with Bombay, his Honour then proceeded to reason to the same effect by referring[306] to Bacon's Abridgement and Magdalen College[307] regarding general statutes not devesting the king of any estate, right, title, interest or prerogative that he had before such act was passed. The South Australian legislation under review did not subtract from any prior existing Crown right, so that it bound the Crown. Bray CJ expressed no appreciation that Bombay had

305. [1969] SASR at 244. This point is argued infrequently, but the weight of reasoning is clearly with Bray CJ. Exactly to point is the concession of Hobart AG in Magdalen College : ch.3 f.n.103, and note the arguments of Frowik and Keble sjts in the last decade of the fifteenth century : ch.2 text after f.n.207, f.nn.211,222.
The case law, including Canadian cases to that time, is set out in D.M. Gordon "How Far Privative or Restrictive Enactment Binds the Crown" (1940) 18 Can. B.R. 751, an article surveying the illogicality of the Crown receiving the benefit of statutes, while not being adversely affected.

306. At 245.

307. See ch.5 f.n.80.

effectively cut off recourse to this line of reasoning, although not explicitly over ruling it. The broad brush of Bombay did not leave room for this more subtle reasoning in miniature.

Chamberlain J dissented from the majority, finding the time limitation in the 1940 act to be indistinguishable from general statutes of limitation which did not bind the Crown.[308] Mitchell J concurred with the Chief Justice, observing that neither Bombay, nor Cayzer, Irvine & Co. Ltd[309] had addressed the issue of a statute investing a new right in the Crown.[310]

The slightly injured thumb of a student in a New South Wales Government run technical school was the subject of litigation which produced, pearl amongst the dross, a sparkling dissent from Windeyer J in the High Court on the subject of statutes and the Crown. The injury was inflicted by a machine which the student alleged should have been fenced in accordance with the requirements of the Factories, Shops and Industries Act, 1962 (N.S.W.). The student claimed that the school constituted a "factory" for the purposes of this legislation, and that the Crown was bound by the legislation, so that failure to fence the dangerous machinery and injury consequent on that failure resulted in a claim in damages against the New South Wales Crown.

308. [1969] SASR at 246.
309. See ch.8 f.n.206.
310. [1969] SASR at 247.

The student was successful in the District Court and the New South Wales Court of Appeal. The Claims against the Government and Crown Suits Act, 1912 (N.S.W.) provides for the New South Wales Crown to litigate in the person of a government official, an anthropologically primitive totemic concept. So it was that Leslie Kenneth Downs, Under Secretary for Justice, as the nominal defendant appealed to the High Court in the matter later reported as Downs v. Williams.[311]

Counsel for the respondent student argued principally along the lines of judgment in the Court of Appeal, where Mason JA (as he then was) had given reasons with which Sugerman ACJ and Manning JA had agreed.[312] This reasoning was to the effect that the Claims against the Government and Crown Suits Act operated to apply the later Factories, Shops and Industries Act to the New South Wales Crown. In the High Court, Gibbs J (as he then was) dissenting, alone found the Crown liable by virtue of the encompassing operation of the Claims against the Government and Crown Suits Act.

The idea of such Crown liability acts operating to create a binding effect of general statutes on the Crown has been referred to above.[313] Maguire v. Simpson[314] in which s.64 of the Judiciary Act, 1963 (Cth), part of a "code" of Commonwealth Crown liability, was held to pick up and apply to the Commonwealth a later State act was a milestone on the path. However, progress in this direction is beset by a

311. (1971) 125 CLR 61.
312. (1970) 92 WN (NSW) 601.
313. Text after f.n.187 supra.
314. (1977) 139 CLR 362.

thicket of considerations concerning, firstly, whether this "pick up" capacity works only in respect of other Crowns in the federation or can be applied to the legislating Crown responsible for the Crown liability act, and secondly, whether such Crown liability acts operate in a temporally ambulatory fashion, that is to say, whether they "pick up" statutes passed at a later date.

These matters, and the judgments in Downs v. Williams in which all the justices except Windeyer J concentrated on the effect of the Claims against the Government and Crown Suits Act, are dealt with at length in McNairn[315], and Aronson and Whitmore.[316] That Crown liability acts might operate to bind the Crown with general acts may be a fine, if technical, solution to the issue of statutes and the Crown, but it is not strictly within the compass of this survey of the judicial process underlying the present state of this aspect of the common law. The reader is invited to pursue the above matters in the works cited, noting that Aronson and Whitmore provide an extensive coverage of Maguire v. Simpson.

In Downs v. Williams four of the five man bench bowed to the Bombay doctrine. A quarter of a century earlier, preceding Bombay, this mechanistic approach had achieved only a toehold in the High Court in Gulson. The majority in Wynyard[317] in 1955, and Barwick CJ (with whom McTiernan J

315. McNairn Governmental Immunity pp.69-77. Note also the review of this book by L. Katz in (1980) 9 Syd. LR 222 at 224 to 227 referring to Maguire v. Simpson.
316. Aronson and Whitmore Public Torts and Contracts pp.13-20. See also Strods v. Commonwealth of Australia infra f.n. 473.
317. F.n. 271 supra.

agreed) in Rhind[318] in 1966, were the only explicit statements adhering to the Privy Council's dictate. They did so without reasoning.[319] No more did McTiernan[320], Menzies[321], Owen[322] or Gibbs JJ in Downs v. Williams. Only Gibbs J (dissenting on other grounds) cited authority, Barwick CJ in Rhind, and noted that Bombay had overturned the promotion of public welfare as a reason for the Crown being bound by a statute, while instituting a necessity for complete frustration of purpose if the Crown were to be bound by implication.

Windeyer J's dissent took shape in the second paragraph of his long judgment where he referred to Plowden's praise of Anthony Browne J in the reign of Elizabeth I, and wrote of his "long and strong judgment in Willon (sic) v. Berkley"[323], quoting the passage set out in the analysis of that case, to the effect that leaving the king unrestrained by a statute rectifying a fault in the common law leaves him free to commit wrong. But Windeyer J then disclaimed mere antiquarian interest in what Anthony Browne J had said. He quoted the Elizabethan

> "... because I believe that the common law can in the twentieth century continue to keep pace with the public interest and meet changing needs of men. Governments are today entering more and more into fields that used to be left to private enterprises. Directly, or by their agencies, Governments engage today in a variety of commercial and industrial undertakings. Modern statutes ought I think to be read with that, as well as ancient dogmas, in mind.

318. F.n. 290 supra.
319. 126 CLR at 65.
320. At 67.
321. At 91.
322. At 93-94.
323. See ch.3 f.n. 46.

> In an era of increasing state socialism I do not think that the Crown, if it conducts a factory, is necessarily to be regarded as exempt from the responsibilities for the safety of persons employed there which the Parliament imposes upon subjects of the Crown who conduct factories."[324]

This appeal to the common law's evolutionary capacity was couched in terms of the functions of government expanding into the province of private commerce, rather than the Crown's special governmental functions being sacrosanct. The former is a dynamic concept which is malleable in the face of different fact situations in determining Crown liability, but the latter has the advantage of being an on/off test : if a statute does not impinge on a regalian right it ought to bind the government. This latter test was, of course, edged aside, if not overthrown outright by the equally distinct Bombay test which looked to the words of the statute rather than the nature of the function being impinged upon.

In Ryan in 1911 Griffith CJ had referred to the sanctity of incommunicable regalian rights[325], but on the following page took up the alternative argument of the Crown being bound when it engaged in functions formerly the preserve of individuals. Windeyer J in Downs v. Williams quoted this passage, while noting that Jordan CJ had disparaged it in North Sydney Municipal Council.[326] Windeyer J said that the foregoing was "a confession of my predilection : but it does not mean that I would abandon

324. 126 CLR at 71.
325. F.n. 150 supra.
326. 126 CLR at 72. See f.n. 256 supra for Jordan CJ's words.

precedent for some presupposition of policy as I turn now to the present case". Having made his obeisance to the Tabernacle, his Honour reviewed the effect of the Claims against the Government and Crown Suits Act before returning to statutes and the Crown.

The dissenter asked himself:

> "Why is it said that the Crown is not bound to observe the same precautions with dangerous machinery that a subject must? It is because the general rule of our law for centuries has been that the Crown is not bound by a statute unless expressly named or bound by necessary implication."[327]

As the present work has attempted to illustrate, this is too broad a generalisation. At the time of judgment in Downs v. Williams the general rule had been in existence not for centuries, but just one hundred years since Edmunds.

His Honour then called in aid De Keyser's Royal Hotel to illustrate that the presumption was not a prerogative in its own right, but was in fact a rule of statutory construction. The famous lines from Donaldson were quoted, unusually, to illustrate "construction" rather than that statutes were made by the Crown for subjects, and it was observed that Madras Electric illustrated a lack of judicial unanimity at the highest level on the question of "prerogative" or "construction".[328]

Windeyer J followed the double barrelled Crown inclusive/Crown exclusive rule from Magdalen College through Bacon's Abridgement to Bonham until the Privy Council in Bombay swept away public good or the prevention of wrong as

327. 126 CLR at 85.
328. At 86.

Crown including statutory criteria, together with the prerogative, rights, titles or interest as Crown excluding factors. Confronted with the rigidity of the Bombay test, his Honour quoted the passage concerning "beneficent purpose" having to be wholly frustrated for the inference of the Crown being bound to be raised.[329] This was the one window even marginally open to allow an argument that the New South Wales Crown was bound by the Factories legislation. With some audacity Windeyer J slipped through this window while still claiming adherence to Bombay. He argued that the ambit of the act was unrestricted, that is to say that it was intended to apply to all factories save those exempted by proclamation under the act, and if Crown operated factories were not covered by the act, the beneficent purpose of protecting factory workers would be frustrated.

The dissenter alluded to, without admitting, the logical weakness of his position and cited Barwick CJ in Rhind:

> "Where the Crown is not expressly mentioned, the implication will be found, if at all, by consideration of the subject matter and of the terms of the particular statute."[330]

Without really advancing the logic of his cause, Windeyer J added, "The subject matter here is safety in factories. The prescription is in general terms". To buttress his case, he then sought to distinguish Bombay on the facts. It, like Gorton and Justices of Kent involved either competing arms

329. At 88. The passage is quoted in ch.8 at f.n. 259.
330. (1966) 119 CLR at 598.

of government, or functions that might be performed by government independently of statutory command, which was not the case here.

Having slipped in support by innuendo for the over-ruled dogma of statutes for the public good and wrong-rectification binding the Crown, Windeyer J turned to the "Crown excluding" aspect of the old fashioned presumption, which, while not specifically over-ruled by Bombay, had ceased to have any utility in the face of the new test. His Honour drew support from the fact that the Factories Act did not attempt "invasion of any proprietary rights of the Crown." Nor was there a divesting of Crown legal rights as had been at stake in Hancock and Hutley. Rather ungrammatically, but revealing a depth of feeling and an approach instinctively rooted in the depths of the common law[331], Windeyer J said:

> "It is not whether the Crown is deprived by statute of rights against a subject but whether a subject is given by statute rights against the Crown."[332]

His Honour then rounded off his dissent by alluding to the public good involved in the statute, and referring with approval to the doctrine in Ryan and Lowden to the effect that when the Crown engages in commerce or other activities formerly the preserve of individuals, the Crown must comply with the statutes regulating such activities. All in all, a

331. See Illingworth CB and Danby CJCP in Additions in 1465: ch.2 f.nn. 158 and 159 on the inability of the king to defeat "common rights" including those created by statute. Note also Danby J (as he then was) in Radclif in 1457 : ch.2 f.n. 114.

332. 126 CLR at 88-89.

spirited dissent that refused to accept the law as a rigid "meccano set" construct, removed from the community for whom it existed.

The end of this decade brought a fasciculus of important High Court decisions on this topic. The intervening period was marked by a judgment in each of the Australian Capital Territory and the South Australian Supreme Courts.[333] In Kent v. Minister of State for Works Smithers J was confronted with the competing claims of a statutory body, the National Capital Development Commission (NCDC) and a Commonwealth Minister. The latter had determined to build a 200 metre high tower for telecommunications and recreational purposes on Black Mountain, one of the hills encircling the city of Canberra. The NCDC challenged this plan, claiming that under its 1957 Commonwealth act it had sole planning powers for the national capital, and it objected to this proposal.

This act did not specifically make the NCDC's planning powers exclusive, let alone specifically bind the Commonwealth Crown, but the powers were granted in broad terms. In this conflict there was of course an underlying similarity with Bombay : a subordinate governmental body, a creature of statute, invested with specific powers, claimed to be able to enforce its powers in respect of the legislating Crown. It is noteworthy that the 1957 Commonwealth act contained in s.12 provisions for breaking

333. (1973) 2 ACTR 1.

deadlocks between the NCDC and the Minister for Works : Cabinet ("the Governor-General-in-Council") would have the final decision, thus addressing the Privy Council's wishful thinking in Bombay when it suggested the legislature may have hoped for co-operation between the Municipality and the Province.[334] Nonetheless, these deadlock provisions were not relied upon, the plaintiff presumably sensing only one outcome from that recourse.

Kent differed from Bombay in that in the former the NCDC's planning function was exercised, and exercisable, primarily upon Commonwealth Crown land[335], while in the latter the Municipality's drainage function would only have impinged on Crown land incidentally in comparison with a large quantity of privately held land. Leading up to confronting Bombay, Smithers J said:

> "If all who have statutory authority to execute works on Commonwealth land are free to execute such works as are in the nature of developing and constructing Canberra as the National Capital not only must chaos result so far as the planning development and construction of the city as the National Capital is concerned, but the functions which Parliament conferred exclusively upon the NCDC are incapable of performance by that body. That would be contrary to Parliament's intention."[336]

His Honour then found that in the light of Bombay ("beneficent purpose must be wholly frustrated unless the Crown were bound")

> "... the nature of the functions conferred are such, and the language conferring them is so explicit, and frustration of the central intention so inevitable on any other basis, that I am forced to the conclusion that the functions were conferred on the NCDC

334. See ch.8 f.n. 261.
335. 2 ACTR at 10.
336. Ibid.

> exclusively of all persons including the Commonwealth and its agencies."[337]

Kent seems to be authority for applying the Bombay test of necessary implication on a percentage basis rather than as an absolute : "wholly frustrated." In Kent the NCDC would still have exercised control over all private land, affecting perhaps only a small percentage of planning capacity, but nonetheless, the control to be exercised in terms of location and design of buildings on privately held land, even if only, for argument's sake, 5% of the NCDC's potential control for the whole of Canberra, was not negligible. If the Crown could ignore the NCDC, the latter's power would still not strictly be "wholly frustrated."

The NCDC won the battle, but inevitably lost the war : the tower now dominates the Canberra skyline on Black Mountain.

On the other hand, the Crown (in right of South Australia) won only a pyrrhic victory in Harris v. S.[338] The Registrar of Companies, Mr. Harold Harris, had failed in a summary prosecution. Costs were awarded against him under the Justices Act, 1921. He refused to pay, and appealed to the Supreme Court seeking an order that the prison term prescribed by the Magistrate in default of payment of costs be found ultra vires.

The first question addressed by Zelling J was whether the Justices Act, with its provisions for awarding costs and in lieu thereof, terms of imprisonment, bound the Crown.

337. At 11.
338. (1976) 18 SASR 329.

His Honour noted that in the past such an act, relating to the administration of justice, would have bound the Crown by implication, but that this was no longer so. He quoted Windeyer J's dissent in Downs v. Williams, at length discussing Bombay, and then quoted Barwick CJ's crisp and decisive assertion of the modern maxim in Rhind.[339] After examining Kitto J's dissent in Wynyard at length, Zelling J came to the conclusion that the Justices Act did not bind the Crown.

The question then became whether the Registrar, the head of a Government Department and employed by the Crown, could take the shield of the Crown. In a splendidly tongue-in-cheek judgment, Zelling J found the Registrar outside the shield of the Crown, so that the act applied to him in full. His Honour did so in reliance on the passage from Kitto J's dissent in Wynyard criticised above[340] to the effect that Crown immunity can never inure for the benefit of a subject. Zelling J said before concluding:

> "That the Registrar would be personally inconvenienced [by being imprisoned] I do not doubt, but the prerogative is the prerogative of the Crown not of the subject, and unless the Crown's service would be prejudiced, the subject cannot claim the privilege."

Justice was done, but the reasoning was unnecessarily convoluted because of adherence to the Bombay/Rhind simplified maxim. The Crown had been found within the compass of statutes for the administration of justice in Additions[341] and Wright.[342] Modern inflexibility led

339. Supra f.nn. 290 and 330.
340. Supra f.nn. 276 and 279.
341. See ch.2 f.n. 153.
342. See ch.8 f.n. 41.

Zelling J to refer to the presumption incorrectly as a "prerogative", ignore the House of Lords in Dixon[343] making plain the extension of the Crown shield to employees, and rely on Kitto J's inaccurate summation of the effect of Bank voor Handel.

Zelling J concluded by referring to Friedmann's article "Public Welfare Offences"[344] where the need was seen for "a more articulate theory of State." His Honour commended the matter to Parliament for its attention.

The High Court handed down judgment on the presumption on five occasions in 1979 and has since been silent on the subject. This eruption of judicial interest covered the gamut of the presumption's uses, from appeals by convicted offenders to deflection of legislation from application to subjects. The first two judgments were handed down on 5th April, 1979, the result of argument in the week 23rd to 26th May, 1978.

In McGraw-Hinds (Aust) Pty Ltd v. Smith[345] the appellant argued that in sending an unsolicited directory together with invoice to the Queensland Government Tourist Bureau it had not breached Queensland legislation making such unsolicited offering and alleged charging an offence. It submitted that as the Queensland Crown was not bound by the act pursuant to s.13 of the Acts Interpretation Act, not only was it incapable of committing this offence, but it

343. See ch.8 f.n. 87.
344. See ch.8 f.n. 282.
345. (1979) 144 CLR 633.

could not constitute a "person" for the purpose of being a recipient of unsolicited goods and charges. On this argument no offence was committed by the appellant, as no "person" received the goods and alleged charge, as was required to constitute the breach.

A majority, Gibbs ACJ, Mason, Aickin and Murphy JJ held for the appellant on other grounds, but all the Justices found against the argument that the Crown was a non-person for the purpose of receipt of goods and documents. Gibbs ACJ said:

> "The fact that an offence is one that may not be committed by the Crown is no reason for concluding that it may not be committed against the Crown. It would be irrational to hold that because the word 'person', when used to refer to the offender, does not include the Crown, therefore the word, when used to refer to the victim of the offence, also does not include the Crown."346

The only reason given by the Acting Chief Justice to justify the charge of irrationality was that "it is impossible to conclude that the legislature intended to create an exception in favour of offences committed against the Crown." But this only begs the question as to the rationality of presuming the legislature did not intend the Crown to comply with general statutory requirements. It is quite proper to assume that the Crown may fall into the category of persons protected by the act. Gibbs ACJ's dicta leaves a lingering doubt as to why the Crown should not also be prevented from certain behaviour by the statute.

Stephen J asserted[347] that no authority directly

346. At 643 to 644.
347. At 649.

supported the appellant's submission that the Crown was not within the purview of this Queensland act either as to commission of, or protection from a breach of its terms. But Blackburn J (as he then was) with whom Cockburn CJ agreed, had held exactly this view in Rustomjee.[348] He had been unable to see that the Statute of Limitations applied at all to the Crown. Scrutton LJ in Cayzer, Irvine & Co Ltd had doubted the concept of the Crown automatically taking the benefit of all statutes.[349]

These judicial misgivings were voiced in the context of the presumption that statutes did not bind the Crown. They reflected an unspoken concern for the concept of the law blowing hot and cold in respect of the Crown. But no one then or since has put the question the other way around, and suggested that as it is perfectly sensible for the Crown to take advantage of statutes, as individuals do, why should it not also comply with them? This thought is amplified by Stephen J's continuation to the claim of lack of historical support or likely legislative intent : he mused on modern commercial statutes at large in a community in which the State is commercially involved. This had been of course the standard argument from Ryan through Windeyer J's dissent in Downs v. Williams for statutes binding the Crown, and here it was being used to support the Crown receiving statutory benefit.

Aickin J agreed with the reasoning of Mason J, whose approach is summed up in the following words:

348. See ch.8 f.nn. 83 to 86.
349. See ch.8 f.n. 211.

> "The Crown is protected and not prejudiced by its inclusion within the description of those persons against whom an offence under the section can be committed. And it is not rational to suppose that the legislature intended to permit an undesirable trading practice to be adopted against the Crown when it prohibited resort to that practice against everyone else."[350]

The use of the word "rational" begged the same question that it had in Gibb's J's decision. The concept of "prejudice" was also of interest. It had arisen in England in the fifteen years prior to Bombay, and had until this point been absent from Australian judgments. Indeed the reliance on Bombay precluded a reference to "prejudice" in most cases : absolute statutory standards swept aside the necessity to look at the effect of an act.

Kitto J, dissenting in Wynyard, had relied heavily on the concept of detriment to the Crown[351], and Bray CJ in Pinchbeck had spoken of a taking away[352] in the context of evenhandedness between Crown and subjects. On the other hand, in Downs v. Williams Windeyer J's dissent had referred to deprivation and the obverse, the according of rights under a statute, in terms of the supervening importance of a subject's rights against the Crown.[353] And Latham CJ's dissent in Gulson quoted Dwyer J below approvingly to the effect that Crown immunity from the statute and regulations under review "would prejudice the whole protective structure."[354]

350. At 656.
351. F.nn. 274 to 281 supra.
352. F.n. 305 supra.
353. F.n. 332 supra.
354. F.n. 207 supra.

"Prejudice" had arisen in the Rent Restriction cases of the 1930s[355] which had as their common thread the existence of parties, successors in title to the Crown, as lessors taking a Crown advantage in relation to leasehold land which had acquired statute-free status while in Crown possession, such advantage lasting only for the duration of the lease originally granted by the Crown. It was said that the presumption (in these cases referred to as a prerogative) applied in rem to the land. To this extent "prejudice" had a static, rather than kinetic quality : it was a particular legal status regarding an estate in land which should not be diminished. This limited application of "prejudice" was altered by Telephone[356] : would the Crown be prejudiced (in that case, put to greater effort) if individuals had to comply with that statute in question?

The common thread in the English cases remained the use of "prejudice" when parties in relationship with the Crown had to have their position regarding a statute resolved. In McGraw-Hinds Mason J moved away from this utilisation of prejudice solely for dealing with non-Crown parties, and used it to illustrate the benefit of statutes flowing to the Crown : in that instance the Crown was not prejudiced, but protected by the statute. Using "prejudice" in a kinetic sense, following the flow of the statute rather than examining its words in vacuo, saved Mason J's analysis from the possible effect that Bombay might take the presumption to the logical extreme assumed by Blackburn J in

355. See ch.8 f.n. 214.
356. See ch.8 f.nn. 351 et seq.

Rustomjee and considered by Scrutton LJ in Cayzer, Irvine of the Crown not being referred to at all by a statute, including reception of the statutes benefit. Mason J established that the presumption was a revolving door, moving in only one direction, that of statutory benefit or protection to the Crown.

Of the remaining Justices in McGraw-Hinds, Jacobs J referred to "the prerogative", which is defensible post-Bombay given the reference to the prerogative in the Queensland Acts Interpretation Act, but Jacobs J seemed unsure as to whether the test for Crown exclusion was one of construction in the light of the prerogative (and even allowing for the Interpretation Act, that approach was inadequate) or whether the excluding principle was itself a prerogative.[357] Murphy J accepted the non-binding effect of the Acts Interpretation Act, but simply asserted his conclusion that "when an Act was aimed at preventing mischief to the public in general" it was presumed that the public's "collective representatives or agencies" whether labelled the government, the Crown or otherwise were intended to be protected.[358] He concluded on the topic:

> "The mysticism associated with the concept of the Crown tends to obscure the fact that it is not likely that an Act designed to protect the public generally from malpractice would permit such malpractice against the government and its numerous trading corporations or instrumentalities."[359]

As with Gibbs and Mason JJ's appeals to rationality, this only begs the question : why is it likely that an act

357. 144 CLR at 663 to 664.
358. At 666.
359. At 667.

designed to protect the public from malpractice would permit such malpractice by the government?

A claim by Bradken Consolidated Ltd against BHP Co. Ltd was argued before the High Court in the same week as McGraw-Hinds, and judgment rendered on the same day. Given that Bradken Consolidated Ltd v. BHP Co. Ltd[360] dealt with the presumption, it is reasonable to assume some interplay of ideas between the judgments in McGraw-Hinds and those of the five Justices in Bradken. Of the six Justices in the former case, all save Aickin J sat on Bradken. The interplay did in fact evidence itself by the introduction in both judgments of "prejudice" into the Australian approach to the presmumption.

The facts of Bradken have the full range of aspects surrounding the presumption that one might expect in a law school exam : Crown "personality"; different Crowns; who may take the benefit of Crown statutory immunity; and of course, the nature of the presumption itself.

The applicant, Bradken, manufactured specialised railway equipment. The Queensland Railways Commissioner entered into a "contract, arrangemnt or understanding" with BHP and a number of companies related to it under which these companies, respondents to the litigation, supplied equipment necessary for a new line. The arrangement between the Commissioner, also a respondent, and the other respondents was that the supply of equipment would be drawn

360. (1979) 145 CLR 107.

exclusively from these companies and there would be no competitive tender. It was alleged by Bradken that these commercial arrangements had the effect of substantially lessening competition in contravention of s.45(3) of the Trade Practices Act 1974(Cth). Bradken further alleged that BHP and one of the other respondents was engaged in the practice of exclusive dealing contrary to s.47(2) of the Trade Practices Act. This Act was expressed, in s.2A, to bind the Crown in right of the Commonwealth where that Crown was carrying on business.

