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THE BACKGROUND OF THE FIFTH AMENDMENT IN ENGLISH LAW: A STUDY OF ITS HISTORICAL IMPLICATIONS

JOHN A. KEMP*

The history of the privilege against self-incrimination is associated with a revolution; in the beginning a revolution against a religion, in the end a revolution against a state. In its earliest stages it was part of a contest between Protestant Anglicans and Protestant Calvinists, between a Protestant Crown and a Protestant Parliament. The privilege is a part of our modern law today because England became Anglican in the sixteenth century and because for the Calvinists that was not Protestant enough.

The roots of the Fifth Amendment in English law lie in a very confusing period of legal history. The late fifteenth and early sixteenth centuries saw the introduction of certain legal procedures which grew out of the prerogative of the Crown and ran counter to the tradition of the customary law. One of these procedures was that which demanded that subjects testify in criminal cases and become the instrument of their own condemnation. This procedure had entered English legal practice sometime during the fifteenth century and was at variance with the principles which had guided earlier medieval law.¹ The fif-

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¹ "Men's conception of the relations of law to equity was naturally affected by the substitution of the background of material force, on which the sovereign state was based, for the religious and moral background which underlay the political theories of the Middle Ages," W. S. Holdsworth, *History of English Law*, 3rd rev. ed., IV, 279. On the struggle between the common law and the Roman law which in so many instances underlay the change from the medieval position, Holdsworth, *op. cit.*, 273. There is a growing valuable literature which treats the new "lay concept" of law and authority, its control of the courts, and its attack on the common law during the fourteenth and fifteenth centuries: G. Delagarde, *La naissance de l'esprit laïque au déclin du moyen âge*, I, S. Paul-Trois-Châteaux, 1934; S. B. Chrimes, *English Constitutional Ideas in the Fifteenth Century*, Cambridge, 1936; J. Neville Figgis, "Bartolus and the Development of European Political

teenth century was not a century noted for its justice. Though it continued to assert that justice was at the very heart of law, its practice was often at variance with its theory.

The common law was violated by appeals to Roman law procedures like the *utilitas regni* and the *speciale mandatum regis*, in which old forms were by-passed, and the subject was confronted with the full force of the royal prerogative. This happened not merely in royal courts of the top level, but in the courts of the justices of the peace and other royal officials, who went far beyond accepted legal practice and tortured "criminals" and "suspects of treason."² Royal officials were far more interested in promoting the cause of the Crown than in maintaining the norms

Ideas," *Transactions of the Royal Historical Society*, XIX, 1905, 147-168; Myron Gilmore, *Argument from Roman Law in Political Thought, 1200-1600*, Cambridge, 1941; E. Kantorowicz, *Laudes Regiae: A Study of Liturgical Acclamations and Medieval Ruler Worship*, Berkley, 1946; "Mysteries of State: An Absolutist Concept and Its Late Mediaeval Origins," *Harvard Theological Review*, XLVIII, 1955, 65-91; "Pro Patria Mori in Mediaeval Political Thought," *American Historical Review*, LVI, 1951, 472-492; C.N.S. Wolf, *Bartolus of Sassoferrato: His Position in the History of Medieval Thought*, Cambridge, 1913, and many others. Yet whatever the process of laicization, it was at that time the laicization of a religious society. Really it was the transfer of power, not the denial of the religious commonwealth.

² Holdsworth, V, 191-192. Under Henry VIII the attitude prevailed that "the Crown and its servants were governed by special courts and a special law, and that in their dealings with the subject they were not necessarily bound by the common law," Holdsworth, IV, 274. There was no possible self-incrimination in the court which followed strict common law procedure; the defendant's plea was a flat denial. In fact, "to defend" meant "to deny." With the formal denial, the defendant could elect to question the witnesses, but if he chose such a course he had to accept the decision rendered in terms of their testimony. Of course a defendant could, if he wished, confess a crime, F. Pollock and F. W. Maitland, *History of English Law*, 2nd ed., 1898, 607-610. If after confessing the defendant claimed that his confession had been drawn from him under duress, the justices could obtain evidence from his fellow prisoners; they could even question the defendant himself, but not under oath. However, "there are no signs of their having done this habitually," *ibid.*, 653-654. By common law it was something new when witnesses testified to the jury, but on occasion judges would require such testimony and justified their action by an appeal to continental procedure, Holdsworth, V, 192-193. J. F. Stephens says that there existed at the time no real rules of evidence as we understand them today, *History of Criminal Law*, London, 1883, I, 350. In conclusion, as Holdsworth says "the privilege against self-incrimination was wholly unknown to the common law of this period," *op. cit.*, V, 193-194. The real reason was that the defendant did not testify under oath.

of strict justice. They had been brought up in an atmosphere, prevalent from the middle of the fourteenth century, which had so exalted the royal authority that the Crown came to be endowed with a religious and even sacred character.³ This attitude continued through the sixteenth century until certain lesser authorities discovered that in various instances it ran counter to their own personal interests. But until this became clear jurists did little to call attention to the flagrant violation of statutes which promised justice "according to the law of the land."⁴ The oath involving self-incrimination grew out of a legal atmosphere little concerned with the old *bonitas* and *equitas* which Budé recalled were the prime objectives of the old law.⁵

The first formal description of the procedure whereby a man on mere suspicion was brought before an English court and forced to testify against himself is found in the Act of the Star Chamber in 1487. Not that this was the first time that the King's Council sitting in Star Chamber had made use of such an oath, but this was the first time that the use of the oath was formally reorganized and received complete description. The authority behind the Star Chamber oath, like the authority behind the Council itself, was the prerogative of the king. As a procedure, the oath was something new and was not traceable to the common law.⁶ The England of early Henry VII was anything but peace-

³ Cf. Kantorowicz's studies, *supra*, n. 1.

⁴ Holdsworth, V, 349-350.

⁵ G. Budæi *Annotationes in Pandectas*, Paris, 1559, 3. The oath *ex officio*, common in English law during the sixteenth century, was not similar to the oath used in ecclesiastical courts from the thirteenth to the fifteenth centuries which demanded formal presentment. Mary H. Maguire, "An Approach of the Common Lawyers on the Oath *Ex Officio* as Administered in the Ecclesiastical Courts of England," *Essays in History and Political Theory in Honor of Charles Howard McIlwain*, Cambridge, 1936, 202; the true meaning of the oath *ex officio* was that the judge had the right to demand a sworn answer merely "in virtue of his office," and without justified suspicion of guilt, *ibid.*, 203.

⁶ Wigmore insists that the Star Chamber's oath *ex officio* (3 H VII 1) "is not a common law rule at all, but is wholly statutory in its authority," and he argues that the objection to the oath during the sixteenth century was to prevent its use in the ecclesiastical courts which were encroaching on civil jurisdiction under Elizabeth, but it was "not to protect from answers in the king's court of justice." "Nemo tenetur se ipsum prodere," 5 *Harvard Law Review* 72 (1891-1892). The jurists had the highest regard for the Star Chamber. Bacon wrote enthusiastically of it and described it as a court "which before subsisted by the

ful and only through a determined use of the royal authority could order be restored to the kingdom.⁷ Since some of the most powerful of the English nobility were the direct causes of this disorder, the Crown used its prerogative to by-pass the long and uncertain processes of the common law courts in favor of more effective measures which would protect the common good.⁸

ancient common laws of the realm" and "was confirmed in certain instances by acts of Parliament," *History of Henry VII*, Works, ed. James Spedding, VII, London, 1857, 279; J. R. Tanner, *Constitutional Documents of the Reign of James I*, Cambridge, 1930, 288. Coke called the Star Chamber "the most honorable court (our parliament excepted) that is in the Christian world," and wrote that it was "the most efficient and most impartial court of Tudor Times," quoted by G. R. Elton, *England Under the Tudors*, London, 1955, 415.

The major problem relative to the Star Chamber is not the court itself or its liceity, but whether the oath *ex officio* began in English law with the statute of 1487. Edward Corwin in his "Supreme Court's Construction of the Self-Incrimination Clause," 37 *Michigan Law Review* 5 (1950), quotes J. F. Stephens (*History of the Criminal Law of England*, 166-183) who wrote that "that year the Chamber . . . was vested with authority to compel defendants to testify under oath"; and Edward Coke says there was introduced a new law "to examine the defendant, which being understood after his answer being made, to be upon oath upon interrogatories, which this ancient court proceeding in criminal causes had not nor could have had but by Act of Parliament or prescription," *The Third and Fourth Parts of the Institutes of the Laws of England*, ed. of 1669, ch. 5. Kenneth Pickthorn, however, notes that "the Star Chamber Act was certainly not regarded by its authors as in any way innovatory; rather it put above question one way of enforcing the law; there were other statutes of the same sort before and since, *Early Tudor Government: Henry VII*, Cambridge, 1949, 145. Pickthorn continues, "Consider for instance, the inquisitorial methods of the council: they were peculiar as a habit, but as an expedient they were by no means unprecedented. That a man should be tried without indictment [that is, accusation by a jury of his neighbors] in a court of common law was no doubt irregular and rare; but it had been done in the King's bench, before justices in eyre, in parliament itself." There were certain attempts to regulate this, 25 E III c. 4 and 37 E III c. 18, but "this provision and its frequent re-enactment shows parliament's intention to regulate rather than abolish suggestions [presentments without jury indictment]; on the face of it and in practice it limited the private accusers, not the Crown, and apparently it did not even do that effectively," *op. cit.*, 49-50. Tanner, discussing the oath *ex officio* in Star Chamber, notes that "sometimes a more summary procedure was adopted which was not authorized by the Act [of 1487] but depended entirely on the ancient practice of the council . . ." *Tudor Constitutional Documents, A.D. 1485 to 1603 with an Historical Commentary*, Cambridge, 1948, 256. The extent of the use of the oath *ex officio* in the tradition of the common law largely depends on how much the common law tradition had suffered under

In the beginning there was little opposition to the procedure which required that a man testify against himself. In fact it was actually popular among the lesser people. After all, it was not something altogether new in the royal courts. Then too it was backed by the respected authority of a strong king. When later, indeed much later, the jurists objected that the use of the oath violated the common law, their arguments, as Feller observed, struck a hollow and unhistorical note and lent "a quality of *ex post facto* rationalisation to any attempt to establish a basis in policy."⁹

Under Henry VIII there was no organized opposition to the oath used in the Star Chamber, though it was common knowledge that his reign witnessed some of the most serious attacks on the

the pressure of royal prerogative during the fifteenth and sixteenth centuries. The whole matter is somewhat more complicated than Justice Samuel H. Hofstadter intimates when he writes that "it has been said that the privilege against self-incrimination is not found in ancient systems of law and that it is unique in Anglo-American law. In *Twining v. New Jersey*, Judge Moody declared that the principle that no person could be compelled to be a witness against himself distinguished the Common Law from all other systems of jurisprudence," *The Fifth Amendment and the Immunity Act of 1954*, New York, 1956, 3. Perhaps the use of the oath extended beyond what was expected by the Act of 1487, but even then the Act itself in no sense limits the authority of the Star Chamber or the use of its oath, Tanner, *Tudor Constitutional Documents*, 251. Undoubtedly, as Maitland says, the council went to extremes during the sixteenth century in its use of the oath, but Coke should have known very well that the oath was not introduced for the first time under Henry VII; Coke, like all great judges, "notwithstanding their feelings regarding the oath had taken part in its proceedings," F. W. Maitland and F. G. Montague, *A Sketch of English Legal History*, New York, 1915, 119. The constitutional question involving the oath was whether the procedure was to be left to the court to determine, which Tanner says was definitely the case in practice, or whether Parliament was to assign the extent of its use, *Tudor Constitutional Documents*, 285. The acquiescent character of the Tudor Parliaments, whatever the verbiage to the contrary, is well known. The authority behind the oath was not that of Parliament but that of the royal prerogative. As William Lambarde said in 1591, "Shall no help at all be sought for at the hands of the King when it cannot be found in the common law?" Tanner, *ibid.*, 285.

