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

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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.