The defence mounted by the respondents consisted of a number of individually simple propositions from which emerged, in the respondents' argument, the inescapable conclusion that the Trade Practices Act did not apply to any of them. Firstly, it was submitted that the Railway Commissioner of Queensland was able to take the shield of the Queensland Crown; this was conceded by Bradken's counsel who discontinued the claim against the Railway Commissioner, but continued against BHP and the other respondent companies.[361] Secondly, the presumption operated in favour of other Crowns within the Australian federation, so that even though the Commonwealth Crown was bound, State Crowns were not, and therefore the Railways Commissioner, as an emanation of the Queensland Crown, was not bound to comply with the Trade Practices Act. Thirdly, BHP and its associated respondent companies, being in commercial arrangements with a Crown unbound by the Trade Practices

361. At 111 arguendo.

Act, were themselves unbound in respect of these arrangements : the arrangements could not be fettered by the act, because "the immunity [the Crown] enjoys extends to contracts arrangements or understandings made by the Crown with others ...".[362] McPherson QC cited Wynyard, Bank voor Handel, and Telephone.

Unlike Telephone, in which the administering Crown attempted to enforce fair trading legislation, in Bradken the responsible Crown, the Commonwealth, spared itself the indignity suffered by the British Crown in Bank voor Handel, Madras Electric and Telephone of arguing to limit the ambit of the presumption. The Commonwealth surrendered its protective role in respect of administration of this particular legislation, together with its general position in respect of Commonwealth legislation applying to State Crowns, in exchange for joining with the State Crown argument for the widest breadth of the presumption.[363]

Gibbs ACJ set out the facts and the nature of relief sought. An insight was granted immediately into the unspoken assumptions and attitudes that underlay the Acting Chief Justice's judgment:

> "The orders sought under s.45 of the Trade Practices Act, if made only against the respondent companies, would affect the rights of the Commissioner just as much as if they were made against him as well."[364]

What was at stake was the Crown's "rights", not as Coke thought in Ecclesiastical Persons[365], how the Crown operated

362. At 109 arguendo.
363. At 110 arguendo.
364. At 112 to 113.
365. See ch.4 f.n. 95.

in a new statutory milieu in its dealings with subjects. The facts in Bradken nicely illustrate the wrong - turning taken by the common law. At issue in Bradken was not a true "Crown right" against a subject, or even a right given by a statute to a subject against the Crown, as reflected on by Windeyer J, dissenting, in Downs v. Williams.[366] The Trade Practices Act invested the whole community with rights in respect of behaviour by corporations. Here that right was being invoked, not against the Crown, but against corporations which claimed immunity because otherwise the Crown would be disadvantaged. But no "prerogative" or even "Crown right" against a subject was involved. The only "right" to be found was the status quo ante, the concept that the Crown, in the absence of clear intention, was to enjoy the freedom of the position prior to the passing of the statute.

Further insight into the Acting Chief Justice's attitude could be gleaned, when within a page, while discussing a constitutional point, he spoke of the act not applying to "prejudice" the "interests" of the Commissioner.[367] But a lengthy analysis of the presumption began some pages later.[368] The rule in Bombay was cited and it was noted that while this act expressly bound the Commonwealth Crown, it was silent as to whether it bound the Crown in right of a State.

366. Supra f.n. 332.
367. 145 CLR at 113.
368. At 116.

In discussing this federal issue, Gibbs ACJ began by referring to the High Court in Roberts "applying the established rule". This is verging on an anachronism, as the "rule" was not really "established" until the Privy Council decision in Bombay in 1947. Griffith CJ did refer in Roberts to the "general rule" which applied because of lack of intention to bind the Crown, but as observed above[369], Griffith CJ's reasoning was based on less than satisfactory grounds. Sutton was accepted as falling within the presumption as "it appeared by necessary implication that the Customs Act was intended to bind the States, since otherwise its provisions might have been rendered ineffective ..."[370] This is no more than a re-run of the "percentage" approach adopted by Smithers J in Kent.[371] State Crown immunity in Sutton would not have resulted in the Commonwealth Customs Act being "wholly frustrated". Only the State Crowns could have imported in defiance of the act. Their immunity did not have a dispensing effect in favour of the general populace. To that extent the legislative intention would have been only partially frustrated.

There is a world of difference between legislation being "rendered ineffective" because a portion of a community is able to evade it, and total frustration which implies that the legislation no longer operates at all. Total frustration might be inferred from a rendering

369. Supra f.nn. 130-132.
370. 145 CLR at 117.
371. Supra text after f.n. 337.

ineffective where the subject of the legislation led to such a conclusion. Higgins J in Sutton for example reasoned as if the Customs Act were dealing solely with dangerous substances[372], which was not the case. In any case, Gibbs ACJ did not apply his own reasoning in respect of Sutton to the facts in Bradken : the Trade Practices Act was rendered quite as ineffective by State Crown immunity as the Customs Act would have been.

The Acting Chief Justice then criticised Hogg's analysis[373] of Pirrie v. McFarlane. His Honour rejected the view that in that case the presumption was applied by the majority. The present writer must concur in this critique, to the effect that only Higgins J relied on the presumption to any extent to find the Commonwealth Crown bound.[374] Gibbs ACJ ran through the remaining High Court decisions in the field up to Rhind, noting Starke J's pivotal judgment in Gulson (which relied on Donaldson) with a reference to its openness to different interpretations.[375]

In determining his preference for the wider application of the presumption (all Australian Crowns presumed immune unless specifically bound) Gibbs ACJ thought this accorded "more with convenience and with the reasons underlying the rule". He referred to Hogg's summation of the presumption

372. Supra f.n. 141. See also Higgins J in Pirrie v. McFarlane reasoning on the basis that the Victorian Motor Car Act must bind the Commonwealth Crown because the act was ineffective unless there was total compliance: supra f.n. 181.
373. Hogg Liability of the Crown p.193.
374. Supra f.nn. 172 to 183.
375. 145 CLR at 120.

as "a melancholy example of communis error"[376], but thought "that the rule of construction which without doubt is firmly established in the law, rests on reasons which are understandable enough".[377] Those reasons the Acting Chief Justice thought "understandable enough" were "clearly stated by Story J in United States v. Hoar [citation given] in a passage cited in Roberts v. Ahern."[378]

Hoar[379] has been referred to on a number of occasions above, cited in Irish and Australian judgments, and by text writers. Now in 1979 Gibbs ACJ quoted the crucial passage from Hoar in full:

> "Where the government is not expressly or by necessary implication included, it ought to be clear from the nature of the mischiefs to be redressed, or the language used, that the government [380] itself was in contemplation of the legislature, before a court of law would be authorized to put such an interpretation upon any statute. In general, acts of the legislature are meant to regulate and direct the acts and rights of citizens; and in most cases the reasoning applicable to them applies with very different, and often contrary force to the government itself. It appears to me, therefore, to be a safe rule founded on the principles of the common law, that the general words of a statute ought not to include the government, or affect its rights, unless that construction be clear and indisputable upon the text of the act."381

376. Hogg Liability of the Crown p.194 (the same expression is used at p.167).
377. 145 CLR at 122.
378. Supra f.n. 132.
379. (1821) 2 Mason 311.
380. From this point inclusive the CLR printing refers to "Government", "Act", and "Statute" with commencing capitals, which do not appear in the Mason report of Hoar.
381. 2 Mason at 314 to 315, quoted at 145 CLR 122.

Before examining this important early American decision, the logic of this crucial passage is worthy of dissection which it has not previously received. The opening words have been noted as a first judicial essay on "necessary implication"[382], but the effect on judicial reasoning may be seen in Gibbs ACJ's judgment, where Bombay is cited after Hoar, leading to the statement, "In my opinion it does not appear by express words or necessary implication that the Trade Practices Act is intended to bind the Crown in right of a State."[383] But the language employed by Story J, an Associate Justice of the United States Supreme Court, sitting in Hoar in a United States Circuit Court in Massachusetts, was to the effect that there were four methods by which a court might ascertain whether a government was in contemplation of a legislature, not merely the two subsequently accepted standards of express words or necessary implication.

Story J's words clearly enunciate a belief that in addition to express words or necessary implication, that is, in their absence, the binding effect of a statute on government may "be clear from the nature of the mischiefs to be redressed, or the language used ...". The concept of "the language used" is uncertain in the extreme, but the reference to the mischiefs to be redressed is an evocation of Coke's peroration in Magdalen College in which he asserted the suppression of mischief as a reason for binding the

382. See ch.5 f.n. 96 and ch.8 f.n. 275.
383. 145 CLR at 123.

Crown, in the broader context of his political beliefs. The passage has been quoted above, but is worthy of repetition in the context of the reasoning and result in Bradken. Coke said:

> "The office of judges is always to make such construction as to suppress the mischief, and advance the remedy; and to suppress subtle inventions and evasions for the continuance of the mischief, et pro privato commodo, and to add force and life to the cure and remedy according to the true intention of the makers of the Act pro bono publico."[384]

The facts in Hoar do bear one similarity with those in Bradken : Hoar involved the question of whether a Massachusetts Statute of Limitations could bind the United States Government, that is to say a federal question was being addressed. But Hoar explicitly involved the prerogative of nullum tempus, always raised by limitation statutes.[385] Story J recognised this and cited Bacon's Abridgement and Magdalen College as authorities that this prerogative was secure against general acts. Weston J's dissent in Willion v. Berkley was referred to in a footnote.[386] Story J then examined the doctrine nullum tempus for its sociological basis : that the functions of the State might not be impeded by the negligence of public officers. Having established that the doctrine existed "for the public benefit", his Honour said, in words immediately preceding those quoted by Gibbs ACJ in Bradken:

384. See ch.5 f.n. 79, 11 Co. Rep. 73B; 77 ER 1246.
385. 2 Mason at 312.
386. At 313.

> "But, independently of any doctrine founded on the notion of prerogative, the same construction of statutes of this sort ought to prevail, founded upon the legislative intention."387

It will be asserted in opposition to the general thrust of the present writer's submissions that Story J had urged his approach to construction irrespective of the presence of a prerogative, but the counter to that is that Story J's reasoning was in respect of "statutes of this sort" and was couched in terms of government advantage only where that was for the "public benefit". This is in accord with the suggestion raised in the context of the Scottish case law that the Crown be bound by statutes "unless a court finds the actual, not hypothetical, requirements of 'government effectiveness' or 'executive necessity' to over-ride the benefit to the public in the Crown adhering to the statute."[388]

The majority judgments in Bradken all turned on statutes not binding the Crown if such process would "prejudice" the Crown. It is facile to assert that Story J's reasoning supports the "prejudice" approach. The decision in Hoar was in a context of a government in a federation not being bound by general legislation of another government in that federation where such legislation impinged on a power of government (in Hoar raising finance through death duties).

In Bradken the Trade Practices Act was not affecting any peculiarly governmental function of the Queensland

387. At 314.
388. Supra f.n. 75.

Crown. The Crown was "prejudiced" only to the extent that a capacity it shared with subjects, entering contracts for supplies, would be constrained in the interests of fair trading and dealing for the benefit of the entire community. In Hoar the function protected, raising revenue through death duties, was not shared with citizens, and was plainly for the general public benefit. The comparison with Bradken is made worse by the realisation that Crown immunity from the Trade Practices Act was not at all for the public benefit. The purpose of the act was to encourage competition in the making of contracts, thus creating economic efficiency. The High Court decision had the opposite effect.

In Bradken Gibbs ACJ reasoned that if the respondent companies were bound, they would not be able to contract as arranged with the Crown with the result that "if the remedies sought are granted against the respondent companies, the Commissioner will be prejudiced by the operation of the Trade Practices Act just as much as if its provisions had been directly enforced against him".[389] The rent restriction cases were called in aid of this proposition, and New Zealand cases beginning with Doyle v. Edwards[390] deflecting "serious liabilities" being imposed upon the Crown.

The Acting Chief Justice proceeded to say that the High Court decisions in Roberts v. Ahern and

389. 145 CLR at 123.
390. (1898) 16 NZLR 572.

Broken Hill Associated Smelters Pty Ltd v. Collector of Imposts (Vict.) "appear also to be cases where persons who were not servants or agents of the Crown were held immune from legislation which did not bind the Crown, because the application of the legislation to them would have prejudiced the interests of the Crown."[391] It must be noted that Broken Hill Associated Smelters was not argued or decided on that basis[392], and while the House of Lords decision in Dixon was argued in Roberts[393], that decision has been extensively criticized above.

The error in the Acting Chief Justice's statement quoted immediately above, is the word "also". This has the effect of putting the New Zealand cases cited, and indeed the English rent restriction cases, in the category of those in which a decision binding the government "would have prejudiced the interests of the Crown". It is unfortunate that Gibbs ACJ said immediately after the statement above, "It is not necessary to explore the limits of this principle." It is in fact very necessary to do just that. The English and New Zealand cases cited by Gibbs ACJ all involved Crown rights in land. In these cases it was not just "serious liabilities" or prejudice to the interest of the Crown upon which the decision turned : it was effect upon Crown real property that was at issue, and that was not

391. 145 CLR at 124.
392. Supra f.n. 154. Curiously, this case was nowhere referred to in McGraw-Hinds, where its finding that the Crown was a "non-person", coupled with incidental non-prejudice to the Crown in a subject evading statutory duties, was surely apposite.
393. Supra f.nn. 116 to 134.

the case in Bradken.

A reading of the half page judgment of Prendergast CJ in Doyle[394] makes this abundantly clear. The leading New Zealand Court of Appeal decision in Lower Hutt City v. AG[395] involved a careful analysis, and acceptance of Dixon, while granting Crown immunity from statute[396] to plumbers working on Crown land because Crown property attracted the immunity. The plumbers were not servants or agents, but independent contractors as was the case in Dixon, but they took Crown immunity while working on Crown property. The judgments invoked a careful reading of Gorton, Justices of Kent, Doyle and the rent restriction cases to strictly limit this extension of immunity to non-Crown personnel to matters which prejudiced Crown property.[397]

Roberts v. Ahern is in fact the aberration in the line of authorities cited by Gibbs ACJ. Bradken did not involve Crown property, let alone real property. However, the Acting Chief Justice finished on this point by claiming support from Telephone[398], also criticized above, but apparently the only English case in which "prejudice" to the Crown was "established" without reference to Crown property.

Stephen J likewise relied on Telephone in the light of the rubric in Bombay and Rhind to conclude that

394. (1898) 16 NZLR 572 at 574.
395. [1965] NZLR 65.
396. The immunity stemmed from the New Zealand Acts Interpretation Act, 1924 s.5(k).
397. See [1965] NZLR at 75 per North P; at 76 to 77 per Turner J; and 80 and 82 per Hutchison J.
398. See ch.8 f.nn. 351 to 368.

> "... the Act will not only not apply directly to the [Crown] but will also not apply so as to prejudice its interests when in contractual relationship with parties to whom the Act clearly applies or when otherwise interested in transactions affecting those parties ..."[399]

His Honour had earlier noted Hogg's and Street's criticism of the presumption : he saw no opening for its judicial variation, saying "only statute can now alter it". He acknowledged that the empirical evidence was against such alteration, Queensland's Acts Interpretation Act s.13 providing an example of a version "of the rule even more favourable to the Crown than the rule itself ..."[400]

Mason and Jacobs JJ in joint judgment reasoned similarly, although not employing the word "prejudice". They spoke rather of affecting the Crown's "right to enter into such contracts ..."[401] The only right in evidence was the spurious one of adherence to the position prior to a statute. The ability to enter into a contract is not a property right such as was protected in the rent restriction cases, or the New Zealand decisions referred to in the judgment of Gibbs ACJ. Mason and Jacobs JJ referred in the context of the federal issue to Starke J's pivotal judgment in Gulson, with its reliance on Donaldson and law being made for subjects and not the Crown.[402] The duo themselves advanced this proposition in relation to whether a Commonwealth statute bound a State Crown.[403]

399. 145 CLR at 129.
400. At 127.
401. At 137, and see 138.
402. At 134.
403. At 136.

This deference in two out of three of the majority judgments in Bradken to the time worn, and in any case incorrect, assertion in Donaldson that statutes are made by the Crown with the assent of Parliament for subjects not for the Crown, is particularly unhappy in this unmeritorious instance of a Crown engaging in commercial activities in defiance of legislation regulating that commerce. It is all the sadder that the High Court persisted with this stance, when the House of Lords, just over a year before argument in Bradken and two years before judgment, decided rather otherwise, admittedly in a decision which allowed the Crown to take the benefit of legislation. In his leading judgment[404] in Town Investments Ltd v. Department of the Environment Lord Diplock said:

> "... the vocabulary used by lawyers in the field of public law has not kept pace with this evolution [from personal rule to constitutional monarchy] and remains more apt to the constitutional realities of the Tudor or even the Norman monarchy than to the constitutional realities of the 20th century.[405] *** We very sensibly speak today of legislation being made by Act of Parliament - though the preamble to every statute still maintains the fiction that the maker was Her Majesty and that the participation of the members of the two Houses of Parliament had been restricted to advice and acquiescence."406

These sentiments reflected the acceptance of necessary change in nomenclature and attitude, to be seen also in Murphy J's utterance shortly afterwards, which serves as the epigraph for this chapter. It is therefore not surprising that Murphy J was the sole dissentient in Bradken. He accepted the presumption as an "interpretative rule", but

404. [1978] AC 359, see ch.8 f.n. 394.
405. At 380.
406. At 381.

only in respect of the legislating Crown. He urged the discarding of the doctrine of the Crown's indivisibility. But even if the act did not strictly bind the State Crown, his Honour could not see why the statute should not still have efficacy:

> Because an Act does not bind the Crown, this does not mean that it has no application to conduct of others in relation to the Crown ..."407

Murphy J had been the reforming Attorney General who had conceived the Trade Practices Act 1974. It was hardly surprising that he looked to the practicalities of the act's operation. He said:

> "The Trade Practices Act is framed in terms designed to protect the public from the operation of restrictive practices and arrangements which experience has shown harms the public not only as individuals but also collectively through federal, State and local governments. An interpretation which remcved from the ambit of the Act any contract (and even more any arrangement or understanding) to which an agent of the State was party would greatly reduce the protection otherwise extended by the Act; the rationale for this is hard to discover in face of s.51(1)(b) which, subject to regulations under the Act, enables a State Parliament to remove its own government's activities, as well as any other act or thing done in the State, from the operation of the Act."408

Murphy J was not the slighest interested in whether or not the purpose of the act was totally frustrated : the practical effect of the Crown not being bound bothered him. But he was a minority of one.

With Bradken the High Court had taken large steps away from the restraints previously existing in respect of two

407. 145 CLR at 140.
408. At 141.

developments surrounding the presumption. Firstly, "prejudice" had, with the exception of Telephone been related to Crown property. That was no longer the case. Secondly, the barriers on who could benefit from Crown immunity had been breached. As pointed out by Leahy writing prior to Bradken:

> "The principle is not that any person or body who can show that application to him of a statute, which does not bind the Crown, would prejudice the Crown can invoke the Crown's immunity from that Statute. Since the decision of the House of Lords in the Bank voor Handel case, to establish Crown immunity from a statute, it is necessary to show (1) that the statute in question does not bind the Crown, (2) that the person or body claiming immunity comes within the traditional classes of persons entitled to Crown privilege and (3) that application of the statute to that person or body would prejudice the interests and purposes of the Crown. Steps (1) and (3) are quite distinct, although they are commonly confused because they both include questions of prejudice."409 (emphasis in original)

The respondent companies in Bradken were not in the traditional class of those entitled to Crown privilege. This step was deleted completely and Leahy's trenchant first sentence above was completely breached. Having cut a swathe through former restraints, and embraced a broad new principle, Bradken was set fair to be the new Australian locus classicus on the presumption, as Bombay, simplifying, had been before it.

McGraw-Hinds and Bradken, although exploring quite different areas of the Crown's relationship to statutes, are decisions in tandem from which two general themes emerge : the

409. J.M. Leahy The Persons Entitled to Crown Privileges Adelaide University Honours Law Thesis (unpublished) 1973, p.128. And see text after ch.8 f.n. 368.

uninhibited use of "prejudice" as an analytical tool; and Murphy J's insistence on a realistic, sociological assessment of the impact of Crown claims to immunity, or claims by others to benefit from Crown immunity. The remaining three High Court decisions on the subject in 1979 did not arise from fact situations as clear cut as Bradken, but the themes already enunciated were further worked out.

Superannuation Fund[410] was argued before judgment in McGraw-Hinds and Bradken, the decision following four months after those cases. The Commonwealth Superannuation Fund Investment Trust claimed immunity from State stamp duty on land transactions on the basis that, firstly, it was the Crown in right of the Commonwealth, and secondly, the Commonwealth Crown could take advantage of a general exemption from stamp duty expressed in the Stamp Duties Act 1923 (S.A.) to be in favour of "the Crown" in all its real estate transactions.

Stephen and Aickin JJ found the Fund not to constitute the Commonwealth Crown; the point did not concern Murphy J, on his reasoning. However Barwick CJ, the sole dissentient in finding the Fund immune from stamp duty, held that it did comprise the Commonwealth Crown. He then turned to the presumption unadorned:

> "Quite apart from the effect of the federal nature of the Constitution, a legislative intention to subject the Crown and its property to taxation must be found in the legislation in express words or by necessary implication. That is the established position at common law."[411]

410. Superannuation Fund Investment Trust v. Commissioner of Stamps of the State of South Australia (1979) 145 CLR 330.
411. At 336.

The Chief Justice tightened up this reference, unnecessarily in the light of Bombay, to cite cases on Crown immunity from taxation on its property where Crown liability was argued by inference rather than express words or necessary implication. Barwick CJ's dissent must at least be accorded the virtue of logical consistency with the Bombay/Rhind approach.

That particular plaudit is not available to Mason J who ignored the presumption in favour of sophisticated statutory interpretation from which the implication appeared (to his Honour) that the "Crown" protected against stamp duty was only the South Australian Crown. After quoting the exempting provision Mason J said:

> "The term 'the Crown' should, I think, be understood as a reference to the Crown in right of the State of South Australia. The provision is one which exempts the Crown from liability; it is not a provision which imposes an obligation or a liability : cf. Bradken ..."[412]

But the statute was imposing a financial burden on property, or at least transactions in property, and all the case law, whether expressing wide or narrow views on Crown statutory immunity, indicated that a general statute did not impose such an impost on the Crown. Therefore, the saving provision in the South Australian act must have been inserted ex abundante cautela, and really added nothing to the strength of the presumption.

In Bradken, Gibbs ACJ[413], and Mason and Jacobs JJ had all opted for immunity to all Australian Crowns in the

412. At 355 to 356.
413. Supra text before f.n. 376.

absence of intent to the contrary. The latter two in joint judgment had said:

> "The body of statutory law, whatever its source, is presumed to be law applying to subjects, not to the Crown, and we can see no reason why in this respect any distinction should be drawn between the various legislative sources of that body of law."[414]

On this reasoning, if the South Australian Stamp Duties Act had remained silent on Crown liability, the Commonwealth Crown would have been free of duty, but Mason J assumed the Commonwealth to be bound in the absence of specific exemption. Inferences from other statutory provisions were used to support this approach, but no reasoning exactly on this subject appeared in Mason J's judgment.

The "prejudice" approach had by now swallowed all rationality in this matter. His Honour's citation of Bradken as authority for the statement "...it is not a provision which imposes an obligation or a liability" illustrates an intellectual double bluff, as a result of which an otiose saving provision was used to apply a burden which would not have existed in the absence of the saving provision.

When Murphy J agreed[415] with Mason J on this interpretation, he was at least being consistent with his previous appeal to do away with the "indivisibility" of the Crown."[416]

414. 145 CLR at 136.
415. 145 CLR at 357.
416. Supra text before f.n. 407.

The two remaining cases in the High Court were decided in November, 1979, the first[417] having been argued after judgment in McGraw-Hinds and Bradken. Group Projects Pty Ltd, a developer, had owned certain land in the Brisbane area, zoned "Future Urban" under the Brisbane City Town Plan. Group Projects then applied to the City Council to have the land rezoned to "Residential A". Subsequently the developer entered into an agreement with the Council dated 30th October, 1975 by which the Council undertook to apply to the appropriate Minister for rezoning. By way of consideration Group Projects agreed to do certain things including the construction of works, most of which hinged on the Queensland Government's approval of the City Council's application for rezoning.

In July 1976 the developer and the Council were informed that the Queensland Government intended to resume the land. At the developer's request the Council proceeded with the application for rezoning. The land was resumed on 13th November, 1976, and on 23rd December, 1976 the Executive Government of Queensland (the Governor-in-Council) made an order approving the rezoning.

Under the agreement between the City Council and the developer, the Council had now executed its side of the bargain. Much of the work to be performed by Group Projects under the agreement was not to take place on the resumed land, and might still have been done after resumption. Group Projects applied for a declaration that the agreement

417. Brisbane City Council v. Group Projects Pty Ltd (1979) 145 CLR 143.

was not binding upon it.

The court was unanimous in finding that the agreement ceased to be binding on the date of Government resumption, 13th November, 1976, but there were two completely separate approaches to this conclusion. Stephen J, with whose reasons Murphy J agreed, found the contract frustrated. On the other hand, Gibbs and Mason JJ concurred in Wilson J's finding that Group Projects was free of contractual obligation, on the land in question becoming Crown land, when it ceased to be subject to the zoning legislation of the City of Brisbane Town Planning Act. The result was that the subsequent proclamation purporting to rezone the land was of no effect.

Wilson J accepted the equation of s.13 of the Acts Interpretation Act, 1954 (Qld) with the common law presumption of Crown immunity from general statutes. He then cited Bombay and Bradken on the common law principle : it was a rule of construction that a statute did not bind the Crown unless such intention appeared "either expressly or by necessary implication from the words of the statute."[418] These last six words would appear to be a return to the strict Bombay barrier in favour of the Crown. Taken literally, the necessary implication could only be drawn by examining the entrails of the statute itself : the social circumstances of its operation would not be available to assist in construction. This was the test as set out in Bombay, but subsequently watered down by Barwick CJ's

418. At 167.

additional reference to "consideration of the subject matter" in Rhind.[419]

The City of Brisbane Town Planning Act specifically provided that land invested in the Crown might be affected if a Crown lessee was himself a sub-lessor (s.3), and further provided that land on lease from the Crown might be the subject of a rezoning application (s.8). Wilson J conceded that a lessee of Crown land might be subject to the Town Plan under the act (his Honour could have conceded leased Crown land as well as the lessee) but said that this did not show that unleased Crown land was intended to be affected by the Plan.[420] He cited Bombay again as authority that total frustration of the act was required for the Crown to be bound, and reiterated that intention to bind the Crown had to appear "from the Act itself" : no external evidence was to be admitted.