⁷ Kenneth Pickthorn, *Early Tudor Government: Henry VII*, 9-11.

⁸ On the drawn-out and very complicated procedure of the common law, cf. Roscoe Pound, *Readings on the History and System of the Common Law*, 2nd ed., Boston, 1913, 365-370.

⁹ A. H. Feller, "Self-Incrimination," *Encyclopedia of the Social Sciences*, XIII, 653.

common law through use of the royal prerogative.¹⁰ Prior to Henry's break with Rome, there was some objection when the Catholic bishops made use of the oath against heretics.¹¹ Christopher St. Germain also complained of its use in his *Doctor and Student*; he makes the Doctor exclaim, "In what uncertaintie shall the king's subjects stand when they shall be put under the lawe of the realme, and be compelled to be ordered by the discretion and conscience of one man."¹² Thomas More's successor as speaker of the Commons, Sir Humphrey Wingfield, also took issue with the oath when the Commons stood before the Lords, March 5, 1532.¹³ However these were but passing objections and manifested no concerted program against the self-incriminatory oath.

Whatever the threat of the procedure, few Englishmen believed it illegal in the Star Chamber. When opposition to it did arise, it was centered on opposition to its use in a royal ecclesiastical court, the Court of the High Commission.

Under Henry VIII there had existed a Commission for Ecclesiastical Affairs, headed by Thomas Cromwell. However the first Anglican commission to make use of the procedure which subsequently gave rise to such bitter controversy was that of 1549. Commissions after 1549 made use of the oath *ex officio*, so named because it was imposed by the judge simply in virtue of his judicial office and without presentment of jury. There were renewals of this commission in 1551, in 1557, and in the first year of Elizabeth (1559). The commission of 1559 was said to possess "statutory authority," based on the Act of Supremacy, an authority earlier commissions did not have, for their authority was traceable exclusively to the royal prerogative. There were other commissions in 1562, 1572, 1576 and 1601, but they differed only in the number of commissioners. About 1570 the

¹⁰ "If ever the existence of the common law was in serious danger, it was in the reign of Henry VIII", Holdsworth, *History of English Law*, IV, 283.

¹¹ The bishops' diocesan courts lost the right to administer the *ex officio* oath when 25 H VIII, 14 repealed 2 H IV, 15, Maguire, "Attack of the Common Lawyers," 212. Therefore, it was early in the Reformation that the English bishops lost their right to administer the oath.

¹² *Doctor and Student*, Hargraves Law Tracts, 323 (Pound, Readings, 163).

¹³ *Statutes of the Realm*, VII, London, 1817, 168.

commission assumed a different character; by this time it began to operate as a regular court.¹⁴

¹⁴ The first ecclesiastical commission put Cromwell in charge of ecclesiastical affairs under Henry VIII, but the commission of 1549 was the first commission to use the procedure followed by later ones in the sixteenth century. This 1549 commission permitted the division of the major commission into smaller groups, thus allowing it to operate simultaneously in various parts of the realm. It also authorized the use of the oath. This commission was re-issued in 1551, and the number of commissioners increased from 25 to 31. The Marian commission of 1557 named no *quorum* and permitted three to act, directed the use of the oath and empowered the commissioners to imprison and fine. The first Elizabethan commission (1559) closely followed that of 1557, but restored the quorum to seven, but then added that any three could act provided one was a member of the *quorum*. This commission claimed statutory authority, previous commissions had been authorized by the Act of Royal Supremacy. Commissions of 1562, 1572, 1576 and 1601 are different only in the number of commissioners named. In all these later commissions three were empowered to act.

The title, "High Commission," begins to appear about 1570, previous commissions were entitled "Commission for Ecclesiastical Affairs," and about this same time the commission gradually began to act as a regular court with an increasing number of cases assigned to it. After 1565 the Privy Council began to assign cases to the commission, *cf.* history of the commissions in Tanner, *Tudor Documents*, 360-361. That the 1559 commission had "statutory authority" would give rise later in the reign to attempts on the part of Parliament to exercise control of it, or at least the lawyers would argue to this right. However, it was exclusively at the Queen's invitation that Parliament became involved at all, or had anything to do with church ritual and doctrine, but as Elton remarks since Parliament was once involved "it was difficult to prevent ardent men in the Commons from supposing that it could do so again," *England Under the Tudors*, 274. Elizabeth's main problem in these ecclesiastical matters was that she was a woman, and unlike her father, governed the Church from the outside through the bishops, for as supreme governor she possessed no quasi-ecclesiastical powers, Elton, 275. Yet, Elizabeth never gave any indication that she depended on parliamentary support in religious matters. In granting letters patent for full authority in religion to William Parker and the commission of July 19, 1559, she said: "And we will and grant that this our letter patent shall be sufficient warrant for you . . . for the execution of this our commission," Tanner, *Tudor Documents*, 372. Even if appeal is made to the Act of Supremacy (1 Eliz. 1.8), there is no limit in the act to the royal prerogative relative to the protection of the establishment, for the act gave the Queen the right to correct all heresies "by any manner of spiritual, or ecclesiastical power, authority, or jurisdiction," *cf.* also Maguire, "Attack of the Common Lawyers," 213. The complete text of the commission of 1559 is in G. W. Prothero, *Select Statutes and Other Ecclesiastical Documents Illustrative of the Reigns of Elizabeth and James*, 1906 ed., 227-232; for the commissions of 1562, 1572 and 1601, *ibid.*, 235-241.

A profound religious change had taken place in England between the accession of Edward and the accession of Elizabeth. The whole religious character of the English settlement had been modified.¹⁵ The old Anglicanism of Henry VIII had passed away, and the new clergy of Elizabeth was shot through with religious divisions and had become thoroughly imbued with Calvinism. Hundreds, indeed thousands, of the Anglican clergy now looked for inspiration to the Scottish Kirk and the conventicles of Strasbourg and Geneva. They had little patience with a "half-purified" Anglicanism and sought the removal of every vestige of Romanism in the Established Church. The Puritans and their supporters in Parliament attacked the very idea of episcopacy and gradually found themselves in solid opposition to the religious settlement sustained by the Queen's prerogative.¹⁶ Whatever Elizabeth's interest or non-interest in dogma, she was astute enough to see that, even though the Puritans protested they were not hostile to her regime, their attacks on Anglicanism veiled a direct attack on her royal supremacy.¹⁷ As far as she was concerned, inwardly they could believe whatever they wanted, but outwardly they had to conform, and conformity meant attend-

¹⁵ "Perhaps the most important single factor in shaping the course of history in the 16th century was the factor of religion," Conyers Read, *Walsingham*, Oxford, 1925, II, 258.

¹⁶ Many attempts would be made by the Puritan-minded Commons to discuss religion during the reign, but as Neale says, "The sovereign held the trump card. After Elizabeth had spoken, Parliament might grumble but had to submit," J. Neale, *Elizabeth and Her Parliaments*, London, 1953, 388. The Commons felt the rebuke of Elizabeth in her reply, May 22, 1572, "The message that forbade the bringing of bills of religion into the House seemed much to impugn the liberty of the House, but nothing was said," but, as Neale adds, the anonymous diarist who reports the session "was of course quite wrong in his interpretation of the liberty of the House," *ibid.*, 303. In 1566, when Elizabeth had been confronted with the succession problem, she said, "As for me, I shall do no otherwise than pleases me. Your bills have no force without my assent and authority; it is monstrous that the feet should direct the head," *ibid.*, 142, also 149, 150. Actually Parliament was not to originate legislation, merely to express grievances, *ibid.*, 189. I am well aware in using the terms, "Calvinists," and "Puritans" that there were numerous divisions among the followers of this belief. I use the terms as they were used by the Anglican authorities of the establishment, who attributed the same political aspirations to all followers of the Calvinist doctrine.

¹⁷ Neale, *Elizabeth and Her Parliaments*, 28.

ance at Anglican services and the reception of the Anglican sacrament from Anglican bishops.

Elizabeth had a passion for conformity.¹⁸ Anyway she never could tolerate the Puritans, and told her bishops that they had to face the Puritan problem squarely and "put them down."¹⁹ The notion that political unity demanded religious unity has had a long history, one that antedated Christianity itself. And the Queen's realm was in desperate need of political unity. England was in constant threat of invasion by the so-called "Catholic powers" on the continent. If this were not enough the Queen herself had no love for a religion which emanated from the hated Scotland of the Kirk and Knox's *First Blast of the Trumpet Against the Monstrous Regiment of Women*. Though Elizabeth betrayed an extraordinary ability for government, precisely because she was a woman, her position as head of the Anglican church was less convincing.²⁰ On their side, the Puritans by op-

¹⁸ From the very beginning of her reign Elizabeth insisted on uniformity: "In the order whereof, saving for an uniformity, there seemeth no matter of great moment." She stated on occasion that she thought it more important than the doctrine of the Eucharist, Prothero, 190.

¹⁹ John Strype, *Annals of the Reformation*, ed. of 1725-1731, II, 219, also in Tanner, *Tudor Documents*, 182. In 1571 she wrote Parker regarding the Puritans that "none should be suffered to decline either on the left or on the right from the direct line limited by the authority of our laws and Injunctions," J. Bruce and T. T. Perowne, *Correspondence of Matthew Parker*, Parker Society, 1853, 386; also P. M. Dawley, *John Whitgift and the Reformation*, London, 1955, 87.

²⁰ Though Knox wrote against Mary of Scotland, whom he called a "cursed Jezebel," and against Mary of Guise, regent of Scotland, he held that no woman could rule lawfully: "Woman in her greatest perfection was made to serve and obey man," Works, ed. D. Laing, Edinburgh, 1846-1864, IV, 374. Elizabeth had little sympathy for either of these women, but she would tolerate no criticism of her sex and she knew the rebellious spirit that underlay Knox's statement, see J. W. Allen's discussion of Knox's *Appellation* in his *History of Political Thought in the Sixteenth Century*, 2nd ed., London, 1941, 110-112. In English circles there was a mixed reaction to Knox's attack on the right of a woman to rule. Within the Queen's circle there was complete acceptance of the theory of the Queen's prerogative; but Aylmer (later Bishop of London) answered hesitantly that female rule was tolerable, for it was the law not the Queen that ruled, "Hawborowe of True and Faithful Subjects" (1559). This was the mind, too, of Onslow, solicitor-general and speaker of the Commons in 1566, while Hooker stated that "lex facit regem." Yet in the 1559 Parliament, Nicholas Heath, archbishop of York, stated that Parliament could not give "spiritual" authority to a woman; she could not take Peter's place as

posing spiritual conformity were a constant cause of unrest. The very structure of the Tudor state implied a control of the national church, and basically a denial of the Queen's religious authority implied disobedience, indeed, even treason. No matter how much the Puritans protested their loyalty, their actions contradicted their words.²¹

The Elizabethan religious settlement out of which developed the opposition to the oath *ex officio* was one of great complexity. Neale insists that "it is shrouded in mystery," and even the account of the 1559 Parliament out of which it grew are so incomplete that little can be discerned with clarity.²² Closely allied to this was the very difficult problem of discovering to what extent the sovereign "ruled as well as reigned."²³ Yet certain basic assumptions underlay the royal policy. Though Elizabeth often ruled with an eye to public opinion, she made it quite clear that the established religion pertained exclusively to her royal prerogative. As far as Parliament was concerned, she kept a "watchful eye on proceedings," and never hesitated to interfere either religiously or politically.²⁴ She could scarcely have acted otherwise. Parliament was still *her* Parliament, using *her* authority and advising her in *her* interests. In the sixteenth century it was still nearer to Edward I or even Henry II than Walpole, however some unhistorical-minded jurists wrote to the contrary a century later.

