APPENDIX III

AN ANALYSIS OF THE PRETENDED POWER OF DISPENSING WITH THE LAW

In the times of the Plantagenet, Lancastrian, Yorkist, Tudor and Stuart dynasties the legislative authority of Parliament was subject to the exercise of the dispensing and suspending powers of the Crown. The dispensing power was frequently used and accomplished the exemption of particular persons, under special circumstances, from the operation of penal laws, being in effect an anticipatory exercise of the undoubted right of the Sovereign to pardon individual offenders. The suspending power was employed openly only during the later part of the seventeenth century temporarily to suspend the entire operation of any one or more statutes, notably those directed against Papists and Dissenters.

The dispensing power was expressed in a form of words derived from the practice of the Papacy, commencing in the reign of Innocent III, in issuing bulls *non obstante* any law to the contrary and in dispensing with the canons in favour of individuals. Pope Martin V, for example, granted a dispensation to a man who married his own sister. [51] Henry III is generally considered [52] to have been the first King to make use of the *non obstante* clause and its use became commonplace, especially in issuing licences authorizing the gift of land to the Church *non obstante* the Statute of Mortmain. [53]

The Commons disliked the dispensing power but would occasionally grant it expressly either for general use or for use only between sessions of Parliament as with the "sufferance" granted with respect to the Statute of Provisors in 1391 which was later enlarged into a "full power and authority to modify the said statute". [54] On other occasions it appears that by statute Parliament specifically excluded the dispensing power and prospectively forbade pardons. Nevertheless, the Crown continued to claim and to exercise a prerogative power of dispensing.

During the reign of Henry VII the idea became accepted that the king could not dispense with penalties for an act which was *malum in se*, but that he could do so with respect to an act which was *malum prohibitum*, that is an act forbidden solely by statute.

The power of the king to dispense with *any* law, and not simply with penal laws, on the grounds of public necessity was expressly stated by the majority in *Rex* v. *Hampden* (1637), and most notably by Vernon, J. It was, however, James II who erected the use of the dispensing power into an engine of policy and administration and it was inevitable that the power would fall with him upon his abdication. It had been true, until the time of James II and despite the dicta in *Rex* v. *Hampden*, that the doctrine of the dispensing power was received with very important qualifications:

(*a*) the King could not dispense with the common law;

(*b*) the King could not dispense with a statute which prohibited what was *malum in se*;

(*c*) Even *malum prohibitum* was not deemed universally dispensible. Some judges held that there could be no dispensation from an express or absolute prohibition, but only from ones *sub modo*.

(*d*) No-one contended that a dispensation could diminish or prejudice the property or private rights of a subject.

(*e*) Dispensations could not be general

James II, having procured the sanction of a judicial opinion to a dispensation with the Test Act in favour of Sir Edward Hales, [55] proceeded to a suspension of the principal laws for the support of the Established Church, thus bringing about his own flight and abdication producing in turn the Declaration of Rights and the Bill of Rights, 1689. [56]

The recitals to the Bill of Rights included the following clauses:

"Whereas the late King James II by the assistance of diverse evil councellors, judges, and ministers imployed by him, did endeavour to subvert and extirpate the Protestant religion and the lawes and liberties of this kingdome:

1. By assumeing and exerciseing a power of dispensing with and suspending of lawes and the execution of lawes without consent of Parlyament.

...

And therefore the said Lords Spirituall and Temporall, and Commons pursuant to their respective letters and elections being now assembled in a full and free representative of this nation taking into their most serious consideration the best meanes for attaining the ends aforesaid doe in the first place (as their auncestors in like case have usually done) for the vindicating and asserting their auntient rights and liberties, declare(*d*):

1. That the pretended power of suspending of laws by regall authoritie without consent of Parlyament is illegall

2. that the pretended power of dispensing with laws or the execution of laws by regall authoritie as it hath beene assumed and exercised of late is illegall ...

...

These recitals and declarations receive statutory force from words near the end of the statute:

"All of which their Majestyes are contended and pleased shall be declared enacted and established by authority of this present Parlyament and shall stand remaine and be the law of this Realme for ever. And the same are by their said Majestyes by and with the advice and Consent of the Lords Spirituall and Temporall and Commons in Parlyament assembled and by the Authority of the same declared enacted and established accordingly."

The statutory character of the Bill of Rights was declared by the first Act of the following session, 2 William and Mary c.1.

The Lords were unwilling absolutely to condemn the dispensing power, and inserted the qualifying words "as it hath been assumed and exercised of late". But by section XII of the Bill of Rights the dispensing power was abolished absolutely, except in such cases as should be specially provided for by a