Wilson J then examined the appellant Council's concession and claim that "although the Crown could not be prejudiced by a zoning and would remain free to vary the purposes for which its land was used without seeking the approval of the Brisbane City Council, the land nevertheless carried the zoning designated in the Plan so far as third persons were concerned."[421] His Honour found a simple answer to this submission. The Plan did not bind the Crown and so could not validly restrain the use of Crown land other than leased Crown land specifically referred to in the act : "the

419. Supra f.n. 330.
420. At 169.
421. At 170.

mere zoning of [Crown] land is without any legal effect." It therefore followed that the purported rezoning of 23rd December, 1976[422] was of no effect, and both parties ought to be discharged from their respective obligations under the agreements.

The kinetics of a statute such as this remain puzzling. Wilson J wrestled with the concept of land zoned under the Plan, vested in the Crown so the zoning is of no effect, which land is then leased. His Honour was of the view that the zoning did not automatically spring into force against the lessee, but that the land would have to be brought under the Plan by separate action for the lessee to be bound. This seems in accord with the English rent restriction cases, although that legislation did not have the refinement of specific reference to Crown lessees. Gibbs J's agreement[423] with Wilson J was specifically reserved on this dicta in the latter's judgment.

The more interesting hypothesis, unaddressed by Wilson J, is that involving leased Crown land, effectively zoned, which reverts to the Crown. In the absence of specific statutory wording the land would presumably revert to "outlaw" status, and given that the Crown could then do what it liked with it, all land owners and residents in the neighbourhood could be defeated in their legitimate expectations as to land usage. Well may the anonymous Elizabethan bureaucrat have scribbled in 1598 that for

422. Misprinted at 145 CLR 170 as "1977".
423. 145 CLR at 152.

efficiency of land usage legislation "the bill may be extended to Her Majesty's own possessions ..."[424]

In Group Projects Wilson J attacked the idea of a statute having the force of law, but without legal consequences : this was "an abstraction, a meaningless fiction."[425] Murphy J had floated such an idea in Bradken[426] and elaborated on it in Group Projects:

> "Even if the zoning is not enforceable against the Crown, that does not mean that the zoning has no consequences. The Crown would be expected to observe the zoning; departure by the Crown from the zoned use could provoke public criticism or parliamentary action."427

This unusual appeal to extra-legal consequences must be seen in the context of a brief judgment which supported Stephen J's implicit finding that the argument over whether zoning operated on Crown land was superfluous. As Stephen J pithily remarked:

> "It was that acquisition [by the Crown on 13th November, 1976] which abruptly brought to an end all prospect of the land being developed ... whether or not the land's original zoning was changed."428

In the light of political and commercial reality, Wilson J's judgment reads as so much voodoo, albeit benignly intended, but in its warnings against abstractions and meaningless fictions it betrays the usual rebuke of a priestly caste under threat. The charge of dabbling in phantasms is remarkable, appearing in the last page of a judgment concerned with the capacity of the Crown's mantle to protect land and subject-users of the land against the

424. See ch.3 f.n. 143.
425. 145 CLR at 170.
426. Supra f.n. 407.
427. 145 CLR at 164.
428. At 156.

prejudice of legislation which, curiously, far from being inherently evil, is proclaimed by judges to be assumed to be for the public good. The possibility expressed on this page that "the purported zoning will automatically arise to bind the lessee" is too ghoulish for further contemplation. The present writer's question posed eight years ago remains unanswered : why is it prejudicial for the Crown to have its actions governed by a statute which regulates social activities and proclaims some of them antithetical to the well being of society?[429]

It may be that necromancy is a relative matter and like beauty is in the eye of the beholder. Relativity is certainly at issue as the three major judgments in Group Projects represent the three strands of common law judging technique over 700 years : Wilson J standing for the Gemeinschaft situational ethic[430] ; Stephen J representing Gesellschaft rationality in respect of commercial exchange[431] ; and Murphy J embodying the modern bureaucratic - administrative approach.[432]

The remaining High Court judgment in this field[433] followed the pattern of its predecessors in 1979. Barwick CJ dissented, although his dissent was not consistent with authority as it had been in Superannuation Fund. Murphy J

429. Churches "Case-note on Statutes and the Crown" (1980) 7 Adel. L.R. 394.
430. See ch.5 f.nn. 133 to 134.
431. See ch.5 f.nn. 136 to 137.
432. Kamenka "Justice" pp.11 to 12.
433. China Ocean Shipping Co v. State of South Australia (The Wuzhou) (1979) 145 CLR 172.

reasoned to a conclusion that enabled him to avoid relying on the presumption, with which he plainly felt uncomfortable. Gibbs, Stephen and Aickin JJ reasoned along conventional lines regarding the Crown being unfettered by statutory restraints.

On 24th October, 1977 the somnolence of the South Australian coastal town of Wallaroo had been broken by the China Ocean Shipping Co's vessel Wuzhou colliding with the Wallaroo jetty, property of the South Australian Government. When the State Crown through its Minister of Marine, sued the owner, agent and master of the Wuzhou for damage to its property, the defendants sought to limit their liability by reference to ss.503 and 504 of the Merchant Shipping Act 1894 (Imp). The import of these sections was that where a ship caused damage, a court in a British possession might limit the liability of the vessel's owner to an aggregate not exceeding eight pounds for each ton of the ship's tonnage.

Much of the decision turned on whether this Imperial Act applied in South Australia in 1977. Alone in the court, Murphy J found that it did not, for reasons of constitutional evolution. He therefore found that the China Ocean Shipping Co could not limit its liability under the Imperial Act to the South Australian Crown or any other South Australian entity. This result, however, accorded with the finding of Gibbs, Stephen and Aickin JJ that the Imperial Act did apply in South Australia, but that the State Crown was not included within the class of persons who

could receive only limited damages. Not being bound by the limitation provision the Crown could sue in full.

Barwick CJ was the sole dissenter in China Ocean. He began by appearing to find the South Australian Crown not within the operation of the statute because there were no express words, nor "necessary implication from the terms of the statute that the Crown should be bound."[434] In this judgment, delivered three weeks after Group Projects, the Chief Justice returned to the strict Bombay test set out by Wilson J, eschewing his looseness with regard to discerning "necessary implication" in Rhind.[435]

Within a page of this statement of principle, Barwick CJ had set out the basis of his dissent, the only logical foundation for which could be his extension in Rhind of the utilisation of "necessary implication" by reference not merely to the words of the statute, but also the subject matter of the statute. This volte face was subtle compared with the assault now perpetrated on precedent and the established mode of approaching the presumption.

In previous recent Australian High Court dissents concerning the presumption, Murphy J had concerned himself with the efficacy of legislation and ignored the further reaches of Kabbalistic learning regarding the effect of the presumption on non-Crown parties[436], while Windeyer J had sought to find a way of binding the Crown, within the terms of the presumption. He attempted to evolve a new

434. At 187.
435. Supra f.nn. 418 and 419.
436. Bradken supra f.n. 408.

perspective without breaking from precedent, implicitly relying on the Rhind approach of studying the subject matter affected by the legislation.[437]

Barwick CJ's dissent simply lacked this finesse. Where Murphy J had shown no interest in the presumption, and had limited its field of operation, and Windeyer J had determined to work within the confines of the presumption while showing a warmth of feeling for the object of legislation, Barwick CJ's approach was completely bull-headed and gave evidence of a capacity to subvert the presumption capriciously, but not by force of logic or sociological reference.

The Chief Justice noted that there were no express words embracing the Crown in ss.503 and 504, the limitation sections. He then said, using words that at first blush turn the presumption on its head outrageously:

> "On the other hand, there are no words which expressly or by any implication would suggest that there was any exception to the operation of the two sections."[438]

This idea of course flies in the face of the whole thrust of the presumption, but in the light of the wording of ss.503 and 504 it does resurrect a crucial issue in the relationship of Crown and subjects as affected by general statutes. The relevant portion of the sections are set out in the judgment of Gibbs J.[439] S.503 provides that "The owners of a ship ... shall not ... be liable to damages beyond the following amounts ..." (in this case eight

437. Downs v. Williams supra f.nn. 323 to 332.
438. 145 CLR at 188.
439. At 192.

pounds for each ton of the ship's tonnage). S.504 provides that "the owner may apply ... in a British possession to any competent court, and that court may determine the amount of the owner's liability and may distribute that amount rateably among the several claimants ..."

The issue which remained unargued and unaddressed throughout China Ocean was that which had been raised in Panayides[440] and crushed in Rhind by Menzies J[441], the concept going back to Ecclesiastical Persons, that the Crown accepted (in that case Church leases, in China Ocean liability as statutorily limited) in accordance with the terms of a statute. This is obviously a doctrine closely allied to that which arose in Pinchbeck[442], that the Crown took a statutory right which had not previously existed in accordance with any limiting terms in the statute. The distinction between the former, unaccepted doctrine and the latter notion, apparently part of modern Australian and Canadian common law at least, is simply that for the Crown to be bound to accept the terms of a statute affecting a right, the statute must be the sole conduit for that right, as was so clearly the case in Pinchbeck where the right had not previously existed. The problem in China Ocean was that the Merchant Shipping Act was limiting liability without explicitly stating that there was no remaining right of damages to the full extent of the common law.

440. Supra f.n. 289.
441. Supra f.n. 441.
442. Supra f.n. 305.

China Ocean illustrates one of the very unfortunate aspects of the presumption. No express demise of the common law right was written in to the Merchant Shipping Act, as an apparently all embracing limitation had that effect in terms of simple legal logic, except that the Crown stands outside this particular pattern of logic.

To return to Barwick CJ's dissent, the flirtation with the heresy that some indication was needed of any exception from the words of a statute, was immediately compounded with a reference to the policy of the sections being defeated if the Crown were not bound, and exacted its claim to an unlimited extent, thus possibly defeating the claims of the other persons who suffered damage in the incident.

The Privy Council in Bombay had effectively crushed references to policy, while admittedly leaving floating, unattached to the logic of intention construed on the words of the statute, the words, " ... the apparent purpose of the statute is one element, and may be an important element, to be considered when an intention to bind the Crown is alleged."[443] As observed by Windeyer J in his dissent in Downs v. Williams[444], Bombay involved a limited fact situation, and one not altogether suitable for basing broad principles on. For example, while the Privy Council was not forced to concentrate on factual capacity in Bombay and rested on statutory words solely, testing fact situations are easy to envisage. There would be no complete frustration of statutory objective in Bombay if either all

443. [1947] AC at 63.
444. Supra text after f.n. 330.

water for private purposes had been piped quite separately from Crown land or only some water for private use had had to traverse Crown land, but frustration on the facts would have arisen if all water for private use had had to be piped across Crown land e.g. to get away from the reservoir.

Despite the fact that he immediately conceded that in this instance the Crown was the sole claimant, this was the sort of factual possibility being addressed by Barwick CJ, which had not been argued in Bombay. This is, however, in the present writer's submission, not merely contrary to the presumption as enunciated in Bombay, but even when attacking the presumption, should only be used when frustration has arisen in reality, not merely hypothesis. This approach would mirror the present writer's concern to limit Crown statutory immunity down to those instances of state necessity on the facts as determined by a court.[445]

The Chief Justice then returned to policy, and the even more inopportune concept of a draftsman not intending an exception in favour of the Crown which would destroy the scheme of the two sections, to support his dissenting view that the Crown was bound.[446] The extent of this heresy is apparent when one notes the words of Beaumont CJ in the High Court of Bombay, expressly disapproved by the Privy Council in Bombay:

445. Supra text after f.n. 71, and f.n. 75.
446. 145 CLR at 189.

> "In my opinion if it can be shown that legislation cannot operate with reasonable efficiency, unless the Crown is bound, that would be a sufficient reason for saying that the Crown is bound by necessary implication. The court must assume that legislation is intended to operate efficiently."447

Undeterred by Privy Council dismissal of a policy of statutory efficency that would bind the Crown, Barwick CJ moved onto an analogous Canadian Supreme Court decision which held the Crown bound by a limitation provision. The Chief Justice appreciated the faults in the reasoning in Gartland Steamship Co v. The Queen[448], but he approved the conclusion. The leading judgment of Locke J in Gartland was extensively quoted by Stephen J in China Ocean[449] for the purpose of criticism. Locke J's judgment showed reasoning that the Crown be bound because the prerogative could not extend a liability imposed on a subject by legislation.

In view of the criticism of the Canandian Supreme Court on this point by Barwick CJ, Gibbs and Stephen JJ[450], it is worth noting that Locke J's reasoning took place not merely in the context of the Canadian Interpretation Act's reference to royal prerogative being saved[451], as noted by

447. AIR (31) 1944 Bombay 26 at 28. In Secretary of State v. Municipal Corporation of Bombay AIR 1935 Bombay 347 at 350 Beaumont CJ found some Crown property liable to taxation under the provisions of the City of Bombay Municipal Act, 1888, because Crown property for governmental purposes was specifically exempted. To the claim that the Crown was immune from the section providing the machinery for levying the tax, Beaumont CJ would not allow a legal liability in the Crown without any means of enforcing it, thus creating the necessary implication. The Chief Justice had refused to draw the inference just a year earlier in Kirpalani v. Secretary of State AIR 1934 Bombay 379.
448. [1960] SCR 315.
449. 145 CLR at 217 quoting [1960] SCR at 345.
450. 145 CLR at 189, 202 and 218 respectively.
451. Now R.S.C. 1970, c.I-23, s.16.

Barwick CJ, but in the context of a statutory provision, which as alluded to above, Locke J thought limited the liability of shipowners absolutely. The distinction was thus between Locke J's implicit assumption that the issue was over absolute statutory rights vested in all persons, and on the other hand the Australian High Court majority attitude that the issue was whether or not Crown rights had been affected.

To conclude his dissent, Barwick CJ finally discussed heresy openly, without quite publicly embracing it. He referred to de Villiers CJ's judgment in South African Railways and Harbours v. Smith's Coasters (Prop) Ltd[452], dealing with s.503 of the Merchant Shipping Act, as an example of recognition "that the Crown may be included by general words in a statute. He cites the Magdalen College Case [authority cited] but, for some reason which to my mind is not plain, decided that the Crown was not bound by the Merchant Shipping Act."[453] The crucial factor regarding the South African case was, of course, that it pre-dated Bombay, which effectively put paid to any utility in Magdalen College.

The judgment of de Villiers CJ in the Appellate Division, in which Curlewis and Roos JJA concurred, was an historical survey of the presumption at a depth never attempted in the Australian High Court. The case law from Willion v. Berkley was surveyed, through such important but obscure cases as Wright[454], but fell to pieces in its

452. [1931] AD 113.
453. 145 CLR at 190.
454. See ch.8 f.n. 41.

analysis of Magdalen College. Having acknowledged that the judgment in Magdalen College had crushed the argument that to save his dignity the king could not be included amongst the persons and bodies politic specifically referred to by a statute[455], de Villiers CJ said two pages later:

> "In the Magdalen College case it was said that if the Act be general, and the Queen be clearly included within the words, if she shall be exempt out of this Act it ought to be by construction of law, and as the case was the law would not make such construction for reasons apparent in the law itself, which the Court then proceeded to state. ... But as pointed out, in s.503 there are no general words extending to the King. No presumption therefore arises here that the Crown is bound."[456]

This reasoning is plainly unsatisfactory, resting as it does on the fact that s.503 refers to the limited liability that shipowners may invoke, rather than the limitation on what persons in general suffering damage may claim. The judgment is intellectually insubstantial to carry the weight pre-Bombay of circumventing Magdalen College. Using it as support for Bombay's frontal assault on Magdalen College because it reached a conclusion favourable to the majority of the section under scrutiny does not enhance its logical validity. Citation by Barwick CJ, dissenting, illustrates its inherent weakness. However, Gibbs J cited it[457], and Stephen J quoted from it at length.[458] Donaldson, with its reliance on losing counsel in Willion v. Berkley, was plainly at the root of de Villiers CJ's move to restrict the operation of the statute and leave the Crown at large.

455. [1931] AD at 128.
456. At 130.
457. 145 CLR at 201.
458. At 221 to 222.

Of the majority, Gibbs J required four pages to enunciate the doctrine in Bombay and Rhind as applied to s.503[459], Stephen J needed six pages[460], and Aickin J only one.[461] The sole statement of note in these affirmations of orthodoxy was Stephen J's explanation for rejecting the Canadian Supreme Court heresy in Gartland, which explanation summed up the kinetics, the physical direction of approach, to the construction of statutes in respect of the Crown in Anglo-Australian Law. The emphasis was solely on the position of the Crown, there being no concession to the universality of rights vesting in individuals under statutes:

> "In England and in Australia the long established approach to the problem is quite different : instead of assuming the existence of a general situation regarding rights and liabilities, brought about by the statute, the first enquiry is whether the statute has anything at all to say concerning the rights of the Crown and the liabilities of subjects at the suit of the Crown. If, as I shall for the moment assume, it has not, the enquiry ends : since the statute does not bind the Crown it may be disregarded and no question arises concerning Crown prerogatives."[462]

The remaining Australian decisions on the presumption have been determined in the Federal Court, or New South Wales courts. In November, 1979, between the High Court decisions in Group Projects and China Ocean, Deane and Fisher JJ in joint judgment in the Federal Court (the former is at the time of writing a Justice of the High Court)

459. At 199 to 202.
460. At 216 to 222.
461. At 240 to 241.
462. At 218.

decided that the Commonwealth Trade Practices Commission was not bound by s.45D of the Trade Practices Act 1974(Cth) despite the existence of s.2A specifically binding the Commonwealth Crown in so far as it was carrying on a business.[463] S.45D made it an offence for two parties to act in concert to hinder or prevent the acquisition of goods or services by a third party from a corporation where such conduct would have the effect of damaging the business of the corporation.

Thomson Publications alleged that the activities of the Trade Practices Commission in policing the Trade Practices Act themselves constituted a breach of s.45D. Deane and Fisher JJ held that the Trade Practices Commission did not carry on a business in the sense referred to by s.2A.[464] This seems a reasonable conclusion, even allowing for the House of Lords' revision of the notion of "government" to constitute "business".[465]

Some twenty months after Bradken, in November 1980, an inferior court had reason to apply the majority decision. F. Sharkey & Co Pty Ltd v. Fisher (No.2)[466] involved an application to the Federal Court to enforce s.45D against the Metropolitan Water Sewerage and Drainage Board, a creature of New South Wales statute. This Board was under ministerial control and was reckoned by the court to

463. Thomson Publications (Aust) Pty Ltd v. Trade Practices Commission (1979) 27 ALR 551.
464. At 568.
465. Town Investments, see ch.8 f.n. 394 and text following.
466. (1980) 33 ALR 184.

constitute the New South Wales Crown. The Board had entered into an agreement with the Water and Sewerage Employees Union (following industrial action by the union) to use members of the Union exclusively in construction work, and further, to cease the use of private contractors altogether.

The applicants were private contractors who claimed that the Board's action was damaging their business, contrary to the provisions of the Trade Practices Act. Given the Board's State Crown status, clearly Bradken was against this submission, but for the first time, an attack was made on the notion of "prejudice". In the words of Sheppard J:

> "It was submitted that here there was no prejudice. The very reverse was true. The Board was in fact being hindered by the conduct of the Union. An injunction restraining the Union and its officials from a continuation of this conduct would enable the Board to act independently of union pressure and thus bring to bear on the problem an open mind enabling it to make a decision on the merits without the threat of industrial pressure and possible disruption of its activities."467

His Honour rejected this submission, basing himself carefully on the three majority decisions in Bradken (and also on Telephone) to find that prejudicial conduct was not that which resulted from the free will limitation by the Board of the Board's methods of performing its functions. Rather, "prejudice" lay in any limitation of persons to contract with the Board, if that were the Board's decision. His Honour said:

467. At 192 to 193.

> "What would occur if I were to accede to the submission now made, would be that an arrangement entered into by a body representing the Crown would be impinged upon. That would affect the Crown's freedom and independence to enter into and to implement such arrangements as it thinks fit. It is in a position, it if chooses to do so, at least in legal theory, to withstand union or industrial pressure by failing to heed it or to take positive steps to suppress it. It is a matter for it whether it succumbs to it or not. My finding that the Board is an agency of the Crown means that the Trade Practices Act has no application to it. It was thus free to enter into and to implement the arrangement which is in question. To affect that arrangement by the granting of the injunctive relief which the applicants claim would be indirectly to affect the freedom of the Crown to do what it has done."[468]

Just as in Bradken, Sharkey resulted in an effective dispensation of the activities of a private association from the Trade Practices Act, in this case the association being a union, because it was acting in concert with the Crown (in right of a State). In both Bradken and Sharkey the private association, through this concerted action with the Crown in defiance of the intent of the Trade Practices Act, was able to drive third parties from the market place, in Bradken of supplying steel parts, in Sharkey of providing service.

The inherent juristic and political flaw in the presumption is illustrated by these two cases. The State Parliaments were empowered under s.51(1)(b) of the Trade Practices Act to legislate to remove State Crown activities, or indeed any actions in their respective States, from the effect of the act.[469] In other words a capacity to

468. At 193.
469. Supra f.n. 408 per Murphy J in Bradken.

legislate for dispensation and suspension, in accordance with the terms of the Bill of Rights, was delegated by the Federal Parliament to the State Parliaments. Such Parliamentary activity is of its nature open, and in the public eye, as a matter of such importance as removing the effect of important legislation from selected parts of the community ought to be. But the presumption allows a back door method of achieving the same end, without the public exposure or debate. True, its application may be tested in open court, but the true forum for lifting the effect of legislation should, axiomatically, be Parliament, the creator of the legislation.

Defeated on one front, F. Sharkey & Co. Pty Ltd and its associates changed ground and attacked the Metropolitan Water Sewerage and Drainage Board under the Industrial Arbitration Act 1940 (N.S.W.). S.88F of this act provided that the New South Wales Industrial Arbitration Commission might make an order or award declaring void any contract or arrangement under which a person performed work in any industry on the ground that the contract or arrangement was, inter alia, unfair or against the public interest.

F. Sharkey & Co and its fellow applicants sought an order from the Industrial Arbitration Commission that the contract between the Board and the Union be voided for being unfair, because it destroyed the businesses of the private contractors and the jobs of their employees, and secondly because it was against the public interest, because the cost

for having the work done would now be higher, and the contract with the Union resulted in the elimination of competitive tendering.

Preliminary jurisdictional points had to be established in this claim, among them whether s.88F of the Industrial Arbitration Act bound the New South Wales Crown, in the shape of the Metropolitan Water Sewerage and Drainage Board. The Full Bench of the New South Wales Industrial Commission, Beattie P and Cahill and Dey JJ cited Bradken and Bombay as authorities for the presumption, but then asserted that their reading of Bradken did not require that necessary implication of the Crown being bound only occurred if the alternative was total frustration of the legislation.[470]

The Commission then proceeded, by a noteably non-technical argument, to arrive at a conclusion that the act in general, and s.88F in particular, bound the Crown, despite there being no express provision to that effect. The process of reasoning was that the Crown was referred to in such a fashion "as to manifest Parliament's intention that employees of the Crown and of public authorities should have substantially the same rights as the employees of private employers to ... awards ... and, accordingly, that the Crown and public authorities should be bound at least by the provisions of the Act relevant to matters of that kind ..."[471]

470. F. Sharkey & Co Pty Ltd v. Metropolitan Water Sewerage and Drainage Board and the Water and Sewerage Employees' Union [1981] 2 NSWLR 824 at 838.
471. Ibid.

This decision reflected the strict legalism of Bombay overcoming estimates of the flow of prejudice against the Crown. Under Bombay the statute had to be construed to ascertain whether the Crown was bound without reference to the surrounding circumstances. In this instance, the statute was so construed, because otherwise it would be unworkable in its references to the rights of Crown employees. But in this case, the issue was not the rights of the day labourer Crown employees, members of the Union, but rather the alleged rights of the third parties affected by Crown conduct with its employees. Because the act was strictly construed as binding the Crown once and for all, not on a situational basis, it was now held to bind the Crown in a situation potentially prejudicial to the Crown, that is, where the capacity of the Crown in contracting for labour as it willed might be diminished.

As the report refers only to jurisdictional points, it is not apparent whether the Commission subsequently made the order sought against the Crown. However, the initial decision binding the Crown by the Industrial Arbitration Act made that a possibility if the Commission interpreted the evidence to constitute unfairness or action against the public interest.

The remaining two Australian cases on the presumption were decided in 1982. The first, Bolwell v. Australian Telecommunications Commission[472], had a factual resemblance

472. (1982) 42 ALR 235.

to the second Sharkey case, with a different result. It was alleged by Bolwell in an information that one Townsend had been prejudiced in his employment by his employer, the defendant, an emanation of the Commonwealth Crown. The Conciliation and Arbitration Act 1904 (Cth) made the alleged conduct an offence and prescribed a penalty : s.5. Since the definition of "industrial dispute" specifically covered Crown employees, the inference was open, as it had been in the second Sharkey decision, to find the Crown bound, as otherwise the reference to Crown employees would be thwarted.

The distinction between that Sharkey ruling, uncited in Bolwell, and this decision of Smithers J in the Federal Court, was that a prosecution was launched rather than relief being sought by way of an order. His Honour specifically relied on Cain v. Doyle[473] to find the Crown immune from the effect of s.5. To "actually bind the Crown in relation to a statutory crime some unequivocal indication is required that it was the intention that it should."[474] After citing Bradken, Rhind, and Bombay and observing Hogg's doubts as to the presumption's antecedents, Smithers J concluded:

> "It [the act, the act's aim] is satisfied in that, subject to special provisions concerning particular authorities, it renders the Crown and its authorities subject to the jurisdiction of the Conciliation and Arbitration Commission in respect of the prevention and settlement of disputes and including the making of awards. It is quite another thing to find an

473. Supra f.n. 212.
474. 42 ALR at 241.

> intention to render the Crown criminally liable. Accordingly it cannot be said that there is an unequivocal indication that the shield of the Crown is removed in respect of s.5 of the Act."[475]

The saga is finalised with the decision of the New South Wales Supreme Court in Strods v. Commonwealth of Australia.[476] The plaintiff had been injured in a factory owned by the Commonwealth at Lithgow, New South Wales. The jury found that the injuries resulted from breach of the Factories, Shops and Industries Act, 1962 (N.S.W.) by the defendant. The question before Cantor J was whether this act bound the Commonwealth Crown, thus enabling the plaintiff to recover damages.