By the 1559 Act of Uniformity the Queen was established in complete possession of the spiritual power, and papal canon law and its various procedures which had governed the church

father of the flock, J. Neale, *Elizabeth and Her Parliaments*, 65-66. The historically weak parliamentary position was given in Harrison's "Description of England" (1577) where he stated that actually not the queen but Parliament ruled, T. P. Taswell-Langmead, *English Constitutional History*, London, 1890, 503-506.

²¹ J. W. Allen, *Political Thought in the Sixteenth Century*, 169.

²² Neale, *Elizabeth and Her Parliaments*, 51.

²³ *Ibid.*, 419.

²⁴ "The Queen kept a watchful eye on proceedings, ready to intervene at any moment with command, message, or indication that some bill or other was not to her liking and would need to be modified to secure her assent . . . If the Queen's interventions were beginning to cause criticism among the Commons, it is probably the latter who, in this as in all similar matters, were thinking unhistorically," Neale, *Elizabeth and Her Parliaments*, 419-420.

in England prior to Henry VIII were declared "utterly void and of none effect."²⁵ In religion she held the same position as her father, with the exception that she was not called "Supreme Head" but "Supreme Governor."²⁶ Her ecclesiastical power was further defined in the Thirty-nine Articles of 1563, where it was stated that the Queen enjoyed the prerogative "given always to all godly princes in Holy Scripture by God Himself, that they should rule all estates and degrees committed to their charge, whether they be ecclesiastical or no . . ." ²⁷

This was precisely what Calvinism denied. Logically the Puritans could not serve a government which compromised with the hated Romanism in any manner and continued to tolerate some of its ceremonies, which Anglicanism certainly did.²⁸ And this spirit of disunion was definitely on the increase.

With the return of the Marian exiles Puritanism had made great steps forward in English university circles, and division and argument divided the ranks of the clergy. Even Parliament was making bold about religion. Elizabeth in a most serious vein

²⁵ 1 Eliz. 1.7 (1559) certainly does away with Roman Catholic canon law which traces its authority as law to the Pope, cf. intro. to the Gregorian *Decretales*, the *Liber Sextus* and the *Extravagantes*. The issuance of law on the part of the Pope was an exercise of his lawgiving authority and, according to the Act of Supremacy "no foreign prince, person, prelate . . . shall at any time after the last day of the session of this Parliament use, enjoy or execute any manner of power, jurisdiction, etc., . . . within this realm (§1) and that Your Highness, your heirs and successors . . . shall have full power and authority by virtue of this Act . . . to exercise, use, occupy and execute . . . all manner of jurisdictions, privileges, and preeminences in any wise touching or concerning any spiritual or ecclesiastical jurisdiction within these your realm," (§8) 1 Eliz. 1.8, also gave the Queen the right to correct all heresies "by any manner of spiritual or ecclesiastical power, authority, or jurisdiction," *Statutes of the Realm*, IV, 350; also Maguire "Attack of the Common Lawyers," 213. In 1 Eliz. 2, the act expressly does away with the Catholic canon law: "all laws . . . whereby any other service . . . is established . . . shall henceforth be utterly void and of none effect," *Statutes of the Realm*, IV, 355.

²⁶ Neale, *Elizabeth and Her Parliaments*, 52; exclusively on her own authority, Elizabeth dropped the hurricane title in the spring of 1560, *ibid.*, 75.

²⁷ Edward Cardwell, *Synodalia*, Oxford, 1842, I, 71. On the unlimited religious authority of the Crown, H. F. Woodhouse, *The Doctrine of the Church in Anglican Theology, 1541-1603*, London, 1954; T. M. Parker, *The English Reformation to 1558*, London, 1950, 136-140.

²⁸ Strype, *Annals*, I, 502.

complained to Archbishop Parker, January 25, 1565, about the lack of uniformity and she cited, in particular, conditions at Oxford and Cambridge.²⁹ Then as early as 1564 the Puritans began their "prophesyings," those secret meetings in which the Calvinist scriptures were expounded and the *Book of Common Prayer* held up to ridicule.³⁰ From Norwich, where these meetings had begun, they spread rapidly throughout England. It was only after the vacillating Archbishop Grindal was given a stinging reprimand by the Queen that they were finally suppressed by royal order, May 7, 1577.³¹

The early 1570's saw the Puritan problem mounting to new proportions in a national debate between the Puritan leader, Thomas Cartwright, and that most zealous defender of Anglicanism, John Whitgift. After 1565 the Puritan version of the Scriptures had been privately circulated, and they were sold openly in 1576. There the Queen and the Anglican church were condemned for their tolerance of "popish" ceremonies, and the Queen's royal rights in religion were disputed.³² In 1574 Traver's *Full and Plain Declaration of Ecclesiastical Discipline* appeared with a preface by Cartwright where he made a clear statement of the Puritan position; they refused to conform to the ceremonies and teachings of the Church of England.³³

The persistent opposition of the Puritans caused increasing discontent in Anglican circles. Arguing that Anglicanism had

²⁹ A. F. Scott Pearson, *Thomas Cartwright and Elizabethan Puritanism*, Cambridge, 1925, 14-15. The dissenter clergymen of London were canvassed and forced to sign that they would wear surplices at their ceremonies, *ibid.*, 16.

³⁰ On these informal Puritan assemblies, Dawley, *John Whitgift*, 145-146. These "prophesyings" were continued in what the Puritans called the "classical movement," an organization of classes out of which developed the Puritan synods. These "classes" became less significant after 1580, G. R. Elton, *England under the Tudors*, 313. "Puritanism had become a conspiracy; the prophesyings were the scenes of an insidious undermining of the Church of England," Dawley, *Whitgift*, 150.

³¹ Tanner, *Tudor Documents*, 184. Elizabeth's determination to suppress them is clear in her conversation with Grindal, December, 1576, J. Neale, *Elizabeth and Her Parliaments*, 371.

³² On the Puritan Bible, D. Neal, *History of the Puritans*, London, 1822, I, 63.

³³ Strype, *Annals*, IV, 413. Traver's *Declaration* was considered a "revolt" and a "declaration of war," Allen, *Political Thought in the Sixteenth Century*, 215.

compromised with Romanism, the Puritans boldly asserted that it no longer had the guidance of the inspired Scriptures. Instead of religion being directed by the Word of God, it was directed by a government not completely "purified." As Allen says; "you could not deny that it was for the Queen, or for the Queen in Parliament, to declare authoritatively what doctrines and what sacraments were indeed in the Scriptures," and even the royal lawyers "maintained that appeal to the text of the Scriptures was, if not quite irrelevant, at least not admissible."³⁴ The Puritans had hit a sore point. They gradually developed a formal attack on the validity of the Anglican church itself, its courts and its procedures, and they challenged "the polity of the establishment and the whole order of the Tudor Commonwealth."³⁵

What gave the government cause for concern was the fact that after 1572 the Puritans were working in terms of a formally organized program. That year they had taken "the first practical step in the organization of English Presbyterianism with the erection of the Presbytery of Wandsworth."³⁶ Earlier in the year they had set up numerous secret presses in violation of the orders

³⁴ Allen, 132. The Anglican bishop, Lancelot Andrews, defended this position in his *Petition to the Queen*, in 1592; on his divine-right political theory, Maurice Reidy, *Bishop Lancelot Andrews, Jacobean Court Preacher*, Chicago, 1955, 185-211.

³⁵ "The Puritans" challenge was not only to the ecclesiastical usages and liturgy of the Church, but also to the policy of the establishment and the whole order of the Tudor commonwealth," Dawley, *Whitgift*, 135. When Hooker described the situation, he showed that the unity of the Church and the commonwealth was indivisible, *On the Laws of Ecclesiastical Polity*, 1612, VIII, 1, 332; 3, 363. This accusation of treason seems to be justified by 13 Eliz. 1, *Statutes of the Realm*, IV, 526, where the Second Elizabethan Treason Act (1571) states that it was treason—at least objectively—to call the Queen "an heretic, schismatic, tyrant, infidel, or usurper of the Crown." Cf. also Tanner, *Tudor Documents*, 414.

³⁶ Scott Pearson, *Cartwright*, 74. With regard to the Puritan attack and especially that of Cartwright in 1572, Strype writes, "Hitherto the Quarrel was only about wearing the cap and the surplice and such-like apparel, and the posture in the receiving of the sacrament; but now they [the Puritans] attempt to move another and more dangerous matter in assaulting the hierarchy of the Church, and disproving and condemning the ancient, wholesome government used in it by archbishops and bishops, deans and arch-deacons, and other ecclesiastical officers, *Annals*, I, 623. As Tanner says "in this criticizing of the system of the Church government, the Puritans were attacking the Royal Supremacy—the cornerstone of the Elizabethan Settlement," *Tudor Documents*, 167.

of the commission, and they renewed their efforts in Parliament for the reform of the English church.³⁷ But the most important act of the year was the publication of the notorious *Admonition to Parliament*, that “first open manifesto of the Puritan party” which in turn provoked an equally notorious Anglican *Answer* by John Whitgift.³⁸

Later some Anglican divines wrote more authoritatively in defense of their church, but in his day Whitgift was its foremost defender. Perhaps this was because he was the perfect representation of the Elizabethan Anglican divine, a man absolutely dedicated to the religious conformity demanded by the Queen. In 1574 Whitgift added to his reputation in his *Defense of the Answer* against Cartwright.³⁹

This *Defense* is one of the most important documents of Anglicanism; everything that Whitgift said later is found sketched in this publication. Differing from certain Anglican bishops who after 1571 were critical of the establishment, Whitgift stated uncompromisingly that anyone religiously at variance with the Queen’s church was guilty of treason.⁴⁰ Men who wrote against the *Prayer Book* and argued against “the tyrannous lordship” of the bishops and who spoke of the English church as being “un-

³⁷ On the secret presses, Scott Pearson, *Cartwright*, 73. Elizabeth rejected the bill in Parliament and intervened through the speaker; she forbade the introduction in Commons of any ecclesiastical bills, unless they had been previously approved by Anglican ecclesiastical authorities, *ibid.*, 58.

³⁸ Text of the *Admonition* in W. H. Dunham and S. Pargellis, *Complaint and Reform in England, 1436-1714*, New York, 1938, 232-257. On the *Admonition*, probably authored by John Field and Thomas Wilcox, see W. H. Frere and C. E. Douglas, eds., *Puritan Manifestoes, A Study of the Origin of the Origin of the Puritan Revolt*, London, 1907, VII. Neale writes that “the *Admonition* to Parliament, referred to by Bancroft, is one of the most important tracts—perhaps, indeed, the most important—in the history of Elizabethan Puritanism,” *Elizabeth and Her Parliaments*, 296. The *Admonition* stated that without the Puritan discipline “there can be no right religion,” Dawley, 133; on Whitgift’s *Answer*, Donald J. McGinn, *The Admonition Controversy*, New Brunswick, 1949, 27; Whitgift, *Works*, ed., J. Ayre, Parker Society, 1851-1853, I, 344; II, 239-240, 281.

³⁹ *The Defense of the Answers to the Admonition against the Replies of T. C. by John Whitgift, Doctor of Divinitie*, (February, 1574), Scott Pearson, *Cartwright*, 130. The same year Cartwright fled to Heidelberg and entered the university there, *ibid.*, 131.