Extensive reference was made to Downs v. Williams[477] in which the same legislation had been held not binding on the New South Wales Crown. It was further noted that the High Court in that case, with only Gibbs J dissenting on this point, held that the Claims Against the Government and Crown Suits Act 1912 (N.S.W.) did not operate to make the Factories legislation binding on the Crown. Menzies J in that case had expressly referred to s.64 of the Judiciary Act 1903 (Cth) as being in like case with the New South Wales Crown Suits legislation : incapable of raising a statutory duty in the Crown to serve as the basis of claims against the Crown, if the statute itself did not bind the Crown.[478]

475. At 242.
476. [1982] 2 NSWLR 182.
477. Supra f.n. 311.
478. [1982] 2 NSWLR at 185.

Cantor J then analysed the change in the law wrought by Maguire v. Simpson[479] and was in no doubt that that unanimous decision of the High Court had destroyed the reasoning in Downs v. Williams regarding the effect of s.64 of the Judiciary Act. The new dispensation vouch-safed to Australian law was that State legislation, otherwise not binding the Commonwealth Crown of its own force, now bound the Commonwealth in the course of litigation with subjects, because s.64 put the Commonwealth Crown in the position of a subject for the purpose of litigation with subjects, and in that position the Crown could not summon in aid the presumption of immunity from statutes in favour of the Crown. It was to be treated as a subject, and subjects were bound by general legislation. The Commonwealth had effected this application of State legislation to itself : it was not the result of State legislation purporting to bind the Commonwealth of its own power.[480]

Cantor J concluded by referring to the argument for the Commonwealth based on Cain v. Doyle. He distinguished the instant case by noting that though the New South Wales act provided for penalty in the event of breach, that was not what was being sought here. The plaintiff was merely establishing breach of binding legislation, as a basis for action in tort. Noting that Dixon J in Cain referred to the sole issue in that case being the liability of the Crown to penalty, and Latham CJ observed that penalty was the only remedy available, facts which did not pertain in Strods,

479. Supra f.n. 314.
480. [1985] 2 NSWLR at 185 to 189.

Cantor J said:

> "... There is no realistic problem affecting the dignity of the Crown in applying the provisions of the Factories, Shops and Industries Act to the Commonwealth Crown although in some circumstances a penalty may be enacted."481

His Honour concluded that, by virtue of s.64 of the Judiciary Act, the New South Wales legislation bound the Commonwealth Crown, at least to the extent of the section setting out the maximum weights which an employee might lift.

The period 1977-1982 contained a wealth of reported Australian case law on the subject which has not been emulated in the subsequent five years. Of the Justices who brought down the key decisions in the High Court in 1979, only Mason (now Chief Justice) and Wilson J remain. For all the change in High Court personnel, the presumption in rigorous Bombay form seems at the time of writing entrenched, and securely coupled to the forensic tool of "prejudice" whenever parties on concert with the Crown are arguing that they also are immune from the effect of legislation. But the 1977 decision in Maguire v. Simpson, as evidenced by the New South Wales decision in Strods in 1982, appears to have cut a swathe through the protective effect of the presumption. A comparison of the New South Wales decision in Sharkey with Bolwell also betokens a greater depth of interest in the working of legislation vis à vis individuals rather than a consuming concern for

481. At 189.

Crown rights : the exception appears to be the jurisprudential issue of penalties, which are presumed not to run against the Crown.

In the wake of Maguire v. Simpson and given the existence of "Crown suit" legislation in each of Australia's nine jurisdictions, providing such legislation is held applicable to statutes of the enacting jurisdiction, the presumption may no longer be available in litigation between individuals and a Crown, except where a penalty is involved. The irony if that were to happen would lie in the presumption's survival as a rump in litigation between individuals, as in Bradken or Group Projects, with one party claiming to be outside the operation of a statute by virtue of its relationship with the Crown (or more properly, Crown property) lest the Crown be prejudiced, even though the Crown was not a party to the litigation. It is this resurrected notion of "prejudice", less than sixty years old, that cannot be swept away by simple reliance on "Crown suit" legislation.

CHAPTER TEN

THE PRESUMPTION AT THE END OF THE TWENTIETH CENTURY : STAGNATION OR CHANGE?

> "Decency, security, and liberty alike demand that government officials shall be subject to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a law breaker, it breeds contempt for the law; it invites every man to become a law unto himself; it invites anarchy."
> per Brandeis J, dissenting, Olmstead v. United States (1927) 277 US 438 at 485.

The Spread of the Presumption through Common and Statute Law.

Brandeis J's dissent in Olmstead, above, occurred in litigation over telephone tapping, but did not directly involve the question of a regulatory statute and government behaviour contrary to the statute. That issue did however, arise in the context of telephone interception in Nardone v. United States.[1] The pervasiveness of the presumption throughout the common law world is illustrated by its continued existence in the United States of America. But Nardone gives some reassurance that the presumption of the Sovereign's immunity from general

1. (1937) 302 US 379. There has been no legislation in the United Kingdom prohibiting this sort of behaviour : Malone v. Commissioner of Police of the Metropolis (No.2) [1979] 2 All E.R. 620 particularly at 640, and see N. Ascherson "The State Burgles our Freedom". The Observer (London newspaper) 24 January, 1988 p.7 commenting on MI 5's claim to legitimate telephone interception under the royal prerogative. Ascherson wrote, "But what is the 'Royal Prerogative' anyway? Here we enter the pantomime of misleading Druidic nonsense which passes for a British constitution."

statutes can be ameliorated.

In the face of the Federal Communications Act general prohibition on wire-tapping, Federal law enforcement agencies pursued this method of obtaining evidence. Roberts J for the majority found that the canon of construction applied only in two situations. Firstly, if the statute would deprive the Sovereign of its established prerogative, title or interest. This was exactly in line with pre-1870 English common law. The second situation is of considerable interest however, as being an American innovation. The majority found that the Sovereign and its officers were not bound "where a reading which would include such officers would work obvious absurdity as, for example, the application of a speed law to a policeman pursuing a criminal or the driver of a fire engine responding to an alarm."[2]

Roberts J then returned to the old, orthodox inclusive rule that "the sovereign is embraced by general words of a statute intended to prevent injury and wrong."[3] In enunciating the excluding theory of necessity, his Honour was assessing the practical effect of legislative inclusion of the Sovereign on the instant facts. There was no compelling necessity for Federal officers to breach the prohibition on wire-tapping. This is in accord with the approach outlined above in chapter nine.[4]

The inherent uncertainty of a case by case approach to

2. At 384. Two State cases were cited to illustrate this concept.
3. Ibid.
4. See ch.9 f.n.75.

"necessity" rather than reliance on hard and fast rules of construction is illustrated by Sutherland J's dissent in Nardone[5], concurred in by McReynolds J. These were two of the anti-New Deal "Four Horsemen", and Sutherland J's conservative concern for the well being of law enforcement authorities highlights the relativity which may affect a perception of "necessity" that the State be immune from the operation of a statute.

Both Roberts and Sutherland JJ cited the same two State decisions concerning police and firemen being exempt from road law in emergency conditions, but where Sutherland J tacked them on to the famous passage from US v. Hoar[6] to illustrate general governmental immunity, Roberts J was far more precise. Only rarely in Anglo-Commonwealth cases concerning government officials and road laws had there been a perception of "necessity", let alone reasoning based on it.[7]

5. 302 US at 385.
6. See ch.9 f.n.381.
7. Compare Chare v. Hart ch.8 f.n.169 with Cooper ch.8 f.n.163, and see the Canadian cases discussed by W.P.M. Kennedy in notes at (1931) 9 Can. B.R. 512 and (1934) 12 Can. B.R. 176, where he urged necessity as an excluding reason in respect of speed limits. Note also the wrestling of the Federal High Court of Rhodesia and Nyasaland in R v. Jones 1962 (3) SA 1 with a Traffic Act of one of the then federation's component parts, Southern Rhodesia, which was expressed to bind the Crown. In Pirrie v. McFarlane Higgins J, dealing with facts revealing no military emergency, reasoned from general necessity that traffic legislation bound all, including the Crown, thus making an assessment of necessity on the facts both an inclusive and exclusive test: see ch.9 f.n.181. Strathclyde was of course a recent example of arguing the prerogative of defence on hypothetical facts as a military necessity which required Crown immunity from a road law. The Transvaal Provincial Division accorded exactly with the writer's suggestion of court estimation of necessity on the instant facts: State v. De Bruin 1975 (3) SA 56.

Although the presumption put down roots and undoubtedly flourished in American jurisprudence (as the Decennial Digests copiously illustrate), the Supreme Court, perhaps because its work is so often touched by the Sovereign-limiting terms of the Bill of Rights, to a greater extent than subordinate American courts, has consistently limited the presumption in a way the English courts did not after 1870. For example, in US v. Knight[8] decided in 1840, thirty years before the English case of Edmunds[9], the Supreme Court found the Federal Government bound by a statute concerning conditions for imprisoned debtors.

A text writer in 1857 even urged the rejection of this fragment of the common law as clashing with American institutions. Sedgwick wrote,

> "The English precedents are based on the old feudal ideas of royal dignity and prerogative; and where the terms of an act are sweeping and universal, I see no good reason for excluding the government, if not specially named, merely because it is the government."[10]

However, this appeal to republican virtue was as doomed as all subsequent text writers' attacks: the Supreme Court expressly relied on the presumption in 1874.[11]

8. (1840) 14 Pet.301, particularly at 315 to 316.
9. See ch.8 f.n.78.
10. T. Sedgwick A Treatise on the Rules which Govern the Interpretation and Application of Statutory and Constitutional Law 1857, p.36.
11. The Dollar Savings Bank v. US (1874) 19 Wall.227 at 239.

The presumption survived, but at least federally, has in the last hundred years been kept closely circumscribed. The case law illustrating these restrictions, and the attitude adopted in response by the Federal Government, are clearly set out in the opinion of the Acting Attorney General, Francis Biddle, to the Secretary of Agriculture on 18 June, 1941.[12] The work of the Supreme Court shows the methods (the Cokeian rubrics; necessity; presumption as to intended ambit of statute etc.) by which the relationship of a legislature's enactments to the Sovereign can be saved from absolutist lack of reality: fundamentally, what is under discussion is a presumption, not an absolute canon of construction.

At the level of inferior American courts, however, the relationship of statutes to the executive is often as rigidly pro-government as it is in the United Kingdom and Australia. The present writer once sought to satirize the five Australian High Court decisions on the presumption in 1979 with a fictitious judgment about the Commonwealth's capacity to build a twenty storey pig pen in defiance of State zoning legislation.[13] Having intended a reductio ad absurdam the writer was later confounded on discovering that in 1977 the Maryland Court of Appeal held that Baltimore city zoning, building and fire codes could not be enforced

12. (1940-1948) 40 Opinions of Attorneys General 97.
13. S. Churches "Case-note on Statutes and the Crown" (1980) 7 Adel. L.R. 394.

against the State's proposed use of a city site as a correctional institution.[14]

The United States, with its numerous jurisdictions and hierarchies of courts, reveals the presumption in its full diversity. Nowhere has it been abolished, but federally and in some States it is kept on a short leash, while in others it is a well developed State immunity. This variation in approach is beginning to show in the remainder of the common law world, unlike the British and Australian experience in the twentieth century.

The existence of statutory entrenchments of the presumption has already been noted in respect of Queensland, Tasmania and New Zealand.[15] Similar legislative provisions exist, for example, in all Canadian jurisdictions, except British Columbia and Prince Edward Island where the presumption has been statutorily abolished since 1974[16]; in common law Africa[17] north of the Roman-Dutch hybrid

14. Mayor and City Council of Baltimore v. State of Maryland (1977) 378 A2d 1326. On zoning in America, see M. Adelfio "Governmental Immunity from Zoning" (1981) 22 Boston College L.R. 783 and case comment "Governmental Immunity from Local Zoning Restrictions : The Balancing Test of Brownfield v. State" (1982) 43 Ohio State L.J. 229.
15. See ch.9 f.nn.263, 295 and 396.
16. P.W. Hogg Constitutional Law of Canada 2nd ed. 1985, p.233 for itemised references, and see this work at pp. 231 et seq. for general discussion of the effect of the various statutes.
17. The general structure is to provide that no statute shall affect the rights of the State unless there are express words or a necessary implication to that effect: Interpretation Act, Zambia s.51(1); Malawi s.58; The Gambia s.41; Uganda s.42; Tanzania s.30; Kenya s.75; The Seychelles s.18 and Aden (while still under the common law) s.20.

jurisdictions of South Africa and Zimbabwe (which retain the presumption in their common law); Israel[18]; Sri Lanka[19]; Malaysia[20] and Guyana.[21] The list is not exhaustive, but enumerates the instances available to the writer.

The Atmosphere Generated by the Presumption

1. Dispensing

Morton[22] and Cain[23] had both explicitly involved a countermanding by Ministers of the Crown of the effect of industrial relations statutes as they applied to Crown establishments, orders upheld because the statutes did not extend to the Crown. The Ministers were not strictly dispensing with the statutes, but directing action in geographical sites, Crown factories, where the statutes did not run, but the effect of the presumption was, for practical purposes, to allow a dispensing.

18. Interpretation Ordinance s.42, being more sophisticated than the African models in providing that general statutes should not only not affect the rights of the State, but not impose any obligations on it either. See J. Potchebutzky "Is the State Subject to the Rule of Law?" (1974) 9 Israel L.R. 369.
19. Interpretation Ordinance s.3, see J.A.L. Cooray Constitutional and Administrative Law of Sri Lanka 1973, p.384.
20. Interpretation and General Clauses Ordinance s.57, see British Lighterage Co v. Lord High Admiral of the United Kingdom (1961) 27 Malayan L.J. 195 holding the British Crown not bound by a Malaysian limitation provision.
21. Interpretation Ordinance s.23, see Alexander v. Munia (1969) 14 WIR 58.
22. See ch.9 f.n.103.
23. See ch.9 f.n.212.

Telephone[24], Bradken[25] and Sharkey[26] (in the Australian Federal Court) also illustrated effective dispensing with statutes in favour of individuals (corporate or natural), in respect of their relationship with the Crown. No ministerial directive was required: a relationship close enough that a binding of the individual would "prejudice" the Crown makes these cases all the starker when contrasted with, firstly, rent restriction and similar cases concerning Crown land, or secondly, cases such as Strathclyde[27] in which the shield of the Crown was clumsily extended to a contractor performing work for the Crown, and in defiance of Dixon[28] taking the Crown's immunity. This is to distinguish the first three cases in this paragraph from others in which individuals take the Crown's immunity from statutes because their actions take place on or in respect of Crown land, or they don the Crown's shield by "becoming" the Crown for the purposes of litigation.

In Telephone, Bradken and Sharkey it was not Crown property or the Crown's persona which operated to protect an individual. Rather, anxiety to leave the Crown free to roam as if a statute had never been passed caused an effective dispensing to extend to individuals in respect of relationships, which if between two individuals, would attract the law.

24. See ch.8 f.n.351.
25. See ch.9 f.n.360.
26. See ch.9 f.n.466.
27. See ch.9 f.n.53.
28. See ch.8 f.n.87.

True it is that, in the leading cases referred to in the three paragraphs above, statutes are only overborne by court order in accordance with law, but it is the present writer's submission that not only is the presumption bad law for historical reasons, but that its application has a warping effect on the post-Bill of Rights legal system. A court ruling that a Minister's order supersedes a statute, or that a potentially "prejudicial" relationship relieves a non-Crown party of the obligation to conform with legislation exemplifies the wrong forum in action.

The present writer maintains that courts applying an obscure legalism in conjunction with a Ministerial directive, or in respect of acts constituting a prima facie illegal relationship, make up the wrong forum for over-ruling the popular will expressed in legislation. The appropriate forum for determining national employment policy was, in the light of existing legislation, in Morton the Westminster Parliament, and in Cain the Australian Federal Parliament. The legality of action in Telephone should have been tested, in accordance with statute, in the Restrictive Practices Court, and with respect to Bradken and Sharkey it was open to the Queensland and New South Wales Parliaments respectively to legislate to permit the restrictive practices performed with the Queensland and New South Wales Crowns.

It may be argued against these claims, and not merely in respect of these most outstanding cases, that in accordance with the Bill of Rights, Parliaments could insert

clauses into legislation permitting the Crown to dispense with it, thus allowing a result in conformity with the presumption.

This is presently exactly what is happening on a noticeable scale in Australia. For example, the complex package of legislation administered by the National Companies and Securities Commission is replete with discretionary powers in the Commission to amend legislation as it affects individuals. S.58 of the Companies (Acquisition of Shares) Act and Codes is prominent in the field[29], even allowing the Commission the startling power of applying legislation to an individual before the legislation has been proclaimed to commence.[30] The problems this poses, not for the rule of law in abstract, but for those engaged in commerce, seeking the certainty which statutes traditionally provide, a certainty now turned illusory, is summed up by a leading Australasian businessman, Sir Ron Brierley:

> "We've got 150 pages of the most complex legislation to work with, but whatever we come up with out of that, the NCSC can still say it is unacceptable. You might as well have a one line Act saying that whatever the NCSC thinks is right is what applies."31

29. Q. Digby "The Principal Discretionary Powers of the National Companies and Securities Commission Under the Takeovers Code" [1984] 2 Company and Securities L.J. 216 at 222.
30. National Companies and Securities Commission "Media Release - The Broken Hill Proprietary Company Limited" 9 March, 1986.
31. Australian Financial Review, 4 August, 1981, p.60.

It is the present writer's thesis that the presumption creates an attitude in the minds of government officials that does not sit easily with modern notions of equality before the law, or professionalism in government, and which manifests itself in the cognate area of statutorily authorised dispensations of legislation. The attitude shows in the quoted response of an "official" to a suggestion that the Australian Capital Territory Electricity Authority might take legal action against Commonwealth Government bodies for breach of legislation restricting power use, deliberately framed to include government authorities,

> "The Commonwealth just can't prosecute itself."[32]

The impact of this general inclination is manifested in a study of dispensations granted prior to the crash of a small commercial jet on 10 October, 1985.

> "Under Air Navigation Order 48, pilots are permitted to fly on only two consecutive nights. But Pelair had a Department of Aviation dispensation which allowed its pilots to fly on five consecutive nights."[33]
> "The Department of Aviation has given Pelair a dispensation which is outside the manufacturer's minimum guidelines for safe operation in the flight manual.
> A spokesman for the Department of Aviation told the National Times that 'There is nothing wrong with the dispensation. The department has the right to make this decision. If they thought it was dangerous they wouldn't do it.' The department maintains that it is not unusual to give dispensations that are outside an aircraft's flight manual. ***

32. "Blind Eye to Lights that Shine through Guidelines" The Canberra Times 7 April, 1982, p.1.
33. "Anatomy of a Pelair jet crash" C. Ryan National Times (Sydney newspaper) 6 December, 1985, p.13.

> Pelair ... had a close association with some members of the department. Barry Lodge, the senior Westwind examiner for the South Australian region, is well known to Pelair personnel. It was Lodge's daughter who received trips on Pelair planes between Perth and the east coast of Australia."34

The temptations posed to officials, and damage inflicted on a system of law and regulation intended to apply equitably for public safety, by allowing dispensation out of the public eye of law framed either in Parliament or as by-laws under parliamentary supervision, is plain to see. One obvious suggestion is that all dispensations performed under statutory authority be tabled in a relevant legislature in fashion analogous with by-laws. Such action would remove the element of the clandestine currently surrounding many dispensations. Officials should also have to justify with written reasons the exercise of the dispensing power when tabling dispensations. Such action would at least prevent the secretive manner in which nine wealthy tourists were allowed to slaughter game animals in March, 1987 in contravention of Kenya's game laws[35], following ministerial approval.

34. Ibid p.15.
35. Swara (organ of the East African Wildlife Society) (1987) 10 No.3 pp.6,7 and 23. The Wildlife (Conservation and Management) Act, c.376 Laws of Kenya provides for the issuing of game licences, but to minimise publicity, this path was not taken. There is no general dispensing power in favour of the Minister written into the act, so that the ministerial approval was illegal. The Minister resigned under parliamentary pressure shortly after his actions were made public.

The attitude engendered by the presumption and the legal power of dispensing can only foster the unfortunate fantasy that governments are above the law and can impose their will as though it were law. Nearly 300 hundred years after the Bill of Rights a Prime Minister of New Zealand ordered the Superannuation Act amended, by press release. Government and employers acted on his edict by ceasing to make deductions from salary payments required by the act, but the Prime Minister was challenged by a citizen and duly castigated by Chief Justice Wild for his illegal action.[36]

Unfortunately Chief Justices do not always stand up to pressure from the executive as well as Higinbotham CJ did in Goldsborough[37] or Wild CJ in Fitzgerald. The dream of those holding executive power that they might subvert the law to their own end without publicly altering the law was given force by the penultimate and ultimate Chief Justices of Kenya over the last half decade, when they ordered judges of the Kenyan High Court to ignore the statutory provisions regarding the enforcement of mortgages, as mortgagee repossession and consequent dispossession of the populace were embarrassing to the Government. Such cases were to be referred to the Attorney General.[38]

36. Fitzgerald v. Muldoon [1976] NZLR 615, and see D.V. Williams "To Remind People of the Bill of Rights 1688" (1977) 3 Monash ULR 243.
37. See ch.9 f.n.111.
38. P. Nowrojee "Enforcement of Decrees in Relation to Meaningful Economic Development" Paper delivered at Kenya Law Reform Commission's Seminar on Land Law reform, 12 June, 1987. Reproduced as Appendix 2. A number of Kenyan statutes deal with mortgages (in Kenya "charges") most obviously The Registered Land Act c.300 Laws of Kenya ss.65 to 84.

2. Concerted Utility of the Presumption by Government and Individuals

It is one thing to concede the capricious effect of the presumption in the retrospect of litigation, but another to accept that it can be utilised as a strategy for circumventing the law. But this is the case, as illustrated by a meeting between oil company officials and the Premier of New South Wales with the Minister for Consumer Affairs in 1980 to discuss petrol prices. The oil companies did not want to go on competing with each other by lowering their prices, but in clear contravention of the Trade Practices Act 1974 (Cth) they wished to collude in a uniform, high price.

> "It was even pointed out to the Minister by one of the representatives present that it was only in the presence of governments, which are exempt from the Trade Practices Act, that such discussions on pricing could take place at all."39

Note that the oil company officials were able to negotiate in contravention of the Trade Practices Act not because the New South Wales Parliament had exercised its powers under that act, but because the officials had entered a "safe force field" protecting them, the Crown persona of the Minister for Consumer Affairs. What is the strength of this force field? Do company officials have merely to be in the same room with the Minister or in closer contact? Perhaps a fairy ring around the Minister might be best : the whole concept reeks of black magic.

39. "City users must pay" Australian Financial Review 19 June, 1980, p.3.

A worse example has arisen more recently with the Northern Territory Government's apparent determination to remain unfettered by the Aboriginal Sacred Sites Act, 1978 (N.T.). A stand of gum trees and rock, proclaimed a sacred site under the act, and so inviolate, were destroyed by Dussin Constructions Pty Ltd in December 1982, the company being under contract to the Northern Territory Government to build a road through the site. The destruction of the site was authorised by the Minister for Lands, Marshall Perron, who claimed an obligation to finish the road improvements as a matter of urgency.[40]

The thirty six Aboriginal custodians of the site recommended that those who desecrated the site be prosecuted in accordance with the act. The Director of the Aboriginal Sacred Sites Authority duly laid a complaint, and on 31 May, 1983 a summons was issued against both Dussin Constructions Pty Ltd and the Minister alleging breaches of the act. Each alleged offence carried penalties of fine, imprisonment or both.

> "On 14 November 1984 the Authority sought leave in the Alice Springs Magistrates Court to withdraw all charges against Perron and Dussin Constructions. The Authority's legal advisors had discovered a technicality which meant that the Government was not bound by the Sacred Sites legislation. Thus, it was unlikely that Dussin, as agent for the Department of Transport and Works, and Perron as responsible minister, could be found guilty of the offences charged."[41]

40. P.N. Grabosky "The Desecration of Injalkajanama (Ntyalkaltyaname)" (as yet unpublished manuscript). Dr. Grabosky is a senior criminologist with the Australian Institute of Criminology, Canberra.
41. Ibid p.9.

Just what the technicality favouring the government was, became highlighted when in late 1986 the Opposition in the Northern Territory Legislative Assembly introduced an amendment to the act so that it would bind the Crown. The bill was defeated on party lines.

The litigation which did not eventuate as R v. Dussin Constructions Pty Ltd and Perron bears strong, if superficial similarities with the Scottish case Strathclyde. The assumption by the authority of Dussin Constructions and Perron's immunity in the wake of Bradken is quite understandable, but the case is one calling for challenge to the existing assumptions in Australia.

Firstly, Dussin Constructions was not strictly an agent of the government, as referred to above. It was a contractor, and as such not entitled to take the shield of the Crown. The same mistake was made in Strathclyde of ignoring the limitations of Crown persona as set out in Dixon. That left Bradken "prejudice" as the sole immunizing factor for the company, and Cain Crown immunity from penalty as the Minister's defence, mounted on the standard presumption of Crown statutory immunity.

A fact situation such as this, embodying extraordinary governmental arrogance, should in future be challenged for the criticisms applied to Strathclyde, Bradken and Cain in chapter nine, but also in the light of curial advances in other jurisdictions in dealing with the presumption in the last twenty or so years, to be dealt with shortly below.

Most obviously the analogy with Strathclyde should be challenged by reference to the acceptance of hypothetical governmental necessity in that case, compared with the lack of any actual emergency necessity in this instance.

3. The Attitude Expressed within Government to Reform of the Presumption

Two Australian law reform bodies have examined the relationship of Crown to statutes. British Columbia's Law Reform Commission has done likewise, and the Law Reform Commissions of Canada and New Zealand are, at the time of writing, investigating the matter.

The Law Reform Commission of British Columbia was first cab off the rank with a report in 1972 on the legal position of the Crown[42] which included a short chapter dealing with statutes and the Crown.[43] The report refers to the presumption as a prerogative of the Crown, but redeems this peccadillo with cogent case examples of third parties being disadvantaged by the presumption because of a concern that the Crown be kept in a pre-statute position rather than that third parties have their statutory rights. The Commission recommended at the conclusion of this chapter:

> "The British Columbia Interpretation Act be amended to provide that the Crown is bound by every statute in the absence of express words to the contrary."

42. Law Reform Commission of British Columbia Report No. 9 on Civil Rights, Part I, Legal Position of the Crown (1972).
43. Ibid pp. 63-67.

This recommendation was enacted in 1974, a commendable turn of speed, perhaps assisted by a change of government in 1972, but the change was not a plank in a party platform. The Interpretation Act, 1974 (B.C.) c.42 was a complete reworking of the former interpretation legislation, s.13 reversing the former statutory immunising of the Crown by providing:

> "Unless an enactment otherwise specifically provides, every Act, and every enactment made thereunder, is binding on Her Majesty."

Mr. Allan R. Roger, British Columbia's Legislative Counsel, has suggested there was no particular public or legislative debate on the measure, but that it stemmed from the collective attitude of personnel in the Attorney General's chambers.[44]

The traffic was not all one way, however, a Laws Declaratory Act being passed in the same year, s.44 of which provided:

> "An enactment that would, except for this section, bind or affect the Crown in respect of
> (a) the use or development of land; or
> (b) the planning, construction, alteration, servicing, maintenance, or use of improvements as defined in the Assessment Act,
> does not bind or affect the Crown."

The aim of this codicil to the sweeping provisions of the Interpretation Act is apparently to save the Crown in right of British Columbia from having its land subject to municipal zoning. The reference, however, to "the use ... of land" does leave open the possibility of all the third

44. Correspondence, A.R. Roger to the writer, 26 February, 1980 and 12 August, 1980.

party claims to immunity that arise from relationship to Crown land which is exempt from statutory control: the rent restriction cases in their various forms, dependent on "prejudice" to the Crown, must still be confronted by courts in British Columbia.

The two 1974 provisions became in 1979 subsections one and two respectively of Section 14 of the Interpretation Act, RSBC c.206. A small amount of reported litigation has referred to s.13 of the Interpretation Act, 1974, but its application has never been contentious.[45] However, there was an unlitigated dispute between the provincial Department of Health, and the department responsible for parks. In the best traditions of Clochemerle, pursuant to s.13 of the 1974 Interpretation Act, Health insisted on determining the standards of construction for public conveniences in recreational areas, while Parks asserted their right to this

45. Cronkhite Supply Ltd v. Worker's Compensation Board (1977) 1 BCLR 142 (B.C. Co.Ct.) appealed to B.C. Court of Appeal and then Supreme Court of Canada (1979) 13 BCLR 33 on question of shield of the Crown; R in Right of British Columbia v. Victoria [1979] 4 WWR 331, (1979) 12 BCLR 35 (B.C. Ct of App.) (Crown bound to pay municipal taxes on profit generated in course of "business" on land; claim that s.44 of Laws Declaratory Act immunized the Crown from the effect of a statute dealing with the "use" of land not accepted, illustrating a limitation on the Crown's immunity in respect of land, and also illustrating how relaxed the British Columbia Court of Appeal felt about the overthrow of the presumption); Twinriver Timber Ltd v. R in Right of British Columbia (1979) 15 BCLR 38; Rutherford v. Rutherford [1980] 2 WWR 330 (Crown as trustee of pension funds bound by Family Relations Act, 1978 (B.C.), an illustration of the utility of the Crown being bound where its own property or rights are not at issue, but another party could manoeuver to use Crown immunity).

function as park operators under s.44 of the Laws Declaratory Act. Legislative Counsel, in retaling this story, noted that Parks seemed to have the law in their favour, but Crown Law advised that government policy was that Health had full control over this matter.[46]

The British Columbia experiment has proceeded without fanfare or hitch, and has recently been copied by Prince Edward Island. The Australian experience has been otherwise. Well may Stephen J have ventured his sardonic comment in Bradken that the evidence was against governments seeking legislation to ameliorate the presumption.[47]

At the end of 1975 the New South Wales Law Reform Commission presented its report Proceedings by and against the Crown.[48] A substantial portion of the report dealt with "The Application of Statutes to the Crown."[49]

A perusal of materials in the New South Wales Department of Attorney General and Justice[50] indicates that the Commission's report was a decade in the making and the work of not less than four chairmen. Much of the initial effort was devoted to determining the terms of reference for

46. Roger, second letter, loc. cit. supra f.n.44.
47. See ch.9 f.n.400.
48. New South Wales Law Reform Commission Report No.24.
49. Part 14, pp. 94 to 136.
50. [This footnote deleted since presentation of the thesis for examination for reasons explained at pp725 - 728]

the report. Minutes of meetings between chairmen and Attorneys General or senior officers of the department during the period mid-June 1967 to mid-June 1970 delineate the battle lines. There was considerable concern, particularly from the Deputy Head of Department, at the Commission's declared intention to survey the law on vicarious liability for independent officers, most obviously police.

The Report was duly submitted in December, 1975 and concentrated on police tort liability and the relationship of the Crown to statutes. Downs v. Williams[51] had been decided in the High Court during the Commission's deliberations, and with its inequity, obvious to a layman's eye, it became the locus classicus of the Commission's analysis of the presumption. Discussing the case in the context of the existing claims against the Crown legislation, the Commission flew its colours on the concept of equity under the law, including statute law, by stating:

> "It is a deplorable feature of the statute law, not only in New South Wales but generally in all common law countries, that all too often Acts, which should bind the Crown, do not contain a provision that they do so."52

Later the Commission referred to the Factories, Shops and Industries Act, 1962 (N.S.W.), the subject of Downs v. Williams. To illustrate the judicial canard that parliaments enact law conscious of the presumption in the

51. See ch.9 f.n.311.
52. N.S.W. L.R.C. No.24 p.27, para 4.9.

Crown's favour, the Report contains the following[53]:

> "For example, did Parliamentarians, when they considered the Factories, Shops and Industries Bill, contemplate that the Crown would not have the duty, like a subject, to fence dangerous machinery? The course of debate on the Bill in Parliament suggests that they did not. We note, for example, that a suggestion made in debate in the Legislative Assembly that it be expressly provided that the Crown be bound elicited the question 'The hon. member is not suggesting that the Crown will not be bound to comply with the provisions of the measure?' The reply to their question was 'No, but I think it would be of assistance to provide specifically to that effect.'"

After detailing the faults in the presumption's pedigree and performance the Commission presented a "Recommendation for radical reform."[54] The report proposed amendment to the Interpretation Act abolishing the presumption. The Crown's position was, however, to be protected by an elaborate scheme of "foreseeability". An act was to bind the Crown "except in so far as it is unlikely that it would have been intended that it bind the Crown having regard to - " three qualifications.

The first two of these involved the "foreseeable extent" to which an act, binding the Crown, would deleteriously affect Crown activity or property, and the third involved the "foreseeable extent" to which the act might fail if the Crown were not bound. The complex scheme was an immediate advance on the general modern approach to the presumption, of sole concern with the Crown's position.

53. Ibid p.109, para 14.11, referring in addition on this point to para 14.32. Quotations from N.S.W. Parliamentary Hansard (1962) vol. 43, p.2038.
54. N.S.W. L.R.C. No. 24 p.111, para 14.14.

The probability of impeding a Crown activity was to be measured against the extent to which "that impediment might be against the public interest", the same yardstick used regarding the probability of an act's being thwarted. The probable burden on Crown property was to be assessed by comparison with the burden on other owners of property.

This thoughtful attempt to off-set the exigencies of government with the interests of the public deserved a better fate than it received. Balancing the probability of the destruction of legislative intent by the Crown not being bound against the public interest was a vast improvement on Bombay. Concern for Crown activity as well as property reflected a realisation of the modern role of the Crown, but picked up the limiting concepts of the reality of "the State" employed by Coke in his report of Magdalen College of "prerogative, estate, right, title or interest".[55]

The Law Reform Commissions of British Columbia and New South Wales shared a concern for Crown property. In British Columbia this was evidenced by reference to the utility or proposed utility of Crown land, while the New South Wales Commission relied on a comparison of burden, related to the amount of land held. This was exemplified by hypothetical acts concerning compulsory destruction of rabbits, and prevention of the spread of prickly pear. The Commission argued that, as the Crown owned enormous amounts of undeveloped land, an obligation on it to kill all rabbits on its land was unduly onerous compared with that on other

55. See ch.5 f.n.80.

landowners. Conversely, however, it could be expected to poison its land where it abutted onto privately owned land to halt the spread of plant vermin.[56]

The whole New South Wales approach to the presumption was also couched in terms of the Crown's exemption from criminal liability being separate from, and in addition to the general presumption.[57] This jurisprudential assertion would doubtless have served as a palliative to politicians concerned as to whether the Crown could be pursued under the proposed new regime to the extent of criminal liability. The present writer, however, sees this as one of the weaknesses of the New South Wales Report.[58] Cain v. Doyle was relied on exclusively to illustrate the point. It has been both criticised, and analysed above to a rather less Crown protective conclusion than that assumed by the New South Wales Law Reform Commission.

The additional criticism of the Commission's Report is that its proposal for reform has become elaborate out of all proportion to the discretion which must necessarily abide in the courts regarding this matter if the Bombay on/off style test is to be removed. The Report's third qualification, the effect of the Crown not being bound in the light of public interest, is unnecessary if the two previous qualifications are removed.

The present writer's attitude is that there is no good reason for legislation which applies to property not

56. N.S.W. L.R.C. No.24 pp.120-121, para 14.22.
57. Ibid p.113, para 14.16.
58. See ch.9 f.nn.212 et seq.

applying to Crown property as a matter of course. If, for reasons of other than emergency/necessity, the parliament is of the view that Crown property should be outside the operation of legislation reckoned by the parliament to be for the welfare of the whole community, then let the parliament pronounce as much, after public debate.

As to the first qualification, impeding Crown activities, this is no more than an attempt to enunciate the concept of executive necessity. Whether stated as here, in rather ponderous legislative form, or left for judges to assess as the situation demands, this must be a variable test dependent on the facts of each case. That is to say, an act should not be held not binding on the Crown merely because a hypothesis exists in which necessity might arise requiring the Crown to be free of legislative embrace. The Crown should only be free of the enactment when those actual facts arise. The Report recognised this by detailing examples of how different Crown activities and properties might escape from, or be under the control of the same legislation.[59] In other words, the fact that the Crown would not be bound by a certain statute with regard to a certain activity or property does not mean that the Crown would have blanket immunity from the statute.

Pages 725 to 728 (containing footnotes 60 - 67) have been removed since presentation of the thesis for examination. The material at these pages covered the bureaucratic manoeuvring within the New South Wales Department of Attorney General and Justice, as a result of which no effect was given to the New South Wales Law Reform Commission Report No. 24.

The sources relied on were internal departmental papers and personal memory of conversations. Such materials are not appropriate in a work generally available to the public. However, the writer will discuss the matters raised with bona fide academic researchers. The writer may be contacted through the Law School, University of Adelaide, GPO Box 498, Adelaide, South Australia 5001.

South Australia has never had a fully fledged Law Reform Commission, but its Law Reform Committee, under the chairmanship of Mr. Justice Zelling (now retired), and consisting of the Solicitor General, another judge, a legal academic, and a representative of the legal profession, has produced many reports. The one hundred and fourth report "relating to proceedings by and against the Crown" was presented to the South Australian Attorney General and tabled in Parliament late in 1987. The Committee's terms of reference had apparently been left wide and vague, to update and further clarify the law relating to proceedings by and against the Crown in right of South Australia, with particular reference to the Crown Proceedings Act 1972.

The Committee's philosophy was set out in the Introduction:

> "The Committee has approached the topic of Crown Proceedings holding the view that the Crown in right of South Australia should as far as the circumstance of the Crown's peculiar responsibilities in the government of the State permit, possess the same or similar rights, powers and privileges, and be subject to the same obligations and duties, as any ordinary citizen. We do not believe that the Crown should retain any procedural or substantive prerogatives or privileges unless there are compelling public policy reasons for it to do so."68

In one and a half pages the Committee pronounced itself dissatisfied with the presumption and offered majority and dissenting proposals for rectification of the law.[69] The Report unfortunately opened on this subject by referring to the presumption as a "fundamental prerogative" immunity of the Crown, and citing a passage from losing counsel in

68. S.Aust. L.R.C. No.104 p.1.
69. Ibid pp. 22 to 23.

Willion v. Berkley, along with Bombay and Bradken as authority for the presumption. However, it went on to note an analysis of the presumption and Bombay in Appendix Four to the Report, and then pronounced:

> "For present purposes it is enough to say that a majority of the Committee considers that the rule offends against the principle of parity and that statutes should be presumed to bind the Crown in the absence of the legislature's express words to the contrary."

Noting that the amendment proposed would only create a new presumption, not a rule of law, the Report concluded:

> "The effect of the proposed reform would be to transfer the onus of rebutting the presumption from subject to Crown, the latter being the party best qualified to establish why it should not be affected by the legislation in question.
>
> Mr. Gray [M.F. Gray QC, at that time Solicitor General of South Australia] does not favour the approach endorsed by the rest of the Committee. He has proposed abolition of the existing presumption, replacing it with a statutory requirement (perhaps in the Acts Interpretation Act) that every statute state specifically whether or not it binds the Crown in right of South Australia."

The first proposal has the elegance of simplicity and leaves the courts work for which they are eminently suited, assessing the effect of a presumption in particular fact situations. The second proposal has the apparent advantage of forcing the parliament to state its intention so that courts are not at a later date saddled with interpreting an obscure legislative will. There are however, two drawbacks in this second proposal. An act would be setting out to control the future legislative expression of parliament. This raises the constitutional issue of a parliament attempting to fetter later parliaments. If it is said that this is purely a procedural matter, questions must be asked

of the efficacy, suitability and legality of an act dictating a parliament's mode of expression. Secondly, after parliament has determined that a statute should bind the Crown, a fact situation may arise beyond the contemplation of parliament at the time of passing, which requires governmental action in the public interest contrary to the terms of the statute. For the approving reasons given in respect of the first proposal, a court is a more suitable forum to determine a presumption of a statute's ambit after the event, than a parliament is to determine a statute's absolute binding effect without the event in contemplation.

Stimulus is provided by a paragraph in the Appendix to the Report dealing with the House of Lord's decision in De Keyser.[70]

> "There is, however, one class of case where the courts have been prepared to construe a statute in a way which prejudices the Crown. In Attorney General v. De Keyser's Royal Hotel Ltd [1920] AC 508, the House of Lords held that where a statute authorised the Crown to do something which was also authorised by the prerogative, and the statute imposed conditions or restrictions on the exercise of the power, then the prerogative power was superseded by the statute so that the power could only be exercised subject to the statutory conditions or restrictions."[71]

70. See ch.8 f.nn.183 et seq.
71. S.Aust. L.R.C. No.104, Appendix Four pp 3 to 4. See, however, McNairn Governmental Immunity pp. 19 to 21, observing that courts could still find the prerogative alive and available to a government despite apparent superseding by legislation. A striking modern instance is Barton v. Commonwealth (1974) 131 CLR 477. See also J. Goldring "The Impact of Statutes on the Royal Prerogative, Australasian Attitudes as to the Rule in Attorney General v. De Keyser's Royal Hotel Ltd" (1974) 48 ALJ 434.

There is an analogy worth drawing between a statute superseding a portion of the common law, the prerogative, and in the process binding the Crown, and the cases stretching from Pinchbeck[72] back to Crooke's case[73] and earlier[74] in which a new right or procedure was established by statute where none had existed before, and in which case the Crown was bound to adhere to the statutory form to obtain the benefit of the statute. These two situations are worth comparison with that in China Ocean[75] in which a statutory limitation on the common law was not made explicitly absolute, so that the Crown could retreat to the high ground of the common law position. This is an option not open to the Crown when De Keyser applies strictly, because statutory intervention in the field of the prerogative is presumed to supersede it entirely, while in the circumstances of Crooke/Pinchbeck there is no common law high ground to fall back to.

It follows that a means of undercutting the presumption would lie in determining that a statute always completely superseded and suppressed previous common law existing in the field. However, not only does De Keyser not provide an absolute rule of voiding the previously existing prerogative, as the retention of the extradition power in

72. See ch.9 f.n.301.
73. See ch.7 f.n.19.
74. See ch.9 f.n.305.
75. See ch.9 text after f.n.442.

the face of Commonwealth statutes in Barton[76] revealed, but such a method of obliging the Crown to conform to statutes has an obvious limitation in the case of regulatory statutes which neither intrude into existing common law rules, nor provide avenues of rewarding litigious procedure. Such regulatory statutes are exemplified in Telephone and Bradken.

It is too soon to know what the response will be in South Australia from the government, parliament or the public service to this sweeping Law Reform Committee recommendation. In 1987 the Canadian and New Zealand Law Reform Commissions published papers foreshadowing research

76. Barwick CJ, Mason and Jacobs JJ in separate judgments found that while the Extradition (Foreign States) Act 1966-1973 (Cth) displaced the prerogative power to seek the surrender of fugitives in certain circumstances, it had not expressly and unambiguously displaced this prerogative in toto. Not only did the statute not extend to the full ambit of the prerogative (in Barton illustrated in geographical terms, as the statute did not, by treaty, reach to Australia's extradition relationship with Brazil) but the prerogative could operate on the facts in Barton without inconsistency with the statute. This distinguishes Barton from De Keyser, in which latter case the statute provided an exclusive mode of action, leaving no room for the operation of the prerogative. The ambit of the prerogative after the passing of a statute in the same field has been a vexed issue since at least 1522: see ch.3 f.n.9; Armiger v. Holland (1597-1598) ch.3 f.n.117 and Commendams ch.6 f.n.15 had wrestled explicity, if unwittingly, with the topic. The problem was a perenniel in the construction of 33 Hen.VIII c.39, see ch.6 f.n.60, ch.7 f.nn.15, 66 and 67 and ch.8 f.nn.3 and 5.

into the subject of statutes and the Crown.[77] The British Columbia and New South Wales experiences illustrate the extreme possibilities for law reform recommendations, and the influence of senior public/civil servants on the capacity for changing the law. In a non-public arena the importance of personality is as great as in the case of judges who operate in the public eye.

The point is that neither potential method of assessing and if necessary altering the presumption, that is, the curial analysis and judicial determination route or the law reform body, bureaucracy/government approval and parliamentary path, seems to offer a way forward resting solely on logic and desirable general jurisprudential concepts which compel adherence. The paradigm shift of understanding in public law is yet to happen.

Conclusion

Should the Presumption be Altered?

The imperfect history of the presumption has been recounted at great length above. The tenderness for king, then Crown or State, observable from the earliest times in the relationship of statutes to the executive has blossomed in the last one hundred and twenty years in the Anglo-

77. Law Reform Commission of Canada, Consultation Paper "Towards a modern federal administrative law" 1987, p.25, following the investigation of broad concepts in Working Paper 40 "The legal status of the federal administration" 1985. The Law Commission, New Zealand, Legislation and its Interpretation, Preliminary Paper No.1 "The Acts Interpretation Act 1924 and Related Legislation" 1987, pp. 41 to 43.

Commonwealth world, defying accepted jurisprudential trends to de-mythologise the Crown and its medieval trappings. With the outstanding exception of the United States Supreme Court, the presumption has tended throughout the common law world to harden into a maxim or rule of mechanical application.

This rigid approach lends the lawyerly illusion of certainty and predictability, but alarmingly, such benefits are apparent only to the trained professional, not the public whom the law exists to serve. To the layman the "presumption as rule" simply delivers statute law skewed, and appears to demonstrate the courts lacking in evenhandedness. The modern concern for prejudice to the State, without a commensurate balancing concern for the position of citizens, such as Coke evolved, betokens a value judgment of great dimension. This is all the more disturbing for its easy acceptance by so much of the judiciary.

The court invoked rule has the prime defect of defeating the intention of legislatures that statute law apply equally and certainly throughout a jurisdiction. Equality before the law and certainty of application are key features of modern common law societies, and the "presumption as rule" replaces ex post facto the legislators' activities with a court invented rule of State supremacy and consequent immunity from general law. The "certainty" of a court invented rule supersedes that of legislators expressing the popular will.

On top of the out-of-tune historical development, the jurisprudential flaw of lack of evenhandedness, and the mechanical defect of obstruction of legislative will, the modern presumption places the Crown in a bad light. For example, the fifty years and more of fair rental, and housing standard cases in which the Crown has been permitted the unchallenged role of Dickension landlord, can only serve to bring government into disrepute. In all those cases, perfectly legitimate expectations as to rental levels, security of tenure and adequate maintenance of housing were thwarted by Crown reliance on an area of lawyers' law that must appear to a layman like a parlour trick. The presumption operates as a form of dispensation in favour not merely of those within the shield of the Crown, such as employees, but persons having a merely contractual relationship with the Crown.

The sum total of these flaws is to create an unprofessional atmosphere in government. A minor interpretative presumption of fragmentation is bolstered by the courts against the major jurisprudential premise of cohesion. Inequity is sustained in the face of the general principle of equality, and this aberration is made all the more gross by the most potent social and political force in the community, government, being the beneficiary of this windfall. The immunity afforded encourages managers in the public sector to rely on their privileged legal position, which covertly advantages them.

The philosophy of modern government (for all the backsliding in reality) is about action according to publicly accepted rule. At the least, this benefit secreted in the interstices of the common law defeats the reasonable expectations held by citizens, of equal application of the law. At its worst, it encourages an arrogance in government born of the knowledge that the government is above the law.

The Process of Change : Mechanics and Objectives

The present writer takes the view that the presumption should be altered, and looks to change through the medium of either the courts or legislatures. There are no other options in a common law system short of revolution.

1. Judicial Capacity

It must be recognised immediately that whatever the capacity of courts to reshape the law interstitially by advancing a major premise to quash a minor anomaly, they are bound to follow the clear dictates of legislatures. Therefore, those jurisdictions with legislative entrenchment of the presumption cannot hope to be rid of it solely by judicial action. However, as will be seen, the courts in such jurisdictions may go far to containing the effect of the presumption.

The approaches which a court might take to altering the presumption might be listed as follows:-

(A) Abolition

Only one jurisdiction so far has seen the presumption

abolished by curial action: India. The State of West Bengal v. Corporation of Calcutta[78] saw Subba Rao CJ lead a majority of the Indian Supreme Court in rejecting the presumption. Six of nine sitting judges agreed with the Chief Justice in this case, finding that the State of West Bengal had to comply with a requirement of the Corporation of Calcutta formulated under the Calcutta Municipal Act, 1951: the State had to take out the licence required of all traders in respect of its trading functions.

Subba Rao CJ said:

> "There are many reasons why the said rule of construction is inconsistent with and incongruous in the present set-up. We have no Crown: the archaic rule based on the prerogative and perfection of the Crown has no relevance to a democratic republic; it is inconsistent with the rule of law based on the doctrine of equality. It introduces conflicts and discrimination."[79] ***
> "... the normal construction, namely, that the general Act applies to citizens as well as to State unless it expressly or by necessary implication exempts the State from its operation, steers clear of all the said anomalies. It prima facie applies to all States and subjects alike, a construction consistent with the philosophy of equality enshrined in our Constitution. This natural approach avoids the archaic rule and moves with the modern trends. This will not cause any hardship to the State. The State can make an Act, if it chooses, providing for its exemption from its operation. Though the State is not expressly exempted from the operation of an Act, under certain circumstances such an exemption may necessarily be implied."[80]

Bachawat J in a separate, concurring judgment, observed difficulties in imposing statutory penalties on the State, which difficulties did not hinder a presumption that the

78. [1967] AIR 997.
79. At 1007.
80. At 1008.

State was to comply with statutes.[81] It is also noteworthy that in the majority judgment, Subba Rao CJ referred to American Supreme Court scepticism of and non-reliance on the presumption[82], concluding with Frankfurter J's dissent in Jess Larson v. Domestic and Foreign Commerce Corporation[83] noting that doctrines of sovereign immunity were in disfavour.

The Chief Justice also referred at some length to Indian case law preceding Bombay to illustrate that the English common law, with its notions of prerogative, and Crown immunities, had never been adopted throughout the entirety of India. Reliance in particular was placed on Bell v. City of Madras[84] in which both judges, Benson and Bhashyam Ayyangar JJ doubted the presumption's acceptance by Indian legislatures. The latter judge quoted Sedgwick, the American author disparaging the utility of the presumption in a modern setting.[85]

In trying to extrapolate from the particular Indian experience to a general common law model it is necessary to remember that Bombay was an imposition on the Indian legal system by the Privy Council, an English oriented tribunal. In bridging the path from Madras to Calcutta while avoiding Bombay, Subba Rao CJ could cast back to a recent past in which the presumption was not readily accepted in India; history that is not available to many other common law jurisdictions.

81. At 1020.
82. At 1006.
83. (1949) 337 US 682.
84. (1902) 1 LR 25 Mad 457.
85. At 495 supra f.n.10.

(B) Replacement of the Existing Presumption with its Reverse

It is one thing for a court to find the presumption inconsistent, incongruous, archaic and anomalous, to paraphrase Subba Rao CJ, and hence find it inapplicable. However in jurisprudential terms, the problem would seem to lie in a court, a "law finding" rather than a "law making" body, putting forward a rule of construction to replace the presumption. If dispatching the presumption appears at first blush ultra vires to a "law finding" body, the present writer would reply that the court, in rejecting an anomaly in the common law, was merely finding the correct legal rule and solution from a range of options.