⁴⁰ Neale, 217.

reformed” spoke the language of sedition, for, as Whitgift insisted, in England Church and State were identical.⁴¹

John Whitgift is one of the most prominent figures in the history of the oath against self-incrimination. A man of less devotion to Anglicanism could never have created the organized antagonism which brought about the abrogation of the oath and the granting of the privilege. From an opposite point of view, the same can be said of Thomas Cartwright. These men had been fellow-students at Cambridge; they had received their bachelor’s degrees the same year, though the determined John was a better student than the man who would later be his great Puritan adversary.⁴² Whitgift became Master of Trinity, July 4, 1567, only to discover that Cartwright was one of his fellows. When one considers the extreme anti-Puritanism manifested by Whitgift later on, it is curious to note that in November, 1565, when he was Lady Margaret Professor of Divinity at the university, he protested the excessive persecution of the Puritans which had resulted in the banishment of some of his better students.⁴³ Later, in 1570, however, when he was vice-chancellor, he headed a commission which forbade Cartwright to teach because of his Puritan doctrines.⁴⁴ A year later, Whitgift suspended the Puritan leader from his fellowship because Cartwright refused to accept Anglican orders.⁴⁵

Whatever his character, Whitgift never enjoyed “good press” in his day or in ours. He was roundly vilified by the

⁴¹ Allen, 175. Whitgift was strongly Erastian. According to G. R. Cragg doctrinally “Whitgift was no less a Calvinist than his opponent . . . The leaders of the Elizabethan Church were Calvinists almost to a man,” *From Puritanism to the Age of Reason*, Cambridge, 1950, 14. This seems tenable if one considers Whitgift’s approval of the Lambeth Articles (November 20, 1594), Neal, I, 209. Dawley’s attempt to excuse Whitgift from doctrinal Calvinism seems unconvincing, *Whitgift*, 213-214, though McGinn seems justified in saying that Whitgift “never was an exponent of the Genevan form of ecclesiastical polity.” *Admonition Controversy*, 33.

⁴² Scott Pearson, *Cartwright*, 8.

⁴³ *Ibid.*, 18.

⁴⁴ The meeting was held December 11, 1577. The board consisted of Whitgift, vice-chancellor of the university, five doctors of divinity and three doctors of laws. They met at Trinity. The vote to suspend Cartwright was unanimous, Scott Pearson, 42-43.

⁴⁵ *Ibid.*, 63.

Puritans and their followers.⁴⁶ Yet he was doing what his position required. No one can deny that he was a curse on their city. He was unrelenting in ferreting them out. Later as bishop of Worcester, he sought the archbishopric of Canterbury and cited as one of his qualifications for the post his "detective achievements" against the Puritans.⁴⁷ When he was finally named to the post, September 23, 1583, his appointment evoked the widest condemnation in Puritan circles. They immediately attacked him and argued that he had no legal authority as archbishop and that consequently his clergy were not obliged to obey him.⁴⁸

Whitgift wasted little time in retaliation. Almost immediately he suspended two hundred and thirty-three ministers who refused to execute his orders.⁴⁹ He became Elizabeth's trump card in her drive for religious conformity. Where previously archbishops and bishops had shown leniency, Whitgift brooked no opposition. He was a severe man; he had been a severe schoolmaster; he would be a severe bishop. To bring about uniformity he applied to the Queen three months after his appointment to Canterbury for a High Commission "with greatly augmented powers."⁵⁰

Up to this time, even though the older commissions had made use of the oath *ex officio*, there had been little attention drawn to the oath because for the most part the bishops had been

⁴⁶ A typical instance of Whitgift's "poor press" is in Edgar I. Fripp, *Condemnation of William Shakespeare, Man and Artist*, Oxford, 1938, 199, and Edward Arber, intro. to Thomas Copper's *An Admonition to the People of England*, English Scholars Library, no. 15, Birmingham, 1882, viii. Even Neale characterizes him as "the dour, unbending Whitgift," *Elizabeth and Her Parliaments*, 400.

⁴⁷ Albert Peel and Leland Carlson, *Cartwrightiana*, London, 1951, I, 21. On the strict surveillance of students at Trinity during Whitgift's mastership, Strype, *Whitgift*, 78; Tanner, *Tudor Documents*, 190. Coke was a student there at that time. One can speculate as to whether this was one of the causes of his extreme antagonism to Whitgift later on.

⁴⁸ Neal, *Puritans*, I, 157.

⁴⁹ *Ibid.*

⁵⁰ "Whitgift," *DNB*, XXI, 133. Though it had been acting as one for years, this commission (December, 1583) was formally set up as a court and had formal approval of its procedure to investigate under oath, which the ordinary bishops could not do. The authority behind the act was that of the Queen, Neal, I, 160. "Because many members of this commission were also members of the Privy Council, it enjoyed great authority, G. R. Elton, *England Under the Tudors*, 428.

lenient with the Puritans. This changed abruptly under Whitgift. He and the bishops would use the oath and "all other means and ways they could devise," so the authorization read, to bring order into the religious life. By the Queen's letters-patent, the commission, which had long acted as a court, was now formally constituted one. That meant in the England of 1583 a threat of fine, imprisonment, and even death.⁵¹

There was an immediate change in the Puritan attack. Where previously they had argued against the ceremonies of Anglicanism, the full force of their attack now would be directed against the hated oath.

By May 1584 Whitgift had drawn up twenty-four articles which were to be put to any Anglican divine suspected of Puritanism. Even where there was but a wisp of suspicion, men were cited before the commission and forced under oath to answer to their religious convictions and their conventicle activities.⁵² The Puritans made an immediate appeal to Lord Burghley. Ever since the Cartwright controversy of 1570, when he was chancellor of Cambridge, they had enlisted his support. Burghley cooperated; he wrote Whitgift and objected that the inquest of the commission smacked too much of the Inquisition.⁵³ He felt that such interrogatories were out of place for ordinary clergymen "except where they were very notorious offenders in Papis-try or heresy." However he left the final decision to the archbishop.⁵⁴

⁵¹ Neal, I, 161. Refusal to answer under oath implied guilt, *ibid.*; Tanner, *Tudor Documents*, 370; E. Cardwell, *Documentary Annals of the Reformed Church of England, 1546-1716*, London, 1839, I, 223. The official establishment of the Commission as a court caused consternation in Puritan ranks, but the oath itself was nothing new.

⁵² "Whitgift," *DNB*, XXI, 133. See the interrogatories in Strype, *Whitgift*, III, c. 8, 160; Tanner, *Documents of the Reign of James I*, 164-172.

⁵³ *DNB*, XXI, 133. Actually Whitgift's commission, as far as procedure was concerned, was more severe than the papal inquisition which required almost *prima facie* evidence of guilt prior to presentment; the latter followed a Roman law procedure. The Puritans vilified the commission: "And as for the commissary's court, that is but a petty little stinking ditch," McGinn, 346. In his objection Burghley's language was "exaggerated," Elton, *England Under the Tudors*, 428. Whitgift replied to Burghley that "it was under the Queen's charge and protection that he enforced the laws," Strype, *Whitgift*, III, 112; Dawley, 172.

⁵⁴ Strype, *Whitgift*, III, ap. 9; Tanner, *James I*, 168.

Whitgift lost no time in defending the oath. Two days later, July 3, 1584, he wrote Burghley and said that he was surprised by his attitude, for the procedure used in the commission was "the ordinary course of other courts likewise; as in the Star Chamber, the Court of the Marches, and other places."⁵⁵ He urged that it was a scandal that Anglican divines taught Calvinistic doctrines contrary to the very structure of the Anglican establishment which they were ordained to serve. He insisted that if the ordinary bishop had the right to reprimand them for such infractions, *a fortiori* this could be done by the archbishop, the "Delegatus per principem," the formally approved legate of the royal authority.⁵⁶ He defended the commission in another letter to Burghley, July 15, 1584: "If we proceed only by presentment and witnesses, then papists, Brownists and family men would expect like measure."⁵⁷ Even when put under pressure by men like Burghley, Whitgift was unbending. He prided himself on refusing to be "influenced by prominent men."⁵⁸

This is a crucial stage in the history of the privilege. The forces against the oath were coalescing. On November 14, of the same year, there appeared a public letter in favor of a Puritan divine, Barnaby Benison, who had been imprisoned because he refused to take the oath. Had it been just another Puritan letter, it would have attracted little attention, for England was flooded with their appeals to Parliament and to people of influence; but this letter carried the signatures of some of the most prominent men in the government, Warwick, Knollys, Mildmay, Walsingham, Bromley, Bedford, Leicester, Crofts, Hatton, Howard and

⁵⁵ Burghley had objected that the archbishop's questions were in "Romish style" and "to be executed *ex mero officio*"; he believed clergymen ought to be treated more kindly. Whitgift answered two days later, July 3, 1584, Tanner, *Tudor Documents*, 374; Prothero, 374.

⁵⁶ Whitgift wrote: "If it be said that it is against the law, reason and charity for a man to accuse himself, *quia nemo tenetur seipsum prodere, aut propriam turpitudinem revelare*, I answer that by law, charity and reason *proditus per denuntiationem alterius, sive per famam, tenetur seipsum ostendere ad evitandum scandalum, et seipsum pergandum. Praeterea, Praelatus potest inquirere sine praevia fama; a fortiori ergo Delegati per Principem possunt. Ad haec, in istis articulis turpitudinis aut flagitium non inquiritur circa publicam functionem ministerii, de quibus Ordinario rationem reddere coguntur*," Strype, *Whitgift*, III, c. 8, 160; Tanner, *James I*, 170.

⁵⁷ Letter of Whitgift to Burghley, July 15, 1584; Neal, I, 165.

⁵⁸ *Ibid.*, 168.

finally Burghley himself.⁵⁹ It had long been evident, even from the beginning of Elizabeth's reign, that the Commons was overwhelmingly sympathetic to the Puritan position; but the government had been able to side-track any action which would have terminated in bills against the establishment.⁶⁰ The November 14th letter, however, was one of the most evident proofs of an alliance between Puritanism and the Commons, an alliance which would ultimately bring about the rejection of the oath.

Accordingly, November 23, 1584, the Commons drew up a series of complaints against Whitgift's commission, Article eleven being of most interest:

Further, that it may please the reverend Fathers aforesaid to forbear their examinations *ex officio mero* of godly and learned preachers not detected [accused] unto them for open offense of life, or for public maintaining of apparent error in doctrine, and only to deal with them for such matters as shall be detected in them; and that also her Majesty's Commissioner for Causes Ecclesiastical be required . . . to forbear the like proceeding against such preachers, and not to call any of them out of the diocese where he dwelleth except some notable offense for reformation whereof their aid shall be required by the Ordinary of the said preachers.⁶¹

Whitgift and the bishops answered the same day. They declared that if there were no oath they could not protect the establishment, for how else could they get information about ministers and parishes secretly going Puritan: ". . . parishioners are so perverse that, though the minister varies the service of the

⁵⁹ *Ibid.*, 169. Walsingham was known to have been closely associated with the Puritans and was so denounced to Elizabeth, C. Reed, *Walsingham*, II, 259.

⁶⁰ Neale, 418. A typical reaction of the Commons is found in the reaction to the Lords' Seditious Bill (1581), when the Puritans saw clearly that the anti-Catholic bill reported out of Lords threatened not only the Catholics but the Puritans—"What sounded the alarm there was that it seemed to be even more dangerous to their Puritan friends," Neale, 394.

⁶¹ Tanner, *Tudor Documents*, 190. The Puritans were putting pressure on Parliament; "their agents were soliciting at the door of the House of Commons all day, and making interest in the evening at the chambers of Parliament men," Neal, I, 172. This pressure resulted in the *Thirty-four Articles of Complaint*, the eleventh of which cited the oath *ex officio*, *ibid.*, 173.