The reality of dismissing the existing presumption is, as illustrated by Subba Rao CJ's judgment in Calcutta, in fact not beset with jurisprudential snares. In the absence of the presumption, all public general acts extend throughout the enacting jurisdiction. It is true that application of statutes to the State in that case would be more than a presumption. Nonetheless, as the Indian Chief Justice pointed out, certain circumstances will raise an implication that on those facts the State should be exempted from the operation of a statute.

At that juncture, in the present writer's submission, the debate between a rule that general statutes bind all, save in exceptional circumstances when the State is exempted, and a presumption that statutes extend to the State, becomes unnecessarily obscurantist. The practical

import of both positions is the same. On the facts of Calcutta Subba Rao CJ was not required to spell out what circumstances would raise State immunity. The present writer would suggest only those of absolute necessity or emergency, and most likely the two together.

(C) The Test for State Exemption

For the reasons briefly outlined immediately above, the present writer is of the view that it is open to a court to rule that statutes bind the Crown (presumptively or absolutely, it matters not) except in certain circumstances. The present writer has suggested[86] earlier that the concept of governmental necessity could refine and stand in the place of the old fashioned exemption to the Crown of the prerogative, which was originally, of course, those powers and capacities required by a sovereign for executive action. The American cases on road-use bear out this approach[87], as does the judgment of Lord Donaldson MR in the Spycatcher

86. "An Excursus on the Principle of Government Effectiveness", see ch.9, text after f.n.65.
87. State of Washington v. Gorham (1920) 188 Pac.457 and Balthasar v. Pacific Electric Railway Co. (1921) 202 Pac.37, cited in Nardone supra f.n.2.

case decided in the Court of Appeal in early 1988.[88]

What is required in this approach is that a superior court declare the present presumption discarded, with a proviso in favour of the State in circumstances posing emergency or necessity, ascertainment of such circumstances to be by courts assessing the facts of each case, not by acceptance of executive claim. Adamson's reference to less Crown-minded Scottish law regarding Crown privilege for documents prevailing over English attitudes is an exact analogy for the present writer's prescription.[89] Australia has also seen the law on Crown privilege alter dramatically in the last decade[90], so that courts now determine the ambit of the Crown's claim: it is no longer accepted as definitive.

As outlined above, an advantage in judicial finding of (A), (B) and (C) is that (B) and (C) follow in the train of (A) without a detailed rule having to be set out. India is the only jurisdiction at the time of writing to have

88. Report not available at time of writing, but explored in this aspect in A. Watkins "The PM's favourite judge" Observer 28 Feb. 1988, p.9. The judge's reasoning was, apparently, that the security service could operate outside the law and not be prosecuted in certain circumstances, as was the case with ambulance and fire engine drivers, who unlike police, did not have a specific exemption from road laws. See Buckoke v. Greater London Council [1971] 2 All ER 254 at 258 per Lord Denning MR on the defence of necessity for fire engine drivers and the reality of prosecutions despite the unavailability of dispensations since 1688.
89. See ch.9 f.n.87.
90. Sankey v. Whitlam (1978) 142 CLR 1. See J. Goldring "Public Law and Accountability of Government" (1985) 15 F.L.R. 1, at p.7, citing other references on the subject of Crown privilege.

ventured thus far in the direction of abolishing the presumption. However, in the last twenty years a number of cases have been decided in Canada, New Zealand and Guyana, and at least two in Australia, that illustrate how the State might be brought within the operation of many general statutes, and the presumption pared of its strength rather than being cultivated. Canada, New Zealand and Guyana are all notable for having statutes imposing the presumption.

(D) Paring down the Presumption

(i) The possible effect of Crown Suit Acts

As indicated above[91], there is in Australia a strong possibility that in future, Crown Suit Acts will be operated not merely to apply the procedure of the law against the Crown, but the substantive law also. A recent Canadian case has illustrated the same trend, at least as regards Federal adoption of provincial statutes.[92] The weakness of relying on this indirect method of overthrowing the presumption is that at best it only serves to make the Crown liable to statutes: it does not curb the benefit flowing to third parties in cases such as Bradken, because of potential "prejudice' to the Crown. Because Crown Suit Acts intrinsically deal with civil litigation, this approach has the additional defect of being unable to deal with the concept of the Crown as liable to prosecution, let alone penalty.

91. See text after ch.9 f.n.478.
92. Norfolk Trust Co. v. Hardy [1984] 5 WWR 86 at 91, Saskatchewan Queen's Bench, per Maurice J.

Given this weakness where third party beneficiaries of Crown immunity are involved, it is appropriate that the second line of judicial attack on the presumption has been in this area, particularly as regards land bearing some Crown proprietary interest. It was the notion of "prejudice" in such instances involving Rent Restriction Acts which then mistakenly flowed into non-property situations as in Bradken.

(ii) Limiting parties from taking the Crown's immunity

(a) Land

The Ontario case of Township of Shuniah v. Richard[93] illustrated the distinction between legislation relating specifically to land, in which case lessees of Crown land were free of statutory burden; and regulatory legislation dealing with operations or construction on the land, in which case the lessees were bound.

In Alexander v Munia[94], Persaud JA in the Guyana Court of Appeal examined the English Rent Restriction cases with some care, but agreed with English authority that the issue of acts applying in rem as opposed to in personam was misleading.[94A] His Lordship concluded that the Rice Farmers (Security of Tenure) Ordinance did apply to Crown land by necessary implication, so that a Crown tenant was bound by its terms in dealing with a sub-tenant.[94B] Luckhoo C concurred, and Crane JA agreed that the Crown was impliedly bound.[94C] Once Crown land was let for a use governed by the Ordinance, that land was subject to the legislation.

93. (1982) 37 OR (2d) 471 at 479
94. (1969) 14 WIR 58. [The analysis of this case has been re-written since presentation of the thesis for examination.]
94A. At 63 to 64
94B. At 66
94C. At 70 and 71 respectively

Two New Zealand planning cases decided within days of each other in May, 1984[95] are in accord with the approach in both Ontario and Guyana, which is to say quite at odds with the Anglo-Australian approach of Egoroff or Group Projects. Retaruke and Pharazyn each refers to the encompassing effect of legislation on Crown lessees as affecting the Crown's "rights".[96] The former case by convergent evolution with Ontario reasoning, stated that the statute under review bound Crown lessees "because the legislation is directed to the use of land rather than its ownership."[97] Pharazyn relied on the facts of that case, in which a lessee was claiming Crown immunity, while the Crown did not resist being bound by the planning legislation under discussion.

(b) Where the Crown is not directly involved

An Ontario matrimonial property dispute in 1979 foreshadowed Township of Shuniah. Re Brown and Brown[98] involved a claim to stand behind the sheltered position of a Canadian Government official, exempt from an Ontario statute. Meehan Co. Ct J said:

> "This is not a case where the Crown itself is being subjected to the Act's provisions on family assets or the matrimonial home; it is not as if the Crown were a party to a matrimonial dispute. Binding the Crown, it is submitted, occurs only where the rights of the Crown are being determined under the legislation ..."[99]

95. Retaruke Timber Co Ltd v. Rodney County Council [1984] 2 NZLR 129; Pharazyn v. Hawke's Bay County Council [1984] 2 NZLR 134. For background to these planning cases see S. Thorburn "The Position of the Crown in Relation to the Town and Country Planning Act 1953" (1972) 2 Auckland ULR 100.
96. At 132, 140 respectively.
97. At 132.
98. (1979) 26 OR (2d) 252, (Ont. Co. Ct).
99. At 259.

(iii) The Crown Abiding by the Rules of whichever Game is Being Played

A Canadian Federal Court decision[100] and an Alberta Court of Appeal judgment[101] go as far as a court might hope to go in the face of legislative entrenchment of the presumption. In Belleau Dube J cited Magdalen College as allowing exceptions to the strict Bombay rule (the English Court of Appeal was, in rigid logic, more accurate in this respect two years later in Egoroff). His Lordship's approach was one of "implied Crown acceptance" of statutory operation, which flies in the face of Anglo-Australian cases such as Telephone and Bradken.

Dube J said that the Crown

> "may also submit to an Act that does not bind it directly, when for example it enters into a contract which is governed by a particular statute. The Crown then implicitly accepts the Act as an 'element of a contract which it has entered into voluntarily'."[102]

Belleau involved the Federal Crown's purchase of land which was subject to legislation vesting a right of purchase in lessees. Dube J added:

> "By purchasing the land [the Federal Crown] voluntarily became subject not only to the contract between the two parties but also to the laws governing that contract."[103]

100. R v. R L Belleau Inc (1984) 37 RPR 150.
101. Alberta Mortgage and Housing Corporation v. Ciereszko [1987] 3 WWR 513.
102. 37 RPR at 155, last words quoted from P.A. Cote Interpretation des Lois 1982, p.172.
103. 37 RPR at 156.

In Alberta Mortgage the provisions of real property legislation barring the enforcement of personal covenants under mortgages were held to apply to the appellant provincial Crown corporation. The thrust of the decision was that the Crown could not adhere to the position status quo ante the statute. Belzil JA for the court relied on Locke J's reasoning in Gartland[104] in the Canadian Supreme Court. The Interpretation Act, R.S.A. 1980, c.I-7 provided:

> "s.14 No enactment is binding on Her Majesty or affects Her Majesty or Her Majesty's rights or prerogatives in any manner, unless the enactment expressly states that it binds Her Majesty."

Despite this provision, the court found that the Crown was

> "bound by its own general laws to the same extent as the subjects unless there be very specific provision exempting it ...
>
> Sections 41 and 43.1 of the Law of Property Act are general laws within the jurisdictional competence of the province governing the relationship between mortgagors and mortgagees in the province prescribing limitations on the personal liability of certain mortgagors in certain circumstances. When the Crown comes into court, it does so on the same footing as other litigants and is bound by its own general laws, s.14 of the Interpretation Act notwithstanding."[105]

Both Belleau and Alberta Mortgage have eschewed sophisticated reasoning based on the modern presumption in favour of solid general principle, that the law should apply evenhandedly. Both decisions are completely at odds with present superior court decisions in England and Australia.

104. See ch.9 f.n.448.
105. [1987] 3 WWR at 522.

(iv) The Crown taking the Burden as well as the Benefit of Statutes.

This heading is a close analogue to its immediate predecessor, but is both more sophisticated in its jurisprudence and possessed of a surer historical pedigree. The recent case law begins with Pinchbeck[106] which case refers to some of the principle's antecedents, and highlights its application where a statute has broken new ground and stated law de novo so that there can be no question of the Crown not being bound to comply with the statute if it is at the same time accepting benefit. As in the absence of the statute there is a void, to obtain the benefit the Crown must comply with the statutory requirements. This was the approach adopted by Galligan J, dissenting, in Re Marten[107] in the Ontario High Court, Divisional Court, and by the Alberta Queen's Bench in Dennis v. Yurkowski.[108] Marten was of interest as a divided decision, dealing with a statute very similar to 33 Hen.VIII c.39 s.74, the subject of so much judicial uncertainty from the seventeenth to the early nineteenth century.[109]

106. See ch.9 f.nn. 301 to 305.
107. (1981) 130 DLR (3d) 607.
108. (1984) 33 Alta LR 167.
109. See ch.6 f.n.60, ch.7 f.nn.66 and 67 and ch.8 f.nn.3 and 5.

(v) Concentration on Individuals', as opposed to Crown Rights.

(a) "Total" Bombay frustration turned on its head

In Norfolk Trust Co[110] the Saskatchewan Queen's Bench found that a provincial act in favour of preserving small farms from being sold up under mortgagee sales (the sort of thing trying to be implemented via the back door in Kenya by a quite improper judicial dispensation[111]) applied to the provincial Crown. Maurice J said:

> "The benefit bestowed by the Act would be wholly frustrated if the crown was not bound by it. A debtor will not have 'shelter beyond the reach of financial misfortune' if his homestead is not exempt from seizure by the Crown. The Crown, in right of Saskatchewan, is bound by the Exemptions Act."[112]

His Lordship was not, of course, adhering to the true Bombay test of total frustration (he referred to the case). Unless the Crown were a creditor in all mortgagee sales (even with the ubiquitous nature of tax burdens, unlikely), the exemption of the Crown from the statute would not frustrate its operation entirely. The approach here is very similar to that in Kent[113] in which the major, although not absolute impact of Crown activity was taken to be enough to require the Crown being bound on utilitarian grounds.

(b) Where conviction of the Crown may not result in the Crown being punished but may assist an individual to obtain remedy

Saskatchewan v. Fenwick[114] provides a complete riposte

110. Supra f.n.92.
111. Supra f.n.38.
112. [1984] 5 WWR at 90.
113. See ch.9 f.n.333.
114. [1983] 3 WWR 153.

to Cain v. Doyle.[115] In a stance consistent with that he was to take the following year in Norfolk Trust Co, Maurice J of the Saskatchewan Queen's Bench found that the Crown could be convicted. The Saskatchewan Labour Standard Act provided that it bound the Crown, and also provided for reinstatement rights after maternity leave. Penalties were prescribed for breach of the act upon conviction, and employees received compensation and reinstatement after a conviction recorded against an employer.

Maurice J said that the penalty section of this legislation

> "cannot be read so as to subject the Crown to a fine or a term of imprisonment but that does not mean the legislature did not intend that a conviction could not be registered against the Crown under the Act. A Crown employee may be entitled to remedies under the Act if the Crown is convicted of a breach of the Act."[116]

(c) Statute interpreted so that persons granted rights under a relationship possess them against the Crown as well as others.

The second Sharkey case[117] in the New South Wales Industrial Commission is the example here, with reasoning that a statute expressed parliament's intention that Crown employees should have the same rights as other employees to awards governing working conditions, and therefore the provisions of the statute governing the determination of awards should bind the Crown. That is to say the Crown must be bound by the legislative machinery of determining rights, if it is apparent that persons in relationship with the

115. See ch.9 f.n.212.
116. [1983] 3 WWR at 155 to 156.
117. See ch.9 f.n.470.

Crown are entitled to the rights.

(vi) Reducing the Scope of the Shield of the Crown

The South Australian decision in Harris[118] illustrated how a court might find, as a technicality, that the Crown was immune from the terms of a statute, but that a Crown employee did not necessarily take that immunity. As indicated above, this is an example of bad law, the presumption, forcing poor reasoning in the pursuit of justice. The South Australian Supreme Court had to rely on Kitto J's dissent in Wynyard (criticised above) and ignore the normal quality of the shield of the Crown as expressed in Dixon, where it was plainly analogous to the concept of employer liability, based as that was in its early, nineteenth century days, on such maxims as "qui facit per alium facit per se".

The Canadian courts have for some time been developing a different train of ideas on this subject. Whereas the Harris/Wynyard axis was to the point that Crown immunity only inured for the Crown's benefit, the Canadian approach is to analyse the "scope of agency" and "Crown purpose". Thus, paralleling Zelling J in Harris, Maurice J in Saskatchewan v. Fenwick said:

> "Even if I had found the government of Saskatchewan enjoyed Crown immunity in this matter, I would have held this immunity did not extend to the other applicants [A Minister and senior civil servants in Saskatchewan's executive]. An agent of the Crown is only entitled to Crown immunity while acting within the scope of his agency."[119]

118. See ch.9 f.n.338.
119. [1983] 3 WWR at 157.

Two Canadian Supreme Court decisions in 1983 take the point beyond this reasonable comparison with the employer/employee relationship. In Canadian Broadcasting Corporation v. The Queen[120] the Corporation, a "Crown agent" under its statute, was found capable of conviction under the Canadian Criminal Code for broadcasting an obscene film. Such a broadcast was not within the terms of its enabling act, and when it stepped outside those legislative bounds, it ceased to be a Crown agent with Crown immunity.

This was further explained in R v. Eldorado Nuclear Ltd[121], where the Supreme Court held two "Crown agents", corporations set up under the Atomic Energy Control Act, to be immune from the operation of the Combines Investigation Act. It was reasoned by the majority that the alleged acts infringing this regulatory legislation fell within the statutory purposes of the two corporations. Furthermore, these acts were committed to effect Crown purposes, and so took immunity, but if they had been committed in the course of fulfilling Crown purposes but not undertaken to effect Crown purposes, no immunity would have applied.

On the examples given, this extraordinarily fine distinction severs any relationship between the utility of the shield of the Crown in Canada, and its sometime alter ego, the employer/employee relationship. Suffice to say, the Federal Court of Appeal followed Eldorado in Re CNCP Telecommunications[122] and found a statutory corporation,

120. (1983) 145 DLR (3d) 42.
121. (1983) 4 DLR (4th) 193.
122. (1985) 24 DLR (4th) 608.

agent of the Crown, incapable of taking Crown statutory immunity, because, in operating federally instead of solely within the province, it had stepped outside the authority of the purposes for which it was created.

This whole approach smacks of artifice. At its most outlandish it requires that statutory corporations have enabling acts at least inferentially permitting activity (for Crown purposes) which will run counter to regulatory legislation, if Crown immunity is to have any meaning. Eldorado is unusual in apparently satisfying that requirement. The presumption (admittedly in Canada in legislative form) ought to be dealt with more boldly than by such back door subterfuges. If the results of the presumption are patent injustice, it deserves frontal assault.

2. The Legislative Option

A legislature might deal with the presumption in fashion similar to the options outlined above undertaken by courts, but it must be accepted that the definitive mode of legislation allows less room for experimentation and case by case adaptation in the courts. The presumption could be statutorily abolished, with nothing further said, which would leave to courts the business of working out sensible exemptions in favour of the Crown on the basis of necessity. But legislative abolition is far more likely to be accompanied by new provisions attempting to establish the breadth of Crown liability.

(A) Abolition

Assuming a legislature does not despatch the presumption without provisos, as referred to above, the options are:

(B) Replacement by Reverse Presumption

As indicated when discussing judicial options above at 1(B), the reverse presumption is, for the flexibility it invests in a court, to be preferred over

(C) Replacement by Absolute Rule that the Crown is Bound.

This second legislative option contains the difficulty that, unlike a judicial decision to the same effect which could be tempered by subsequent court action, the legislative mode is definitive and may leave courts compelled to bind the Crown in situations in which it ought, on the facts, to be exempt. The present writer prefers option B above, as recommended by the South Australian Law Reform Committee majority report.[123]

(D) Other options are evidenced by the South Australian Law Reform Committee minority report, the British Columbia and New South Wales Law Reform Commission reports, and the legislation which actually transpired in British Columbia. For the reasons set out at length above, these approaches are unnecessarily complicated, their main thrusts being foreseeability or protection of the Crown from

123. Supra f.n.69.

subordinate land control authorities. Courts are the fora equipped to deal with foreseeability and do not require a formula as complex as that recommended in New South Wales. As for building usage and land regulation, if the Crown wishes to be free of council or local government control, it should legislate openly to say it can flout the plans established for general welfare, and otherwise applying to the whole community.

Looking to the Future

It is the present writer's submission that the existing relationship between statutes and the Crown should be discarded and replaced with a presumption that the Crown is bound by all statutes in the absence of express words to the contrary. While this might be effected clearly by legislatures, at least one example, that of New South Wales, serves to remind that the seigneurial stance of senior public servants may block legislative initiative. In the present writer's view it is open to the courts to overhaul the existing presumption and replace it with something workable as has happened in India.

It is for the courts to acknowledge the fundamental and over-riding importance of equality before the law. The test of their courage and worth is to be found in whether they evolve the law on the basis of this paramount precept, or

whether they opt to retain the incantation and mystery of the existing presumption which marks lawyers off as a priestly caste, removed from the rest of society. The test will be passed all the more easily if courts can accept that in despatching the present state of Crown/statute relationships, far from committing heresy, they will be performing their proper function of adjusting the law to social reality.

The point is not, for example, that the Anglo-Australian presumption of the last 120 years is unsatisfactory, so that a return should be made to Coke's including/excluding tests now nearly 400 years old. Rather, the point is that Coke perceived the changed nature of the State in his own day and tried to create a workable rule for dealing with the Crown's relationship to statutes. The task at the end of the twentieth century is to follow Coke's ethos, not parrot his exact words. Breadth of perception and boldness of action are the prescriptions for court lawyers in this matter.

The common law is cloth constantly in need of refashioning. This remoulding does not destroy the fabric, but is integral to its continued utility. The public law side of the common law must beware that if it becomes a leaden cloak of the past crushing the present, it will have discarded its very spirit: its vitality.

"Ma, they carry life preservers.
How do you know that?
It's the law. They have to.
Who's going to enforce it? This is the government, they make the law, they don't have to obey it, they don't hafta take care of you one bit - they could throw you over the side and who'd know it?"
G. Keillor Leaving Home 1987 p.66.

"... the foundation of reverence is this perception, that the present holds within itself the complete sum of existence, backwards and forwards, that whole amplitude of time which is eternity."
A.N. Whitehead "The Aims of Education" in The Aims of Education and other Essays 1929, p.23.

"In a time in some respects similar to our own, St. Augustine of Hippo, after a lusty and intellectually inventive young manhood, withdrew from the world of sense and intellect and advised others to do likewise : 'There is another form of temptation, even more fraught with danger. This is the disease of curiosity ... ' *** In the last chapter of The Ascent of Man Bronowski confessed himself saddened 'to find myself suddenly surrounded in the West by a sense of terrible loss of nerve, a retreat from knowledge.'"
C. Sagan The Dragons of Eden 1977, pp.246 to 247.

"But all civilizations are born to die. Those fortunate to live in one should study the past to learn from its errors, and with the wisdom of hindsight strive to keep at bay for a while the drifting sands of decay."
P. Johnson The Civilization of Ancient Egypt 1978, p.234.

Post Script

On 23rd March, 1988 I received in Nairobi a letter from Mr. N.J. Adamson CB QC, First Parliamentary Draftsman for Scotland, containing the Times Law Report of 17th March, 1988 of the appeal to the First Division of the Inner House

of the Court of Session in Lord Advocate v. Strathclyde Regional Council and Lord Advocate v. Dumbarton District Council. The Lord President (Lord Emslie), with whom Lords Grieve and Brand concurred, over-turned the decision of Lord Cullen in Strathclyde. The Lord President did not discard the presumption out of hand, but opined that the Crown only had statutory immunity if a statutory provision "would prejudicially affect the Crown by divesting it of some of its existing rights, interests or privileges", (not true of course, in the light of cases such as Telephone and Bradken). Despite this apparent return to the law of yesteryear as a means of subduing the presumption, the Lord President had much to say about the changing functions of "the Crown" and "statutes" from a former age when the Crown had "arbitrary powers", to the modern period.

The report is reproduced in its relevant parts without further comment. The present writer thanks Mr. Adamson for his thoughtfulness in following up our correspondence of many months earlier.

Lord Advocate v. Strathclyde Regional Council and

Lord Advocate v. Dumbarton District Council

Judgment of the First Division of the Inner House of the Court of Session (The Lord President (Lord Emslie), Lord Grieve and Lord Brand), 8th February, 1988, reported The Times 17th March, 1988.

> "The Lord President observed that the present case appeared to be the first occasion on which the correct formulation of the special rule of construction required to be identified.

All the cases referred to in which Crown immunity had been considered were concerned with statutory provisions which, if they applied to the Crown, would prejudicially affect the Crown by divesting it of some of its existing rights, interests or privileges.

In the present case there was no suggestion that the application to the Crown of the statutes invoked by the respondents would prejudicially affect the Crown's rights, interest or privileges.

The question to be answered was whether, on a proper construction of the statutes, it could be affirmed that the Crown meant to be bound by the particular provisions.

In order to answer that question it was essential to determine whether there was a special rule of construction applicable in the construction of all statutory provisions when the issue of Crown immunity had to be resolved, or whether the special rule of construction only applied when the statutory provisions in question would bind the Crown to its prejudice.

The maxim "the King can do no wrong" applied to the Monarch personally. The proposition that legislation was for the subjects of the Crown was questionable. In modern times, the Crown legislated not only for its subjects but for the Crown itself in all its modern manifestations and activities.

The rule of construction of universal application emerged in an age when the Crown was virtually unfettered in the exercise of arbitrary powers, and when anything enacted in a statute would be likely to constitute a derogation of its position.

In those times there was an antecedent improbability that the Crown meant to be bound by any statutory provision. The special rule of construction of universal application was designed to protect the Crown against divestiture of any of its rights, privileges or interests.

In the centuries that had passed since that rule was formulated enormous changes had taken place in the position of the Crown. It now personified the executive government of the country in all its activities and no longer exercised arbitrary power in all things.

Consequently, there was no justification in principle for the universal application of the special rule, designed for the protection of the Crown in seventeenth-century circumstances, in the quite different circumstances of the twentieth century.

There was no longer an antecedent improbability that the Crown would agree to be bound by any statutory provisions. Such an improbability could only be identified where particular statutory provisions would bind the Crown to its prejudice.

In modern times the application of the special rule was only required for the protection of the Crown where it was necessary to construe statutory provisions which would be likely, if applied to the Crown, to encroach upon its rights, interests and privileges.

Unless there was binding authority or persuasive judicial opinion to follow the Lord Ordinary's opinion, the respondent's contention that the special rule had to be interpreted to fit modern circumstances was well founded.

Much support for that proposition could be found from the modern authorities. There was no authority for the rule in the wide terms formulated by the Lord Ordinary.

His Lordship having considered the authorities, concluded that they supported the view that the rule in its ancient formulation required to be interpreted to suit the modern circumstances of the Crown in all its manifestations.

There remained the petitioner's contention that the application of the special rule turned upon looking at any statute as a whole, and that if any provision therein bound the Crown to its prejudice then the Crown was not affected by any of the provisions of the statute unless named expressly or by necessary implication.

That contention fell to be rejected. It was not supported by authority.

Modern statutes often included a wide range of provisions. There was no reason in principle why, where Crown immunity was claimed in respect of particular provisions in a statute, the question of the application of the special rule of construction should not be answered by asking if those provisions would bind the Crown to its prejudice. Such an approach was in accordance with principle and common sense, and was supported by authority. ***

In the petition against Dumbarton, the enforcement notice and the stop notice proceeded on the assumption that the Crown erections on the carriageway constituted a breach of planning control. The Crown claimed no right to occupy the land or erect anything on it.