Church as by law appointed; they will not complain, much less be witnesses against him.”⁶² The same day Whitgift wrote the Queen that “there is likewise now in hand in the same house a bill concerning ecclesiastical courts and the visitation of bishops; which may react to the overthrow of ecclesiastical jurisdiction and study of the civil laws.”⁶³

Overlooking no avenue of redress, the Puritans even appealed to Whitgift himself, “who had a prevailing interest with the Queen.” They hoped that he would see their point and that he would not permit men to accuse themselves under the oath *ex officio*—“it being contrary to the law and liberty of the subject.” Whitgift refused to hear them, and the Queen would not even permit them to present their request.⁶⁴

By this time the oath had become a symbol of opposition. The Puritans saw it as an instrument of oppression in the hands of government, and above all in a government, imperfectly “purified.” Parliament considered the untouchable character of the oath, which was not even permitted to be discussed by it, a limitation on its “liberties.” The jurists, on the other hand, though they were not interested in religion, took a dim view of a commission which was consistently moving into areas of law previously the exclusive preserve of the courts of common law. Since common law judges shared in the fines collected by their courts, they viewed the commission in terms of their shrinking pocketbooks.⁶⁵ All these forces would do valiant battle against the oath, but without the religious zeal of the Puritans the cam-

⁶² Whitgift’s answer the same day (November 23, 1585) is in Neal, I, 173.

⁶³ Strype, *Whitgift*, 198; Neal, I, 174. Two years later, as the pressure continued, Whitgift accused the Puritans of making it their object “to erect a new popedom in everie parish, in advauncing of their new presbyterie,” Scott Pearson, *Cartwright*, 242.

⁶⁴ Neal, I, 175.

⁶⁵ “As soon as the High Commission became a regular court, it appeared as a rival jurisdiction which tempted the litigants away from ordinary courts; and as the salaries of the judges were largely supplemented from the fees paid by the suitors, the question was one in which they were personally interested. The principal points of attack were the right of the court to fine and imprison, and the legality of the *ex officio* oath,” Tanner, *Tudor Documents*, 362. The common law courts issued writs of objection to the procedure of the commission, as they had previously done against similar procedures of the Court of Requests, *ibid.*, 302.

paign would have failed.⁶⁶ Though the latter knew the dangers involved in refusing the oath, they took the chance and in doing so gained not ignominy but great prestige. They stood out "ardent patriots amidst dangers that exalted the spirit."⁶⁷

But the pressure of the commission was not stayed. On May 23, 1585, William, bishop of Chester, wrote the Earl of Derby that, whatever the objections, the Anglican church needed the extreme measures of Whitgift. He told of the increasing number of Catholic priests and of the almost general contempt of the people for the religious program of the government.⁶⁸ This same year saw numerous imprisonments of the Puritan clergy; Cartwright, Tanner, Gardiner, Weggington and others were in the Fleet. What tortured the soul of the Puritans was that wholly unqualified Anglican ministers of the lowest class enjoyed complete freedom to preach the Gospel while their own learned clergy languished in prison.⁶⁹

On January 23, 1586, the Star Chamber directed judges to show no mercy to any group which contributed to political and religious disorder. Whitgift said that the purpose of this order was "to render public criticism impossible." During the whole controversial period the Queen went right along with Whitgift's program. She believed in him implicitly, and she saw in his un-deviating devotion to her religious policy irrefutable proof of his

⁶⁶ T. P. Taswell-Langmead, 482, n. 1. The Commons sympathized with the Puritans and asked that more leniency be shown their ministers. Actually it was a question of who would hold the sovereign power, Parliament or Queen, Tanner, *Tudor Documents*, 51-52.

⁶⁷ Neale, 418.

⁶⁸ Letter of the Bishop of Chester, May 23, 1585, to the Earl of Derby, "The commissyon was never more needful, for the Contry is full of Semynaryes [priests], and the people are bolde and contemptuous," J. H. Pollen, *Unpublished Documents Relating to the English Martyrs, 1584-1603*, London, 1908, I, 110.

⁶⁹ Neal, I, 177-179. What annoyed the Puritans was that Anglican clerics of the lowest caste and utterly unqualified were allowed to preach the Gospel, while well-educated Puritan Clergymen were silenced and imprisoned, *ibid.*, 179. Church revenues were insufficient to provide the church with trained men. Dawley wrote, "The Church's revenues and properties already plundered by the commissioners of Edward VI beyond any significant repair by Mary Tudor, were still the object of continuous and thinly disguised robbery and extortion. In this the Crown was the worst offender. Elizabeth systematically bled the very Church she supported so firmly," *Whitgift*, 108.

loyalty to her. He became even more closely associated with her government when he was named to the Privy Council, February 2, 1586.⁷⁰

At the end of the following year, the Puritans again appealed to Parliament. They complained of the long imprisonment of their ministers who refused to take the oath when it was presented by the commission. These men knew that in the interrogatories prepared by the government there were matters with which they could never agree, and their unwillingness to accept the surplice and the *Prayer Book* automatically condemned them.⁷¹ So they simply refused to take the oath at all.

The defeat of the Armada in 1588 brought a period of relative calm. The pressure from the continent lessened. Holland was in friendly hands. The French were divided by the war of the Three Henrys. With the unrelenting oppression of the Irish chieftains, the island was secure in English hands. Finally, with James on the throne of Scotland, England was at last delivered from "the nightmare of the North."⁷² The Puritans thought it a good time to seek some concessions from the Queen; they begged her favor against the oath, the commission and the hated "Romish" practices of the Anglican church. They soon discovered that for them the situation had not changed at all. She answered them bluntly that she would tolerate "no meddling with affairs of religion without her special allowance."⁷³

They had actually chosen a bad hour. Despite her formal injunction forbidding printing to the Puritans, England had been flooded since 1588 with the *Marprelate Tracts* which openly attacked her religious policy. They were a reminder to her and to Whitgift, if they needed one at all, that for all their vigilance

⁷⁰ DNB, XXI, 133. "In his [Whitgift's] examination of prisoners he showed a brutal insolence which is alien to all modern conceptions of justice and religion," *ibid.*, 134.

⁷¹ Neal, I, 179-180.

⁷² Tanner, *Documents . . . James I*, 1-2. The defeat of the Armada brought little solace to English Catholics, even though they had pledged their loyalty to the Queen and "more Catholics were executed than in any other period of the same length," Pollen, *Unpublished Documents*, 150. In many of their letters of the period, they too object to the use of the oath *ex officio*, Pollen, *ibid.*, 325.

⁷³ Neal, I, 188.

they had failed to bring the Puritans under their control.⁷⁴ In retaliation, the government rounded up all Puritans in any way suspected of publishing the *Tracts*. Among those arrested was a John Penry, a clergyman who had been cited before the commission in 1587 for his *Aequity of an Humble Supplication* in which he objected to the very few Bibles allowed the Welsh by the government. He was executed in 1593 for his role in the *Marprelate* printing.⁷⁵ Another Puritan suspect was John Udall, minister of Kingston-on-Thames. He too refused to take the oath when questioned by the bishop of Rochester. There was nothing new in the fact that he refused the oath; what was new was the argument he used to justify his refusal. He appealed to freedom of conscience. He argued (undoubtedly under advice of counsel) that he could not take the oath because it was contrary to the tradition of the English common law. With this began a new type of argument against the oath which would culminate in Coke's *Third and Fourth Institutes*.⁷⁶

In the same year (July 6, 1590) Elizabeth warned James VI of Scotland of the Puritan threat: "they want to take our place while they enjoy our privilege."⁷⁷ By the fall of the year the commission proceeded with plans to summon Thomas Cartwright, the "Patriarch of the Puritans." This move created panic among the Puritans. Cartwright was at the top level of their activity; what he might be forced to confess could well ruin their cause. Special meetings were held to instruct him for his appearance before the commission. He was told to refuse to take the oath, though the committee agreed that he could answer certain questions previously submitted for his testimony.⁷⁸ The

⁷⁴ *Ibid.*, I, 189.

⁷⁵ A detailed account of Penry's presses is in John Waddington, *Life of John Penry*, London, 1854.

⁷⁶ Neal, I, 190-191; *State Trials*, I, 167-188, 32 Eliz. July 24, 1590. In these reports of trials, it is difficult to say whether a person was being questioned before the commission, the council or the Star Chamber, for frequently the same men sat in all three courts, Holdsworth, V, 193, n. 8 *ad finem*; Wigmore, "The Privileges," 5 *Harvard Law Review* 629 (1891-1892).

⁷⁷ John Bruce, ed., *Letters of Elizabeth and James I*, Camden Society, 1849, 63-64.

⁷⁸ Cartwright was called "the Patriarche" and "Chiefest counsaylor" of the Puritans, Scott Pearson, *Cartwright*, 270. He had a sense of the impending danger. His imprisonment was a staggering blow to the Puri-

Puritans by this time were getting excellent counsel in matters pertaining to the oath. But it became increasingly evident that they had to avoid the oath, for certain Puritan clergymen had taken it and confessed to activities which involved not only the brethren but their supporters in Commons.⁷⁹

At this very time, Mr. Cawdry, minister of Liffingham, Suffolk, was brought before the commission and refused the oath.⁸⁰ His counsel argued that the commission could not pry into religious matters, for though the Queen herself was legally competent to do so, she could not delegate such authority.⁸¹ On this occasion the royal lawyers introduced a new argument in defense of the oath. They began to argue from the curious legal position that the commission's authority was "built upon the old canon law still in force."⁸² Now, certainly Elizabeth never believed this, nor did Whitgift, for they knew well that the authority behind the oath, just as the authority behind the oath in Star Chamber, was the royal prerogative. This new kind of argument would ultimately ruin the royal cause in religion, for it paved the way for that battery of unhistorical legal arguments which sought either to uphold or condemn the commission and the oath in terms of legal precedent.⁸³

ran cause, *ibid.*, 317. He refused to take the oath, when first questioned, because it was to be taken "without all limitation," *ibid.*, 329. His friends were even more adamant and they too were imprisoned, Neal, I, 194. By this time the Puritans were getting expert legal advice in their opposition to the oath. Cartwright objected to it because his councillor told him that it was contrary to the common and ecclesiastical laws of England and that it was contrary to conscience. He insisted also that a man would be a fool to take the oath because of the dire effects that could follow from it, such as the ruin of a man's good name and the violation of a man's private rights, Peal and Carson, *Cartwrightiana*, I, 31-40. In May, 1591, Cartwright again refused to take the oath before the High Commission. Such a refusal made it impossible for the court to operate, and this was one of the weaknesses of its procedure, Scott Pearson, 328. In later years, any refusal was taken as a sign of guilt, *ibid.*, 330.

⁷⁹ Neal, I, 196.

⁸⁰ *Ibid.*, I, 195.

⁸¹ *Ibid.*, I, 161.

⁸² *Ibid.*, I, 196.

⁸³ There was at this time a fundamental change in the Puritan argument. Where previously they had argued that the royal prerogative could not authorize the oath, now they began to argue that it was against the common law and appealed to the Roman Catholic canon law in effect

By the 1590's the government certainly interpreted the Puritan program as a program of sedition. In 1592, when Cartwright and his followers sought freedom on bail, the government was agreeable provided that the ministers signed a statement in which they were in accord that all assemblies that sought to change the existing religious laws *sine permissu reginae* were seditious. They were also to agree that the government was lawful according to the Scriptures, that Presbyterianism was unlawful and dangerous, and finally that no Calvinist had the right to excommunicate the Queen. Cartwright and the ministers would not sign the statement.⁸⁴ In the eyes of the government, such a refusal implied treason.

In their defense against the commission investigating the *Marprelate Tracts*, the Puritans enlisted the support of James Morrice, attorney of the Court of Wards, who had repeatedly written against the legality of the oath. Morrice's main argument was in terms of historical precedent. He stated that the oath "was against the popes' decretals except in heresy."⁸⁵ In February, 1593, Morrice sought to introduce a bill into the Commons which would have limited the authority of the commission. During the debate, the Queen heard of the bill. When Edward Coke, the speaker, requested the routine freedom of speech, the Queen granted it, but then she brought up the religious question. "Privilege of speech is granted," she said, "but ye must know what privilege ye have; not to speak everyman what he listest or what cometh into his brain to utter; your privilege is *Ay* or *No*." Later she summoned Coke and ordered the imprisonment of Morrice for his remarks against her religious authority.⁸⁶

prior to the Reformation, in which the oath was authorized only in cases involving wills and marriages, Corwin, "Self-Incrimination Clause," 6. Coke followed the same trend at the time (1589).

⁸⁴ Scott Pearson, 327.

⁸⁵ S. D'Ewes, *A Complete Journal of . . . both the House of Lords and the House of Commons throughout the Whole Reign of Queen Elizabeth . . .*, ed. 1693. Coke was speaker on this occasion, Neal, I, 197.

⁸⁶ *Ibid.*; on the question put to Cartwright and his followers, Scott Pearson, 356. Here again the common law jurists join with the Puritans. Camden wrote that "*contra homines regni leges in foris ecclesiasticis indigne opprimi; Reginam eiusmodi auctoritatem spiritualem ex iure non posse deligare nec alios exercere delegatam; fora illa non posse a reo iusiurandum ex officio exigere, cum nemo seipsum accusare teneatur; iusiurandum illud homines ad sui condemnationem cum ignominiosa confusione,*

The Commons were aroused. They had been discussing their role in the Elizabethan religious settlement and they feared that this abrupt interference of the Queen would result in their being forbidden to treat the subject at all. Though it is very difficult to say just what the rights of the Commons were in this matter, they did receive at the moment strong support from the common law judges whose *Remonstrance* to Chancellor Hatton and to Burghley stated that the action of the commission was violating *habeas corpus* and was operating against the common law.⁸⁷

The various attempts to find some precedent against the commission finally did weaken its authority. Yet for all the legal research of the jurists, they would never have succeeded but for the religious zeal of the Puritans. They were given to compromise, the Puritans were not. After 1596 numerous "stays" and "exceptions" were granted by common law judges against the subpoenas of the commission. Whitgift in turn fought to prevent such actions and drew up a lengthy list of cases in which the commission and the church courts had been frustrated by such technicalities. However the "stays" continued to be issued not only under Whitgift but under his successor, Bancroft. Only

vel in spontaneum periurium cum animarum exitio praecipitare; praeterea de allis quam matrimonialibus et testamentariis causis non debere cognoscere . . ." *Annales* [ad an. 1591], 38. In the same section, Camden wrote that the Puritan opposition was contrary to the very prerogative of the Crown, and that there was no doubt at all that the ecclesiastical courts could treat of matters other than matrimonial and testamentary under oath, and he applauded the Queen that she managed under such pressure to maintain the royal and ecclesiastical authority inviolate, *ibid.*

⁸⁷ Taswell-Langmead, *English Constitutional History*, 482-483. The Commons were most concerned about what they held was a violation of their rights, and they cited many flagrant abuses. The question is whether actually there were more abuses at the end of the reign or whether the Commons felt itself strong enough to object during Elizabeth's declining years, see *Remonstrances of the Judges* to Sir Christopher Hatton, the Lord Chancellor, Sir William Cecil, and Lord Burghley, *ibid.*, 485-486. There is a record (March 14, 1594) of a priest, Father Ingrams, who according to the notary's report refused "to submyt him selfe acc. to ye statute. He will not tell with whom, in whose house, or in what place of Scotland he hath bene . . . He answereth the truth is not to be told at all tymes, & yt ys a point of honestye not to disclose any, where harm may come to them . . ." Pollen, *Unpublished Documents*, 243.

Laud would put an end to such obstructions.⁸⁸ During the struggle, Whitgift discovered treason in his own ranks: some of the Anglican bishops connived at such interventions and thus prevented the commission from employing the oath.⁸⁹

From his earliest days as archbishop, Whitgift had tried to prevent the coalition of the Commons and the Puritans. He spent the entire summer of 1584 in an effort to block the introduction into the autumn Parliament of any bills touching on religion. He fought to keep the Puritans out of the House where they frequently staged demonstrations to influence the members.⁹⁰ Elizabeth cooperated to the fullest in Whitgift's program: even as late as November, 1597, she refused the Commons any permission to discuss questions of religion.⁹¹

At the end of the reign, prosecution of the Puritans somewhat subsided. Neal remarks that "the combattants were out of breath." But, he argues that the main reason for the more lenient attitude was the fear on the part of the bishops that James might not support them. The Scotsman would soon be king of England; Elizabeth was dying.⁹² To the very end however she used every means at her disposal to protect her religious settlement. What gave her greatest cause for concern was the different mind, the changed mentality, that seemed to prevail in England since the defeat of the Armada; there was "a new buoyancy and self-confidence . . . in the English mind." As Tanner observes, "We might almost say that from the Armada the glory of Elizabeth begins to wane."⁹³

⁸⁸ Neal, I, 212.

⁸⁹ *Ibid.*, I, 211. Considering the activities of Puritan groups relative to the oath during the decade (1593-1603) one questions Dawley's statement that "the decade of conflict that closed in 1593 brought an end to the Puritan challenge to Elizabeth's ecclesiastical settlement," *Whitgift*, 186.

⁹⁰ Neal, I, 212; S. D'Ewes, *Complete Journal*, 474-478; Tanner, *Tudor Documents*, 572-573.

⁹¹ Elizabeth repeated this prohibition, November 16, 1597, and November 16, 1601, D'Ewes, 557, 640-649; Tanner, *Tudor Documents*, 638-641. During the summer of 1597, Whitgift worked incessantly to prevent the forthcoming Parliament of October 24, from handling any religious matters; he also sought to keep the Puritans out of the Commons, Neal, I, 212.

⁹² Neal, I, 212. Nonetheless Parliament in 1601 still continued to object against the oath, *ibid.*

⁹³ Tanner, *Tudor Documents*, 558. Eleton shows the decline of the Queen's

Though there was a changed atmosphere during the last years of Elizabeth, the Puritans still urged their program. As late as 1601 they campaigned against the oath. In the Essex rebellion (February 7, 1601) certain Puritans had been involved and the party strove to release them from prison for fear that they would be subjected to the oath.⁹⁴ On the other hand, Whitgift too carried his battle down to the wire. On Elizabeth's death, the lines were clearly drawn. The struggle against the oath would provoke a head-on clash between Crown and bishops on one hand, and Puritans and Commons on the other.

Any discussion of the attack on the self-incriminatory oath necessarily involves Sir Edward Coke. Few jurists were so instrumental in its destruction. Born in 1552, Coke had attended Trinity College, Cambridge, when Whitgift was master. He was there too when Whitgift suspended Cartwright, and he knew the severity of the future archbishop.⁹⁵ If perchance he did not know it then, he knew it well later in life. Though his friendship with Burghley, Coke advanced rapidly in politics and after 1589 was elected to the Commons on numerous occasions. During this period he became speaker. Coke relayed to the Commons the answer of Elizabeth when she forbade them any discussion of the religious question on the occasion of the Morrice incident. He was considered the most outstanding lawyer of his time, and became Chief Justice of the Common Pleas in 1606, and eleven years later Chief Justice of the King's Bench.

During his early years in the Commons he clearly saw the delicateness of the religious situation. As speaker he was reluctant to bring it out into the open, though at heart, he, like so many members of the Commons, was in complete sympathy with

authority towards the end of the reign, *England Under the Tudors*, 462-463. He rejects the idea that the last four Elizabethan Parliaments manifested a new spirit of independence, and prefers to argue that there was a growing feeling that the younger generation ought to have its say, *ibid.*, 466.

⁹⁴ The Essex Rebellion (February, 1601), which implicated some of the Puritans, brought another attack on the oath. The Catholics took a dim view of the efforts of the Puritans to obtain the privilege, for they argued that the former sought it exclusively for themselves, *An Open Letter to the Queen*, (1600) in *Unpublished Documents*, 383. Cartwright defended this Puritan position, Scott Pearson, 91.

⁹⁵ *DNB*, XXI, 135; and esp. Tanner, *James I*, 146.

the Puritans. He openly declared however that he would not consider arguments against Whitgift and the commission without the permission of the Queen. When this was sought, she forbade him ever to mention the matter again.⁹⁶

The strong personal feeling of Coke against the oath is associated with his own clashes on a non-official level with Whitgift. He felt deeply the suspension of Cartwright at Trinity; he knew the entrenched position of the archbishop with the Queen. Coke was anything but a religious man, and cared little about Anglicanism, but whether he lived it or not the establishment became a factor in his own life. He ran afoul of ecclesiastical law on the occasion of his secret marriage with Lady Elizabeth Hatton, Burghley's granddaughter, and Whitgift brought him to his knees. But this was something Edward Coke could never bear with equanimity. Long known for his uncontrollable rancor and bitterness—witness his disgraceful conduct later in the Raleigh, Essex and Southampton trials and the Gunpowder Plot—his clash with Whitgift over his marriage made him a mortal enemy of the archbishop.⁹⁷

Coke had attacked the commission in the Cawdrey Case in 1591, and he revealed on that occasion the procedure which he would later make use of against the oath. He argued that an ecclesiastical commission had no right to imprison, because it did not have such power by the Act of Supremacy or by the com-

⁹⁶ *DNB*, IV, 685.

⁹⁷ *DNB*, IV, 686 on Coke's violence. Stephens says that what was weak in evidence, Coke supported with rancor, *Criminal Law*, I, 333. His brutality and vindictiveness in the Raleigh, Essex and Southampton trials were matters of public knowledge, *DNB*, IV, 686. Coke's marriage was ecclesiastically irregular because it had been performed in a private dwelling, without publication of the banns, and without license. Because of this he was prosecuted by Whitgift. Coke was a mortal enemy of Bacon, his early rival for the hand of Lady Hatton, who supported her in her opposition to the marriage arranged by Sir Edward of their daughter to Sir John Villiers, brother of Buchingham. Coke forced the marriage through and it ended in disaster. It is generally accepted that Coke acted as a gentleman for the first time in his life on the occasion of the attainder of Bacon in 1620, when he took no advantage of his enemy, *DNB*, IV, 692. Catherine D. Bowen's *The Lion and the Throne, The Life and Times of Sir Edward Coke (1552-1634)*, Boston, 1957, for all the recognized ability of the authoress to weave an entrancing story, needs serious criticism as far as the law of the time is concerned.

mon law which forbade imprisonment to church courts. He insisted that the commission was a "statutory court" and not based on the royal prerogative. It was, according to Coke, an ancient court, based on an ancient law, merely operating in new circumstances. He contended that the Act of Supremacy had merely "restored" the old jurisdiction, "ecclesiastical and spiritual," to the crown.⁹⁸

It will be recalled that in the Cawdry Case even the jurists of the Crown, in an astounding change of argument, used this same historical approach, namely, that the commission had authority only in terms of "the ancient prerogative and law of England."⁹⁹ This argument that the rights of the commission were based on old law and not new prerogative would be repeatedly used by Coke under James. He took this tack in his arguments of 1606 and 1611, and he developed it in his *Fourth Book of the Institutes*, which however was printed only posthumously. Equipped with this argument, the courts at Westminster began using the *habeas corpus* to free men imprisoned by the commission.¹⁰⁰

Coke's opposition to the oath was not based on religious conviction. Like Cotton, Clarendon, Camden, Jonson, Ussher, Hales, and Selden, he was typically Erastian. For them religion was a matter of government, but the question was which government, Crown or Parliament.¹⁰¹ Even when he argued against the oath, Coke never said that the oath as such was illegal, but only that it was illegal for the Crown to use it. He held that it was valid only if administered by Parliament and that even the

⁹⁸ Tanner, *Tudor Documents*, 373, gives his position in the Cawdry case. On his arguments that the commission was a statutory court, and not based on the royal prerogative, Maguire, "Common Lawyers," 217. Neale observes that at this critical moment of the controversy the Puritans (and Coke) had "little historical sense and a convenient memory for precedents," *Elizabeth and Her Parliaments*, 218.