It was not claimed that what was done was in virtue of any Crown interest or privilege.

Consequently, the special rule of construction in its modern formulation did not fall to be applied in deciding as a matter of construction, whether sections 20(1), 84, 87 and 88 of the Town and Country Planning (Scotland) Act 1972 applied to the Crown.

None of those sections would bind the Crown to its prejudice where the issue arose from an alleged "development" by the Crown of land owned by a third party. The ordinary rules of construction fell to be applied. Giving the words used in the sections their ordinary meaning, those provisions bound the Crown.

The objectives of the sections could be achieved without recourse to prosecution for noncompliance. The presence of penal provisions in a statute did not affect the construction of other provisions which ex concessu did not bind the Crown to its prejudice."

Appendix 1

Magdalene College : Henry Smyth's Vice Chancellor's Book, 3v (i.e. folio 3, overleaf)

The Humble petition of the Master and Fellows of Magdalen Colledge in your university of Cambridge

Humbly shewing, that whereas they were lawfully seized in fee in right of the Colledge of a parcell of grounds called the great Covent garden without Aldgate London of the gift of their founder. And in 17 Eliz. a graunt in feefarm was unduly procured from Dr Kelke the then Master and the then fellows to the late Queen Elizabeth and her successors upon condition expressed to graunt the same to Benedict Spinola, and his heires, which was contrary to the fundamental Statutes of the house, and Lawes of the Land. And the same after by meane conveyance came to Edward late Earle of Oxford, and from him to John Wolly and Francis Trentham and their heires, and after to Thomas Wood now living and his heires, This graunt being void in law, Dr Gooche the succeeding Master entering into part, and was in possession, and sealed a lease to recover the rest (deteyned from him) by ejectione firme. Thomas Wood to incumber the Colledge unduly procured an office to be found, that the said Earle Edward died seized, that it descended to Earl Henry, (which was in no point true) and by colour thereof kept the Colledge in suit from 4th Jacobi, till 13th Jac. whereby the Colledge expended neere £1,000 and hee obteyned £300 more in the Court of Wards of the Colledge for the meane profitt of that part whereof they had possession. After long delay the Colledge had liberty to go to Law, and in the Court of King's Bench obteyned a verdict and judgment which the other

sought to impeach by writt of error; but finding no hope to prevail therein (for that the judgment was affirmed by all the Judges that argued thereupon in the Exchequer [Chamber] he prosecuted suit in Chancery, where Dr Gooche then Master, relying upon the judgment of Law demurred to the said Bill and refusing to answer for that hee then stood fully resolved that after verdict and judgment at law, the cause ought not to be subject to the examination of Chancery. Thereupon a decree passed upon his contumacy, and the suggestions of the bill were taken to so confess, without any examination of witnesses on either side upon the points of law or equity (which said suggestions your petitioners can disprove). This decree, upon a new petition, pretending valuable considerations and points of equity was strengthnedd by a privy seale from your late Royal Father, induced by Certificate of the late Lord Chancellor and 3 Judges taking the said suggestions of the Bill to be true, and not to bee further questioned, which indeed were not true, and might well have beene questioned and tried even by the opinion and leave often given by the said Court of Chancery, if the Contumacy of the late Master had not peremptorily withstood it (as appeareth by the orders and decree of the said Court). After all which upon the former inducements, a later decree past that no Bill of review should be had in the same cause, whereby your petitioners being innocent of the said contempt are deprived of the inheritance of the premisses (being in value farr better than all the rest of their other revenues) without valuable consideration or recompense to them or their successors

forever contrary to the true meaning of the late Queen Elizabeth who in her Majesties letters of dispensation royally intended the good of the Colledge and their Successors, and contrary to their fundamentall Statutes and the Lawes of the Land and without any examination of witnesses taken in the said Courts, having but £15 per annum reserved by the said decree, whereas the premises are worth about £800 yeerely and for which the said Thomas Wood or some in his behalf formerly before the said decreee, offered to assure to the Colledge L100 per annum, beside other considerations, but hath not paid or tendered any rent at all, for the space of 4 yeares last part of thereabouts.

> Maie it therefore please your sacred Majestie to take into your royal care and protection the state of the poor Colledge, that the personal contempt of one man may not so greevously prejudice the whole Society and their successors; but that your Majestie would gratiously vouchsafe to take of that binding restraint and signifie the same to the right honourable the Lord Keeper of the great Seale that youre petitioners may bee at liberty, according to the usual course of that Court, to exhibit their bill of reviewe, against the said erroneous decree and to proceed to reversing of the same as apperteined to equity and justice, they being able to prove the Allegations of the said Bill (which for not answering were taken pro confisso) to bee untrue, and there is both law and equity there on the Colledge. And youre petitioners according to their bounden duty, shall ever pray for youre Majestie.

Att the Court at Whitehall 5th May 1628

His Majestie out of his most royall and tender care of Colledges and advauncement of learning is gratiously pleased to referr this petition to the consideration of the Lord Keeper, And if his Lorship shall find that the allegations in the Bill were taken pro confisso for contumacy in not answering without examination of witnesses on the Colledge

behalfe, then to give order that this Bill of reviewe bee admitted and the cause to proceed to hearinge before him as to equity and conscience may apperteyne notwithstanding the said restraint.

Edward Powill

To the Right Honourable Thomas Lord Coventry Lord Keeper of the great seale of England

The humble petition of the Master and fellows of Magdalene Colledge in Cambridge

Humbly showing that upon his Majesties reference of our humble petition for a bill of reviewe, it pleased your Lordship to heare the allegations of Thomas Wood and his counsell and at his instant and earnest suite to give him time from the third day of July last untill this present terme of St Michael to shewe cause why our bill of reviewe should not be admitted, but all this time hee hath failed to show any cause therein though wee have duly attended, for the same. Your petitioners humbly beseech your Honoure to vouchsafe a finall direction and order in this cause.

And your petitioners shall, as ever bound in all duty pray for your Honoure.

Let this bee showed to Mr Wood whose answere I do speedily expect after this shall be showed him and then I shall give further direction.

22 November 1628 Thomas Coventry C.S.

Appendix 2

Circulars promulgated by Chief Justices of Kenya regarding forced sale of land (taken from paper by P. Nowrojee "Enforcement of Decrees in Relation to Meaningful Economic Development" delivered at Kenya Law Reform Commission's Seminar on Land Law reform, 12 June, 1987. All the material below is extracted from Mr. Nowrojee's paper).

ATTACHMENT AND SALE OF LAND

The Government is deeply concerned about the security situation where decrees for attachment and sale of land are executed. This applies particularly in the case of large farms owned or occupied by co-operative societies or members of land companies. In order to minimise the danger the Provincial Administration and the Police should be consulted before any order is made for the attachment or sale of land so that arrangements may be made for the necessary security to be provided and consideration given to finding alternative pieces of land for those persons who may be evicted. No such order should issue until all other remedies for recovery have been exhausted.

Deputy Registrars are being instructed to inform the Provincial Administration or the Attorney-General's Chambers immediately a suit is filed involving a dispute over any such farm so that prompt action can be taken to assist the parties to reach a settlement out of court. Only in very exceptional circumstances should an injunction (whether ex parte or otherwise) affecting a large farm in the occupation of several families be granted to an individual and not without consulting the Provincial Administration or the Attorney-General to enable consideration to be given to the likely consequences to the security situation.

No ex parte judgment should be given in land cases without very careful consideration and only in exceptional circumstances without hearing the parties.

This circular is issued at the request of the Government while amending legislation is under consideration.

4th September, 1984

A.H. Simpson
CHIEF JUSTICE

Copy to:

The Registrar.

Source: The Law Society of Kenya: Appendix 1 to the Minutes of the May 1986 Council Monthly meeting.

The Circular immediately affected the execution process. It sharply qualified the interests of Attaching Creditors. The circular was not circulated to advocates nor was it issued in the form of a public Practise Note. It was an administrative directive issued to the Puisne Judges of the High Court and copied to the Registrar of the High Court. It further affected the law and practise on injunctions, again qualifying the law and Order 39, Civil Procedure Rules, on temporary and permanent injunctions.

The following year a second circular was issued.

THE SECOND CIRCULAR: 18TH OCTOBER 1986: INJUNCTIONS, ATTACHMENT AND SALE OF LAND, EVICTIONS

This read:

ATTACHMENT AND SALE OF LAND

Please refer to the circular dated 4th September, 1984, issued by the Chief Justice to bring to your notice the Government's deep concern about the security situation where decrees for the attachment and sale of land are executed. Please now read the above heading as follows:-

INJUNCTIONS, ATTACHMENT AND SALE OF LAND, EVICTIONS

The Government is still deeply concerned about the security situation, and in order to minimise the danger no order of restraint by means of injunction - (whether ex parte or otherwise) - or for attachment or sale of land or eviction from farm lands should be made until all other remedies have been exhausted, and then only after consultation with the Provincial Administration and the Police so that the necessary security arrangements may be made and consideration given to finding alternative areas of land for those persons who may be evicted.

Deputy Registrars must continue to follow the instruction to inform the Provincial Administration and the Attorney-General's Chambers immediately a suit is filed involving a dispute over any farm land mentioned in the circular so that prompt action can be taken to assist the parties to reach a settlement out of court.

No ex parte judgment should be given in such land cases without very careful consideration and only in exceptional cases without hearing the parties.

C.B. Madan
Acting CHIEF JUSTICE

Dated 18th October, 1985

c.c. The Honourable the Attorney-General

The Registrar

Source: The Law Society of Kenya Appendix 2 to the Minutes of the May 1986 Council Monthly meeting.

The circular confirmed the application and effects of the first. Again it was only an administrative directive to the Puisne Judges and copied additionally to the Attorney-General, and again not to the affected public practitioners. Within a short time a third circular was issued.

THE THIRD CIRCULAR: 24TH JANUARY 1986: INJUNCTIONS, ATTACHMENT AND SALE OF LAND, EVICTIONS.

This read:

INJUNCTIONS, ATTACHMENT AND SALE OF LAND
EVICTIONS

Please refer to my Circular dated the 18th October, 1985 concerning the above subject.

I wish all Honourable Judges to ensure that no application for stay, injunction, certiorari, etc. will be entertained by them, nor any order made of the kind above mentioned, or any other order which may dislodge the occupants of any land before clearance with the Administration, so that the exercise may be properly carried out, any clearance should be done through the office of the Attorney-General who will make State Counsel available to appear before any Judge any time an application is made in respect of any land for any such orders.

C.B. Madan
Acting CHIEF JUSTICE

24th January, 1986

c.c. The Honourable the Attorney-General
The Registrar

Source: The Law Society of Kenya Appendix 3 to the Minutes of the May 1986 Council Monthly meeting.

This circular extended the area of court processes affected. Certiorari was added to the list. This was a radical intervention in a crucial remedy of administrative law. It also required that judges were not to make any such order "before clearance with the Administration." Again the circular was not made available to the public or to practitioners.

Less than a month later a fourth circular was issued.

THE FOURTH CIRCULAR: 13TH FEBRUARY, 1986: INJUNCTIONS, ATTACHMENT AND SALE OF LAND, EVICTIONS

This read:

INJUNCTIONS, ATTACHMENT AND SALE OF LAND, EVICTIONS

Please refer to the previous circulars dated 4th September, 1984, 18th October, 1985 and 24th January, 1986, issued concerning agricultural land as the subject matter of litigation in courts.

It is accepted that security problems arise out of such litigation involving, for example, eviction of occupants from the land as a result of applications to enforce the rights of the decree-holders in execution proceedings.

In order that human and economic upheavals may not occur it is considered advisable that although seised of the cases the court should advise the litigants as persuasively as they can to refer their dispute to elders as provided for in Act No.14 of 1981.

The fact of life in Kenya is that there are usually a number of people, more often in large numbers than small, living on such land, whether small or large, in most cases for as long as memory can go. It is this type of land which should be safeguarded against disruption by an order made by the court of the type mentioned above. The application therefore should be referred by the court to the Administration to resolve the dispute.

When referred to them the Administration will no doubt closely liase with the Chambers of the Attorney-General.

The above circulars do not apply to execution proceedings in the case of properties for example in urban areas.

Please apprise the deputy registrar or deputy registrars attached to your court of the contents of this circular.

C.B. Madan

13th February, 1986

c.c. The Honourable the Attorney-General

The Registrar

Chairman, Law Society of Kenya

Source: The Law Society of Kenya Appendix 4 to the Minutes of the May, 1986 Council Monthly meeting.

The circular, also addressed to all High Court Judges, made two further extensions: (a) it sought to amend Act No.14 of 1981 to High Court cases, although the act itself was only restricted to magistrate's courts cases; and (b) it required that "the applicatoin should be referred by the Court to the Administration to resolve the dispute."

This circular was finally copied to the "Chairman, Law Society of Kenya", but was still not made available to members of the public.

THE PRESENT STATE OF THE LAW RELATING TO EXECUTION

The present state of the law relating to execution is accordingly that provided by Order 21, Civil Procedure Rules as modified by these four Circulars. The circulars have no force of law nor have they effected formal amendments to Order 21 or any other statutory provision. Yet they have altered the remedies available to an adjudged successful party.

Table of Cases

Australia

	Chapter and footnote of major reference
Amalgamated Society of Engineers v. Adelaide Steamship Co. (1920) 28 CLR 129	9-169
Ansett Transport Industries (Operations) Pty Ltd v. Commonwealth (1977) 139 CLR 54	9-70
AG v. Goldsborough (1889) 15 VLR 638	9-111
Barton v. Commonwealth (1974) 131 CLR 477	10-71
Bolwell v. Australian Telecommunications Commission (1982) 42 ALR 235	9-469
Bradken Consolidated Ltd v. BHP Co. Ltd (1979) 145 CLR 170	9-360
Brisbane City Council v. Group Projects Pty Ltd (1979) 145 CLR 143	9-417
Broken Hill Associated Smelters Pty Ltd v. Collector of Imposts (Vic.) (1918) 25 CLR 61	9-154
Cain v. Doyle (1946) 72 CLR 409	9-212
China Ocean Shipping Co v. State of South Australia (The Wuzhou) (1979) 145 CLR 172	9-433
Commonwealth v. Boyle (1953) 89 CLR 229	9-261
Commonwealth v. Cigamatic (1962) 108 CLR 372	9-261
Commonwealth v. Rhind (1966) 119 CLR 584	9-290
Connell v. Commonwealth [1979] 1 NSWLR 65	8-386
Dalgety and Co Ltd v. The Crown (1942) 44 WALR 49	9-189
Downs v. Williams (1971) 126 CLR 61 (H.C.)	9-311
(Williams v. Downs) (1970) 92 WN (NSW) 601 (N.S.W.C.A.)	9-312
Engineers, see Amalgamated Society of Engineers v. Adelaide Steamship Co	
Essendon Corporation v. Criterion Theatres Ltd (1947) 74 CLR 1	9-259
F. Sharkey & Co Pty Ltd v. Fisher (No.2) (1980) 33 ALR 184	9-466
F. Sharkey & Co Pty Ltd v. Metropolitan Water Sewerage and Drainage Board and the Water and Sewerage Employees Union [1981] 2 NSWLR 824	9-470
Goldsborough, see AG v. Goldsborough	
Group Projects, see Brisbane City Council v. Group Projects Pty Ltd	
Gulson, see Minister for Works (W.A.) v. Gulson	
Harris v. S (1976) 18 SASR 32	9-338
Hay, see R v. Hay	
Hodge v. Gray 23 QJPR 7, noted (1929) 3 ALJ 59	9-188
Housing Commission of New South Wales v. Panayides [1963] NSWR 48	9-282
Kaye v. AG (Tas.) (1956) 94 CLR 193	9-263
Kelly v. Hart (1908) 8 SR (NSW) 272	9-142
Kent v. Minister of State Works (1973) 2 ACTR 1	9-333

Table of Cases

Lowden v. Sydney Harbour Trust Commissioners
(1920) 21 SR (NSW) 59 9-155
McGraw-Hinds (Aust.) Pty Ltd v. Smith
(1979) 144 CLR 633 9-345
Maguire v. Simpson (1977) 139 CLR 362 9-314
Minister for Works (W.A.) v. Gulson
(1944) 69 CLR 338 (H.C.) 9-192
(1944) 45 WALR 90 (WA S.Ct F.C.) 9-206
Minister for Works v. Pinchbeck [1969] SASR 240 9-301
Murray v. Cold Road Pty Ltd ex parte Cold Road
Pty Ltd [1969] QWN (QLR) 29 9-296
Night Soil Shifters Case, see Roberts v. Ahern
North Sydney Municipal Council v. Housing Commission
of New South Wales (1948) 48 SR (NSW) 281 9-253
Panayides, see Housing Commission of New South Wales
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Pinchbeck, see Minister of Works v. Pinchbeck
Pirrie v. McFarlane (1925) 36 CLR 170 9-170
Privy Pan Handlers case, see Roberts v. Ahern
Public Curator of Queensland v. Morris
(1951) 51 SR (NSW) 402 9-264
R v. Hay [1924] VLR 97 9-162
R v. Sutton (1908) 5 CLR 789 9-135
Randwick Municipal Council v. Commissioner for
Government Transport (1966) 13 LGRA 126 9-292
Rhind, see Commonwealth v. Rhind
Roberts v. Ahern (1904) 1 CLR 406 9-116
Ryan, see Sydney Harbour Trust Commission v. Ryan
Sankey v. Whitlam (1978) 142 CLR 1 10-90
Sharkey, see F. Sharkey & Co. Pty Ltd
Strods v. Commonwealth of Australia
[1982] 2 NSW LR 182 9-473
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Ship-Money, Case of (sub nom R v. Hampden) (1637) 3 St. Tr. 825 6-47

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Sloane v. Pawlett (1721) 8 Mod. 12; 88 E.R. 10 7-50
Smith, In re Arthur Heaven (1876) 46 LJQB 73;
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Smithett v. Blythe (1830) 1 B & D 509; 109 E.R. 876 8-31
Standen v. University of Oxford and Whitton (1622)
Jones W. 82 E.R. 11 6-44
Stonor's (Sir William) case (sub nom Dormer v.
R and Fortescue) (1495-1496) YBB 12 Hen.VII
Trin. pl.1 f.19; 13 Hen.VII Mich. pl.3 f.4, 64
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Swift, The (1813) 1 Dods 320, 165 E.R. 1325 8-8
Telephone Apparatus Manufacturers,
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[1962] 1 WLR 596 (H.C.) 8-353
Territorial and Auxiliary Forces Association of the
County of London v. Nichols [[1949] 1 KB 35 8-286
Territorial Forces Association v. Philpot [1947]
2 All E.R. 376 8-286
Thomas v. The Queen (1874) 10 LRQB 44 8-93
Thomas v. Pritchard [1903] 1 KB 209 8-156
Thomas v. Sorrell (1667-1675) Vaughan 330; 124 E.R. 1098
1 Lev. 217; 83 E.R. 376, 2 Keble 245 et seq.;
84 E.R. 152 et seq., and 3 Keble 76 et seq.;
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Thurston v. Mills (1812) 16 East 254; 104 E.R. 1085 8-5
Tobin v. The Queen (1864) 16 CB (NS) 310;
143 E.R. 1148 8-68
Town Investments Ltd v. Department of the Environment
[1976] 3 All E.R. 479 (C.A.) 8-394
[1978] AC 359 (H.L.) 8-394
Uppom v. Sumner (1778) 2 Black W 1294; 96 E.R. 758 7-66
Walter of Langton's Executor v. The Abbot of Selby
(1329-1330) 98 S.S. p.609 1-90
Warrain v. Smith (1614-1615) 2 Bulst. 146;
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Warren v. Smith, see Magdalen College case, or Warrain
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Westover v. Perkins (1859) 2 El. & El. 57; 121 E.R. 22 8-62
Wheaton v. Maple & Co [1893] 3 Ch 48 8-125
Wheeler v. Wirral Estates Ltd [1935] 1 KB 294 8-214
Wildmore's case (1658) 2 Sid. 68; 82 E.R. 1261 6-65
Willion v. Berkley (1562) 1 Plo. 233; 75 E.R. 339 3-19
Wimbish v. Tailbois 1 Plo. 39; 75 E.R. 63 3-26
Wirral Estates v. Shaw [1932] 2 KB 247 8-128
Wood v. Leeds Area Health Authority [1974] ICR 535 8-390

Table of Cases

India

Bell v. City of Madras (1902) ILR 25 Mad 457 10-84
Kirpalani v. Secretary of State AIR 1934 Bombay 379 9-447
Province of Bombay v. Municipal Corporation of City of Bombay AIR (31) 1944 Bombay 26 9-447
State of West Bengal v. Corporation of Calcutta [1967] AIR 997 10-78

Ireland
(including Northern Ireland)

AG v Mayor of Drogheda [1900] 1 IR 404 9-91
Cork County Council v. Commissioner of Public Works [1945] IR 561 9-96
Fitzsimons v. Menkin [1938] IR 805 9-97
Galway County Council v. Minister of Finance [1931] IR 215 9-94
Irish Land Commission and Board of Public Works v. Ruane [1938] IR 148 9-95
Maloney, Re, a Bankrupt [1926] IR 202. 9-93
Minister of Agriculture v. Mackle [1952] NILR 161 9-108
Morton v. Air Ministry [1946] NILR 136 9-103
R v. Cruise [1852] 2 Ir. Ch. R. (N.S.) 65 8-203

Malaysia

British Lighterage Co v. Lord High Admiral of the United Kingdom (1961) 27 Malayan LJ 195 10-20

New Zealand

Doyle v. Edwards(1898) 16 NZLR 572 9-390
Fitzgerald v. Muldoon [1976] NZLR 615 10-36
Lower Hutt City v. AG [1965] NZLR 65 9-395
Pharazyn v. Hawke's Bay County Council [1984] 2 NZLR 134 10-95
Retaruke Timber Co Ltd v. Rodney County Council [1984] 2 NZLR 129 10-95

Scotland

Advocate General v. Commissioners of Police for the City of Edinburgh (1850) 12 D 456 9-6
Advocate General v. Magistrates of Inverness (1856) 18 D 366 9-15
Bruce v. Veitch (1810) FC (NS) II 387 9-3
Greig v. University of Edinburgh (1868) 6 M 97 9-13
Lord Advocate v. Baker (1920) cited in Lord Advocate v. Barlow 9-49
Lord Advocate v. Barlow [1924] SLT (Sh. Ct Rep.) 72 9-50
Lord Advocate and Barbour v. Lang (1866) 5 M 84 9-8
Lord Advocate v. Strathclyde Regional Council 1987 SCLR 171 9-53

Table of Cases

Lord Commissioners of the Admiralty v. Dunlop (Blair's Trustee) 1916 SC 247 8-2
Magistrates of Edinburgh v. Lord Advocate 1912 SC 1085 9-37
Somerville v. Lord Advocate (1893) 20 R 1050 9-21
Strathclyde, see Lord Advocate v. Strathclyde Regional Council.

South Africa

South African Railways and Harbours v. Smith's Coasters (Prop) Ltd [1931] AD 113. 9-452
State v. De Bruin 1975 (3) SA 56 [TPD] 10-7

United States

Balthasar v. Pacific Electric Railway Co. (1921) 202 Pac. 37 10-87
Dollar Savings Bank v. US (1874) 19 Wall 227 10-11
Jess Larsen v. Domestic and Foreign Commerce Corporation (1949) 337 US 682 10-83
Mayor and City Council of Baltimore v. State of Maryland (1977) 378 A 2d 1326 10-14
Nardone v. US (1937) 302 US 79 10-1
Olmstead v. US (1927) 277 US 438 10-Epigraph
State of Washington v. Gorham (1920) 188 Pac. 457 10-87
US v. Hoar (1821) 2 Mason 311 9-379
US v. Knight (1840) 14 Pet. 301 10-8

West Indies

Alexander v. Munia (1969) 14 WIR 58 10-94
Brewster v. Lash (1903) 2 Barbados LR 72 9-130

Zimbabwe
(formerly Rhodesia, and Southern Rodesia)

Patriotic Front - ZAPU v. Minister of Justice 1986 (1) SA 532 1-31
R v. Jones 1962 (3) SA 1 10-7

Bibliography*

Manuscripts and other original sources, printed or in microfiche, of judicial decisions, court documents, parliamentary proceedings, readings, letters, diaries, observations, poetry and drama.

Anon HLS MS 1081 f.48 v et seq.

Anon HLS MS 2068 f.1 et seq.

R. Bowyer Parliamentary Diary 1606-1607 (ed.) D.H. Willson

T. Brugge Reading on Westminster II c.5, 1469 (1952) 71 S.S. Readings and Moots at the Inns of Court vol.I

Chapter Acts 1545 - 1642 for Dean and Chapter of Chichester, Sussex Record Society vol.58

R. Constable Prerogativa Regis: Tertia Lectura Roberti Constable de Lyncolnis Inne Anno 11 H.7 (ed.) S.E. Thorne 1949

D'Ewes Journals (A Compleat Journal of the Votes, Speeches and Debates, both of the House of Lords and House of Commons throughout the Whole Reign of Queen Elizabeth of Glorious Memory 1693)

J. Donne The Poems of John Donne (ed.) H. Grierson 1933

Egerton Papers, The Camden Society 1840

E.R. Foster (ed.) Proceedings in Parliament 1610 vol.2 1966

S.R. Gardiner (ed.) Parliamentary Debates in 1610 Camden Society 1862

T.E. Hartley (ed.) Proceedings in the Parliaments of Elizabeth I vol.I 1558-1581 1981

HMC Series 9

Kenya : Chief Justices' Circulars on Sale of Land (see Appendix 2)

John Manningham's Diary (ed.) R.P. Sorlien 1976

J. Morrice Reading of the Middle Temple c.21 Eliz.R British Museum Additional Manuscript 36, 081 ff.229-275 appendix to E.T. Lampson The Royal Prerogative 1485-1604 1938 unpublished Harvard University Ph.D thesis.

Norwich Chapter Books 1566-1649, (1953) 24 Norfolk Record Society

W. Notestein et al. (eds) Commons Debates 1621

Paston Letters and Papers of the Fifteenth Century Part II (ed.) N. Davies 1976

Privy Council Printed Papers in Appeals 1946 Judgment Nos 37-51, vol.27

Seneca De Beneficiis

Seneca "Consolation to Polybius" in Moral Essays

W. Shakespeare Macbeth

Henry Smyth's Vice-Chancellor's Book Magdalene College Library, Cambridge (see Appendix 1)

Turnour HLS MS 109 f.23r et seq.

* Authors are listed with their initials first so that no confusion occurs with the various judicial offices traditionally identified by abbreviation after a surname.

Monographs

L.W. Abbott Law Reporting in England 1485-1585 1973
K.R. Andrews Elizabethan Privateering 1964
M. Aronson and H. Whitmore Public Torts and Contracts 1982
F. Bacon Works (eds) J. Spedding, R.L. Ellis and D.D. Heath 1872
Bacon's Abridgement (M. Bacon) 3rd ed. 1758
7th ed. 1832
T. Baker History of the College of St. John the Evangelist (ed.) J.E.B. Mayor 1869
L.T. Barrett Memorials of the Parochial Church of the Parish of Attleborough 1848
J. Beaute Un Grand Juriste Anglais : Sir Edward Coke : Ses Idees Politiques et Constitutionelles 1975
B.W. Beckingsale Burghley, Tudor Statesman 1520-1598 1967
H.E. Bell The Court of Wards and Liveries 1953
W. Blackstone Commentaries 1765
F. Blomefield An Essay Towards a Topographical History of the County of Norfolk 1732
J. Bodin Six Books of the Commonwealth 1576
(ed.) M.J. Tooley
W.C. Bolland Manual of Year Book Studies 1925
C.D. Bowen The Lion and the Throne 1957
Bracton De Legibus et Consuetudinibus (ed.) S.E. Thorne 1968
R. Brooke The Graunde Abridgement (first published 1568) 1576 ed.
E. St J. Brooks Sir Christopher Hatton 1946
Broom's Legal Maxims 9th ed. 1924 (ed.) W.J. Byrne
J. Brydall Jura Coronae 1680
M. Buck Politics, Finance and the Church in the Reign of Edward II 1983
M.M. Cannon Land Boomers 1976
Chitty's Prerogatives of the Crown 1820
S.B. Chrimes English Constitutional Ideas in the Fifteenth Century 1936
G.E. Cokayne The Complete Peerage (ed.) V. Gibbs 1926
Comyn's Digest 5th ed. 1822
J.A.L. Cooray Constitutional and Administrative Law of Sri Lanka 1973
J. Cowell The Interpreter 1607
Craies on Statute Law 6th ed. 1963
7th ed. 1971
R. Crompton A Declaration of the Ende of Traytors 1587
C. Cross The Royal Supremacy in the English Church 1969
J. Davies The Question Concerning Impositions (c.1623) published 1656
A.V. Dicey Introduction to the Study of the Law of the Constitution 1885 (7th ed., 1908)
A.V. Dicey Law and Public Opinion in England in the Nineteenth Century 1905
F.C. Dietz English Public Finance 1558-1641 1964

P.Duplessis-Mornay Vindiciae Contra Tyrannos 1575
(ed.) H.J. Laski A Defence of Liberty against Tyrants 1924
F.W.L. Dwarris General Treatise on Statutes : Their Rules of Construction 1830 vol II
G.R. Elton The Tudor Constitution 1962
C.S. Emden The Civil Servant in the Law and Constitution 1923
C.H.S. Fifoot Lord Mansfield 1936
Fitzherbert's Natura Brevium (FNB) (first published 1534) 1794 ed.
Fleta, Book V (1983) 99 S.S.
E. Forset The Bodies Natural and Politique 1606
J. Fortescue De Laudibus Legum Angliae (ed.) S.B. Chrimes 1942
J. Fortescue A Learned Commendation of the Politique Laws of England 1567
E. Foss The Judges of England 1857
A. Fox and J.A. Guy Reassessing the Henrician Age : Humanism, Politics and Reform 1500-1550 1986
J.H. Franklin Jean Bodin and the Sixteenth Century Revolution in the Methodology of Law and History 1963
M.M. Goldsmith Hobbes' Science of Politics 1966
H.L. Gray The Influence of the Commons on Early Legislation 1932
R.A. Griffiths The Reign of Henry VI 1981
J.A. Guy Christopher St German on Chancery and Statute 1985, Selden Society Supplementary Series vol.6
J.A. Guy The Public Career of Sir Thomas More 1980
Hale's Prerogatives of the King (ed.) D.E.C. Yale (1975) 92 S.S.
Halsbury's Laws of England 3rd ed. 1972
Hardcastle Construction and Effect of Statutory Law 2nd ed. 1892 (ed.) W.F. Craies
M. Hastings The Court of Common Pleas 1947
Hawkin's Pleas of the Crown 1716-1721
F. Heal Of Prelates and Princes 1980
R.W. Heinze The Proclamations of the Tudor Kings 1976
C. Hill Economic Problems of the Church 1956
T. Hobbes Dialogue between a Philosopher and a Student of the Common Laws of England (ed.) J. Cropsey 1971
P.W. Hogg Constitutional Law of Canada 2nd ed. 1985
P.W. Hogg Liability of the Crown 1971
W.S. Holdsworth A History of English Law 5th ed. 1942
W.S. Holdsworth Some Makers of English Law 1966 (The Tagore Lectures 1937-1938)
N.D. Hurnard The King's Pardon for Homicide before AD 1307 1969
E.W. Ives The Common Lawyers of Pre-Reformation England 1983
D. Jenkins Lex Terrae 1647
John of Salisbury The Statesman's Book of John of Salisbury (1159) (ed.) J. Dickinson 1963
E.H. Kantorowicz The King's Two Bodies 1957

J.M. Kelly Fundamental Rights in the Irish Law and Constitution 2nd ed. 1968
P.M. Kendall Richard III 1955 (1972 ed.)
D.M.Kerly An Historical Sketch of the Equitable Jurisdiction of the Court of Chancery 1890
L.A. Knafla Law and Politics in Jacobean England 1977
T.S. Kuhn The Structure of Scientific Revolutions 1970
J.R. Lander Conflict and Stability in Fifteenth Century England 1969
J.R. Lander Crown and Nobility 1450-1509 1976
B.P. Levack The Civil Lawyers in England 1603-1641 1973
T.H. Lloyd Alien Merchants in England in the High Middle Ages 1982
J. Locke Two Treatises on Government 1690 (ed.) P.Laslett 1960
N. Machiavelli The Prince c.1515 trans. G. Bull 1961
C.H. McIlwain Constitutionalism Ancient and Modern 1940
C.H. McIlwain (ed.) Political Works of James I 1918
C.H. McIlwain The Growth of Political Thought in the West 1931
C.H.H. McNairn Governmental and Intergovernmental Immunity in Australia and Canada 1978
F.W. Maitland Collected Papers 1911
F.W. Maitland The Constitutional History of England (1963 ed.)
Maxwell on Statutes 10th ed. 1953
R.E. Megarry The Rent Acts 9th ed. 1961
C. Merbury Royall Monarchie 1581
Mew's Digest of English Case Law to 1924 2nd ed. 1925
Mirror of Justices F.W. Maitland (ed.) 7 S.S.
J.A. Muller Stephen Gardiner and the Tudor Reaction 1926
J.E. Neale Elizabeth I and her Parliaments 1559-1581 1953
J.E. Neale Elizabeth I and her Parliaments 1584-1601 1957
C.M.G. Ogilvie The King's Government and the Common Laws 1471-1641 1958
R. O'Sullivan The Spirit of the Common Law (ed.) B.A. Wortley 1965
V. Palmer National Portraits (1962 ed.)
H. Parker The Case of Ship-Money 1640
T.W. Parker The Knights Templars in England 1963
D.A. Pinto The Mayor, The Commissioner and the Metropolitan Administration (Bombay) 1984
T.F.T. Plucknett Concise History of the Common Law 5th ed. 1956
T.F.T. Plucknett Legislation of Edward I 1949
T.F.T. Plucknett Statutes and their Interpretation in the First Half of the Fourteenth Century 1922
F. Pollock and F.W. Maitland History of the English Law before the Time of Edward I (ed.) S.F.C. Milsom 1968
J. Ponet Politike Power 1556
L. Radzinowicz A History of English Criminal Law 1967
W. Raleigh The Prince or Maxims of State 1642
C. Read Lord Burghley and Queen Elizabeth 1960

M. Rheinstein (ed.) Max Weber on Law in Economy and Society 1954
H.G. Richardson and G.O. Sayles The Irish Parliament in the Middle Ages 1964
W.C. Richardson Tudor Chamber Administration 1485-1547 1952
G.S. Robertson Civil Proceedings By and Against the Crown 1908
A.L. Rowse The England of Elizabeth 1973
V.J. Scattergood Politics and Poetry in the Fifteenth Century 1971
L.G. Schwoerer The Declaration of Rights, 1689 1981
T. Sedgwick A Treatise on the Rules which Govern the Interpretation and Application of Statutory and Constitutional Law 1857
Q. Skinner The Foundations of Modern Political Thought vol.II 1978
A.G.R. Smith Servant of the Cecils : The Life of Sir Michael Hickes 1977
T. Smith De Republica Anglorum (ed.) L. Alston 1906
W. Stanford An Exposition on the Royal Prerogative (written 1548, published 1567)
C. St German Doctor and Student (1974) 91 S.S. (eds) T.F.T. Plucknett and J.L. Barton
L. Stone The Crisis of the Aristocracy 1558-1641 1965
L. Stone The Causes of the English Revolution 1529-1642 1972
L. Stone Family and Fortune : Studies in Aristocratic Finance in the Sixteenth and Seventeenth Centuries 1973
H. Street Governmental Liability 1953
Strype Annals of the Reformation 2nd ed. 1725-1731
J.R. Tanner English Constitutional Conflicts of the Seventeenth Century 1961
S.E. Thorne (ed.) A Discourse upon the Exposicion and Understandinge of Statutes 1942
B. Tierney (ed.) The Middle Ages : Sources of Medieval History vol.I 1970
G.H. Treitel The Law of Contract 1983
W. Tyndale The Obedience of a Christian Man 1528
V.G. Venturini Malpractice : The Administration of the Murphy Trade Practices Act 1980
Viner's Abridgement 1744
P. Vinogradoff Collected Papers vol.I (undated)
H.W.R. Wade Administrative Law 4th ed. 1977
D.M. Walker Delict 1966
D.M. Walker Principles of Scottish Private Law vol.I 2nd ed. 1975
I. Walton Lives (ed.) C.H. Dick 1899
W.A. West The Law of Dilapidations 7th ed. 1974
C.C. Weston and J.R. Greenberg Subjects and Sovereigns : The Grand Controversy over Legal Sovereignty in Stuart England 1981
E. Wilberforce Statute Law 1881
G. Williams Criminal Law, The General Part 2nd ed. 1961

G.L. Williams Crown Proceedings 1948
B. Wolffe Henry VI 1981
R. Wooddesson Lectures on the Laws of England 1842
F.D. Wormuth The Royal Prerogative 1939

Articles, Case-Notes and Reviews

M. Adelfio Government Immunity from Zoning (1981) 22 Boston College L.R. 783
B.,A.W. Commentary 1987 SCLR 185
N. Ascherson The State Burgles our Freedoms The Observer 24 Jan. 1988 p.7
J.H. Baker The Common Lawyers and the Chancery:1616 (1969) 4 Irish Jurist 386
J.H. Baker Coke's Note Books and the Sources of his Reports (1972) 30 C.L.J. 59
J.H. Baker The Dark Age of English Legal History, 1500-1700 in D. Jenkins (ed.) Legal History Conference, 1972 1975
J.H. Baker English Law and the Renaissance (1985) 44 C.L.J. 46
R.C. Barnett Place, Profit and Power : A Study of the Servants of William Cecil, Elizabethan Statesman (1969) 51 James Sprunt Studies in History and Political Science 129
G. Barraclough Legislation in Medieval England (1940) 56 L.Q.R. 75
P. Birdsall Non Obstante in Essays in Honour of C.H. McIlwain 1936
C.H. Hunter Blair The Sheriffs of Northumberland (1942) 20 Archaeologia Aeliana 4th series p.11
J. Blow Nibley Green 1470 : The Last Private Battle Fought in England in C.M. Crowder (ed.) English Government and Society in the Fifteenth Century 1967
P. Brett The Case of the Statutory Petard (1956) 29 A.L.J. 635
C. Brooks and K. Sharpe Reply to D.R. Kelley (1976) 72 Past and Present 133
C.W. Brooks The Common Lawyers in England in W. Prest (ed.) Lawyers in Early Modern Europe and America 1981
S. Churches Case-Note on Statutes and the Crown (1980) 7 Adel. L.R. 394
S. Churches Natural Justice and Executive Discretion in Australia [1980] Public Law 397
S.C. Churches 'Bona Fide' Police Torts and Crown Immunity : A Paradigm of the Case for Judge Made Laws (1980) 6 U.Tas. L.R. 294
S.C. Churches The Presumption of a Yearly Term in a General Contract of Employment or the Black Death and the Malady Lingers on (1978) 10 U.Q.L.J. 195
E.F. Churchill The Crown and the Alien (1920) 36 L.Q.R. 402

E.F. Churchill The Dispensing Power and the Defence of the Realm (1921) 37 L.Q.R. 412

E.F. Churchill The Dispensing Power of the Crown in Ecclesiastical Affairs (1922) 38 L.Q.R. 297

E.F. Churchill Dispensation under the Tudors and Stuarts (1919) 34 E.H.R. 409

G. Constable The Alleged Disgrace of John of Salisbury in 1159 (1954) 69 E.H.R. 67

H.J. Cook Against Common Right and Reason : The College of Physicians versus Dr Thomas Bonham (1985) 29 Am. J.L.H. 310

D.R. Coquillette The English Civilian Writers (1981) 61 Boston U.L.R. 49

C. Cross Churchmen and the Royal Supremacy in F. Heal and R. O'Day (eds) Church and Society in England : Henry VIII to James I 1977

Q. Digby The Principal Discretionary Powers of the National Companies and Securities Commission under the Takeovers Code (1984) 2 Company and Securities L.J. 216

W.H. Dunham Tudor Paradox (1964) J.B.S. 24

C.A. Edie Revolution and the Rule of Law : The End of the Dispensing Power, 1689 (1977) 10 Eighteenth Century Studies 434

C.A. Edie Tactics and Strategies : Parliament's Attack upon the Royal Dispensing Power 1597-1689 (1985) 29 Am. J.L.H. 197

J.G. Edwards The Plena Potestas of English Parliamentary Representatives in E.B. Fryde and E. Miller (eds) Historical Studies of the English Parliament - vol.I Origins to 1399 1970 p.136

L. Ehrlich Proceedings against the Crown 1216-1377 in P. Vinogradoff (ed.) Oxford Studies in Social and Legal History vol.VI

G.R. Elton The Body of the Whole Realm: Parliament and Representation in Medieval and Tudor England in G.R. Elton (ed.) Studies in Tudor and Stuart Politics and Government vol.2 1974

G.R. Elton Enacting Clauses and Legislative Initiative (1980) 53 Bull. I.H.R. 153

G.R. Elton The English Parliament in the Sixteenth Century : Estates and Statutes in A. Cosgrove and J.I. McGuire (eds) Parliament and Community 1983 Historical Studies XIV p.80

G.R. Elton Henry VII : Rapacity and Remorse in G.R. Elton Studies in Tudor and Stuart Politics and Government 1974 vol.1 p.47

G.R. Elton Henry VII : A Restatement in G.R. Elton Studies in Tudor and Stuart Politics and Government 1974 vol.1 p.78

G.R. Elton Parliament in the Sixteenth Century in G.R. Elton Studies in Tudor and Stuart Politics and Government 1983 vol.3 p.170

G.R. Elton Reform by Statute : Thomas Starkey's Dialogue and Thomas Cromwell's Policy (1968) 54 Proceedings of the British Academy p.187

G.R. Elton The Rule of Law in Sixteenth Century England in G.R. Elton Studies in Tudor and Stuart Politics and Government 1974 vol.1

G.R. Elton The Sessional Printing of Statutes, 1484-1547 in E.W. Ives (ed.) Wealth and Power in Tudor England 1978

G.R. Elton Tudor Government : The Points of Contact - Parliament in G.R. Elton Studies in Tudor and Stuart Politics and Government 1983 vol.3

A. Esmein Princeps Legibus Solutus Est in P. Vinogradoff (ed.) Essays in Legal History 1913

W.G. Friedmann Public Welfare Offences, Statutory Duties, and the Legal Status of the Crown (1950) 13 M.L.R. 24

N.M. Fuidge Queen Elizabeth I and the Petition of Right (1975) 48 Bull. I.H.R. 40

J. Goldring The Impact of Statutes on the Royal Prerogative, Australian Attitudes as to the Rule in Attorney General v. De Keyser's Royal Hotel Ltd (1974) 48 A.L.J. 434

J. Goldring Public Law and Accountability of Government (1985) 15 F.L.R. 1

D.M. Gordon Case-Note on Statutes affecting the Crown (1927) 5 Can. B.R. 634

D.M. Gordon How Far Privative or Restrictive Enactment Binds the Crown (1940) 18 Can. B.R. 751

J. Gough and D.P. Derham Gulson (1947) 3 Res Judicatae 92

F. Heal The Bishops and the Act of Exchange of 1559 (1974) 17 History Journal 227

F. Heal Economic Problems of the Clergy in F. Heal and R. O'Day (eds) Church and Society in England : Henry VIII to James I 1977 p.99

F.J.C. Hearnshaw Bodin and the Genesis of the Doctrine of Sovereignty in R.W. Seton-Watson (ed.) Tudor Studies 1924

R.W. Heinze Proclamations and Parliamentary Protest, 1539-1610 in D.J. Guth and J.W. McKenna (eds) Tudor Rule and Revolution 1982

R. Houlbrooke The Protestant Episcopate 1547-1603 : The Pastoral Contribution in F. Heal and R. O'Day (eds) Church and Society in England : Henry VIII to James I 1977 p.78

R.W. Howell An Historical Account of the Rise and Fall of Mandamus (1985) 15 V.U.W.L.R. 127

P. Jackson The Crown : Some Recent Proceedings (1982) 7 Holdsworth LR 91

W.I. Jennings Case-Note (1927) 43 L.Q.R 157

J. Jowell The Legal Control of Administrative Discretion [1973] Public Law 178

E. Kamenka What is Justice in Justice (eds) E. Kamenka and A.E-S. Tay 1979

L. Katz Review of McNairn Governmental Immunity (1980) 9 Syd. L.R. 222

D.R. Kelley History, English Law and the Renaissance (1974) 65 Past and Present 24, (1976) 72 Past and Present 143

W.P.M. Kennedy Case-Note on Traffic Law and the Crown (1931) 9 Can. B.R.512

W.P.M. Kennedy Case-Note on Traffic Law and the Crown (1934) 12 Can.B.R. 176

C.S. Knighton Economics and Economies of a Royal Peculiar : Westminster Abbey 1540-1640 in R. O'Day and F. Heal (eds) Princes and Paupers in the English Church 1981

D. Little Sir Edward Coke and the Conflict in Law and Order in D. Little Religion, Order and Law : A Study in Pre-Revolutionary England 1969 p.167

R.P. Longaker Andrew Jackson and the Judiciary in F.O. Gatell (ed.) Essays on Jacksonian America 1970 p.121

W.T. MacCaffrey Parliament : The Elizabethan Experience in D.J. Guth and J.W. McKenna (eds) Tudor Rule and Revolution 1982

W.T. MacCaffrey Place and Patronage in Elizabethan Politics in S.T. Bindoff (ed.) Elizabethan Government and Society 1961

C.H.H. McNairn Crown Immunity from Statute (1978) 56 Can. B.R. 145

B.S. Markesinis The Royal Prerogative Revisited (1973) 32 C.L.J. 287

J.D.B. Mitchell The Royal Prerogative in Modern Scots Law [1957] Public Law 304

V. Morgan Whose Prerogative in Late Sixteenth and Early Seventeenth Century England? (1984) 5 Jnal of Legal History 39

R. O'Day Ecclesiastical Patronage : Who Controlled the Church in F. Heal and R. O'Day (eds) Church and Society in England : Henry VIII to James I 1977

T.F.T. Plucknett Bonham's Case and Judicial Review (1926) 40 H.L.R. 30

T.F.T. Plucknett Ellesmere on Statutes (1944) 60 L.Q.R. 242

T.F.T. Plucknett The Lancastrian Constitution in R.W. Seton-Watson (ed.) Tudor Studies 1924

J. Potchebutzky Is the State Subject to the Rule of Law (1974) 9 Israel L.R. 369

E. Powell Settlement of Disputes by Arbitration in Fifteenth Century England (1984) 2 Law and History Review 21

T.B. Pugh and C.D. Ross The English Baronage and the Income Tax of 1436 (1953) 26 Bull. I.H.R. 19

M. Radin Early Statutory Interpretation in England (1943) 38 N.W.U.L.R. (Ill.L.R.) 20

J.F. Reinhardt The Status of the Crown in the Time of Bracton (1943) 17 Temple U.L.Q. 242

H.G. Richardson and G.O. Sayles The Early Statutes (1934) 50 L.Q.R. 201 and 540

C. Ryan Anatomy of a Pelair Jet Crash National Times 6 December, 1985 p.13
J. Saltmarsh The Founder's Statutes of King's College, Cambridge in J.C. Davies (ed.) Studies Presented to Sir Hilary Jenkinson 1957 p.337
J. Saltmarsh King's College in Victoria History of the Counties of England 1959
G. Sawer Crown Liability in Tort and the Exercise of Discretions (1951) 5 Res Judicatae 14
W. Shiels Some Problems of Government in a New Diocese : Peterborough 1560-1630 in R. O'Day and F. Heal Continuity and Change : Personnel and Administration of the Church of England 1500-1642 1976
E.G.L. Stones Sir Geoffrey Le Scrope Chief Justice of the King's Bench (1954) 69 E.H.R. 12
H. Street Crown Proceedings Act, 1947 (1948) 11 M.L.R. 129
H. Street The Effect of Statutes upon the Rights and Liabilities of the Crown (1947-8) 7 U.Tor. L.J. 357.
S. Thorburn The Position of the Crown in Relation to the Town and Country Planning Act 1953 (1972) 2 Auckland ULR 100
S.E. Thorne Sir Edward Coke Selden Society Lecture, 1952
S.E.Thorne The Equity of a Statute and Heydon's Case (1936) 31 N.W.U.L.R. (Ill L.R.) 202
A. Tunc The Royal Will and the Rule of Law : A Survey of French Constitutionalism under the Ancien Regime in A.E. Sutherland (ed.) Government under Law 1955
C. Vickers-Willis The Crown and Statutes (1941) 5 Res Judicatae 241
P. Vinogradoff Constitutional History and the Year Books (1913) 29 L.Q.R. 273
A. Von Mehren The Judicial Conception of Legislation in Tudor England in P. Syre (ed.) Interpretation of Modern Legal Philosophies : Essays in Honour of Roscoe Pound 1947
S. Wexler Discretion : The Unacknowledged Side of Law (1975) 25 U.Tor. L.J. 120
D.V. Williams To Remind People of the Bill of Rights 1688 (1977) 3 Monash U.L.R. 243
G. Williams Case-Note (1948) 64 L.Q.R. 190
K.S.H. Wyndham Crown Land and Royal Patronage in Mid-Sixteenth Century England 19 J.B.S. 30
G. Zellick Government Beyond Law [1985] Public Law 283

Unsigned Articles

Anon Note (1903) 19 L.Q.R. 131
Anon Note (1945) 61 L.Q.R. 12
Anon The Application of Statutes to the Crown (1947) 204 L.T. 186
Anon Governmental Immunity from Local Zoning Restrictions : The Balancing Test of Brownfield v. State (1982) 43 Ohio State L.J. 229

Unpublished Works (at time of writing)

N.J. Adamson Material for Stair Encyclopedia
P.N. Grabosky The Desecration of Injalkajanama (Ntyalkaltyaname)
E.T. Lampson The Royal Prerogative 1485-1603 1938 Harvard University Ph.D thesis
J.M. Leahy The Persons Entitled to Crown Privileges 1973 Adelaide University Honours Law Thesis
P. Nowrojee Enforcement of Decrees in Relation to Meaningful Economic Development Paper delivered at Kenya Law Reform Commission Seminar on Land Law Reform 12 June, 1987
R.A. Swanson The Office of Attorney General in England 1558-1641 1976 University of Virginia Ph.D Thesis

Opinions and Law Reform Commission Reports

Attorneys General (U.S.), Opinions of, (1940-1948) vol.40, F. Biddle p.97
L.R.C. of B.C. Report No.9 Civil Rights Part I, Legal Position of the Crown (1972)
L.R.C. of Canada The Legal Status of Federal Administration 1985 Working Paper No.40
L.R.C. of Canada Towards a Modern Federal Administrative Law Consultation Paper 1987
L.R.C. of N.S.W. Report No.24 Proceedings By and Against The Crown 1975
Law Commission, New Zealand Legislation and its Interpretation Preliminary Paper No.1 "The Acts Interpretation Act 1924 and Related Legislation" 1987
L.R.C. of South Australia Report No.104 Proceedings By and Against the Crown 1987

Introductory, Epigrammatic and Concluding Materials (if not in the body of the text)

Bentham's Comments on the Commentaries 1774-1776 (ed.) C.W. Everett 1928
O.W. Holmes The Path of the Law (1897) 10 H.L.R. 457
G. Keillor Leaving Home 1987
P. Johnson The Civilization of Ancient Egypt 1978

S.B. Kopp Guru : Metaphors from a Psychotherapist 1971
C.H. McIlwain Some Illustrations of the Influence of Unchanged Names for Changing Institutions in P. Sayre (ed.) Interpretations of Modern Legal Philosophies : Essays in Honor of Roscoe Pound 1947
T. Ruoff Links with London (1962) 36 A.L.J. 53
C. Sagan The Dragons of Eden 1977
A.N. Whitehead The Aims of Education in the Aims of Education and Other Essays 1929