⁹⁹ Tanner, *Tudor Documents*, 362.

¹⁰⁰ *Institutes*, IV, c. 74; Prothero, 404-407. Coke identified the English common law with reason and the *lex naturae*, Elton, 401.

¹⁰¹ W. K. Jordan, *Development of Religious Toleration in England, 1603-1640*, Cambridge, 1936, 479-481. He insisted that "the civil courts ought to have a care of the peace of the Church," *ibid.*, 118-119. He argued that the ecclesiastical laws of the bishops were controlled by common law and statute, W. Notestein, F. Relf, H. Simpson, *Commons Debates 1621*, New Haven, 1935, V, 72.

bishops were directly subject to parliamentary authority. As to the oath, he wrote, "There is an act of Parliament for it," and he stated that he did not oppose its use only its abuse—"non tollere usum sed abusum."¹⁰²

Coke's appeals to legal precedent in his defense of the common law courts and the right of Parliament to control the oath ring a false note. He made use of medieval precedents, but twisted them to fit his cause. "As inaccurate as he was garrulous," he often argued without any true regard for legal accuracy, with the result that today one is forced to suspect him constantly.¹⁰³ He is accused of having invented precedents and making history support him in questions wholly unrelated to the past.¹⁰⁴ But that concerned him little. His favorite expression was, "Out of the old fields must grow new corn."¹⁰⁵ Yet in this he was not singular; his spirit reflected that of Commons, which Neale describes as being guided by "precedent-quoting, wishful thinking."¹⁰⁶

¹⁰² Notes of Sir Thomas Barrington in the Commons, *Commons Debates*, III, 263. He held it was legal if imposed on clerics and some laymen, but not on all laymen, and only if it were used by a civil, not an ecclesiastical court, *ibid.* Coke sought the control of the oath by Parliament not by the Crown. On May 15, 1621, he was reported as saying, "No man speaks against the jurisdiction but the corruption of spiritual oaths. *Qui tollit abusum confirmat usum.* For the oath *ex officio* there is an Act of Parliament that they may give it . . . and herein the ancient common law agreeth with the canon law," "Anonymous Journal," *Commons Debates*, II, 370. One of the most confusing arguments in legal history is that used by Coke to justify parliamentary control of the ecclesiastical courts and the oath *ex officio*. Though one may respect A. L. Rowse's work on Elizabethan history and his enthusiasm for Coke in the battle against the oath, one can scarcely subscribe to his characterization of him as "essentially historical," *The England of Elizabeth*, London, 1951, 376. Rowse does describe Coke's view of the Middle Ages as "extremely tendencious, but the *tendenz* was good," *ibid.*, 379; but this looks astonishingly like the end justified the means. Curiously, during the period when he was fighting the use of the oath, Coke was a member of a Commons' committee which demanded that James I be more diligent in his use of it against Catholic recusants, *Commons Debates*, II, 26 n.; also *DNB*, IV, 692.

¹⁰³ Jeremy Bentham, *Rationale of Judicial Evidence*, London, 1827, V, 264 n.

¹⁰⁴ *Commons Debates*, II, 194, n. 33.

¹⁰⁵ Holdsworth, V, 478. True, Coke had the greatest reverence for the common law, but he was not singular in this, *DNB*, IV, 695. He considered the common law a "mystery," and himself its greatest discerner, G. Sabine, *History of Political Theory*, New York, 1937, 451.

¹⁰⁶ Neale writes of the "precedent-quoting, wishful-thinking House of

With all his complex argumentation, Coke was a veiled enemy of the monarchy, a staunch defender of the rights of Parliament and the courts of common law. The High Commission was a prerogative court and a threat to his own judicial position as a common law judge; it essentially ran counter to his own self-interest.¹⁰⁷ Yet his personal contribution to the final elimination of the self-incriminatory oath, whether his arguments were based on good law or bad, cannot be overestimated.

With the accession of James I, the attack on the oath entered a new phase. Even before he arrived in London, the Puritan party had presented him with the *Millenary Petition*, directed against the doctrine and ritual of the Anglican church and against the oath *ex officio*.¹⁰⁸ James answered the *Petition* at the Hampton Court conference, January 18, 1604. His observations on that occasion were a bombshell to the Puritans, for he strongly defended the episcopacy and the oath. In his *Sum and Substance of the Conference*, Barlow wrote that "His Majesty so soundly described the oath *ex officio*; first for the ground thereof; secondly, the wisdom of the law therein; thirdly, the manner of pro-

Commons of Elizabethan times, whose fantastic notions about the antiquity and powers of Parliament were the prop of their adolescent egoism" *Elizabeth and Her Parliaments*, 407.

¹⁰⁷ On the occasion of the Bates Case under James, Coke feared that by that time the doctrine of absolute power had penetrated into the courts, actually James was according to Tudor precedents quite within his power to levy a tax on currants, Tanner, *James I*, 337-338. On March 13, 1621, Coke "sayeth that for the good estate of the realm King Alured had twice a year Parliaments at London and in other places, yet since Parliaments have been used very rarely, to the detriment of the subjects," "Anonymous Journal," *Commons Debates*, II, 211. As to the self-interest of the common lawyers, Tanner observes that "as soon as the High Commission became a regular court, it appeared as a rival jurisdiction which tempted litigants away from the ordinary [common law] courts; and as the salaries of judges were largely supplemented from the fees paid by the suitors, the question was one in which they were personally interested," *Tudor Documents*, 362. This had also been the basis for the attack of the common law judges and lawyers against the Court of Requests; it had become a competitor for fees, *State Papers Domestic*, H VIII, iii, 571; Tanner, *Tudor Documents*, 302. This was also the reason underlying their attack on the Chancery, which greatly expanded in the number of cases which it handled during the sixteenth century; but, despite the pressure, it was not abolished, Elton, 413.

¹⁰⁸ *Millenary Petition*, April, 1603; The ministers asked "that the oath *ex officio* be more sparingly used," Neal, I, 228; Tanner, *James I*, 59.

ceeding thereby, and the necessary and profitable effect thereof, in such a compendious but absolute order that all the Lords and the rest of the present auditors stood amazed at it . . .”¹⁰⁹ Whitgift who was there was so transported with joy at this formal approval of the commission and the oath that he cried out, “Undoubtedly your Majesty speaks by the special assistance of God’s Spirit.”¹¹⁰ The archbishop did not enjoy for long the royal approval; he died at the end of the year and was succeeded by Bancroft, who until then had been bishop of London.¹¹¹

After the *Millenary Petition* and its failure, the next move against the oath came from Parliament. In *A Formal Apology and Satisfaction to be Delivered to His Majesty*, a committee of the Commons stated, March 19, 1604, that neither James, nor any king, nor any man had the right “to alter religion” or “to make laws concerning the same otherwise than, as in temporal causes, by consent of Parliament.”¹¹² Parliament was becoming more articulate; it would never have used such language under Elizabeth.¹¹³

The bishops considered this interference of the Commons a threat to their own religious authority. They diligently sought to keep religion out of secular hands. However they soon discovered that the Commons were in no mood to withdraw their assertions. In fact, in 1604 and again in 1606, Parliament passed bills “to restrain the execution of canon ecclesiastical not confirmed by Parliament,” and even though these bills were rejected by the Lord Chancellor because of the opposition of the bishops, the pressure was definitely on.¹¹⁴

¹⁰⁹ Tanner, *James I*, 68. James supported the hierarchy because it was the strongest support of the crown, Taswell-Langmead, *English Constitutional History*, 508. Some of the Puritans opposed the Hampton Court conference because they asserted that the ministers had not been chosen by a representative group of the Puritan party, Neal, I, 234.

¹¹⁰ Neal, I, 233.

¹¹¹ *Ibid.*, I, 240.

¹¹² Taswell-Langmead, 515.

¹¹³ It was quite evident that Parliament felt that it could act with more recklessness against the “foreign” James. This feeling towards the foreigner was evident even as early as 1563 in the Commons, see speech of Sir Ralph Sadler, Neale, 104.

¹¹⁴ Tanner, *James I*, 230-231. The suspensions of clergymen continued under Bancroft. Many were removed because of their refusal to take the oath, Neal, I, 242-244. In 1606 the judges reported that the com-

One of the strong arguments pushed against the commission was that it used not only religious but secular authority. In the summer of 1607 certain Puritan members argued that the bishops were not observing "as they were bound to do" the statute of 13th Elizabeth on the religious settlement; and they objected to the oath as "being a hateful thing and unlawful" and "contrary to the laws of England."¹¹⁵ Bradshaw shows the Puritan attitude at the time:

They hold the oath *ex officio* on the imposer's part to be most damnable and tyrannous, against the very law of nature, devised by Anti-Christ, through the inspiration of the devil, to tempt weak Christians to perjure themselves, or be drawn to reveal to the enemies of Christianity those secret religious acts which, though done for the advancement of the Gospel, may bring on themselves and their dearest friends heavy sentences of condemnation from court.¹¹⁶

Parliament again urged that the bishops were exercising civil power. Their attack was not directed against the oath itself, for they knew well that the oath was common enough in the proceedings of the Council even prior to 3 H VII c.1, which reorganized the Star Chamber. They objected to a religious tribunal using it. Even Coke admitted this.¹¹⁷ On the other hand, the

mission did not have the right of imprisonment, Tanner, *James I*, 147. The documents show that the judges feared burning for heresy, and appealed to the old canon law which forbade the administration of physical punishment by church courts, *cf.* Petition of Grievances (1610). They argued that in one and the same sentence the commissioners were treating both civil and religious matters, Tanner, *James I*, 152. In 1607 Coke made "his most weighty assault" on the oath when, as Chief Justice of the Common Pleas, and in conjunction with Popham, Chief Justice of the King's Bench, he justified the stand of the Commons that the oath was permissible in English law only in cases involving wills and marriages, Corwin, "Supreme Court's Construction," 7. He held that it could be used against the Catholics, who, if they refused to take it, became liable to *praemunire*, Jac. I. IV. 8-9; Prothero, 258-259; also Jac. I. VI. 3-4; Prothero, 273-274.

¹¹⁵ Neal, I, 253.

¹¹⁶ *Ibid.*, 249.

¹¹⁷ See *supra* n. 6 on the accepted legality of the oath in Star Chamber (3 H VIII, 1) and its prior use in certain English procedures. Coke had often been present in Star Chamber when the oath was used, *Commons Debates*, II, 472; V, 211, 422. He admitted that the court

Puritan opposition, which the Commons chose to support, though for a completely different reason than that which inspired the religionists, contended that any civil agency outside of the presbytery had no rights whatsoever in religion and interfered with religion contrary to God's laws.

On May 24, 1610, a petition against the commission and the oath was circulated in the Commons. Therein it was stated that the bishops were "exercising other authorities not belonging to the ecclesiastical jurisdiction," and that there was no appeal from the commission "though there was appeal from civil courts."¹¹⁸ This petition became the basis of a formal appeal to the king, July 7, 1610. The Commons stated that one of their grievances was "that thereby [in the commission] the same men have both spiritual and temporal jurisdiction and may force the party by oath to accuse himself of any offense and also inquire thereof by jury . . ." They continued that the Commons considered it "unreasonable to enforce a man upon his own oath to accuse and expose himself to those punishments . . ."¹¹⁹

Whatever reasons were brought forward in this controversy concerning the oath, the true problem was one of power. No matter how often the oath and the commission came up for discussion, they were secondary issues. Parliament was perfectly willing to have either or both as long as Parliament administered them. The crucial question was whether the king, whom Bancroft had said possessed all the authority in the church possessed by the pope, was to enjoy his royal prerogative or be a "king in Parliament" with the final authority in the latter.¹²⁰ James was not slow to see that the attacks against the bishops and their courts were attacks against himself. He had to defend the oath and the commission or his own authority would be reduced to nothing.

In October, 1610, in the face of Puritan and Parliamentary opposition, the king imposed "episcopacy" on the Scottish

and its procedure were not new in English law, Tanner, *Tudor Documents*, 291. He was high in praise of the court, even though it did use the oath *ex officio*, Elton, 415.

¹¹⁸ Neal, I, 254.

¹¹⁹ Prothero, 303-304. This did not hold for English Catholics, *ibid.*

¹²⁰ R. Bancroft, *A Survey of the Pretended Holy Discipline*, 1592, 291; Hooker, *Ecclesiastical Polity*, VII, ii, 14.

church.¹²¹ The following year he again approved the commission and allowed it to continue using the oath saying that:

. . . If any person shall refuse to take the said oath in the cases aforesaid or having taken the oath shall refuse to answer upon their oath directly and fully unto the articles and matters objected against them, then it shall be lawful to you . . . to apprehend . . . such persons.¹²²

There was little change in the position of either side to the end of the reign. Puritan ministers continued to be cast into prison, and the bishops defended their rights and the divine origin of their office. Parliament continued to characterize the oath and the commission as instances of excessive and illegal use of royal authority.¹²³ This was the situation until 1640.

During the 1630's Puritan ministers were suspended from their parishes, and numerous "informers" under oath revealed the main cells of the Puritan opposition.¹²⁴ Parliament now openly stated that the commission operated with parliamentary and not royal authority; therefore it could regulate all ecclesias-

¹²¹ Neal, I, 257.

¹²² The question is discussed in Patent Roles, 9 Jac. I pt. 18 and again mentioned in those of 1618 and 1625; for James' statement, *ibid.*, 425; Prothero, 424-425. James permitted the use of the oath only after a person was reasonably suspect. This was in accord with the tradition of Roman law procedure and that used by the old canon law, A. H. Feller, "Self-Incrimination," *ESS*, XIII, 652.

¹²³ The oath and the commission continued to be a serious problem. Mr. Arthur Hildershaw, a non-conformist minister, refused the oath in 1615 and was imprisoned by the commission for three months; John Selden was made to appear before the commission because of certain statements in his *History of Tithes*, Neal, I, 266. The Puritans objected in 1617 that "the King is so full of his prerogative" that they could make no headway against the commission, Neal, I, 260. On May 15, 1621, the town of Northampton petitioned against John Lambe, chancellor of the bishop of Peterborough who made use of the oath *ex officio* "only upon the Judge's suspicion" with the result that the defendant was unjustly burdened with expensive appeals, *Commons Debates*, 1621, VI, 471-473. The same day in the Commons, Sir Benjamin Rudierd argued that because of the threat of the oath worthy clergymen were deprived of their holdings, while wholly unlettered men were permitted to occupy pulpits. Under Charles I the Puritans continued to argue that the commission and the oath violated the common law, was "worse than the Roman Inquisition," and had no right to fine at all, Neal, I, 280-281.

¹²⁴ For instances of suspension from office, see Neal, I, 316, 317, 318, 319; the activity of informers is described, *ibid.*, 321.

tical affairs. Archbishop Laud, now the great enemy of the Puritans, took a further step and persuaded Charles to grant the bishops the right to hold courts in their own name and not simply as delegates of the royal authority. In answer the jurists appealed to the medieval common law which forbade the bishop to use the oath *ex officio* except in matrimonial and testamentary cases, or by letters-patent, or by special commission under the great seal.¹²⁵

The struggle against the oath was nearing an end, and the two strong forces ultimately involved, King and Parliament, arrayed themselves for battle. Now it was clear that from the beginning the whole question had been one of royal or parliamentary authority.

Almost on this very eve of the abolition of the oath, the *Lilburne* case broke. John Lilburne, apparently a former clerk of William Prynne, was brought before the Star Chamber in 1637 for distributing *The Litany* and other writings of Prynne and Bastwick against the bishops. Lilburne refused to take the oath for he did not wish to inform on the others. He was sentenced in Star Chamber in February, 1638, and ordered to pay a fine of 500 Pounds.¹²⁶ Lilburne's case, actually of minor importance in the long struggle against the self-incriminatory oath, became something of a *cause célèbre*. The Commons held that

¹²⁵ On the reaction to Laud, Neal, I, 323-324. Pym in the 1630 Parliament insisted that the commission was purely and simply a tool of Parliament—"as for the High Commission it is derived from Parliament," Neal, I, 292. Under fire with the commission were the Anglican bishops because of their apparent sympathy for "romanism," Neal, I, 302. There was a violent reaction in Scotland after the promulgation of the change in the liturgy in the Kirk by Charles, July 23, 1637. In the assembly of the Scottish church, November 29, 1638, protests were made against all the innovations of Laud, against episcopacy and ordinations, and against the commission, Neal, I, 338. Charles would not agree that the commission was contrary to the laws of the realm, *ibid.*, 342.

¹²⁶ Neal, I, 329. Lilburne refused the oath because he did not wish to inform on others. However, he admitted that had he been indicted he would have answered, Corwin, "The Supreme Court's Construction," 8. Griswold certainly exaggerates the importance of Lilburne in the struggle against the oath; he writes, "It seems quite clear that we owe the privilege of today primarily to 'Freeborn John Lilburne,'" Edwin N. Griswold, *The Fifth Amendment Today*, Cambridge, 1956, 3. One of the most recent accounts of Lilburne's activity is in Joseph Frank, *The Levellers*, Cambridge, 1955, 12-28.

his fine and imprisonment were contrary to English law. Later in 1646, though by that time they were anything but sympathetic to the cantankerous John, they reimbursed him to the extent of 3000 Pounds.¹²⁷

The crisis came in 1640. It was almost inevitable. Faced with the Scottish war, the king could get no supply. Mobs prowled through London; disorder was rampant. Gangs gathered outside the Court of the High Commission, shouting, "No bishops, no High Commission."¹²⁸ By the end of the year the Commons was in open revolt; they denied the divine origin of the episcopacy and Laud became the object of the most vile vituperation. The speaker, Sir John Harbottle Grimstone, described him as "the very sty of all pestilential filth that had infested government."¹²⁹ Debate in the Commons contrasted the lordly bishops of the day with those bishops of the early church who were elected by the people and "who did not proceed against criminals but with the consent of their presbyters, and upon the testimony of several witnesses; whereas ours proceed by the oath *ex officio*, by which men are obliged to accuse themselves."¹³⁰

Charles was defeated and agreed to abolish the Star Chamber, the High Commission and the oath. After August, 1641, they were no longer part of the English legal structure.¹³¹ But

¹²⁷ Corwin, 8; William Haller, ed., *Tracts on Liberty in the Puritan Revolution, 1638-1647*, New York, 1934, I, 13.

¹²⁸ Neal, I, 344.

¹²⁹ *Ibid.*, I, 357.

¹³⁰ *Ibid.*, I, 366. Previously Neal wrote that one of the first acts of the 1640 Commons was "to reduce the powers of the spiritual courts . . . and to bring them to a parliamentary standard," *ibid.*, 362. In his comments on the acts of the 1640 Parliament Neal gave the Puritan position on the commission; he argued that ecclesiastical laws in Saxon times were confirmed by peers and representatives of the people; to these great councils Parliament succeeded, and it was composed of laymen and ecclesiastics; when the clergy withdrew in convocation and enacted laws without king and parliaments "during the reign of popery" all their acts were illegal; finally, Parliament never once gave up its right to control all ecclesiastical law in England, *ibid.*, 353.

¹³¹ Neal, I, 387; William Haller, *Rise of Puritanism . . . from Thomas Cartwright to John Lilburne and John Milton, 1570-1643*, New York, 1938, 326. As Maitland and Montague observe, "The ecclesiastical courts had been reduced to dignified impotence," *Sketch of Legal History*, 131. During this crucial period when the Puritans were gaining the privilege for themselves, they still insisted that Charles use it against

their revocation was the end of true royal authority in England. Yet all this was somewhat anticlimactic, for with the execution of Stafford, the king's trusted adviser, Parliament had already won the battle. If Charles could not protect such a man, neither could he protect the bishops, the commission, the oath or his prerogative.¹³²

The privilege—actually it should be called the right—against self-incrimination thus became part of the English law for most Englishmen in 1641. The restatement of it in the Bill of Rights of 1689 added nothing new. From this source it entered into the Virginia Bill of Rights and went on to become part of the Constitution of the United States.

However, when all is considered, the victory of 1641 simply meant that Parliament had triumphed over royal authority.¹³³ From then on there was a new sovereign. The oath itself had just been a whipping boy. As Coke said, Parliament never opposed the oath as such, it opposed the royal authority which administered it. Yet for all the mass of parliamentary argument and questionable appeals to ancient law, it undoubtedly would

the papists and put them to death. The king answered that under Elizabeth and his father no one was put to death for religion and that he should act as they had done, Neal, I, 372-374. In the attack against the bishops during the Parliament of summer 1641, some of the members argued against abolishing the order, for they said that "almost ever since the Conquest according to Matthew Paris, Sir Henry Spelman, and others the bishops had voted in Parliament." To which it was replied that "time and usage ought to be of no weight with lawmakers on the behalf of things which are allowed to be inconvenient," Neal, I, 379. Actually, the English Puritan or Presbyterian of the 1640's, unlike the Independents, remained quite Erastian and "sought to limit the revolution to the acquisition of the sovereignty of Parliament, *not* the people," A. S. P. Woodhouse, *Puritanism and Liberty; Being the Army Debates (1641-1649) from the Clarke Manuscripts with Supplementary Documents*, 2nd ed., London, 1950, intro. A. H. Feller observes that the formal claim of privilege appears the same year, "although [there was] no inkling of such a privilege in the procedure of the common law courts . . . it was finally established at the end of the seventeenth century," *ESS*, XIII, 652.

¹³² Neal, I, 376.

¹³³ In March, 1647, the Levellers in their *Appeal to Parliament* objected that the Puritans themselves were now using the same "unjust power of the Star Chamber" and "the great oppression of the High Commission" to declare the Levellers heretics and enemies of the state. Lilburne argued in the same terms in his *Legal Fundamental Liberties* (1649), Woodhouse, *Puritanism and Liberty*, 318-319.

never have been abolished but for the unrelenting religious zeal of the Puritans. It was their persevering action against the oath in the name of religion that brought Parliament into the struggle in the beginning. The Puritans denied the right of the English Crown in religion, and when this right was effectively abolished, so were the commission and the oath *ex officio*.¹⁸⁴ The oath had its authority from the royal prerogative and it is fruitless to argue against it by appealing to the medieval common law where it was never used at all.

¹⁸⁴ The tremendous power of the Puritan machine in the early seventeenth century dwindled to almost nothing after 1660; "by 1660 Calvinism in England had passed the peak of its power, though at first contemporaries scarcely recognized the fact," Cragg, *From Puritanism to the Age of Reason*, 13. After the Restoration, "John Hales, having seen the triumph of Calvinism at Dort, returned disillusioned and 'bade good night to Calvin,'" Cragg, *ibid.*, 33.